Florida Association of County Attorneys
2017 Continuing Legal Education Program
June 28-29, 2017 – Palm Beach County
Palm Beach County Convention Center
2 (A, B & C) – Second Floor
(13 CLE Hours)

Wednesday, June 28, 2017

12:30 p.m. to 12:40 p.m.	**Opening Remarks and Welcome** *Patrick McCormack, FACA President* *St. Johns County Attorney*
12:40 p.m. to 1:50 p.m.	The Aftermath of Amendment 2 Passing (Regulatory Measures on Medical Marijuana) *Jennifer Ann Tschetter, Esq.* *Hopping Green & Sams, P.A.*
1:50 p.m. to 2:20 p.m.	Clobber Bad Writing – Fixing Pervasive Problems in Legal Drafting *David Shields, Assistant County Attorney* *Seminole County*
2:20 p.m. to 2:30 p.m.	**Refreshment Break**
2:30 p.m. to 3:20 p.m.	Fair Housing in Your Community: A Primer for County Attorneys *James A. Kowalski, Esq.* *Stephen Pitel, Esq.* *Jacksonville Area Legal Aid* *Henry J. Hunnefeld, Esq.* *City of Miami Attorney's Office*
3:20 p.m. to 4:10 p.m.	Care & Feeding of Appointed Boards– Who's Really Your Client? *Rebecca Lavie* *Assistant County Attorney* *St. Johns County*
4:10 p.m. to 5:00 p.m.	Procurement Standards Under the Federal Uniform Grants Guidance *R. Brian Tipton, Esq., Managing Director,* *The Graham Private Client Law Group*
5:00 p.m. to 6:00 p.m.	***Welcome Reception*** *West Palm Beach Hilton*

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Thursday, June 29, 2017

9:00 a.m. to 10:30 a.m.	Acquisition – Pre-Condemnation Considerations for Condemnors *Matthew "Guy" Minter, County Attorney* *Marion County* Eminent Domain from Resolution to Order of Taking and After *Jack Gutman, Sr., Assistant County Attorney* *Pasco County*
10:30 a.m. to 10:40 a.m.	**Refreshment Break**
10:40 a.m. to 11:30 a.m.	Does a Rising Tide Float All Boats…? *Erin L. Deady, Esq.* *Erin L. Deady, P.A.*
11:30 a.m. to 12:30 p.m.	E-Discovery and Public Records Applications *Todd Eastman, Vice President,* *Business Development & Partnerships* *Logikcull.com* *Michelle Jordan, County Attorney* *Jackson County*
12:30 p.m. to 1:30 p.m.	**Luncheon/Awards Presentation** *Palm Beach County Convention Center*
1:30 p.m. to 3:10 p.m.	Emergency Management; FEMA Reimbursement: A Local Government Perspective *Albert J. Hadeed, County Attorney, Flagler County* *Adam Ferguson, Sr. Administer- Floodplain Program, Monroe County* Lessons Learned and Then Some…Chapter 252 Emergency Management *Bryan Koon, Director* *State of Florida Emergency Management*
3:10 p.m. to 3:20 p.m.	**Ice Cream Refreshment Break**
3:20 p.m. to 4:10 p.m.	Attack of the Mini Cell Towers in Public Rights-of-Way *Gary L. Resnick, Esq.* *Gray Robinson*
4:10 p.m. to 5:00 p.m.	2017 Legislative Update *Davin Suggs, Director of Public Policy* *Florida Association of Counties*
5:00 p.m. to 5:10 p.m.	**Closing Remarks**

Amendment 2 and Regulatory Measures on Medical Marijuana

Jennifer A. Tschetter
Hopping, Green & Sams, P.A.

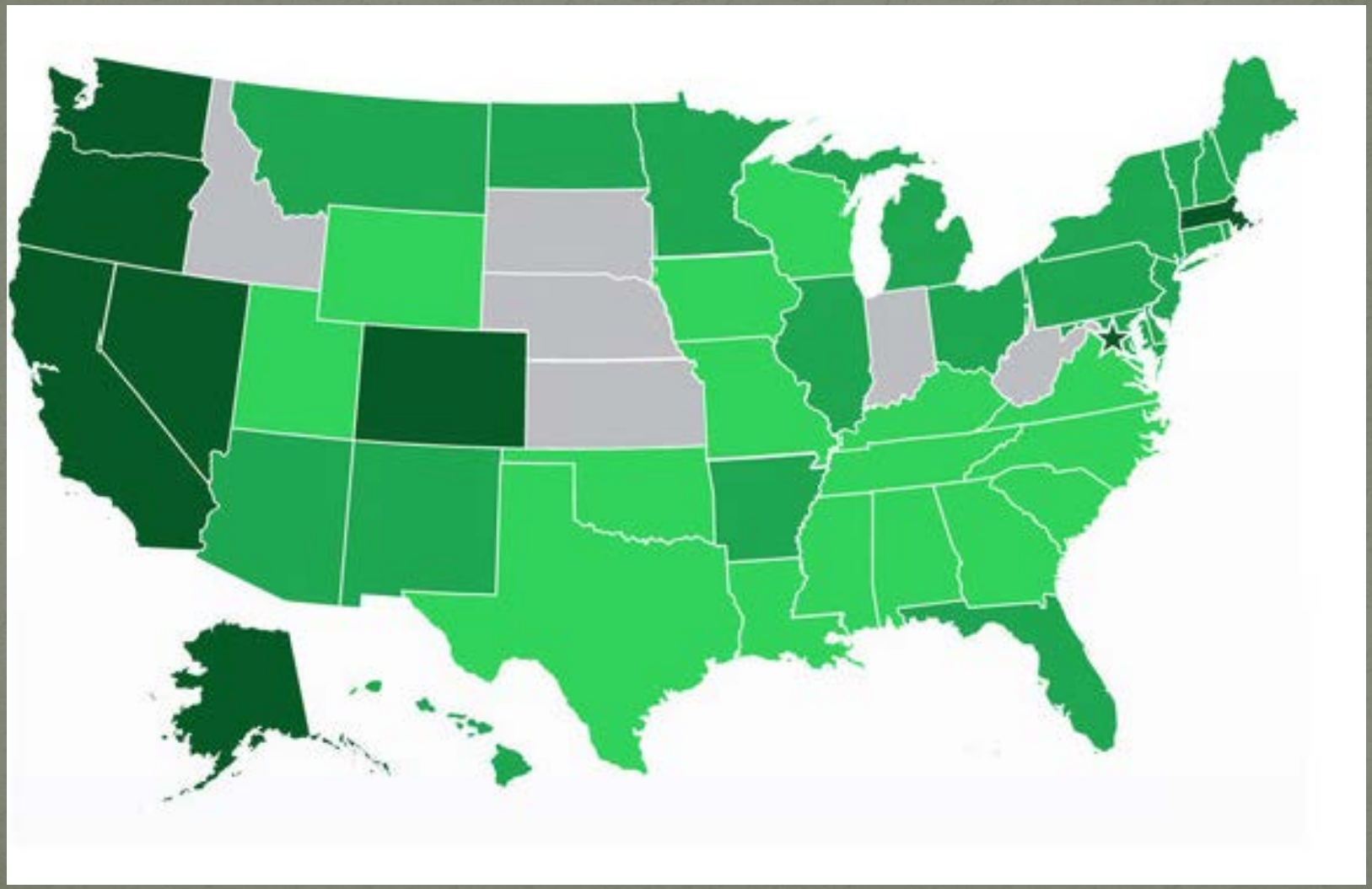
Overview

- Legal Framework
- Local Considerations
- Future Issues and Challenges

Federal Law

- Controlled Substances Act (CSA), 21 U.S.C. § 801 et seq.
- Cole Memorandum, August 29, 2013
  - 8 Enforcement Priorities
  - Prosecutorial discretion
- Cole Memorandum, February 14, 2014
  - Prosecutorial discretion for financial crimes

Overview of State Laws



Florida Cannabis Laws (2014-2016)

- Compassionate Medical Cannabis Act of 2014
  - Low-THC cannabis for patients with cancer or seizures
- Chapter 64-4, F.A.C.
  - Established selection process for dispensing organizations
- Chapter 2016-123, Laws of Florida
  - Cannabis with no THC limits for terminal patients

Constitutional Amendment (2017)

- Makes use of medical cannabis legal
- Expands definition of qualifying conditions
- Contemplates MMTCs, not dispensing organizations
- Administered by the Department of Health
  - 6 months to promulgate regulations
  - 9 months to issue patient identification cards
  - Provides standing for any citizen to sue the Department for failure to comply within 9 months
- Contemplates caregivers may also have possession
- Effective January 3, 2017

SB8A – Special Session (2017)

- Passed on June 9, 2017
  - Senate vote (29-6)
  - House vote (103-9)
- Needs Governor's signature
- Will be effective upon becoming law

SB 8-A: Patient Provisions

- 90-day waiting period removed
- Low-THC required to be available
- Edibles and vaping
- Snow birds accommodated

SB 8-A: Physician Provisions

- Allows for three 70-day certifications to be submitted
- Must see the patient and recertify necessity every 30 weeks
- Makes registration easier

SB 8-A: Caregiver Provisions

- Generally, must be Florida resident and pass background screening
- Exceptions for family members and hospice
- Will not be a profession

SB 8-A: Number of MMTCs

- Currently 7 MMTCs (formerly dispensing organizations)
- 10 new MMTCs by October 3, 2017
  - 5 previous applicants – named by August 1, 2017
  - 5 new applicants – named by October 3, 2017
    - Preference for Black Farmers Association
    - Preference for citrus processing facilities
- 4 new MMTCs for every 100,000 patients in the registry

SB 8-A: MMTC Dispensary Caps

- Each MMTC can have a maximum of 25 dispensaries
- Allotments to MMTCs based upon regional population
- Can buy and sell dispensaries to alter caps
- Caps increase by 5 for every 100,000 patients registered
- Caps sunset on April 1, 2020

SB 8-A: Preemption

- Local governments given authority to ban
- If not banned, cannot limit number
- Can impose land use regulations, but no more stringent than those applied to pharmacies

SB 8-A: Miscellaneous

- Seed-to-sale tracking required
- Independent laboratory testing required
- No sales tax

DOH Regulations (2017)

- Constitutional authority so not subject to the APA

- Procedure published
  - 15-day notice period
  - 3-day comment period

- Initial Regulations published
  - Acknowledge SB 8-A
  - Promise for additional regulations should SB 8-A become law

Local Issues

- Dispensing Organizations
  - What
  - Who
  - Where
- Land Use Considerations
  - Limitations
  - Planning
  - Zoning

What is an MMTC?

- Selected by the Department by region after application and scoring
- Vertical integration
- Background checks
- Medical Director

Who are the current MMTCs?

- Trulieve (Hackney) – Northwest
- CHT Medical (Chestnut Hill) – Northeast
- The Green Solution (San Felasco) – Northeast
- Knox Medical (Knox) – Central
- Grow Healthy (McCrory's Sunny Hill) – Central
- Surterra (Alpha Foliage) – Southwest
- Modern Health Concepts (Costa Farms) - Southeast

Where is cultivation taking place?

- Trulieve – Gadsden County
- CHT Medical – Alachua County
- The Green Solution – Alachua County
- Knox Medical – Orange County
- Grow Healthy – Polk County
- Surterra – Hillsborough County
- Modern Health Concepts – Miami-Dade County

Limitations on Number

- Ban – Statutorily authorized in SB 8-A
  - *City of Riverside v Inland Empire Patients Health & Wellness Center*, 300 P.3d 494 (Cal. 2013)
  - *Ter Beek v. City of Wyoming*, 846 N.W.2d 531 (Mich. 2014)

- Delivery is always available to facilitate accessibility

Local Regulations Authorized

- "A [local government] may determine by ordinance the criteria for the location of, and other permitting requirements that do not conflict with state law or department rule for, medical marijuana treatment center dispensing facilities located within [its] boundaries."

- Local governments can ensure compliance with the Florida Building Code and Florida Fire Prevention Code, including local amendments.

Limitation on Local Regulations

- "A [local government] may not enact ordinances for permitting or determining the location of dispensing facilities which are most restrictive than its ordinances permitting or determining the locations for pharmacies licensed under chapter 465."

- "A [local government] may not charge an MMTC a license or permit fee in an amount greater than the fee charged by such [local government] to pharmacies."

Previously authorized MMTCs

- "A dispensing facility location approved by a [local government] pursuant to former s. 381.986(8)(b), Florida Statutes 2016, is not subject to the location requirements of this subsection."

Limitations on Location

- Identify permissible land uses and prohibit others
- Buffers from other land uses
  - Schools and daycares
  - Places of worship
  - Parks
  - Hospitals
  - Residential zoning districts
  - Another dispensing facility

Other Possible Limitations

- Conditional Use or Special Exception Process
- Notice requirements
- Mixed-use limitations
- Signage
- Drive-through prohibition
- Parking requirements

Other Local Considerations

- Issuance and termination procedures
- Hours of operation
- On-site consumption
- Entry by patients and personnel only
- Security system requirements
- Garbage disposal and odor mitigation
- Neighborhood representative
- Local government entry and inspection rights

The Future

- Federal Response
  - Currently unknown
  - Robust regulatory structure and consistency with 8 enforcement priorities will determine response
- Department of Health Regulations
- Litigation

Questions?

Section 29, Article X, Florida Constitution

Medical marijuana production, possession and use.—

(a) PUBLIC POLICY.

(1) The medical use of marijuana by a qualifying patient or caregiver in compliance with this section is not subject to criminal or civil liability or sanctions under Florida law.

(2) A physician shall not be subject to criminal or civil liability or sanctions under Florida law solely for issuing a physician certification with reasonable care to a person diagnosed with a debilitating medical condition in compliance with this section.

(3) Actions and conduct by a Medical Marijuana Treatment Center registered with the Department, or its agents or employees, and in compliance with this section and Department regulations, shall not be subject to criminal or civil liability or sanctions under Florida law.

(b) DEFINITIONS. For purposes of this section, the following words and terms shall have the following meanings:

(1) "Debilitating Medical Condition" means cancer, epilepsy, glaucoma, positive status for human immunodeficiency virus (HIV), acquired immune deficiency syndrome (AIDS), post-traumatic stress disorder (PTSD), amyotrophic lateral sclerosis (ALS), Crohn's disease, Parkinson's disease, multiple sclerosis, or other debilitating medical conditions of the same kind or class as or comparable to those enumerated, and for which a physician believes that the medical use of marijuana would likely outweigh the potential health risks for a patient.

(2) "Department" means the Department of Health or its successor agency.

(3) "Identification card" means a document issued by the Department that identifies a qualifying patient or a caregiver.

(4) "Marijuana" has the meaning given cannabis in Section 893.02(3), Florida Statutes (2014), and, in addition, "Low-THC cannabis" as defined in Section 381.986(1)(b), Florida Statutes (2014), shall also be included in the meaning of the term "marijuana."

(5) "Medical Marijuana Treatment Center" (MMTC) means an entity that acquires, cultivates, possesses, processes (including development of related products such as food, tinctures, aerosols, oils, or ointments), transfers, transports, sells, distributes, dispenses, or administers marijuana, products containing marijuana, related supplies, or educational materials to qualifying patients or their caregivers and is registered by the Department.

(6) "Medical use" means the acquisition, possession, use, delivery, transfer, or administration of an amount of marijuana not in conflict with Department rules, or of related supplies by a qualifying patient or caregiver for use by the caregiver's designated qualifying patient for the treatment of a debilitating medical condition.

(7) "Caregiver" means a person who is at least twenty-one (21) years old who has agreed to assist with a qualifying patient's medical use of marijuana and has qualified for and obtained a caregiver identification card issued by the Department. The Department may limit the number of qualifying patients a caregiver may assist at one time and the number of caregivers that a qualifying patient may have at one time. Caregivers are prohibited from consuming marijuana obtained for medical use by the qualifying patient.

(8) "Physician" means a person who is licensed to practice medicine in Florida.

(9) "Physician certification" means a written document signed by a physician, stating that in the physician's professional opinion, the patient suffers from a debilitating medical condition, that the medical use of marijuana would likely outweigh the potential health risks for the patient, and for how long the physician recommends the medical use of marijuana for the patient. A physician certification may only be provided after the physician has conducted a physical examination and a full assessment of the medical history of the patient. In order for a physician certification to be issued to a minor, a parent or legal guardian of the minor must consent in writing.

(10) "Qualifying patient" means a person who has been diagnosed to have a debilitating medical condition, who has a physician certification and a valid qualifying patient identification card. If the Department does not begin issuing identification cards within nine (9) months after the effective date of this section, then a valid physician certification will serve as a patient identification card in order to allow a person to become a "qualifying patient" until the Department begins issuing identification cards.

(c) LIMITATIONS.

(1) Nothing in this section allows for a violation of any law other than for conduct in compliance with the provisions of this section.

(2) Nothing in this section shall affect or repeal laws relating to non-medical use, possession, production, or sale of marijuana.

(3) Nothing in this section authorizes the use of medical marijuana by anyone other than a qualifying patient.

(4) Nothing in this section shall permit the operation of any vehicle, aircraft, train or boat while under the influence of marijuana.

(5) Nothing in this section requires the violation of federal law or purports to give immunity under federal law.

(6) Nothing in this section shall require any accommodation of any on-site medical use of marijuana in any correctional institution or detention facility or place of education or employment, or of smoking medical marijuana in any public place.

(7) Nothing in this section shall require any health insurance provider or any government agency or authority to reimburse any person for expenses related to the medical use of marijuana.

(8) Nothing in this section shall affect or repeal laws relating to negligence or professional malpractice on the part of a qualified patient, caregiver, physician, MMTC, or its agents or employees.

(d) DUTIES OF THE DEPARTMENT. The Department shall issue reasonable regulations necessary for the implementation and enforcement of this section. The purpose of the regulations is to ensure the availability and safe use of medical marijuana by qualifying patients. It is the duty of the Department to promulgate regulations in a timely fashion.

(1) Implementing Regulations. In order to allow the Department sufficient time after passage of this section, the following regulations shall be promulgated no later than six (6) months after the effective date of this section:

a. Procedures for the issuance and annual renewal of qualifying patient identification cards to people with physician certifications and standards for renewal of such identification cards. Before issuing an identification card to a minor, the Department must receive written consent from the minor's parent or legal guardian, in addition to the physician certification.

b. Procedures establishing qualifications and standards for caregivers, including conducting appropriate background checks, and procedures for the issuance and annual renewal of caregiver identification cards.

c. Procedures for the registration of MMTCs that include procedures for the issuance, renewal, suspension and revocation of registration, and standards to ensure proper security, record keeping, testing, labeling, inspection, and safety.

d. A regulation that defines the amount of marijuana that could reasonably be presumed to be an adequate supply for qualifying patients' medical use, based on the best available evidence. This presumption as to quantity may be overcome with evidence of a particular qualifying patient's appropriate medical use.

(2) Identification cards and registrations. The Department shall begin issuing qualifying patient and caregiver identification cards, and registering MMTCs no later than nine (9) months after the effective date of this section.

(3) If the Department does not issue regulations, or if the Department does not begin issuing identification cards and registering MMTCs within the time limits set in this section, any Florida citizen shall have standing to seek judicial relief to compel compliance with the Department's constitutional duties.

(4) The Department shall protect the confidentiality of all qualifying patients. All records containing the identity of qualifying patients shall be confidential and kept from public disclosure other than for valid medical or law enforcement purposes.

(e) LEGISLATION. Nothing in this section shall limit the legislature from enacting laws consistent with this section.

(f) SEVERABILITY. The provisions of this section are severable and if any clause, sentence, paragraph or section of this measure, or an application thereof, is adjudged invalid by a court of competent jurisdiction other provisions shall continue to be in effect to the fullest extent possible.

An act relating to medical use of marijuana; providing legislative intent; amending s. 212.08, F.S.; providing an exemption from the state tax on sales, use, and other transactions for marijuana and marijuana delivery devices used for medical purposes; amending s. 381.986, F.S.; providing, revising, and deleting definitions; providing qualifying medical conditions for a patient to be eligible to receive marijuana or a marijuana delivery device; providing requirements for designating a qualified physician or medical director; providing criteria for certification of a patient for medical marijuana treatment by a qualified physician; providing for certain patients registered with the medical marijuana use registry to be deemed qualified; requiring the Department of Health to monitor physician registration and certifications in the medical marijuana use registry; requiring the Board of Medicine and the Board of Osteopathic Medicine to create a physician certification pattern review panel; providing rulemaking authority to the department and the boards; requiring the department to establish a medical marijuana use registry; specifying entities and persons who have access to the registry; providing requirements for registration of, and maintenance of registered status by, qualified patients and caregivers; providing criteria for nonresidents to prove residency for registration as a qualified

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patient; defining the term "seasonal resident"; authorizing the department to suspend or revoke the registration of a patient or caregiver under certain circumstances; providing requirements for the issuance of medical marijuana use registry identification cards; requiring the department to issue licenses to a certain number of medical marijuana treatment centers; providing for license renewal and revocation; providing conditions for change of ownership; providing for continuance of certain entities authorized to dispense low-THC cannabis, medical cannabis, and cannabis delivery devices; requiring a medical marijuana treatment center to comply with certain standards in the production and distribution of edibles; requiring the department to establish, maintain, and control a computer seed-to-sale marijuana tracking system; requiring background screening of owners, officers, board members, and managers of medical marijuana treatment centers; requiring the department to establish protocols and procedures for operation, conduct periodic inspections, and restrict location of medical marijuana treatment centers; providing a limit on county and municipal permit fees; authorizing counties and municipalities to determine the location of medical marijuana treatment centers by ordinance under certain conditions; providing penalties; authorizing the department to impose sanctions on persons or entities engaging in unlicensed activities; providing

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that a person is not exempt from prosecution for certain offenses and is not relieved from certain requirements of law under certain circumstances; providing for certain school personnel to possess marijuana pursuant to certain established policies and procedures; providing that certain research institutions may possess, test, transport, and dispose of marijuana subject to certain conditions; providing applicability; amending ss. 458.331 and 459.015, F.S.; providing additional acts by a physician or an osteopathic physician which constitute grounds for denial of a license or disciplinary action to which penalties apply; creating s. 381.988, F.S.; providing for the establishment of medical marijuana testing laboratories; requiring the Department of Health, in collaboration with the Department of Agriculture and Consumer Services and the Department of Environmental Protection, to develop certification standards and rules; providing limitations on the acquisition and distribution of marijuana by a testing laboratory; providing an exception for transfer of marijuana under certain conditions; requiring a testing laboratory to use a department-selected computer tracking system; providing grounds for disciplinary and administrative action; authorizing the department to refuse to issue or renew, or suspend or revoke, a testing laboratory license; creating s. 381.989, F.S.; defining terms; directing the department and the Department of Highway Safety and Motor Vehicles to institute public

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education campaigns relating to cannabis and marijuana and impaired driving; requiring evaluations of public education campaigns; authorizing the department and the Department of Highway Safety and Motor Vehicles to contract with vendors to implement and evaluate the campaigns; amending ss. 385.211, 499.0295, and 893.02, F.S.; conforming provisions to changes made by the act; creating s. 1004.4351, F.S.; providing a short title; providing legislative findings; defining terms; establishing the Coalition for Medical Marijuana Research and Education within the H. Lee Moffitt Cancer Center and Research Institute, Inc.; providing a purpose for the coalition; establishing the Medical Marijuana Research and Education Board to direct the operations of the coalition; providing for the appointment of board members; providing for terms of office, reimbursement for certain expenses, and meetings of the board; authorizing the board to appoint a coalition director; prescribing the duties of the coalition director; requiring the board to advise specified entities and officials regarding medical marijuana research and education in this state; requiring the board to annually adopt a Medical Marijuana Research and Education Plan; providing requirements for the plan; requiring the board to issue an annual report to the Governor and the Legislature by a specified date; requiring the Department of Health to submit reports to the board containing specified data; specifying responsibilities

of the H. Lee Moffitt Cancer Center and Research Institute, Inc.; amending s. 1004.441, F.S.; revising definition; amending s. 1006.062, F.S.; requiring district school boards to adopt policies and procedures for access to medical marijuana by qualified patients who are students; providing emergency rulemaking authority; providing for venue for a cause of action against the department; providing for defense against certain causes of action; directing the Department of Law Enforcement to develop training for law enforcement officers and agencies; amending s. 385.212, F.S.; renaming the department's Office of Compassionate Use; providing severability; providing a directive to the Division of Law Revision and Information; providing appropriations; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Legislative intent.—It is the intent of the Legislature to implement s. 29, Article X of the State Constitution by creating a unified regulatory structure. If s. 29, Article X of the State Constitution is amended or a constitutional amendment related to cannabis or marijuana is adopted, this act shall expire 6 months after the effective date of such amendment.

Section 2. Present paragraph (l) of subsection (2) of section 212.08, Florida Statutes, is redesignated as paragraph (m), and a new paragraph (l) is added to that subsection, to

read:

212.08 Sales, rental, use, consumption, distribution, and storage tax; specified exemptions.—The sale at retail, the rental, the use, the consumption, the distribution, and the storage to be used or consumed in this state of the following are hereby specifically exempt from the tax imposed by this chapter.

(2) EXEMPTIONS; MEDICAL.—

(1) Marijuana and marijuana delivery devices, as defined in s. 381.986, are exempt from the taxes imposed under this chapter.

Section 3. Section 381.986, Florida Statutes, is amended to read:

(Substantial rewording of section. See s. 381.986, F.S., for present text.)

381.986 Medical use of marijuana.—

(1) DEFINITIONS.—As used in this section, the term:

(a) "Caregiver" means a resident of this state who has agreed to assist with a qualified patient's medical use of marijuana, has a caregiver identification card, and meets the requirements of subsection (6).

(b) "Chronic nonmalignant pain" means pain that is caused by a qualifying medical condition or that originates from a qualifying medical condition and persists beyond the usual course of that qualifying medical condition.

(c) "Close relative" means a spouse, parent, sibling, grandparent, child, or grandchild, whether related by whole or half blood, by marriage, or by adoption.

(d) "Edibles" means commercially produced food items made

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with marijuana oil, but no other form of marijuana, that are produced and dispensed by a medical marijuana treatment center.

(e) "Low-THC cannabis" means a plant of the genus *Cannabis*, the dried flowers of which contain 0.8 percent or less of tetrahydrocannabinol and more than 10 percent of cannabidiol weight for weight; the seeds thereof; the resin extracted from any part of such plant; or any compound, manufacture, salt, derivative, mixture, or preparation of such plant or its seeds or resin that is dispensed from a medical marijuana treatment center.

(f) "Marijuana" means all parts of any plant of the genus *Cannabis*, whether growing or not; the seeds thereof; the resin extracted from any part of the plant; and every compound, manufacture, salt, derivative, mixture, or preparation of the plant or its seeds or resin, including low-THC cannabis, which are dispensed from a medical marijuana treatment center for medical use by a qualified patient.

(g) "Marijuana delivery device" means an object used, intended for use, or designed for use in preparing, storing, ingesting, inhaling, or otherwise introducing marijuana into the human body, and which is dispensed from a medical marijuana treatment center for medical use by a qualified patient.

(h) "Marijuana testing laboratory" means a facility that collects and analyzes marijuana samples from a medical marijuana treatment center and has been certified by the department pursuant to s. 381.988.

(i) "Medical director" means a person who holds an active, unrestricted license as an allopathic physician under chapter 458 or osteopathic physician under chapter 459 and is in

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compliance with the requirements of paragraph (3)(c).

(j) "Medical use" means the acquisition, possession, use, delivery, transfer, or administration of marijuana authorized by a physician certification. The term does not include:

1. Possession, use, or administration of marijuana that was not purchased or acquired from a medical marijuana treatment center.

2. Possession, use, or administration of marijuana in a form for smoking, in the form of commercially produced food items other than edibles, or of marijuana seeds or flower, except for flower in a sealed, tamper-proof receptacle for vaping.

3. Use or administration of any form or amount of marijuana in a manner that is inconsistent with the qualified physician's directions or physician certification.

4. Transfer of marijuana to a person other than the qualified patient for whom it was authorized or the qualified patient's caregiver on behalf of the qualified patient.

5. Use or administration of marijuana in the following locations:

a. On any form of public transportation, except for low-THC cannabis.

b. In any public place, except for low-THC cannabis.

c. In a qualified patient's place of employment, except when permitted by his or her employer.

d. In a state correctional institution, as defined in s. 944.02, or a correctional institution, as defined in s. 944.241.

e. On the grounds of a preschool, primary school, or secondary school, except as provided in s. 1006.062.

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f. In a school bus, a vehicle, an aircraft, or a motorboat, except for low-THC cannabis.

(k) "Physician certification" means a qualified physician's authorization for a qualified patient to receive marijuana and a marijuana delivery device from a medical marijuana treatment center.

(l) "Qualified patient" means a resident of this state who has been added to the medical marijuana use registry by a qualified physician to receive marijuana or a marijuana delivery device for a medical use and who has a qualified patient identification card.

(m) "Qualified physician" means a person who holds an active, unrestricted license as an allopathic physician under chapter 458 or as an osteopathic physician under chapter 459 and is in compliance with the physician education requirements of subsection (3).

(n) "Smoking" means burning or igniting a substance and inhaling the smoke.

(o) "Terminal condition" means a progressive disease or medical or surgical condition that causes significant functional impairment, is not considered by a treating physician to be reversible without the administration of life-sustaining procedures, and will result in death within 1 year after diagnosis if the condition runs its normal course.

(2) QUALIFYING MEDICAL CONDITIONS.—A patient must be diagnosed with at least one of the following conditions to qualify to receive marijuana or a marijuana delivery device:

(a) Cancer.

(b) Epilepsy.

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(c) Glaucoma.

(d) Positive status for human immunodeficiency virus.

(e) Acquired immune deficiency syndrome.

(f) Post-traumatic stress disorder.

(g) Amyotrophic lateral sclerosis.

(h) Crohn's disease.

(i) Parkinson's disease.

(j) Multiple sclerosis.

(k) Medical conditions of the same kind or class as or comparable to those enumerated in paragraphs (a)-(j).

(l) A terminal condition diagnosed by a physician other than the qualified physician issuing the physician certification.

(m) Chronic nonmalignant pain.

(3) QUALIFIED PHYSICIANS AND MEDICAL DIRECTORS.—

(a) Before being approved as a qualified physician, as defined in paragraph (1)(m), and before each license renewal, a physician must successfully complete a 2-hour course and subsequent examination offered by the Florida Medical Association or the Florida Osteopathic Medical Association which encompass the requirements of this section and any rules adopted hereunder. The course and examination shall be administered at least annually and may be offered in a distance learning format, including an electronic, online format that is available upon request. The price of the course may not exceed $500. A physician who has met the physician education requirements of former s. 381.986(4), Florida Statutes 2016, before the effective date of this section, shall be deemed to be in compliance with this paragraph from the effective date of this

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act until 90 days after the course and examination required by this paragraph become available.

(b) A qualified physician may not be employed by, or have any direct or indirect economic interest in, a medical marijuana treatment center or marijuana testing laboratory.

(c) Before being employed as a medical director, as defined in paragraph (1)(i), and before each license renewal, a medical director must successfully complete a 2-hour course and subsequent examination offered by the Florida Medical Association or the Florida Osteopathic Medical Association which encompass the requirements of this section and any rules adopted hereunder. The course and examination shall be administered at least annually and may be offered in a distance learning format, including an electronic, online format that is available upon request. The price of the course may not exceed $500.

(4) PHYSICIAN CERTIFICATION.—

(a) A qualified physician may issue a physician certification only if the qualified physician:

1. Conducted a physical examination while physically present in the same room as the patient and a full assessment of the medical history of the patient.

2. Diagnosed the patient with at least one qualifying medical condition.

3. Determined that the medical use of marijuana would likely outweigh the potential health risks for the patient, and such determination must be documented in the patient's medical record. If a patient is younger than 18 years of age, a second physician must concur with this determination, and such concurrence must be documented in the patient's medical record.

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4. Determined whether the patient is pregnant and documented such determination in the patient's medical record. A physician may not issue a physician certification, except for low-THC cannabis, to a patient who is pregnant.

5. Reviewed the patient's controlled drug prescription history in the prescription drug monitoring program database established pursuant to s. 893.055.

6. Reviews the medical marijuana use registry and confirmed that the patient does not have an active physician certification from another qualified physician.

7. Registers as the issuer of the physician certification for the named qualified patient on the medical marijuana use registry in an electronic manner determined by the department, and:

a. Enters into the registry the contents of the physician certification, including the patient's qualifying condition and the dosage not to exceed the daily dose amount determined by the department, the amount and forms of marijuana authorized for the patient, and any types of marijuana delivery devices needed by the patient for the medical use of marijuana.

b. Updates the registry within 7 days after any change is made to the original physician certification to reflect such change.

c. Deactivates the registration of the qualified patient and the patient's caregiver when the physician no longer recommends the medical use of marijuana for the patient.

8. Obtains the voluntary and informed written consent of the patient for medical use of marijuana each time the qualified physician issues a physician certification for the patient,

which shall be maintained in the patient's medical record. The patient, or the patient's parent or legal guardian if the patient is a minor, must sign the informed consent acknowledging that the qualified physician has sufficiently explained its content. The qualified physician must use a standardized informed consent form adopted in rule by the Board of Medicine and the Board of Osteopathic Medicine, which must include, at a minimum, information related to:

a. The Federal Government's classification of marijuana as a Schedule I controlled substance.

b. The approval and oversight status of marijuana by the Food and Drug Administration.

c. The current state of research on the efficacy of marijuana to treat the qualifying conditions set forth in this section.

d. The potential for addiction.

e. The potential effect that marijuana may have on a patient's coordination, motor skills, and cognition, including a warning against operating heavy machinery, operating a motor vehicle, or engaging in activities that require a person to be alert or respond quickly.

f. The potential side effects of marijuana use.

g. The risks, benefits, and drug interactions of marijuana.

h. That the patient's de-identified health information contained in the physician certification and medical marijuana use registry may be used for research purposes.

(b) If a qualified physician issues a physician certification for a qualified patient diagnosed with a qualifying medical condition pursuant to paragraph (2)(k), the

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physician must submit the following to the applicable board within 14 days after issuing the physician certification:

1. Documentation supporting the qualified physician's opinion that the medical condition is of the same kind or class as the conditions in paragraphs (2)(a)-(j).

2. Documentation that establishes the efficacy of marijuana as treatment for the condition.

3. Documentation supporting the qualified physician's opinion that the benefits of medical use of marijuana would likely outweigh the potential health risks for the patient.

4. Any other documentation as required by board rule.

The department must submit such documentation to the Coalition for Medical Marijuana Research and Education established pursuant to s. 1004.4351.

(c) A qualified physician may not issue a physician certification for more than three 70-day supply limits of marijuana. The department shall quantify by rule a daily dose amount with equivalent dose amounts for each allowable form of marijuana dispensed by a medical marijuana treatment center. The department shall use the daily dose amount to calculate a 70-day supply.

1. A qualified physician may request an exception to the daily dose amount limit. The request shall be made electronically on a form adopted by the department in rule and must include, at a minimum:

a. The qualified patient's qualifying medical condition.

b. The dosage and route of administration that was insufficient to provide relief to the qualified patient.

c. A description of how the patient will benefit from an increased amount.

d. The minimum daily dose amount of marijuana that would be sufficient for the treatment of the qualified patient's qualifying medical condition.

2. A qualified physician must provide the qualified patient's records upon the request of the department.

3. The department shall approve or disapprove the request within 14 days after receipt of the complete documentation required by this paragraph. The request shall be deemed approved if the department fails to act within this time period.

(d) A qualified physician must evaluate an existing qualified patient at least once every 30 weeks before issuing a new physician certification. A physician must:

1. Determine if the patient still meets the requirements to be issued a physician certification under paragraph (a).

2. Identify and document in the qualified patient's medical records whether the qualified patient experienced either of the following related to the medical use of marijuana:

a. An adverse drug interaction with any prescription or nonprescription medication; or

b. A reduction in the use of, or dependence on, other types of controlled substances as defined in s. 893.02.

3. Submit a report with the findings required pursuant to subparagraph 2. to the department. The department shall submit such reports to the Coalition for Medical Marijuana Research and Education established pursuant to s. 1004.4351.

(e) An active order for low-THC cannabis or medical cannabis issued pursuant to former s. 381.986, Florida Statutes

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2016, and registered with the compassionate use registry before the effective date of this section, is deemed a physician certification, and all patients possessing such orders are deemed qualified patients until the department begins issuing medical marijuana use registry identification cards.

(f) The department shall monitor physician registration in the medical marijuana use registry and the issuance of physician certifications for practices that could facilitate unlawful diversion or misuse of marijuana or a marijuana delivery device and shall take disciplinary action as appropriate.

(g) The Board of Medicine and the Board of Osteopathic Medicine shall jointly create a physician certification pattern review panel that shall review all physician certifications submitted to the medical marijuana use registry. The panel shall track and report the number of physician certifications and the qualifying medical conditions, dosage, supply amount, and form of marijuana certified. The panel shall report the data both by individual qualified physician and in the aggregate, by county, and statewide. The physician certification pattern review panel shall, beginning January 1, 2018, submit an annual report of its findings and recommendations to the Governor, the President of the Senate, and the Speaker of the House of Representatives.

(h) The department, the Board of Medicine, and the Board of Osteopathic Medicine may adopt rules pursuant to ss. 120.536(1) and 120.54 to implement this subsection.

(5) MEDICAL MARIJUANA USE REGISTRY.—

(a) The department shall create and maintain a secure, electronic, and online medical marijuana use registry for physicians, patients, and caregivers as provided under this

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section. The medical marijuana use registry must be accessible to law enforcement agencies, qualified physicians, and medical marijuana treatment centers to verify the authorization of a qualified patient or a caregiver to possess marijuana or a marijuana delivery device and record the marijuana or marijuana delivery device dispensed. The medical marijuana use registry must also be accessible to practitioners licensed to prescribe prescription drugs to ensure proper care for patients before medications that may interact with the medical use of marijuana are prescribed. The medical marijuana use registry must prevent an active registration of a qualified patient by multiple physicians.

(b) The department shall determine whether an individual is a resident of this state for the purpose of registration of qualified patients and caregivers in the medical marijuana use registry. To prove residency:

1. An adult resident must provide the department with a copy of his or her valid Florida driver license issued under s. 322.18 or a copy of a valid Florida identification card issued under s. 322.051.

2. An adult seasonal resident who cannot meet the requirements of subparagraph 1. may provide the department with a copy of two of the following that show proof of residential address:

a. A deed, mortgage, monthly mortgage statement, mortgage payment booklet or residential rental or lease agreement.

b. One proof of residential address from the seasonal resident's parent, step-parent, legal guardian or other person with whom the seasonal resident resides and a statement from the

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person with whom the seasonal resident resides stating that the seasonal resident does reside with him or her.

c. A utility hookup or work order dated within 60 days before registration in the medical use registry.

d. A utility bill, not more than 2 months old.

e. Mail from a financial institution, including checking, savings, or investment account statements, not more than 2 months old.

f. Mail from a federal, state, county, or municipal government agency, not more than 2 months old.

g. Any other documentation that provides proof of residential address as determined by department rule.

3. A minor must provide the department with a certified copy of a birth certificate or a current record of registration from a Florida K-12 school and must have a parent or legal guardian who meets the requirements of subparagraph 1.

For the purposes of this paragraph, the term "seasonal resident" means any person who temporarily resides in this state for a period of at least 31 consecutive days in each calendar year, maintains a temporary residence in this state, returns to the state or jurisdiction of his or her residence at least one time during each calendar year, and is registered to vote or pays income tax in another state or jurisdiction.

(c) The department may suspend or revoke the registration of a qualified patient or caregiver if the qualified patient or caregiver:

1. Provides misleading, incorrect, false, or fraudulent information to the department;

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2. Obtains a supply of marijuana in an amount greater than the amount authorized by the physician certification;

3. Falsifies, alters, or otherwise modifies an identification card;

4. Fails to timely notify the department of any changes to his or her qualified patient status; or

5. Violates the requirements of this section or any rule adopted under this section.

(d) The department shall immediately suspend the registration of a qualified patient charged with a violation of chapter 893 until final disposition of any alleged offense. Thereafter, the department may extend the suspension, revoke the registration, or reinstate the registration.

(e) The department shall immediately suspend the registration of any caregiver charged with a violation of chapter 893 until final disposition of any alleged offense. The department shall revoke a caregiver registration if the caregiver does not meet the requirements of subparagraph (6)(b)6.

(f) The department may revoke the registration of a qualified patient or caregiver who cultivates marijuana or who acquires, possesses, or delivers marijuana from any person or entity other than a medical marijuana treatment center.

(g) The department shall revoke the registration of a qualified patient, and the patient's associated caregiver, upon notification that the patient no longer meets the criteria of a qualified patient.

(h) The department may adopt rules pursuant to ss. 120.536(1) and 120.54 to implement this subsection.

(6) CAREGIVERS.—

(a) The department must register an individual as a caregiver on the medical marijuana use registry and issue a caregiver identification card if an individual designated by a qualified patient meets all of the requirements of this subsection and department rule.

(b) A caregiver must:

1. Not be a qualified physician and not be employed by or have an economic interest in a medical marijuana treatment center or a marijuana testing laboratory.

2. Be 21 years of age or older and a resident of this state.

3. Agree in writing to assist with the qualified patient's medical use of marijuana.

4. Be registered in the medical marijuana use registry as a caregiver for no more than one qualified patient, except as provided in this paragraph.

5. Successfully complete a caregiver certification course developed and administered by the department or its designee, which must be renewed biennially. The price of the course may not exceed $100.

6. Pass a background screening pursuant to subsection (9), unless the patient is a close relative of the caregiver.

(c) A qualified patient may designate no more than one caregiver to assist with the qualified patient's medical use of marijuana, unless:

1. The qualified patient is a minor and the designated caregivers are parents or legal guardians of the qualified patient;

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2. The qualified patient is an adult who has an intellectual or developmental disability that prevents the patient from being able to protect or care for himself or herself without assistance or supervision and the designated caregivers are the parents or legal guardians of the qualified patient; or

3. The qualified patient is admitted to a hospice program.

(d) A caregiver may be registered in the medical marijuana use registry as a designated caregiver for no more than one qualified patient, unless:

1. The caregiver is a parent or legal guardian of more than one minor who is a qualified patient;

2. The caregiver is a parent or legal guardian of more than one adult who is a qualified patient and who has an intellectual or developmental disability that prevents the patient from being able to protect or care for himself or herself without assistance or supervision; or

3. All qualified patients the caregiver has agreed to assist are admitted to a hospice program and have requested the assistance of that caregiver with the medical use of marijuana; the caregiver is an employee of the hospice; and the caregiver provides personal care or other services directly to clients of the hospice in the scope of that employment.

(e) A caregiver may not receive compensation, other than actual expenses incurred, for any services provided to the qualified patient.

(f) If a qualified patient is younger than 18 years of age, only a caregiver may purchase or administer marijuana for medical use by the qualified patient. The qualified patient may

not purchase marijuana.

(g) A caregiver must be in immediate possession of his or her medical marijuana use registry identification card at all times when in possession of marijuana or a marijuana delivery device and must present his or her medical marijuana use registry identification card upon the request of a law enforcement officer.

(h) The department may adopt rules pursuant to ss. 120.536(1) and 120.54 to implement this subsection.

(7) IDENTIFICATION CARDS.—

(a) The department shall issue medical marijuana use registry identification cards for qualified patients and caregivers who are residents of this state, which must be renewed annually. The identification cards must be resistant to counterfeiting and tampering and must include, at a minimum, the following:

1. The name, address, and date of birth of the qualified patient or caregiver.

2. A full-face, passport-type, color photograph of the qualified patient or caregiver taken within the 90 days immediately preceding registration or the Florida driver license or Florida identification card photograph of the qualified patient or caregiver obtained directly from the Department of Highway Safety and Motor Vehicles.

3. Identification as a qualified patient or a caregiver.

4. The unique numeric identifier used for the qualified patient in the medical marijuana use registry.

5. For a caregiver, the name and unique numeric identifier of the caregiver and the qualified patient or patients that the

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caregiver is assisting.

6. The expiration date of the identification card.

(b) The department must receive written consent from a qualified patient's parent or legal guardian before it may issue an identification card to a qualified patient who is a minor.

(c) The department shall adopt rules pursuant to ss. 120.536(1) and 120.54 establishing procedures for the issuance, renewal, suspension, replacement, surrender, and revocation of medical marijuana use registry identification cards pursuant to this section and shall begin issuing qualified patient identification cards by October 3, 2017.

(d) Applications for identification cards must be submitted on a form prescribed by the department. The department may charge a reasonable fee associated with the issuance, replacement, and renewal of identification cards. The department shall allocate $10 of the identification card fee to the Division of Research at Florida Agricultural and Mechanical University for the purpose of educating minorities about marijuana for medical use and the impact of the unlawful use of marijuana on minority communities. The department shall contract with a third-party vendor to issue identification cards. The vendor selected by the department must have experience performing similar functions for other state agencies.

(e) A qualified patient or caregiver shall return his or her identification card to the department within 5 business days after revocation.

(8) MEDICAL MARIJUANA TREATMENT CENTERS.—

(a) The department shall license medical marijuana treatment centers to ensure reasonable statewide accessibility

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and availability as necessary for qualified patients registered in the medical marijuana use registry and who are issued a physician certification under this section.

1. As soon as practicable, but no later than July 3, 2017, the department shall license as a medical marijuana treatment center any entity that holds an active, unrestricted license to cultivate, process, transport, and dispense low-THC cannabis, medical cannabis, and cannabis delivery devices, under former s. 381.986, Florida Statutes 2016, before July 1, 2017, and which meets the requirements of this section. In addition to the authority granted under this section, these entities are authorized to dispense low-THC cannabis, medical cannabis, and cannabis delivery devices ordered pursuant to former s. 381.986, Florida Statutes 2016, which were entered into the compassionate use registry before July 1, 2017, and are authorized to begin dispensing marijuana under this section on July 3, 2017. The department may grant variances from the representations made in such an entity's original application for approval under former s. 381.986, Florida Statutes 2014, pursuant to paragraph (e).

2. The department shall license as medical marijuana treatment centers 10 applicants that meet the requirements of this section, under the following parameters:

a. As soon as practicable, but no later than August 1, 2017, the department shall license any applicant whose application was reviewed, evaluated, and scored by the department and which was denied a dispensing organization license by the department under former s. 381.986, Florida Statutes 2014; which had one or more administrative or judicial challenges pending as of January 1, 2017, or had a final ranking

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within one point of the highest final ranking in its region under former s. 381.986, Florida Statutes 2014; which meets the requirements of this section; and which provides documentation to the department that it has the existing infrastructure and technical and technological ability to begin cultivating marijuana within 30 days after registration as a medical marijuana treatment center.

b. As soon as practicable, but no later than October 3, 2017, the department shall license one applicant that is a recognized class member of *Pigford v. Glickman*, 185 F.R.D. 82 (D.D.C. 1999), or *In Re Black Farmers Litig.*, 856 F. Supp. 2d 1 (D.D.C. 2011) and is a member of the Black Farmers and Agriculturalists Association-Florida Chapter. An applicant licensed under this sub-subparagraph is exempt from the requirements of subparagraphs (b)1. and (b)2.

c. As soon as practicable, but no later than October 3, 2017, the department shall license applicants that meet the requirements of this section in sufficient numbers to result in 10 total licenses issued under this subparagraph, while accounting for the number of licenses issued under sub-subparagraphs a. and b.

3. For up to two of the licenses issued under subparagraph 2., the department shall give preference to applicants that demonstrate in their applications that they own one or more facilities that are, or were, used for the canning, concentrating, or otherwise processing of citrus fruit or citrus molasses and will use or convert the facility or facilities for the processing of marijuana.

4. Within 6 months after the registration of 100,000 active

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qualified patients in the medical marijuana use registry, the department shall license four additional medical marijuana treatment centers that meet the requirements of this section. Thereafter, the department shall license four medical marijuana treatment centers within 6 months after the registration of each additional 100,000 active qualified patients in the medical marijuana use registry that meet the requirements of this section.

5. Dispensing facilities are subject to the following requirements:

a. A medical marijuana treatment center may not establish or operate more than a statewide maximum of 25 dispensing facilities, unless the medical marijuana use registry reaches a total of 100,000 active registered qualified patients. When the medical marijuana use registry reaches 100,000 active registered qualified patients, and then upon each further instance of the total active registered qualified patients increasing by 100,000, the statewide maximum number of dispensing facilities that each licensed medical marijuana treatment center may establish and operate increases by five.

b. A medical marijuana treatment center may not establish more than the maximum number of dispensing facilities allowed in each of the Northwest, Northeast, Central, Southwest, and Southeast Regions. The department shall determine a medical marijuana treatment center's maximum number of dispensing facilities allowed in each region by calculating the percentage of the total statewide population contained within that region and multiplying that percentage by the medical marijuana treatment center's statewide maximum number of dispensing

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facilities established under sub-subparagraph a., rounded to the nearest whole number. The department shall ensure that such rounding does not cause a medical marijuana treatment center's total number of statewide dispensing facilities to exceed its statewide maximum. The department shall initially calculate the maximum number of dispensing facilities allowed in each region for each medical marijuana treatment center using county population estimates from the Florida Estimates of Population 2016, as published by the Office of Economic and Demographic Research, and shall perform recalculations following the official release of county population data resulting from each United States Decennial Census. For the purposes of this subparagraph:

(I) The Northwest Region consists of Bay, Calhoun, Escambia, Franklin, Gadsden, Gulf, Holmes, Jackson, Jefferson, Leon, Liberty, Madison, Okaloosa, Santa Rosa, Taylor, Wakulla, Walton, and Washington Counties.

(II) The Northeast Region consists of Alachua, Baker, Bradford, Clay, Columbia, Dixie, Duval, Flagler, Gilchrist, Hamilton, Lafayette, Levy, Marion, Nassau, Putnam, St. Johns, Suwannee, and Union Counties.

(III) The Central Region consists of Brevard, Citrus, Hardee, Hernando, Indian River, Lake, Orange, Osceola, Pasco, Pinellas, Polk, Seminole, St. Lucie, Sumter, and Volusia Counties.

(IV) The Southwest Region consists of Charlotte, Collier, DeSoto, Glades, Hendry, Highlands, Hillsborough, Lee, Manatee, Okeechobee, and Sarasota Counties.

(V) The Southeast Region consists of Broward, Miami-Dade,

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Martin, Monroe, and Palm Beach Counties.

c. If a medical marijuana treatment center establishes a number of dispensing facilities within a region that is less than the number allowed for that region under sub-subparagraph b., the medical marijuana treatment center may sell one or more of its unused dispensing facility slots to other licensed medical marijuana treatment centers. For each dispensing facility slot that a medical marijuana treatment center sells, that medical marijuana treatment center's statewide maximum number of dispensing facilities, as determined under sub-subparagraph a., is reduced by one. The statewide maximum number of dispensing facilities for a medical marijuana treatment center that purchases an unused dispensing facility slot is increased by one per slot purchased. Additionally, the sale of a dispensing facility slot shall reduce the seller's regional maximum and increase the purchaser's regional maximum number of dispensing facilities, as determined in sub-subparagraph b., by one for that region. For any slot purchased under this sub-subparagraph, the regional restriction applied to that slot's location under sub-subparagraph b. before the purchase shall remain in effect following the purchase. A medical marijuana treatment center that sells or purchases a dispensing facility slot must notify the department within 3 days of sale.

d. This subparagraph shall expire on April 1, 2020.

If this subparagraph or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this act which can be given effect without the invalid provision or application, and to this

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end, the provisions of this subparagraph are severable.

(b) An applicant for licensure as a medical marijuana treatment center shall apply to the department on a form prescribed by the department and adopted in rule. The department shall adopt rules pursuant to ss. 120.536(1) and 120.54 establishing a procedure for the issuance and biennial renewal of licenses, including initial application and biennial renewal fees sufficient to cover the costs of implementing and administering this section, and establishing supplemental licensure fees for payment beginning May 1, 2018, sufficient to cover the costs of administering ss. 381.989 and 1004.4351. The department shall identify applicants with strong diversity plans reflecting this state's commitment to diversity and implement training programs and other educational programs to enable minority persons and minority business enterprises, as defined in s. 288.703, and veteran business enterprises, as defined in s. 295.187, to compete for medical marijuana treatment center licensure and contracts. Subject to the requirements in subparagraphs (a)2.-4., the department shall issue a license to an applicant if the applicant meets the requirements of this section and pays the initial application fee. The department shall renew the licensure of a medical marijuana treatment center biennially if the licensee meets the requirements of this section and pays the biennial renewal fee. An individual may not be an applicant, owner, officer, board member, or manager on more than one application for licensure as a medical marijuana treatment center. An individual or entity may not be awarded more than one license as a medical marijuana treatment center. An applicant for licensure as a medical marijuana treatment

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center must demonstrate:

1. That, for the 5 consecutive years before submitting the application, the applicant has been registered to do business in in the state.

2. Possession of a valid certificate of registration issued by the Department of Agriculture and Consumer Services pursuant to s. 581.131.

3. The technical and technological ability to cultivate and produce marijuana, including, but not limited to, low-THC cannabis.

4. The ability to secure the premises, resources, and personnel necessary to operate as a medical marijuana treatment center.

5. The ability to maintain accountability of all raw materials, finished products, and any byproducts to prevent diversion or unlawful access to or possession of these substances.

6. An infrastructure reasonably located to dispense marijuana to registered qualified patients statewide or regionally as determined by the department.

7. The financial ability to maintain operations for the duration of the 2-year approval cycle, including the provision of certified financial statements to the department.

a. Upon approval, the applicant must post a $5 million performance bond issued by an authorized surety insurance company rated in one of the three highest rating categories by a nationally recognized rating service. However, a medical marijuana treatment center serving at least 1,000 qualified patients is only required to maintain a $2 million performance

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bond.

b. In lieu of the performance bond required under sub-subparagraph a., the applicant may provide an irrevocable letter of credit payable to the department or provide cash to the department. If provided with cash under this sub-subparagraph, the department shall deposit the cash in the Grants and Donations Trust Fund within the Department of Health, subject to the same conditions as the bond regarding requirements for the applicant to forfeit ownership of the funds. If the funds deposited under this sub-subparagraph generate interest, the amount of that interest shall be used by the department for the administration of this section.

8. That all owners, officers, board members, and managers have passed a background screening pursuant to subsection (9).

9. The employment of a medical director to supervise the activities of the medical marijuana treatment center.

10. A diversity plan that promotes and ensures the involvement of minority persons and minority business enterprises, as defined in s. 288.703, or veteran business enterprises, as defined in s. 295.187, in ownership, management, and employment. An applicant for licensure renewal must show the effectiveness of the diversity plan by including the following with his or her application for renewal:

a. Representation of minority persons and veterans in the medical marijuana treatment center's workforce;

b. Efforts to recruit minority persons and veterans for employment; and

c. A record of contracts for services with minority business enterprises and veteran business enterprises.

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(c) A medical marijuana treatment center may not make a wholesale purchase of marijuana from, or a distribution of marijuana to, another medical marijuana treatment center, unless the medical marijuana treatment center seeking to make a wholesale purchase of marijuana submits proof of harvest failure to the department.

(d) The department shall establish, maintain, and control a computer software tracking system that traces marijuana from seed to sale and allows real-time, 24-hour access by the department to data from all medical marijuana treatment centers and marijuana testing laboratories. The tracking system must allow for integration of other seed-to-sale systems and, at a minimum, include notification of when marijuana seeds are planted, when marijuana plants are harvested and destroyed, and when marijuana is transported, sold, stolen, diverted, or lost. Each medical marijuana treatment center shall use the seed-to-sale tracking system established by the department or integrate its own seed-to-sale tracking system with the seed-to-sale tracking system established by the department. Each medical marijuana treatment center may use its own seed-to-sale system until the department establishes a seed-to-sale tracking system. The department may contract with a vendor to establish the seed-to-sale tracking system. The vendor selected by the department may not have a contractual relationship with the department to perform any services pursuant to this section other than the seed-to-sale tracking system. The vendor may not have a direct or indirect financial interest in a medical marijuana treatment center or a marijuana testing laboratory.

(e) A licensed medical marijuana treatment center shall

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cultivate, process, transport, and dispense marijuana for medical use. A licensed medical marijuana treatment center may not contract for services directly related to the cultivation, processing, and dispensing of marijuana or marijuana delivery devices, except that a medical marijuana treatment center licensed pursuant to subparagraph (a)1. may contract with a single entity for the cultivation, processing, transporting, and dispensing of marijuana and marijuana delivery devices. A licensed medical marijuana treatment center must, at all times, maintain compliance with the criteria demonstrated and representations made in the initial application and the criteria established in this subsection. Upon request, the department may grant a medical marijuana treatment center a variance from the representations made in the initial application. Consideration of such a request shall be based upon the individual facts and circumstances surrounding the request. A variance may not be granted unless the requesting medical marijuana treatment center can demonstrate to the department that it has a proposed alternative to the specific representation made in its application which fulfills the same or a similar purpose as the specific representation in a way that the department can reasonably determine will not be a lower standard than the specific representation in the application. A variance may not be granted from the requirements in subparagraph 2. and subparagraphs (b)1. and 2.

1. A licensed medical marijuana treatment center may transfer ownership to an individual or entity who meets the requirements of this section. A publicly traded corporation or publicly traded company that meets the requirements of this

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section is not precluded from ownership of a medical marijuana treatment center. To accommodate a change in ownership:

a. The licensed medical marijuana treatment center shall notify the department in writing at least 60 days before the anticipated date of the change of ownership.

b. The individual or entity applying for initial licensure due to a change of ownership must submit an application that must be received by the department at least 60 days before the date of change of ownership.

c. Upon receipt of an application for a license, the department shall examine the application and, within 30 days after receipt, notify the applicant in writing of any apparent errors or omissions and request any additional information required.

d. Requested information omitted from an application for licensure must be filed with the department within 21 days after the department's request for omitted information or the application shall be deemed incomplete and shall be withdrawn from further consideration and the fees shall be forfeited.

Within 30 days after the receipt of a complete application, the department shall approve or deny the application.

2. A medical marijuana treatment center, and any individual or entity who directly or indirectly owns, controls, or holds with power to vote 5 percent or more of the voting shares of a medical marijuana treatment center, may not acquire direct or indirect ownership or control of any voting shares or other form of ownership of any other medical marijuana treatment center.

3. A medical marijuana treatment center may not enter into

any form of profit-sharing arrangement with the property owner or lessor of any of its facilities where cultivation, processing, storing, or dispensing of marijuana and marijuana delivery devices occurs.

4. All employees of a medical marijuana treatment center must be 21 years of age or older and have passed a background screening pursuant to subsection (9).

5. Each medical marijuana treatment center must adopt and enforce policies and procedures to ensure employees and volunteers receive training on the legal requirements to dispense marijuana to qualified patients.

6. When growing marijuana, a medical marijuana treatment center:

a. May use pesticides determined by the department, after consultation with the Department of Agriculture and Consumer Services, to be safely applied to plants intended for human consumption, but may not use pesticides designated as restricted-use pesticides pursuant to s. 487.042.

b. Must grow marijuana within an enclosed structure and in a room separate from any other plant.

c. Must inspect seeds and growing plants for plant pests that endanger or threaten the horticultural and agricultural interests of the state in accordance with chapter 581 and any rules adopted thereunder.

d. Must perform fumigation or treatment of plants, or remove and destroy infested or infected plants, in accordance with chapter 581 and any rules adopted thereunder.

7. Each medical marijuana treatment center must produce and make available for purchase at least one low-THC cannabis

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product.

8. A medical marijuana treatment center that produces edibles must hold a permit to operate as a food establishment pursuant to chapter 500, the Florida Food Safety Act, and must comply with all the requirements for food establishments pursuant to chapter 500 and any rules adopted thereunder. Edibles may not contain more than 200 milligrams of tetrahydrocannabinol and a single serving portion of an edible may not exceed 10 milligrams of tetrahydrocannabinol. Edibles may have a potency variance of no greater than 15 percent. Edibles may not be attractive to children; be manufactured in the shape of humans, cartoons, or animals; be manufactured in a form that bears any reasonable resemblance to products available for consumption as commercially available candy; or contain any color additives. To discourage consumption of edibles by children, the department shall determine by rule any shapes, forms, and ingredients allowed and prohibited for edibles. Medical marijuana treatment centers may not begin processing or dispensing edibles until after the effective date of the rule. The department shall also adopt sanitation rules providing the standards and requirements for the storage, display, or dispensing of edibles.

9. Within 12 months after licensure, a medical marijuana treatment center must demonstrate to the department that all of its processing facilities have passed a Food Safety Good Manufacturing Practices, such as Global Food Safety Initiative or equivalent, inspection by a nationally accredited certifying body. A medical marijuana treatment center must immediately stop processing at any facility which fails to pass this inspection

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until it demonstrates to the department that such facility has met this requirement.

10. When processing marijuana, a medical marijuana treatment center must:

a. Process the marijuana within an enclosed structure and in a room separate from other plants or products.

b. Comply with department rules when processing marijuana with hydrocarbon solvents or other solvents or gases exhibiting potential toxicity to humans. The department shall determine by rule the requirements for medical marijuana treatment centers to use such solvents or gases exhibiting potential toxicity to humans.

c. Comply with federal and state laws and regulations and department rules for solid and liquid wastes. The department shall determine by rule procedures for the storage, handling, transportation, management, and disposal of solid and liquid waste generated during marijuana production and processing. The Department of Environmental Protection shall assist the department in developing such rules.

d. Test the processed marijuana using a medical marijuana testing laboratory before it is dispensed. Results must be verified and signed by two medical marijuana treatment center employees. Before dispensing, the medical marijuana treatment center must determine that the test results indicate that low-THC cannabis meets the definition of low-THC cannabis, the concentration of tetrahydrocannabinol meets the potency requirements of this section, the labeling of the concentration of tetrahydrocannabinol and cannabidiol is accurate, and all marijuana is safe for human consumption and free from

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contaminants that are unsafe for human consumption. The department shall determine by rule which contaminants must be tested for and the maximum levels of each contaminant which are safe for human consumption. The Department of Agriculture and Consumer Services shall assist the department in developing the testing requirements for contaminants that are unsafe for human consumption in edibles. The department shall also determine by rule the procedures for the treatment of marijuana that fails to meet the testing requirements of this section, s. 381.988, or department rule. The department may select a random sample from edibles available for purchase in a dispensing facility which shall be tested by the department to determine that the edible meets the potency requirements of this section, is safe for human consumption, and the labeling of the tetrahydrocannabinol and cannabidiol concentration is accurate. A medical marijuana treatment center may not require payment from the department for the sample. A medical marijuana treatment center must recall edibles, including all edibles made from the same batch of marijuana, which fail to meet the potency requirements of this section, which are unsafe for human consumption, or for which the labeling of the tetrahydrocannabinol and cannabidiol concentration is inaccurate. The medical marijuana treatment center must retain records of all testing and samples of each homogenous batch of marijuana for at least 9 months. The medical marijuana treatment center must contract with a marijuana testing laboratory to perform audits on the medical marijuana treatment center's standard operating procedures, testing records, and samples and provide the results to the department to confirm that the marijuana or low-THC cannabis meets the

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requirements of this section and that the marijuana or low-THC cannabis is safe for human consumption. A medical marijuana treatment center shall reserve two processed samples from each batch and retain such samples for at least 9 months for the purpose of such audits. A medical marijuana treatment center may use a laboratory that has not been certified by the department under s. 381.988 until such time as at least one laboratory holds the required certification, but in no event later than July 1, 2018.

e. Package the marijuana in compliance with the United States Poison Prevention Packaging Act of 1970, 15 U.S.C. ss. 1471 et seq.

f. Package the marijuana in a receptacle that has a firmly affixed and legible label stating the following information:

(I) The marijuana or low-THC cannabis meets the requirements of sub-subparagraph d.

(II) The name of the medical marijuana treatment center from which the marijuana originates.

(III) The batch number and harvest number from which the marijuana originates and the date dispensed.

(IV) The name of the physician who issued the physician certification.

(V) The name of the patient.

(VI) The product name, if applicable, and dosage form, including concentration of tetrahydrocannabinol and cannabidiol. The product name may not contain wording commonly associated with products marketed by or to children.

(VII) The recommended dose.

(VIII) A warning that it is illegal to transfer medical

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marijuana to another person.

(IX) A marijuana universal symbol developed by the department.

11. The medical marijuana treatment center shall include in each package a patient package insert with information on the specific product dispensed related to:

a. Clinical pharmacology.

b. Indications and use.

c. Dosage and administration.

d. Dosage forms and strengths.

e. Contraindications.

f. Warnings and precautions.

g. Adverse reactions.

12. Each edible shall be individually sealed in plain, opaque wrapping marked only with the marijuana universal symbol. Where practical, each edible shall be marked with the marijuana universal symbol. In addition to the packaging and labeling requirements in subparagraphs 10. and 11., edible receptacles must be plain, opaque, and white without depictions of the product or images other than the medical marijuana treatment center's department-approved logo and the marijuana universal symbol. The receptacle must also include a list all of the edible's ingredients, storage instructions, an expiration date, a legible and prominent warning to keep away from children and pets, and a warning that the edible has not been produced or inspected pursuant to federal food safety laws.

13. When dispensing marijuana or a marijuana delivery device, a medical marijuana treatment center:

a. May dispense any active, valid order for low-THC

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cannabis, medical cannabis and cannabis delivery devices issued pursuant to former s. 381.986, Florida Statutes 2016, which was entered into the medical marijuana use registry before July 1, 2017.

b. May not dispense more than a 70-day supply of marijuana to a qualified patient or caregiver.

c. Must have the medical marijuana treatment center's employee who dispenses the marijuana or a marijuana delivery device enter into the medical marijuana use registry his or her name or unique employee identifier.

d. Must verify that the qualified patient and the caregiver, if applicable, each has an active registration in the medical marijuana use registry and an active and valid medical marijuana use registry identification card, the amount and type of marijuana dispensed matches the physician certification in the medical marijuana use registry for that qualified patient, and the physician certification has not already been filled.

e. May not dispense marijuana to a qualified patient who is younger than 18 years of age. If the qualified patient is younger than 18 years of age, marijuana may only be dispensed to the qualified patient's caregiver.

f. May not dispense or sell any other type of cannabis, alcohol, or illicit drug-related product, including pipes, bongs, or wrapping papers, other than a marijuana delivery device required for the medical use of marijuana and which is specified in a physician certification.

g. Must, upon dispensing the marijuana or marijuana delivery device, record in the registry the date, time, quantity, and form of marijuana dispensed; the type of marijuana

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delivery device dispensed; and the name and medical marijuana use registry identification number of the qualified patient or caregiver to whom the marijuana delivery device was dispensed.

h. Must ensure that patient records are not visible to anyone other than the qualified patient, his or her caregiver, and authorized medical marijuana treatment center employees.

(f) To ensure the safety and security of premises where the cultivation, processing, storing, or dispensing of marijuana occurs, and to maintain adequate controls against the diversion, theft, and loss of marijuana or marijuana delivery devices, a medical marijuana treatment center shall:

1.a. Maintain a fully operational security alarm system that secures all entry points and perimeter windows and is equipped with motion detectors; pressure switches; and duress, panic, and hold-up alarms; and

b. Maintain a video surveillance system that records continuously 24 hours a day and meets the following criteria:

(I) Cameras are fixed in a place that allows for the clear identification of persons and activities in controlled areas of the premises. Controlled areas include grow rooms, processing rooms, storage rooms, disposal rooms or areas, and point-of-sale rooms.

(II) Cameras are fixed in entrances and exits to the premises, which shall record from both indoor and outdoor, or ingress and egress, vantage points.

(III) Recorded images must clearly and accurately display the time and date.

(IV) Retain video surveillance recordings for at least 45 days or longer upon the request of a law enforcement agency.

2. Ensure that the medical marijuana treatment center's outdoor premises have sufficient lighting from dusk until dawn.

3. Ensure that the indoor premises where dispensing occurs includes a waiting area with sufficient space and seating to accommodate qualified patients and caregivers and at least one private consultation area that is isolated from the waiting area and area where dispensing occurs. A medical marijuana treatment center may not display products or dispense marijuana or marijuana delivery devices in the waiting area.

4. Not dispense from its premises marijuana or a marijuana delivery device between the hours of 9 p.m. and 7 a.m., but may perform all other operations and deliver marijuana to qualified patients 24 hours a day.

5. Store marijuana in a secured, locked room or a vault.

6. Require at least two of its employees, or two employees of a security agency with whom it contracts, to be on the premises at all times where cultivation, processing, or storing of marijuana occurs.

7. Require each employee or contractor to wear a photo identification badge at all times while on the premises.

8. Require each visitor to wear a visitor pass at all times while on the premises.

9. Implement an alcohol and drug-free workplace policy.

10. Report to local law enforcement within 24 hours after the medical marijuana treatment center is notified or becomes aware of the theft, diversion, or loss of marijuana.

(g) To ensure the safe transport of marijuana and marijuana delivery devices to medical marijuana treatment centers, marijuana testing laboratories, or qualified patients, a medical

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marijuana treatment center must:

1. Maintain a marijuana transportation manifest in any vehicle transporting marijuana. The marijuana transportation manifest must be generated from a medical marijuana treatment center's seed-to-sale tracking system and include the:

a. Departure date and approximate time of departure.

b. Name, location address, and license number of the originating medical marijuana treatment center.

c. Name and address of the recipient of the delivery.

d. Quantity and form of any marijuana or marijuana delivery device being transported.

e. Arrival date and estimated time of arrival.

f. Delivery vehicle make and model and license plate number.

g. Name and signature of the medical marijuana treatment center employees delivering the product.

(I) A copy of the marijuana transportation manifest must be provided to each individual, medical marijuana treatment center, or marijuana testing laboratory that receives a delivery. The individual, or a representative of the center or laboratory, must sign a copy of the marijuana transportation manifest acknowledging receipt.

(II) An individual transporting marijuana or a marijuana delivery device must present a copy of the relevant marijuana transportation manifest and his or her employee identification card to a law enforcement officer upon request.

(III) Medical marijuana treatment centers and marijuana testing laboratories must retain copies of all marijuana transportation manifests for at least 3 years.

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2. Ensure only vehicles in good working order are used to transport marijuana.

3. Lock marijuana and marijuana delivery devices in a separate compartment or container within the vehicle.

4. Require employees to have possession of their employee identification card at all times when transporting marijuana or marijuana delivery devices.

5. Require at least two persons to be in a vehicle transporting marijuana or marijuana delivery devices, and require at least one person to remain in the vehicle while the marijuana or marijuana delivery device is being delivered.

6. Provide specific safety and security training to employees transporting or delivering marijuana and marijuana delivery devices.

(h) A medical marijuana treatment center may not engage in advertising that is visible to members of the public from any street, sidewalk, park, or other public place, except:

1. The dispensing location of a medical marijuana treatment center may have a sign that is affixed to the outside or hanging in the window of the premises which identifies the dispensary by the licensee's business name, a department-approved trade name, or a department-approved logo. A medical marijuana treatment center's trade name and logo may not contain wording or images commonly associated with marketing targeted toward children or which promote recreational use of marijuana.

2. A medical marijuana treatment center may engage in Internet advertising and marketing under the following conditions:

a. All advertisements must be approved by the department.

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b. An advertisement may not have any content that specifically targets individuals under the age of 18, including cartoon characters or similar images.

c. An advertisement may not be an unsolicited pop-up advertisement.

d. Opt-in marketing must include an easy and permanent opt-out feature.

(i) Each medical marijuana treatment center that dispenses marijuana and marijuana delivery devices shall make available to the public on its website:

1. Each marijuana and low-THC product available for purchase, including the form, strain of marijuana from which it was extracted, cannabidiol content, tetrahydrocannabinol content, dose unit, total number of doses available, and the ratio of cannabidiol to tetrahydrocannabinol for each product.

2. The price for a 30-day, 50-day, and 70-day supply at a standard dose for each marijuana and low-THC product available for purchase.

3. The price for each marijuana delivery device available for purchase.

4. If applicable, any discount policies and eligibility criteria for such discounts.

(j) Medical marijuana treatment centers are the sole source from which a qualified patient may legally obtain marijuana.

(k) The department may adopt rules pursuant to ss. 120.536(1) and 120.54 to implement this subsection.

(9) BACKGROUND SCREENING.-An individual required to undergo a background screening pursuant to this section must pass a level 2 background screening as provided under chapter 435,

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which, in addition to the disqualifying offenses provided in s. 435.04, shall exclude an individual who has an arrest awaiting final disposition for, has been found guilty of, regardless of adjudication, or has entered a plea of nolo contendere or guilty to an offense under chapter 837, chapter 895, or chapter 896 or similar law of another jurisdiction.

(a) Such individual must submit a full set of fingerprints to the department or to a vendor, entity, or agency authorized by s. 943.053(13). The department, vendor, entity, or agency shall forward the fingerprints to the Department of Law Enforcement for state processing, and the Department of Law Enforcement shall forward the fingerprints to the Federal Bureau of Investigation for national processing.

(b) Fees for state and federal fingerprint processing and retention shall be borne by the individual. The state cost for fingerprint processing shall be as provided in s. 943.053(3)(e) for records provided to persons or entities other than those specified as exceptions therein.

(c) Fingerprints submitted to the Department of Law Enforcement pursuant to this subsection shall be retained by the Department of Law Enforcement as provided in s. 943.05(2)(g) and (h) and, when the Department of Law Enforcement begins participation in the program, enrolled in the Federal Bureau of Investigation's national retained print arrest notification program. Any arrest record identified shall be reported to the department.

(10) MEDICAL MARIJUANA TREATMENT CENTER INSPECTIONS; ADMINISTRATIVE ACTIONS.—

(a) The department shall conduct announced or unannounced

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inspections of medical marijuana treatment centers to determine compliance with this section or rules adopted pursuant to this section.

(b) The department shall inspect a medical marijuana treatment center upon receiving a complaint or notice that the medical marijuana treatment center has dispensed marijuana containing mold, bacteria, or other contaminant that may cause or has caused an adverse effect to human health or the environment.

(c) The department shall conduct at least a biennial inspection of each medical marijuana treatment center to evaluate the medical marijuana treatment center's records, personnel, equipment, processes, security measures, sanitation practices, and quality assurance practices.

(d) The Department of Agriculture and Consumer Services and the department shall enter into an interagency agreement to ensure cooperation and coordination in the performance of their obligations under this section and their respective regulatory and authorizing laws. The department, the Department of Highway Safety and Motor Vehicles, and the Department of Law Enforcement may enter into interagency agreements for the purposes specified in this subsection or subsection (7).

(e) The department shall publish a list of all approved medical marijuana treatment centers, medical directors, and qualified physicians on its website.

(f) The department may impose reasonable fines not to exceed $10,000 on a medical marijuana treatment center for any of the following violations:

1. Violating this section or department rule.

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2. Failing to maintain qualifications for approval.

3. Endangering the health, safety, or security of a qualified patient.

4. Improperly disclosing personal and confidential information of the qualified patient.

5. Attempting to procure medical marijuana treatment center approval by bribery, fraudulent misrepresentation, or extortion.

6. Being convicted or found guilty of, or entering a plea of guilty or nolo contendere to, regardless of adjudication, a crime in any jurisdiction which directly relates to the business of a medical marijuana treatment center.

7. Making or filing a report or record that the medical marijuana treatment center knows to be false.

8. Willfully failing to maintain a record required by this section or department rule.

9. Willfully impeding or obstructing an employee or agent of the department in the furtherance of his or her official duties.

10. Engaging in fraud or deceit, negligence, incompetence, or misconduct in the business practices of a medical marijuana treatment center.

11. Making misleading, deceptive, or fraudulent representations in or related to the business practices of a medical marijuana treatment center.

12. Having a license or the authority to engage in any regulated profession, occupation, or business that is related to the business practices of a medical marijuana treatment center suspended, revoked, or otherwise acted against by the licensing authority of any jurisdiction, including its agencies or

subdivisions, for a violation that would constitute a violation under Florida law.

13. Violating a lawful order of the department or an agency of the state, or failing to comply with a lawfully issued subpoena of the department or an agency of the state.

(g) The department may suspend, revoke, or refuse to renew a medical marijuana treatment center license if the medical marijuana treatment center commits any of the violations in paragraph (f).

(h) The department may adopt rules pursuant to ss. 120.536(1) and 120.54 to implement this subsection.

(11) PREEMPTION.—Regulation of cultivation, processing, and delivery of marijuana by medical marijuana treatment centers is preempted to the state except as provided in this subsection.

(a) A medical marijuana treatment center cultivating or processing facility may not be located within 500 feet of the real property that comprises a public or private elementary school, middle school, or secondary school.

(b)1. A county or municipality may, by ordinance, ban medical marijuana treatment center dispensing facilities from being located within the boundaries of that county or municipality. A county or municipality that does not ban dispensing facilities under this subparagraph may not place specific limits, by ordinance, on the number of dispensing facilities that may locate within that county or municipality.

2. A municipality may determine by ordinance the criteria for the location of, and other permitting requirements that do not conflict with state law or department rule for, medical marijuana treatment center dispensing facilities located within

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the boundaries of that municipality. A county may determine by ordinance the criteria for the location of, and other permitting requirements that do not conflict with state law or department rule for, all such dispensing facilities located within the unincorporated areas of that county. Except as provided in paragraph (c), a county or municipality may not enact ordinances for permitting or for determining the location of dispensing facilities which are more restrictive than its ordinances permitting or determining the locations for pharmacies licensed under chapter 465. A municipality or county may not charge a medical marijuana treatment center a license or permit fee in an amount greater than the fee charged by such municipality or county to pharmacies. A dispensing facility location approved by a municipality or county pursuant to former s. 381.986(8)(b), Florida Statutes 2016, is not subject to the location requirements of this subsection.

(c) A medical marijuana treatment center dispensing facility may not be located within 500 feet of the real property that comprises a public or private elementary school, middle school, or secondary school unless the county or municipality approves the location through a formal proceeding open to the public at which the county or municipality determines that the location promotes the public health, safety, and general welfare of the community.

(d) This subsection does not prohibit any local jurisdiction from ensuring medical marijuana treatment center facilities comply with the Florida Building Code, the Florida Fire Prevention Code, or any local amendments to the Florida Building Code or the Florida Fire Prevention Code.

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(12) PENALTIES.—

(a) A qualified physician commits a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083, if the qualified physician issues a physician certification for the medical use of marijuana for a patient without a reasonable belief that the patient is suffering from a qualifying medical condition.

(b) A person who fraudulently represents that he or she has a qualifying medical condition to a qualified physician for the purpose of being issued a physician certification commits a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.

(c) A qualified patient who uses marijuana, not including low-THC cannabis, or a caregiver who administers marijuana, not including low-THC cannabis, in plain view of or in a place open to the general public; in a school bus, a vehicle, an aircraft, or a boat; or on the grounds of a school except as provided in s. 1006.062, commits a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.

(d) A qualified patient or caregiver who cultivates marijuana or who purchases or acquires marijuana from any person or entity other than a medical marijuana treatment center violates s. 893.13 and is subject to the penalties provided therein.

(e)1. A qualified patient or caregiver in possession of marijuana or a marijuana delivery device who fails or refuses to present his or her marijuana use registry identification card upon the request of a law enforcement officer commits a misdemeanor of the second degree, punishable as provided in s.

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775.082 or s. 775.083, unless it can be determined through the medical marijuana use registry that the person is authorized to be in possession of that marijuana or marijuana delivery device.

2. A person charged with a violation of this paragraph may not be convicted if, before or at the time of his or her court or hearing appearance, the person produces in court or to the clerk of the court in which the charge is pending a medical marijuana use registry identification card issued to him or her which is valid at the time of his or her arrest. The clerk of the court is authorized to dismiss such case at any time before the defendant's appearance in court. The clerk of the court may assess a fee of $5 for dismissing the case under this paragraph.

(f) A caregiver who violates any of the applicable provisions of this section or applicable department rules, for the first offense, commits a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083 and, for a second or subsequent offense, commits a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.

(g) A qualified physician who issues a physician certification for marijuana or a marijuana delivery device and receives compensation from a medical marijuana treatment center related to the issuance of a physician certification for marijuana or a marijuana delivery device is subject to disciplinary action under the applicable practice act and s. 456.072(1)(n).

(h) A person transporting marijuana or marijuana delivery devices on behalf of a medical marijuana treatment center or marijuana testing laboratory who fails or refuses to present a transportation manifest upon the request of a law enforcement

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officer commits a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083.

(i) Persons and entities conducting activities authorized and governed by this section and s. 381.988 are subject to ss. 456.053, 456.054, and 817.505, as applicable.

(j) A person or entity that cultivates, processes, distributes, sells, or dispenses marijuana, as defined in s. 29(b)(4), Art. X of the State Constitution, and is not licensed as a medical marijuana treatment center violates s. 893.13 and is subject to the penalties provided therein.

(k) A person who manufactures, distributes, sells, gives, or possesses with the intent to manufacture, distribute, sell, or give marijuana or a marijuana delivery device that he or she holds out to have originated from a licensed medical marijuana treatment center but that is counterfeit commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084. For the purposes of this paragraph, the term "counterfeit" means marijuana; a marijuana delivery device; or a marijuana or marijuana delivery device container, seal, or label which, without authorization, bears the trademark, trade name, or other identifying mark, imprint, or device, or any likeness thereof, of a licensed medical marijuana treatment center and which thereby falsely purports or is represented to be the product of, or to have been distributed by, that licensed medical marijuana treatment facility.

(l) Any person who possesses or manufactures a blank, forged, stolen, fictitious, fraudulent, counterfeit, or otherwise unlawfully issued medical marijuana use registry identification card commits a felony of the third degree,

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punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(13) UNLICENSED ACTIVITY.—

(a) If the department has probable cause to believe that a person or entity that is not registered or licensed with the department has violated this section, s. 381.988, or any rule adopted pursuant to this section, the department may issue and deliver to such person or entity a notice to cease and desist from such violation. The department also may issue and deliver a notice to cease and desist to any person or entity who aids and abets such unlicensed activity. The issuance of a notice to cease and desist does not constitute agency action for which a hearing under s. 120.569 or s. 120.57 may be sought. For the purpose of enforcing a cease and desist order, the department may file a proceeding in the name of the state seeking issuance of an injunction or a writ of mandamus against any person or entity who violates any provisions of such order.

(b) In addition to the remedies under paragraph (a), the department may impose by citation an administrative penalty not to exceed $5,000 per incident. The citation shall be issued to the subject and must contain the subject's name and any other information the department determines to be necessary to identify the subject, a brief factual statement, the sections of the law allegedly violated, and the penalty imposed. If the subject does not dispute the matter in the citation with the department within 30 days after the citation is served, the citation shall become a final order of the department. The department may adopt rules pursuant to ss. 120.536(1) and 120.54 to implement this section. Each day that the unlicensed activity continues after issuance of a notice to cease and desist

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constitutes a separate violation. The department shall be entitled to recover the costs of investigation and prosecution in addition to the fine levied pursuant to the citation. Service of a citation may be made by personal service or by mail to the subject at the subject's last known address or place of practice. If the department is required to seek enforcement of the cease and desist or agency order, it shall be entitled to collect attorney fees and costs.

(c) In addition to or in lieu of any other administrative remedy, the department may seek the imposition of a civil penalty through the circuit court for any violation for which the department may issue a notice to cease and desist. The civil penalty shall be no less than $5,000 and no more than $10,000 for each offense. The court may also award to the prevailing party court costs and reasonable attorney fees and, in the event the department prevails, may also award reasonable costs of investigation and prosecution.

(d) In addition to the other remedies provided in this section, the department or any state attorney may bring an action for an injunction to restrain any unlicensed activity or to enjoin the future operation or maintenance of the unlicensed activity or the performance of any service in violation of this section.

(e) The department must notify local law enforcement of such unlicensed activity for a determination of any criminal violation of chapter 893.

(14) EXCEPTIONS TO OTHER LAWS.—

(a) Notwithstanding s. 893.13, s. 893.135, s. 893.147, or any other provision of law, but subject to the requirements of

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this section, a qualified patient and the qualified patient's caregiver may purchase from a medical marijuana treatment center for the patient's medical use a marijuana delivery device and up to the amount of marijuana authorized in the physician certification, but may not possess more than a 70-day supply of marijuana at any given time and all marijuana purchased must remain in its original packaging.

(b) Notwithstanding s. 893.13, s. 893.135, s. 893.147, or any other provision of law, but subject to the requirements of this section, an approved medical marijuana treatment center and its owners, managers, and employees may manufacture, possess, sell, deliver, distribute, dispense, and lawfully dispose of marijuana or a marijuana delivery device as provided in this section, s. 381.988, and by department rule. For the purposes of this subsection, the terms "manufacture," "possession," "deliver," "distribute," and "dispense" have the same meanings as provided in s. 893.02.

(c) Notwithstanding s. 893.13, s. 893.135, s. 893.147, or any other provision of law, but subject to the requirements of this section, a certified marijuana testing laboratory, including an employee of a certified marijuana testing laboratory acting within the scope of his or her employment, may acquire, possess, test, transport, and lawfully dispose of marijuana as provided in this section, in s. 381.988, and by department rule.

(d) A licensed medical marijuana treatment center and its owners, managers, and employees are not subject to licensure or regulation under chapter 465 or chapter 499 for manufacturing, possessing, selling, delivering, distributing, dispensing, or

lawfully disposing of marijuana or a marijuana delivery device, as provided in this section, s. 381.988, and by department rule.

(e) This subsection does not exempt a person from prosecution for a criminal offense related to impairment or intoxication resulting from the medical use of marijuana or relieve a person from any requirement under law to submit to a breath, blood, urine, or other test to detect the presence of a controlled substance.

(f) Notwithstanding s. 893.13, s. 893.135, s. 893.147, or any other provision of law, but subject to the requirements of this section and pursuant to policies and procedures established pursuant to s. 1006.62(8), school personnel may possess marijuana that is obtained for medical use pursuant to this section by a student who is a qualified patient.

(g) Notwithstanding s. 893.13, s. 893.135, s. 893.147, or any other provision of law, but subject to the requirements of this section, a research institute established by a public postsecondary educational institution, such as the H. Lee Moffitt Cancer Center and Research Institute, Inc., established under s. 1004.43, or a state university that has achieved the preeminent state research university designation under s. 1001.7065 may possess, test, transport, and lawfully dispose of marijuana for research purposes as provided by this section.

(15) APPLICABILITY.—This section does not limit the ability of an employer to establish, continue, or enforce a drug-free workplace program or policy. This section does not require an employer to accommodate the medical use of marijuana in any workplace or any employee working while under the influence of marijuana. This section does not create a cause of action

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against an employer for wrongful discharge or discrimination. Marijuana, as defined in this section, is not reimbursable under chapter 440.

(16) FINES AND FEES.—Fines and fees collected by the department under this section shall be deposited in the Grants and Donations Trust Fund within the Department of Health.

Section 4. Paragraph (uu) is added to subsection (1) of section 458.331, Florida Statutes, to read:

458.331 Grounds for disciplinary action; action by the board and department.—

(1) The following acts constitute grounds for denial of a license or disciplinary action, as specified in s. 456.072(2):

(uu) Issuing a physician certification, as defined in s. 381.986, in a manner out of compliance with the requirements of that section and rules adopted thereunder.

Section 5. Paragraph (ww) is added to subsection (1) of section 459.015, Florida Statutes, to read:

459.015 Grounds for disciplinary action; action by the board and department.—

(1) The following acts constitute grounds for denial of a license or disciplinary action, as specified in s. 456.072(2):

(ww) Issuing a physician certification, as defined in s. 381.986, in a manner not in compliance with the requirements of that section and rules adopted thereunder.

Section 6. Section 381.988, Florida Statutes, is created to read:

381.988 Medical marijuana testing laboratories; marijuana tests conducted by a certified laboratory.—

(1) A person or entity seeking to be a certified marijuana

testing laboratory must:

(a) Not be owned or controlled by a medical marijuana treatment center.

(b) Submit a completed application accompanied by an application fee, as established by department rule.

(c) Submit proof of an accreditation or a certification approved by the department issued by an accreditation or a certification organization approved by the department. The department shall adopt by rule a list of approved laboratory accreditations or certifications and accreditation or certification organizations.

(d) Require all owners and managers to submit to and pass a level 2 background screening pursuant to s. 435.04 and shall deny certification if the person or entity has been found guilty of, or has entered a plea of guilty or nolo contendere to, regardless of adjudication, any offense listed in chapter 837, chapter 895, or chapter 896 or similar law of another jurisdiction.

1. Such owners and managers must submit a full set of fingerprints to the department or to a vendor, entity, or agency authorized by s. 943.053(13). The department, vendor, entity, or agency shall forward the fingerprints to the Department of Law Enforcement for state processing, and the Department of Law Enforcement shall forward the fingerprints to the Federal Bureau of Investigation for national processing.

2. Fees for state and federal fingerprint processing and retention shall be borne by such owners or managers. The state cost for fingerprint processing shall be as provided in s. 943.053(3)(e) for records provided to persons or entities other

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than those specified as exceptions therein.

3. Fingerprints submitted to the Department of Law Enforcement pursuant to this paragraph shall be retained by the Department of Law Enforcement as provided in s. 943.05(2)(g) and (h) and, when the Department of Law Enforcement begins participation in the program, enrolled in the Federal Bureau of Investigation's national retained print arrest notification program. Any arrest record identified shall be reported to the department.

(e) Demonstrate to the department the capability of meeting the standards for certification required by this subsection, and the testing requirements of s. 381.986 and this section and rules adopted thereunder.

(2) The department shall adopt rules pursuant to ss. 120.536(1) and 120.54 establishing a procedure for initial certification and biennial renewal, including initial application and biennial renewal fees sufficient to cover the costs of administering this certification program. The department shall renew the certification biennially if the laboratory meets the requirements of this section and pays the biennial renewal fee.

(3) The department shall adopt rules pursuant to ss. 120.536(1) and 120.54 establishing the standards for certification of marijuana testing laboratories under this section. The Department of Agriculture and Consumer Services and the Department of Environmental Protection shall assist the department in developing the rule, which must include, but is not limited to:

(a) Security standards.

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(b) Minimum standards for personnel.

(c) Sample collection method and process standards.

(d) Proficiency testing for tetrahydrocannabinol potency, concentration of cannabidiol, and contaminants unsafe for human consumption, as determined by department rule.

(e) Reporting content, format, and frequency.

(f) Audits and onsite inspections.

(g) Quality assurance.

(h) Equipment and methodology.

(i) Chain of custody.

(j) Any other standard the department deems necessary to ensure the health and safety of the public.

(4) A marijuana testing laboratory may acquire marijuana only from a medical marijuana treatment center. A marijuana testing laboratory is prohibited from selling, distributing, or transferring marijuana received from a marijuana treatment center, except that a marijuana testing laboratory may transfer a sample to another marijuana testing laboratory in this state.

(5) A marijuana testing laboratory must properly dispose of all samples it receives, unless transferred to another marijuana testing laboratory, after all necessary tests have been conducted and any required period of storage has elapsed, as established by department rule.

(6) A marijuana testing laboratory shall use the computer software tracking system selected by the department under s. 381.986.

(7) The following acts constitute grounds for which disciplinary action specified in subsection (8) may be taken against a certified marijuana testing laboratory:

(a) Permitting unauthorized persons to perform technical procedures or issue reports.

(b) Demonstrating incompetence or making consistent errors in the performance of testing or erroneous reporting.

(c) Performing a test and rendering a report thereon to a person or entity not authorized by law to receive such services.

(d) Failing to file any report required under this section or s. 381.986 or the rules adopted thereunder.

(e) Reporting a test result if the test was not performed.

(f) Failing to correct deficiencies within the time required by the department.

(g) Violating or aiding and abetting in the violation of any provision of s. 381.986 or this section or any rules adopted thereunder.

(8) The department may refuse to issue or renew, or may suspend or revoke, the certification of a marijuana testing laboratory that is found to be in violation of this section or any rules adopted hereunder. The department may impose fines for violations of this section or rules adopted thereunder, based on a schedule adopted in rule. In determining the administrative action to be imposed for a violation, the department must consider the following factors:

(a) The severity of the violation, including the probability of death or serious harm to the health or safety of any person that may result or has resulted; the severity or potential harm; and the extent to which s. 381.986 or this section were violated.

(b) The actions taken by the marijuana testing laboratory to correct the violation or to remedy the complaint.

(c) Any previous violation by the marijuana testing laboratory.

(d) The financial benefit to the marijuana testing laboratory of committing or continuing the violation.

(9) The department may adopt rules pursuant to ss. 120.536(1) and 120.54 to implement this section.

(10) Fees collected by the department under this section shall be deposited in the Grants and Donations Trust Fund within the Department of Health.

Section 7. Section 381.989, Florida Statutes, is created to read:

381.989 Public education campaigns.—

(1) DEFINITIONS.—As used in this section, the term:

(a) "Cannabis" has the same meaning as in s. 893.02.

(b) "Department" means the Department of Health.

(c) "Marijuana" has the same meaning as in s. 381.986.

(2) STATEWIDE CANNABIS AND MARIJUANA EDUCATION AND ILLICIT USE PREVENTION CAMPAIGN.—

(a) The department shall implement a statewide cannabis and marijuana education and illicit use prevention campaign to publicize accurate information regarding:

1. The legal requirements for licit use and possession of marijuana in this state.

2. Safe use of marijuana, including preventing access by persons other than qualified patients as defined in s. 381.986, particularly children.

3. The short-term and long-term health effects of cannabis and marijuana use, particularly on minors and young adults.

4. Other cannabis-related and marijuana-related education

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determined by the department to be necessary to the public health and safety.

(b) The department shall provide educational materials regarding the eligibility for medical use of marijuana by individuals diagnosed with a terminal condition to individuals that provide palliative care or hospice services.

(c) The department may use television messaging, radio broadcasts, print media, digital strategies, social media, and any other form of messaging deemed necessary and appropriate by the department to implement the campaign. The department may work with school districts, community organizations, and businesses and business organizations and other entities to provide training and programming.

(d) The department may contract with one or more vendors to implement the campaign.

(e) The department shall contract with an independent entity to conduct annual evaluations of the campaign. The evaluations shall assess the reach and impact of the campaign, success in educating the citizens of the state regarding the legal parameters for marijuana use, success in preventing illicit access by adults and youth, and success in preventing negative health impacts from the legalization of marijuana. The first year of the program, the evaluator shall conduct surveys to establish baseline data on youth and adult cannabis use, the attitudes of youth and the general public toward cannabis and marijuana, and any other data deemed necessary for long-term analysis. By January 31 of each year, the department shall submit to the Governor, the President of the Senate, and the Speaker of the House of Representatives the annual evaluation of

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the campaign.

(3) STATEWIDE IMPAIRED DRIVING EDUCATION CAMPAIGN.—

(a) The Department of Highway Safety and Motor Vehicles shall implement a statewide impaired driving education campaign to raise awareness and prevent marijuana-related and cannabis-related impaired driving and may contract with one or more vendors to implement the campaign. The Department of Highway Safety and Motor Vehicles may use television messaging, radio broadcasts, print media, digital strategies, social media, and any other form of messaging deemed necessary and appropriate by the department to implement the campaign.

(b) At a minimum, the Department of Highway Safety and Motor Vehicles or a contracted vendor shall establish baseline data on the number of marijuana-related citations for driving under the influence, marijuana-related traffic arrests, marijuana-related traffic accidents, and marijuana-related traffic fatalities, and shall track these measures annually thereafter. The Department of Highway Safety and Motor Vehicles or a contracted vendor shall annually evaluate and compile a report on the efficacy of the campaign based on those measures and other measures established by the Department of Highway Safety and Motor Vehicles. By January 31 of each year, the Department of Highway Safety and Motor Vehicles shall submit the report on the evaluation of the campaign to the Governor, the President of the Senate, and the Speaker of the House of Representatives.

Section 8. Subsection (1) of section 385.211, Florida Statutes, is amended to read:

385.211 Refractory and intractable epilepsy treatment and

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research at recognized medical centers.—

(1) As used in this section, the term "low-THC cannabis" means "low-THC cannabis" as defined in s. 381.986 that is dispensed only from a dispensing organization as defined in former s. 381.986, Florida Statutes 2016, or a medical marijuana treatment center as defined in s. 381.986.

Section 9. Paragraphs (b) through (e) of subsection (2) of section 499.0295, Florida Statutes, are redesignated as paragraphs (a) through (d), respectively, and present paragraphs (a) and (c) of that subsection, and subsection (3) of that section are amended, to read:

499.0295 Experimental treatments for terminal conditions.—

(2) As used in this section, the term:

~~(a) "Dispensing organization" means an organization approved by the Department of Health under s. 381.986(5) to cultivate, process, transport, and dispense low-THC cannabis, medical cannabis, and cannabis delivery devices.~~

(b) ~~(c)~~ "Investigational drug, biological product, or device" means~~:~~

~~1.~~ a drug, biological product, or device that has successfully completed phase 1 of a clinical trial but has not been approved for general use by the United States Food and Drug Administration and remains under investigation in a clinical trial approved by the United States Food and Drug Administration~~; or~~

~~2. Medical cannabis that is manufactured and sold by a dispensing organization~~.

(3) Upon the request of an eligible patient, a manufacturer may~~, or upon a physician's order pursuant to s. 381.986, a~~

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~~dispensing organization may~~:

(a) Make its investigational drug, biological product, or device available under this section.

(b) Provide an investigational drug, biological product, or device~~, or cannabis delivery device as defined in s. 381.986~~ to an eligible patient without receiving compensation.

(c) Require an eligible patient to pay the costs of, or the costs associated with, the manufacture of the investigational drug, biological product, or device~~, or cannabis delivery device as defined in s. 381.986~~.

Section 10. Subsection (3) of section 893.02, Florida Statutes, is amended to read:

893.02 Definitions.—The following words and phrases as used in this chapter shall have the following meanings, unless the context otherwise requires:

(3) "Cannabis" means all parts of any plant of the genus *Cannabis*, whether growing or not; the seeds thereof; the resin extracted from any part of the plant; and every compound, manufacture, salt, derivative, mixture, or preparation of the plant or its seeds or resin. The term does not include "marijuana," ~~"low-THC cannabis,"~~ as defined in s. 381.986, if manufactured, possessed, sold, purchased, delivered, distributed, or dispensed, in conformance with s. 381.986.

Section 11. Section 1004.4351, Florida Statutes, is created to read:

1004.4351 Medical marijuana research and education.—

(1) SHORT TITLE.—This section shall be known and may be cited as the "Medical Marijuana Research and Education Act."

(2) LEGISLATIVE FINDINGS.—The Legislature finds that:

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(a) The present state of knowledge concerning the use of marijuana to alleviate pain and treat illnesses is limited because permission to perform clinical studies on marijuana is difficult to obtain, with access to research-grade marijuana so restricted that little or no unbiased studies have been performed.

(b) Under the State Constitution, marijuana is available for the treatment of certain debilitating medical conditions.

(c) Additional clinical studies are needed to ensure that the residents of this state obtain the correct dosing, formulation, route, modality, frequency, quantity, and quality of marijuana for specific illnesses.

(d) An effective medical marijuana research and education program would mobilize the scientific, educational, and medical resources that presently exist in this state to determine the appropriate and best use of marijuana to treat illness.

(3) DEFINITIONS.—As used in this section, the term:

(a) "Board" means the Medical Marijuana Research and Education Board.

(b) "Coalition" means the Coalition for Medical Marijuana Research and Education.

(c) "Marijuana" has the same meaning as provided in s. 29, Art. X of the State Constitution.

(4) COALITION FOR MEDICAL MARIJUANA RESEARCH AND EDUCATION.—

(a) There is established within the H. Lee Moffitt Cancer Center and Research Institute, Inc., the Coalition for Medical Marijuana Research and Education. The purpose of the coalition is to conduct rigorous scientific research, provide education,

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disseminate research, and guide policy for the adoption of a statewide policy on ordering and dosing practices for the medical use of marijuana. The coalition shall be physically located at the H. Lee Moffitt Cancer Center and Research Institute, Inc.

(b) The Medical Marijuana Research and Education Board is established to direct the operations of the coalition. The board shall be composed of seven members appointed by the chief executive officer of the H. Lee Moffitt Cancer Center and Research Institute, Inc. Board members must have experience in a variety of scientific and medical fields, including, but not limited to, oncology, neurology, psychology, pediatrics, nutrition, and addiction. Members shall be appointed to 4-year terms and may be reappointed to serve additional terms. The chair shall be elected by the board from among its members to serve a 2-year term. The board shall meet at least semiannually at the call of the chair or, in his or her absence or incapacity, the vice chair. Four members constitute a quorum. A majority vote of the members present is required for all actions of the board. The board may prescribe, amend, and repeal a charter governing the manner in which it conducts its business. A board member shall serve without compensation but is entitled to be reimbursed for travel expenses by the coalition or the organization he or she represents in accordance with s. 112.061.

(c) The coalition shall be administered by a coalition director, who shall be appointed by and serve at the pleasure of the board. The coalition director shall, subject to the approval of the board:

1. Propose a budget for the coalition.

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2. Foster the collaboration of scientists, researchers, and other appropriate personnel in accordance with the coalition's charter.

3. Identify and prioritize the research to be conducted by the coalition.

4. Prepare the Medical Marijuana Research and Education Plan for submission to the board.

5. Apply for grants to obtain funding for research conducted by the coalition.

6. Perform other duties as determined by the board.

(d) The board shall advise the Board of Governors, the State Surgeon General, the Governor, and the Legislature with respect to medical marijuana research and education in this state. The board shall explore methods of implementing and enforcing medical marijuana laws in relation to cancer control, research, treatment, and education.

(e) The board shall annually adopt a plan for medical marijuana research, known as the "Medical Marijuana Research and Education Plan," which must be in accordance with state law and coordinate with existing programs in this state. The plan must include recommendations for the coordination and integration of medical, pharmacological, nursing, paramedical, community, and other resources connected with the treatment of debilitating medical conditions; research related to the treatment of such medical conditions; and education.

(f) By February 15 of each year, the board shall issue a report to the Governor, the President of the Senate, and the Speaker of the House of Representatives on research projects, community outreach initiatives, and future plans for the

coalition.

(g) Beginning January 15, 2018, and quarterly thereafter, the Department of Health shall submit to the board a data set that includes, for each patient registered in the medical marijuana use registry, the patient's qualifying medical condition and the daily dose amount and forms of marijuana certified for the patient.

(5) RESPONSIBILITIES OF THE H. LEE MOFFITT CANCER CENTER AND RESEARCH INSTITUTE, INC.—The H. Lee Moffitt Cancer Center and Research Institute, Inc., shall allocate staff and provide information and assistance, as the coalition's budget permits, to assist the board in fulfilling its responsibilities.

Section 12. Subsection (1) of section 1004.441, Florida Statutes, is amended to read:

1004.441 Refractory and intractable epilepsy treatment and research.—

(1) As used in this section, the term "low-THC cannabis" means "low-THC cannabis" as defined in s. 381.986 that is dispensed only from a dispensing organization as defined in former s. 381.986, Florida Statutes 2016, or a medical marijuana treatment center as defined in s. 381.986.

Section 13. Subsection (8) is added to section 1006.062, Florida Statutes, to read:

1006.062 Administration of medication and provision of medical services by district school board personnel.—

(8) Each district school board shall adopt a policy and a procedure for allowing a student who is a qualified patient, as defined in s. 381.986, to use marijuana obtained pursuant to that section. Such policy and procedure shall ensure access by

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the qualified patient; identify how the marijuana will be received, accounted for, and stored; and establish processes to prevent access by other students and school personnel whose access would be unnecessary for the implementation of the policy.

Section 14. Department of Health; authority to adopt rules; cause of action.—

(1) EMERGENCY RULEMAKING.—

(a) The Department of Health and the applicable boards shall adopt emergency rules pursuant to s. 120.54(4), Florida Statutes, and this section necessary to implement ss. 381.986 and 381.988, Florida Statutes. If an emergency rule adopted under this section is held to be unconstitutional or an invalid exercise of delegated legislative authority, and becomes void, the department or the applicable boards may adopt an emergency rule pursuant to this section to replace the rule that has become void. If the emergency rule adopted to replace the void emergency rule is also held to be unconstitutional or an invalid exercise of delegated legislative authority and becomes void, the department and the applicable boards must follow the nonemergency rulemaking procedures of the Administrative Procedures Act to replace the rule that has become void.

(b) For emergency rules adopted under this section, the department and the applicable boards need not make the findings required by s. 120.54(4)(a), Florida Statutes. Emergency rules adopted under this section are exempt from ss. 120.54(3)(b) and 120.541, Florida Statutes. The department and the applicable boards shall meet the procedural requirements in s. 120.54(a), Florida Statutes, if the department or the applicable boards

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have, before the effective date of this act, held any public workshops or hearings on the subject matter of the emergency rules adopted under this subsection. Challenges to emergency rules adopted under this subsection are subject to the time schedules provided in s. 120.56(5), Florida Statutes.

(c) Emergency rules adopted under this section are exempt from s. 120.54(4)(c), Florida Statutes, and shall remain in effect until replaced by rules adopted under the nonemergency rulemaking procedures of the Administrative Procedures Act. By January 1, 2018, the department and the applicable boards shall initiate nonemergency rulemaking pursuant to the Administrative Procedures Act to replace all emergency rules adopted under this section by publishing a notice of rule development in the Florida Administrative Register. Except as provided in paragraph (a), after January 1, 2018, the department and applicable boards may not adopt rules pursuant to the emergency rulemaking procedures provided in this section.

(2) CAUSE OF ACTION.—

(a) As used in s. 29(d)(3), Article X of the State Constitution, the term:

1. "Issue regulations" means the filing by the department of a rule or emergency rule for adoption with the Department of State.

2. "Judicial relief" means an action for declaratory judgment pursuant to chapter 86, Florida Statutes.

(b) The venue for actions brought against the department pursuant to s. 29(d)(3), Article X of the State Constitution shall be in the circuit court in and for Leon County.

(c) If the department is not issuing patient and caregiver

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identification cards or licensing medical marijuana treatment centers by October 3, 2017, the following shall be a defense to a cause of action brought under s. 29(d)(3), Article X of the State Constitution:

1. The department is unable to issue patient and caregiver identification cards or license medical marijuana treatment centers due to litigation challenging a rule as an invalid exercise of delegated legislative authority or unconstitutional.

2. The department is unable to issue patient or caregiver identification cards or license medical marijuana treatment centers due to a rule being held as an invalid exercise of delegated legislative authority or unconstitutional.

Section 15. Department of Law Enforcement; training related to medical use of marijuana.-The Department of Law Enforcement shall develop a 4-hour online initial training course, and a 2-hour online continuing education course, which shall be made available for use by all law enforcement agencies in this state. Such training shall cover the legal parameters of marijuana-related activities governed by ss. 381.986 and 381.988, Florida Statutes, relating to criminal laws governing marijuana.

Section 16. Section 385.212, Florida Statutes, is amended to read:

385.212 Powers and duties of the Department of Health; Office of Medical Marijuana ~~Compassionate~~ Use.—

(1) The Department of Health shall establish an Office of Medical Marijuana ~~Compassionate~~ Use under the direction of the Deputy State Health Officer.

(2) The Office of Medical Marijuana ~~Compassionate~~ Use may enhance access to investigational new drugs for Florida patients

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through approved clinical treatment plans or studies. The Office of Medical Marijuana ~~Compassionate~~ Use may:

(a) Create a network of state universities and medical centers recognized pursuant to s. 381.925.

(b) Make any necessary application to the United States Food and Drug Administration or a pharmaceutical manufacturer to facilitate enhanced access to medical ~~compassionate~~ use of marijuana for Florida patients.

(c) Enter into any agreements necessary to facilitate enhanced access to medical ~~compassionate~~ use of marijuana for Florida patients.

(3) The department may adopt rules necessary to implement this section.

(4) The Office of Medical Marijuana Use shall administer and enforce s. 381.986.

Section 17. If any provision of this act or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this act which can be given effect without the invalid provision or application, and to this end the provisions of this act are severable.

Section 18. The Division of Law Revision and Information is directed to replace the phrase "the effective date of this act" wherever it occurs in this act with the date the act becomes a law.

Section 19. (1) For the 2017-2018 fiscal year, 55 full-time equivalent positions, with associated salary rate of 2,198,860, are authorized and the sums of $3.5 million in nonrecurring funds from the General Revenue Fund and $4,055,292 in recurring

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funds and $1,238,148 in nonrecurring funds from the Grants and Donations Trust Fund are appropriated to the Department of Health for the purpose of implementing the requirements of this act. Of the funds appropriated, $3,158,572 in recurring funds and $1,238,148 in nonrecurring funds from the Grants and Donations Trust Fund and 27 full-time equivalent positions shall be placed in reserve. The Department of Health is authorized to submit budget amendments requesting the release of funds being held in reserve pursuant to chapter 216, Florida Statutes contingent upon need and demonstration of fee collections to support the budget authority.

(2) For the 2017-2018 fiscal year, the sum of $500,000 in nonrecurring funds from the General Revenue Fund is appropriated to the Department of Health to implement the statewide cannabis and marijuana education and illicit use prevention campaign established under s. 381.989, Florida Statutes.

(3) For the 2017-2018 fiscal year, the sum of $5 million in nonrecurring funds from the Highway Safety Operating Trust Fund are appropriated to the Department of Highway Safety and Motor Vehicles to implement the statewide impaired driving education campaign established under s. 381.989, Florida Statutes.

(4) For the 2017-2018 fiscal year, the sum of $100,000 in recurring funds from the Highway Safety Operating Trust Fund is appropriated to the Department of Highway Safety and Motor Vehicles for the purpose of training additional law enforcement officers as drug recognition experts.

(5) For the 2017-2018 fiscal year, the sum of $750,000 in nonrecurring funds from the General Revenue Fund is provided for the Coalition for Medicinal Cannabis Research and Education at

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the H. Lee Moffitt Cancer Center and Research Institute, Inc., to conduct medical cannabis research.

Section 20. This act shall take effect upon becoming a law.

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DEPARTMENT OF HEALTH

The Department of Health, Office of Compassionate Use hereby provides notice that the regulation development procedure below has been filed for adoption with the Department Agency Clerk and is effective as of June 14, 2017, pursuant to the Department's authority under Article X, Section 29, of the Florida Constitution. This regulation development procedure will be used by the Department to implement its regulation authority under the Florida Constitution. The Department previously provided notice of the proposed procedure in Vol. 43 No. 102, May 25, 2017 issue of the Florida Administrative Register.

Office of Compassionate Use
Article X, Section 29, of the Florida Constitution
Regulation Development Procedure

A. Background

In November 2016, Florida voters passed an amendment to Article X of the Florida Constitution establishing provisions for the recommendation, use, and sale of medical marijuana. Under the amendment, the Florida Department of Health is responsible for registering and regulating medical marijuana treatment centers that produce and distribute marijuana for medical purposes, as well as issuing identification cards to patients and caregivers. Regulations promulgated pursuant to constitutional authority are not subject to Chapter 120, Florida Statutes. Because there is public benefit to having uniform procedures that are clearly laid out for such regulations, the Florida Department of Health (Department) establishes the following procedures for implementing Article X, Section 29 of the Florida Constitution.

B. Definitions of Regulations

a. Regulations are statements of general applicability to guide the conduct or action of the Department, medical marijuana treatment centers, physicians, patients, and caregivers, adopted by the Department to implement its powers and duties. Regulations must be consistent with the law.

b. Regulations are not subject to the provisions of Chapter 120, Florida Statutes, as they are promulgated pursuant to constitutionally delegated authority and not legislatively delegated authority.

C. Regulation Development Procedures

a. Notice

i. Prior to the adoption, amendment, or repeal of any regulation, except an emergency regulation, the Department shall give notice of its intended action. This notice shall be given at least 15 days prior to any proposed adoption or repeal of a regulation. Notice of a proposed regulation, amendment, or repeal shall include publication in the Florida Administrative Register.

b. Comments

i. Any person may submit written comments concerning a proposed regulation, amendment, or repeal to the contact person identified in the notice within 3 days after the date of the notice.

ii. In response, the Department may solicit additional written comments, schedule a public hearing, withdraw or modify the regulation, amendment, or repeal in whole or in part after notice, or proceed with adopting the regulation.

c. Adoption

i. The Department is responsible for adopting its regulations. Regulations are adopted upon promulgation by the Department.

d. Filing

i. Place of Filing, Record and Effective Date

1. When adopted, the regulation, amendment, or repeal shall be filed with the Agency Clerk and posted in the Florida Administrative Register.

2. The regulation, amendment, or repeal shall become effective on the date of filing unless the effective date is stated otherwise.

D. Due Process

a. In implementing regulations that affect the rights of individuals, the Department will honor established due process principles to ensure that applicable due process rights are afforded to affected individuals.

E. Emergency Regulations

a. An emergency regulation may be adopted if there is an immediate danger to the public health, safety, or welfare under a procedure which is fair under the circumstances. The action taken must be only that necessary to protect the public interest in the emergency. At the time of, or prior to the Department's action, it must publish in the Florida Administrative Register specific facts and reasons for concluding that the procedure is fair under the circumstances. An emergency regulation shall not be effective for a period longer than 90 days. However, the Department may take identical action under the regular regulation development procedure set forth herein.

DEPARTMENT OF HEALTH

Office of Compassionate Use Notice of Proposed Regulation

The Department of Health, Office of Compassionate Use hereby provides notice of its proposed regulation pursuant to the Department's authority under Article X, Section 29, of the Florida Constitution. The person to be contacted regarding the proposed regulation or to submit comments is: Courtney Coppola at Courtney.Coppola@flhealth.gov.

THE TEXT OF THE PROPOSED REGULATION IS:

1-1.01 Medical Marijuana for Debilitating Medical Conditions

(1) For the purposes of this chapter, in accordance with Article X, Section 29, Fla. Const., the following definitions shall apply:

(a) "Fla. SB 8-A (2017)" shall mean the enrolled version dated June 9, 2017 available at: https://www.flsenate.gov/Session/Bill/2017A/8A/BillText/er/PDF.

(b) "Medical Marijuana Treatment Center (MMTC)" shall have the meaning provided in Article X, Section 29, Fla. Const.

(c) "Caregiver" shall have the same meaning as provided in s. 381.986(1)(a), F.S. as amended by Fla. SB 8-A (2017) and must meet the requirements of s. 381.986(6), F.S. as amended by Fla. SB 8-A (2017) provided however, that a Caregiver shall not be required to complete the certification course provided in s. 381.986(6)(a)(5) F.S. as amended by Fla. SB 8-A until such course has been developed by the Department of Health.

(d) "Close Relative" shall have the same meaning as provided in s. 381.986(1)(c), F.S. as amended by Fla. SB 8-A (2017).

(e) "Medical use" shall have the same definition as medical use in s. 381.986(1)(j), F.S. as amended by Fla. SB 8-A (2017).

(f) "Qualified patient" shall mean a qualified patient as defined by s. 381.986(1)(l), F.S., as amended by Fla. SB 8-A (2017).

(g) "Qualifying debilitating medical condition" shall have the same meaning as a Qualifying Medical Condition as provided in s. 381.986(2), F.S. as amended by Fla. SB 8-A (2017).

(h) The 70 day supply limitation set forth in s. 381.986(8)(e)13.b., F.S. as amended by Fla. SB 8-A (2017), shall be an adequate supply for a qualifying patient's medical use.

(i) "Qualified physician" has the same meaning as s. 381.986(1)(m), F.S. as amended by Fla. SB 8-A (2017). A qualified physician must meet the requirements of s. 381.986(3), F.S. as amended by Fla. SB 8-A (2017).

(j) "Physician certification" has the same meaning as s. 381.986(1)(k), F.S. as amended by Fla. SB 8-A (2017) and may be issued by a qualified physician pursuant to the requirements of s. 381.986(4), F.S. as amended by Fla. SB 8-A (2017).

(2) All MMTCs, physicians, patients, and caregivers must be registered in the online Compassionate Use Registry as required by Rule 64-4.009, F.A.C. All orders for medical marijuana must be entered into the registry for processing accordingly.

(3) All patients and caregivers must have a valid Compassionate Use Registry identification card to obtain medical marijuana or a medical marijuana delivery device as required by Rule 64-4.011, F.A.C.

(4) Each prospective caregiver shall present to Florida Department of Law Enforcement or one of its approved vendors for fingerprinting. At that time, a prospective caregiver shall provide the entity ORI number **FL924890Z**. The report will be sent directly to the Department of Health.

(5) Any entity that holds an active, unrestricted license to cultivate, process, transport, and dispense low-THC cannabis, medical cannabis, and cannabis delivery devices, under s. 381.986, F.S. (2016) shall be registered as an MMTC upon certification to the Department of Health that the prospective MMTC meets the requirements set forth in s. 381.986(8), F.S. as amended by Fla. SB 8-A (2017). If Fla. SB 8-A (2017) becomes law, the Department of Health shall immediately begin the process to implement regulations and or rules as necessary to register additional MMTCs pursuant to the requirements and limitations set forth in s. 381.986(8), F.S. as amended by Fla. SB 8-A (2017).

(6) All MMTCs shall be held to the representations made within its initial application for licensure and shall be subject to the operational and licensing requirements of s. 381.986(8), F.S. as amended by Fla. SB 8-A (2017). All MMTC's are subject to the inspections and penalties set forth in s. 381.986(10), F.S. as amended by Fla. SB 8-A (2017)

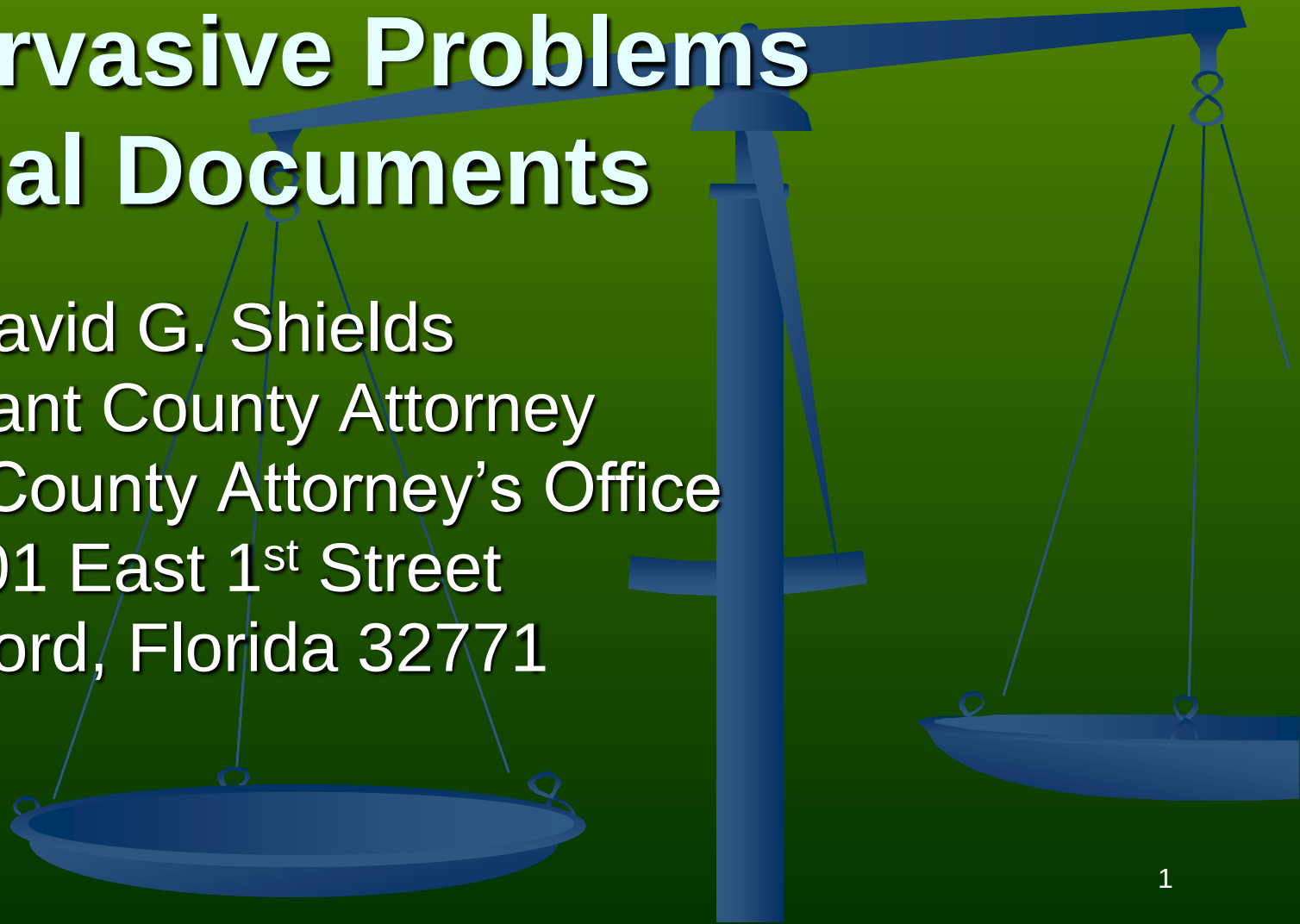
(7) All MMTCs shall follow record keeping standards through a seed-to-sale tracking system as set forth in s. 381.986, F.S., as amended by Fla. SB 8-A (2017).

(8) All MMTCs shall abide by the security, product testing, labeling and safety standards set forth in s. 381.986, F.S as amended by Fla. SB 8-A (2017).

Regulation Authority Art. X, § 29(d), Fla. Const. History – New _____.

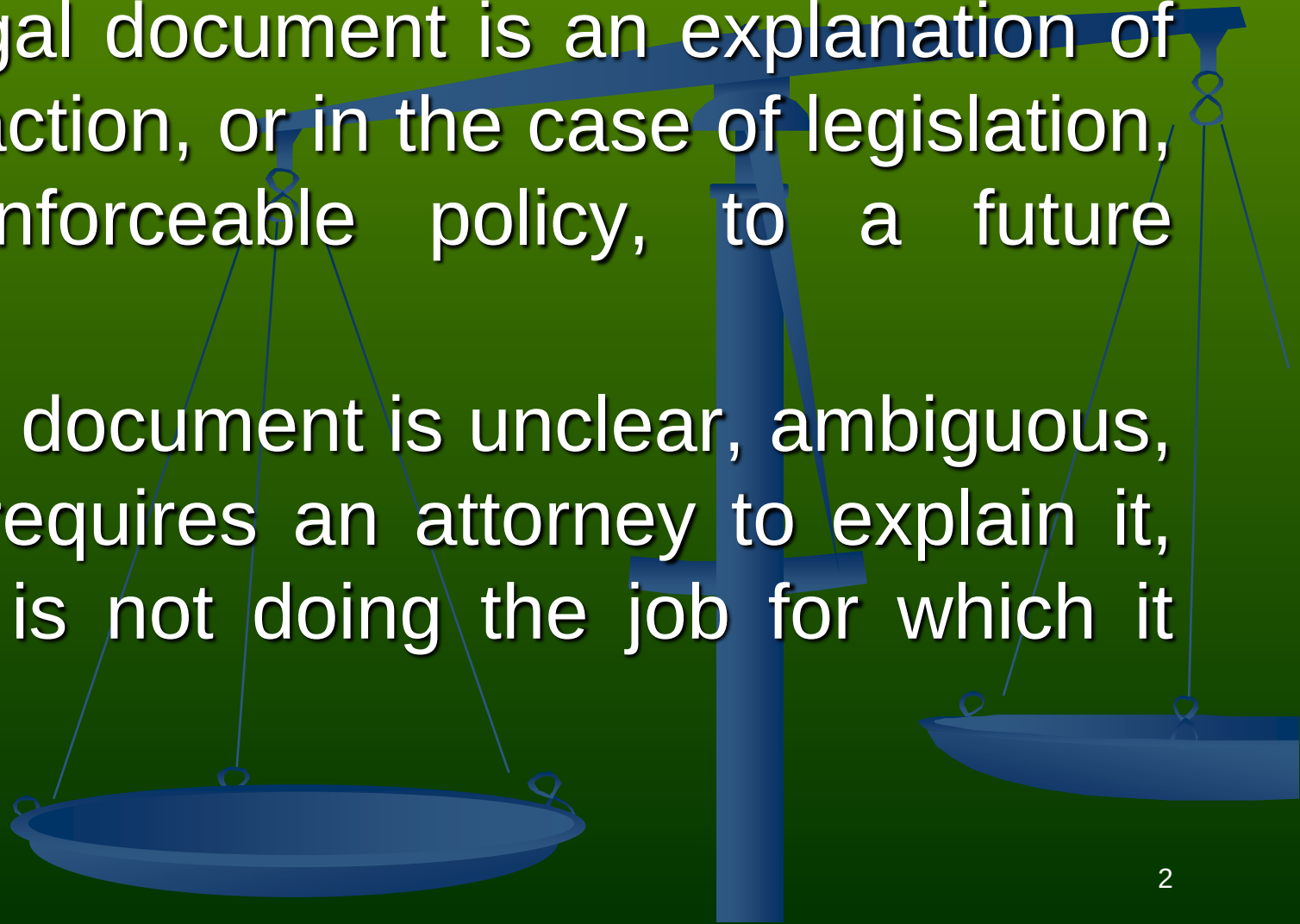
Clobber Bad Writing
Fixing Pervasive Problems in Legal Documents

David G. Shields
Assistant County Attorney
Seminole County Attorney's Office
1101 East 1st Street
Sanford, Florida 32771



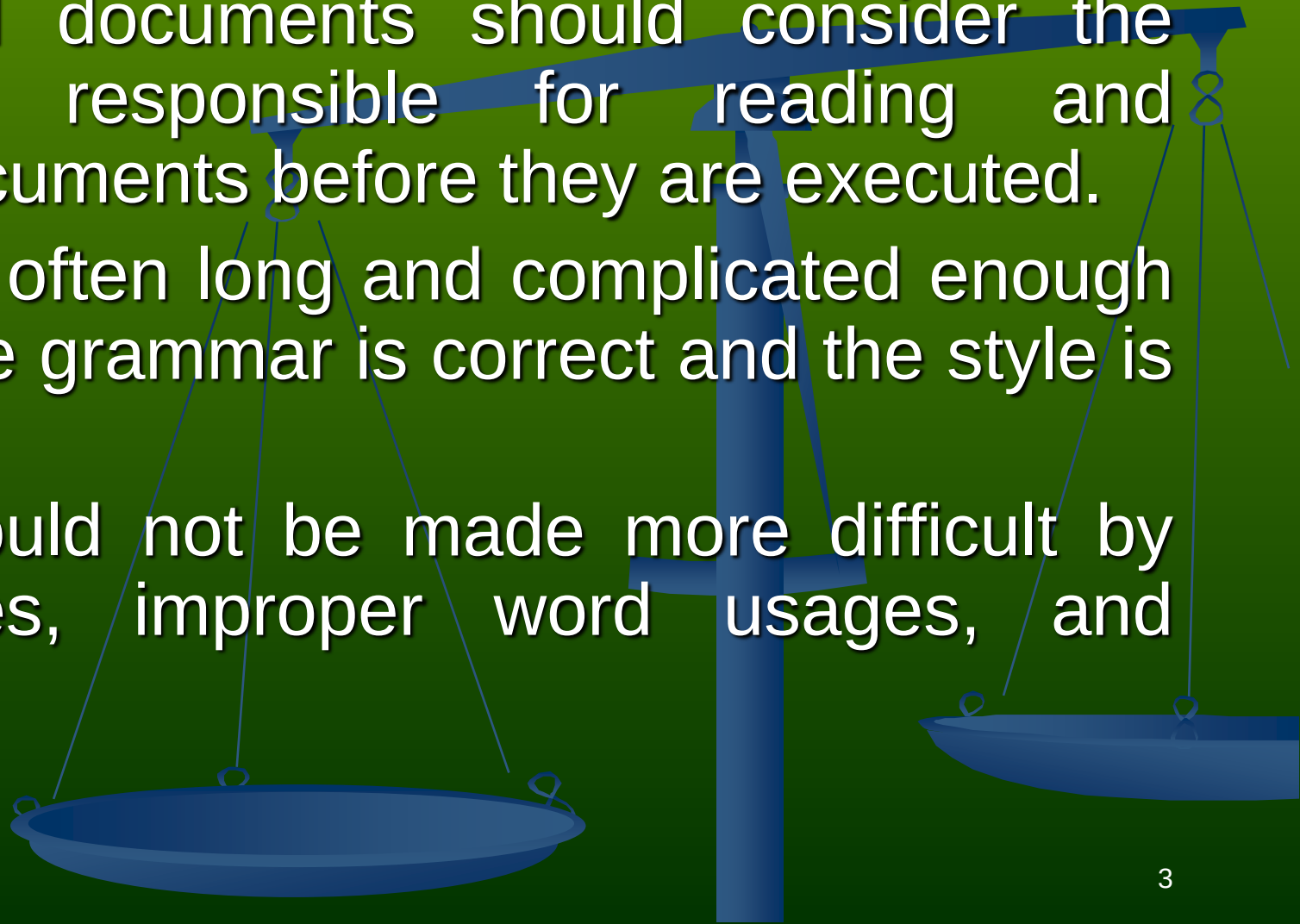
Why the Concern about Legal Drafting?

- At its essence, a legal document is an explanation of the terms of a transaction, or in the case of legislation, a statement of enforceable policy, to a future hypothetical judge.
- To the extent a legal document is unclear, ambiguous, difficult to read, or requires an attorney to explain it, the legal document is not doing the job for which it was intended.



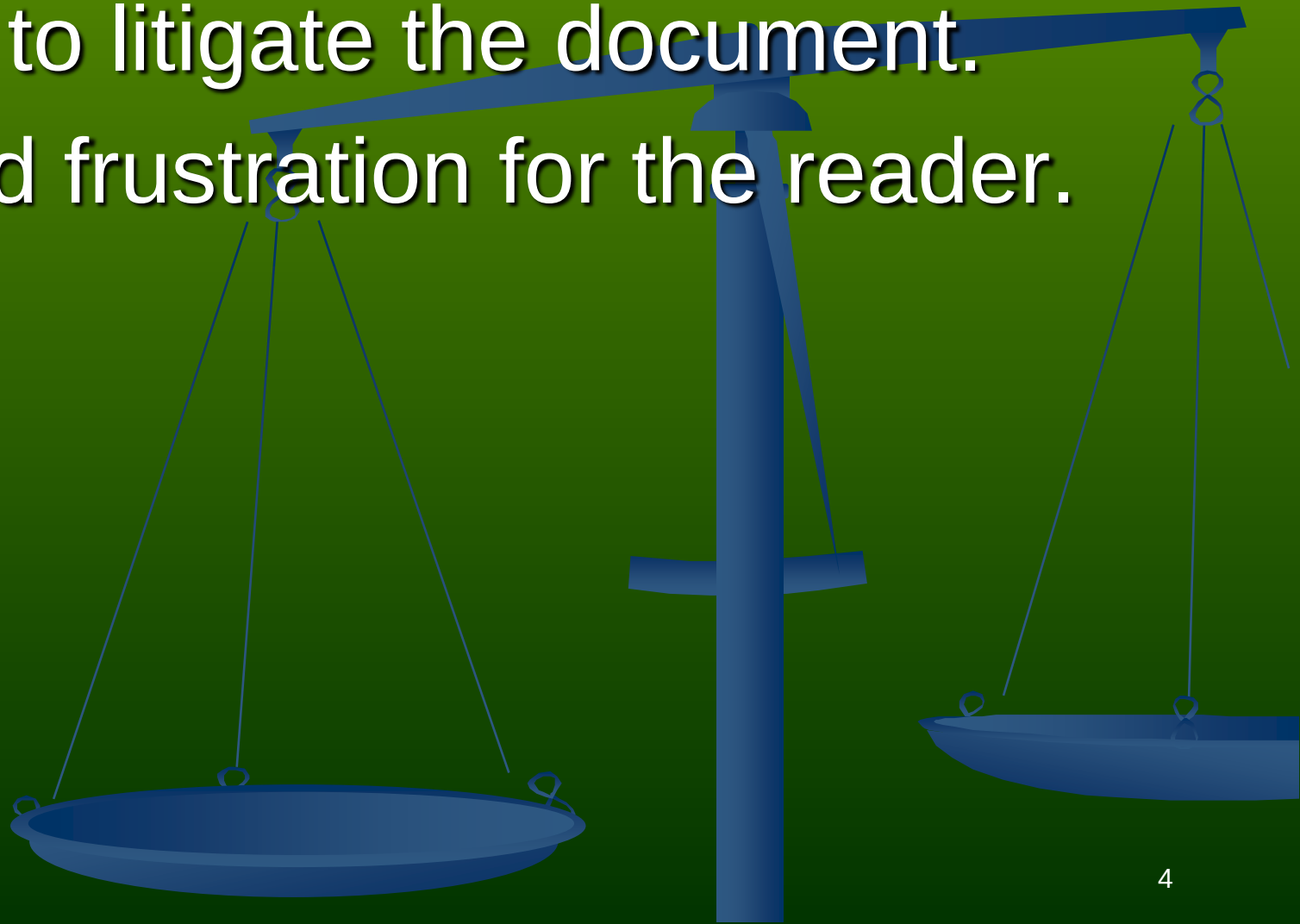
Why the Concern about Legal Drafting?

- The writers of legal documents should consider the persons who are responsible for reading and understanding the documents before they are executed.
- Legal documents are often long and complicated enough to read even when the grammar is correct and the style is polished.
- The reader's job should not be made more difficult by grammatical mistakes, improper word usages, and antiquated legalese.



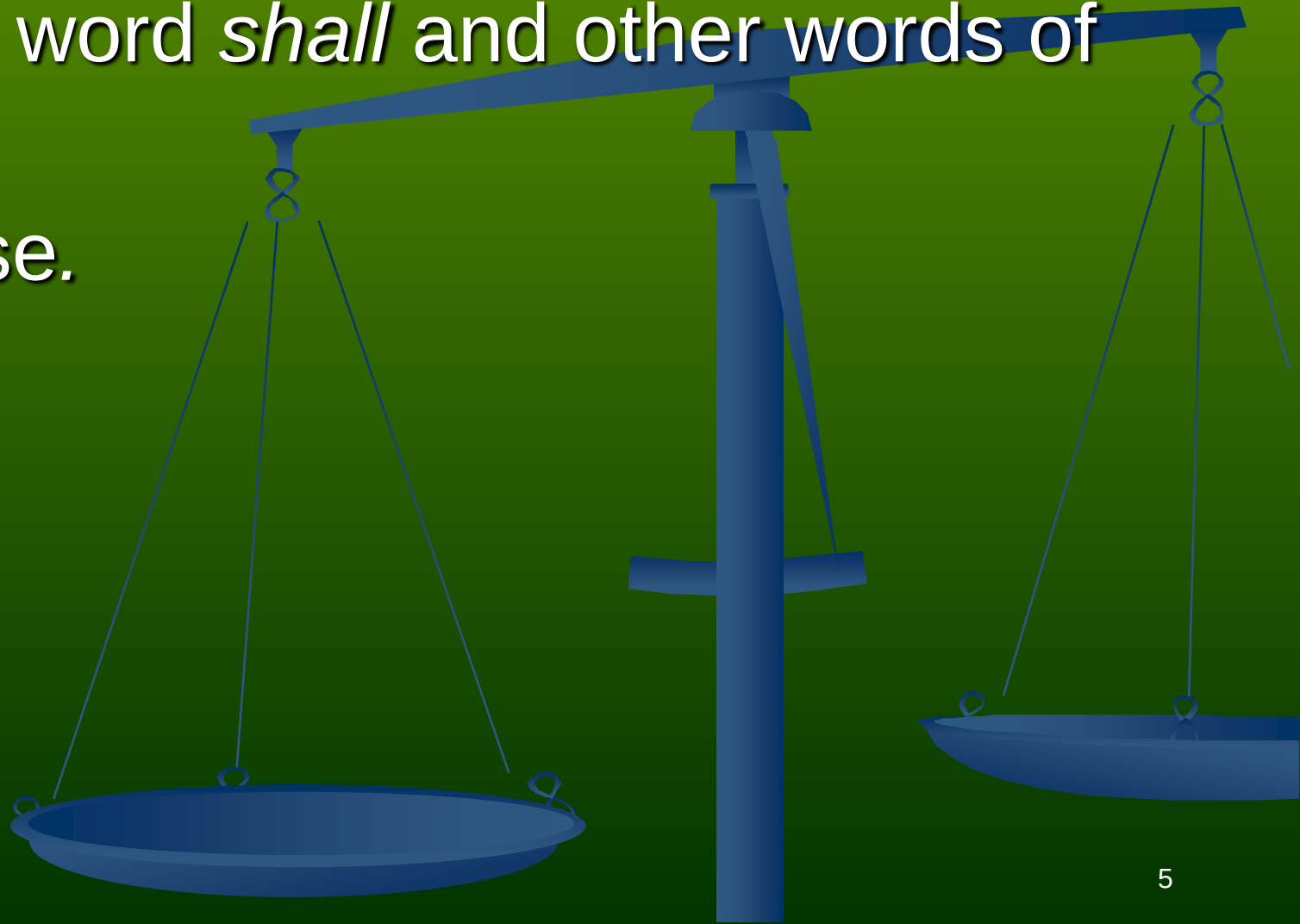
Why the Concern about Legal Drafting?

- To avoid having to litigate the document.
- To save time and frustration for the reader.



The Two Biggest Drafting Problems

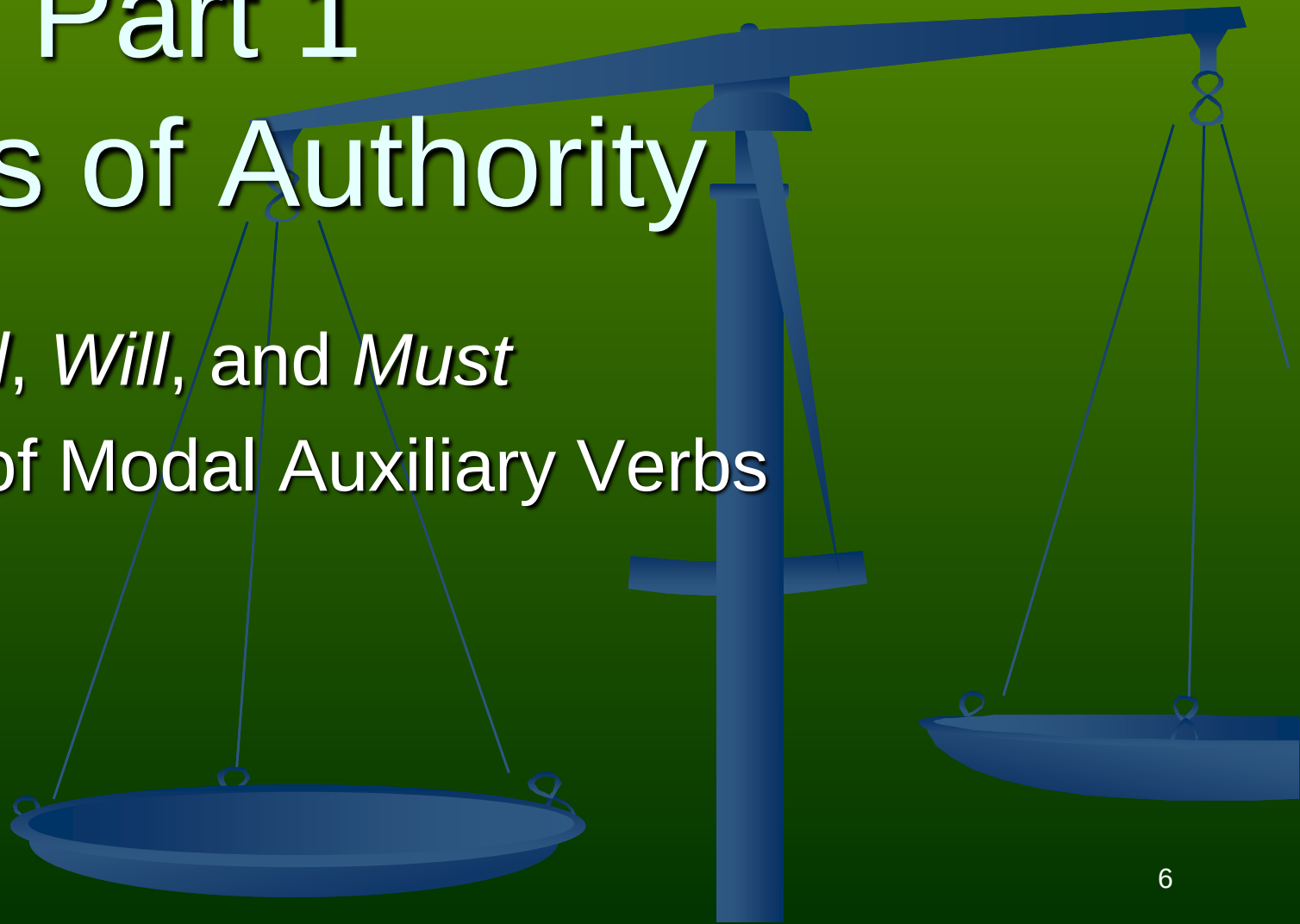
- The misuse of the word *shall* and other words of authority.
- The use of legalese.



Part 1
Words of Authority

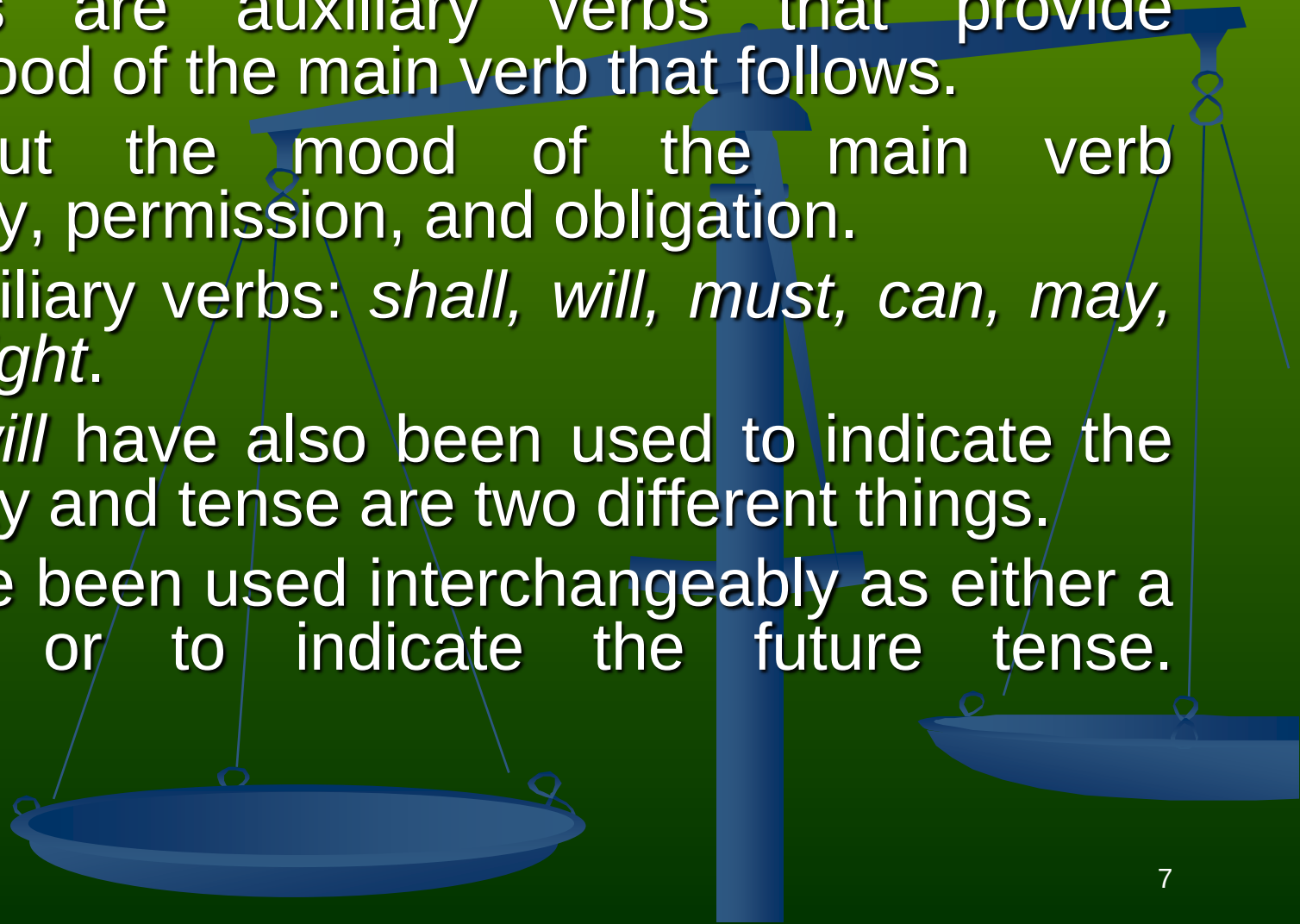
Shall, *Will*, and *Must*

A Subclass of Modal Auxiliary Verbs



Modal Auxiliary Verbs

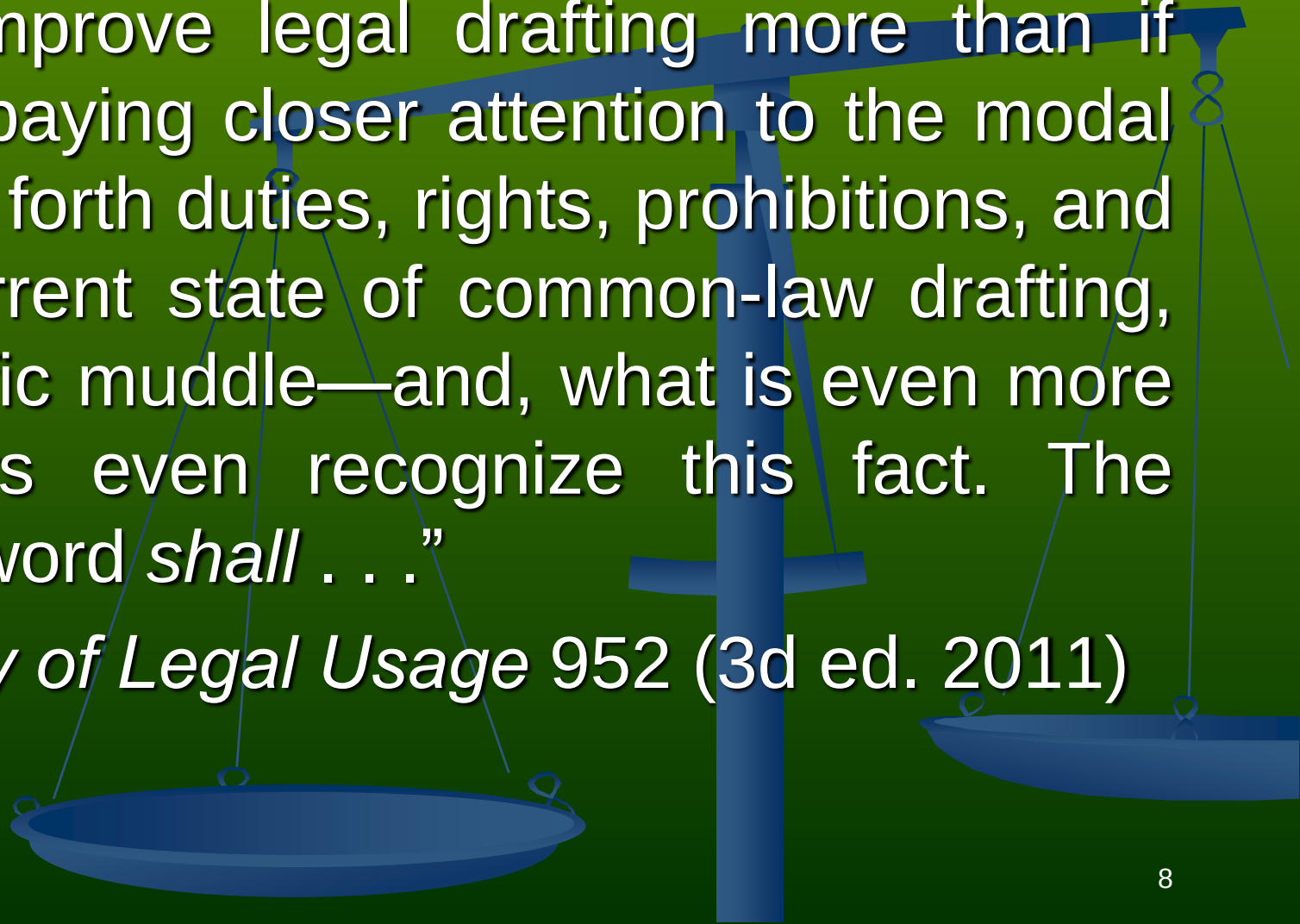
- Modal auxiliary verbs are auxiliary verbs that provide information about the mood of the main verb that follows.
- This information about the mood of the main verb involves likelihood, ability, permission, and obligation.
- Examples of modal auxiliary verbs: *shall, will, must, can, may, should, would, could, might*.
- Historically, *shall* and *will* have also been used to indicate the future tense, but modality and tense are two different things.
- Thus, *shall* and *will* have been used interchangeably as either a modal auxiliary verb or to indicate the future tense.



Bryan Garner on Words of Authority

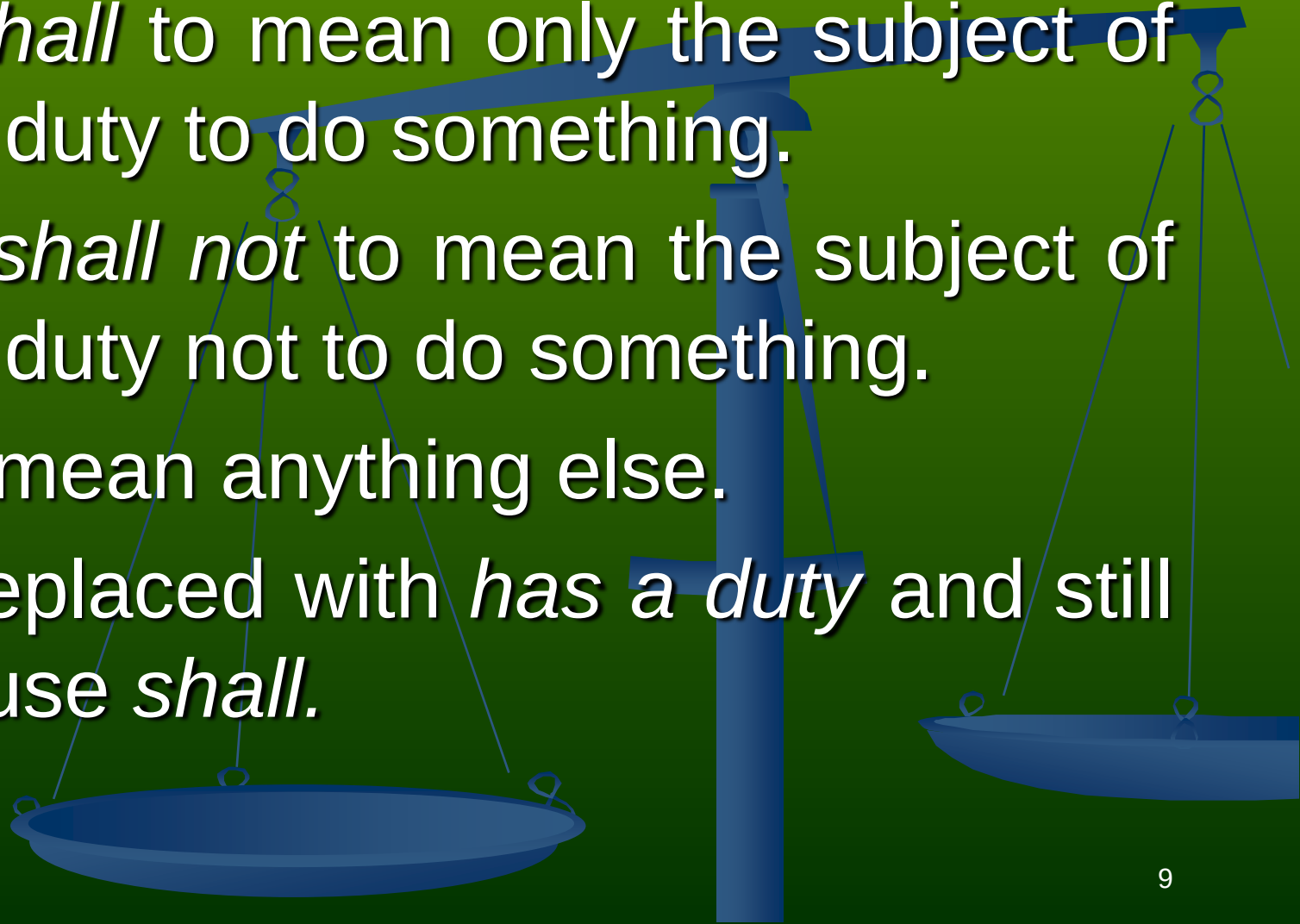
"Few reforms would improve legal drafting more than if drafters were to begin paying closer attention to the modal verbs by which they set forth duties, rights, prohibitions, and entitlements. In the current state of common-law drafting, these verbs are a horrific muddle—and, what is even more surprising, few drafters even recognize this fact. The primary problem is the word *shall* . . ."

Garner's Dictionary of Legal Usage 952 (3d ed. 2011)



The Best Solution for *Shall*

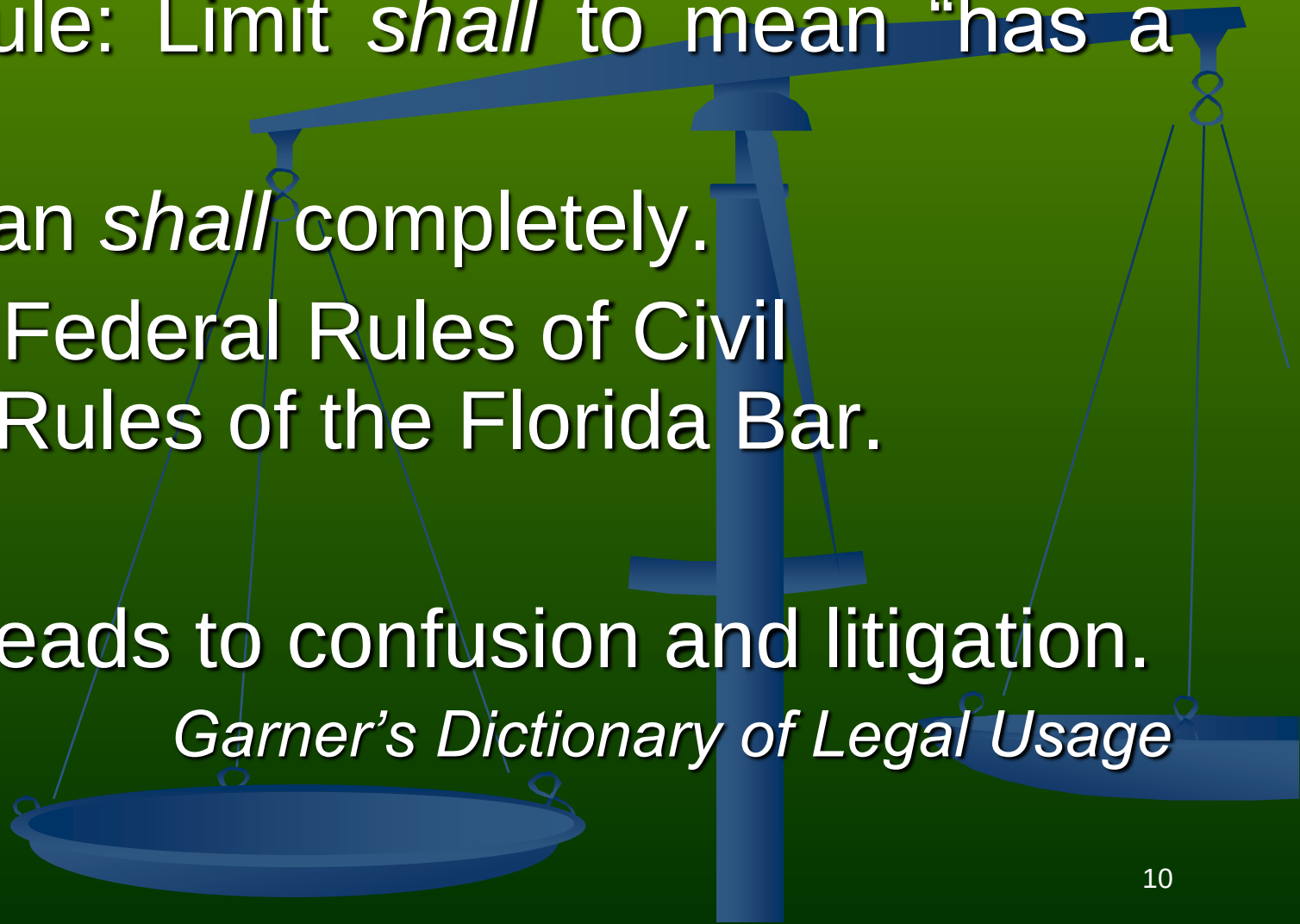
- Restrict the word *shall* to mean only the subject of the sentence has a duty to do something.
- Restrict the words *shall not* to mean the subject of the sentence has a duty not to do something.
- Do not use *shall* to mean anything else.
- If *shall* cannot be replaced with *has a duty* and still make sense, don't use *shall.*



Approaches to the Use of *Shall*

- The American Rule: Limit *shall* to mean "has a duty to."
- The ABC Rule: Ban *shall* completely.
  - Examples: The Federal Rules of Civil Procedure, the Rules of the Florida Bar.
- Let *shall* run wild.
  - This approach leads to confusion and litigation.

Garner's Dictionary of Legal Usage

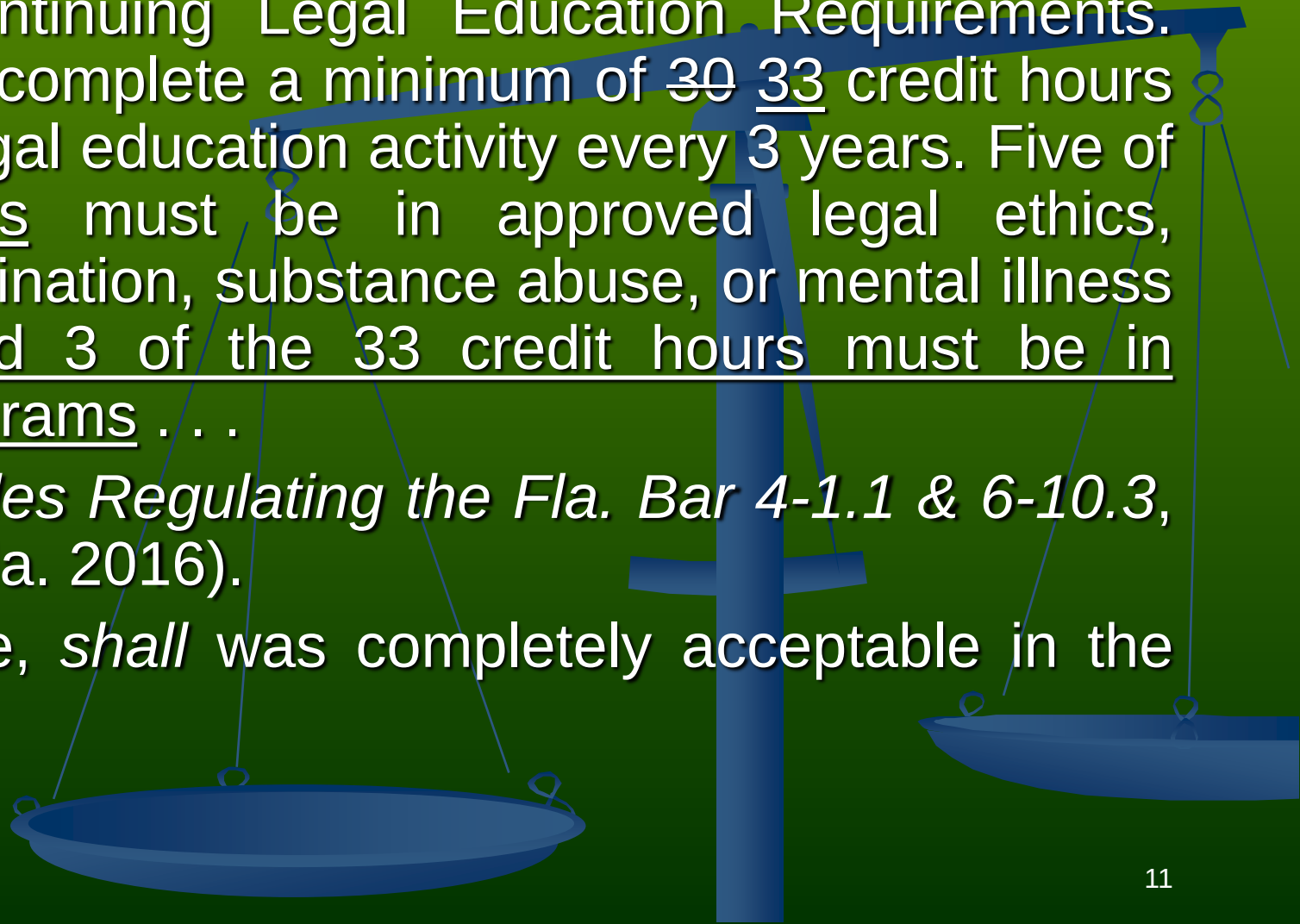


A Recent Example of the ABC Rule

(b) Minimum Hourly Continuing Legal Education Requirements. Each member ~~shall~~ must complete a minimum of ~~30~~ 33 credit hours of approved continuing legal education activity every 3 years. Five of the ~~30~~ 33 credit hours must be in approved legal ethics, professionalism, bias elimination, substance abuse, or mental illness awareness programs and 3 of the 33 credit hours must be in approved technology programs . . .

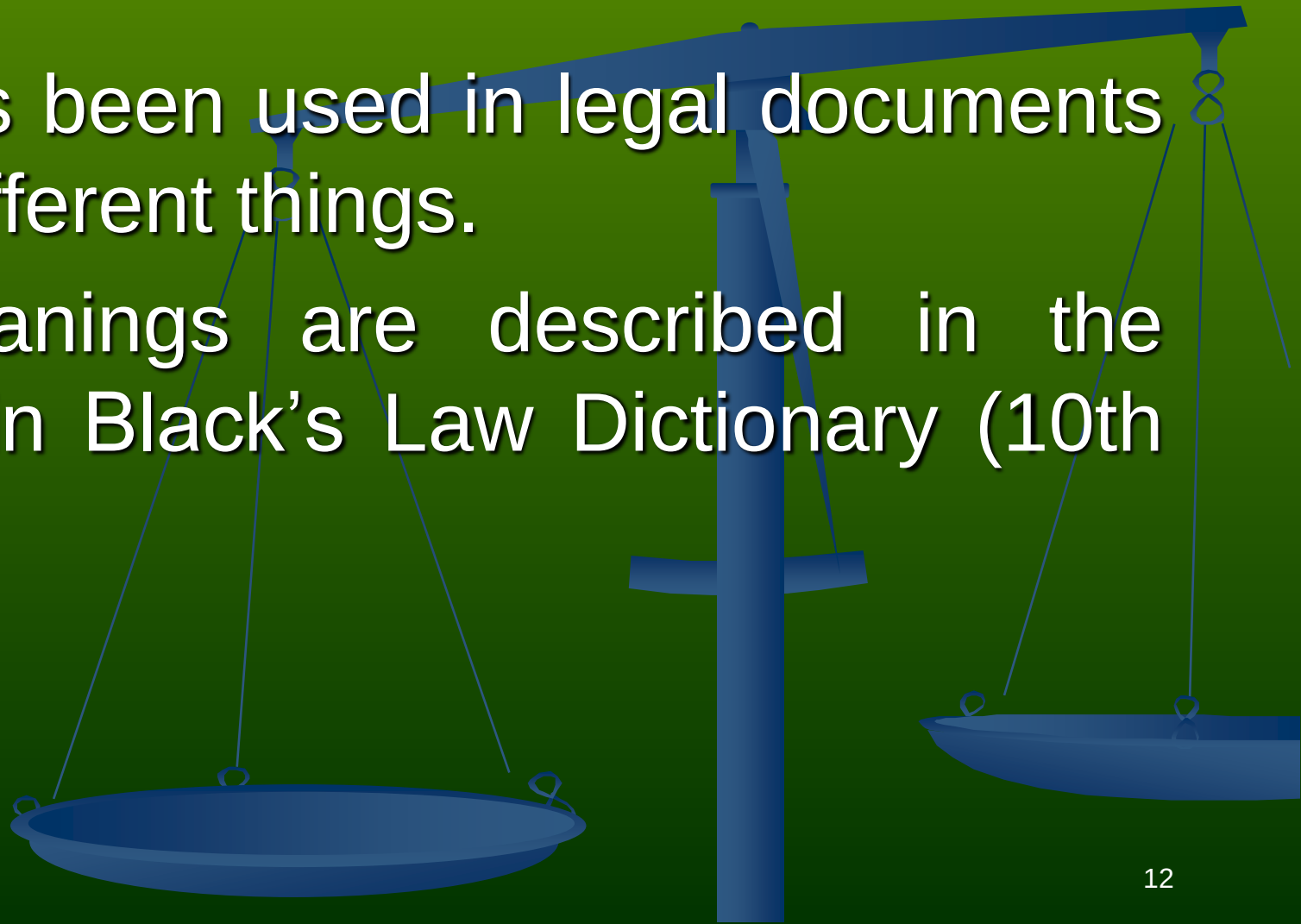
In re: Amendments to Rules Regulating the Fla. Bar 4-1.1 & 6-10.3, 200 So. 3d 1225, 1228 (Fla. 2016).

Under the American Rule, *shall* was completely acceptable in the second sentence.



Shall as Defined in Black's Law Dictionary
(10th ed. 2014)

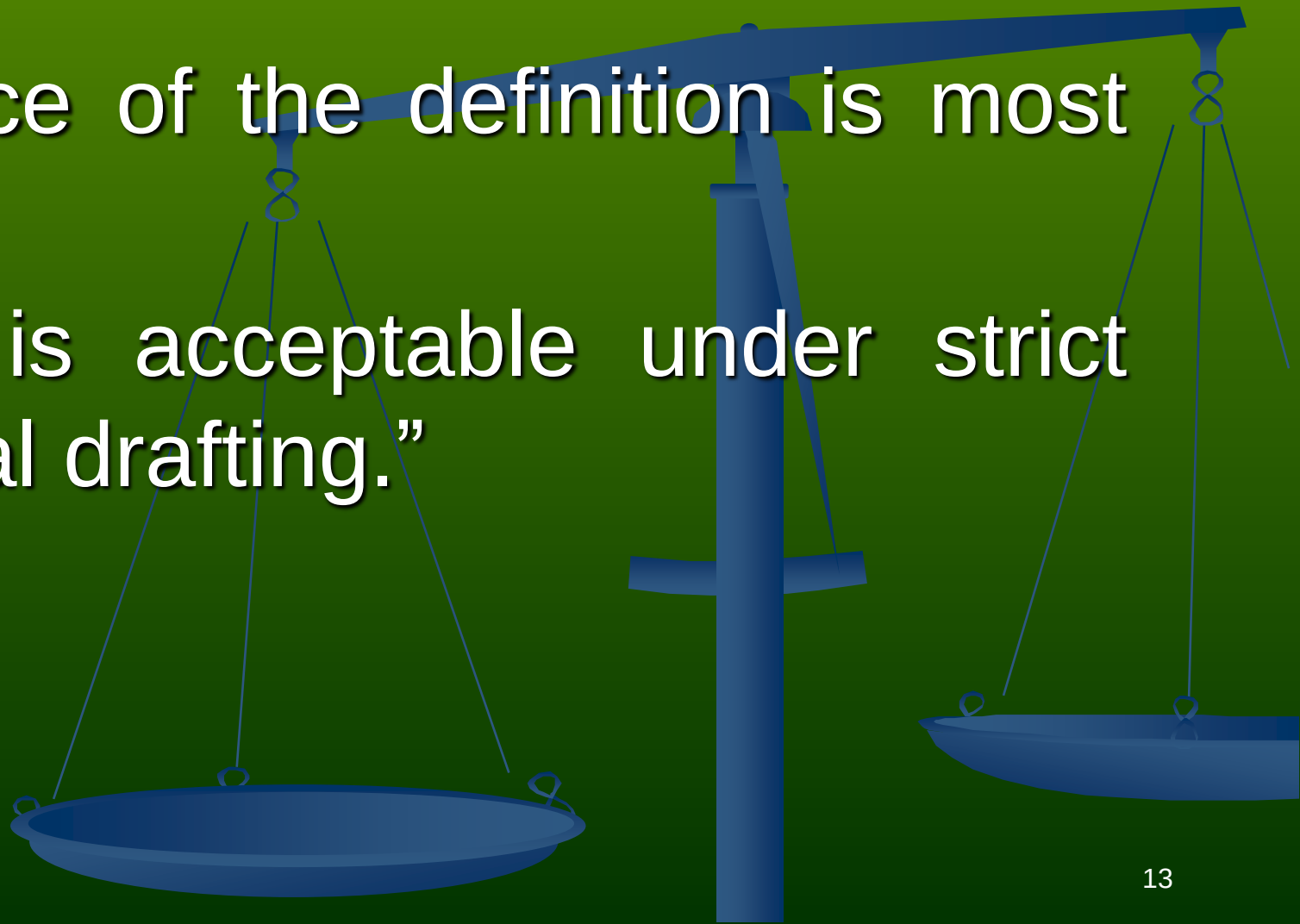
- The word *shall* has been used in legal documents to mean several different things.
- All of these meanings are described in the definition of *shall* in Black's Law Dictionary (10th ed. 2014), but --



Shall as Defined in Black's Law Dictionary
(10th ed. 2014)

- The last sentence of the definition is most critical:

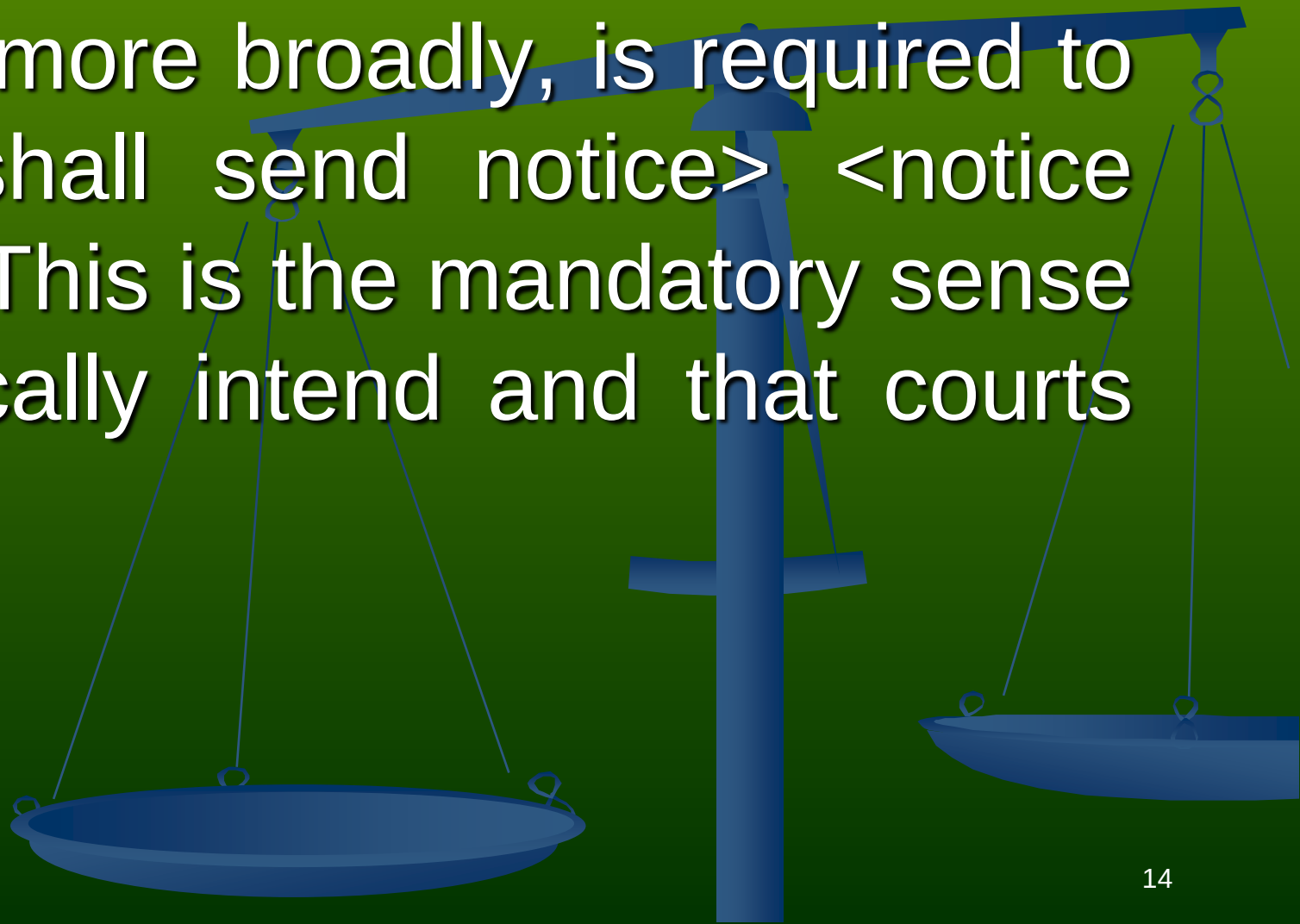
  "Only sense 1 is acceptable under strict standards of legal drafting."



Shall as Defined in Black's Law Dictionary

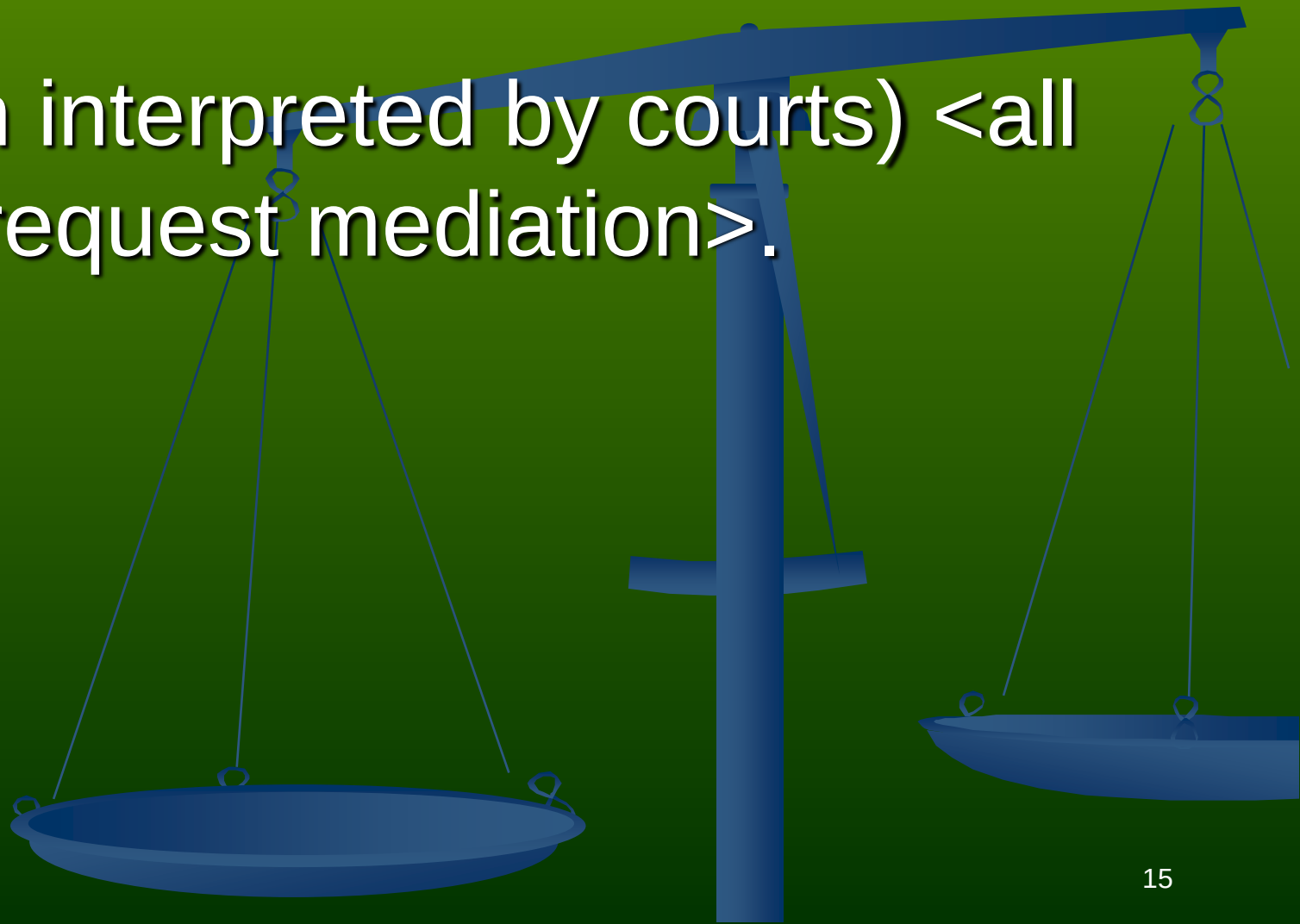
(10th ed. 2014)

1. Has a duty to; more broadly, is required to <the requester shall send notice> <notice shall be sent>. ● This is the mandatory sense that drafters typically intend and that courts typically uphold.



Shall as Defined in Black's Law Dictionary
(10th ed. 2014)

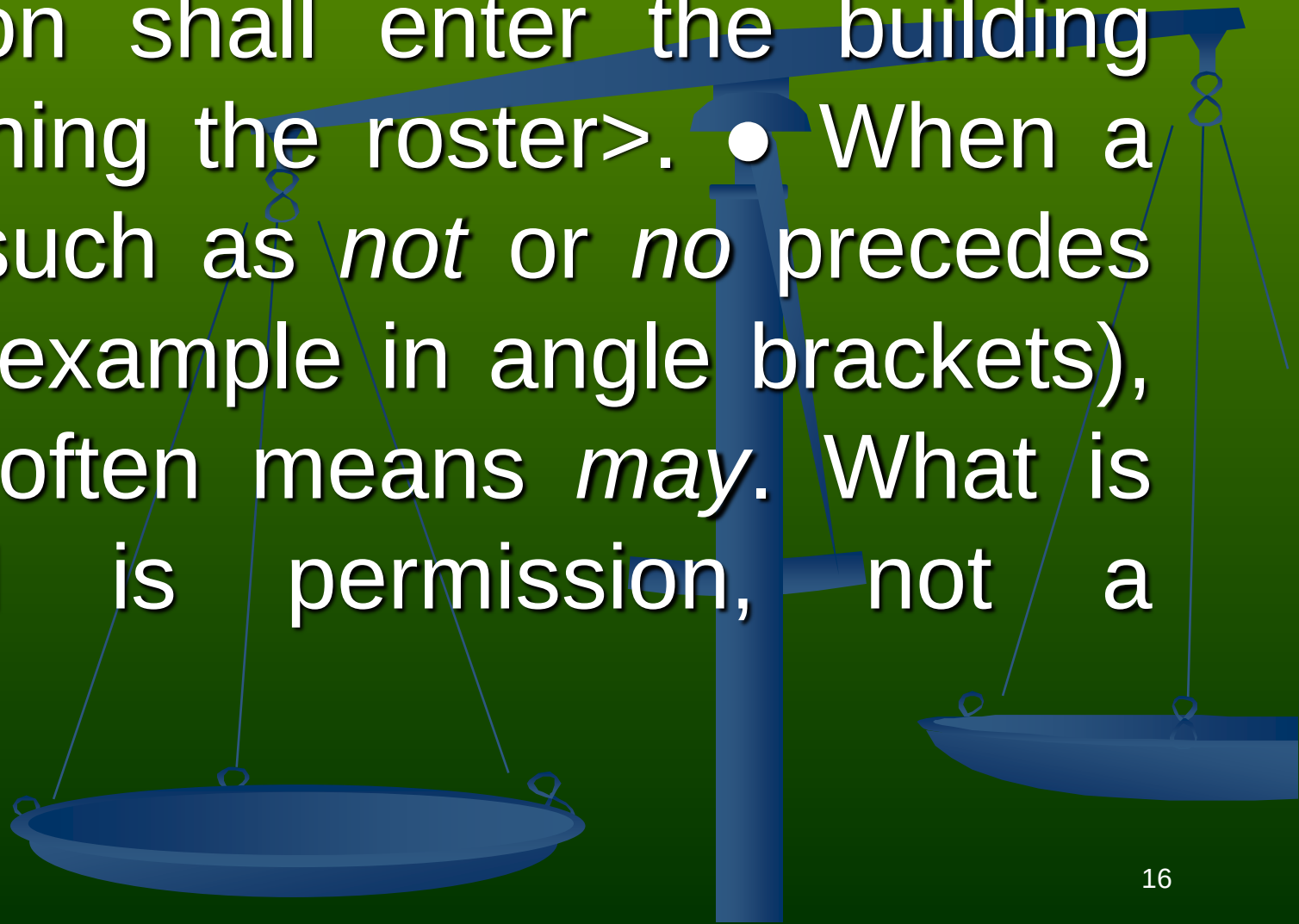
2. Should (as often interpreted by courts) <all claimants shall request mediation>.



Shall as Defined in Black's Law Dictionary

(10th ed. 2014)

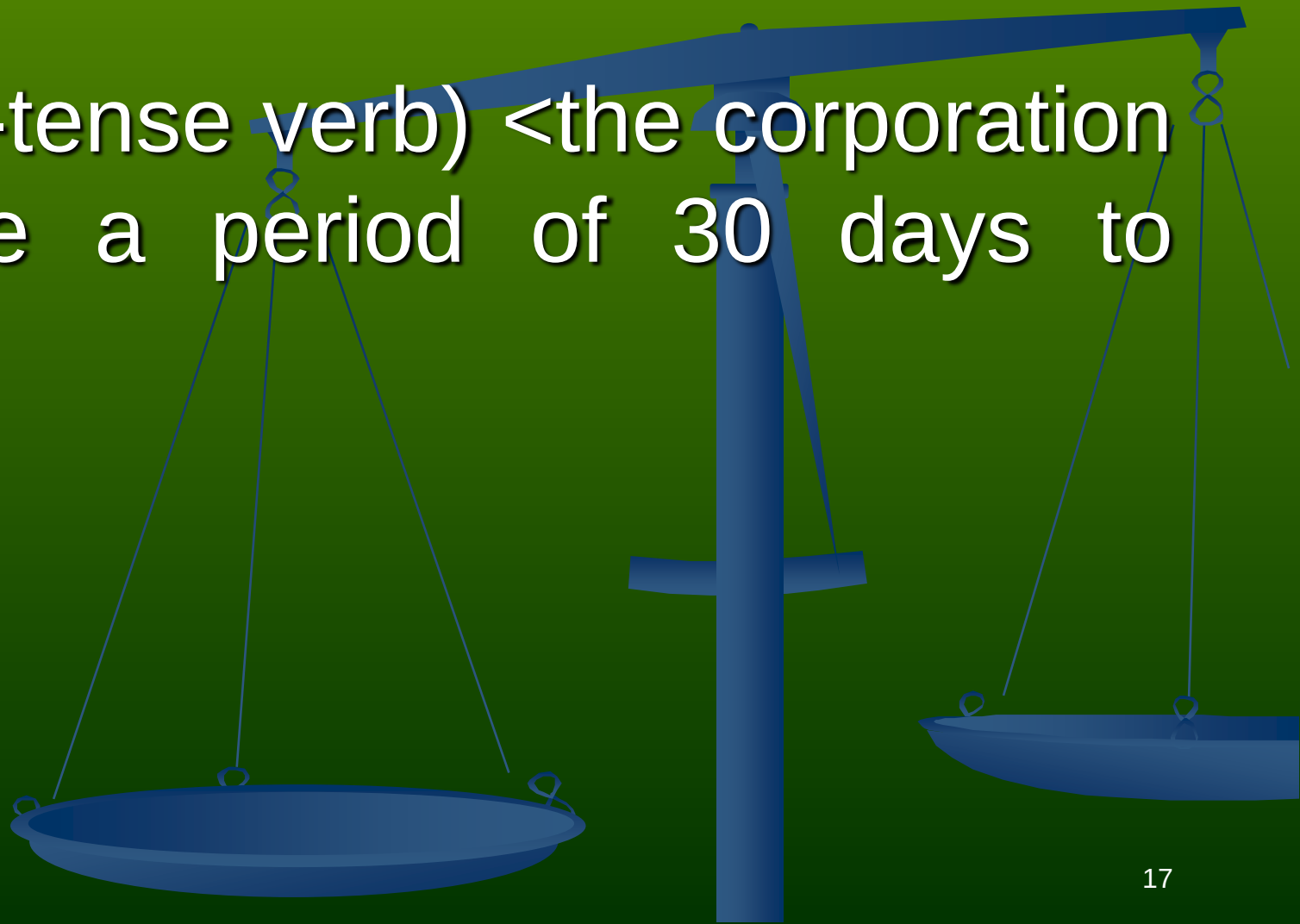
3. May <no person shall enter the building without first signing the roster>. • When a negative word such as *not* or *no* precedes *shall* (as in the example in angle brackets), the word *shall* often means *may*. What is being negated is permission, not a requirement.



Shall as Defined in Black's Law Dictionary

(10th ed. 2014)

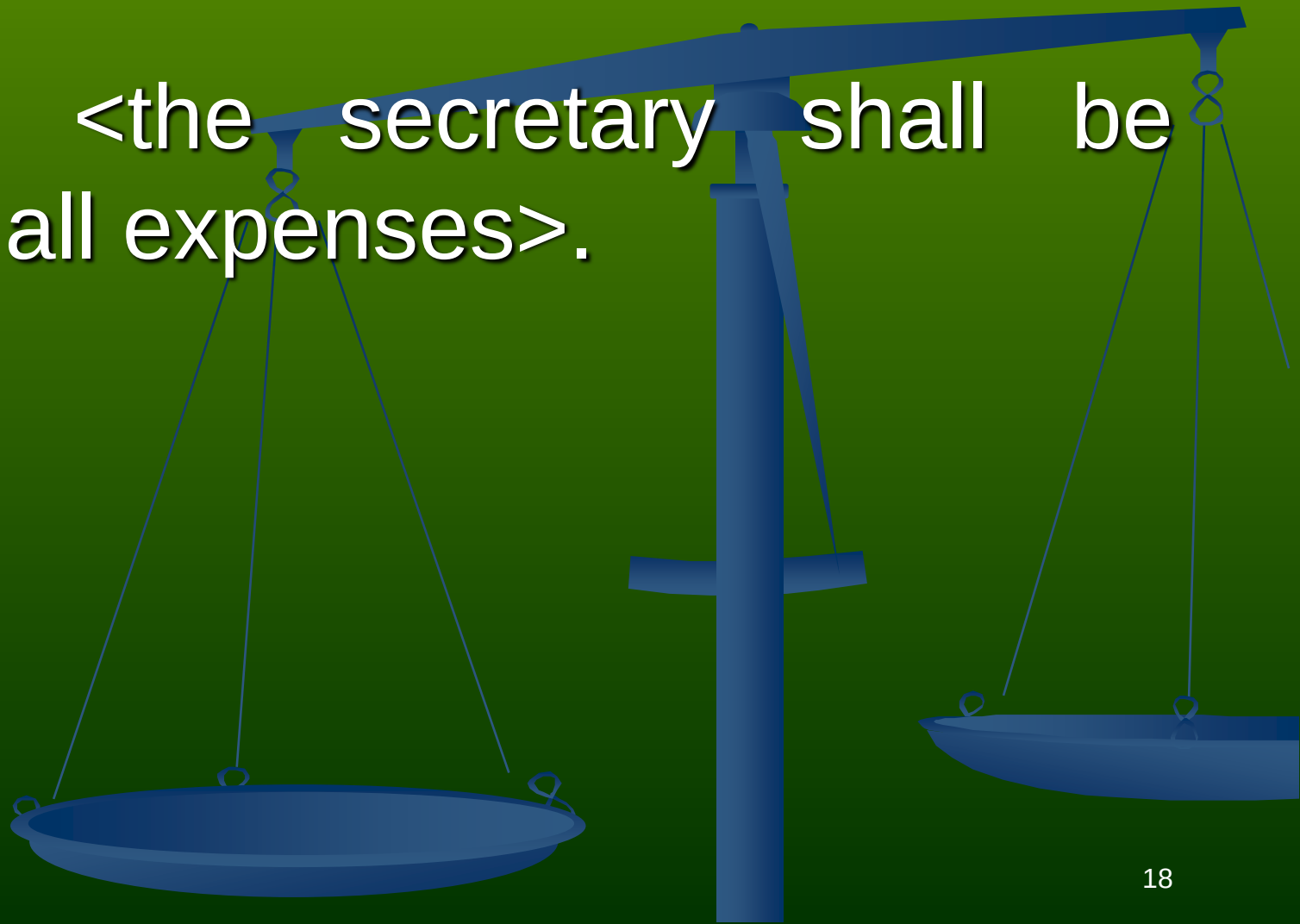
4. Will (as a future-tense verb) <the corporation shall then have a period of 30 days to object>.



Shall as Defined in Black's Law Dictionary

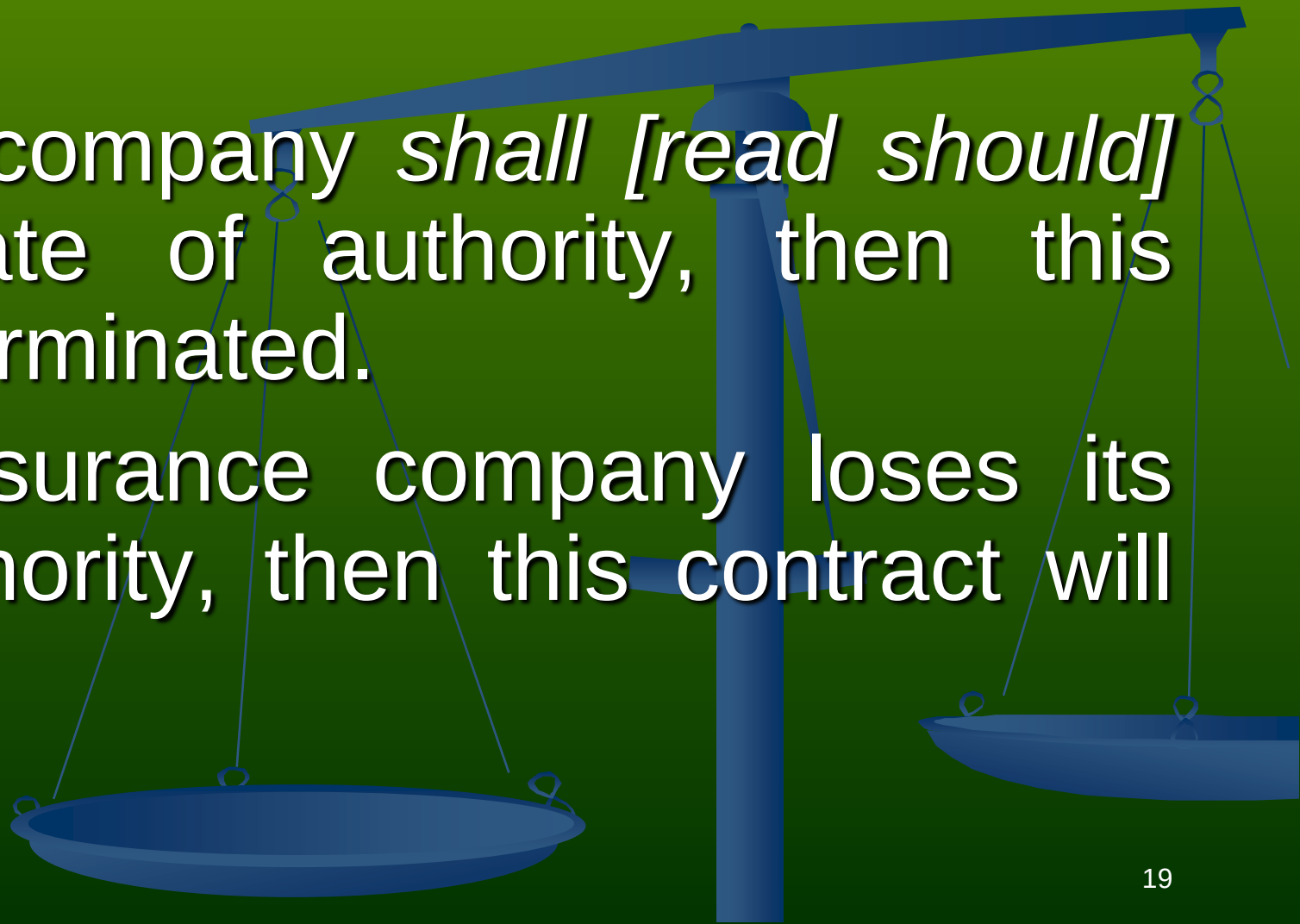
(10th ed. 2014)

5. Is entitled to <the secretary shall be reimbursed for all expenses>.



One Other Misuse of *Shall*

- As a conditional.
- If the insurance company *shall [read should]* lose its certificate of authority, then this contract will be terminated.
- Better: If the insurance company loses its certificate of authority, then this contract will be terminated.



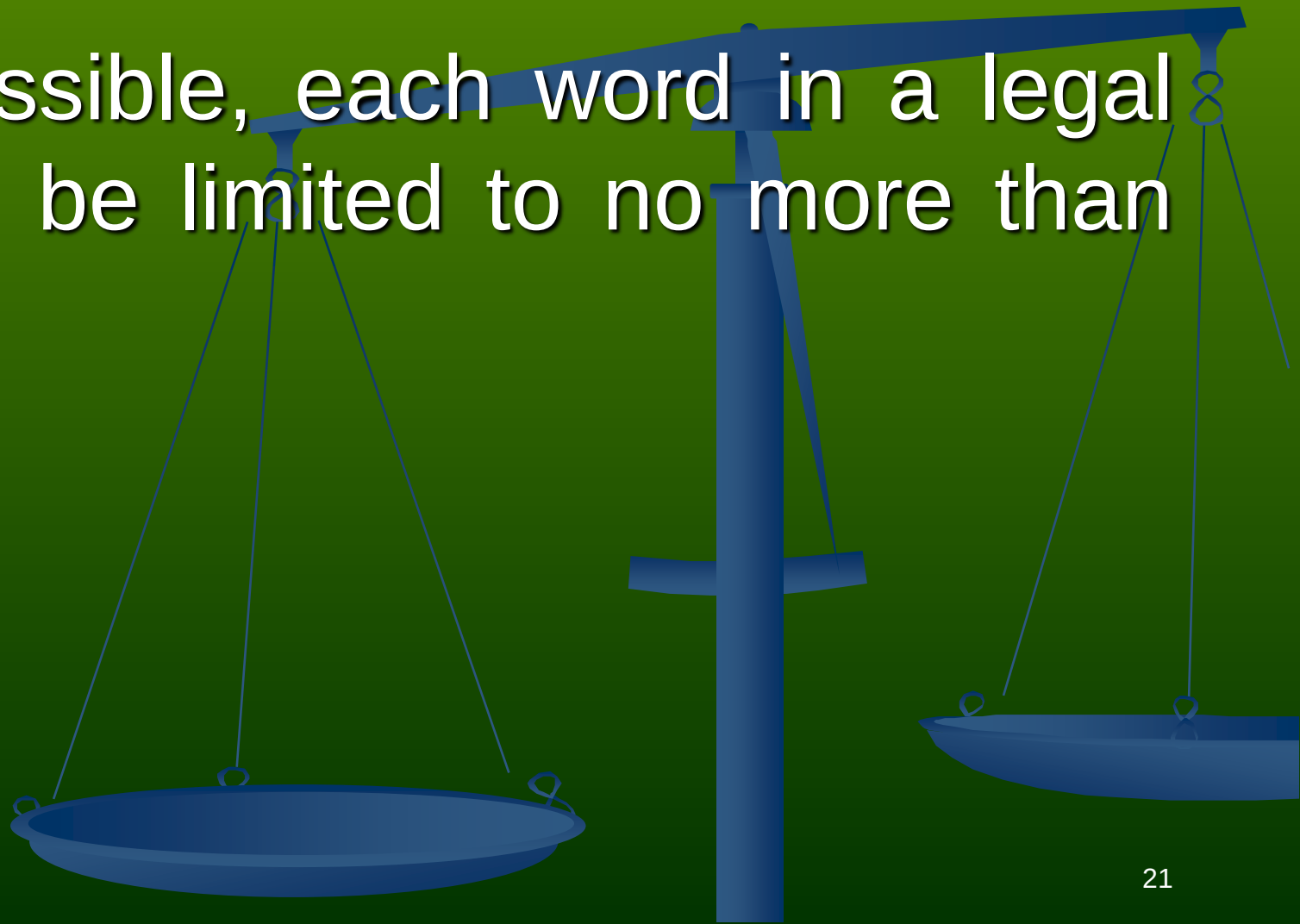
Summary of Possible Meanings for *Shall*

- Duty or obligation
- Recommendation (should)
- Permission (may)
- Future tense auxiliary verb (will)
- Entitlement
- Conditional



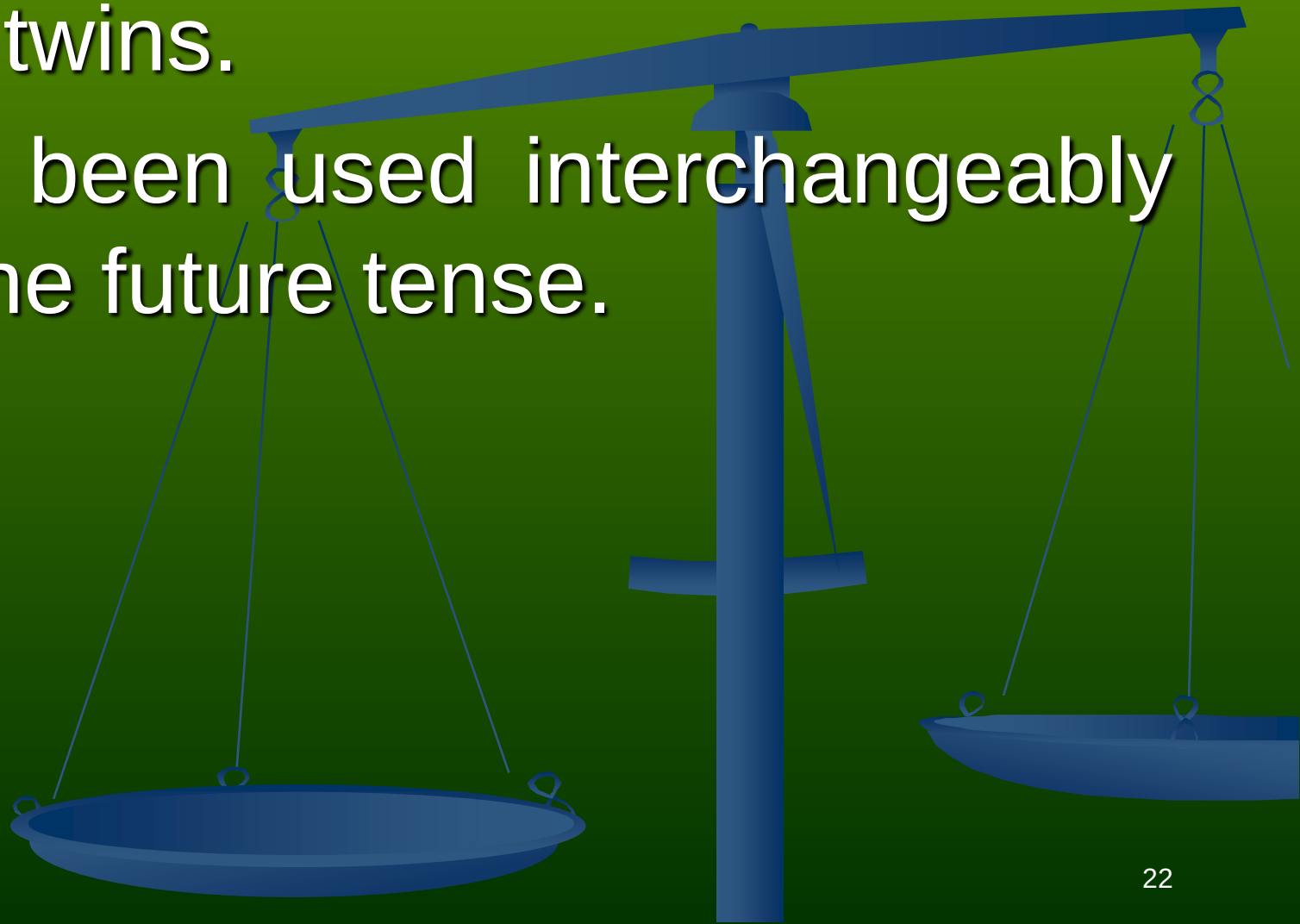
A Drafting Best Practice

- To the extent possible, each word in a legal document should be limited to no more than one meaning.



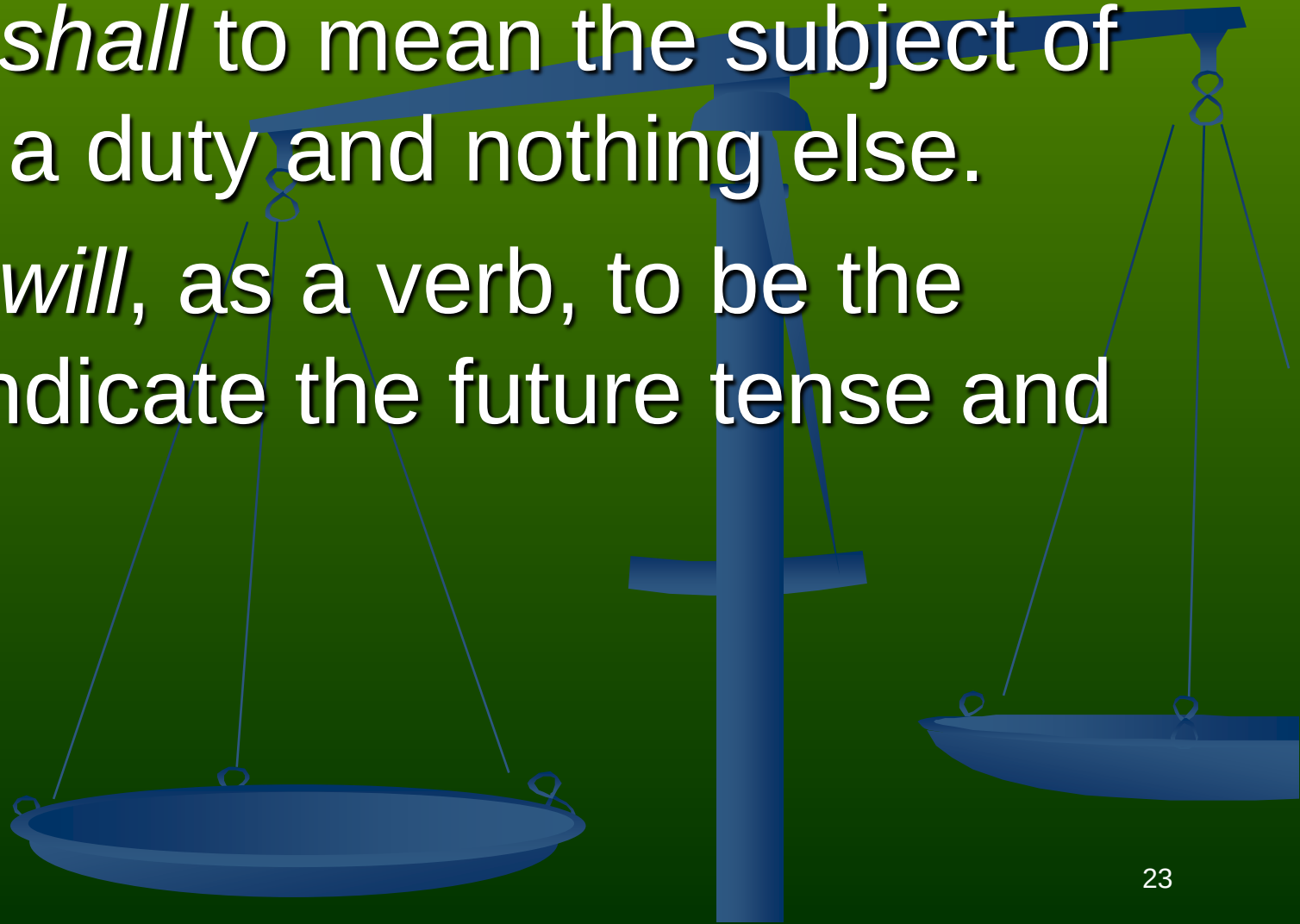
Shall and *Will*

- *Shall* and *will* are twins.
- They have often been used interchangeably to mean duty or the future tense.



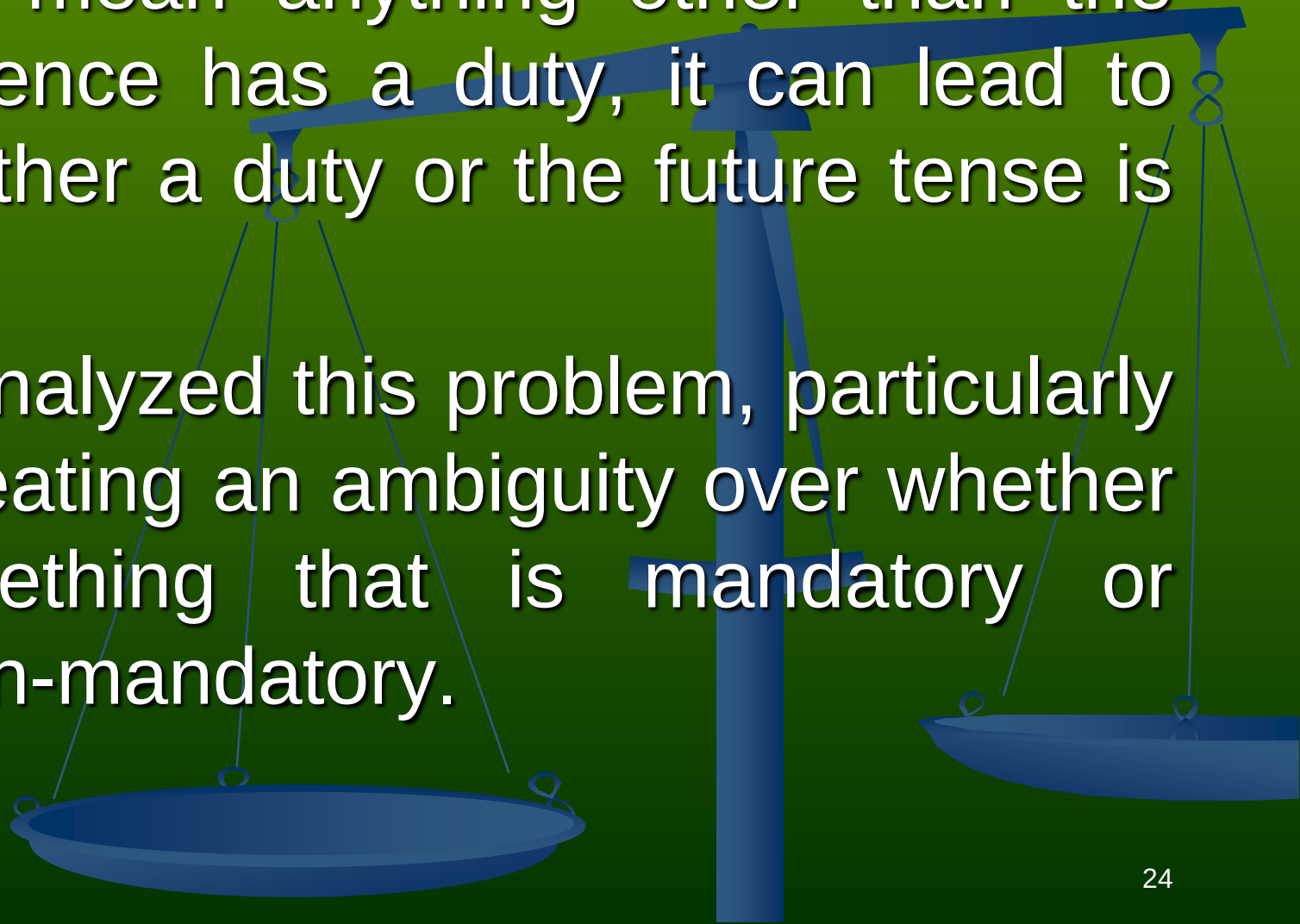
A Specific Drafting Best Practice

- Restrict the word *shall* to mean the subject of the sentence has a duty and nothing else.
- Restrict the word *will*, as a verb, to be the auxiliary verb to indicate the future tense and nothing else.



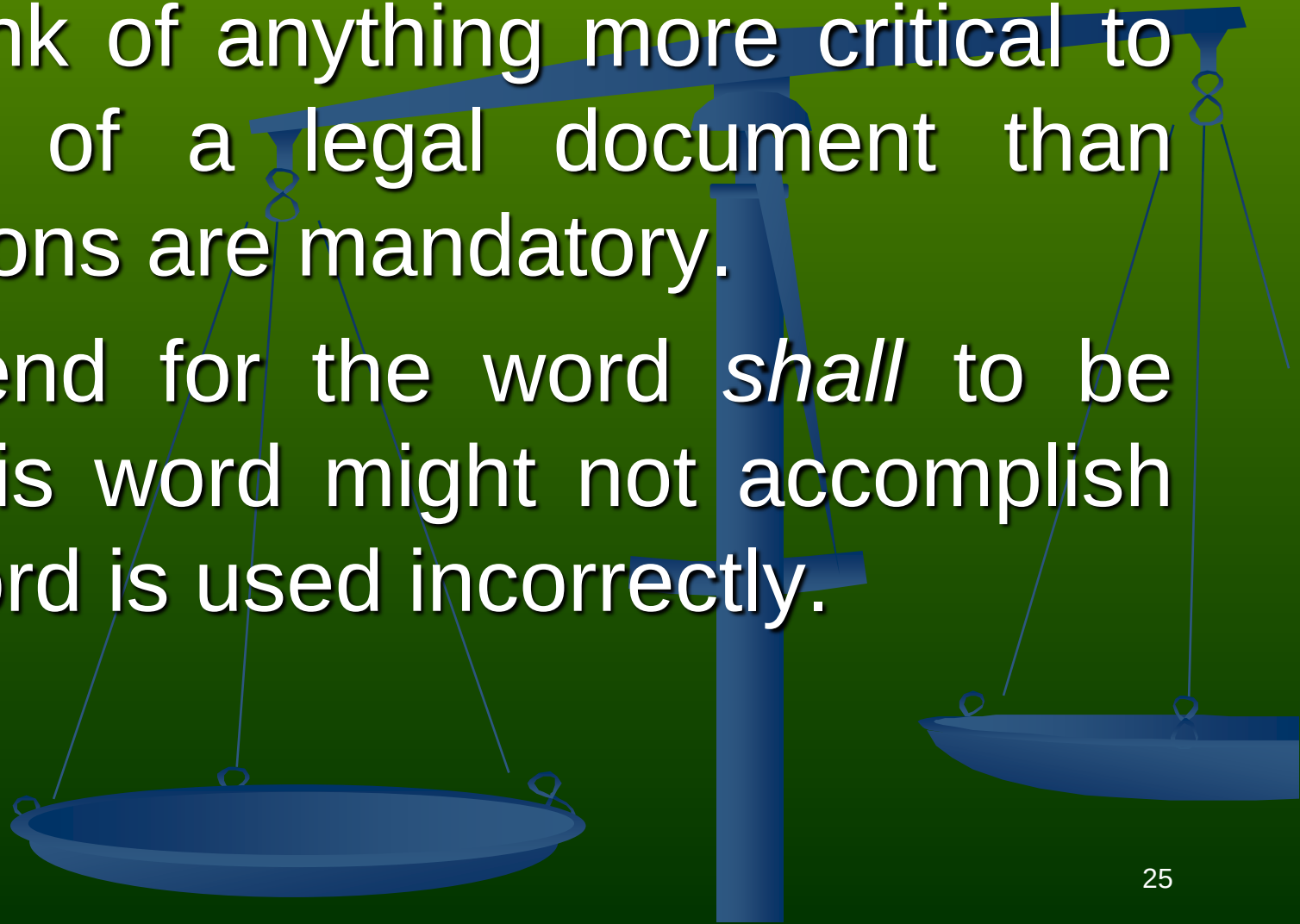
Shall and *Will*

- If *shall* is used to mean anything other than the subject of the sentence has a duty, it can lead to confusion over whether a duty or the future tense is intended.
- Court cases have analyzed this problem, particularly with statutes, as creating an ambiguity over whether *shall* means something that is mandatory or directory, that is, non-mandatory.



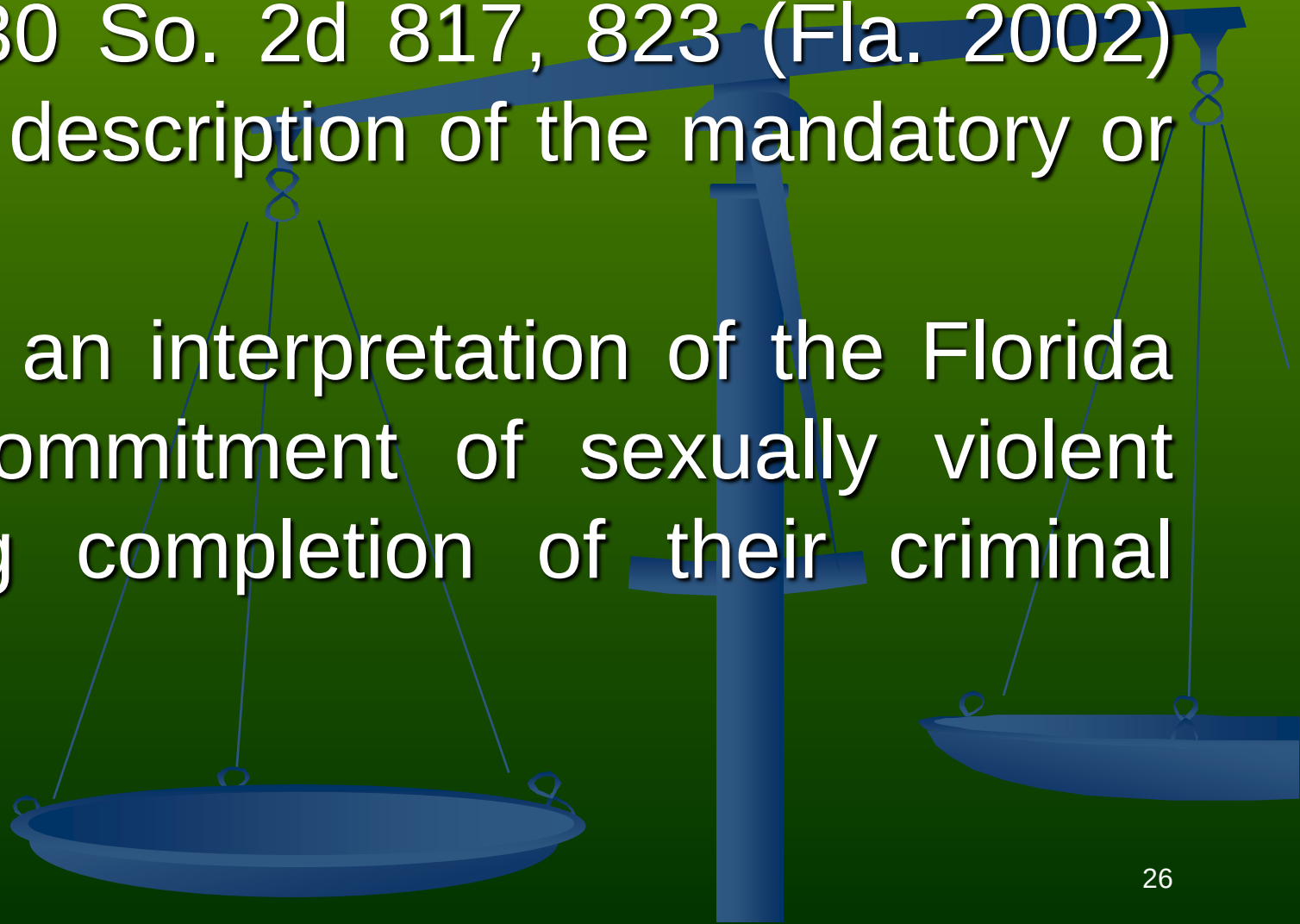
Mandatory or Directory

- It is difficult to think of anything more critical to the interpretation of a legal document than whether its provisions are mandatory.
- A writer may intend for the word *shall* to be mandatory, but this word might not accomplish this result if the word is used incorrectly.



Mandatory or Directory

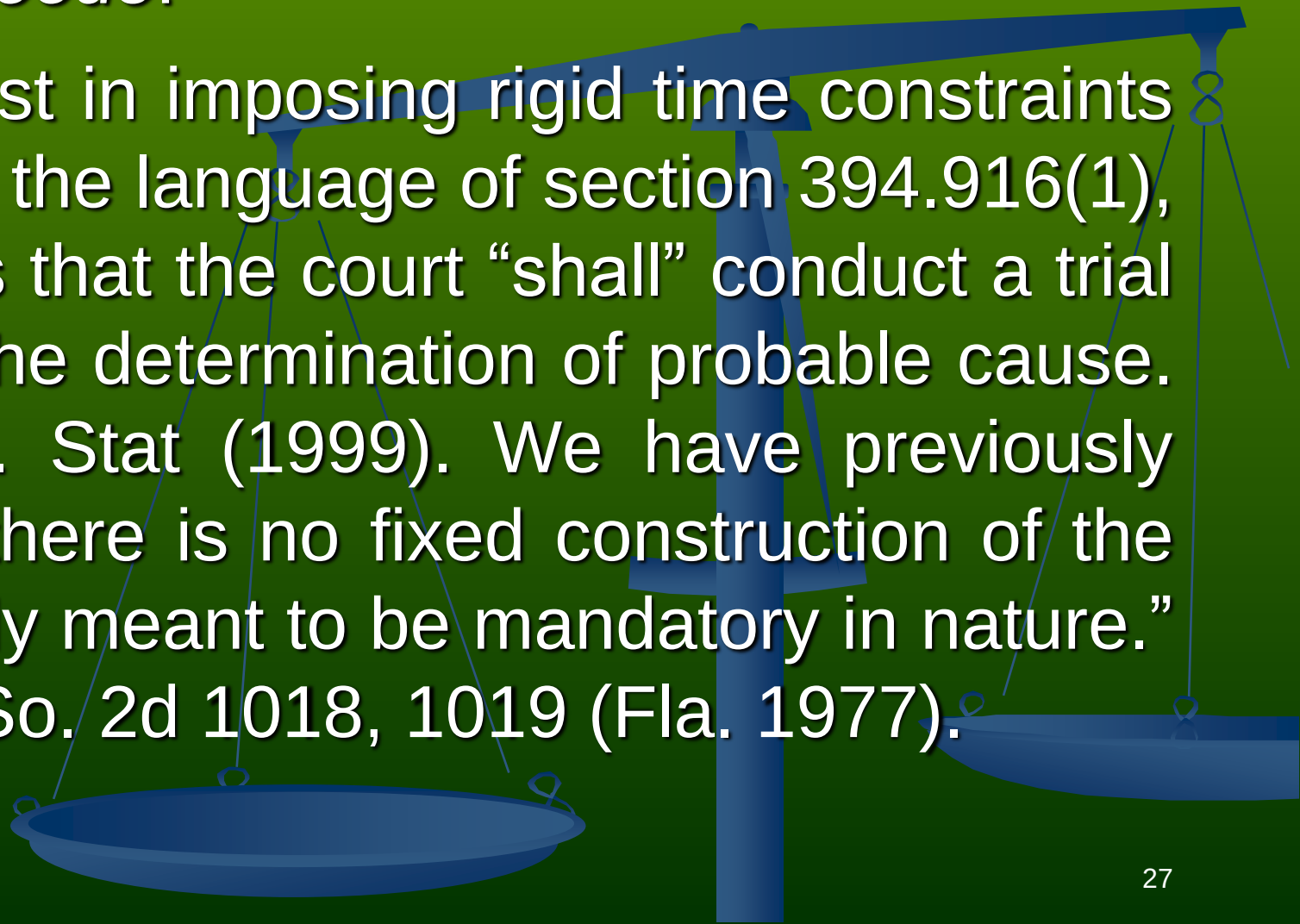
- *State v. Goode*, 830 So. 2d 817, 823 (Fla. 2002) provides a concise description of the mandatory or directory problem.
- This case involved an interpretation of the Florida Statute for civil commitment of sexually violent predators following completion of their criminal sentences.



Mandatory or Directory

Quoting from *State v. Goode*:

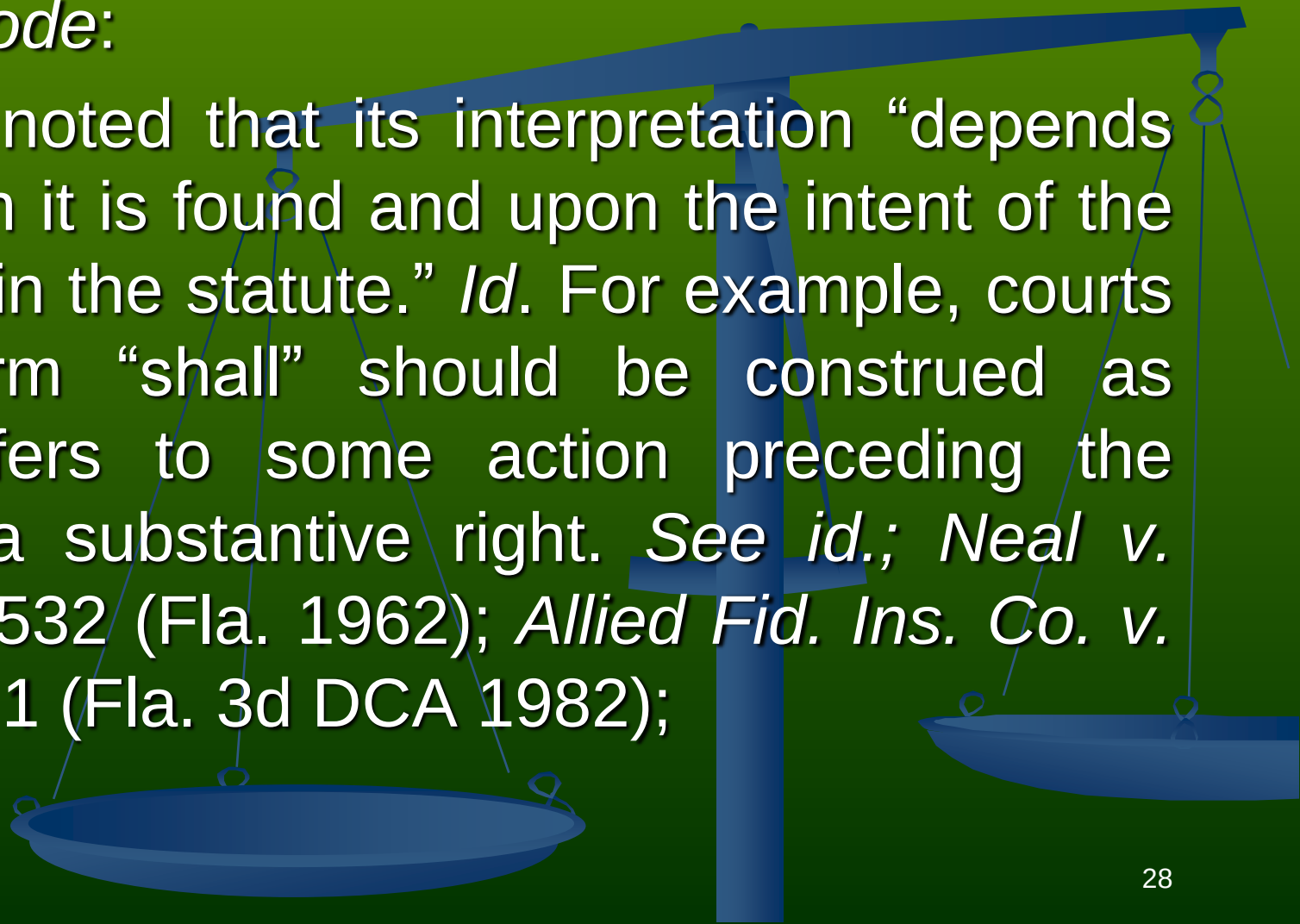
The Legislature's interest in imposing rigid time constraints is expressly reflected in the language of section 394.916(1), which specifically states that the court "shall" conduct a trial within thirty days after the determination of probable cause. *See* § 394.916(1), Fla. Stat (1999). We have previously stated that "[a]lthough there is no fixed construction of the word 'shall,' it is normally meant to be mandatory in nature." *See S.R. v. State*, 346 So. 2d 1018, 1019 (Fla. 1977).



Mandatory or Directory

Quoting from *State v. Goode*:

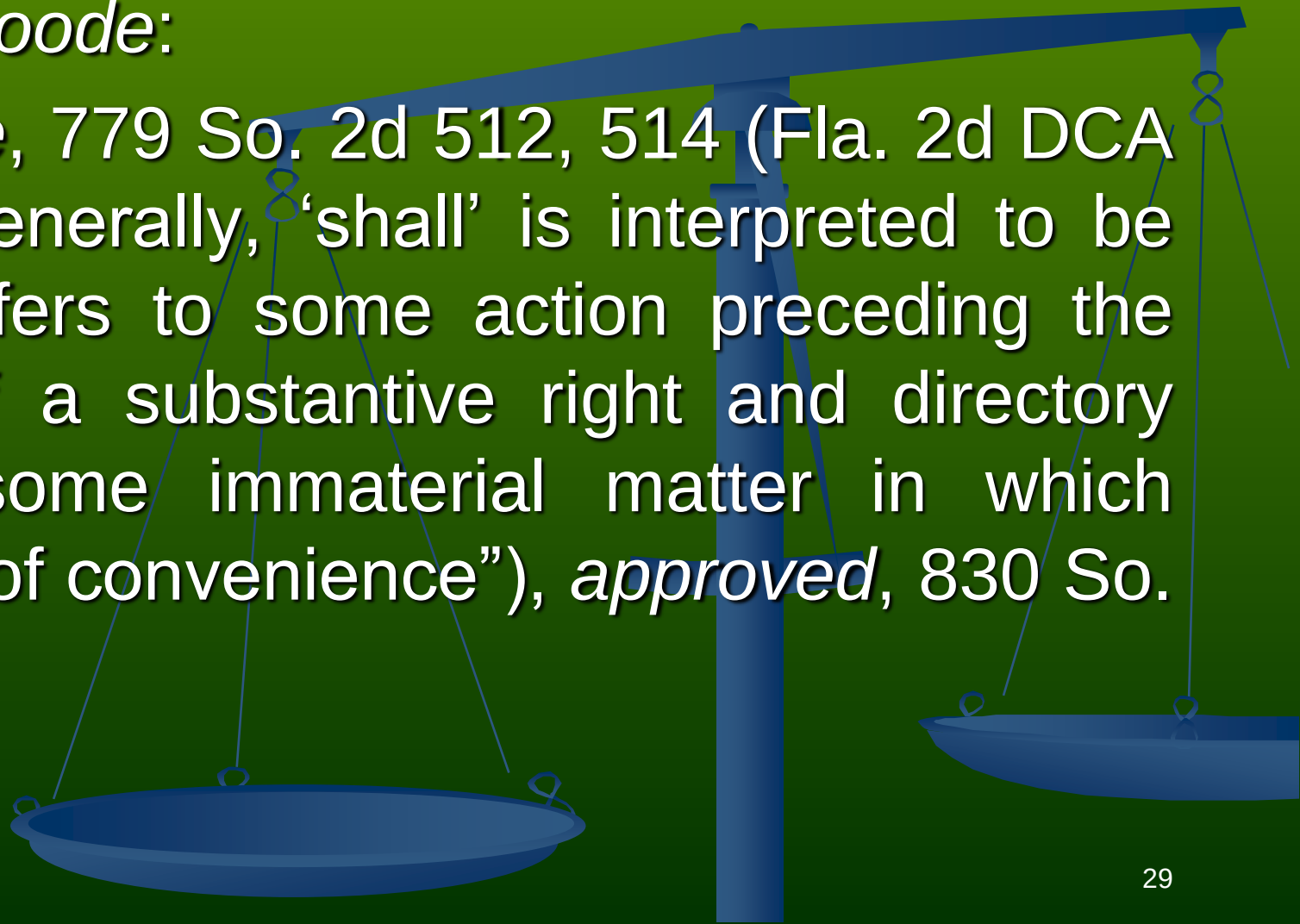
However, we have also noted that its interpretation "depends upon the context in which it is found and upon the intent of the legislature as expressed in the statute." *Id*. For example, courts have held that the term "shall" should be construed as mandatory where it refers to some action preceding the possible deprivation of a substantive right. *See id.; Neal v. Bryant*, 149 So. 2d 529, 532 (Fla. 1962); *Allied Fid. Ins. Co. v. State*, 415 So. 2d 109, 111 (Fla. 3d DCA 1982);



Mandatory or Directory

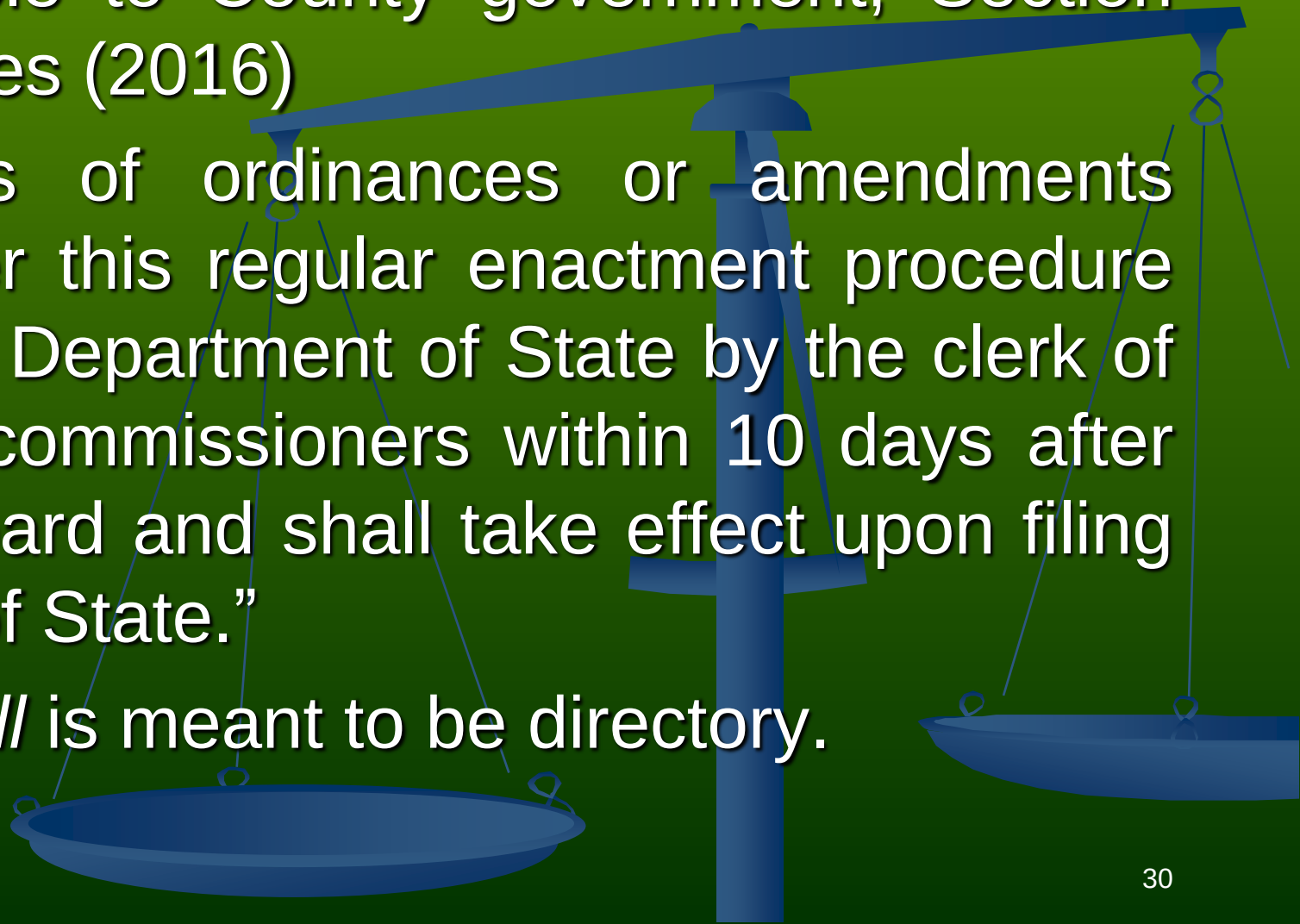
Quoting from *State v. Goode*:

see also Kinder v. State, 779 So. 2d 512, 514 (Fla. 2d DCA 2000) (stating that "[g]enerally, 'shall' is interpreted to be mandatory where it refers to some action preceding the possible deprivation of a substantive right and directory where it relates to some immaterial matter in which compliance is a matter of convenience"), *approved*, 830 So. 2d 832, (Fla.).



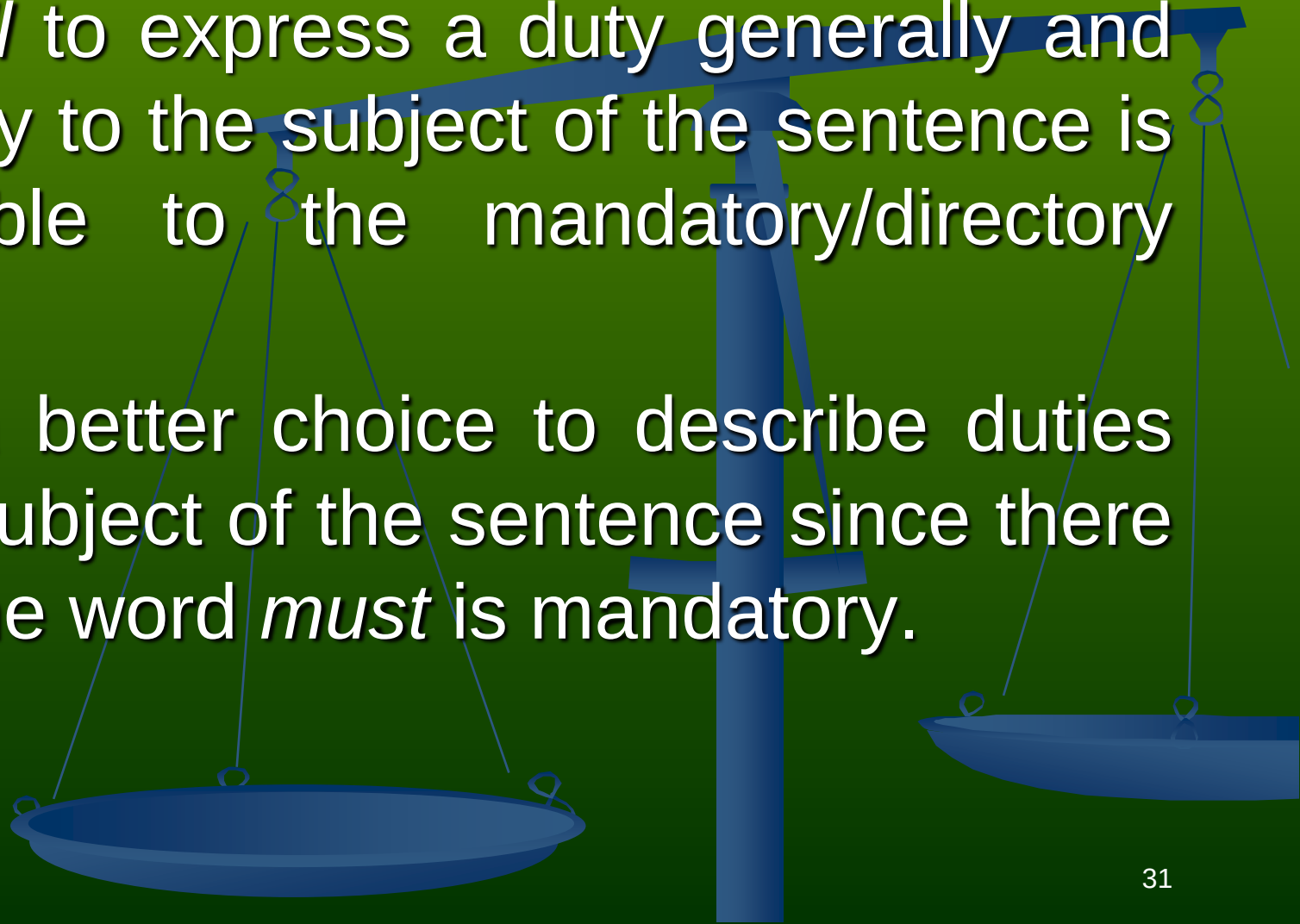
Mandatory or Directory

- An example applicable to County government, Section 125.66, Florida Statutes (2016)
- “(b) Certified copies of ordinances or amendments thereto enacted under this regular enactment procedure shall be filed with the Department of State by the clerk of the board of county commissioners within 10 days after enactment by said board and shall take effect upon filing with the Department of State.”
- Arguably, the first *shall* is meant to be directory.



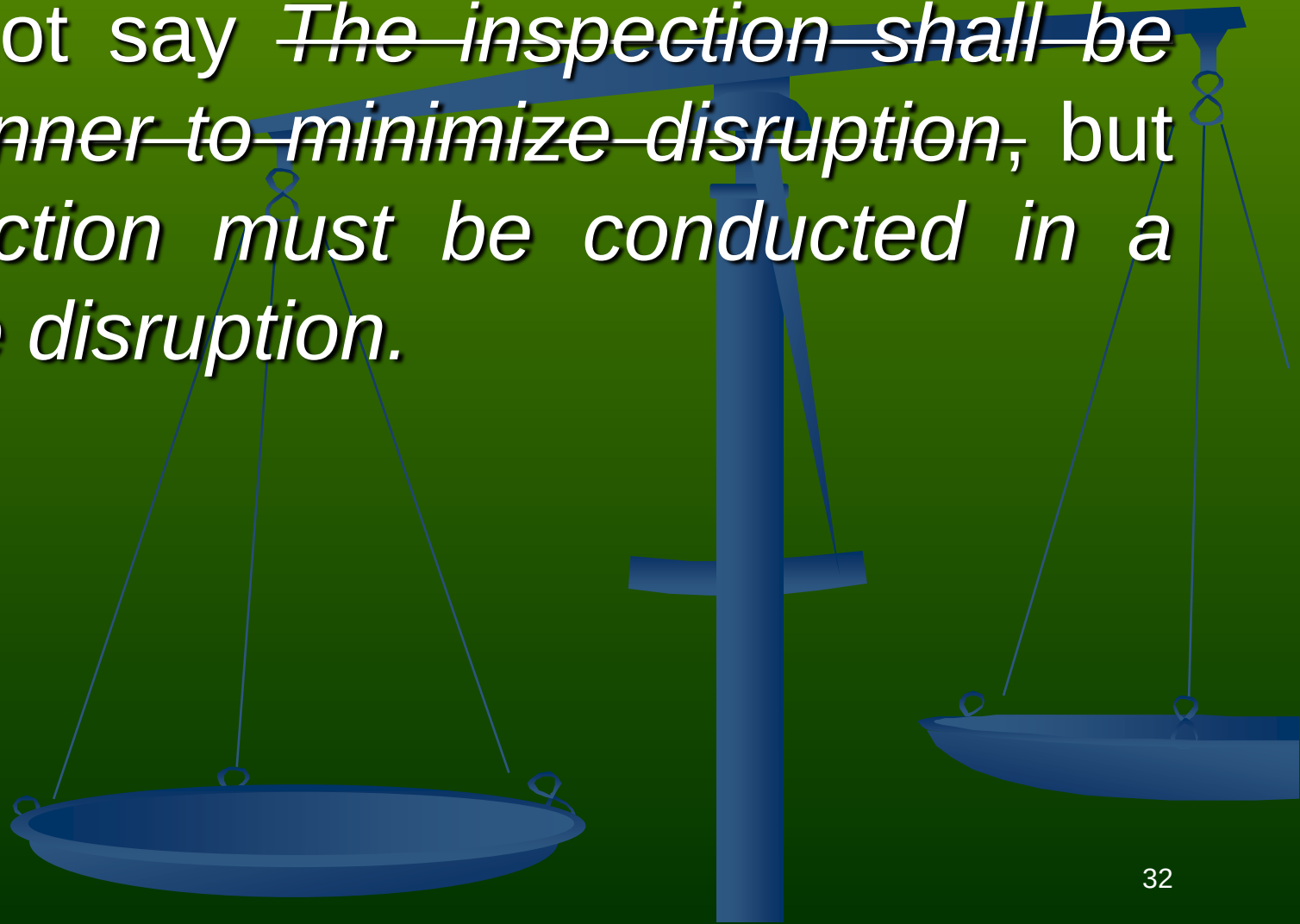
Shall and *Must*

- Using the word *shall* to express a duty generally and not ascribing the duty to the subject of the sentence is especially susceptible to the mandatory/directory problem.
- The word *must* is a better choice to describe duties not ascribed to the subject of the sentence since there is no question that the word *must* is mandatory.



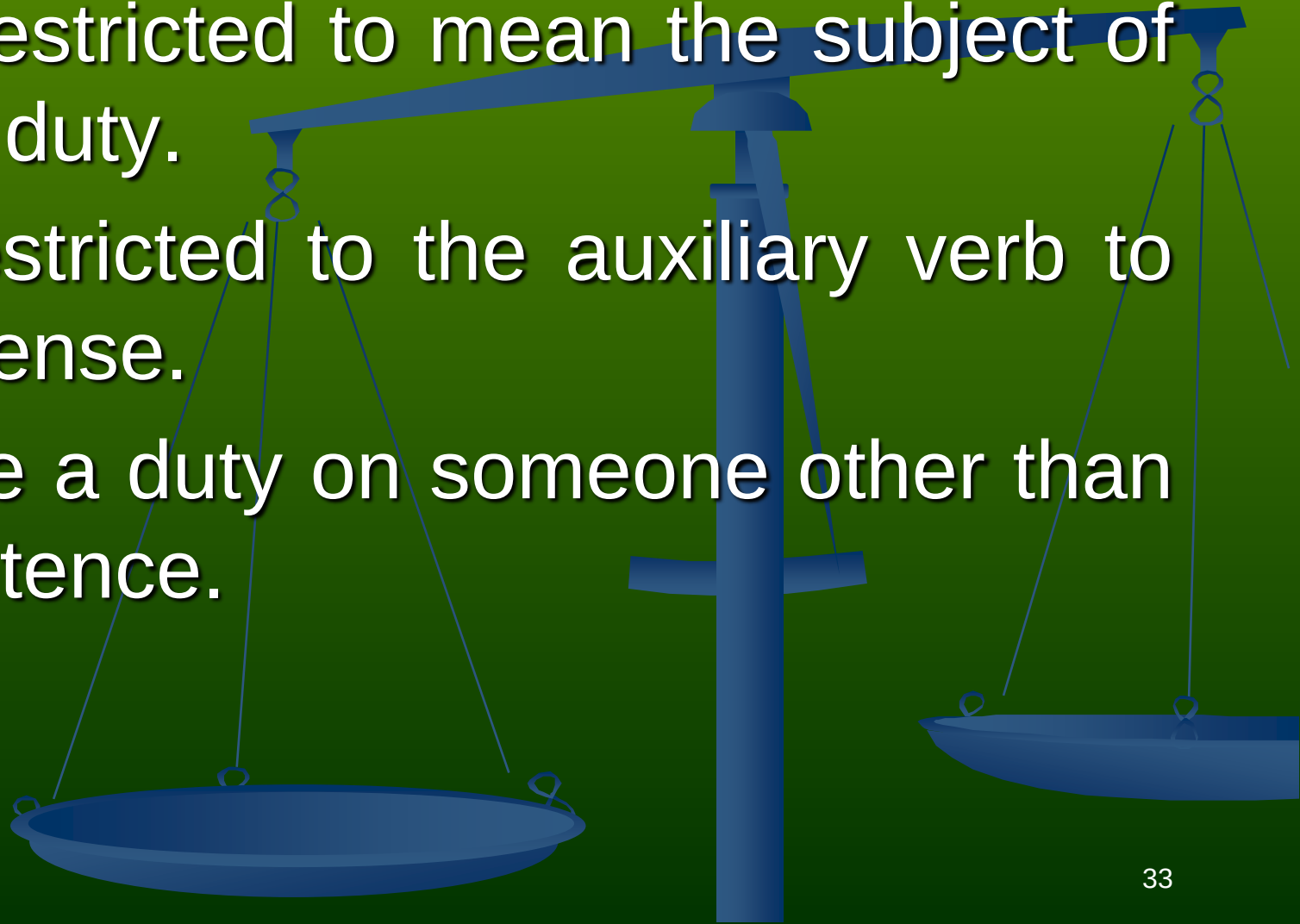
Shall and *Must*

- For example, do not say ~~*The inspection shall be conducted in a manner to minimize disruption*~~, but instead *The inspection must be conducted in a manner to minimize disruption.*



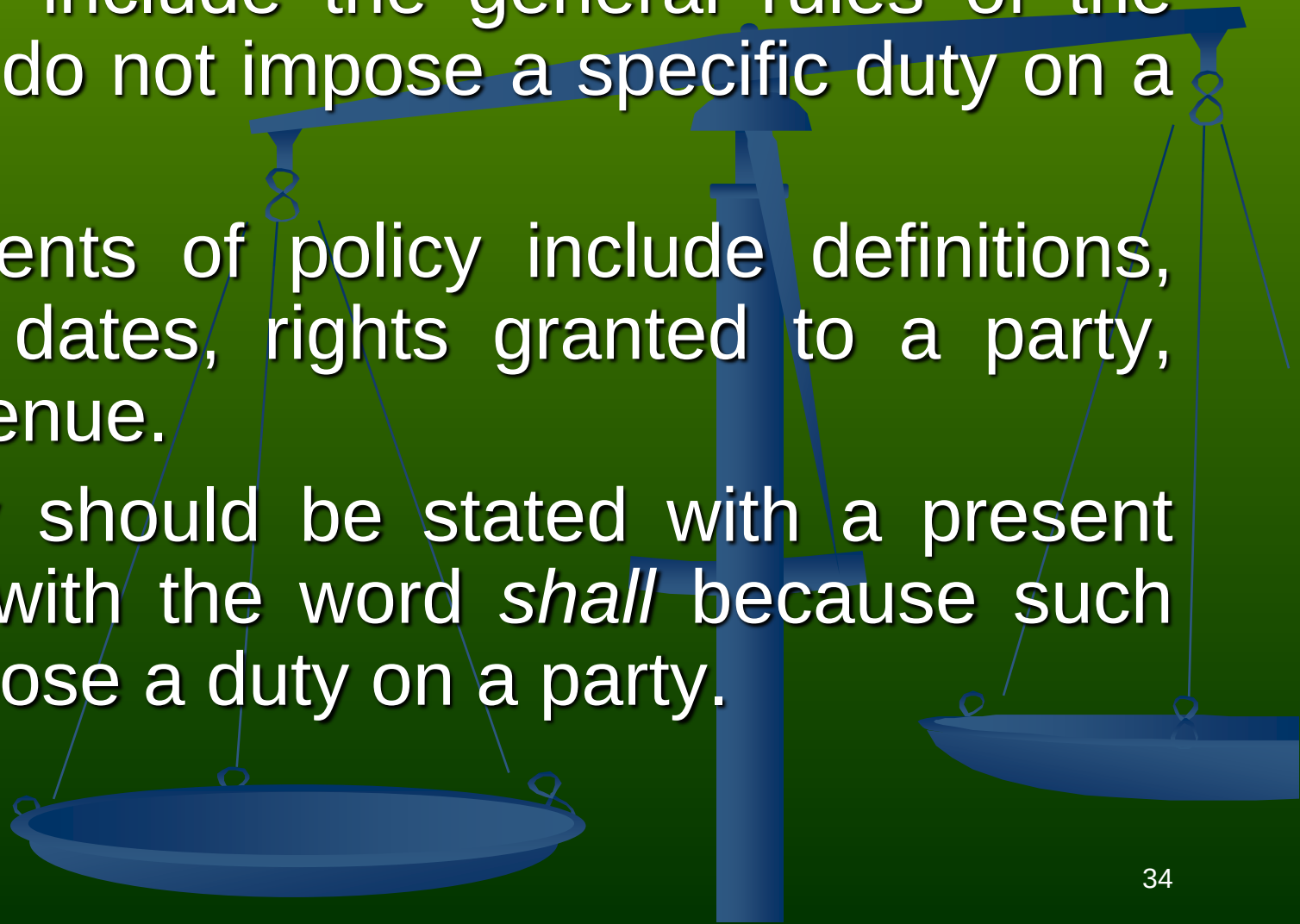
Shall, Will, and *Must*

- The word *shall* is restricted to mean the subject of the sentence has a duty.
- The word *will* is restricted to the auxiliary verb to indicate the future tense.
- Use *must* to impose a duty on someone other than the subject of a sentence.



Statements of Policy

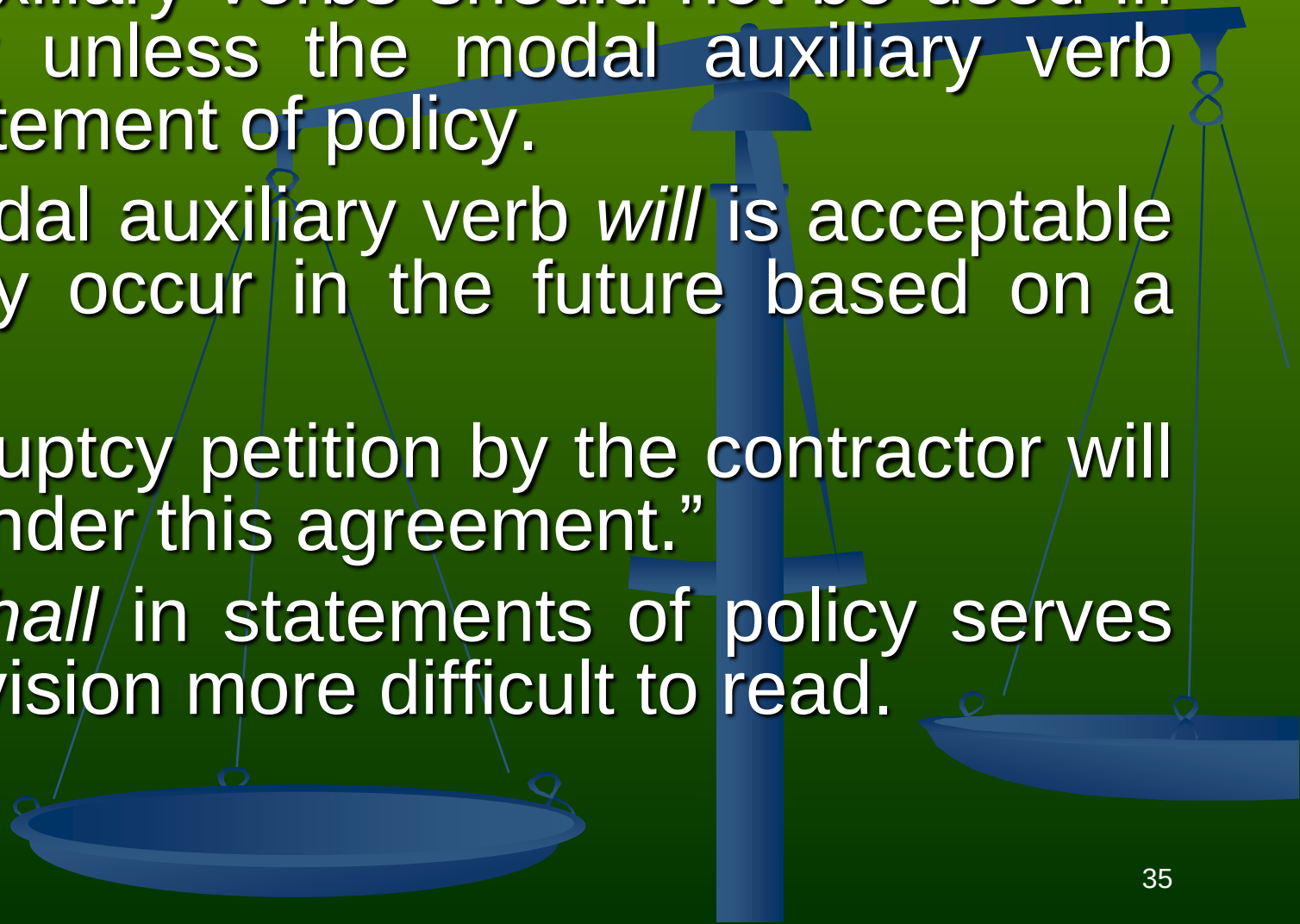
- Statements of policy include the general rules of the document, rules that do not impose a specific duty on a party.
- Examples of statements of policy include definitions, starting and ending dates, rights granted to a party, governing law, and venue.
- Statements of policy should be stated with a present tense verb and not with the word *shall* because such provisions do not impose a duty on a party.



Statements of Policy

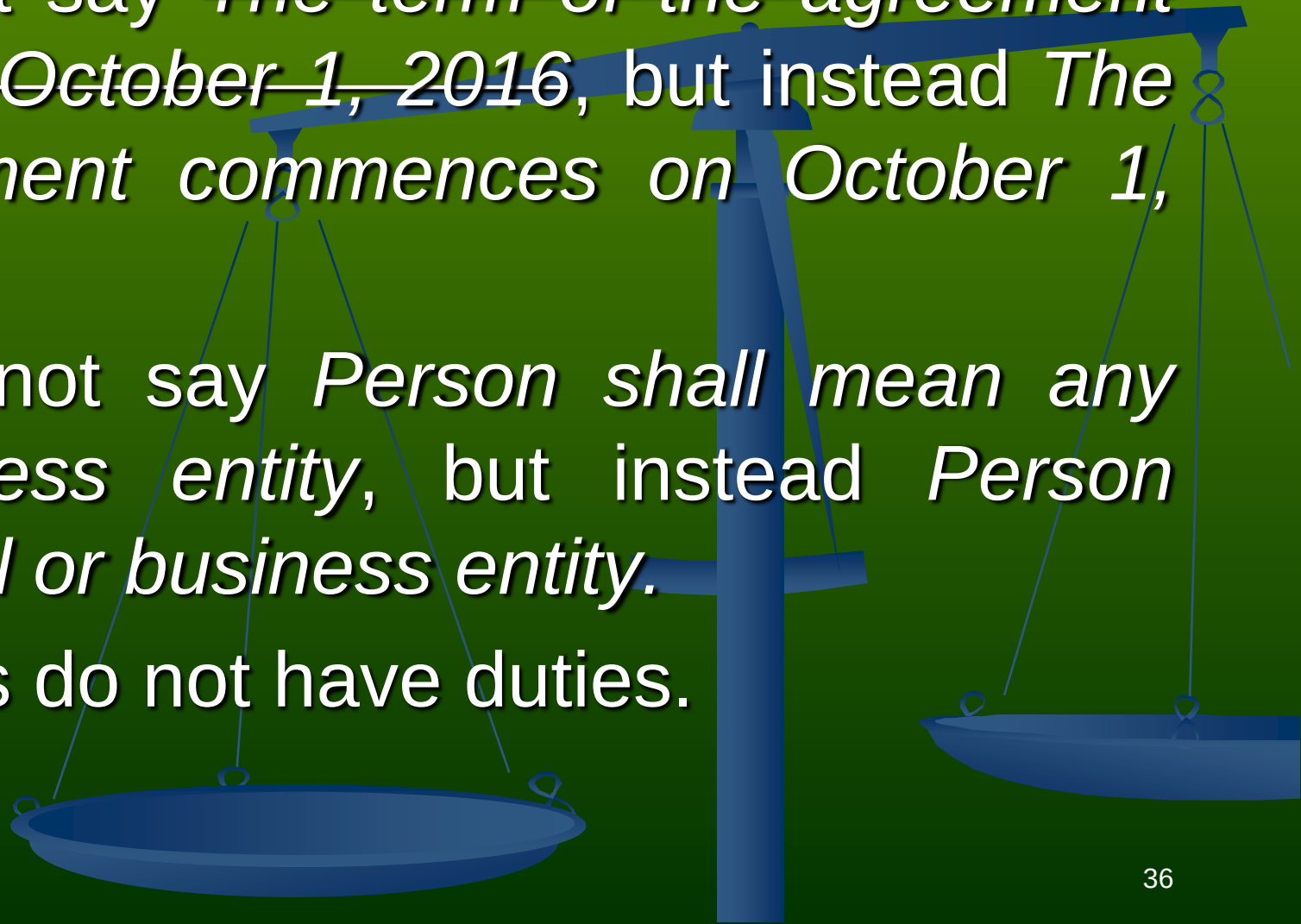
- In general, modal auxiliary verbs should not be used in statements of policy unless the modal auxiliary verb contributes to the statement of policy.
- For example, the modal auxiliary verb *will* is acceptable for a policy that may occur in the future based on a condition.

  “The filing of a bankruptcy petition by the contractor will constitute a default under this agreement.”
- Inserting the word *shall* in statements of policy serves only to make the provision more difficult to read.



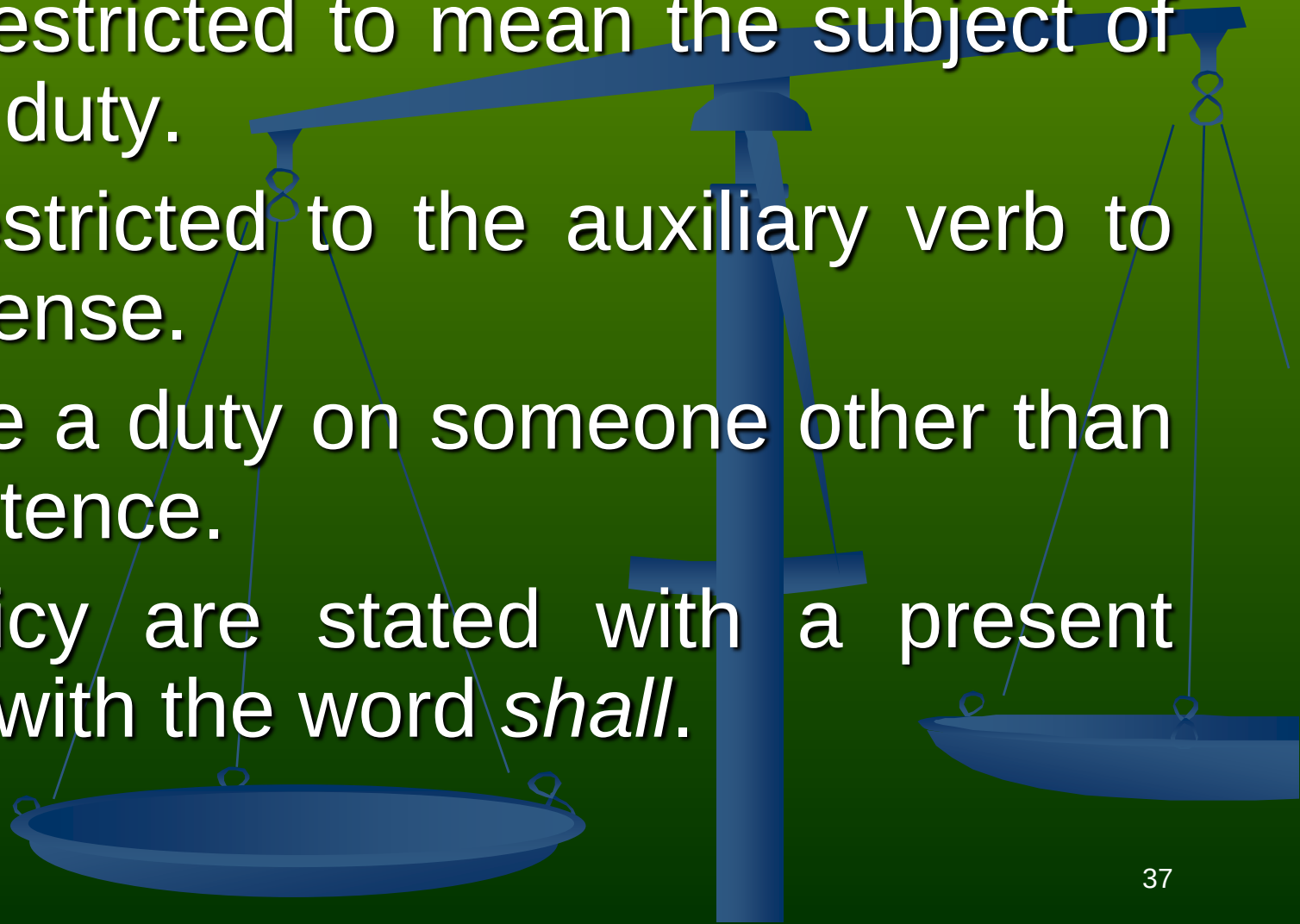
Statements of Policy

- For example, do not say ~~*The term of the agreement shall commence on October 1, 2016*~~, but instead *The term of the agreement commences on October 1, 2016.*
- For definitions, do not say *Person shall mean any individual or business entity*, but instead *Person means any individual or business entity.*
- Dates and definitions do not have duties.



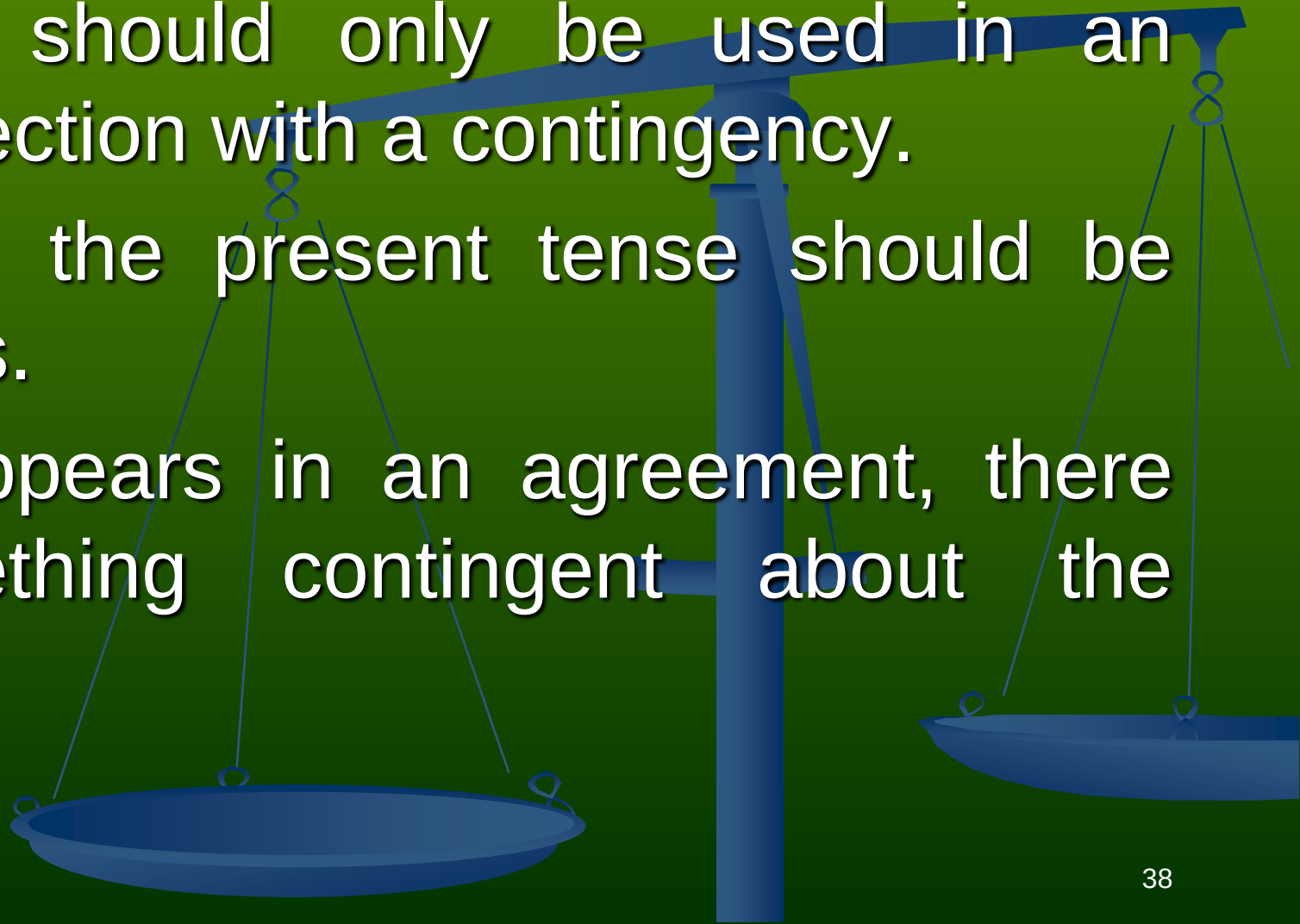
Four Rules on Words of Authority

- The word *shall* is restricted to mean the subject of the sentence has a duty.
- The word *will* is restricted to the auxiliary verb to indicate the future tense.
- Use *must* to impose a duty on someone other than the subject of a sentence.
- Statements of policy are stated with a present tense verb and not with the word *shall*.



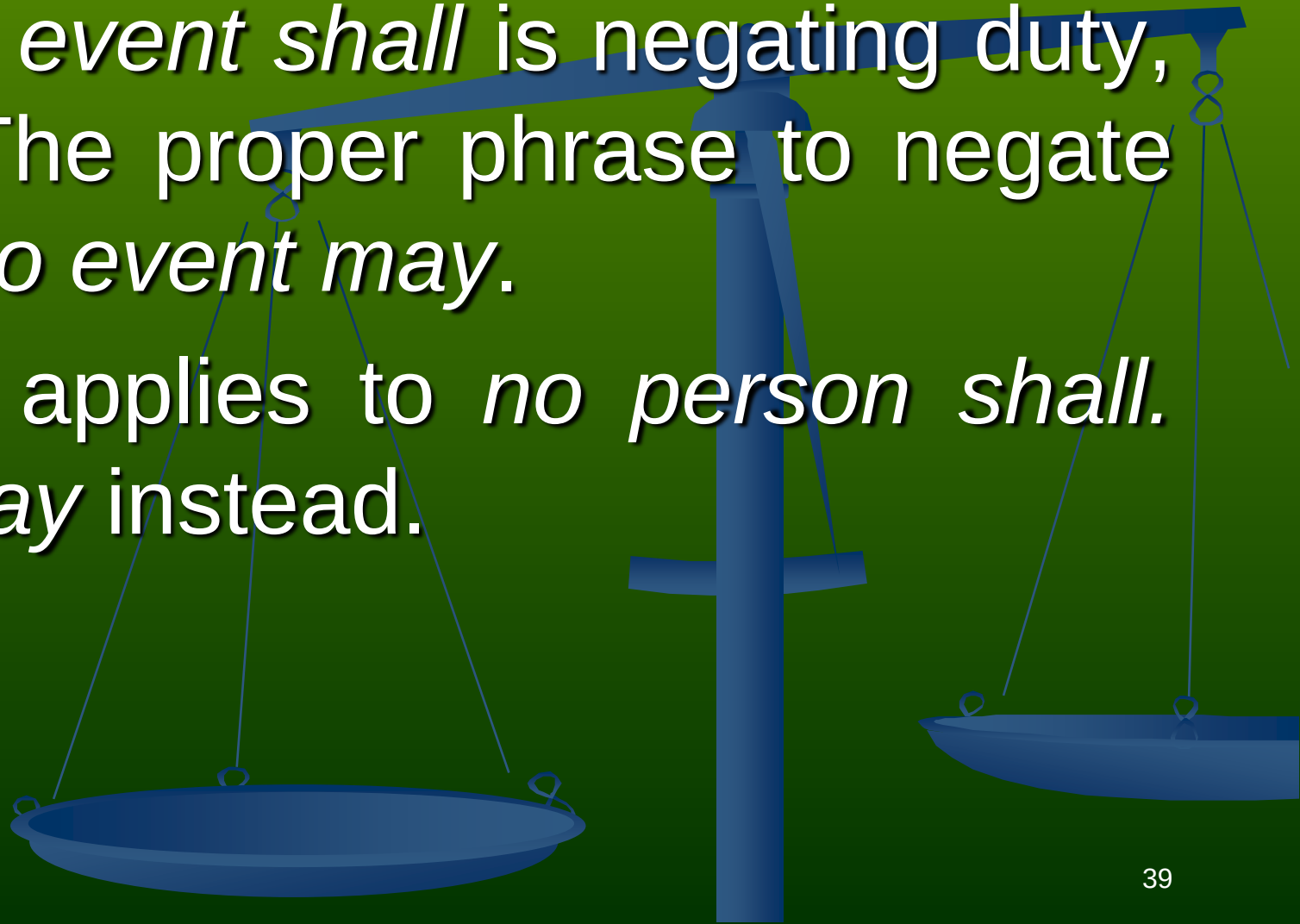
The Future Tense in Agreements

- The future tense should only be used in an agreement in connection with a contingency.
- In most instances, the present tense should be used in agreements.
- If the word *will* appears in an agreement, there should be something contingent about the statement.



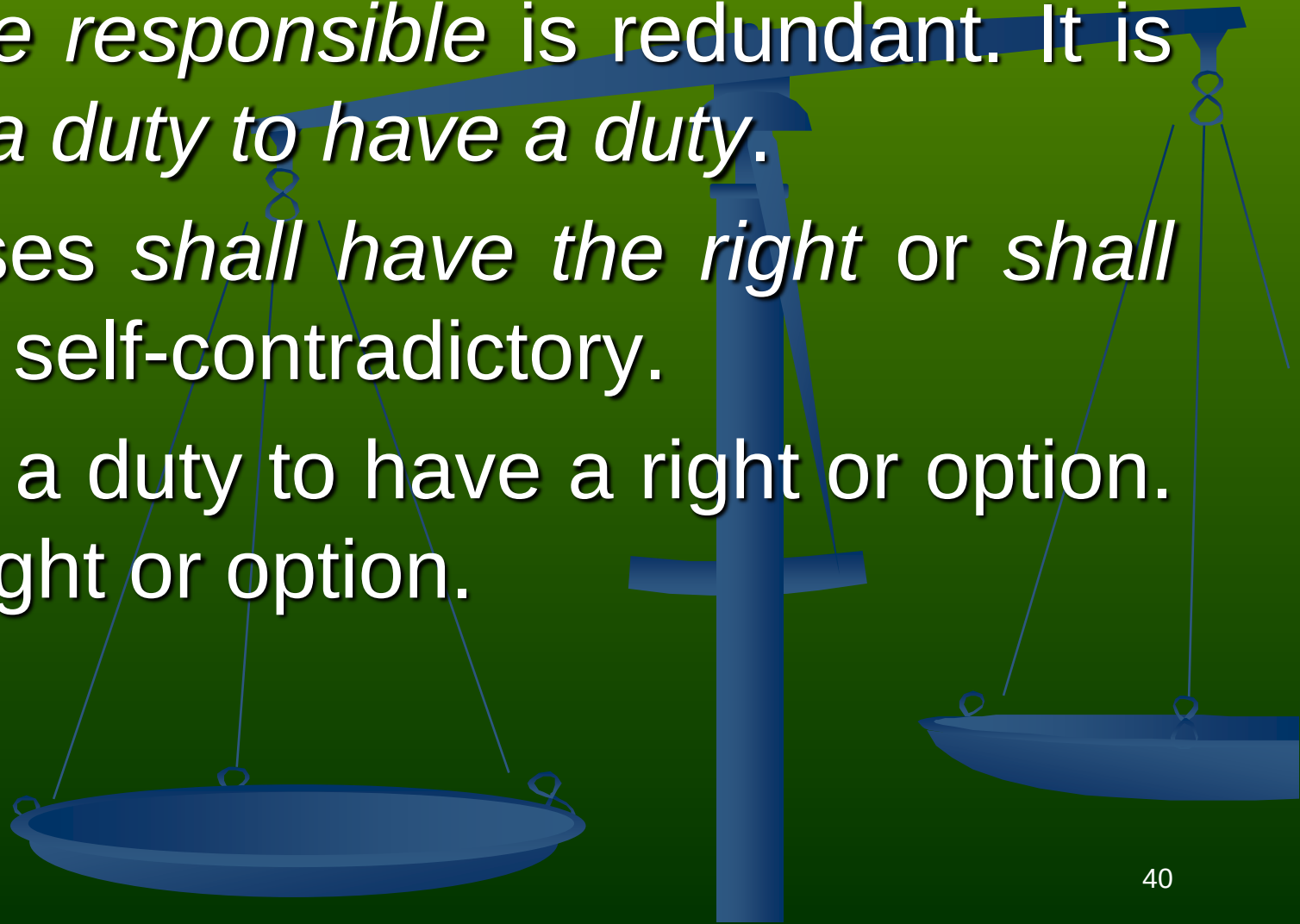
Negating Permission [*No . . . may*]

- The phrase *in no event shall* is negating duty, not permission. The proper phrase to negate permission is *in no event may*.
- The same issue applies to *no person shall.* Use *no person may* instead.



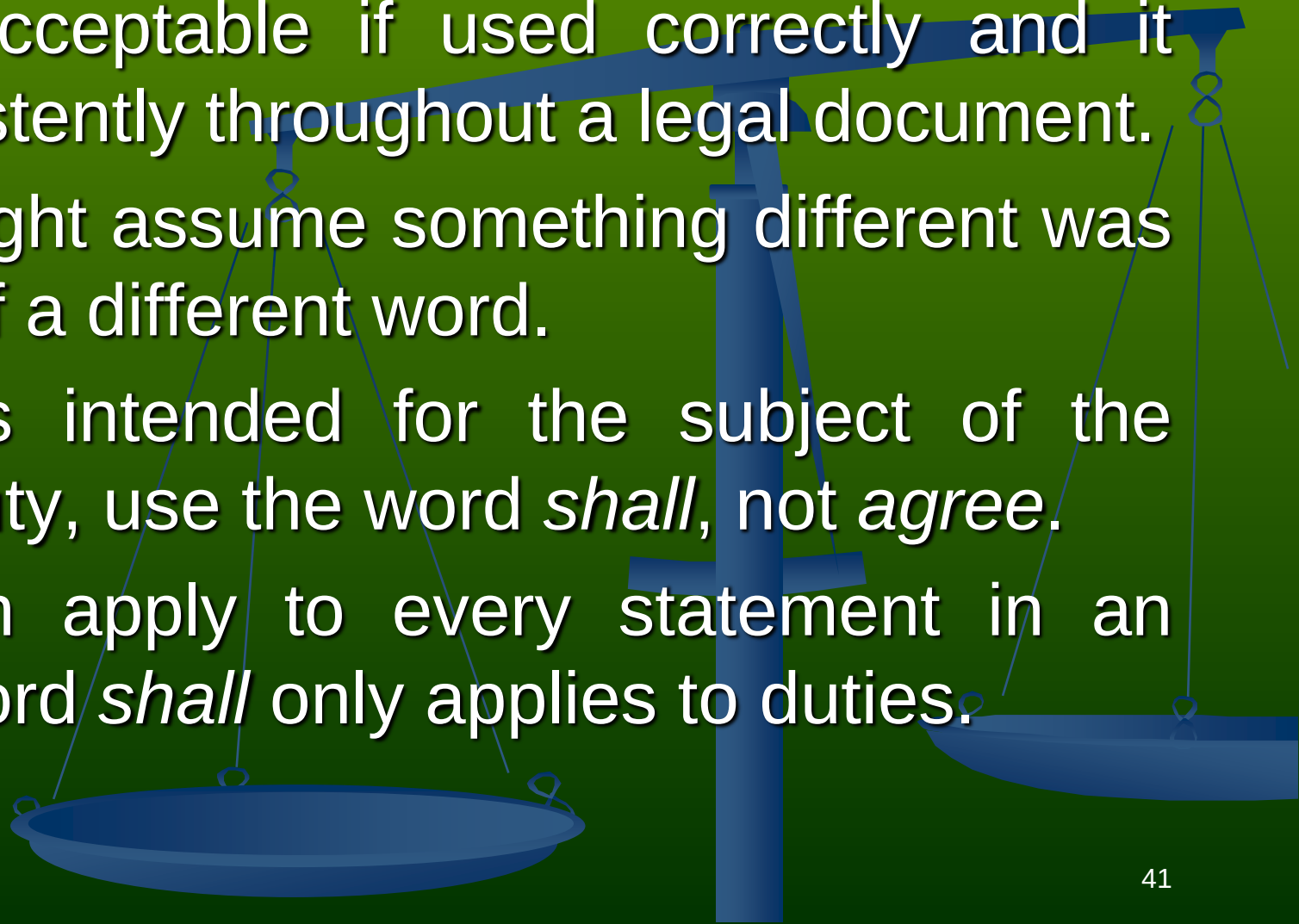
Misuses of *Shall*

- The phrase *shall be responsible* is redundant. It is literally saying *has a duty to have a duty*.
- Similarly, the phrases *shall have the right* or *shall have the option* are self-contradictory.
- One does not have a duty to have a right or option. One simply has a right or option.



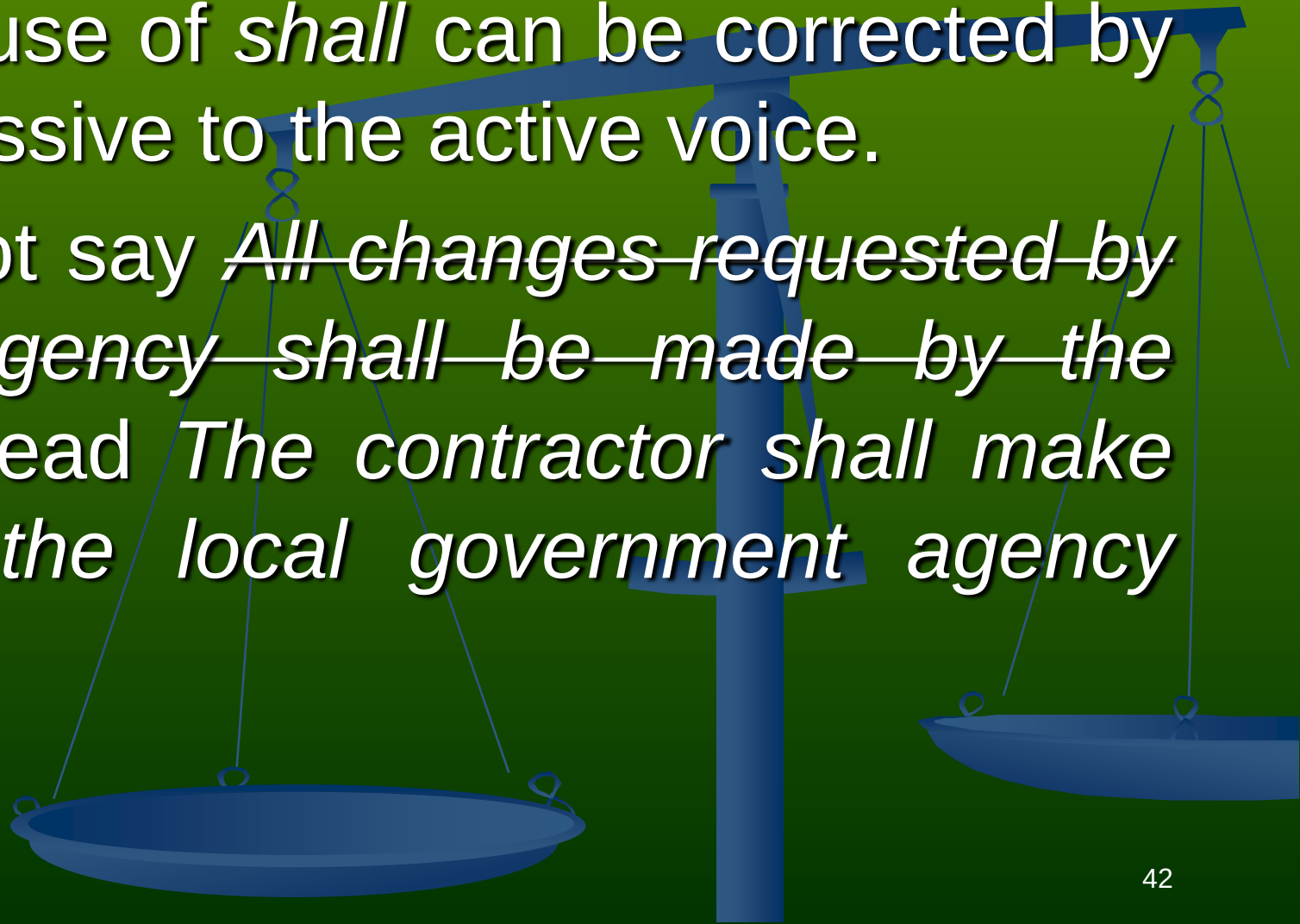
Don’t Hesitate to Use *Shall* If Appropriate

- The word *shall* is acceptable if used correctly and it should be used consistently throughout a legal document.
- Otherwise, a court might assume something different was intended by the use of a different word.
- For example, if it is intended for the subject of the sentence to have a duty, use the word *shall*, not *agree*.
- The word *agree* can apply to every statement in an agreement, but the word *shall* only applies to duties.



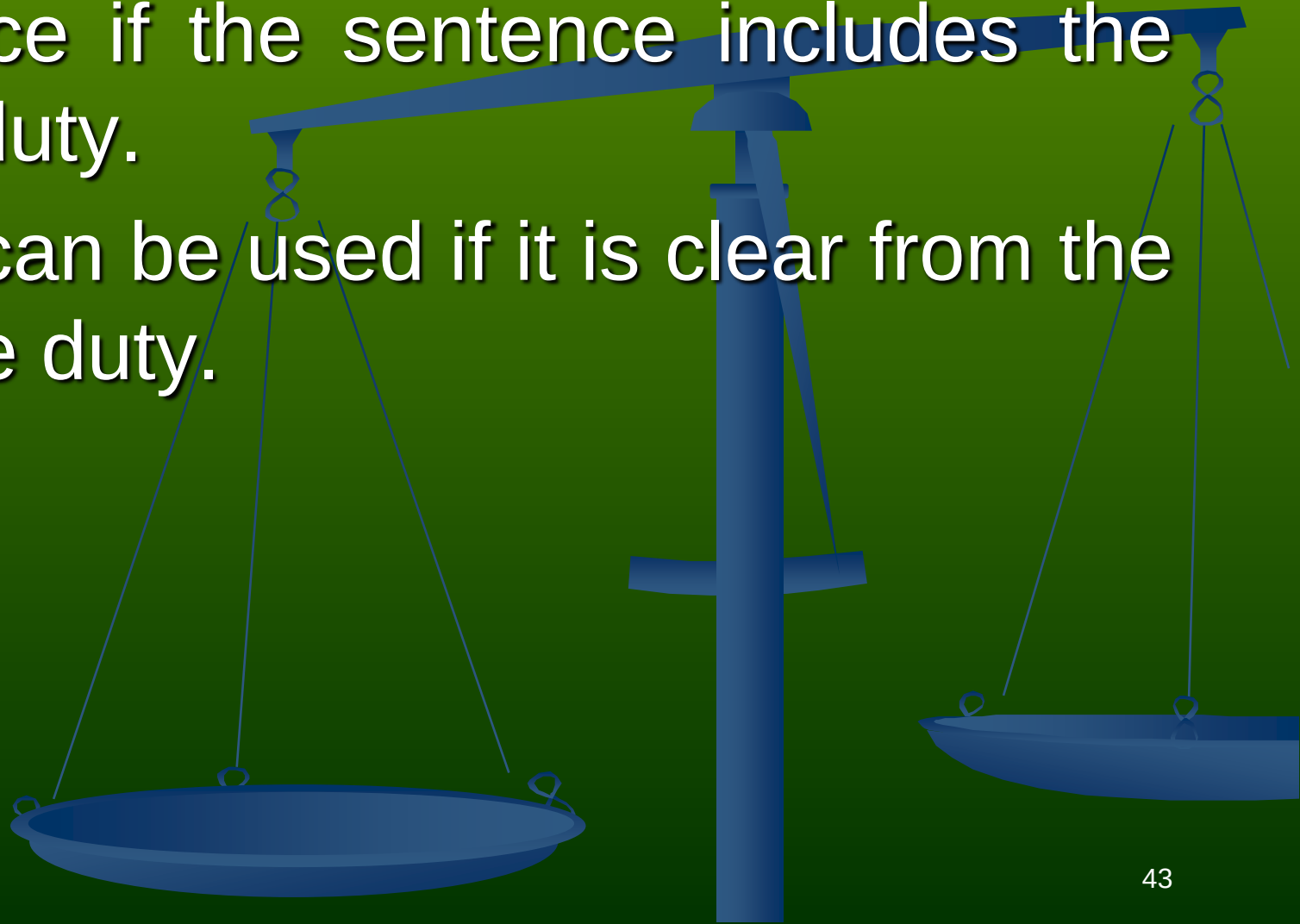
An Easy Fix for Many Misuses of *Shall*

- Often an incorrect use of *shall* can be corrected by shifting from the passive to the active voice.
- For example, do not say ~~*All changes requested by the government agency shall be made by the contractor*~~, but instead *The contractor shall make all changes that the local government agency requests.*



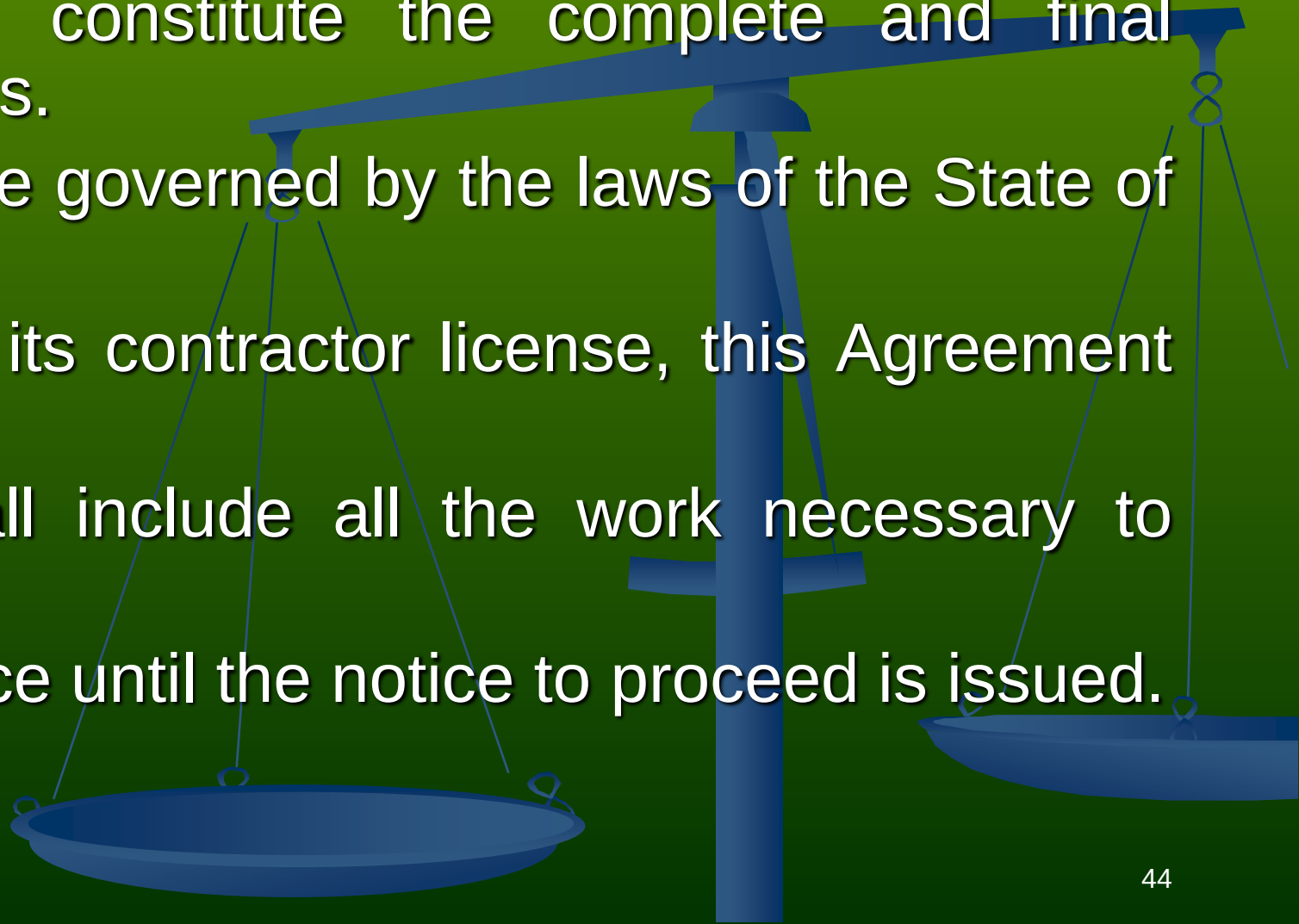
Active or Passive Voice and Duties

- Use the active voice if the sentence includes the person having the duty.
- The passive voice can be used if it is clear from the context who has the duty.



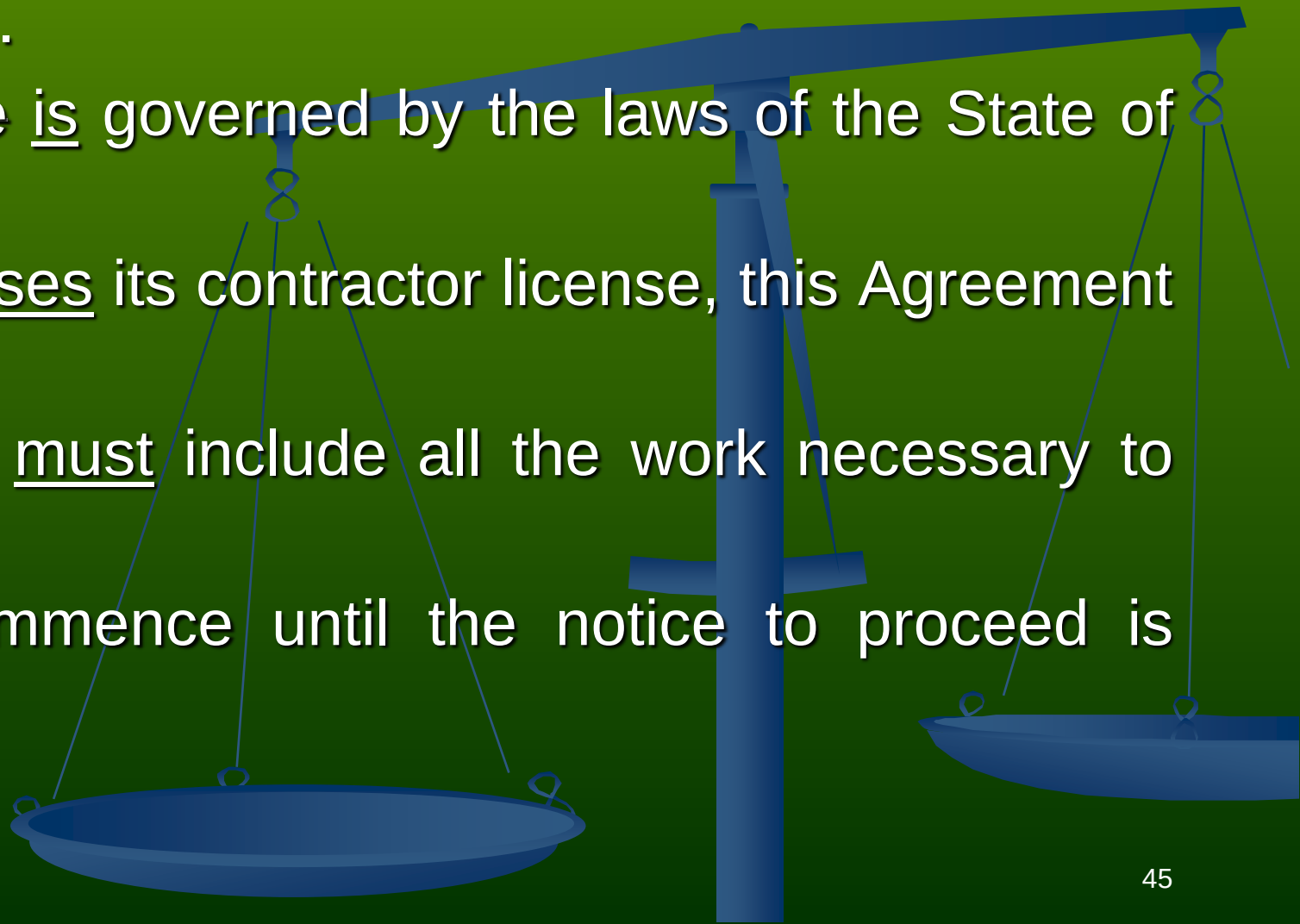
How Not to Use *Shall* (Muddled Modal Verbs)

- This Agreement shall constitute the complete and final expression of the parties.
- This Agreement shall be governed by the laws of the State of Florida.
- If contractor shall lose its contractor license, this Agreement shall be in default.
- The specifications shall include all the work necessary to complete the project.
- No work shall commence until the notice to proceed is issued.



Misuses of *Shall* Corrected

- This Agreement ~~shall constitute~~ constitutes the complete and final expression of the parties.
- This Agreement ~~shall be~~ is governed by the laws of the State of Florida.
- If contractor ~~shall lose~~ loses its contractor license, this Agreement ~~shall~~ will be in default.
- The specifications ~~shall~~ must include all the work necessary to complete the project.
- No work ~~shall~~ may commence until the notice to proceed is issued.



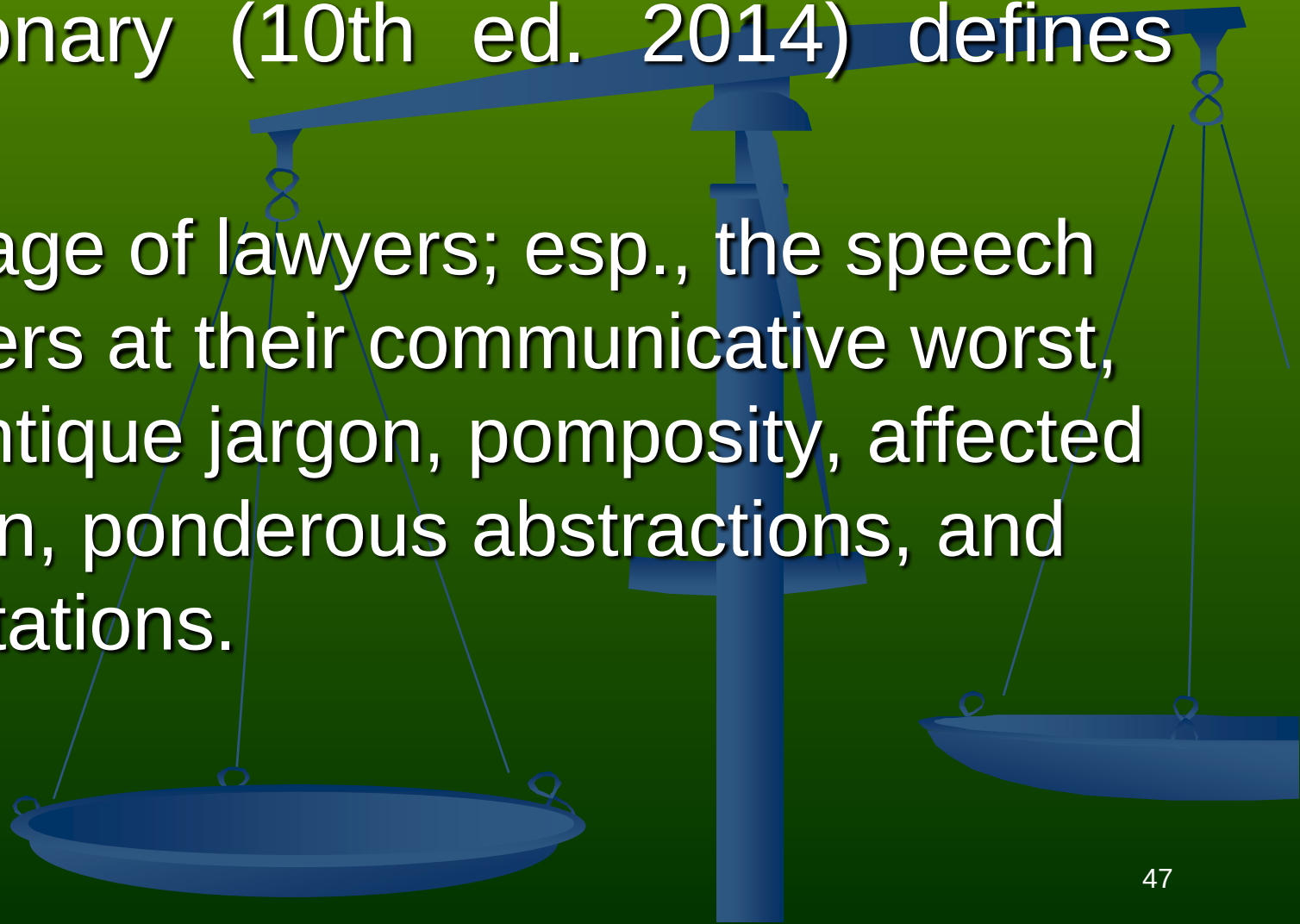
Part 2
Legalese



Legalese

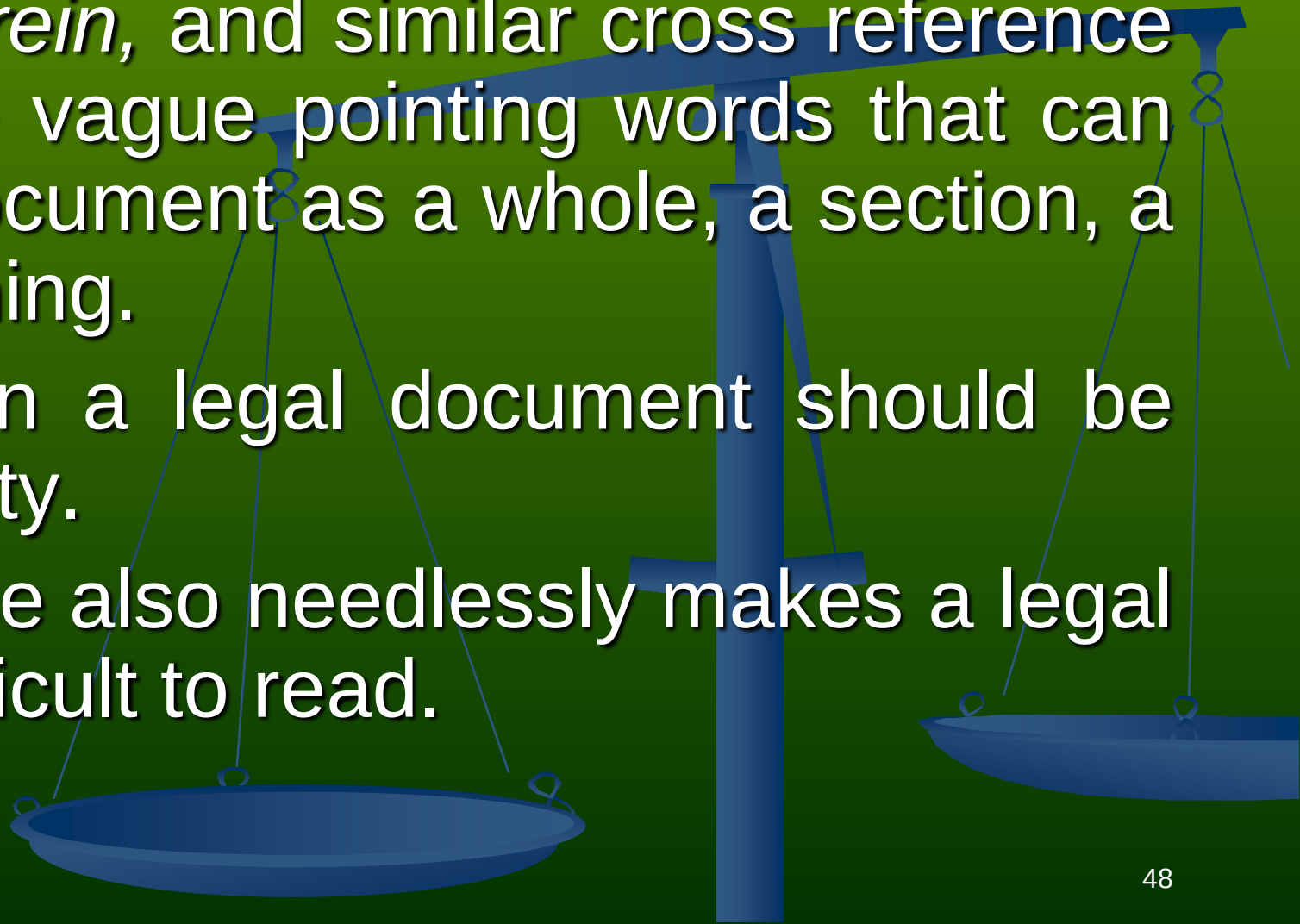
- Black's Law Dictionary (10th ed. 2014) defines *legalese* as follows:

  The peculiar language of lawyers; esp., the speech and writing of lawyers at their communicative worst, characterized by antique jargon, pomposity, affected displays of precision, ponderous abstractions, and hocus-pocus incantations.



Legalese Cross Reference Words (*Here* and *There* Words)

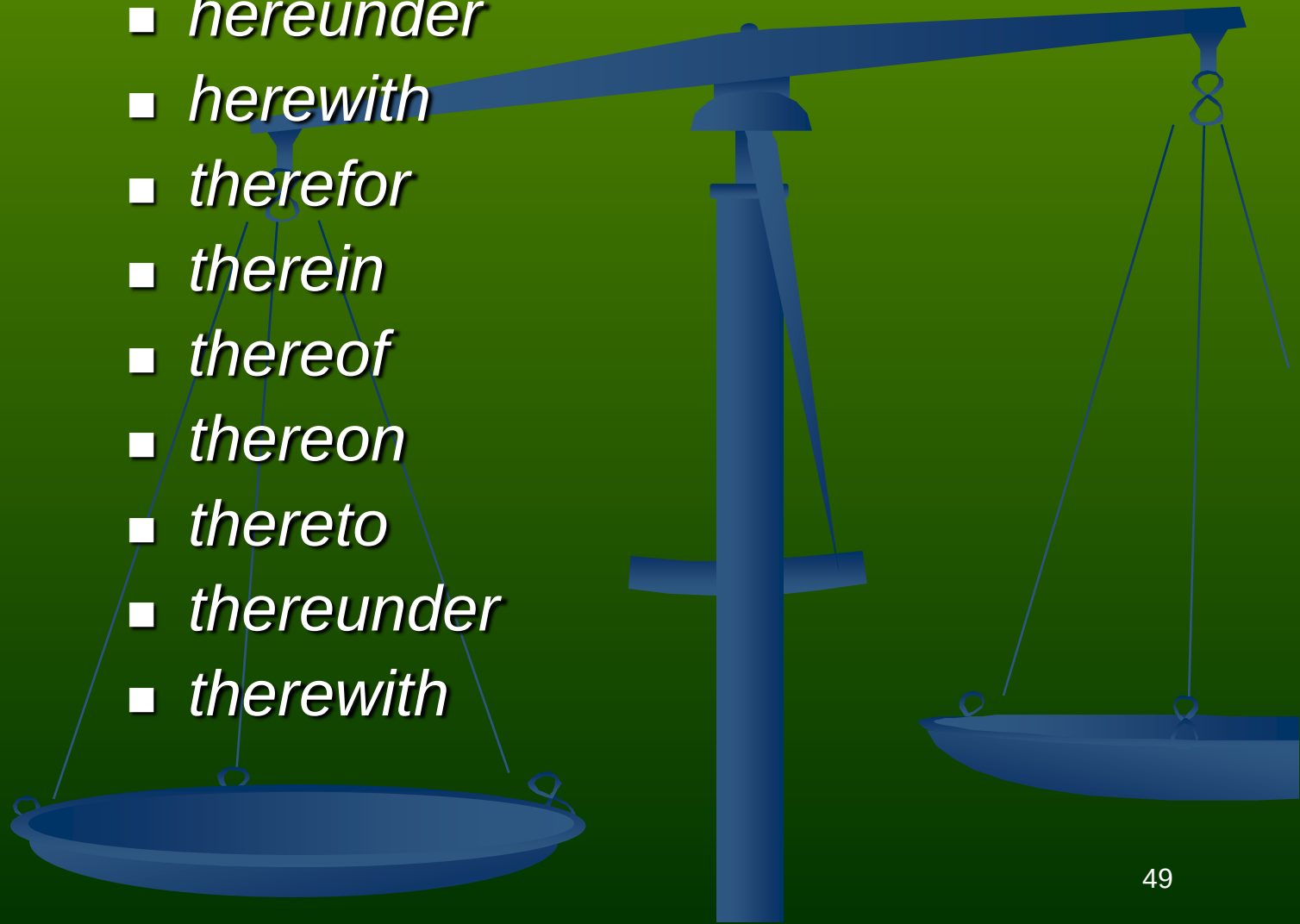
- *Hereto, thereto, herein,* and similar cross reference legalese words are vague pointing words that can refer to the legal document as a whole, a section, a paragraph, or anything.
- Cross references in a legal document should be stated with specificity.
- This type of legalese also needlessly makes a legal document more difficult to read.



Legalese Cross Reference Words

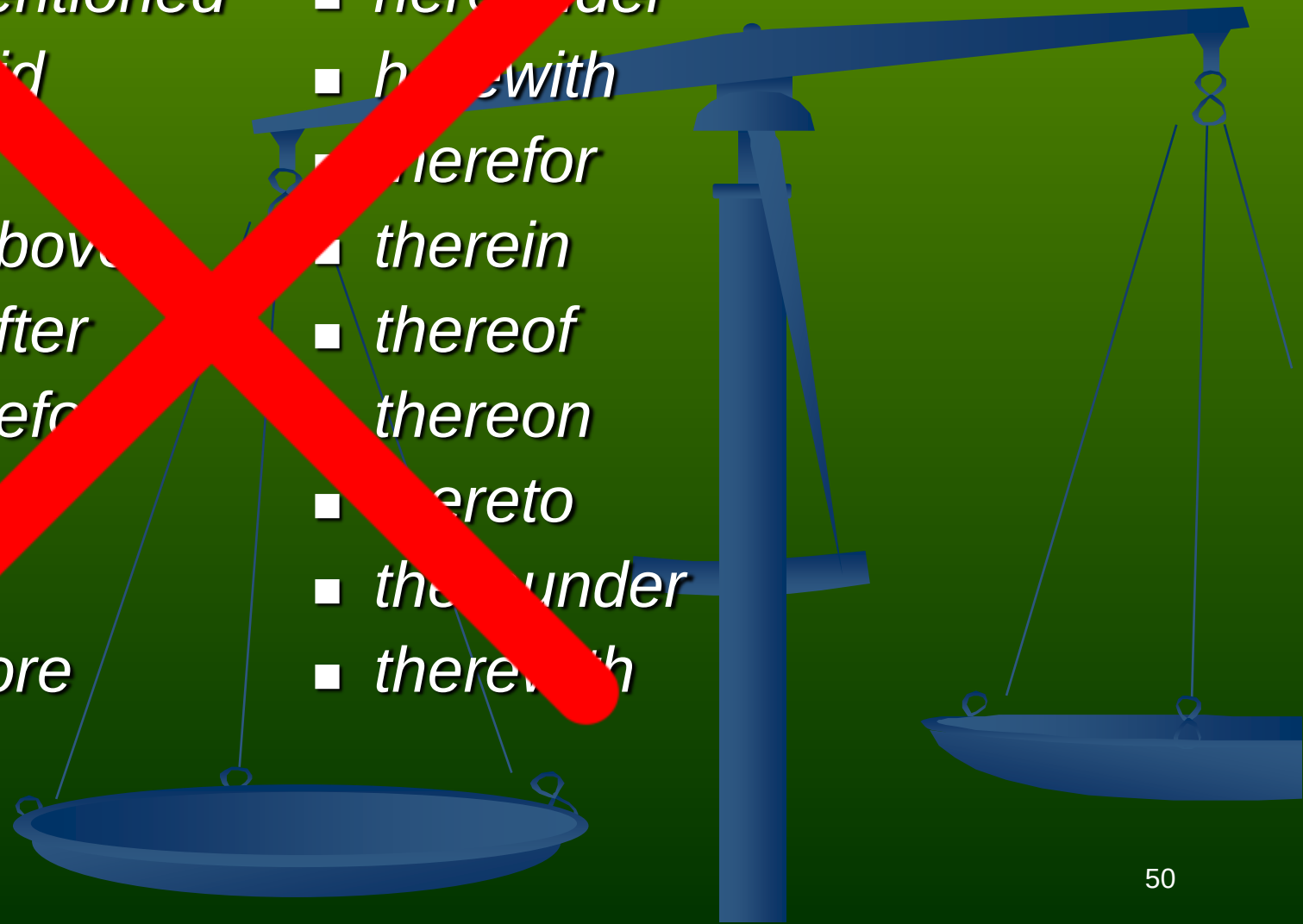
To the maximum extent possible, avoid these legalese referential words:

- *aforementioned*
- *aforesaid*
- *herein*
- *hereinabove*
- *hereinafter*
- *hereinbefore*
- *hereof*
- *hereto*
- *heretofore*
- *hereunder*
- *herewith*
- *therefor*
- *therein*
- *thereof*
- *thereon*
- *thereto*
- *thereunder*
- *therewith*



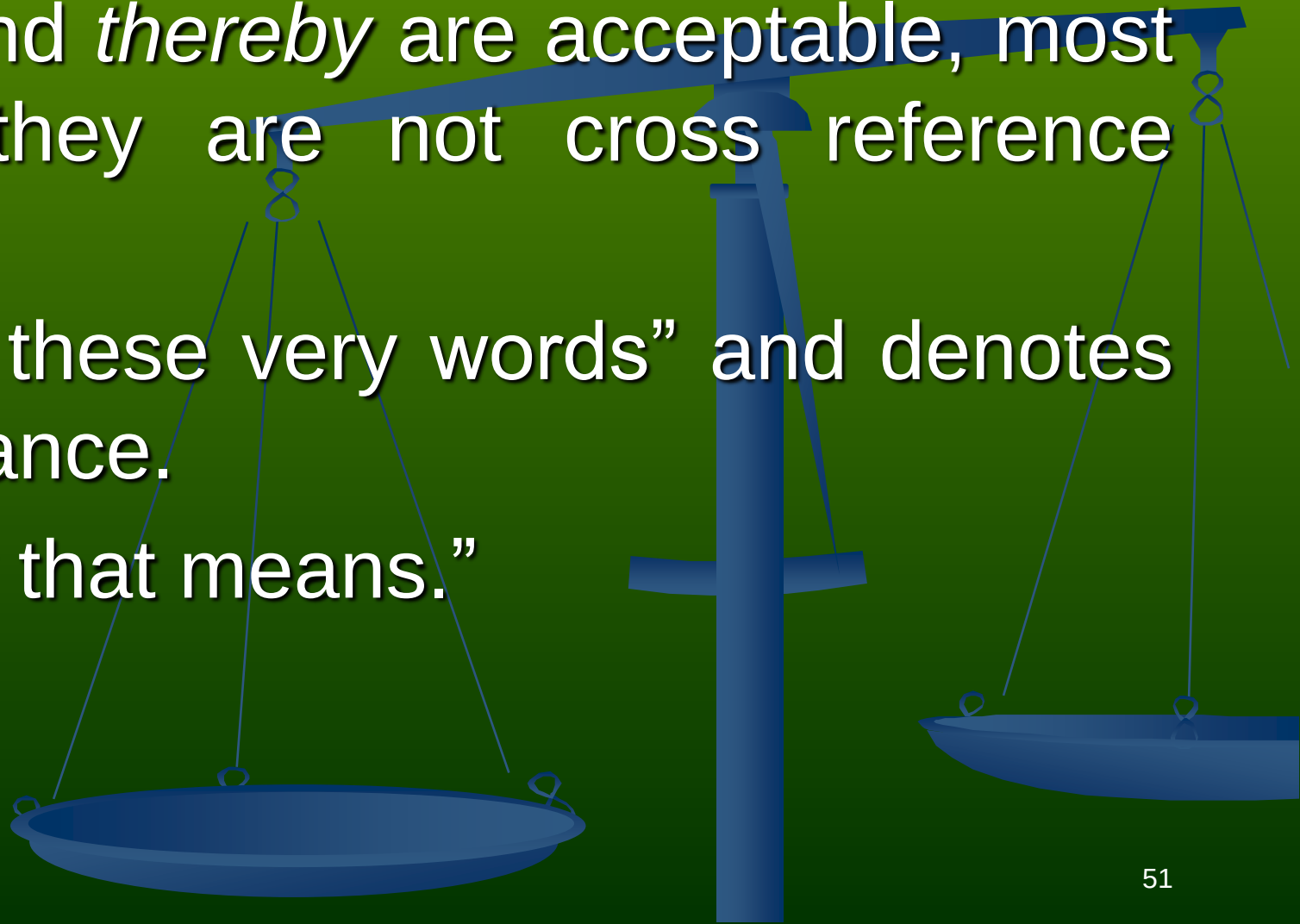
Legalese Cross Reference Words

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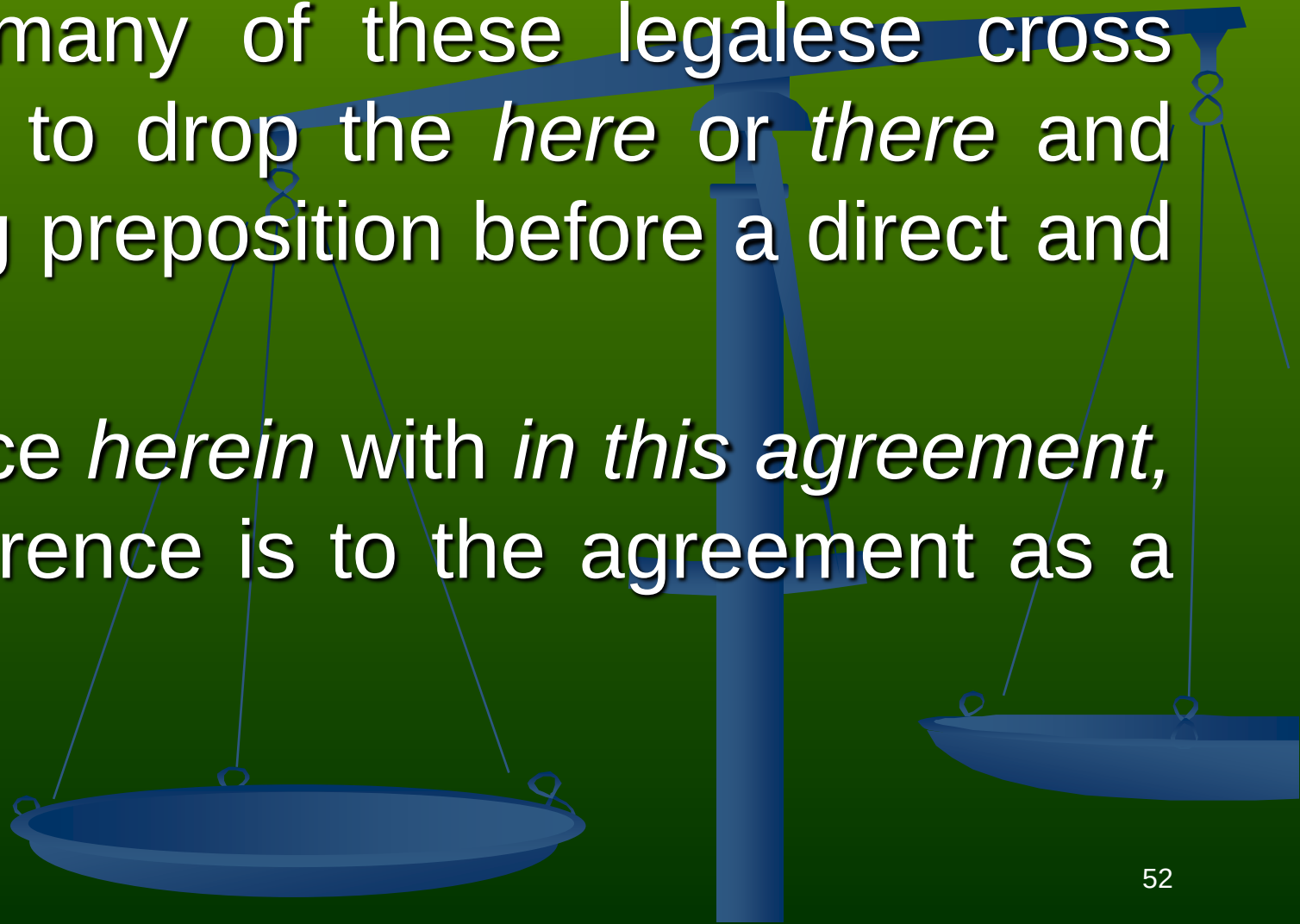
Hereby and *Thereby* Are Acceptable

- Note that *hereby* and *thereby* are acceptable, most notably because they are not cross reference words.
- *Hereby* means “by these very words” and denotes immediate performance.
- *Thereby* means “by that means.”



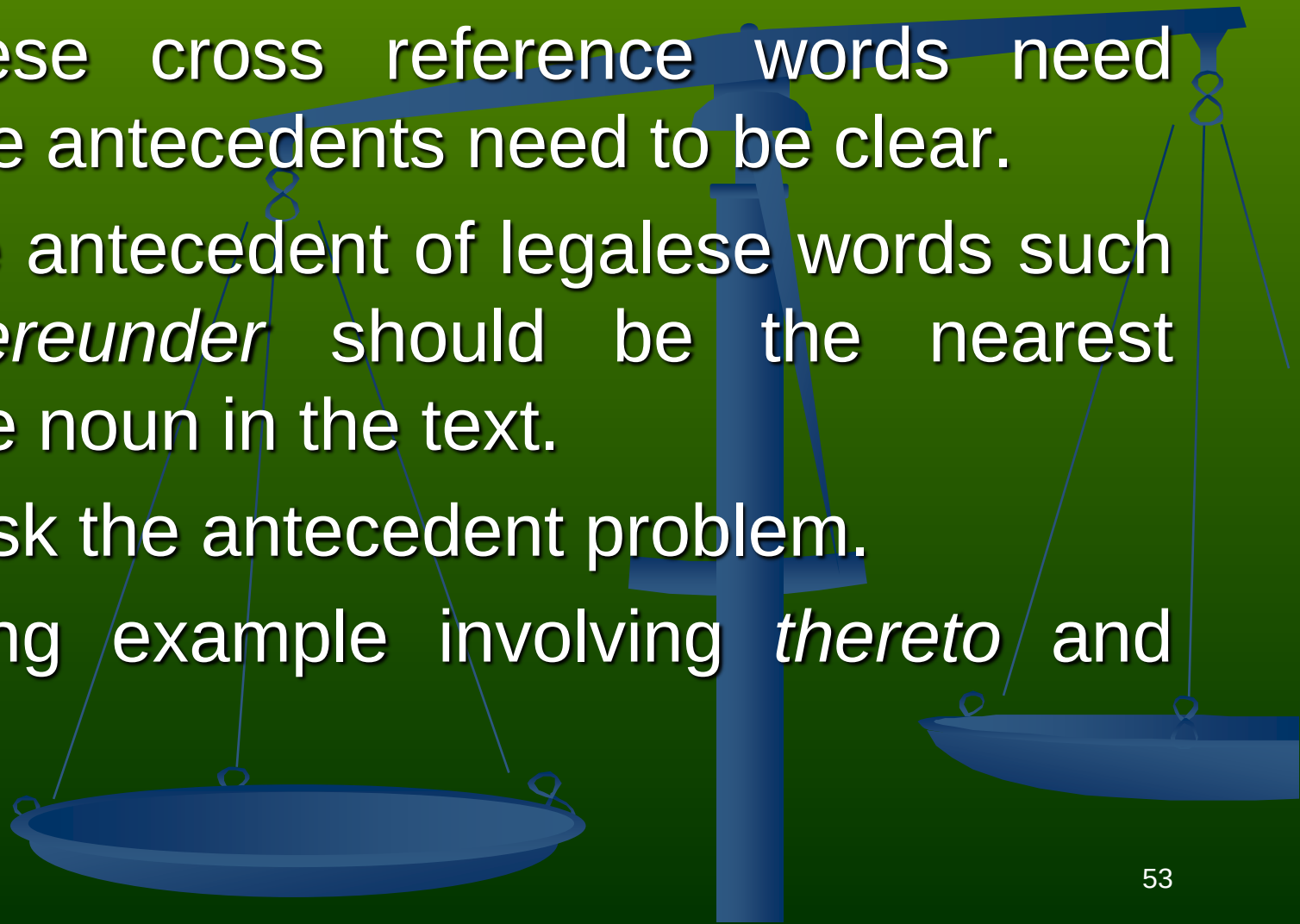
Legalese Cross Reference Words

- The easy fix for many of these legalese cross reference words is to drop the *here* or *there* and place the remaining preposition before a direct and specific reference.
- For example, replace *herein* with *in this agreement,* if the intended reference is to the agreement as a whole.



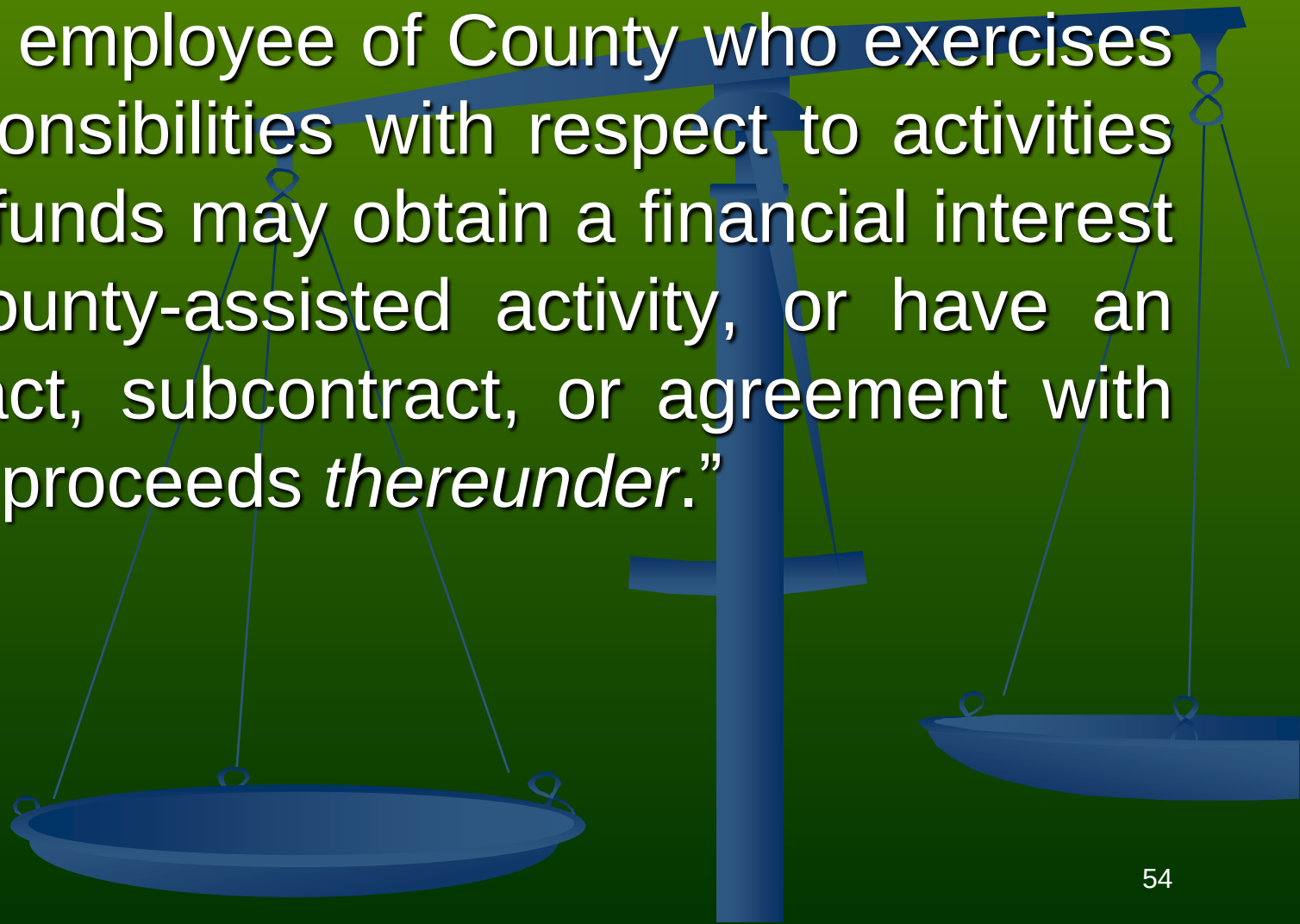
Legalese and Lost Antecedents

- Some of the legalese cross reference words need antecedents and these antecedents need to be clear.
- As with pronouns, the antecedent of legalese words such as *thereto* and *thereunder* should be the nearest reasonable descriptive noun in the text.
- Legalese tends to mask the antecedent problem.
- Consider the following example involving *thereto* and *thereunder*:



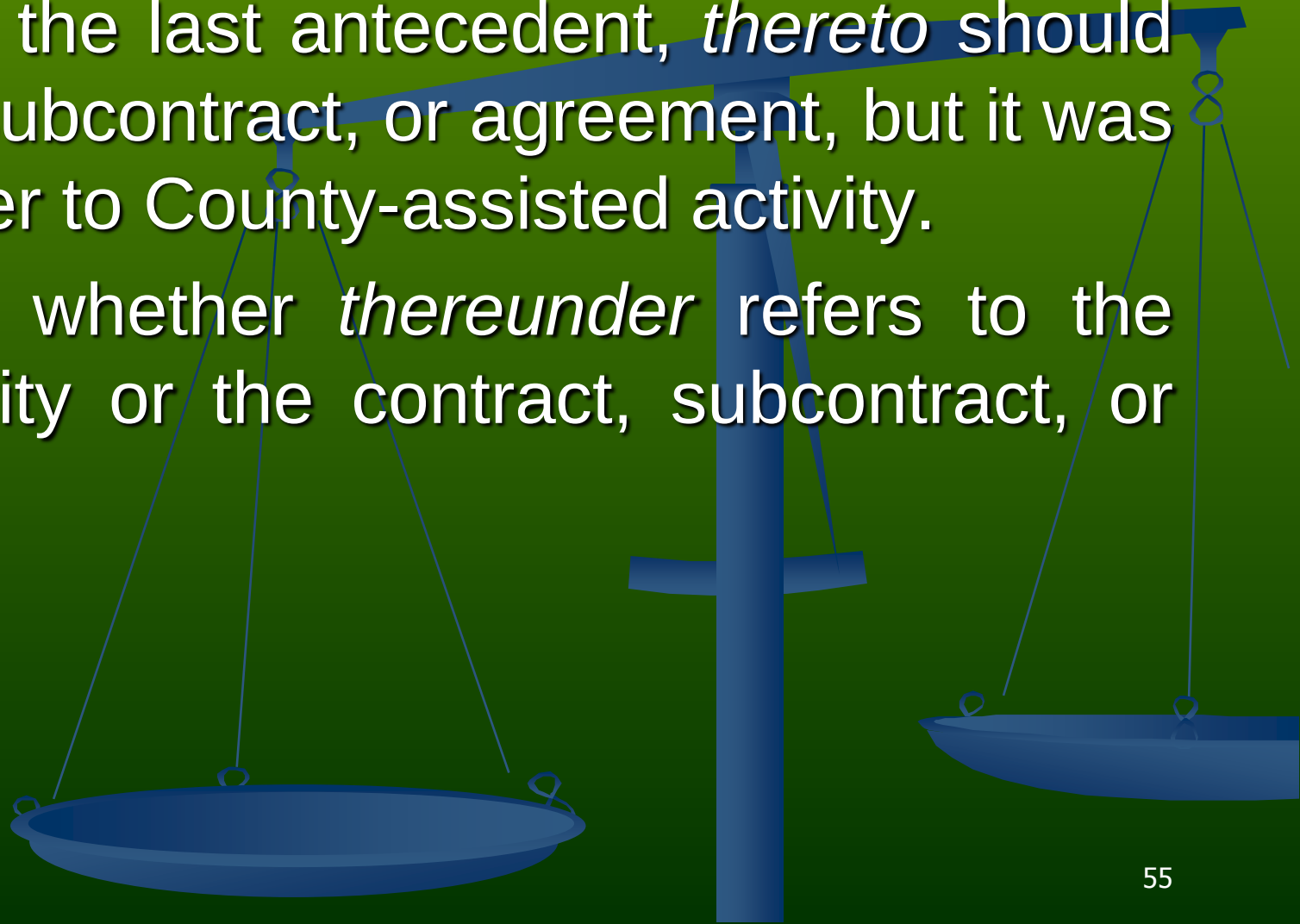
Legalese and Lost Antecedents

"No person who is an employee of County who exercises any functions or responsibilities with respect to activities assisted with County funds may obtain a financial interest or benefit from a County-assisted activity, or have an interest in any contract, subcontract, or agreement with respect *thereto* or the proceeds *thereunder*."



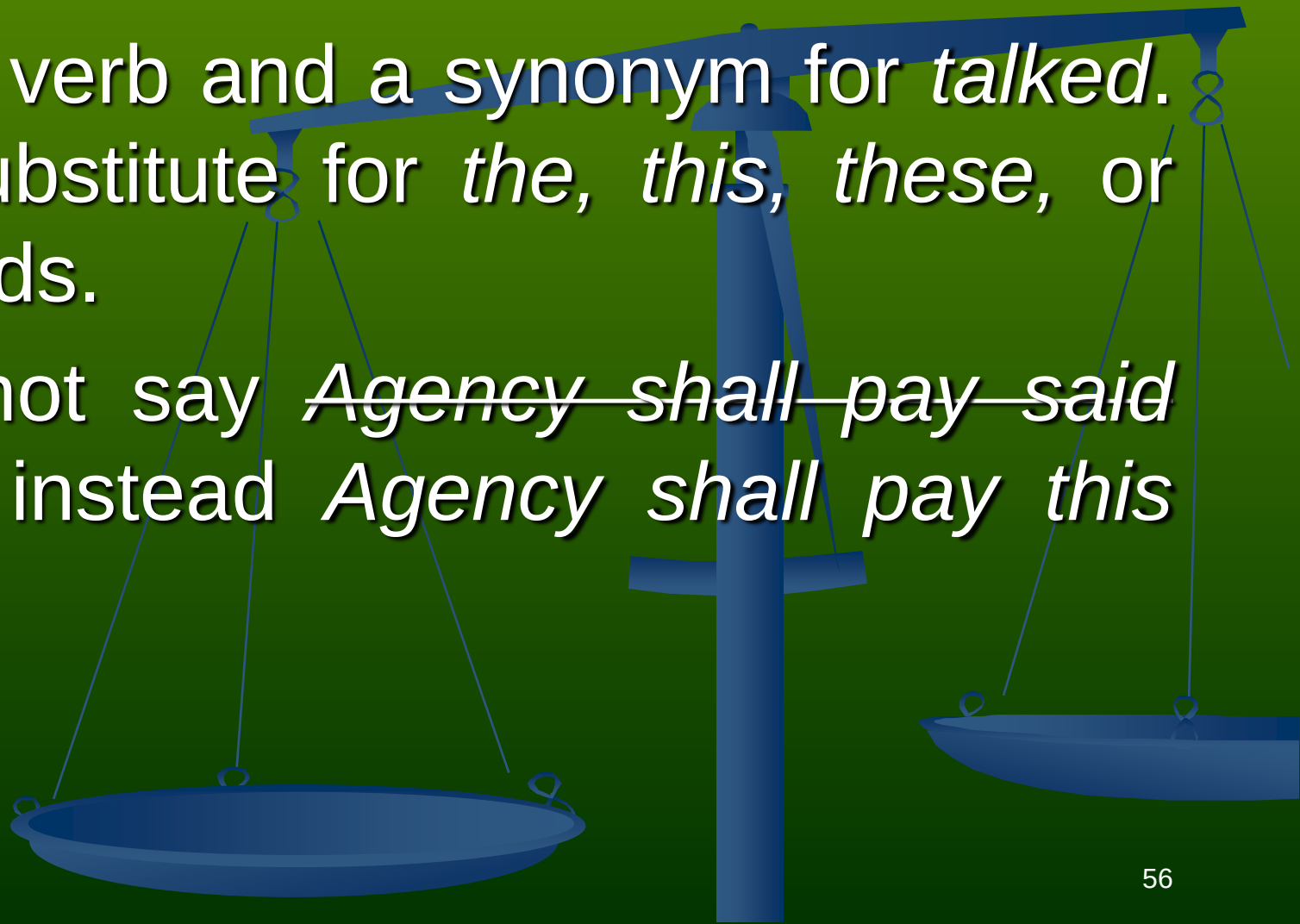
Legalese and Lost Antecedents

- Under the doctrine of the last antecedent, *thereto* should refer to the contract, subcontract, or agreement, but it was probably meant to refer to County-assisted activity.
- It is not at all clear whether *thereunder* refers to the County-assisted activity or the contract, subcontract, or agreement.



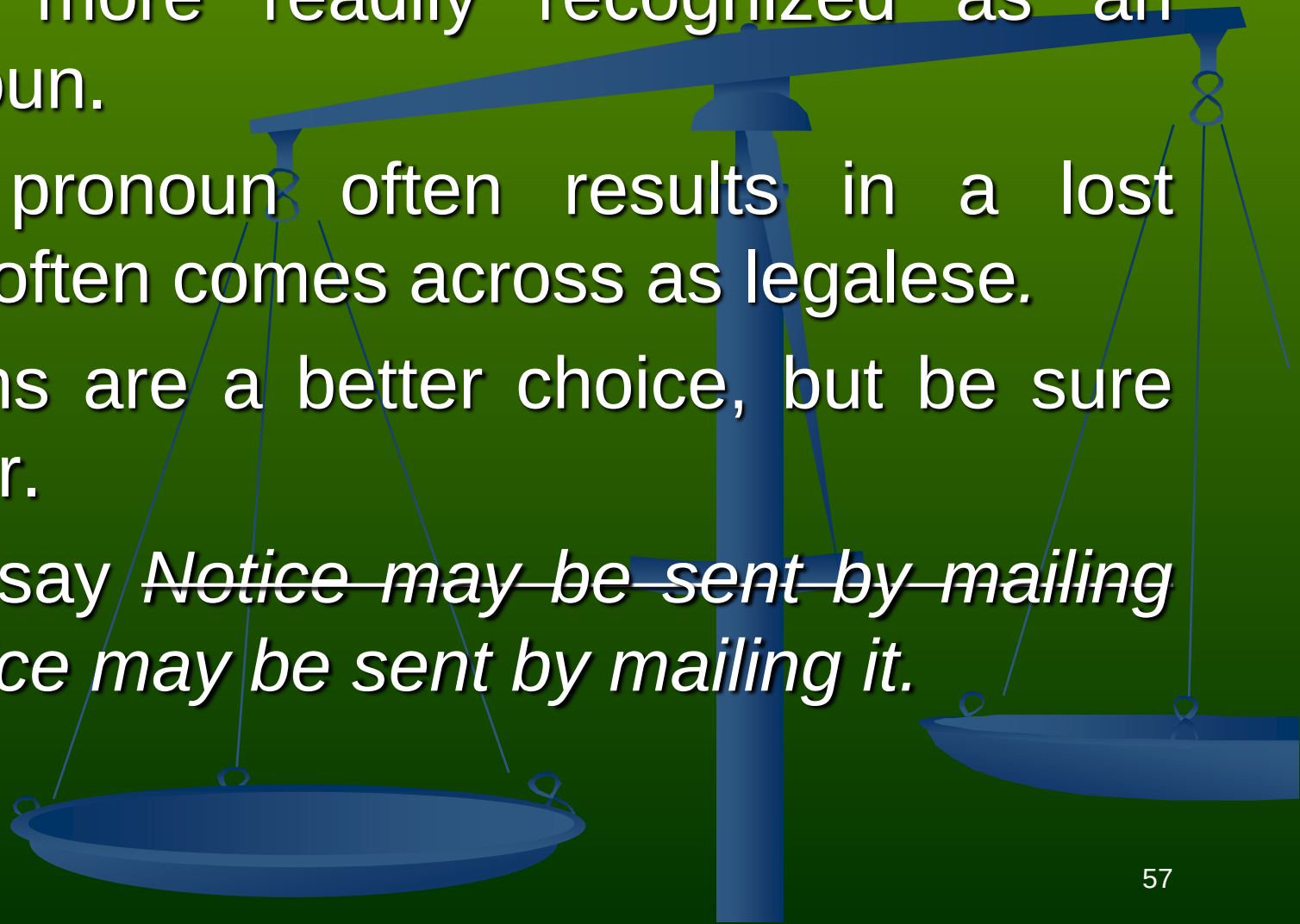
Said as Something Other Than a Verb

- The word *said* is a verb and a synonym for *talked*. It is not a valid substitute for *the, this, these,* or similar pointing words.
- For example, do not say ~~*Agency shall pay said invoice timely*~~ but instead *Agency shall pay this invoice timely*.



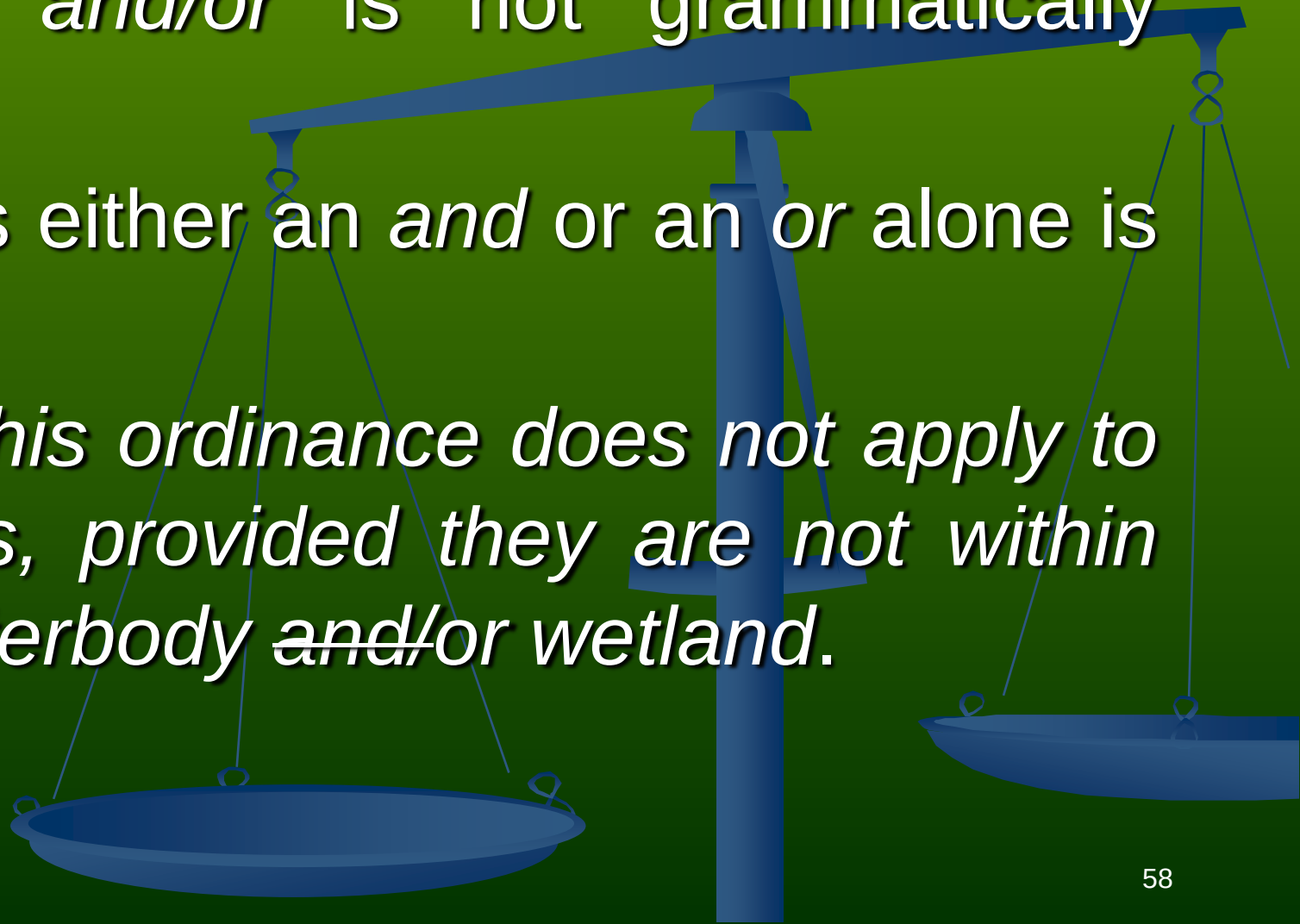
Same as Something Other Than an Adjective

- The word *same* is more readily recognized as an adjective than a pronoun.
- Using *same* as a pronoun often results in a lost antecedent and most often comes across as legalese.
- Conventional pronouns are a better choice, but be sure the antecedent is clear.
- For example, do not say ~~*Notice may be sent by mailing same*~~ but instead *Notice may be sent by mailing it.*



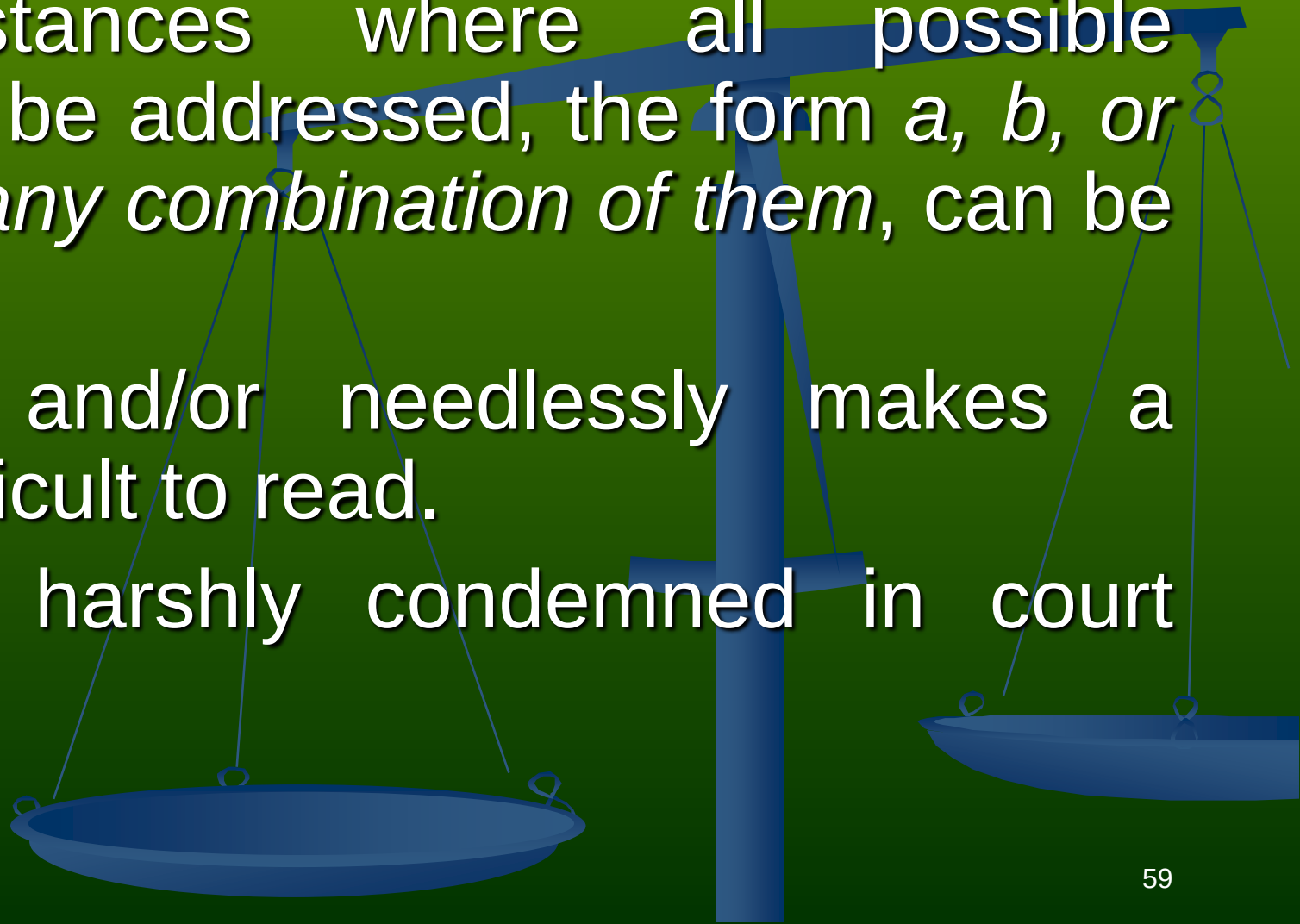
And/or

- The combination *and/or* is not grammatically acceptable.
- In almost all cases either an *and* or an *or* alone is appropriate.
- As an example: *This ordinance does not apply to vegetable gardens, provided they are not within ten feet of any waterbody ~~and/~~or wetland*.



And/or

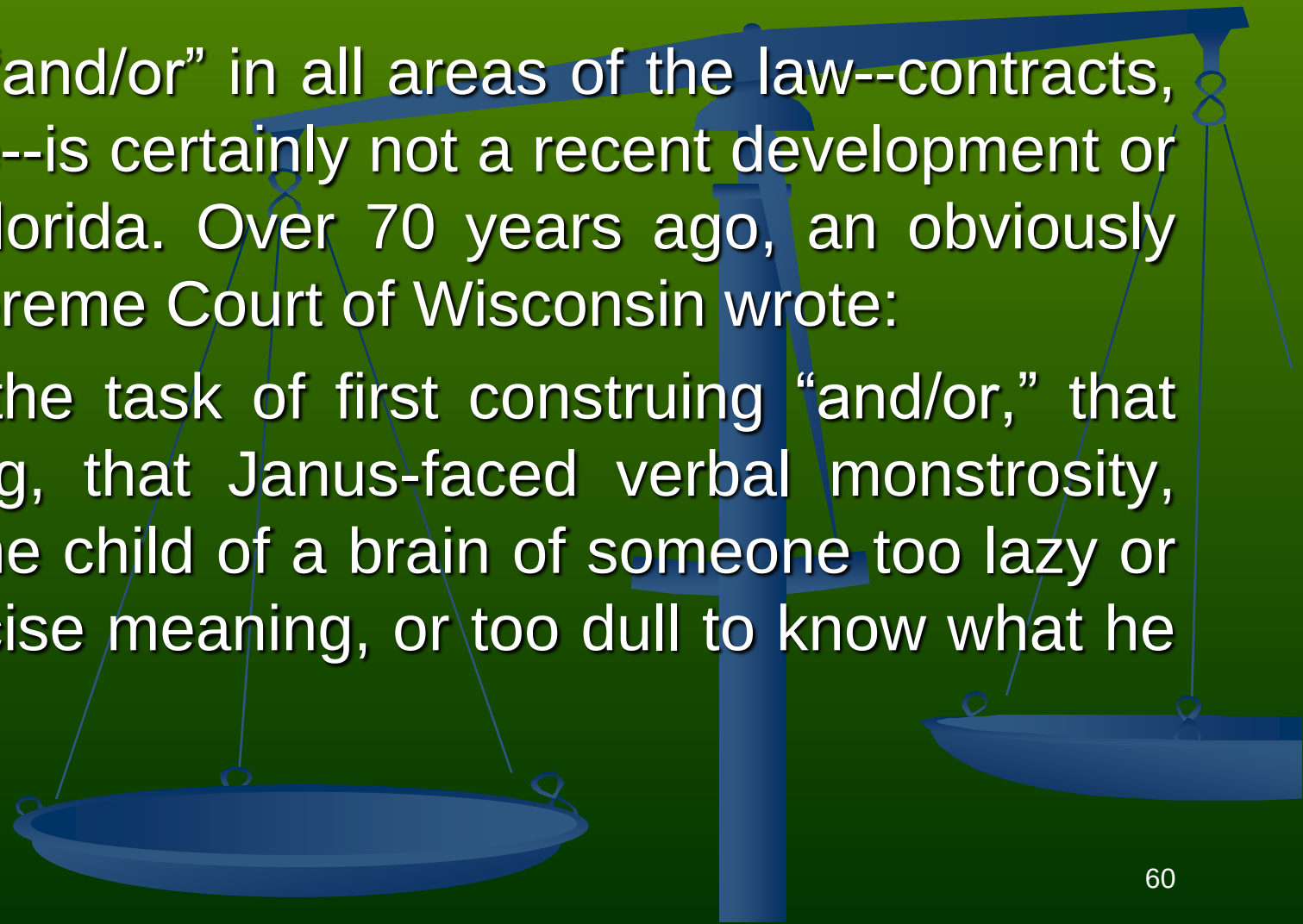
- In the few instances where all possible combinations must be addressed, the form *a, b, or both*, or *a, b, c, or any combination of them*, can be used.
- The combination and/or needlessly makes a document more difficult to read.
- *And/or* has been harshly condemned in court cases.



And/or and the Florida Third District

The confusion created by “and/or” in all areas of the law--contracts, criminal law, and otherwise--is certainly not a recent development or a contagion confined to Florida. Over 70 years ago, an obviously annoyed Justice of the Supreme Court of Wisconsin wrote:

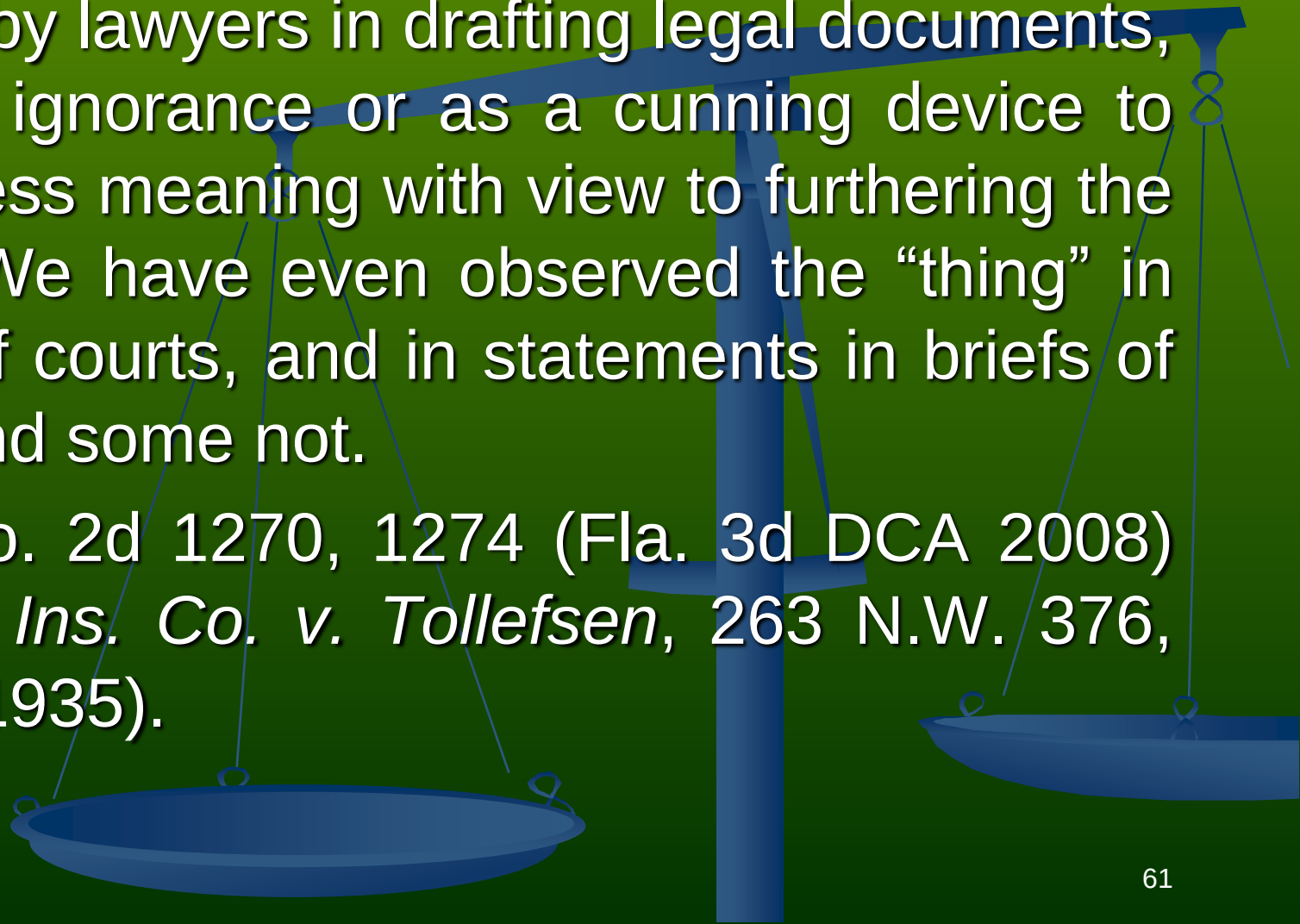
[W]e are confronted with the task of first construing “and/or,” that befuddling, nameless thing, that Janus-faced verbal monstrosity, neither word nor phrase, the child of a brain of someone too lazy or too dull to express his precise meaning, or too dull to know what he did mean,



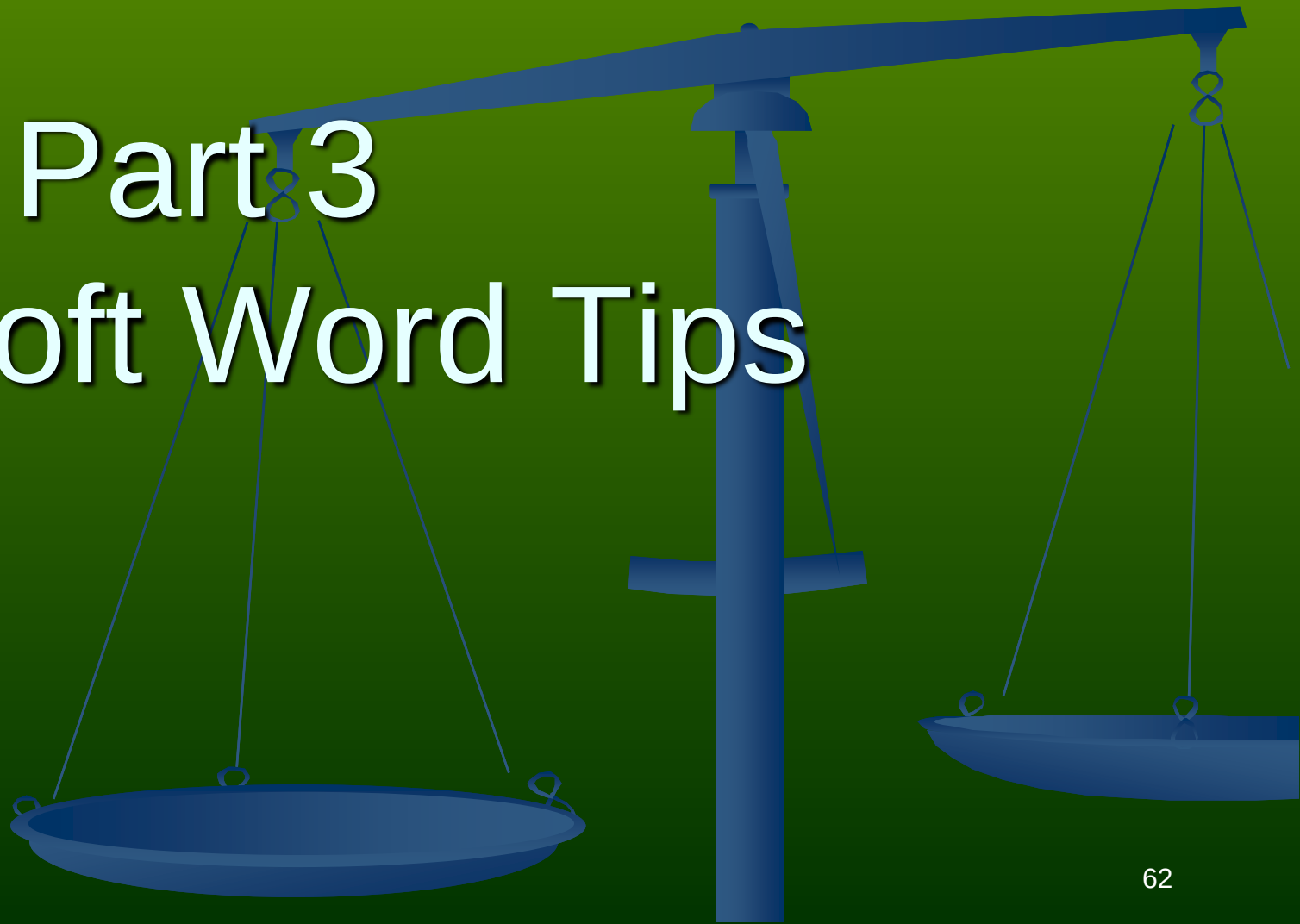
And/or and the Florida Third District

. . . now commonly used by lawyers in drafting legal documents, through carelessness or ignorance or as a cunning device to conceal rather than express meaning with view to furthering the interest of their clients. We have even observed the "thing" in statutes, in the opinion of courts, and in statements in briefs of counsel, some learned and some not.

Aguilera v. State, 975 So. 2d 1270, 1274 (Fla. 3d DCA 2008) *quoting Employers' Mut. Ins. Co. v. Tollefsen*, 263 N.W. 376, 377, 219 Wis. 434 (Wis. 1935).

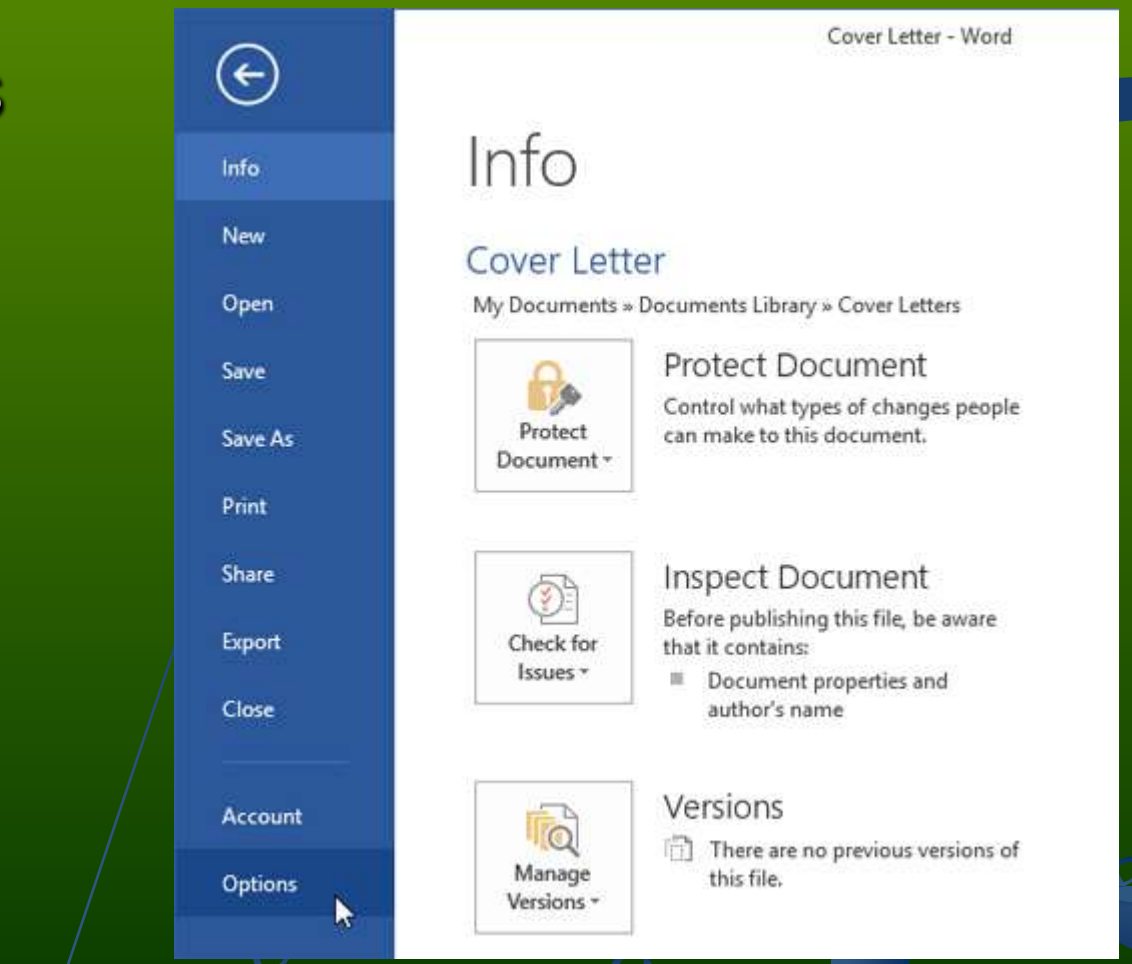


Part 3
Microsoft Word Tips

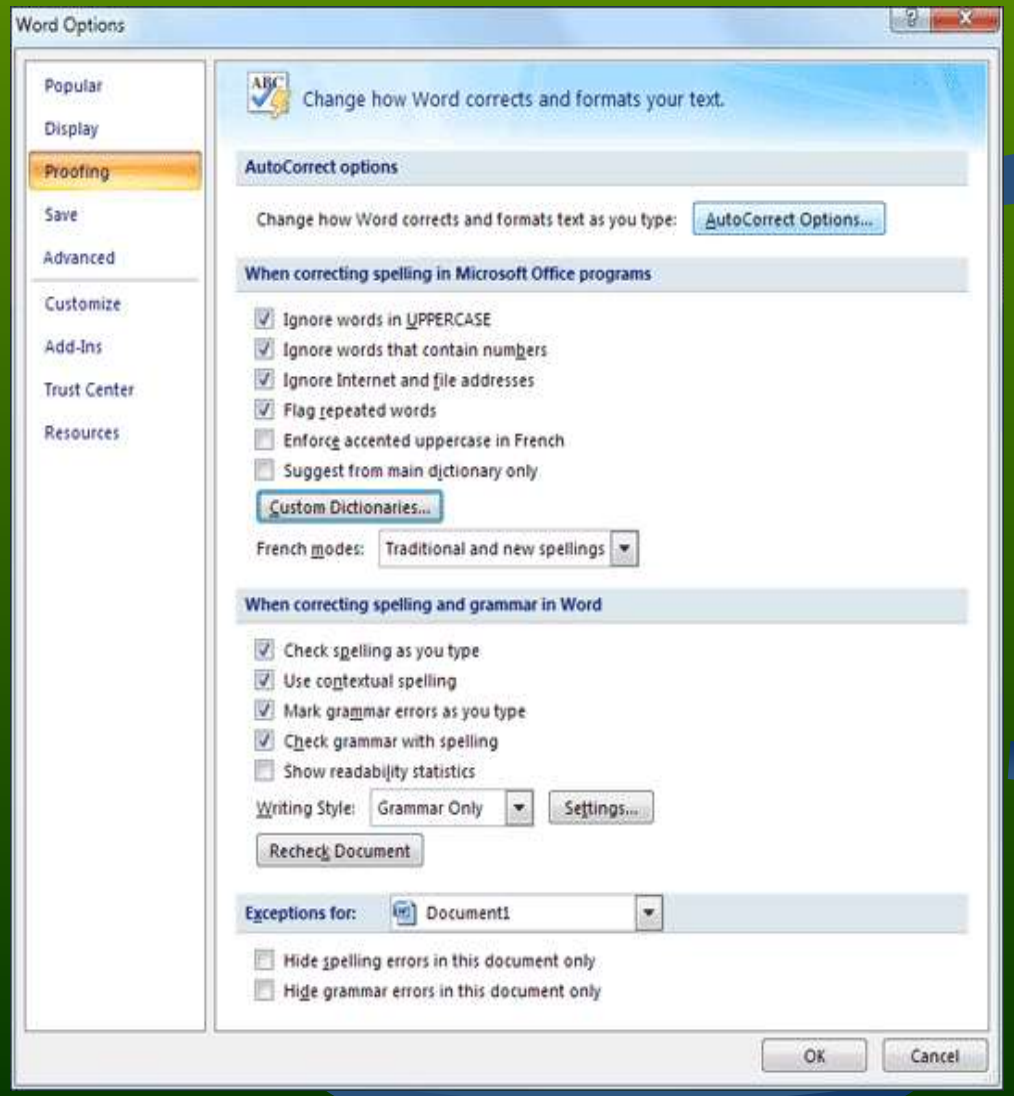


Microsoft Word Tips

- Setting File Options
- File | Options



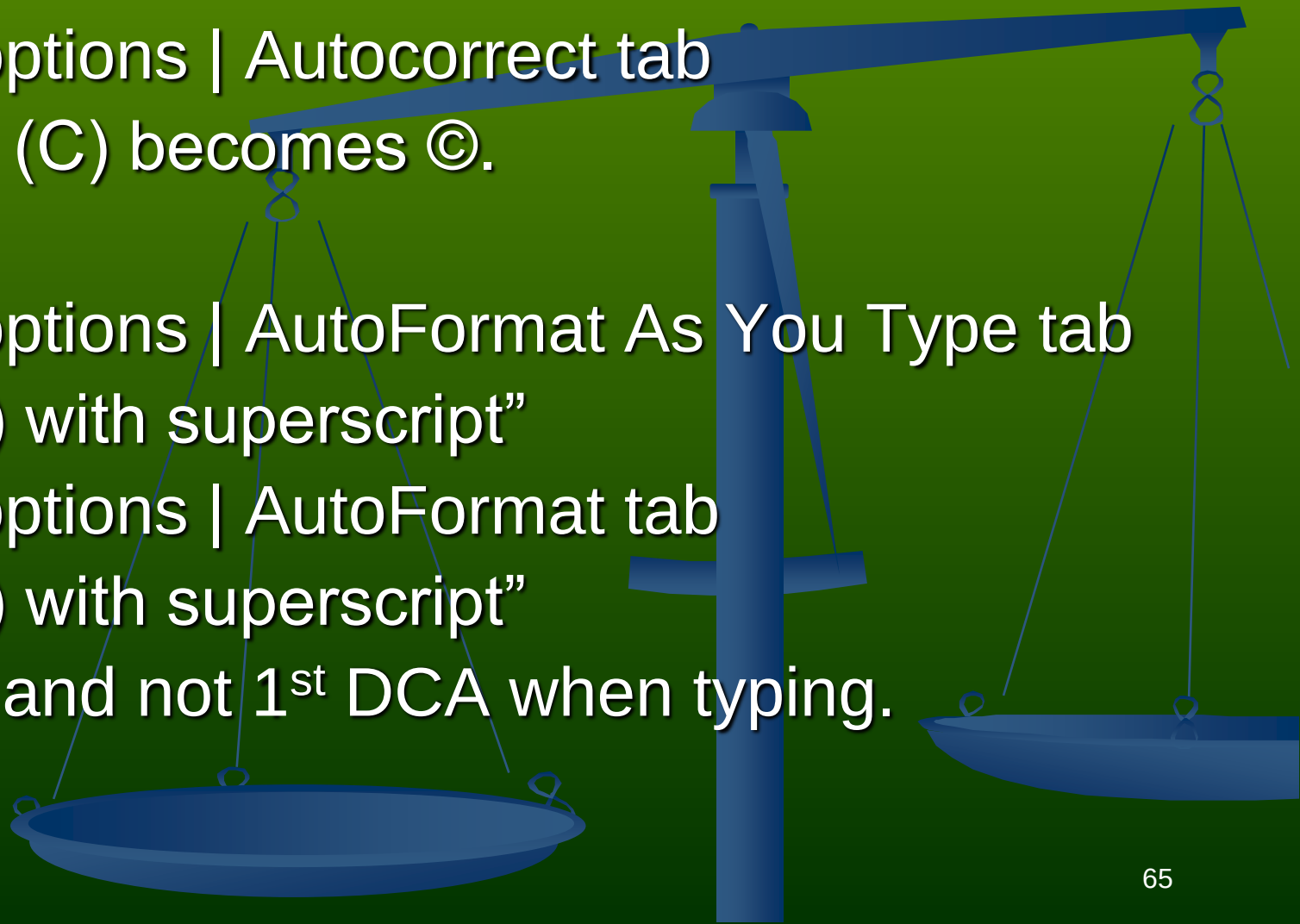
Microsoft Word Tips



Microsoft Word Tips

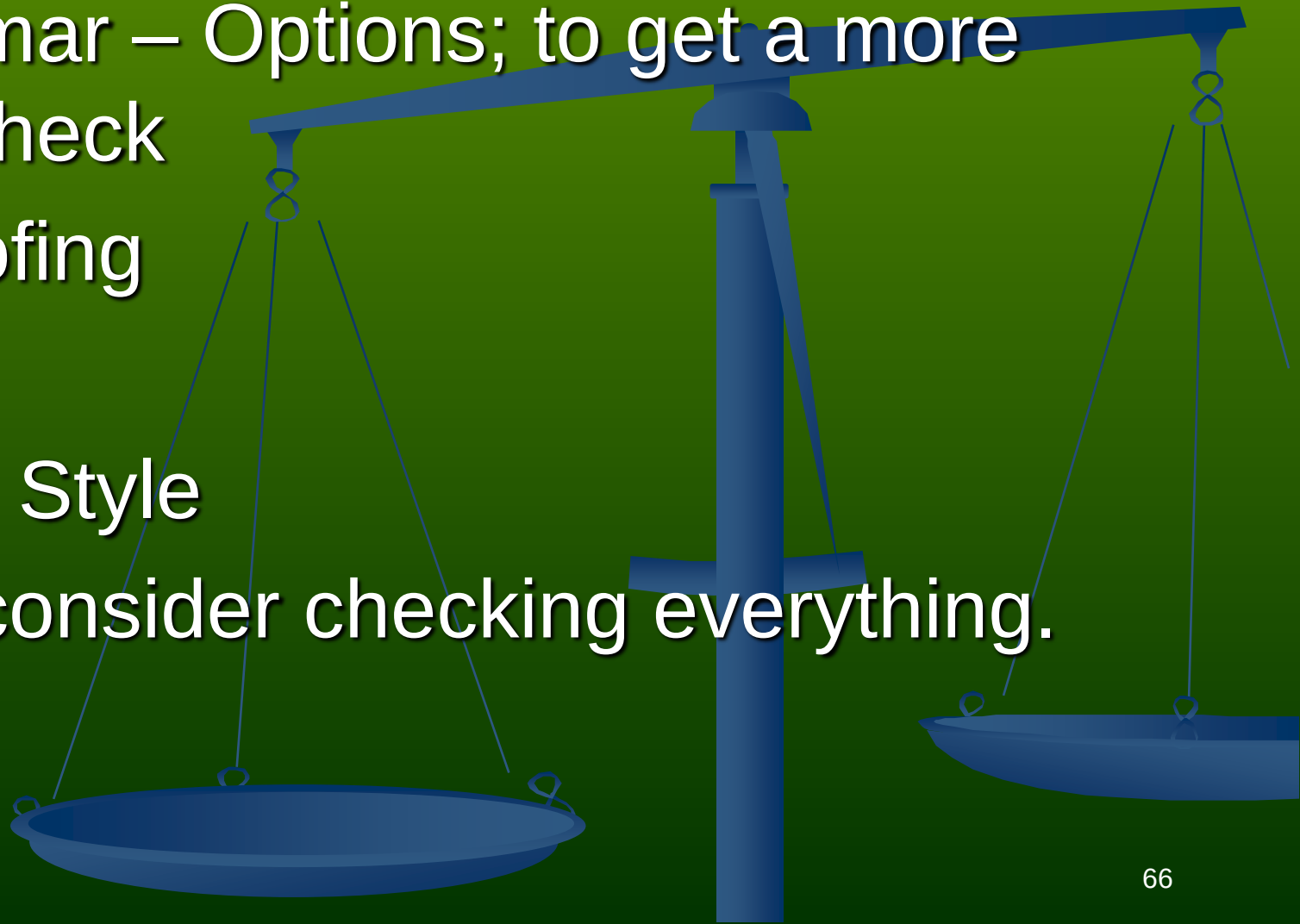
- File | Options
- Proofing | Autocorrect options | Autocorrect tab
- Delete “(C)” ; otherwise (C) becomes ©.

- Proofing | Autocorrect options | AutoFormat As You Type tab
- Uncheck “Ordinals (1st) with superscript”
- Proofing | Autocorrect options | AutoFormat tab
- Uncheck “Ordinals (1st) with superscript”
- This results in 1st DCA and not 1st DCA when typing.



Microsoft Word Tips

- Spelling and Grammar – Options; to get a more detailed grammar check
- File | Options | Proofing
- Writing Style
- Click Grammar and Style
- Click Settings and consider checking everything.



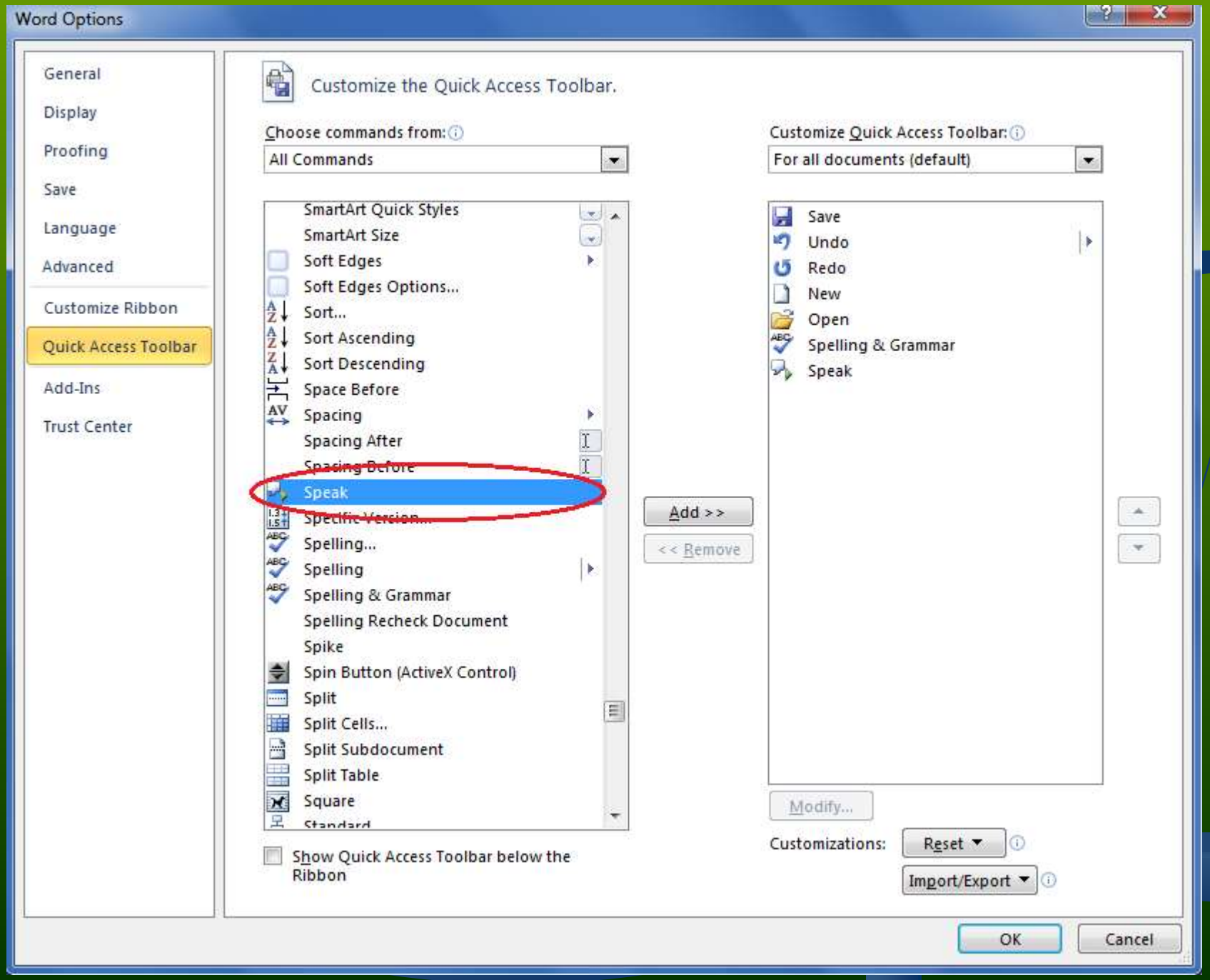
Microsoft Word Tips

- Speak Selected Text Command
- This command will read the text, helping to spot errors.

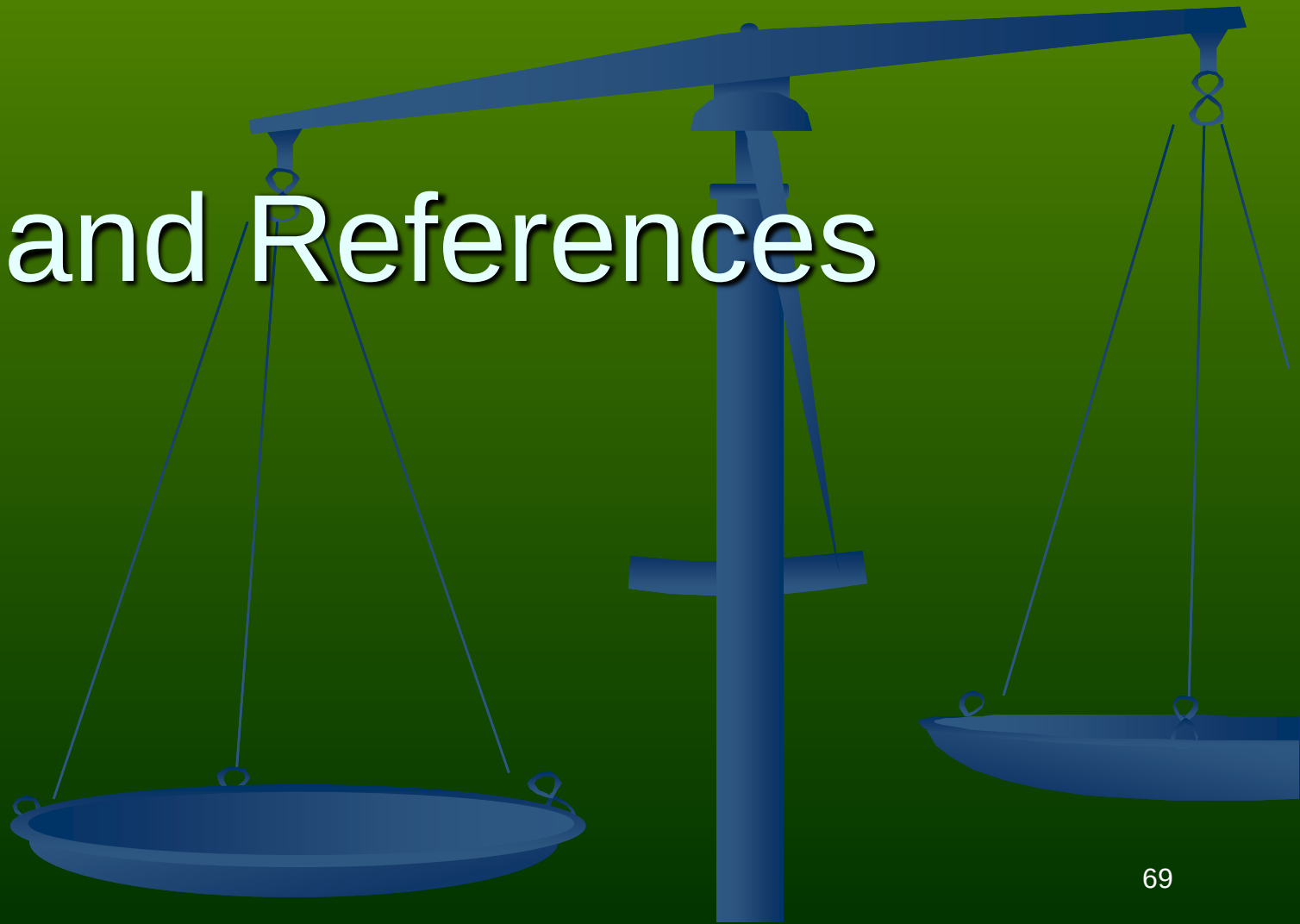
- To Place on Quick Access Toolbar
- Click Customize Quick Access Toolbar →
- Click More Commands



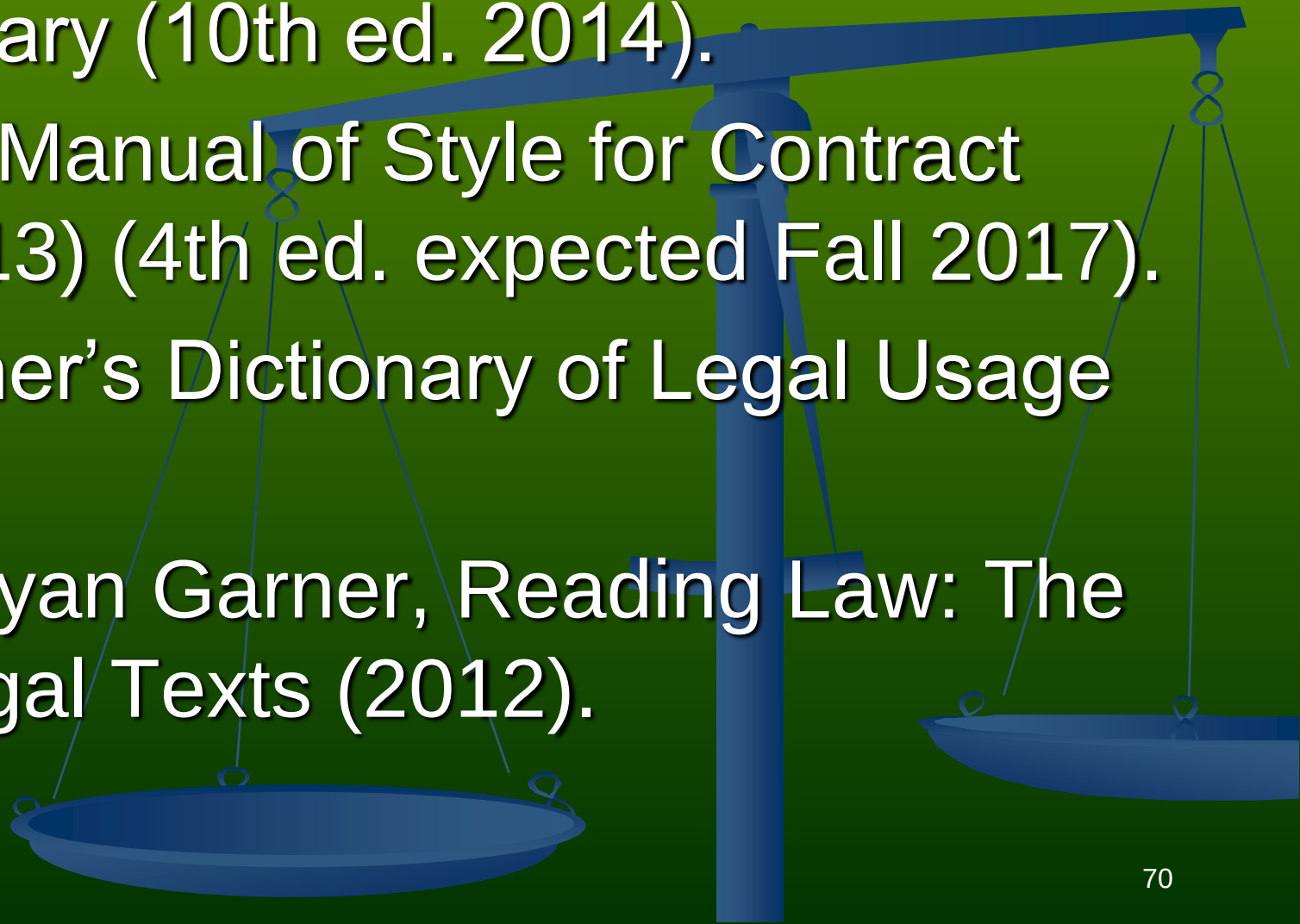
- Click All Commands
- Look for and select “Speak”
- Click Add to add to Quick Access Toolbar



Sources and References



Sources



- Black's Law Dictionary (10th ed. 2014).
- Kenneth Adams, A Manual of Style for Contract Drafting (3d ed. 2013) (4th ed. expected Fall 2017).
- Bryan Garner, Garner's Dictionary of Legal Usage (3d ed. 2011).
- Antonin Scalia & Bryan Garner, Reading Law: The Interpretation of Legal Texts (2012).

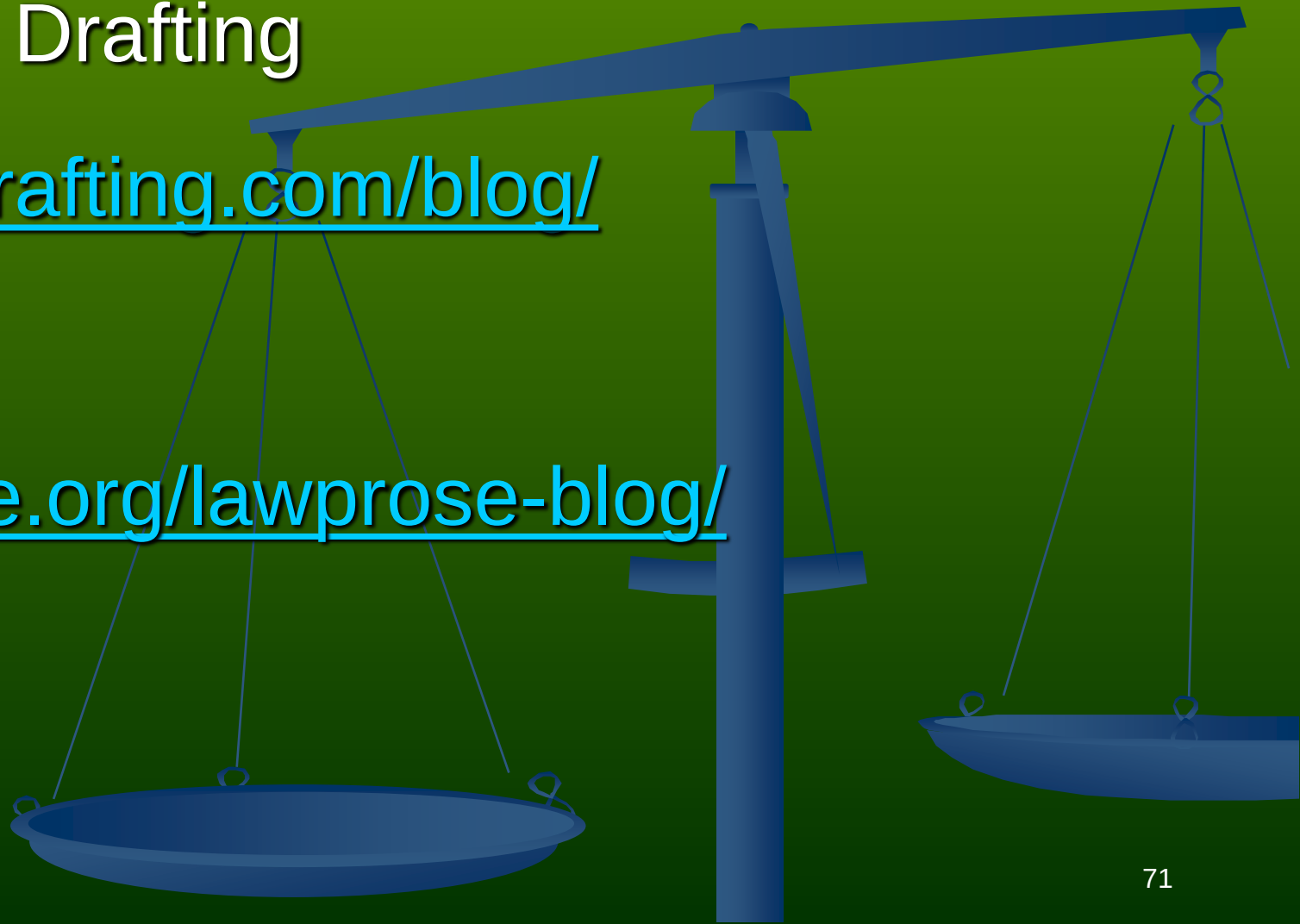
Blogs

- Adams on Contract Drafting

  http://www.adamsdrafting.com/blog/

- LawProse

  http://www.lawprose.org/lawprose-blog/



UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

ABILITY HOUSING OF NORTHEAST FLORIDA, INC., Plaintiff, v. CITY OF JACKSONVILLE, Defendant.	)	Case No. 3:15-cv-1380-J-32PDB
DISABILITY RIGHTS FLORIDA, INC., Plaintiff, v. CITY OF JACKSONVILLE, Defendant.	)	Case No. 3:15-cv-1411-J-32JRK
UNITED STATES OF AMERICA, Plaintiff, v. CITY OF JACKSONVILLE, FLORIDA Defendant.	)	Case No. 3:16-cv-1563-J-32PDB

CONSENT DECREE BETWEEN THE UNITED STATES OF AMERICA AND THE CITY OF JACKSONVILLE, FLORIDA

The United States of America alleges as follows:

NATURE OF ACTION

1. The United States initiated this action to enforce the Fair Housing Act, Title VIII of the Civil Rights Act of 1968, as amended ("FHA"), 42 U.S.C. §§ 3601 *et seq*., and Titles II and V of the Americans with Disabilities Act of 1990, as amended ("ADA"), 42 U.S.C. §§ 12131–12134, 12203, and their implementing regulation, 28 C.F.R. Part 35. In its Complaint, the United States alleges that the City of Jacksonville, Florida ("City") discriminated on the basis of disability, in violation of the FHA and ADA, by preventing Ability Housing, Inc. ("Ability Housing") from developing permanent supportive housing for people with disabilities within its Springfield Historic District ("Springfield") and by retaliating against Ability Housing after it made a complaint under the FHA and ADA.

2. The United Stated alleges in the Complaint that the City's application of its Zoning Code to Ability Housing has denied or has otherwise made housing unavailable because of disability, in violation of the FHA, 42 U.S.C. § 3604(f)(1); that the City denied Ability Housing's requests for a reasonable accommodation to the Zoning Code when such accommodation may have been necessary to afford persons with disabilities an equal opportunity to use and enjoy a dwelling, in violation of 42 U.S.C. § 3604(f)(3)(B); and that the City retaliated against Ability Housing because it made a complaint under the FHA, in violation of 42 U.S.C. § 3617.

3. The United States alleges that the City's actions constitute a denial of rights protected by the FHA to a group of persons, which raises an issue of general public importance, in violation of 42 U.S.C. § 3614(a).

4. The United States also alleges that the City violated Title II of the ADA, 42 U.S.C. § 12132, by excluding individuals with disabilities from participation in, and by denying them the benefits, services, programs, or activities of a public entity, as well as by failing to make reasonable modifications to its policies, practices, or procedures; and that the City violated Title V of the ADA, 42 U.S.C. § 12203, by discriminating against Ability Housing because it opposed an act or practice made unlawful by Title II of the ADA.

5. On November 18, 2015, Ability Housing filed a federal lawsuit in this Court under the FHA and ADA against the City (Case No. 3:15-CV-1380) alleging claims related to those alleged in the United States' Complaint. Disability Rights Florida, an advocate for people with disabilities throughout Florida (together with Ability Housing, "the Private Plaintiffs"), also filed suit on November 25, 2015 (Case No. 3:15-CV-1411). In the two suits, which are consolidated with the United States' Complaint, the Private Plaintiffs and the City reached a settlement agreement resolving the Private Plaintiffs' complaints ("Private Settlement Agreement"). The Private Settlement Agreement appears as Appendix A. As stipulated in the Private Settlement Agreement, within 10 days of the City's fulfillment of its obligations under the Private Settlement Agreement, the Private Plaintiffs will dismiss with prejudice their cases (Case Nos. 3:15-CV-1380 and 3:15-CV-1411).

6. The United States and the City have voluntarily agreed to resolve the United States' claims against the City by entering into this Consent Decree ("Decree"), as indicated by the signatures below and by the ratification of the Decree by the Jacksonville

City Council on _____ through Ordinance No. _____. Together with the Private Settlement Agreement, as incorporated herein, this Decree is intended to effect a comprehensive settlement of the United States' and the related claims of the Private Plaintiffs.

7. The City expressly denies any wrongdoing as alleged by the United States in the Complaint. It is understood and acknowledged that this Decree does not constitute an admission by the City of any violation of the FHA, ADA, or any other law.

Therefore, it is hereby ORDERED, ADJUDGED, AND DECREED as follows:

JURISDICTION

8. This Court has jurisdiction over this action, and may grant the relief sought herein, pursuant to 28 U.S.C. §§ 1331 and 1345; 42 U.S.C. § 3614(a); 42 U.S.C. §§ 12132-12133, 12203(c); and 28 U.S.C. §§ 2201 and 2202.

GENERAL INJUNCTION AND NONDISCRIMINATION PROVISIONS

9. The City, its agents, employees, successors, and all persons in active concert or participation with it, shall not:

a. Deny, or otherwise make unavailable, a dwelling to a buyer or renter because of a disability of that buyer or renter, of any person residing in or intending to reside in such dwelling, or of any person associated with such buyer or renter;

b. Adopt, maintain, enforce, or implement any zoning or land use laws, regulations, policies, procedures or practices that discriminate on the basis of disability in violation of the FHA and the ADA;

c. Refuse to make reasonable accommodations[1] in the application of rules, policies, practices or services when such accommodations may be necessary to afford a person or persons with disabilities an equal opportunity to use and enjoy a dwelling; or

d. Coerce, intimidate, threaten, or interfere with persons in the exercise of or enjoyment of, or on account of their having exercised or enjoyed, or on account of their having aided or encouraged any other person in the exercise of enjoyment of, any right granted or protected by the FHA or ADA.

SPECIFIC INJUNCTIVE RELIEF

10. As stipulated in the Private Settlement Agreement, the City shall rescind the May 29, 2014 Written Interpretation related to Ability Housing within 10 days of the City Council's approval of the Private Settlement Agreement referenced in Paragraph 5, above.

11. The City shall not deem any entity or individual(s) ineligible to receive City funds on the basis that the entity or individual(s) complained, in any manner and including but not limited to filing a lawsuit or pursuing litigation, that the City discriminated against the entity, individuals whom the entity supports, or the individual(s), in violation of their civil rights. Ability Housing is therefore eligible to apply for, compete for, and to receive Jacksonville Journey and any other City funds

[1] In this Decree, the term "reasonable accommodation," *see* 42 U.S.C. § 3604(f)(3)(B), also includes "reasonable modification," as used in the implementing regulation for Title II of the ADA, 28 C.F.R. § 35.130(b)(7).

administered by the City, the Local Initiative Support Corporation ("LISC"), or by any other entity for which Ability Housing is otherwise qualified to receive notwithstanding its current litigation with the City in Case No. 3:15-CV-1380 and Case No. 2014-CA-8148 in the Circuit Court, Fourth Judicial District, in and for Duval County, Florida.

12. As stipulated in the Private Settlement Agreement, on _____[BY APRIL 30, 2017, OR SUCH LATER DATE AS AGREED UPON BY THE CITY AND THE UNITED STATES], the City amended its Zoning Code, Chapter 656 of the City of Jacksonville Ordinance Code, by passing Ordinance No. _____, which appears in Appendix B [ORDINANCE MUST BE SUBSTANTIALLY SIMILAR TO THE PROPOSED ORDINANCE]. Among other changes, these amendments make clear that the permanent supportive housing at issue in the Complaint is properly characterized as a multiple-dwelling use and is permitted wherever multiple-family dwellings are permitted. The amendments generally include changes to the following:

a. Part 1 (General Provisions), Subpart A (Basic Provisions) to recognize and require construction of the Zoning Code consistent with civil rights laws;
b. Part 1 (General Provisions), Subpart B (Administration) to create a procedure for persons with disabilities to request reasonable accommodations from provisions of the Zoning Code;
c. Part 3 (Schedule of District Regulations), Subpart F (Planned Unit Development) to prohibit the use of planned unit developments to discriminate or violate civil rights;

d. Part 3 (Schedule of District Regulations), Subpart I (Springfield Zoning Overlay and Historic District Regulations) to remove prohibitions on housing for people with disabilities, allow group care homes by exception in the RMD-S district, and to allow residential treatment facilities as allowable uses by exception in the CCG-S district; and

e. Part 16 (Definitions) to amend definitions to make clear that the permanent supportive housing at issue in the Complaint is properly characterized as a multiple-dwelling use and is permitted wherever multiple-family dwellings are permitted; to add definitions for supportive services and reasonable accommodations; and to ensure that the definitions reflect that a resident's receipt of supportive services in a dwelling unit does not change the dwelling unit into another type of use.

REASONABLE ACCOMMODATION POLICY

13. As stipulated in the Private Settlement Agreement and referenced in Paragraph 12(b), the City has amended its Zoning Code to authorize its Zoning Administrator to grant "administrative deviations," as described in Section 656.109 of the City's Zoning Code, for reasonable accommodation requests. *See* Appendix B. Within sixty (60) days of the entry of this Decree, the City shall also submit to the United States a written policy that details the process by which persons may request reasonable accommodations or modifications on the basis of disability from the City's zoning, land use, and code requirements ("Reasonable Accommodation Policy" or "Policy"). Prior to

its implementation, the Policy must be approved by the United States. The Policy shall comply with the FHA and the ADA and shall include the following provisions:

a. The City shall provide a description of where and how the City will accept and process requests for accommodations in its rules, policies, practices, or in the provision of its services;

b. The City shall acknowledge all requests for reasonable accommodations, in writing, within fifteen (15) days of the City's receipt of an oral or written request;

c. The City shall provide written notification to those requesting a reasonable accommodation of the decision regarding their request for accommodation within thirty (30) days of the receipt of the request; if the City denies a request, it shall include an explanation of the basis for such denial in this written notification;

d. The City shall retain records of all oral and written reasonable accommodation and modification requests, and the City's responses thereto, including (i) the name, address, and telephone number of the person making the request; (ii) the date on which the request was received; (iii) the nature of the request; and (iv) the final written decision regarding the request; and

e. The City shall not impose any fees or costs for requesting a reasonable accommodation or modification, or otherwise retaliate against any person

who has exercised his or her right under the Fair Housing Act to make one or more reasonable accommodation requests.

14. Within ten (10) days of the approval of the Reasonable Accommodation Policy by the United States and throughout the term of this Decree, the City shall implement the Policy. The City shall post and publicly display the Policy on the City's website, and at the offices of the City with responsibility for administration and enforcement of the City's zoning, land use, and code requirements.

COMPLIANCE OFFICER

15. Within thirty (30) days of the entry of this Decree, the City shall designate an individual as the Fair Housing Compliance Officer ("FHCO"). The FHCO shall have the responsibility to receive complaints of alleged housing discrimination and disability discrimination against the City; serve as a resource to the City and its officers, elected and appointed officials, employees, and agents on fair housing and disability rights; and in consultation with the City's attorneys, the Office of General Counsel, coordinate the City's compliance with this Decree.

16. The FHCO shall be designated to receive and review all complaints of housing discrimination and disability discrimination made against the City or any officer, elected or appointed official, employee, or agent of the City. If complaints are made verbally, the FHCO shall make a contemporaneous written record of those complaints.

17. The FHCO shall maintain copies of this Decree, the Reasonable Accommodation Policy, and the HUD Complaint form and HUD pamphlet entitled "Are you a victim of housing discrimination?" (HUD official forms 903 and 903.1,

respectively) and make these materials available to anyone, upon request, without charge, including all persons making fair housing complaints to the FHCO.

18. The FHCO shall report to the City every three months on activities taken in compliance with this Decree.

FAIR HOUSING AND ADA TRAINING

19. Within ninety (90) days of the entry of this Decree, the City shall provide training(s) on the requirements of the Decree, the FHA (in particular, those provisions that relate to disability discrimination), and the ADA (in particular, the ADA's application to zoning). The training(s) shall be provided to all City officers, elected and appointed officials, and employees who have duties related to the planning, zoning, permitting, construction, code enforcement, or occupancy of residential housing, including but not limited to professional staff and employees of the Planning and Development Department, the Mayor and members of the City Council, and members of the Planning Commission and Certificate of Use Board. The training(s) shall be conducted in accordance with the following:

a. The training(s) shall be conducted by a qualified third party or parties, subject to the approval of the United States. The trainer(s) shall not be connected to the City or its officers, elected or appointed officials, employees, agents or counsel. No fewer than sixty (60) days before the date of each training under this Paragraph, the City shall submit to counsel for the United States the name of the person(s) or organization(s) proposed to provide the training, together with copies of the professional

qualifications of such person(s) or organization(s), and copies of all materials to be used in the training.

b. Any expenses associated with the training(s) shall be borne by the City.

c. The training(s) shall be video-recorded and the City shall maintain copies of the written materials provided for each training. Each newly elected, appointed, or hired individual covered by this Paragraph shall first receive training within thirty (30) days after the date he or she enters office or commences service or employment, either (1) by attending the next regularly scheduled live training, if it occurs within the thirty (30) day period, or (2) by viewing the video recording of the most recent live training and receiving copies of any written materials provided for that training.

d. The City shall provide a copy of this Decree to each person required to receive the training(s).

20. The City shall require each trainee to execute a certification confirming: (i) the trainee's attendance; (ii) the date of the training; and (iii) the trainee's receipt and comprehension of the Decree. The Certification of Training and Receipt of Consent Decree appears as Appendix C to this Decree. All trainees shall complete the certifications at the conclusion of each training session.

REPORTING AND RECORDKEEPING

21. Within one hundred (100) days of the entry of this Decree, the City shall submit all executed copies of the Certification of Training and Receipt of Consent Decree (Appendix C) described in Paragraph 20.[2]

22. The City shall prepare compliance reports twice annually detailing all actions the City has taken to fulfill its obligations under this Decree since the last compliance report. The City shall submit its first report to the United States within six (6) months of entry of the Decree, and subsequent reports every six (6) months thereafter for the duration of the Decree, except that the final report shall be delivered to the United States not less than sixty (60) days prior to the expiration of this Decree. The City shall include in the compliance reports, at a minimum, the following information:

a. The name, address, and title of the employee or official serving as the Fair Housing Compliance Officer referred to in Paragraph 15;

b. A summary of each zoning or land-use request or application, including requests for reasonable accommodations, related to housing for persons with disabilities, indicating: (i) the date of the application; (ii) the applicant's name; (iii) the applicant's current street address; (iv) the street address of the subject property or proposed housing; (v) the City's decision(s) regarding the matter, including any decision on appeal; (vi) the

[2] The City shall send all documents, notices, and other communications required by the Decree to be sent to the United States via regular U.S. mail to:

Chief, Housing and Civil Enforcement Section
Civil Rights Division
United States Department of Justice
950 Pennsylvania Ave., NW – G Street
Washington, DC 20530
Attn: DJ# 175-17M-513

reasons for each decision, including a summary of the facts upon which the City relied; and (vii) complete copies of any minutes and audio or video recordings from all meetings or hearings discussing the zoning request or application;

c. Copies of any Certifications of Training and Receipt of Consent Decree (Appendix C) described in Paragraph 20, above, that are signed after the preceding compliance report was issued; and

d. Any complaints of housing discrimination or disability discrimination by the City, either received by the FHCO pursuant to Paragraph 16 or by another City employee or official, including a copy of the complaint, any documents filed with the complaint, and any written response to the complaint by the City. If the complaint has not been resolved, the City shall report any efforts the City undertook or plans to undertake to resolve the complaint.

23. Within thirty (30) days of adopting any amendments or modifications to the Zoning Code or to other City rules, laws, or ordinances that may detrimentally or directly affect housing for persons with disabilities, the City shall send copies of the enacted amendments or modifications to the United States. Any amendment or modification must be consistent with Paragraph 12 of this Decree.

24. The City shall retain all records relating to any provision of this Decree. Counsel for the United States shall have the opportunity to inspect and copy any such records after giving reasonable notice to counsel for the City.

COMPENSATION OF AGGRIEVED PARTIES

25. Within thirty (30) days of the City Council's approval of the Private Settlement Agreement, the City shall pay Ability Housing and Disability Rights Florida the amounts agreed upon in the Private Settlement Agreement (Appendix A).

26. As stipulated in the Private Settlement Agreement, within one (1) year of the Private Plaintiffs' dismissal of their cases (Case Nos. 3:15-CV-1380 and 3:15-CV-1411), the City shall establish and award a 1.5 million dollar ($1,500,000) grant for the development of Permanent Supportive Housing within the City for persons with disabilities. The grant shall be awarded to a qualified developer through a competitive grant process. Ability Housing shall be eligible to participate in the grant process and to receive some or all of the grant award.

CIVIL PENALTY

27. Within ten (10) days of the entry of this Decree, the City shall pay twenty-five thousand dollars ($25,000) to the United States Treasury as a civil penalty pursuant to 42 U.S.C. § 3614(d)(1)(C) to vindicate the public interest. The payment shall be in the form of an electronic fund transfer pursuant to written instructions to be provided by the United States.

28. In the event that the City, its agents, or its employees engage in any future violation(s) of the FHA, such violation(s) shall constitute a "subsequent violation" under 42 U.S.C. § 3614(d)(1)(C)(ii).

DURATION

29. This Decree shall remain in effect for a period of five (5) years after its entry. The Court shall retain jurisdiction over the action for the duration of the Decree for the purpose of enforcing its provisions and terms. The United States may move the Court to extend the duration of the Decree in the interests of justice.

30. Any time limits for performance imposed by this Decree may be extended by mutual written agreement of the parties.

ENFORCEMENT

31. The parties shall endeavor in good faith to resolve informally any differences regarding interpretation of and compliance with this Decree prior to bringing such matters to the Court for resolution. However, in the event of a failure by the City to perform in a timely manner any act required by this Decree or otherwise to act in conformance with any provisions thereof, the United States may move this Court to impose any remedy authorized by law or equity. Remedies include, but are not limited to, findings of contempt, an order requiring performance of such act or deeming such act to have been performed, and an award of any damages, costs, and reasonable attorneys' fees that may have been occasioned by the violation or failure to perform.

COSTS AND FEES

32. The parties will bear their own costs and fees associated with this litigation.

TERMINATION OF LITIGATION HOLD

33. The parties agree that, as of the date of the entry of this Consent Decree, litigation is not "reasonably foreseeable" concerning the matters described above. To the extent that either party previously implemented a litigation hold to preserve documents,

electronically stored information (ESI), or things related to the matters described above, the party is no longer required to maintain such litigation hold. Nothing in this Paragraph relieves either party of any other obligations imposed by this Consent Decree.

DONE AND ORDERED at Jacksonville, Florida this _____ day of _____, 2017.

_____
TIMOTHY J. CORRIGAN
United States District Judge

For Plaintiff United States:

Dated:

A. LEE BENTLEY, III
United States Attorney
Middle District of Florida

_____
YOHANCE A. PETTIS
Fla. Bar No. 021216
Assistant United States Attorney
United States Attorney's Office
Middle District of Florida
400 North Tampa Street, Suite 3200
Tampa, FL 33602
Phone: (813) 274-6000
Fax: (813) 274-6198
Yohance.Pettis@usdoj.gov

VANITA GUPTA
Principal Deputy Attorney General
Civil Rights Division

SAMEENA SHINA MAJEED
Chief

_____
MICHAEL S. MAURER
Deputy Chief
ABIGAIL B. MARSHAK
NY Reg. No. 5350053
Trial Attorney
U.S. Department of Justice
Civil Rights Division
Housing and Civil Enforcement Section
950 Pennsylvania Avenue NW – G St.
Washington, DC 20530
Phone: (202) 514-1968
Fax: (202) 514-1116
Abigail.Marshak@usdoj.gov

For Defendant City of Jacksonville:

Dated:

By:_____

Its: _____

Date:_____

_____
Witness

Print name:_____

Date: _____

APPENDIX A

[Private Settlement Agreement]

SETTLEMENT AGREEMENT AND RELEASE

THIS SETTLEMENT AGREEMENT AND RELEASE (***"Settlement Agreement"***) is entered into between the Plaintiffs in the below referenced lawsuits, Ability Housing, Inc. f/k/a Ability Housing of Northeast Florida, Inc. (***"Ability Housing"***) and Disability Rights Florida (***"DRF,"*** and collectively with Ability Housing, ***"Plaintiffs"***), and Defendant, the City of Jacksonville, (***"The City"***) (collectively, the ***"Parties"***).

RECITALS

A. These actions are currently pending in the United States District Court for the Middle District of Florida, styled as *Ability Housing, Inc. v. City of Jacksonville*, Case No. 3:15-cv-1380-J-32PDB, and *Disability Rights Florida v. City of Jacksonville*, Case No. 3:15-cv-1411, which have been consolidated under Case No. 3:15-cv-1380 (the consolidated cases shall hereinafter be referred to as the ***"Action"***).

B. Ability Housing is a non-profit corporation based in Jacksonville whose mission is to provide quality, affordable, community inclusive housing for individuals and families at risk of homelessness and adults with disabilities.

C. DRF is a federally funded, non-profit corporation whose mission is to advance the quality of life, dignity, equality, self-determination, and freedom of choice of persons with disabilities through collaboration, education, advocacy, as well as legal and legislative strategies.

D. Ability Housing sought to redevelop an existing 12-unit apartment building in the City's Springfield neighborhood for the purpose of renting units to disabled, chronically homeless persons, as permanent supportive housing,[1] using a grant from the Florida Housing Finance Corporation (the ***"Project"***). Before permits were obtained to redevelop the building, the Director of the Planning and Development issued a Written Interpretation on May 29, 2014, which distinguished multi-family housing (allowed by right) from the proposed use of the Project and concluded that it was a prohibited Special Use in the Springfield Overlay District. The Written Interpretation's rationale distinguished the proposed use from the allowed multi-family use on the basis that the residents would have disabilities and receive support services. On appeal to the Planning Commission, where Ability Housing alleged that the federal fair housing laws prohibited such a distinction, the Commission upheld the Written Interpretation.

E. In 2015, Ability Housing sought a Certificate of Use from the Zoning Administrator for the Project, asserting that a denial would be unlawful discrimination against persons with disabilities and providers of housing for persons with disabilities. The City denied the Certificate of Use, citing to the Written Interpretation. On appeal to the Certificate of Use Appeals Board, the City again denied the Certificate, citing to the Written Interpretation.

F. Ability Housing brought the Action under the Fair Housing Act, 42 U.S.C. § 3601 et seq. (***"FHA"***), and the Americans with Disabilities Act, 42 U.S.C. § 12131 et seq. (***"ADA"***),

[1] Permanent supportive housing includes making health and social services available to residents.

alleging that the City violated Ability Housing's rights and expressly discriminated against persons with disabilities by denying Ability Housing a Certificate of Use for the Project. Additionally, Ability Housing alleged that the City retaliated against Ability Housing for having asserted rights under the FHA and ADA by withholding grant monies that had previously been awarded to Ability Housing and by instituting a code enforcement action against the current owner of the property for the proposed Project. Specifically, Ability Housing alleged that: (i) Local Initiatives Support Coalition (***"LISC"***) was instructed by at least one City official to not make an annual grant of City "Jacksonville Journey" funds to Ability Housing because Ability Housing sued the City, and because the City does not issue grants to organizations which are in active disputes with the City; (ii) thereafter, LISC did not make an annual grant of Jacksonville Journey Funds to Ability Housing; and (iii) LISC had granted Ability Housing Jacksonville Journey funds in prior years.

G. Ability Housing alleged that, because of the City's actions, Florida Housing Finance Corporation withdrew the $1,355,222 grant awarded to Ability Housing to purchase and renovate the 12-unit apartment building. Further, Ability Housing alleges that it was unable to proceed with the Project, it has lost certain out-of-pocket money that it expended on its efforts to pursue the proposed Project, and it has expended attorneys' fees and costs pursuing the Action.

H. DRF brought the Action under the FHA and ADA, alleging that the City's zoning ordinance, the Springfield Overlay, which included a prohibition on new group care homes, residential treatment facilities, and community residential homes within a defined area of Springfield, facially discriminates against persons with disabilities by denying them the right to reside in the dwelling of their choice.

I. The City denies Plaintiffs' allegations, including denying that its actions violated any Federal, State or local law or regulation or that Plaintiffs are entitled to recover any damages in the Action. However, the City affirms that it is its policy, and the policy of the United States, that it is illegal to discriminate against disabled persons, including persons with mental disabilities and providers of housing to disabled persons, and including any retaliation against such persons for asserting their rights, and that disabled persons have the right to live in the neighborhood of their choosing in furtherance of the purposes of these policies.

J. The Parties have investigated the facts and have analyzed the relevant legal issues with regard to the claims and defenses asserted in the Action. The Parties continue to maintain that their respective claims and defenses are viable. However, the Parties have also weighed the uncertainties of trial and the benefits to be obtained under the proposed settlement, and have considered the costs, risks, and delays associated with the continued prosecution of these complex and time-consuming causes of action and the likely appeals of any rulings in favor of either Plaintiffs or the City. These considerations were made after substantial discovery including voluminous document production and numerous depositions.

K. Accordingly, it was the Parties' intention to negotiate in good faith in an attempt to compromise the Parties' respective positions, arguments and defenses and develop and agree upon settlement terms. The Parties' objective for this Settlement Agreement is to encapsulate the settlement terms and conclude this matter to avoid the costs of further litigation and trial, and to settle and dispose of, fully and completely and forever, any and all claims and causes of action

that were asserted or that could have been asserted in the Action on account of the Project or alleged retaliatory conduct by the City.

AGREEMENT

1. DEFINITIONS. The following section defines terms that are not defined above. Some definitions use terms that are defined later in this section:

1.1 The term ***"City's Counsel"*** means Jason Teal, Esquire and Wendy Byndloss, Esquire, Office of General Counsel, City Hall, 117 West Duval Street, Suite 480, Jacksonville, Florida 32202.

1.2 The term ***"City Council"*** means the City Council of the City of Jacksonville.

1.3 The term ***"Court"*** means the United States District Court for the Middle District of Florida, where the Action is pending.

1.4 The term ***"Effective Date"*** means the date the City Council approves this Settlement Agreement.

1.5 The term ***"Ordinance Code"*** means the City of Jacksonville Ordinance Code.

1.6 The term ***"Plaintiffs' Counsel"*** shall mean:

1.6.1 On behalf of Ability Housing: Edward Cole, Esquire and Allison Stocker, Esquire, Akerman LLP, 50 N. Laura Street, Suite 3100, Jacksonville, FL 32202; and

1.6.2 On behalf of DRF: David Boyer, Esquire, and Molly Jean Paris, Esquire, Disability Rights Florida, 1930 Harrison Street, Suite 104, Hollywood, FL 33020.

1.7. The term ***"Settlement"*** means the settlement of the Action.

1.8 The term ***"Zoning Code"*** shall refer to Chapter 656 of the Ordinance Code.

2. SETTLEMENT TERMS.

2.1 Rescission of Written Interpretation. Within ten (10) days of the Effective Date, the City shall rescind the May 29, 2014 Written Interpretation related to the Project.

2.2 Proposed Amendment of City Ordinance. Within thirty (30) days of the Effective Date, the City's Counsel shall submit and present a proposed ordinance in substantially the form set forth on **Exhibit A** to this Settlement Agreement to the

Jacksonville City Council for approval. The Parties recognize that they cannot bind the City Council through this Settlement Agreement and that the proposed ordinance may be altered or rejected during the legislative process. The amendments shall generally include changes to the following:

(a) Part I (General Provisions), Subpart A (Basic Provisions) to recognize and require construction of the Zoning Code consistent with civil rights law, including the FHA and ADA;

(b) Part I (General Provisions), Subpart B (Administration) to create a procedure for persons with disabilities to request reasonable accommodations from provisions of the Zoning Code;

(c) Part 3 (Schedule of District Regulations), Subpart F (Planned Unit Development) to prohibit the use of planned unit developments to discriminate or violate civil rights;

(d) Part 3 (Schedule of District Regulations), Subpart I (Springfield Zoning Overlay and Historic District Regulations) to remove certain prohibitions on housing for persons with disabilities, allow group care homes for persons with disabilities by exception in the RMD-S district, and to allow residential treatment facilities as allowable uses by exception in the CCG-S district; and

(e) Part 16 (Definitions) to amend definitions of group care home for persons with disabilities and residential treatment facilities, and to add definitions for supportive services and reasonable accommodation.

(f) To recognize that a disabled resident's receipt of supportive services in a dwelling unit, provided by the owner, management or third parties, does not change a multiple-dwelling unit or other dwelling unit into another type of differently regulated use.

2.3 Compensation to Plaintiffs. Within (30) days after the Effective Date or the date on which Plaintiffs' Counsel provides the City with a Form W-9, whichever is later, the City shall pay the following compensation to:

2.3.1 Ability Housing: $400,000, by check payable to "Akerman LLP Trust Account," which represents Ability Housing's out-of-pocket expenses and a portion of Ability Housing's reasonable attorneys' fees and costs, but excludes Jacksonville Journey funds Ability Housing did not receive; and

2.3.2 DRF: $25,000, by check payable to "Disability Rights Florida Trust Account," which represents DRF's reasonable attorneys' fees and costs.

2.4 Dismissal with Prejudice. Within ten (10) days of the later of (a) payment of the Compensation to Plaintiffs as detailed in Section 2.3, above, or (b) City

Council enacting an ordinance as specified in Section 2.2, above, and the ordinance becoming law, Plaintiffs will dismiss their respective lawsuits, with prejudice, with each party to bear its own fees and costs (except as agreed in Section 2.3, above). Notwithstanding the foregoing, the dismissal shall not divest the Court or jurisdiction to enforce the terms of this Settlement Agreement.

2.5 Eligibility for Jacksonville Journey and Other City Grant Funds. Upon execution of this Settlement Agreement, Ability Housing shall be eligible to apply and compete for "Jacksonville Journey" funds and any other City funds administered by the City, LISC or any other entity for which Ability Housing is otherwise qualified to receive. If for any reason this Settlement Agreement is terminated, then subject to applicable laws, the City shall determine whether Ability Housing is eligible to apply and compete for any City funds. No entity shall receive any funds if it is in litigation with the City except litigation involving claims alleging a violation by the City of any party's civil rights.

2.6 Grant for Development of Permanent Supportive Housing. Within one (1) year following dismissal of the Action, the City shall establish and award a grant of $1.5 million ($1,500,000) for the development of "Permanent Supportive Housing" within the City for persons with disabilities. The grant shall be awarded to a qualified developer through a competitive grant process. Ability Housing shall be eligible to participate in the grant process and to receive some or all of the grant award. The definition of "Permanent Supportive Housing" in the grant shall be the same definition used by the U.S. Department of Housing and Urban Development (***"HUD"***) to wit:

> Long-term, community-based housing that has supportive services for homeless persons with disabilities. This type of supportive housing enables special needs populations to live as independently as possible in a permanent setting. The supportive services may be provided by the organization managing the housing or coordinated by the applicant and provided by other public or private service agencies. Permanent housing can be provided in one structure or several structures at one site or in multiple structures at scattered sites. There is no definite length of stay.

2.7 Parties' General Release. Subject to fulfillment of all Conditions Precedent as described in section 2.8 below and as of the later of (a) payment of the Compensation to Plaintiffs as detailed in Section 2.3, or (b) the Effective Date of this Settlement Agreement, Plaintiffs, and each of Plaintiffs' successors and assigns, shall release and forever discharge the City from all manner of action, causes of action, claims, demands, rights, suits, obligations, debts, contracts, agreements, promises, liabilities, damages (including punitive or any other form of exemplary damages), charges, fines, penalties, losses, costs, expenses, and attorneys' fees, of any nature whatsoever, known or unknown, in law or equity, fixed or contingent, which they have or may have arising out of any of the acts, omissions or other conduct of the City complained of in the Action, including any claims or actions that were or could have been alleged in the Action. Subject to fulfillment of all Conditions Precedent as described in section 2.8 below and as of the later of (a) payment of the Compensation to Plaintiffs as detailed in Section 2.3, or (b) the Effective Date of this Settlement Agreement, the City shall release and forever discharge the Plaintiffs, and each of Plaintiffs' successors and

assigns, from all manner of action, causes of action, claims, demands, rights, suits, obligations, debts, contracts, agreements, promises, liabilities, damages (including punitive or any other form of exemplary damages), charges, fines, penalties, losses, costs, expenses, and attorneys' fees, of any nature whatsoever, known or unknown, in law or equity, fixed or contingent, which they have or may have arising out of any of the acts, omissions or other conduct of the Plaintiffs in the Action, including any claims or actions that were or could have been alleged in the Action. This release shall not affect the Parties' right to enforce the terms of the Settlement Agreement.

2.8 Conditions Precedent. This Settlement Agreement is contingent upon the following conditions: (a) approval and authorization to bind the City of Jacksonville under this Settlement Agreement by City Resolution or Ordinance; (b) introduction by the City's Counsel of an ordinance substantially similar to the attached draft ordinance; (c) enactment of an ordinance by the City substantially similar to the attached draft ordinance (the ***"Zoning Ordinance"***) (both (b) and (c) to occur by April 30, 2017; however this deadline may be extended by mutual consent of the Parties); and (d) DRF's and Ability Housing's right to approve or disapprove of any changes made to the Zoning Ordinance from the attached draft. DRF's and Ability Housing's right to approve or disapprove changes to the draft Zoning Ordinance in this paragraph 2.8 (d) shall be in their sole discretion. Should these conditions not be met, Ability Housing and/or DRF may elect to terminate this Settlement Agreement and proceed forward with their claims in the Action. Any non-terminating Plaintiff may elect to continue to be bound by this Settlement Agreement. DRF and Ability Housing recognize the City Council's exclusive authority to enact legislation; such right to approve or disapprove the Zoning Ordinance is only as to their rights to determine whether or not to terminate the Settlement Agreement.

3. ADDITIONAL PROVISIONS

3.1 The City's Denial of Wrongdoing. This Settlement Agreement reflects the Parties' compromise and Settlement of the disputed claims. Its provisions, and all related drafts, communications and discussions, cannot be construed as or deemed to be evidence of an admission or concession of any point of fact or law (including, but not limited to, the FHA, ADA, or the proper interpretation of Florida Laws and the Jacksonville Municipal Code and related ordinances, or the existence of any alleged violations thereof) by any person or entity and cannot be offered or received into evidence or requested in discovery in the Action or any other action or proceeding as evidence of an admission or concession.

3.2 Voluntary Agreement. The Parties acknowledge they have each executed this Settlement Agreement voluntarily and without duress or undue influence.

3.3 Binding on Successors. This Settlement Agreement binds and benefits the Parties' respective successors and assigns.

3.4 Parties Represented by Counsel. The Parties acknowledge that: (a) they have been represented by independent counsel of their own choosing during the negotiation of this Settlement Agreement and the preparation of this Settlement Agreement; (b) they have read this Settlement Agreement and are fully aware of its contents; and (c) their respective counsel fully explained to them the Settlement Agreement and its legal effect.

3.5 Authorization. Each Party warrants and represents that there are no liens or claims of lien or assignments, in law or equity, against any of the claims or causes of action released by this Settlement Agreement and, further, that each Party is fully entitled and duly authorized to give this complete and final release and discharge. To the extent any such liens exist, the Parties expressly agree to waive those liens in order to effectuate this Settlement Agreement.

3.6 Entire Agreement. This Settlement Agreement and attached exhibit contain the entire agreement between the Parties and constitute the complete, final, and exclusive embodiment of their agreement with respect to the Action. This Settlement Agreement is executed without reliance on any promise, representation, or warranty by any Party or any Party's representative other than those expressly set forth in this Settlement Agreement.

3.7 Construction and Interpretation. Neither Party nor any of the Parties' respective attorneys will be deemed the drafter of this Settlement Agreement for purposes of interpreting any provision in this Settlement Agreement in any judicial or other proceeding that may arise between them. This Settlement Agreement has been, and must be construed to have been, drafted by all the Parties to it, so that any rule that construes ambiguities against the drafter will have no force or effect.

3.8 Headings and Formatting of Definitions. The various headings used in this Settlement Agreement are solely for the Parties' convenience and may not be used to interpret this Settlement Agreement. Similarly, bolding and italicizing of definitional words and phrases is solely for the Parties' convenience and may not be used to interpret this Settlement Agreement. The headings and the formatting of the text in the definitions do not define, limit, extend, or describe the Parties' intent or the scope of this Settlement Agreement.

3.9 Exhibits. The exhibit to this Settlement Agreement is an integral part of the Settlement Agreement and the Settlement and is incorporated into this Settlement Agreement as though fully set forth in the Settlement Agreement. A refusal to approve the Exhibit in substantially the same form in which it appears in this document shall constitute a refusal to approve this Settlement Agreement.

3.10 Modifications and Amendments. No amendment, change, or modification to this Settlement Agreement, whether proposed by the Parties or the Court, will be valid unless agreed upon in a writing signed by the Parties or their counsel.

3.11 Enforcement. The Parties agree that the Court shall retain jurisdiction over the Parties to enforce the terms of this Settlement Agreement.

3.12 Governing Law. This Settlement Agreement is governed by Florida law and must be interpreted under Florida law and without regard to conflict of laws principles.

3.13 Further Assurances. The Parties must execute and deliver any additional papers, documents and other assurances, and must do any other acts reasonably necessary, to perform their obligations under this Settlement Agreement and to carry out this Settlement Agreement's expressed intent.

3.14 Agreement Constitutes a Complete Defense. To the extent permitted by law, this Settlement Agreement may be pled as a full and complete defense to, and may be used as the basis for an injunction against, any action, suit, or other proceedings that may be instituted, prosecuted or attempted in breach of or contrary to this Settlement Agreement.

3.15 Execution Date. This Settlement Agreement is deemed executed on the date the Settlement Agreement has been signed by all of the undersigned.

3.16 Counterparts. This Settlement Agreement may be executed in counterparts, each of which constitutes an original, but all of which together constitutes one and the same instrument. Several signature pages may be collected and annexed to one or more documents to form a complete counterpart. Photocopies of executed copies of this Settlement Agreement may be treated as originals.

3.17 Recitals. The Recitals are incorporated by this reference and are part of the Settlement Agreement.

3.18 Severability. If any provision of this Settlement Agreement is declared by the Court to be invalid, void, or unenforceable, the remaining provisions of this Settlement Agreement will continue in full force and effect.

3.19 Inadmissibility. This Settlement Agreement (whether or not approved, revoked, or made ineffective for any reason) and any proceedings or discussions related to this Settlement Agreement are inadmissible as evidence of any liability or wrongdoing whatsoever in any Court or tribunal in any state, territory, or jurisdiction except that this provision shall not prohibit any Party from introducing this Settlement Agreement in an effort to enforce the terms of this Settlement Agreement.

3.20 No Conflict Intended. Any inconsistency between this Settlement Agreement and the attached exhibit will be resolved in favor of this Settlement Agreement.

3.21 List of Exhibits: The following exhibit is attached to this Settlement Agreement:

Exhibit A – Proposed Ordinance

3.22 Waivers. No failure to exercise and no delay in exercising any right, remedy, or power under this Settlement Agreement shall operate as a waiver thereof, nor shall any single or partial exercise of any right, remedy, or power under this Settlement Agreement preclude any other or further exercise thereof, or the exercise of any other right, remedy, or power provided herein or by law or in equity.

[Intentionally Blank/Signature Pages Follow]

The Parties have agreed to the terms of this Settlement Agreement and have signed below.

ABILITY HOUSING, INC., f/k/a ABILITY HOUSING OF NORTHEAST FLORIDA, INC.

By: _____
Greg Matovina, Chairman

Date: 12/27/16

_____
Witness

Print name: SARA Jo HALL

Date 12/27/16

DISABILITY RIGHTS FLORIDA

By: Maryellen McDonald, Executive Director
[Name and Title]

Date: 12/29/2016

Susan P. Morgan
Witness

Print name: Susan P. Morgan

Date 12/29/2016

THE CITY OF JACKSONVILLE

By: _____

Its: Chief Administrative Officer

Date: 1/03/17

_____
Witness

Print name: Kandi R. Bogue

Date: 1/3/17

APPENDIX B

[Ordinance]

Introduced by the Council President at the request of the Office of General Counsel substituted by the Land Use and Zoning Committee and amended on the Floor by Council:

ORDINANCE 2017-36-E

AN ORDINANCE AMENDING CHAPTER 656, (ZONING CODE), PART 1 (GENERAL PROVISIONS), SUBPART A (BASIC PROVISIONS), SECTION 656.107 (CONFLICTING PROVISIONS), *ORDINANCE CODE,* TO STATE THE INTENT OF THE CITY THAT ALL REGULATIONS OF THE ZONING CODE BE APPLIED TO PROTECT CIVIL RIGHTS; AMENDING CHAPTER 656, (ZONING CODE), PART 1 (GENERAL PROVISIONS), SUBPART B (ADMINISTRATION), SECTION 656.112 (RESERVED) TO CREATE A NEW SECTION 656.112 (REASONABLE ACCOMMODATIONS FOR DISABLED PERSONS), *ORDINANCE CODE*, TO CREATE A PROCEDURE FOR DISABLED PERSONS TO REQUEST REASONABLE ACCOMMODATIONS FROM PROVISIONS OF THE ZONING CODE; AMENDING CHAPTER 656 (ZONING CODE), PART 3 (SCHEDULE OF DISTRICT REGULATIONS), SUBPART F (PLANNED UNIT DEVELOPMENT), SECTION 656.340 (PLANNED UNIT DEVELOPMENT - PUD), *ORDINANCE CODE*, TO PROHIBIT USE OF PLANNED UNIT DEVELOPMENT TO DISCRIMINATE OR VIOLATE CIVIL RIGHTS; AMENDING CHAPTER 656 (ZONING CODE), PART 3 (SCHEDULE OF DISTRICT REGULATIONS), SUBPART I (SPRINGFIELD ZONING OVERLAY AND HISTORIC DISTRICT

REGULATIONS), SECTION 656.365 (LEGISLATIVE FINDINGS AND INTENT), *ORDINANCE CODE*, TO REMOVE THE REFERENCE TO THE NUMBER OF GROUP CARE HOMES AND COMMUNITY RESIDENTIAL HOMES WITHIN THE DISTRICT; AMENDING CHAPTER 656 (ZONING CODE), PART 3 (SCHEDULE OF DISTRICT REGULATIONS), SUBPART I (SPRINGFIELD ZONING OVERLAY AND HISTORIC DISTRICT REGULATIONS), SECTION 656.368 (SPRINGFIELD HISTORIC ZONING DISTRICTS), *ORDINANCE CODE*, TO REMOVE REFERENCE TO "SPECIAL USES," PROHIBIT NEW ROOMING HOUSES IN THE OVERLAY DISTRICTS, TO CREATE PROCEDURES FOR EXISTING ROOMING HOUSES, TO ALLOW BY EXCEPTION IN THE RMD-S DISTRICT GROUP CARE HOMES, TO ALLOW BY EXCEPTION IN THE CCG-S DISTRICT RESIDENTIAL TREATMENT FACILITIES FOR PERSONS WITH DISABILITIES AND EMERGENCY SHELTERS, AND TO REQUIRE CERTAIN OTHER USES TO MEET THE STANDARDS OF PART 4 OF THE ZONING CODE; AMENDING CHAPTER 656 (ZONING CODE), PART 3 (SCHEDULE OF DISTRICT REGULATIONS), SUBPART I (SPRINGFIELD ZONING OVERLAY AND HISTORIC DISTRICT REGULATIONS), SECTION 656.369, *ORDINANCE CODE*, TO REQUIRE LICENSURE OF EXISTING PROHIBITED USES AND REMOVE REFERENCE TO "SPECIAL USES"; AMENDING CHAPTER 656 (ZONING CODE), PART 16 (DEFINITIONS), SECTION 656.1601 (DEFINITIONS), *ORDINANCE CODE*, TO AMEND DEFINITIONS OF COMMUNITY RESIDENTIAL HOME, DWELLING,

MULTIPLE-DWELLING USE, DWELLING, ONE-FAMILY OR SINGLE-FAMILY, DWELLING UNIT, GROUP CARE HOME, RESIDENTIAL TREATMENT FACILITY, AND ROOMING HOUSES, ADDING DEFINITIONS FOR DISABLED PERSON, REASONABLE ACCOMMODATION, AND SUPPORTIVE SERVICES; PROVIDING AN EFFECTIVE DATE.

BE IT ORDAINED by the Council of the City of Jacksonville:

Section 1. Amending Section 656.107 (Conflicting provisions), *Ordinance Code.* Chapter 656 (Zoning Code), Part 1 (Supplementary Regulations), Subpart A (Basic Provisions), Section 656.107 (Conflicting provisions), *Ordinance Code,* is hereby amended to read as follows:

CHAPTER 656. ZONING CODE

PART 1. SUPPLEMENTARY REGULATIONS

SUBPART A. BASIC PROVISIONS

*** * ***

Sec. 656.107. – Conflicting provisions; protection of civil rights.

(a) It is not the intent of the provisions of the Zoning Code to interfere with or abrogate or annul any easement, covenant or other agreement between parties; provided, however, that when the regulations of the Zoning Code impose a greater restriction upon the use of buildings or land, or upon the height of buildings, or require larger open spaces than are imposed or required by other ordinances, rules, regulations or by easements, covenants or agreements, the provisions of this Chapter shall control.

(b) It is the intent of the City that all regulations of the Zoning Code be applied and interpreted so as to protect and be consistent with civil rights recognized by the U.S. and Florida Constitutions, ordinances and laws, including the Jacksonville Fair Housing Ordinance, the Rehabilitation Act of 1973, the U.S. Fair Housing Act, the U.S. Civil Rights Acts of 1964 and 1968, the Religious Land Use and Institutionalized Persons Act of 2000, and the Americans with Disabilities Act as such laws may be amended from time to time. Employees of the Planning and Development Department, including the Planning Director, employees of the Office of the General Counsel, and the Planning Commission are directed to avoid any and all interpretations or applications of the Zoning Code which would unlawfully infringe upon the civil rights of any person.

* * *

Section 2. Amending Section 656.112 (Reserved), *Ordinance Code.* Chapter 656 (Zoning Code), Part 1 (Supplementary Regulations), Subpart B (Administration), Section 656.112 (Reserved), *Ordinance Code,* is hereby amended to read as follows:

CHAPTER 656. ZONING CODE

PART 1. SUPPLEMENTARY REGULATIONS

* * *

SUBPART B. ADMINISTRATION

Sec. 656.112 ~~Reserved.~~ Reasonable Accommodations for Disabled Persons.

(a) **Intent.** A reasonable accommodation to the Zoning Code may be requested to allow a disabled person, as that term is recognized by federal, state or local law, to use and enjoy a dwelling. A reasonable accommodation process is necessary because in some instances certain standards found in the Zoning Code, if

strictly applied, would inhibit the use of a dwelling due to a person's disability. As such, the City needs a formal process whereby a disabled individual, or individuals, or a person, entity or group on behalf of a disabled individual or individuals, may make a request for a reasonable accommodation ("Request for a Reasonable Accommodation") and seek relief from a particular zoning standard in order to afford them an equal opportunity to legally use and enjoy a dwelling. Accommodations must be considered on an individual basis because the nature and extent of a disability and the requirements of the Zoning Code will vary in each case. If an individual does not request an accommodation, the City is not obligated to provide one except where an individual's known disability impairs his/her ability to know of, or effectively communicate a need for, an accommodation that is made obvious to the City. The grant of a Request for a Reasonable Accommodation shall not be deemed to be a rezoning of property, or to allow uses that would otherwise require a zoning exception or waiver pursuant to Chapter 656, Ordinance Code.

If the Request for a Reasonable Accommodation would constitute a request for a rezoning or zoning exception, then the person may make application for such rezoning or zoning exception in the same manner as other rezoning or zoning exception requests, however, the Request for Reasonable Accommodation criteria in Section 656.112, *Ordinance Code,* shall be considered in addition to the standard criteria for the request for rezoning or zoning exception, and there shall be no application fee or fee for notice applied to the request.

(b) **Application process.**

(1) Requests for Reasonable Accommodations may be made orally or in writing to the Planning and Development

Department, which will assist the applicant with filling out the written application on a form prescribed by the Department. Said application form shall be developed in consultation with the Chief of Disabled Services for the City of Jacksonville, as defined in Chapter 28, Part 9, *Ordinance Code*. Such form shall instruct the applicant regarding what information is required from the applicant in order for the application to be deemed complete.

(2) Upon receipt of the Request for Reasonable Accommodation application, the Planning Director shall notify the Chief of Disabled Services of the request and consult with the Chief to determine whether the application is complete within five (5) working days. If it is determined that the application is not complete, written notice shall be provided to the applicant within three (3) working days specifying the deficiencies. The Director shall take no further action on the application until the deficiencies are remedied.

(3) No fees or costs may be imposed for Request for Reasonable Accommodation applications.

(4) Unless barred by administrative *res judicata*, the time limitations in Sec. 656.125(d), *Ordinance Code*, do not apply to rezoning or zoning exception applications that also constitute Requests for Reasonable Accommodations.

(c) **Department Decision.** The Director shall make the decision on the application based upon consultation with, and the written recommendation of, the Chief of Disabled Services. The applicant may receive a decision by the Director with a hearing, or may elect to have the decision made by the Director without a hearing. The Department shall inform the applicant of this option to receive a decision without a hearing at the time of his or her application.

(1) If the applicant chooses to have a hearing on the application, the Director shall schedule a hearing on the application on a date certain at least 14 days after notice is posted but within thirty (30) days after the application has been deemed complete. The Director shall make a decision within 5 business days of the hearing.

(2) If the applicant elects to receive a decision without a hearing, the Director shall establish the date of decision to be at least 14 days after notice is posted but within thirty (30) days after the application has been deemed complete. The Director shall make the decision on the date established.

(3) The Chief of Disabled Services shall provide the Director with a written recommendation on the applicant's claimed disability at least five (5) business days prior to the date established for the decision by the Director, or the date of the hearing if one is scheduled to take place.

(4) Persons wishing to provide competent, substantial evidence related to the application shall provide those comments in writing to the Director five (5) business days prior to the date established for the decision by the Director, or may provide such evidence before or at the hearing if one takes place.

(5) The Director shall provide the applicant a written order including his/her decision within 10 days of the date of decision for both hearing and non-hearing proceedings. Any order denying a Request for Reasonable Accommodation, or its conditional approval, shall include an explanation of the basis for such denial or conditional approval.

(d) **Notice.** Notice of Request for Reasonable Accommodation shall be given within three (3) days of the receipt of a complete application by the Department by posting signs on the subject property at intervals of not more than 200 feet along all street sides of property upon which the request is made. The signs shall indicate the request and information on how, and by when, participation is allowed. The Department shall also post notice at City Hall and the Planning and Development Department in the specified location for posted notices within three (3) days after receipt of a complete application. No published advertisement shall be required. The date of the hearing or the date established for the decision by the Director shall be specified in the notice.

(e) **Criteria.** In evaluating a Request for Reasonable Accommodation, the Director shall consider competent, substantial evidence relating to the following:

(1) whether the applicant meets the definition of a disabled person. The Director shall make this determination based upon consultation with, and the recommendation of, the Chief of Disabled Services;

(2) whether there is an identifiable relationship, or nexus, between the requested accommodation and the person’s needs;

(3) whether a sufficient alternative to the specific initial request exists, if the initial request is determined to be not reasonable;

(4) whether granting this request would change the essential nature of the Zoning Code as compared to strict application of the code to the circumstances of the request; and

(5) whether the request would impose undue financial and administrative burdens on the City.

It is the City's intent that reasonable accommodations be granted where required by federal law. If the Director, based upon the Chief of Disabled Services' recommendation regarding the applicant's claimed disability, determines that the specific request is not reasonable, he/she shall offer, where possible, some other accommodation which would meet the requester's needs. No additional standards of review of Requests for Reasonable Accommodation are required. In making this determination, it shall not be a factor whether there are other neighborhoods or dwellings that could accommodate the person.

The Director and Chief of Disabled Services are entitled to obtain information that is necessary to evaluate if a requested reasonable accommodation may be necessary because of a disability. If a person's disability is obvious, or otherwise known to the Director or Chief, and if the need for the requested accommodation is also readily apparent or known, then the Director or Chief may not request any additional information about the applicant's disability or the disability-related need for the accommodation. However, if the applicant's disability is known or readily apparent to the Director or Chief, but the need for the accommodation is not readily apparent or known, the Director may request only information that is necessary to evaluate the disability-related need for the accommodation. The Director or Chief may not ordinarily inquire as to the nature and severity of an individual's disability, however, the Director or Chief may request reliable disability-related information that: (1) is necessary to verify that the person meets the Fair Housing Act and Americans with

Disability Act's definition of "disability", (2) describes the needed accommodation, and (3) shows the relationship between the person's disability and the need for the requested accommodation. Depending on the individual's circumstances, information verifying that the person meets the Act's definition of disability can usually be provided by the individual, but also may come from a doctor or medical professional, a peer support group, a non-medical service agency, or a reliable third party who is in a position to know about the individual's disability. Once the Director, based upon consultation with and the written recommendation of the Chief, has established that the applicant meets the definition of a disabled person, the Director should seek only the information necessary to evaluate if the request is needed because of a disability.

(f) **Term of accommodation.** Requests for Reasonable Accommodations shall be personal to the applicant and shall not run with the land, and shall only remain in place for as long as the applicant's need for the request exists or remains. It shall be the responsibility of the property owner to remove or correct any non-conforming zoning code standard authorized in an approved Request for Reasonable Accommodation once the need for the accommodation ends.

(g) **Appeal.** Decisions on Requests for Reasonable Accommodation are appealable to the City Council pursuant to the procedures identified in sections 656.140-145. The Council's review of the appeal shall be limited to a consideration of whether the Request for Reasonable Accommodation criteria were properly considered and applied, taking all laws, ordinances and other judicial or legal guidance into consideration, and whether sufficient alternatives were evaluated.

Section 3. Amending Section 656.340, (Planned Unit Development -- PUD), *Ordinance Code*. Chapter 656, (Zoning Code), Part 3 (Schedule of District Regulations), Subpart F (Planned Unit Development), Section 656.340 (Planned Unit Development -- PUD), *Ordinance Code,* is hereby amended to read as follows:

CHAPTER 656. ZONING CODE

*** * ***

PART 3. SCHEDULE OF DISTRICT REGULATIONS

*** * ***

SUBPART F. PLANNED UNIT DEVELOPMENT

Sec. 656.340. Planned Unit Development -- PUD.

It is the intent and purpose of this district that Planned Unit Developments, both large scale, which consists of five acres or more, and small scale, which consists of less than five acres, be utilized to create living environments that are responsive to the needs of their inhabitants; to provide flexibility in planning, design and development; to encourage innovative approaches to the design of community environments; to encourage the fulfillment of housing needs appropriate to various lifestyles and income levels; to encourage the integration of different housing types within a development; provide an opportunity for new approaches to ownership; to provide for an efficient use of land; to provide an environment compatible with surrounding land use; to adapt the zoning process to changes in construction and development technology; to encourage the preservation of the natural site features; to provide community environments that are so designed and located as to be an integral part of the total ecosystem; to encourage the design of communities and structures adapted to the local climate; thereby promoting the public health, safety, morals, order, comfort, convenience, appearance, prosperity, and general

welfare of the City of Jacksonville. It is further intended that the Planned Unit Development district may be utilized to implement the Comprehensive Plan. It is not the intent to utilize the Planned Unit Development district solely to diminish the usual application of the provisions of the Zoning Code. The Planned Unit Development district process shall not be used to discriminate against or otherwise violate civil rights of the existing or future residents, users or occupants of the PUD. The rights of people with disabilities to access and use housing in the form of dwelling units, community residential homes or group homes shall not be more restrictive in a PUD than in equivalent conventional zoning districts.

* * *

Section 4. Amending Section 656.365, (Legislative findings and intent), *Ordinance Code*. Chapter 656, (Zoning Code), Part 3 (Schedule of District Regulations), Subpart I (Springfield Zoning Overlay and Historic District Regulations), Section 656.365 (Legislative findings and intent), *Ordinance Code,* is hereby amended to read as follows:

CHAPTER 656. ZONING CODE

* * *

PART 3. SCHEDULE OF DISTRICT REGULATIONS

* * *

SUBPART I. SPRINGFIELD ZONING OVERLAY AND HISTORIC DISTRICT REGULATIONS

Sec. 656.365. Legislative findings and intent.

The Council hereby finds and determines as follows:

* * *

(e) Within the one square mile area of the Springfield Historic District, the Council finds there is a disproportionately

large number of rooming houses ~~(thirteen), group care homes, community residential homes of seven or more residents~~ and automotive uses ~~(twenty)~~, including automotive sales and repairs and related automotive uses.

* * *

Section 5. Amending Section 656.368, (Springfield Historic Zoning Districts), *Ordinance Code*. Chapter 656, (Zoning Code), Part 3 (Schedule of District Regulations), Subpart I (Springfield Zoning Overlay and Historic District Regulations), Section 656.368 (Springfield Historic Zoning Districts), *Ordinance Code,* is hereby amended to read as follows:

CHAPTER 656. ZONING CODE

* * *

PART 3. SCHEDULE OF DISTRICT REGULATIONS

* * *

SUBPART I. SPRINGFIELD ZONING OVERLAY AND HISTORIC DISTRICT REGULATIONS

* * *

Sec. 656.368. Springfield Historic Zoning Districts.

Springfield Historic Districts include the following:

I. *Residential Medium Density-Springfield (RMD-S) District.*

(a) *Permitted uses and structures.*

* * *

(5) Community residential homes of six or fewer residents meeting the performance standards and development criteria set forth in Part 4 of the Zoning Code ~~and the special use criteria set forth in Section 656.369~~.

(6) Housing for the elderly <u>meeting the performance standards and development criteria set forth in Part</u>

4 of the Zoning Code, if applicable. ~~meeting the criteria for special uses set forth in Section 656.369.~~

* * *

(c) *Permissible uses by exception.*

* * *

(5) Nursing homes meeting the performance standards and development criteria set forth in Part 4 of the Zoning Code, if applicable. ~~meeting the criteria for special uses set forth in Section 656.369.~~

* * *

(10) Group care homes, meeting the performance standards and development criteria set forth in Part 4, if applicable.

(d) *Prohibited uses.* ~~Special uses. Special uses include residential treatment facilities, rooming houses, emergency shelter homes, group care homes, and community residential homes of over six residents. New special uses~~ New rooming houses are not allowed in the district and existing rooming houses ~~special uses~~ must conform to the standards set forth in Section 656.369(~~g~~f).

(e) Those uses that were considered legally nonconforming special uses pursuant to Ord. 2000-302-E, § 1 and Ord. 2007-1046-E, §§ 1, 2, that existed prior to December 21, 2000, the effective date of Ord. 2000-302-E, § 1, are permitted as of right if such use is authorized in the property's underlying zoning district. Except where otherwise permitted as of right or by a validly issued exception, such properties shall not expand their square footage, relocate, or increase the number of non-staff residents, and, if the use ceases for six (6) consecutive months, the property shall comply with all current zoning requirements.

[Reletter the remaining subsections accordingly.]

* * *

II. *Commercial, Residential and Office-Springfield (CRO-S) District.*

(a) *Permitted uses and structures.*

* * *

(14) Homes for the aged or orphans and similar uses, meeting the performance standards and development criteria set forth in Part 4 of the Zoning Code, if applicable.~~meeting the criteria for special uses set forth in Section 656.369~~.

* * *

(23) Community residential homes of up to six residents meeting the performance standards and development criteria set forth in Part 4 of the Zoning Code, if applicable~~, and criteria for special uses set forth in Section 656.369~~.

(24) Hospice facilities, meeting the performance standards and development criteria set forth in Part 4 of the Zoning Code, if applicable.~~ meeting the criteria for special uses set forth in Section 656.369.~~

* * *

(d) *Permissible uses by exception.*

* * *

(5) Nursing homes, meeting the performance standards and development criteria set forth in Part 4 of the Zoning Code, if applicable.~~ meeting the special uses criteria set forth in Section 656.369.~~

(6) Group care homes meeting the performance standards and development criteria set forth in Part 4 of the Zoning Code, if applicable~~, and the special use criteria set forth in Section 656.369~~.

(7) Housing for the elderly, meeting the performance standards and development criteria set forth in Part 4 of the Zoning Code, if applicable.~~ meeting the special use criteria set forth in Section 656.369(g)~~.

(8) Essential services, including water, sewer, gas, telephone, radio, television and electric, meeting the performance standards and development criteria set forth in Part 4 of the Zoning Code.

(9) Day care centers meeting the performance standards and development criteria set forth in Part 4 of the Zoning Code, if applicable.~~, and the Springfield performance standards and development criteria set forth in Section 656.369~~.

* * *

(e) *Prohibited uses.*~~Special uses. Special uses include residential treatment facilities, rooming houses, emergency shelter homes, group care homes, and community residential homes of over six residents. New special uses~~ New rooming houses are not allowed in the districts~~s~~ and existing uses must conform to the standards for ~~special uses~~rooming houses in Section 656.369(~~g~~f).

(f) Those uses that were considered legally nonconforming special uses pursuant to Ord. 2000-302-E, § 1 and Ord. 2007-1046-E, §§ 1, 2, that existed prior to December 21, 2000, the effective date of Ord. 2000-302-E, § 1, are permitted as of right if such use is authorized in the property's underlying zoning district. Except

where otherwise permitted as of right or by a validly issued exception, such properties shall not expand their square footage, relocate, or increase the number of non-staff residents, and, if the use ceases for six (6) consecutive months, the property shall comply with all current zoning requirements.

[Reletter the remaining subsections accordingly.]

*** * ***

III. *Commercial Neighborhood Springfield (CN-S) District.* This zoning district is designed to accommodate existing historic neighborhood original use commercial properties and new neighborhood commercial uses that are compatible with the residential character of the neighborhood. Properties with original use and historic use neighborhood commercial structures do not have to meet lot, yard, and lot coverage requirements.

*** * ***

(d) *Prohibited uses.* ~~Special uses. Special uses include residential treatment facilities, rooming houses, emergency shelter homes, group care homes, and community residential homes of over six residents.~~ New rooming houses ~~special uses~~ are not allowed in the districts~~.~~ and existing rooming houses ~~special uses~~ must conform to standards for rooming houses ~~special uses~~ in Section 656.369(~~g~~f).

(e) Those uses that were considered legally nonconforming special uses pursuant to Ord. 2000-302-E, § 1 and Ord. 2007-1046-E, §§ 1, 2, that existed prior to December 21, 2000, the effective date of Ord. 2000-302-E, § 1, are permitted as of right if such use is authorized in the property's underlying zoning district. Except where otherwise permitted as of right or by a validly issued exception, such properties shall not expand their square footage,

relocate, or increase the number of non-staff residents, and, if the use ceases for six (6) consecutive months, the property shall comply with all current zoning requirements.

* * *

IV. *Commercial Community/General-Springfield (CCG-S) District.*

* * *

(c) *Permissible uses by exception.*

* * *

(11) Residential treatment facilities for persons with disabilities, meeting the performance standards and development criteria set forth in Part 4 of the Zoning Code, if applicable.

(12) Emergency shelter homes, meeting the performance standards and development criteria set forth in Part 4 of the Zoning Code, if applicable.

(d) *Intensive uses.*

(1) *Prohibited uses*~~*Special uses*~~*.* ~~Special uses include residential treatment facilities, rooming houses, emergency shelter homes, group care homes, community residential homes of seven or more residents.~~ New rooming houses ~~special uses~~ are not allowed in the districts~~.~~ and existing uses must conform to standards for rooming houses ~~special uses~~ in Section 656.369(f).

* * *

(e) Those uses that were considered legally nonconforming special uses pursuant to Ord. 2000-302-E, § 1 and Ord. 2007-1046-E, §§ 1, 2, that existed prior to December 21, 2000, the effective date of Ord. 2000-302-E, § 1, are permitted as of right if such use is authorized in the property's underlying zoning district. Except

where otherwise permitted as of right or by a validly issued exception, such properties shall not expand their square footage, relocate, or increase the number of non-staff residents, and, if the use ceases for six (6) consecutive months, the property shall comply with all current zoning requirements.

[Reletter the remaining subsections accordingly.]

*** * ***

Section 5. Amending Section 656.369, (Springfield performance standards and development criteria), *Ordinance Code*. Chapter 656, (Zoning Code), Part 3 (Schedule of District Regulations), Subpart I (Springfield Zoning Overlay and Historic District Regulations), Section 656.369 (Legislative findings and intent), *Ordinance Code,* is hereby amended to read as follows:

CHAPTER 656. ZONING CODE

*** * ***

PART 3. SCHEDULE OF DISTRICT REGULATIONS

*** * ***

SUBPART I. SPRINGFIELD ZONING OVERLAY AND HISTORIC DISTRICT REGULATIONS

*** * ***

Sec. 656.369. – Springfield performance standards and development criteria.

The following permitted uses or permissible uses by exception shall meet the performance standards and criteria listed under each use. These uses are in addition to, rather than in lieu of, the supplementary regulations of Section 656.401, as applicable.

*** * ***

~~(c) *Community residential homes.* Community residential homes of six or fewer residents shall be allowed, subject to the following criteria:~~

~~(1) New community residential homes must be at least 1,000 feet from existing community residential homes.~~

~~(2) Principal and accessory residential structures must comprise at least 1,500 heated square feet.~~

~~(A) Chain link fences shall not be allowed in front yards or in side yards along public streets.~~

~~(B) The use shall comply with all applicable City property maintenance and unsafe building codes.~~

Reletter subparagraphs (d), (e), and (f) accordingly

*** * ***

(~~g~~f) ~~Special uses. Special uses are residential/institutional uses that~~Rooming houses are no longer permitted in the districts. ~~Such uses~~Rooming houses may continue if they comply with the standards and criteria of this subsection within one year from the effective date of this legislation~~. The following uses are identified as special uses: residential treatment facilities, rooming houses, emergency shelter homes, group care homes, and community residential homes of seven or more residents.~~ Beginning November 1, 2008 and thereafter, all ~~special use facilities~~rooming houses shall provide the following information to the Director:

(1) Information showing or depicting the accurate square footage of the facility's livable interior space and number of habitable rooms, as it existed on December 21, 2000; and

~~(2) Licensure or permit information from the relevant State agency showing continuous operation of the~~

~~facility from prior to December 21, 2000; and~~

(~~3~~2) ~~License or permit information or a~~Affidavit ~~if such information is not available~~ as to number of residents authorized to legally occupy the ~~licensed or permitted facility~~rooming house on or before December 21, 2000; and

(~~4~~3) Number of persons considered by the ~~facility~~ rooming house to be occupying the facility ~~as full-time staff and/or their immediate family members~~.

Those ~~special use facilities~~rooming houses which provide the above information in a timely manner are considered legally non-conforming and shall be allowed to continue operation until such time as the legally non-conforming status ceases, as provided in this Chapter. As relating to the information submitted as required in this subsection, ~~special use facilities~~rooming houses shall not expand their square footage ~~of the facility~~, relocate the facility or increase the number of ~~licensed~~ residents in the facility. ~~Additionally, if a facility increases the number of staff, including immediate family members, the facility shall notify the Director within 90 days of such increase.~~

The city shall through annual inspections also ensure that such rooming house uses comply with the following standards, and if the property is not in compliance with the standards after a reasonable time allowed for correction of the violation, if the facility fails to timely submit the information required herein, or if the rooming house ~~special~~ use intensifies, expands, or relocates~~or fails to report increases in staff in a timely manner~~, the ~~special~~rooming house use shall not be allowed to continue.

Notwithstanding anything to the contrary in the zoning code, the

occupancy of a ~~special use facility~~rooming house shall not exceed any applicable occupancy limitation otherwise required by any federal, state or local law, rule or regulation.

(1) Chain link fences shall not be allowed in any yards along public streets (not including alleys), and must be located at least six feet behind the closest vertical plane of the primary structure.

(2) The use shall comply with all applicable City property maintenance and unsafe building codes.

(3) Twenty-four-hour, on-site management shall be required.

~~(4) New rooming houses are not permitted. Existing rooming houses shall be identified by one or more of the following existing conditions, each of which shall create a rebuttable presumption that a building is a rooming house:~~

~~(A) Signs that indicate rooms, beds, or living spaces for rent;~~

~~(B) Interior locks, partitions, hasps, appliances such as electric fry pans, toaster ovens, refrigerators, etc.;~~

~~(C) Individual storage of food;~~

~~(D) Alphabetical, numeric, or other labeling of bedrooms or living areas;~~

~~(E) Alterations to structures which enhance or facilitate its use as a rooming house.~~

Section 6. Amending Section 656.1601, *Ordinance Code*. Chapter 656, (Zoning Code), Part 16 (Definitions), Section 656.1601 (Definitions), *Ordinance Code,* is hereby amended to read as follows:

CHAPTER 656. ZONING CODE

*** * ***

PART 16. DEFINITIONS

Sec. 656.1601. Definitions.

*** * ***

Community residential home ~~is a dwelling unit licensed to serve clients of CFS, which provides a living environment for up to 14 residents who operate as the functional equivalent of a family, including such supervision and care by supportive staff as may be necessary to meet the physical, emotional and social needs of the residents. The residents of the community residential home are not to be related to the owner/operator by law, blood, marriage or adoption~~ means a dwelling unit licensed to serve residents who are clients of the Department of Elderly Affairs, the Agency for Persons with Disabilities, the Department of Juvenile Justice, or the Department of Children and Families or licensed by the Agency for Health Care Administration which provides a living environment for 7 to 14 unrelated residents who operate as the functional equivalent of a family, including such supervision and care by supportive staff as may be necessary to meet the physical, emotional, and social needs of the residents and shall be limited to those persons defined as "residents" in F.S. § 419.001(1)(d). A community residential home is not also a rooming house or a boardinghouse.

*** * ***

Disabled person means (1) individuals with a physical or mental impairment that substantially limits one or more major life activities, (2) individuals who are regarded as having such impairment; and (3) individuals with a record of such impairment. The term *physical or mental impairment* as defined by the Fair

Housing Act includes, but is not limited to, diseases and conditions such as orthopedic, visual, speech and hearing impairments, cerebral palsy, autism, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, HIV infection, developmental disabilities, mental illness, drug addiction (other than addiction caused by current, illegal use of a controlled substance), and alcoholism. The term *major life activity* includes, but is not limited to, seeing, hearing, walking, breathing, sleeping, standing, lifting bending, reading, performing manual tasks, concentrating, thinking, communicating, caring for one's self, learning, speaking, and working. Juvenile offenders and sex offenders or predators, by virtue of that status, are not disabled persons. Persons who would pose a direct threat to the health or safety of other individuals or result in substantial physical damage to the property of others are not protected by the Fair Housing Act or the Americans with Disabilities Act. A determination that an individual poses a direct threat must rely on an individualized assessment that is based on reliable objective evidence (for example, current conduct or a recent history of overt acts). The assessment must consider: (1) the nature, duration, and severity of the risk of injury; (2) the probability that injury will actually occur; and (3) whether there are any reasonable accommodations that will eliminate or significantly reduce the direct threat.

*** * ***

Dwelling, multiple-dwelling use means, for purposes of determining whether a lot is in multiple-dwelling use, the following:

(1) Multiple-dwelling uses in which individual dwelling units are intended to be rented and maintained under central

ownership and management; those which are under collective ownership and management, including cooperative apartments, condominiums and the like; row houses or townhouses in individual ownership; and all other forms of multiple dwellings regardless of ownership management, taxation or other consideration, where the form does not meet the requirements of this Zoning Code for a single-family dwelling. A multiple-dwelling use may contain residents who receive *supportive services*, whether provided by the owner, management or third parties. Owners and managers may provide or coordinate *supportive services* for tenants. Ancillary services whose primary purpose is to support tenants may be located onsite, including but not limited to laundry facilities, day care and after-school programs for children, gymnasiums, swimming pools, concierge services, and coordination of care for disabled persons which are within the scope of *supportive services*.

*** * ***

Dwelling, multiple-family means a building containing more than one dwelling unit.

Dwelling, one-family or single-family means a building containing only one dwelling unit. The term is not to be construed as including recreational vehicles, tents, houseboats or other forms of temporary or portable house. Manufactured homes and modular homes which comply with the provisions of Subpart C, Part 4 of the Zoning Code are considered single-family dwellings. For the purposes of this Zoning Code, row houses, townhouses, condominiums, cooperative apartments or other form of dwelling units which are not in individual detached buildings meeting all the requirements

of a single-family dwelling shall not be construed to be single-family dwellings. A building in which a room or other portion is rented to or occupied by someone other than a part of the family shall not be considered to be a single-family dwelling. A dwelling unit which otherwise meets the definition of a community residential home or the definition of a group care home shall be deemed a single family unit and a noncommercial, residential use if that unit has six (6) or fewer residents, and meets the performance standards and development criteria of Part 4 of the Zoning Code, if applicable.

Dwelling unit means a room or rooms connected together constituting a residential use as a separate, independent housekeeping establishment for a family, and containing sleeping facilities and one kitchen. The dwelling unit may be for owner occupancy or for rental or lease on a weekly, monthly or longer basis~~,~~. It shall be physically separated from other rooms or dwelling units which may be in the same structure ~~and containing sleeping facilities and one kitchen~~. A *dwelling unit's* residents may receive *supportive services* provided by or coordinated by a landlord, government agencies, third party providers, or others, whether or not as part of a government-funded program, including visits to the dwelling unit relating to such services. It is intended that a *dwelling unit* not be considered a *rooming house, substance abuse treatment facility, or group care home* by virtue of the residents receiving *supportive services* that are subordinate and ancillary to the residential character of the use.

* * *

Group care home means a facility occupied by seven or more persons whether operated for profit or not, which provides, for a period exceeding 24 hours, one or more personal services for

persons who required these personal services and are not related to the owner or administrator by law, blood, marriage or adoption and not in foster care. The personal services, in addition to housing and food services, may include personal assistance with bathing, dressing, housekeeping, adult supervision, emotional security and other related services but may not include inpatient medical services. Permissible services in a group care home include *supportive services.* A group care home is not also a rooming house or boarding house.

* * *

Major life activity – See "*Disabled person*."

Physical or mental impairment – See "*Disabled person*."

Reasonable accommodation as to the Zoning Code means any change, modification or adjustment to a Zoning Code standard that may be necessary for a person with a disability to have an equal opportunity to use and enjoy a dwelling, including its public and common use spaces. An accommodation is necessary if there is a disability related need for the accommodation.

* * *

Residential treatment facility means a facility other than a hospital or nursing home, having one or more supervisors residing on the premises and providing board, lodging, medication and other treatment and counseling for persons progressing from relatively intensive treatment for criminal conduct, delinquency, mental or emotional illness, alcoholism, drug addiction or similar conditions, as well as providing relatively intensive diagnostic or therapeutic services for alcoholism, drug abuse, mental illness, emotional problems, developmental disabilities or similar conditions for its residents. A residential treatment facility shall not be deemed to include a nursing home, hospital, group care

home, or emergency shelter home, nor shall a dwelling unit or multiple-family use be considered a residential treatment facility by virtue of the residents receiving *supportive services* coordinated by a landlord or a third party that are subordinate and ancillary to the residential character of the use. Nothing shall prevent a residential treatment facility from having out patients. The residents of the residential treatment facility are generally intending to return to full normal participation in community life.

* * *

Rooming houses means a building in which sleeping accommodations are offered to the public where rentals are for a period of a week or longer, and occupancy is generally by resident rather than transient, rentals are for use of a bedroom with shared access to the primary kitchen and/or bathroom(s) shared with occupants of other rented bedrooms, and where residents do not operate as a family. Existing rooming houses shall be identified by one or more of the following existing conditions, each of which shall create a rebuttable presumption that a building is a rooming house:

(a) Signs that indicate rooms, beds, or living spaces for rent;

(b) Interior locks, partitions, hasps, appliances such as electric fry pans, toaster ovens, refrigerators, etc.;

(c) Individual storage of food;

(d) Alphabetical, numeric, or other labeling of bedrooms or living areas;

(e) Alterations to structures which enhance or facilitate its use as a rooming house.

* * *

Supportive services are services offered or provided to

residents of a dwelling that are subordinate and ancillary to the residential character of the use and that provide assistance to or aid in the resident's life success or well-being. Supportive services include, but are not limited to, counseling, improving knowledge and educational skills associated with substance abuse prevention, English as a Second Language, literacy, health education, consumer education, learning skills that can be used to secure and retain a job, food and groceries, credit counseling, life skills training, outpatient mental health services, outreach services, community-based substance abuse treatment (such as an Alcoholics Anonymous meeting, but not inpatient detoxification or inpatient treatment), transportation, and health service. It is the intent of the Zoning Code that this definition includes those s*upportive services* as are provided in grant programs for permanent supportive housing under the U.S. Housing and Urban Development Department's Continuum of Care Program.

*** * ***

Section 7. Effective Date. This ordinance shall become effective upon signature by the Mayor or upon becoming effective without the Mayor's signature.

Form Approved:

_____

Office of General Counsel

Legislation Prepared By: Susan C. Grandin

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APPENDIX C

CERTIFICATION OF TRAINING AND RECEIPT OF CONSENT DECREE

_____ I attended training on the federal Fair Housing Act and Title II of the Americans with Disabilities Act. I have had all of my questions concerning these topics answered to my satisfaction.

_____ I watched a videotape of the complete training session provided pursuant to the Consent Decree referenced below. I have had all of my questions concerning these topics answered to my satisfaction.

I have also received a copy of the Consent Decree entered in *United States v. City of Jacksonville*, Case No. 3:15-CV-1411, filed in the United States District Court for the Middle District of Florida. I have read and understand these documents and have had my questions about these documents answered. I understand my legal responsibilities under the Consent Decree and will comply with those responsibilities. I further understand that the Court may impose sanctions on the City of Jacksonville if I violate any provision of this Decree.

_____
Date

_____
Employee/Agent Name (Print)

_____
Employee/ Agent Signature

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 14-14543

D.C. Docket No. 1:13-cv-24506-WPD

CITY OF MIAMI,
a Florida Municipal Corporation,

Plaintiff - Appellant,

versus

BANK OF AMERICA CORPORATION,
BANK OF AMERICA, N.A., et al.,

Defendants - Appellees.

Appeals from the United States District Court
for the Southern District of Florida

(September 1, 2015)

Before MARCUS and WILSON, Circuit Judges, and SCHLESINGER,[*] District Judge.

MARCUS, Circuit Judge:

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[*] Honorable Harvey E. Schlesinger, United States District Judge for the Middle District of Florida, sitting by designation.

The City of Miami has brought an ambitious fair housing lawsuit against Bank of America,[1] alleging that it engaged in a decade-long pattern of discriminatory lending in the residential housing market that caused the City economic harm. The City claims that the bank targeted black and Latino customers in Miami for predatory loans that carried more risk, steeper fees, and higher costs than those offered to identically situated white customers, and created internal incentive structures that encouraged employees to provide these types of loans. The predatory loans, as identified by the City, include: high-cost loans (i.e., those with an interest rate at least three percentage points above a federally established benchmark), subprime loans, interest-only loans, balloon payment loans, loans with prepayment penalties, negative amortization loans, no documentation loans, and adjustable rate mortgages with teaser rates (i.e., a lifetime maximum rate greater than the initial rate plus 6%). Complaint for Violations of the Federal Fair Housing Act at 34, City of Miami v. Bank of America Corp., No. 13-24506-CIV (S.D. Fla. July 9, 2014) ("Complaint"). The City alleged that by steering minorities toward these predatory loans, Bank of America caused minority-owned properties throughout Miami to fall into

[1] The City also filed substantially similar complaints against Citigroup and Wells Fargo for the same behavior. The three cases were heard by the same judge in the Southern District of Florida, and resolved in the same way: the reasoning laid out in the district court's order in this case was adopted and incorporated in the orders dismissing the other two cases. They were each appealed separately. We have resolved the companion cases in separate opinions. See City of Miami v. Citigroup Inc., No. 14-14706; City of Miami v. Wells Fargo & Co., No. 14-14544. This opinion contains the most detailed account of our reasoning.

unnecessary or premature foreclosure, depriving the City of tax revenue and forcing it to spend more on municipal services (such as police, firefighters, trash and debris removal, etc.) to combat the resulting blight. The City asserts one claim arising under the Fair Housing Act (FHA), 42 U.S.C. § 3601 et seq., as well as an attendant unjust enrichment claim under Florida law.

The district court dismissed the City's FHA claim with prejudice on three grounds: the City lacked statutory standing under the FHA because it fell outside the statute's "zone of interests"; the City had not adequately pled that Bank of America's conduct proximately caused the harm sustained by the City; and, finally, the City had run afoul of the statute of limitations and could not employ the continuing violation doctrine. We disagree with each of these conclusions.

As a preliminary matter, we find that the City has constitutional standing to pursue its FHA claims. We also conclude that under controlling Supreme Court precedent, the "zone of interests" for the Fair Housing Act extends as broadly as permitted under Article III of the Constitution, and therefore encompasses the City's claim. While we agree with the district court that the FHA contains a proximate cause requirement, we find that this analysis is based on principles drawn from the law of tort, and that the City has adequately alleged proximate cause. Finally, we conclude that the "continuing violation doctrine" can apply to the City's claims, if they are adequately pled.

Because the district court imposed too stringent a zone of interests test and wrongly applied the proximate cause analysis, we conclude that it erred in dismissing the City's federal claims with prejudice and in denying the City's motion for leave to amend on the grounds of futility. As for the state law claim, we affirm the dismissal because the benefits the City allegedly conferred on the defendants were not sufficiently direct to plead an unjust enrichment claim under Florida law.

I.

On December 13, 2013, the City of Miami brought this complex civil rights action in the United States District Court for the Southern District of Florida against Bank of America Corporation, Bank of America N.A., Countrywide Financial Corporation, Countrywide Home Loans, and Countrywide Bank, FSB (collectively "Bank of America" or "the Bank") containing two claims. First, it alleged that the defendants violated sections 3604(b)[2] and 3605(a)[3] of the Fair Housing Act, Complaint at 53, by engaging in discriminatory mortgage lending

[2] 42 U.S.C. § 3604(b) makes it unlawful "[t]o discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin."

[3] "It shall be unlawful for any person or other entity whose business includes engaging in residential real estate-related transactions to discriminate against any person in making available such a transaction, or in the terms or conditions of such a transaction, because of race, color, religion, sex, handicap, familial status, or national origin." 42 U.S.C. § 3605(a). A "residential real estate-related transaction" includes "the making or purchasing of loans . . . for improving, constructing, repairing, or maintaining a dwelling; or secured by residential real estate." Id. § 3605(b)(1).

practices that resulted in a disproportionate and excessive number of defaults by minority homebuyers and caused financial harm to the City. It also alleged that the Bank unjustly enriched itself by taking advantage of "benefits conferred by the City" while, at the same time, engaging in unlawful lending practices, which "denied the City revenues it had properly expected through property and other tax payments and . . . cost[] the City additional monies for services it would not have had to provide . . . absent [the Bank's] unlawful activities."

The complaint accused Bank of America of engaging in both "redlining" and "reverse redlining." Redlining is the practice of refusing to extend mortgage credit to minority borrowers on equal terms as to non-minority borrowers. Reverse redlining is the practice of extending mortgage credit on exploitative terms to minority borrowers. Complaint at 3. The City alleged that the Bank engaged in a vicious cycle: first it "refused to extend credit to minority borrowers when compared to white borrowers," then "when the bank did extend credit, it did so on predatory terms." Id. at 4. When minority borrowers then attempted to refinance their predatory loans, they "discover[ed] that [the Bank] refused to extend credit at all, or on terms equal to those offered . . . to white borrowers." Id. at 5.

The City claimed that this pattern of providing more onerous loans -- i.e., those containing more risk, carrying steeper fees, and having higher costs -- to black and Latino borrowers (as compared to white borrowers of identical

creditworthiness) manifested itself in the Bank's retail lending pricing, its wholesale lending broker fees, and its wholesale lending product placement. Id. at 18-25. It also averred that the Bank's internal loan officer compensation system encouraged its employees to give out these types of loans even when they were not justified by the borrower's creditworthiness. See id. at 20, 24. The City claimed that Bank of America's practice of redlining and reverse redlining constituted a "continuing and unbroken pattern" that persists to this day. Id. at 4.

The City said that the Bank's conduct violated the Fair Housing Act in two ways. First, the City alleged that the Bank intentionally discriminated against minority borrowers by targeting them for loans with burdensome terms. Id. at 30-33. Second, the City claimed that the Bank's conduct had a disparate impact on minority borrowers, resulting in a disproportionate number of foreclosures on minority-owned properties, and a disproportionate number of exploitative loans in minority neighborhoods. Id. at 26-30.

Among other things, the City employed statistical analyses to draw the alleged link between the race of the borrowers, the terms of the loans, and the subsequent foreclosure rate of the underlying properties. Drawing on data reported by the Bank about loans originating in Miami from 2004-2012, the City claimed that a Bank of America loan in a predominantly (greater than 90%) minority neighborhood of Miami was 5.857 times more likely to result in foreclosure than

such a loan in a majority-white neighborhood. Id. at 43. According to the City's regression analysis (which purported to control for objective risk characteristics such as credit history, loan-to-value ratio, and loan-to-income ratio), id. at 37, a black Bank of America borrower in Miami was 1.581 times more likely to receive a loan with "predatory" features[4] than a white borrower, and a Latino borrower was 2.087 times more likely to receive such a loan. Moreover, black Bank of America borrowers with FICO scores over 660 (indicating good credit) in Miami were 1.533 times more likely to receive a predatory loan than white borrowers, while a Latino borrower was 2.137 times more likely to receive such a loan. Id. at 6.

The City's data also suggested that from 2004-2012, 21.9% of loans made by Bank of America to black and Latino customers in Miami were high-cost, compared to just 8.9% of loans made to white customers. Id. at 34. Data cited in the complaint showed significantly elevated rates of foreclosure for loans in minority neighborhoods. While 53.3% of Bank of America's Miami loan originations were in "census tracts" that are at least 75% black or Latino, 95.7% of loan originations that had entered foreclosure by June 2013 were from such census

[4] As we've noted, the City identified as "predatory" those containing features such as high-cost loans (i.e., those with an interest rate that was at least three percentage points above a federally established benchmark), subprime loans, interest-only loans, balloon loan payments, loans with prepayment penalties, negative amortization loans, no documentation loans, and adjustable rate mortgages with teaser rates (i.e., a lifetime maximum rate greater than the initial rate plus 6%). Complaint at 34.

tracks. Id. at 39. And 32.8% of Bank of America's loans in predominantly black or Latino neighborhoods resulted in foreclosure, compared to only 7.7% of its loans in non-minority (at least 50% white) neighborhoods. Id. at 40. Likewise, a Bank of America borrower in a predominantly black or Latino census tract was 1.585 times more likely to receive a predatory loan as a borrower with similar characteristics in a non-minority neighborhood. Id. at 38.

The complaint also alleged that the bank's loans to minorities resulted in especially quick foreclosures.[5] The average time to foreclosure for Bank of America's black and Latino borrowers was 3.144 years and 3.090 years, respectively, while for white borrowers it was 3.448 years. Id. at 42. The allegations also gathered data from various non-Miami-based studies (some nationwide, some based on case studies in other cities) to demonstrate the elevated prevalence of foreclosure, predatory loan practices, and higher interest rates among black and Latino borrowers, and the foreseeability of foreclosures arising from predatory lending practices and their attendant harm. See id. at 26-30.

The City's charges were further amplified by the statements of several confidential witnesses who claimed that the Bank deliberately targeted black and

[5] The complaint quoted a joint report from the Department of Housing and Urban Development and the Department of the Treasury noting that time to foreclosure is an important indicator of predatory practices: "[t]he speed with which the subprime loans in these communities have gone to foreclosure suggests that some lenders may be making mortgage loans to borrowers who did not have the ability to repay those loans at the time of origination." U.S. Dep't of Hous. & Urban Dev. & U.S. Dep't of Treasury, Curbing Predatory Home Mortgage Lending 25 (2000), available at http://www.huduser.org/Publications/pdf/treasrpt.pdf. Complaint at 43.

Latino borrowers for predatory loans. Thus, for example, one mortgage loan officer with Bank of America who worked on loans in the Miami area claimed that the bank targeted less savvy minorities for negative amortization loans. Id. at 31. Another noted that Bank of America paid higher commissions to loan officers for Fair Housing Act loans as opposed to the allegedly more advantageous Community Reinvestment Act (CRA) loans, incentivizing officers to steer borrowers away from the CRA loans. Id. at 32. Still another noted that back-end premiums (a premium earned by the loan officer equal to the difference between the borrower's loan rate and the rate the bank pays for it) on loans were not disclosed and "often eluded less educated, minority borrowers." Id. One of the witnesses explained that from 2011-2013, Bank of America did not offer regular refinancing to persons with mortgages at over 80% of the value of the house (including many negative amortization loans), which disproportionately affected minorities in danger of losing their homes. Id. at 33.

Notably, the City sought damages based on reduced property tax revenues. Id. at 45. It claimed that the Bank's lending policies caused minority-owned property to fall into unnecessary or premature foreclosure. Id. The foreclosed-upon properties lost substantial value and, in turn, decreased the value of the surrounding properties, thereby depriving the City of property tax revenue. The City alleged that "Hedonic regression" techniques could be used to quantify the

losses the City suffered that were attributable to the Bank's conduct. Id. at 46-47. The City also sought damages based on the cost of the increased municipal services it provided to deal with the problems attending the foreclosed and often vacant properties -- including police, firefighters, building inspectors, debris collectors, and others. These increased services, the City claimed, would not have been necessary if the properties had not been foreclosed upon due to the Bank's discriminatory lending practices. Id. at 49-50. The City also sought a declaratory judgment that the Bank's conduct violated the FHA, an injunction barring the Bank from engaging in similar conduct, and punitive damages, as well as attorneys' fees. Id. at 55-56.

On July 9, 2014, the district court granted defendants' motion to dismiss.[6] First, the court found that the City of Miami lacked statutory standing to sue under the FHA. The court determined that, based on this Court's earlier opinion in Nasser v. City of Homewood, 671 F.2d 432 (11th Cir. 1982), the City's claim fell outside the FHA's "zone of interests," and therefore the City lacked standing to sue under this statute. In particular, the trial court determined that the City had alleged "merely economic injuries" that were not "affected by a racial interest." Like the plaintiffs in Nasser, the court suggested, the City was seeking redress under the

[6] This order was adopted and incorporated in the two companion cases involving Citigroup and Wells Fargo.

FHA for "an economic loss from a decrease in property values," and as with the plaintiffs in Nasser, this was insufficient. The City's goal went far beyond the purpose of the FHA, which is to "provide, within constitutional limitations, for fair housing throughout the United States." City of Miami v. Bank of America Corp., 2014 WL 3362348, at *4 (quoting 42 U.S.C. § 3601).

The court also concluded that the FHA contains a proximate cause requirement, but that the City had not adequately pled proximate cause. The City had not sufficiently traced any foreclosures to the defendants' conduct, as opposed to confounding background variables such as "a historic drop in home prices and a global recession," and "the decisions and actions of third parties, such as loan services, government entities, competing sellers, and uninterested buyers." Id. at *5. The court also determined that the City had not shown that the Bank's mortgage practices caused the City any harm. It was unimpressed with the "statistics and studies" the City cited, noting that some were not based on data from Miami, some were not limited to the defendants' practices, and others "d[id] not control for relevant credit factors that undoubtedly affect lending practices." Id. Moreover, some of the harm to the City stemmed directly from "the actions of intervening actors such as squatters, vandals or criminals that damaged foreclosed properties." Id.

The district court also concluded that the City's federal claim ran afoul of the statute of limitations. It noted that for the FHA, a plaintiff must bring his claim "not later than 2 years after the occurrence" of the discriminatory housing practice, and that for discriminatory loans the statute of limitations begins to run from the date of the loan closing. But the City had not alleged that any loans were made later than 2008, a full five years before its complaint was filed. The court was not persuaded by the City's invocation of the continuing violation doctrine -- which can allow plaintiffs, under some circumstances, to sue on an otherwise time-barred claim -- since the City had not alleged sufficient facts to support its allegation that the specific practices continued into the statutory period. The district court dismissed the City's FHA claim with prejudice, reasoning that even if the statute of limitations deficiencies could be cured by an amended pleading, the City's lack of statutory standing could not be.

Finally, the district court rejected the City's unjust enrichment claim on several grounds. As a preliminary matter, the City had failed to draw the necessary causal connection between the Bank's alleged discriminatory practices and its receipt of undeserved municipal services. Moreover, the court found that the City had failed to allege basic elements of an unjust enrichment claim under Florida law. It determined that any benefit the Bank received from municipal services was not direct but "derivative" and, therefore, insufficient to support an unjust

enrichment claim. It also found that the City had failed to allege that the Bank was not otherwise entitled to those services as a Miami property owner. Finally, it rejected the City's argument that Miami was forced to pay for the Bank's externalities (the costs of the harm caused by its mortgage lending), holding that paying for externalities cannot sustain an unjust enrichment claim. The district court dismissed the unjust enrichment claim without prejudice, leaving the City free to amend its complaint.

The City chose not to proceed on its unjust enrichment claim alone "because the two claims are so intimately entwined and based on largely the same underlying misconduct." Instead, it moved in the district court for reconsideration and for leave to file an amended complaint, arguing that it had standing under the FHA and that the amended complaint would cure any statute of limitations deficiency. The proposed amended complaint alleged that the Bank's discriminatory lending practices "frustrate[] the City's longstanding and active interest in promoting fair housing and securing the benefits of an integrated community," thereby "directly interfer[ing]" with one of the City's missions. First Amended Complaint for Violations of the Federal Fair Housing Act at 31, City of Miami v. Bank of America Corp., No. 13-24506-CIV (S.D. Fla. Sept. 9, 2014) ("Amended Complaint"). It also made more detailed allegations about properties that had been foreclosed upon after being subject to discriminatory loans.

Specifically, the proposed amended complaint identified five foreclosed properties that corresponded to predatory loans that originated between 2008 and 2012, and three that originated between 2004 and 2008. It also identified seven properties that corresponded to predatory loans that the Bank had issued after December 13, 2011 (within two years of filing suit) that had not yet been foreclosed upon but were likely to "eventually enter the foreclosure process," based on expert analysis. Id. at 36-37. The complaint continued to invoke the continuing violation doctrine and claimed that the statute of limitations had not run.

The district court denied the City's motion for reconsideration and for leave to amend. As for statutory standing, the court explained that "[a]rguing that this Court's reasoning was flawed is not enough for a motion for reconsideration." City of Miami v. Bank of America Corp., 2014 WL 4441368, at *2. And the court was unimpressed by the City's new argument that it "has a generalized non-economic interest . . . in racial diversity," ruling that these were "claims [the City] never made and amendments it did not previously raise or offer despite ample opportunity," and were therefore "improperly raised as grounds for reconsideration." Id. Finally, the court noted that these "generalized allegations [do not] appear to be connected in any meaningful way to the purported loss of tax revenue and increase in municipal expenses allegedly caused by Defendants' lending practices." Id. at *2 n.1.

The City timely appealed the court's final order of dismissal.

II.

A. Standard of Review

We review the district court's grant of a motion to dismiss with prejudice de novo, "accepting the [factual] allegations in the complaint as true and construing them in the light most favorable to the plaintiff." Mills v. Foremost Ins. Co., 511 F.3d 1300, 1303 (11th Cir. 2008) (quotation omitted). We generally review the district court's decision to deny leave to amend for an abuse of discretion, but we will review de novo an order denying leave to amend on the grounds of futility, because it is a conclusion of law that an amended complaint would necessarily fail. Hollywood Mobile Estates Ltd. v. Seminole Tribe of Fla., 641 F.3d 1259, 1264 (11th Cir. 2011). Finally, we review de novo whether plaintiffs have Article III standing. Ga. Latino Alliance for Human Rights v. Governor of Ga., 691 F.3d 1250, 1257 (11th Cir. 2012).

B. Fair Housing Act Claim

1. Article III Standing

We come then to the first essential question in the case: whether the City of Miami has constitutional standing to bring its Fair Housing Act claim. See Bochese v. Town of Ponce Inlet, 405 F.3d 964, 974 (11th Cir. 2005) ("[Article III] [s]tanding is a threshold jurisdictional question which must be addressed prior

to . . . the merits of a party's claims." (quoting Dillard v. Baldwin Cnty. Comm'rs, 225 F.3d 1271, 1275 (11th Cir. 2000)). Although the district court addressed only the issue of so-called "statutory standing," the Bank contests both Article III standing and statutory standing, and we address each in turn.

"[S]tanding is an essential and unchanging part of the case-or-controversy requirement of Article III." Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992). It is by now axiomatic that to establish constitutional standing at the pleading stage, the plaintiff must plausibly allege: (1) an injury in fact that is concrete, particularized, and actual or imminent; (2) "a causal connection between the injury and the conduct complained of," such that the injury is "fairly traceable to the challenged action of the defendant"; and (3) that a favorable judicial decision will "likely" redress the injury. See Bochese, 405 F.3d at 980 (quotation omitted). The "line of causation" between the alleged conduct and the injury must not be "too attenuated." Allen v. Wright, 468 U.S. 737, 752 (1984). The party invoking federal jurisdiction bears the burden of establishing these elements. See FW/PBS, Inc. v. Dallas, 493 U.S. 215, 231 (1990). At the pleading stage, "general factual allegations of injury resulting from the defendant's conduct may suffice" to demonstrate standing. Defs. of Wildlife, 504 U.S. at 561.

The district court did not address whether the City had Article III standing because it granted the Bank's motion to dismiss on other grounds. On appeal, the

Bank argues that the City lacked Article III standing because it had not adequately alleged the causal connection -- that is, the "traceability" -- between its injury and the Bank's conduct. We are unpersuaded.

To recap, the City claims that the Bank's discriminatory lending practices caused minority-owned properties to fall into foreclosure when they otherwise would not have, or earlier than they otherwise would have. This, in turn, decreased the value of the foreclosed properties themselves and the neighboring properties, thereby depriving the City of property tax revenue, and created blight, thereby forcing the City to spend additional money on municipal services. Complaint at 45-50. We have little difficulty in finding, based on controlling Supreme Court caselaw, that the City has said enough to allege an injury in fact for constitutional standing purposes. Our analysis is guided by Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91 (1979). In that case, the Village of Bellwood sued a real estate firm under the FHA for discriminatory renting practices that caused racial segregation. Id. at 94-95. The Supreme Court held that the village had Article III standing to bring its claim partly on the basis of "[a] significant reduction in property values," because such a reduction "directly injures a municipality by diminishing its tax base, thus threatening its ability to bear the costs of local government and to provide services." Id. at 110-11. Like the Village of Bellwood, the City of Miami claims that an allegedly discriminatory policy has reduced local

property values and diminished its tax base. Thus, like the Village of Bellwood, the City of Miami has adequately alleged an injury in fact.

As for Article III causation, the Bank claims that the City's harm is not fairly traceable to the Bank's conduct. Specifically, it suggests that a myriad of other factors cause foreclosure and blight -- including the state of the housing market and the actions of third parties like other property owners, competing sellers, vandals, etc. -- thereby breaking the causal chain. While we acknowledge the real possibility of confounding variables, at this stage in the proceeding the City's alleged chain of causation is perfectly plausible: taking the City's allegations as true, the Bank's extensive pattern of discriminatory lending led to substantially more defaults on its predatory loans, leading to a higher rate of foreclosure on minority-owned property and thereby reducing the City's tax base. See Cnty. of Cook v. Wells Fargo & Co., No. 14 C 9548, 2015 WL 4397842, at *3-4 (N.D. Ill. July 17, 2015) (finding the same causal allegation sufficient for Article III traceability in a materially identical FHA case and citing eight other district court cases finding the same). Moreover, the complaint supports its allegations with regression analyses that link the Bank's treatment of minority borrowers to predatory loans, predatory loans to foreclosure, and foreclosure to reduced tax revenue. Complaint at 6, 37-38, 44, 46. All told, the City has "allege[d] . . . facts

essential to show jurisdiction." FW/PBS, 493 U.S. at 231 (quoting McNutt v. Gen. Motors Acceptance Corp., 298 U.S. 178, 189 (1936)).

Of course, the City has limited its claim only to those damages arising from foreclosures caused by the Bank's lending practices. At a subsequent stage in the litigation it may well be difficult to prove which foreclosures resulted from discriminatory lending, how much tax revenue was actually lost as a result of the Bank's behavior, etc. But at this early stage, the claim is plausible and sufficient. The City has said enough to establish Article III standing.[7]

2. "Statutory Standing"

The district court dismissed the City's claim, however, not on the basis of Article III standing, but because it lacked what the court characterized as "statutory standing." It found that the City fell outside the FHA's "zone of interests," and that its harm was not proximately caused by the Bank's actions. Ultimately, we disagree with the district court's legal conclusions. As for the zone of interests, we conclude that we are bound by Supreme Court precedent stating that so-called statutory standing under the FHA extends as broadly as Article III will permit, and find that this includes the City. As for proximate cause, we agree that it must be

[7] The third Lujan factor, redressability, is not at issue in this appeal. The City has "allege[d] a monetary injury and an award of compensatory damages would redress that injury." Resnick v. AvMed, Inc., 693 F.3d 1317, 1324 (11th Cir. 2012).

pled for a damages claim under the FHA, but find that the City has adequately done so here.

Notably, the Supreme Court recently clarified in Lexmark International, Inc. v. Static Control Components, Inc., 134 S. Ct. 1377 (2014), that the longstanding doctrinal label of "statutory standing" (sometimes also called "prudential standing") is misleading. The proper inquiry is whether the plaintiff "has a cause of action under the statute." Id. at 1387. But that inquiry isn't a matter of standing, because "the absence of a valid . . . cause of action does not implicate subject-matter jurisdiction, i.e., the court's statutory or constitutional power to adjudicate the case." Id. at 1387 n.4 (quoting Verizon Md. Inc. v. Public Serv. Comm'n of Md., 535 U.S. 635, 642-643 (2002)). Instead, it is "a straightforward question of statutory interpretation." Id. at 1388.

This issue comes before the Court on a motion to dismiss for failure to state a claim, and the City's pleadings are evaluated for plausibility using the standard set forth in Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007), and Ashcroft v. Iqbal, 556 U.S. 662 (2009). "The complaint must contain enough facts to make a claim for relief plausible on its face; a party must plead 'factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.'" Resnick v. AvMed, Inc., 693 F.3d 1317, 1324-25 (11th Cir. 2012) (quoting Iqbal, 556 U.S. at 678). Of course, in evaluating the plausibility of

the claim we must take all of the plaintiff's factual allegations as true. See Iqbal, 556 U.S. at 678.

a. Zone of Interests

In general, a statutory cause of action "extends only to those plaintiffs whose interests 'fall within the zone of interests protected by the law invoked.'" Lexmark, 134 S. Ct. at 1388 (quoting Allen v. Wright, 468 U.S. 737, 751 (1984)). The Supreme Court has instructed us that this test "applies to all statutorily created causes of action," but its application is not uniform: "certain statutes . . . protect a more-than-usually 'expansive' range of interests." Id. (quoting Bennett v. Spear, 520 U.S. 154, 164 (1997)) (alteration adopted).

The FHA provides that

> [a]n aggrieved person may commence a civil action in an appropriate United States district court or State court not later than 2 years after the occurrence or the termination of an alleged discriminatory housing practice . . . to obtain appropriate relief with respect to such discriminatory housing practice or breach.

42 U.S.C. § 3613(a)(1)(A). It defines an "aggrieved person" as anyone who "claims to have been injured by a discriminatory housing practice," or "believes that such person will be injured by a discriminatory housing practice that is about to occur." Id. at § 3602(i).

The Bank claims that the City is not an "aggrieved person," and, therefore, falls outside the statute's zone of interests and cannot state a cause of action under

the FHA. The City argues, however, that "FHA statutory standing is as broad as the Constitution permits under Article III," and therefore it is within the statute's zone of interests. Older Supreme Court cases appear to support the City's view, while certain more recent cases -- as well as an older decision of this Court -- have cast some doubt on the viability of those holdings. The answer requires carefully parsing both Supreme Court and Eleventh Circuit precedent, and a review of the relevant cases is instructive.

i. Early Supreme Court cases

The first major FHA case explicated by the Supreme Court is Trafficante v. Metropolitan Life Insurance, 409 U.S. 205 (1972). Two tenants of an apartment complex -- one black, one white -- alleged that the landlord discriminated against minorities on the basis of race when renting units, in violation of the FHA. Id. at 206-07. The Court held that standing under the Act was defined "as broadly as is permitted by Article III of the Constitution . . . insofar as tenants of the same housing unit that is charged with discrimination are concerned." Id. at 209 (quotation omitted). "The language of the Act is broad and inclusive," the Court wrote, and "the alleged injury to existing tenants by exclusion of minority persons from the apartment complex is the loss of important benefits from interracial associations." Id. at 209-10.

Seven years later, in Gladstone, the Village of Bellwood brought suit under the FHA against two real estate firms for "steering" black and white homeowners into targeted, race-specific neighborhoods, thereby "manipulat[ing] the housing market," "affecting the village's racial composition," and causing "[a] significant reduction in property values." 441 U.S. at 109-10. The Court concluded that the village had stated a cause of action under the FHA and reaffirmed, based on the legislative history and purpose of the statute, that statutory standing under the FHA "is as broad as is permitted by Article III of the Constitution." Id. at 109 (quotation omitted and alteration adopted).

Next came Havens Realty Corp. v. Coleman, 455 U.S. 363 (1982), in which -- along with other plaintiffs -- a nonprofit corporation whose purpose was "to make equal opportunity in housing a reality in the Richmond Metropolitan Area" brought an FHA claim against a realty firm for racial steering (i.e., fostering racial segregation by guiding prospective buyers towards or away from certain apartments based on the buyer's race). In the clearest and most unambiguous terms, the Supreme Court reiterated the holding of Gladstone: "Congress intended standing under [the FHA] to extend to the full limits of Art. III and . . . the courts accordingly lack the authority to create prudential barriers to standing in suits brought under [the FHA]." Id. at 372 (quotation omitted). As the Court explained, "the sole requirement for standing to sue under [the FHA] is the Art. III minima of

injury in fact: that the plaintiff allege that as a result of the defendant's actions he has suffered 'a distinct and palpable injury.'" Id. (quoting Warth v. Seldin, 422 U.S. 490, 501 (1975)). The organization's allegation that the racial steering "perceptibly impaired [its] ability to provide counseling and referral services for low- and moderate-income homeseekers" was sufficient to constitute injury in fact for purposes of Article III (and statutory) standing. Id. at 379.

ii. Nasser

Less than a month after Havens, the Eleventh Circuit issued an opinion in Nasser, 671 F.2d 432, on which the district court and the Bank principally rely. In Nasser, property owners challenged a zoning ordinance that rezoned their property from multi-family residential to single-family residential, alleging, inter alia, that the ordinance violated the FHA. Id. at 434. In 1976, the plaintiffs entered into an agreement with a developer for the construction of a multi-family housing complex on their property. The developer had looked into the possibility of making some units of this complex available for low- and moderate-income families via rent subsidies, and had inquired with the Department of Housing and Urban Development. But the development never materialized. A detailed affidavit from a member of the county planning commission stated that the plaintiffs had never suggested that their purpose "was to build a multi-family project for the use and benefit of low income or minority groups." Id. at 435. Instead, the affidavit

claimed that the plaintiffs had represented their project as "an exclusive-high rent apartment complex." Id. The Court found that there was no "evidence that the 1976 project was in any way affected by or related to racial or other minority interests." Id.

Three years later, the land was re-zoned. Id. at 434. The plaintiffs claimed that the re-zoning had reduced the value of their property by more than 50% (from $285,000 to $135,000). See id. at 435. A panel of this Court concluded that the plaintiffs lacked statutory standing under the FHA despite this purported economic injury. In making this determination, the Court considered Trafficante and Gladstone, and concluded: "There is no indication that the [Supreme] Court intended to extend standing, beyond the facts before it, to plaintiffs who show no more than an economic interest which is not somehow affected by a racial interest." Id. at 437. The Nasser Court found that the property owners lacked an economic interest affected by a racial interest, and therefore lacked standing to sue under the FHA. Id. at 438.

iii. Newer Supreme Court cases on statutory standing

Two recent Supreme Court cases have cast some doubt on the broad interpretation of FHA statutory standing in Trafficante, Gladstone, and Havens. In Thompson v. North American Stainless, LP., 562 U.S. 170 (2011), the Court considered whether an employee had a cause of action under Title VII, which uses

nearly identical statutory language to the FHA. See 42 U.S.C. § 2000e-5(f)(1) ("[A] civil action may be brought . . . by the person claiming to be aggrieved."). The Court rejected the argument that this language expanded statutory standing to the limits of Article III. Id. at 177. Instead, it drew an analogy to the Administrative Procedure Act (which contains similar language) and held that plaintiffs must "fall[] within the 'zone of interests' sought to be protected by the statutory provision whose violation forms the legal basis for his complaint." Id. at 177-78 (quoting Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 883 (1990)).

The Court acknowledged that this analysis was in some tension with Trafficante and Gladstone. But in glossing Trafficante, the Thompson Court focused on language in the opinion that arguably limited the holding to its facts: the Trafficante Court stated that standing under the FHA was coextensive with Article III only "insofar as tenants of the same housing unit that is charged with discrimination are concerned." Id. at 176 (quoting Trafficante, 409 U.S. at 209). The Thompson Court acknowledged that later cases (such as Gladstone) reiterated that standing under the FHA "reaches as far as Article III permits" without any limiting language, but it stated that "the holdings of those cases are compatible with the 'zone of interests' limitation" that the Court went on to read into Title VII. Id. at 177.

Finally, the Supreme Court's recent opinion in Lexmark (interpreting the Lanham Act) discarded the labels "prudential standing" and "statutory standing," and clarified that the inquiry was really a question of statutory interpretation, and not standing at all. 134 S. Ct. at 1386-87 & n.4. One aspect of this interpretation, the Court explained, was a zone of interests analysis, which "requires [the court] to determine, using traditional tools of statutory interpretation, whether a legislatively conferred cause of action encompasses a particular plaintiff's claim." Id. at 1387. The Court went on to say that this zone of interests test "applies to all statutorily created causes of action." Id. at 1388. Lexmark did not mention the FHA or any of the Court's FHA cases.

iv. Analysis

The scope and role of the zone of interests analysis in the FHA context is a difficult issue, and one that has sharply divided the courts that have considered it. Compare, e.g., Cnty. of Cook, 2015 WL 4397842, at *5-6 (holding that Thompson and Lexmark effectively overruled the Supreme Court's interpretation of FHA statutory standing as being coextensive with Article III standing), with, e.g., City of Los Angeles v. JPMorgan Chase & Co., No. 2:14-CV-04168-ODW, 2014 WL 6453808, at *6 (C.D. Cal. Nov. 14, 2014) (finding that the Supreme Court's original interpretation of FHA statutory standing remained good law after Thompson and Lexmark). Ultimately, we disagree with the district court, and hold

that the phrase "aggrieved person" in the FHA extends as broadly as is constitutionally permissible under Article III.

Simply put, Trafficante, Gladstone, and Havens have never been overruled, and the law of those cases is clear as a bell: "[statutory] standing under [the FHA] extends 'as broadly as is permitted by Article III of the Constitution.'" Gladstone, 441 U.S. at 98 (quoting Trafficante, 409 U.S. at 209); accord Havens, 455 U.S. at 372. While Thompson has gestured in the direction of rejecting that interpretation, a gesture is not enough. The rule governing these situations is clear: "if a precedent of the Supreme Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to the Supreme Court[] the prerogative of overruling its own decisions." Evans v. Sec'y, Fla. Dep't of Corr., 699 F.3d 1249, 1263 (11th Cir. 2012) (quotation omitted and alterations adopted); accord Tenet v. Doe, 544 U.S. 1, 10-11 (2005). In other words, "the Supreme Court has insisted on reserving to itself the task of burying its own decisions." Evans, 699 F.3d at 1263 (quotation omitted).

Notably, Thompson itself was a Title VII case, not a Fair Housing Act case. Thompson surveyed Trafficante and Gladstone, but did not explicitly overrule them -- nor could it, given the different statutory context in which it arose. Instead, the Court held that any suggestion drawn from the FHA cases that Title VII's

cause of action is similarly broad was "ill-considered" dictum. Thompson, 562 U.S. at 176. It's true that Title VII contains nearly identical statutory language to the FHA, and therefore the Thompson Court's interpretation of Title VII may signal that the Supreme Court is prepared to narrow its interpretation of the FHA in the future. (The dicta in Thompson indicating that its Title VII interpretation is "compatible" with the Court's previous FHA holdings suggests as much. See 562 U.S. at 176-77.) But that day has not yet arrived, and until it does, our role as an inferior court is to apply the law as it stands, not to read tea leaves. The still-undisturbed holding of the Supreme Court's FHA cases is that the definition of an "aggrieved person" under the FHA extends as broadly as permitted under Article III.

This Court's binding precedent in Nasser is not to the contrary. Nasser stands for the unremarkable proposition that a plaintiff has no cause of action under the FHA if he makes no allegation of discrimination (or disparate impact) on the basis of race (or one of the FHA's other protected characteristics: color, religion, sex, handicap, familial status, and national origin). The allegation of discrimination provides the "racial interest" Nasser requires to bring an economic injury within the scope of the statute. 671 F.2d at 437. The Nasser plaintiffs' claim was unrelated to race (or any protected FHA characteristic) altogether; they simply objected to the rezoning of their property because it cost them money. As

the Nasser Court put it, the plaintiffs' "interest in [the] value of the property in no way implicate[d] [the] values protected by the Act." Id.

Indeed, this is exactly how subsequent Eleventh Circuit caselaw has treated Nasser. In Baytree of Inverrary Realty Partners v. City of Lauderhill, 873 F.2d 1407 (11th Cir. 1989) -- the only case of this Court to revisit or reference Nasser's treatment of the FHA -- we held that a non-minority real estate developer, Baytree, stated a claim under the FHA when it challenged the city's decision to rezone its property, alleging that the decision was racially motivated and rendered the property worthless. Id. at 1408. We distinguished Nasser as a case "in which plaintiffs alleged only an economic injury unaffected by any racial interest," and found it inapposite because Baytree had properly alleged that its injury "result[ed] from racial animus." Id. at 1409. The same is true of the City of Miami's claim. Like Baytree, the City claims to have suffered an economic injury resulting from a racially discriminatory housing policy; in neither case does Nasser prevent the plaintiff from stating a claim under the FHA.

In sum, we agree with the City that the term "aggrieved person" in the FHA sweeps as broadly as allowed under Article III; thus, to the extent a zone of interests analysis applies to the FHA, it encompasses the City's allegations in this case. The City's claim does not suffer from the same flaw as the Nasser plaintiffs', because the City has specifically alleged that its injury is the result of a Bank

policy either expressly motivated by racial discrimination or resulting in a disparate impact on minorities.

b. Proximate Cause

The district court also concluded that the City's pleadings did not sufficiently allege that the Bank's lending practices were a proximate cause of the City's injury. It determined that the City had not "allege[d] facts that isolate Defendants' practices as the cause of any alleged lending disparity" compared to the background factors of a cratering economy and the actions of independent actors such as "loan services, government entities, competing sellers, and uninterested buyers." City of Miami v. Bank of America Corp., 2014 WL 3362348, at *5. It also found that the City's statistical analyses indicating that foreclosures caused economic harm were "insufficient to support a causation claim," because some of the studies were not limited to Miami, some were not limited to the defendants' practices, and some did not control for relevant credit factors. Id. The plaintiffs disagree, arguing that they need not plead proximate causation at all, only the lesser "traceability" required by Article III. In the alternative, they say that their pleadings were sufficient under either standard. Although we agree with the Bank and the district court that proximate cause is a required element of a damages claim under the FHA, we find that the City has pled it adequately.

In Lexmark, the Supreme Court illuminated the doctrine of proximate cause as it relates to statutory causes of action. "[W]e generally presume that a statutory cause of action is limited to plaintiffs whose injuries are proximately caused by violations of the statute." 134 S. Ct. at 1390. This principle reflects "the reality that the judicial remedy cannot encompass every conceivable harm that can be traced to alleged wrongdoing," as well as the Court's assumption that Congress is familiar with the traditional common-law rule and "does not mean to displace it sub silentio." Id. (quotation omitted). The Court made clear that proximate causation is not a requirement of Article III, but rather an element of the cause of action under a statute, and it "must be adequately alleged at the pleading stage in order for the case to proceed." Id. at 1391 n.6. The Supreme Court has read a variety of federal statutory causes of action to contain a proximate cause requirement. See, e.g., Lexmark, 134 S. Ct. at 1390-93 (Lanham Act); Dura Pharmaceuticals, Inc. v. Broudo, 544 U.S. 336, 346 (2005) (securities fraud); Holmes v. Sec. Investor Prot. Corp., 503 U.S. 258, 265-68 (1992) (RICO); Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters, 459 U.S. 519, 529-35 (1983) (Clayton Act).

Although proximate cause "is not easy to define," the basic inquiry is "whether the harm alleged has a sufficiently close connection to the conduct the statute prohibits." Lexmark, 134 S. Ct. at 1390. The requirement is "more

restrictive than a requirement of factual cause alone," Paroline v. United States, 134 S. Ct. 1710, 1720 (2014), and we have said that it demands "something [more]" than Article III traceability, Focus on the Family v. Pinellas Suncoast Transit Auth., 344 F.3d 1263, 1273 (11th Cir. 2003); see also Lexmark, 134 S. Ct. at 1391 n.6. But the nature of the proximate cause requirement differs statute by statute: it is "controlled by the nature of the statutory cause of action," so the scope of liability depends on the statutory context. Lexmark, 134 S. Ct. at 1390.

No case of the Supreme Court or this Court has ever dealt directly with the existence or application of a proximate cause requirement in the FHA context. But certain statements by the Supreme Court suggest that proximate cause must exist for a damages action brought under the FHA. First, the Lexmark Court characterized proximate cause as a "general[] presum[ption]" in statutory interpretation. Id. at 1390. Moreover, the Supreme Court has observed that an FHA damages claim is "in effect, a tort action," governed by general tort rules, Meyer v. Holley, 537 U.S. 280, 285 (2003); Curtis v. Loether, 415 U.S. 189, 195 (1974) ("A damages action under the [FHA] sounds basically in tort -- the statute merely defines a new legal duty, and authorizes the courts to compensate a plaintiff for the injury caused by the defendant's wrongful breach."), and proximate cause is a classic element of a tort claim, see Dan B. Dobbs, Paul T. Hayden & Ellen M. Bublick, The Law of Torts § 198 (2d ed. 2011). If the City's claim is functionally

a tort action, then presumably the City must adequately plead proximate cause, just like any other plaintiff raising any tort claim. At least two of our sister circuits appear to have reached the same conclusion. See Pac. Shores Props., LLC v. City of Newport Beach, 730 F.3d 1142, 1167-68 & n.32 (9th Cir. 2013) (noting that a damages action under the FHA "sounds basically in tort" and applying a proximate cause requirement), cert. denied sub nom. City of Newport Beach v. Pac. Shores Props., LLC, 135 S. Ct. 436 (2014); Samaritan Inns, Inc. v. Dist. of Columbia, 114 F.3d 1227, 1234-35 (D.C. Cir. 1997) (same); see also Miami Valley Fair Hous. Ctr., Inc. v. Connor Grp., No. 3:10-CV-83, 2015 WL 853193, at *4-5 (S.D. Ohio Feb. 26, 2015) (holding that a fair housing organization must establish proximate cause because it is "one step removed from the discrimination," so its claimed damages must be "t[ied] . . . to the defendant's alleged wrongdoing").[8]

[8] We recognize that our conclusion that a private cause of action under the FHA contains a proximate cause requirement may be in some tension with the Supreme Court's general holding that statutory standing under the FHA extends as broadly as permitted under Article III. As we've explained, Article III's only causation requirement is that the plaintiff's injury be "fairly traceable" to the defendant's unlawful conduct. Defs. of Wildlife, 504 U.S. at 590 (quoting Allen, 468 U.S. at 751). Plainly, proximate cause is not an element of constitutional standing. See Lexmark, 134 S. Ct. at 1391 n.6. Nonetheless, we do not interpret Trafficante, Gladstone, or Havens to have read a proximate cause requirement out of the statute. Nothing in those cases decided, or even asked, whether some kind of proximate cause requirement is an element of an FHA claim.

To the extent those cases addressed Article III standing, they were concerned with what we call today the first Lujan factor: injury in fact -- an injury that is "concrete and particularized," and "actual or imminent." Defs. of Wildlife, 504 U.S. at 560. In Trafficante, the plaintiffs were two tenants, one black, one white, who had lost the benefit of interracial associations; causation was not discussed. 409 U.S. at 206; see Gladstone, 441 U.S. at 112-13 (characterizing Trafficante's holding as turning on Article III's injury-in-fact requirement). In Gladstone, causation was again not considered, except for a suggestion in dicta that evidence of

The Bank argues that proximate cause creates a "directness requirement" within the FHA, and that the City's pleadings, therefore, fail because they do not allege that the Bank's actions directly harmed the City. The City does not accuse the Bank of discriminating against the City itself in its lending practices; instead, it claims that the Bank's discriminatory practices led the City to lose tax revenue and spend money combating the resulting blight. This harm, the Bank claims, is too indirect to have been proximately caused by the Bank's conduct.

We disagree. The Bank proposes to draw its proximate cause test from other statutory contexts, primarily from the Supreme Court's interpretation of the Racketeer Influenced and Corrupt Organizations Act (RICO) in Holmes, 503 U.S. 258. In that case, the Court read a proximate cause requirement into RICO, reasoning that its statutory language (granting a cause of action to anyone injured

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the defendant's business practices might "be relevant to the establishment of the necessary causal connection between the alleged conduct and the asserted injury" in later stages of litigation. Id. at 114 n.29. Finally, in Havens, the Court did not discuss causation; "the question before [the Court] . . . [was] whether injury in fact ha[d] been sufficiently alleged." 455 U.S. at 376 (emphasis added). Nothing in the holdings of these cases speaks to the existence of a proximate cause requirement, let alone bars us from interpreting the FHA to require a showing of proximate cause for damages actions.

Moreover, it seems inconceivable that the FHA would not contain a proximate cause requirement of some sort, because the alternative would produce seemingly absurd results. Requiring nothing but Article III traceability for FHA damages actions would create an open-ended fount of liability, particularly for plaintiffs (like the City of Miami) who are at least one step removed from the defendant's discriminatory conduct. This, of course, is why proximate cause is a classic element of a tort action -- and, as we have said, the Supreme Court has observed that damages claims under the FHA are essentially tort actions. Indeed, this statutory interpretation, rooted in the nature of the cause of action, has now been embraced by all three circuit courts of appeals to have addressed the issue.

"by reason of" a violation of 18 U.S.C. § 1692, see 18 U.S.C. § 1964(c)) mirrored language used in the antitrust statutes, which had long been interpreted to contain such a requirement. See Holmes, 503 U.S. at 267-68. One of the "central elements" of proximate cause in the RICO and antitrust context, the Court explained, is "a demand for some direct relation between the injury asserted and the injurious conduct alleged." Id. at 268-69; see, e.g., Simpson v. Sanderson Farms, Inc., 744 F.3d 702, 712 (11th Cir. 2014) (applying the Holmes directness requirement in a civil RICO case); cf. Lexmark, 134 S. Ct. at 1390 (appearing to endorse a directness requirement by noting that a claim "ordinarily" fails to allege proximate cause when "the harm [to the plaintiff] is purely derivative of 'misfortunes visited upon a third person by the defendant's acts'" (quoting Holmes, 503 U.S. at 268)). The Bank argues that proximate cause in the FHA context must be the same.

But the Supreme Court in Lexmark made clear that proximate cause is not a one-size-fits-all analysis: it can differ statute by statute. Thus, for example, Lexmark involved an allegation of false advertising under the Lanham Act brought by one company against a rival. As the Court noted, all such injuries "are derivative of those suffered by consumers who are deceived by the advertising." 134 S. Ct. at 1391. A claim based on such a derivative injury might not satisfy proximate cause under a statute that strictly requires a direct connection between

the plaintiff's harm and the defendant's conduct. Nevertheless, the Court found that the claim satisfied proximate causation under the Lanham Act: because the statute authorized suit "only for commercial injuries," the derivative nature of the plaintiff's claim could not be "fatal" to the plaintiff's cause of action. Id. In other words, the statutory context shaped the proximate cause analysis. So, too, in this case.

The FHA's proximate cause requirement cannot take the shape of the strict directness requirement that the Bank now urges on us: indeed, such a restriction would run afoul of Supreme Court and Eleventh Circuit caselaw allowing entities who have suffered indirect injuries -- that is, parties who have not themselves been directly discriminated against -- to bring a claim under the FHA. Notably, the Village of Bellwood in Gladstone was permitted to bring an FHA claim even though it was not directly discriminated against. 441 U.S. at 109-11. So, too, was the non-profit corporation in Havens, which alleged impairment of its organizational mission and a drain on its resources, not direct discrimination. 455 U.S. at 378-79. And in our own Circuit, the same is true of the plaintiff in Baytree, a non-minority developer who challenged a city's zoning decision as racially discriminatory. 873 F.2d at 1408-09. Indeed, the Supreme Court in Havens instructed that the distinction between direct and indirect harms -- or, as the Havens Court characterized it, the difference "between 'third-party' and 'first-

party' standing" -- was "of little significance in deciding" whether a plaintiff had a cause of action under the FHA. 455 U.S. at 375; see Pac. Shores Props., 730 F.3d at 1168 n.32 ("The fact that FHA plaintiffs' injuries must be proximately caused by the defendants' discriminatory acts does not, of course, mean that defendants are not liable for foreseeable, but indirect, effects of discrimination.").

In examining RICO and the antitrust statutes, the Supreme Court has looked to the statutory text and legislative history to determine the scope and meaning of the proximate cause requirement. See Holmes, 503 U.S. at 265-68. Neither party has presented any argument based on these considerations. However, the Supreme Court has observed that the language of the FHA is "broad and inclusive," Trafficante, 409 U.S. at 209, and must be given "a generous construction," id. at 212. What's more, while the Supreme Court has cautioned that "[t]he legislative history of the [the FHA] is not too helpful" in determining the scope of its cause of action, it observed that the FHA's proponents "emphasized that those who were not the direct objects of discrimination had an interest in ensuring fair housing, as they too suffered." Id. at 210. In short, nothing in the text or legislative history of the FHA supports the Bank's cramped interpretation.

As we've noted, damages claims arising under the FHA have long been analogized to tort claims. Thus, we look to the law of torts to guide our proximate cause analysis in this context. We agree with the City that the proper standard,

drawing on the law of tort, is based on foreseeability.[9] See Dobbs, Hayden & Bublick, supra, § 199, at 686 ("Professional usage almost always reduces proximate cause issues to the question of foreseeability. The defendant must have been reasonably able to foresee the kind of harm that was actually suffered by the plaintiff . . ."); see also Pac. Shores Props., 730 F.3d at 1168 & n.32 (noting in the FHA context that "the doctrine of proximate cause serves merely to protect defendants from unforeseeable results" of their unlawful conduct, and that defendants are "liable for foreseeable . . . effects of discrimination.").

Under this standard, the City has made an adequate showing. The complaint alleges that the Bank had access to analytical tools as well as published reports drawing the link between predatory lending practices "and their attendant harm," such as premature foreclosure and the resulting costs to the City, including, most notably, a reduction in property tax revenues. Complaint at 8-9, 26-27, 32-33, 47-48, 50. The district court rejected the plaintiffs' claim partly because it failed to "allege facts that isolate Defendants' practices as the cause of any alleged lending disparity." City of Miami v. Bank of America Corp., 2014 WL 3362348, at *5. But as we have said even in the more restrictive RICO context, proximate cause "is not . . . the same thing as . . . sole cause." Cox v. Adm'r U.S. Steel & Carnegie, 17

[9] We acknowledge that the Supreme Court has rejected foreseeability as the touchstone of proximate cause "in the RICO context," Hemi Grp., LLC v. City of New York, 559 U.S. 1, 12 (2010), but we have already explained why that statutory context does not govern our analysis today.

F.3d 1386, 1399 (11th Cir.), opinion modified on reh'g, 30 F.3d 1347 (11th Cir. 1994); see Dobbs, Hayden & Bublick, supra, § 198, at 683 ("[The proximate cause requirement] does not mean that the defendant's conduct must be the only proximate cause of the plaintiff's injury."). Instead, a proximate cause is "a substantial factor in the sequence of responsible causation." Cox, 17 F.3d at 1389 (quotation omitted). The City has surely alleged that much: it claims that the Bank's discriminatory lending caused property owned by minorities to enter premature foreclosure, costing the City tax revenue and municipal expenditures. Although there are several links in that causal chain, none are unforeseeable. See Dobbs, Hayden & Bublick, supra, § 204, at 705 (explaining that intervening causes become "superseding" only if they are unforeseeable). And, as we noted in the context of Article III traceability, the City has provided the results of regression analyses that purport to draw the connection between the Bank's conduct toward minority borrowers, foreclosure, and lost tax revenue. This empirical data is sufficient to "raise the pleadings above the speculative level." Dekalb Cnty. v. HSBC N. Am. Holdings, Inc., No. 1:12-CV-03640-SCJ, 2013 WL 7874104, at *7 (N.D. Ga. Sept. 25, 2013); see Twombly, 550 U.S. at 555; cf. Maya v. Centex Corp., 658 F.3d 1060, 1073 (9th Cir. 2011) ("Expert testimony can be used to

explain the causal connection between defendants' actions and plaintiffs' injuries, even in the context of other market forces.").[10]

In the face of longstanding caselaw drawn from the Supreme Court and this Court permitting FHA claims by so-called third party plaintiffs who are injured by a defendant's discrimination against another person, it is clear that the harm the City claims to have suffered has "a sufficiently close connection to the conduct the statute prohibits." Lexmark, 134 S. Ct. at 1390. Of course, whether the City will be able to actually prove its causal claims is another matter altogether. At this stage, it is enough to say that the City has adequately pled proximate case, as required by the FHA.

3. Statute of Limitations

[10] The Bank also makes much of City of Cleveland v. Ameriquest Mortgage Sec., Inc., 615 F.3d 496 (6th Cir. 2010), a Sixth Circuit case brought by the City of Cleveland against various financial entities that it claimed were responsible for a large portion of the Cleveland subprime lending market and a foreclosure crisis that devastated local neighborhoods. Id. at 498-99. The Sixth Circuit held that the city's claims did not adequately plead proximate cause, in part because "the cause of the alleged harms is a set of actions (neglect of property, starting fires, looting, and dealing drugs) that is completely distinct from the asserted misconduct (financing subprime loans)." Id. at 504. The defendants insist that the same analysis applies here. But City of Cleveland is readily distinguishable. Most glaringly, the city in that case brought a state-law public nuisance claim, not an FHA claim. Id. at 498. Ohio law had adopted its proximate cause test from Holmes, which we have already explained is inapposite, and the court in no way suggested that an identical proximate cause requirement existed in the FHA. Id. at 503. Moreover, the defendants in that case "did not originate the subprime mortgages at issue" -- rather, they "finance[ed], purchas[ed], and pool[ed] . . . vast amounts of these loans," creating mortgage-backed securities that were then sold to the public. Id. at 499. It was this financial activity that Cleveland challenged as a public nuisance, not the original issuance of the loans. Thus, the Cleveland defendants' activity was one step further removed than the activity of the Bank in this case, which issued the allegedly predatory loans in the first instance.

The FHA also requires that claims be filed "not later than 2 years after the occurrence or the termination of an alleged discriminatory housing practice." 42 U.S.C. § 3613(a)(1)(A). The district court concluded, and the parties do not contest, that an FHA claim for issuing a discriminatory loan begins to run from the date that the loan closes. City of Miami v. Bank of America Corp., 2014 WL 3362348, at *6; see Estate of Davis v. Wells Fargo Bank, 633 F.3d 529, 532 (7th Cir. 2011) (calculating FHA statute of limitations for a predatory loan beginning with the date the loan was issued).

This lawsuit was filed on December 13, 2013. Thus, in a traditional statute of limitations analysis, the complained-of loans must have closed after December 13, 2011. The City maintains that it has alleged a pattern and practice of discriminatory lending by the Bank, and its claims, therefore, qualify for the application of the "continuing violation doctrine." The district court disagreed, finding that the City had not alleged facts sufficient to support its allegation that the specific practices continued into the statutory period. We remain unpersuaded.

The complaint alleged that the City had identified 3,326 discriminatory loans issued by the Bank in Miami between 2004 and 2012 that had resulted in foreclosure. Complaint at 50-51. It then listed ten specific property addresses that it claimed "corresponded to these foreclosures," but provided no specific information (e.g., the type of loan, the characteristics that made it predatory or

discriminatory, when the loan closed, when the property went into foreclosure, etc.) for each address. Id. at 51. (The City also claimed that "with the benefit of discovery," it "anticipate[d] . . . be[ing] able to identify more foreclosures resulting from the issuance of discriminatory loans." Id. at 51 n.35.) As the district court noted, however, the City failed to allege that any of the loans closed within the limitations period (between December 13, 2011, and December 13, 2013).

On appeal, the City does not contend that its original complaint was adequate; rather, it argues that it could readily cure the statute of limitations flaws if given the opportunity. In support, the City points to the proposed amended complaint that it provided along with its motion for reconsideration and motion to amend. The district court acknowledged that the City might indeed be able to remedy its statute of limitations deficiencies with an amendment, but the court never considered whether the City's proposed amended complaint was sufficient, because it concluded that the City remained outside the statute's zone of interests and had not adequately pled proximate cause. Because the district court erred both as to the zone of interests and proximate cause, we are obliged to remand the cause of action in the first instance to determine whether or not the City could remedy any statute of limitations deficiency. We decline to evaluate the City's proposed amended complaint before the district court has had the opportunity to do so. See Adinolfe v. United Techs. Corp., 768 F.3d 1161, 1172 (11th Cir. 2014) ("[A]s an

appellate tribunal, we are generally limited to reviewing arguments and issues that have been raised and decided in the district court.").

In order to provide guidance on remand, we offer this discussion of the application of the continuing violation doctrine to this case. In addition to noting that the City never alleged that any particular loan closed within the limitations period (a deficiency that may well be cured in an amended pleading), the district court also seemingly held that the City's claim could not qualify for the application of the continuing violation doctrine because the complaint did not identify a singular and uniform practice of continuing conduct.

The continuing violation doctrine applies to "the continued enforcement of a discriminatory policy," and allows a plaintiff to "sue on otherwise time-barred claims as long as one act of discrimination has occurred . . . during the statutory period." Hipp v. Liberty Nat. Life Ins. Co., 252 F.3d 1208, 1221 (11th Cir. 2001) (per curiam). The governing law on the continuing violation doctrine in the FHA context is drawn from the Supreme Court's decision in Havens. In that case, three plaintiffs[11] -- a black individual looking to rent an apartment, a black "tester," and a white "tester"[12] -- brought FHA claims. Havens, 455 U.S. at 368. Their lawsuit was filed on January 9, 1979. Coles v. Havens Realty Corp., 633 F.2d 384, 386

[11] As discussed earlier, there was also a fourth plaintiff: a non-profit corporation. Havens, 455 U.S. at 367. Its claim is not relevant to the discussion of the statute of limitations.

[12] The testers posed as renters for the purpose of collecting evidence of unlawful racial steering practices.

(4th Cir. 1980), aff'd in part, rev'd in part sub nom. Havens, 455 U.S. 363. At the time, the limitations period under the FHA was 180 days. The plaintiffs identified five separate incidents of discrimination: on March 14, March 21, March 23, July 6, and July 13 of 1978. Only the incident on July 13 was within the limitations period. See Havens, 455 U.S. at 380.

On March 14, March 21, and March 23, the two testers asked Havens about available apartments. Each time, the black tester was told that nothing was available, while the white tester was told that there were vacancies. Id. at 368. On July 6, the black tester made a further inquiry and was told that there were no vacancies, while another white tester (not a party to the suit) was told that there were openings. Id. Finally, on July 13 -- the only incident within the limitations period -- the black plaintiff who was genuinely looking to rent asked Havens about availability and was falsely told that there was nothing. Id.

All three plaintiffs alleged that Havens's practices deprived them of the benefits of living in an integrated community. Id. at 369. The Supreme Court held that the claims were not time-barred for any of the plaintiffs because they alleged a "continuing violation" of the FHA, despite the fact that only one discriminatory incident was within the limitations window, and that incident involved only one of the three plaintiffs. Id. at 380-81. "[A] 'continuing violation' of the Fair Housing Act should be treated differently from one discrete act of discrimination," the

Court explained. Id. at 380. The Court reasoned that "[w]here the challenged violation is a continuing one," there is no concern about the staleness of the plaintiff's claims. Id. Moreover, the Court emphasized "the broad remedial intent of Congress embodied in the [Fair Housing] Act" in rejecting the defendants' "wooden application" of the statute of limitations. Id. The Court concluded: "where a plaintiff, pursuant to the Fair Housing Act, challenges not just one incident of conduct violative of the Act, but an unlawful practice that continues into the limitations period, the complaint is timely when it is filed within [the limitations period, starting at] the last asserted occurrence of that practice." Id. at 380-81.

The case before us -- if the City is able to identify FHA violations within the limitations period -- is on all fours with Havens. The City has alleged "not just one incident . . . but an unlawful practice that continues into the limitations period." Id. at 381. The City alleges that the Bank has engaged in a longstanding practice of discriminatory lending in which it extends loans to minority borrowers only on more unfavorable terms than those offered to white borrowers. The predatory qualities of the loans have taken slightly different forms over time (e.g., higher interest rates, undisclosed back-end premiums, higher fees, etc.), but the essential discriminatory practice has remained the same: predatory lending targeted at minorities in the City of Miami. The fact that the burdensome terms have not

remained perfectly uniform does not make the allegedly unlawful practice any less "continuing." The various instances of discriminatory lending comprise the practice, which continues into the limitations period. At least at the pleading stage, this is enough to plausibly invoke the continuing violation doctrine. See City of Los Angeles, 2014 WL 6453808, at *7 ("The City's allegations of discrimination under the FHA relate to Chase's lending practices overall, not a specific type of loan issued. The Court finds the allegations sufficient to apply the continuing violations doctrine."); City of Los Angeles v. Citigroup Inc., 24 F. Supp. 3d 940, 952 (C.D. Cal. 2014) ("In this case, [the plaintiff] is alleging a pattern and practice of 'discriminatory lending' on the part of Defendants over at least an eight-year period. While the types of loans that Defendants allegedly issued to minority borrowers may have changed during the relevant time period, [the plaintiff] alleges that they remained high-risk and discriminatory. This is sufficient to apply the continuing-violation doctrine."); accord City of Los Angeles v. Bank of Am. Corp., No. CV 13-9046 PA (AGRx), 2014 WL 2770083, at *10 (C.D. Cal. June 12, 2014); City of Los Angeles v. Wells Fargo & Co., 22 F. Supp. 3d 1047, 1058-59 (C.D. Cal. 2014); see also Hargraves v. Capital City Mortg. Corp., 140 F. Supp. 2d 7, 17-19 (D.D.C. 2000) (applying the continuing violation doctrine to an FHA claim challenging a mortgage company's practice of predatory and discriminatory lending, where that practice took various forms, including charging exorbitant

interest rates, fraudulent fees and penalties, inadequate risk assessment, and elevated rates of foreclosure).

4. Remand

Resolving a plaintiff's motion to amend is "committed to the sound discretion of the district court," but that discretion "is strictly circumscribed" by Rule 15(a)(2) of the Federal Rules of Civil Procedure, which instructs that leave to amend should be "freely give[n] when justice so requires." Gramegna v. Johnson, 846 F.2d 675, 678 (11th Cir. 1988); see also Shipner v. E. Air Lines, Inc., 868 F.2d 401, 407 (11th Cir. 1989) ("[U]nless a substantial reason exists to deny leave to amend, the discretion of the district court is not broad enough to permit denial").

As we have explained, we find that the City is within the FHA's zone of interests and has sufficiently alleged proximate causation between its injury and the Bank's conduct. The district court's refusal to allow the City to amend, and its conclusion that any amended complaint would be futile, was legal error and therefore an abuse of discretion. On remand, the City should be granted leave to amend its complaint.

We also note that while this appeal was pending, the Supreme Court handed down a decision that may materially affect the resolution of this case. In Texas Department of Housing & Community Affairs v. Inclusive Communities Project, Inc., 135 S. Ct. 2507 (2015), a non-profit organization brought a Fair Housing Act

claim against the Texas Department of Housing and Community Affairs, alleging that the Department's allocation of low-income housing tax credits caused racial segregation by "granting too many credits for housing in predominantly black inner-city areas and too few in predominantly white suburban neighborhoods." Id. at 2514. The claim was brought on a disparate-impact theory, alleging not that the Department's practice was driven by a discriminatory intent, but rather that it had a "'disproportionately adverse effect on minorities' and [was] otherwise unjustified by a legitimate rationale." Id. at 2513 (quoting Ricci v. DeStefano, 557 U.S. 557, 577 (2009)). The question before the Court was whether disparate-impact claims are cognizable under the FHA. The Court held that they are. Id. at 2525.

However, in dicta, the Court announced the "proper[] limit[s]" on disparate impact liability under the FHA, needed both to avoid serious constitutional issues and to protect potential defendants from abusive disparate-impact claims. Id. at 2522; see id. at 2522-24. Specifically, the Court noted that defendants must be allowed to "explain the valid interest served by their [challenged] policies," id. at 2522, and that courts should insist on a "robust causality requirement" at the "prima facie stage" linking the defendant's conduct to the racial disparity, id. at 2523. The Court emphasized that disparate-impact claims must be aimed at "removing artificial, arbitrary, and unnecessary barriers," rather than "displac[ing] valid governmental and private priorities." Id. at 2524 (quoting Griggs v. Duke

Power Co., 401 U.S. 424, 431 (1971)) (alterations adopted). Any newly pled complaint must take into account the evolving law on disparate impact in the FHA context. Without the new pleadings before us, we have no occasion to pass judgment on how Inclusive Communities will impact this case, but we flag the issue both for the parties and for the district court on remand.

C. Unjust Enrichment Claim

As for the City's state law unjust enrichment claim, we agree with the district court and affirm its ruling. In deciding this claim, we are obliged to apply Florida's substantive law. See Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938). Where the highest state court has not provided the definitive answer to a question of state law, "we must predict how the highest court would decide this case," looking to the decisions of the lower state courts for guidance. See Molinos Valle Del Cibao, C. por A. v. Lama, 633 F.3d 1330, 1348 (11th Cir. 2011). Under Florida law, the doctrine of unjust enrichment (sometimes called a "contract implied in law," "quasi-contract," and various other terms) governs the situation in which one party has conferred a valuable benefit on another in the absence of a contract, but "under circumstances that ma[ke] it unjust to retain it without giving compensation." See Magwood v. Tate, 835 So. 2d 1241, 1243 (Fla. Dist. Ct. App. 2003) (quoting Commerce P'ship 8098 Ltd. P'ship v. Equity Contracting Co., 695 So. 2d 383, 386 (Fla. Dist. Ct. App. 1997)). There are three elements of an unjust

enrichment claim under Florida law: first, the plaintiff has conferred a benefit on the defendant; second, the defendant voluntarily accepted and retained that benefit; and, finally, the circumstances are such that it would be inequitable for the defendants to retain the benefit without paying for it. Virgilio v. Ryland Grp., Inc., 680 F.3d 1329, 1337 (11th Cir. 2012) (citing Fla. Power Corp. v. City of Winter Park, 887 So. 2d 1237, 1241 n.4 (Fla. 2004)). As for the first element, the benefit must be conferred directly from the plaintiff to the defendant. Century Senior Servs. v. Consumer Health Ben. Ass'n, Inc., 770 F. Supp. 2d 1261, 1267 (S.D. Fla. 2011) (citing Peoples Nat'l Bank of Commerce v. First Union Nat'l Bank of Fla., N.A., 667 So. 2d 876, 879 (Fla. Dist. Ct. App. 1996)). "At the core of the law of restitution and unjust enrichment is the principle that a party who has been unjustly enriched at the expense of another is required to make restitution to the other." Gonzalez v. Eagle Ins. Co., 948 So. 2d 1, 3 (Fla. Dist. Ct. App. 2006).

The City alleged that the Bank "received and utilized benefits derived from a variety of municipal services, including police and fire protection, as well as zoning ordinances, tax laws, and other laws and services that have enabled [the Bank] to operate and profit within the City of Miami." Complaint at 54. It went on to allege that "[a]s a direct and proximate result of [the Bank's] predatory lending practices, [the Bank] ha[s] been enriched at the City's expense" by utilizing those benefits while denying the City tax revenue and costing it in

additional municipal expenditures required to address foreclosed properties. The Bank "failed to remit those wrongfully obtained benefits," the complaint claimed. The City also alleged that it had paid for the Bank's externalities (the costs of the harm caused by the discriminatory lending patterns), that the Bank was aware of this benefit, and that its retention would be unjust. Id. at 55.

The district court dismissed the claim without prejudice, in part because the City had not alleged that it had conferred a direct benefit onto the Bank to which they were not otherwise legally entitled, as required under Florida law. As for the denied tax revenues, the district court noted that such a denial is not a direct benefit conferred on the Bank by the City. As for the municipal services, the district court found that they did not create an unjust enrichment claim for two reasons. First, the municipal services were not benefits conferred directly on the Bank -- the services were provided to the residents of Miami, not to the Bank, and any benefit the Bank received was merely derivative. Second, the City had not adequately alleged that the Bank, as a Miami property owner, was not legally entitled to those services. We agree.

The City maintains that its complaint states a cause of action under Florida law, but it has not cited to a single Florida case. The City relies primarily on White v. Smith & Wesson Corp., 97 F. Supp. 2d 816 (N.D. Ohio 2000), where the mayor and City of Cleveland sued various gun manufacturers and dealers alleging, inter

alia, unjust enrichment on the ground that the city had conferred a benefit on the defendants by paying for their "externalities": "the costs of the harm caused by Defendants' failure to incorporate safety devices into their handguns and negligent marketing practices." Id. at 829. The Ohio law of unjust enrichment essentially tracks Florida law. See id. ("In order to maintain a cause of action for unjust enrichment under Ohio law, a plaintiff must allege: (1) a benefit conferred by a plaintiff upon a defendant; (2) knowledge by the defendant of the benefit; and, (3) retention of the benefit by the defendant under circumstances where it would be unjust to do so without payment."). Without citing to a single Ohio state court case in its unjust enrichment analysis, the district court determined that plaintiffs had stated such a claim under Ohio law.

The City cites only two other cases, neither of which were from Florida. See City of Boston v. Smith & Wesson Corp., No. 199902590, 2000 WL 1473568, at *18 (Mass. Super. Ct. July 13, 2000) (allowing an unjust enrichment claim against gun manufacturers under Massachusetts law on the same reasoning as was employed in White); City of New York v. Lead Indus. Ass'n, Inc., 190 A.D.2d 173, 177 (N.Y. App. Div. 1993) (permitting the City of New York's claim for restitution against manufacturers of lead-based paint for the City's expenditures in abating the hazard of lead-based paint and treating the victims). None of these cases, obviously, governs our application of Florida law.

We have not found any case -- and the City has provided none -- supporting an unjust enrichment claim of this type under Florida law. First, the City alleges that the Bank must pay the City for the tax revenue the City has been denied due to the Bank's unlawful lending practices. Although a deprivation of tax revenue may create an injury in fact under Article III, such an injury does not fit within the unjust enrichment framework. The missing tax revenue is in no way a benefit that the City has conferred on the Bank. The City has provided no explanation for this incongruity on appeal.

Instead, the City focuses on the municipal services -- including police, firefighters, zoning ordinances, and tax laws -- that it claims it would not have had to provide if not for the Bank's predatory lending. But this version of the unjust enrichment claim fares no better, for three independent reasons. For starters, it's not clear that municipal expenditures are among the types of benefits that can be recovered by unjust enrichment under Florida law. We have found no Florida case in which a municipality recovered its expenditures on an unjust enrichment theory. Indeed, at least one case suggests that a municipality cannot recover such expenditures without express statutory authorization, which the City has never alleged. See Penelas v. Arms Tech., Inc., No. 99-1941 CA-06, 1999 WL 1204353, at *2 (Fla. Cir. Ct. Dec. 13, 1999) ("[T]he County's claim for damages, based on the costs to provide 911, police, fire and emergency services effectively seeks

reimbursement for expenditures made in its performance of governmental functions. Costs of such services are not, without express legislative authorization, recoverable by governmental entities."), aff'd, 778 So. 2d 1042 (Fla. Dist. Ct. App. 2001).

Moreover, the benefits provided by these municipal services were not directly conferred on the Bank, as is required for an unjust enrichment claim under Florida law. See, e.g., Virgilio, 680 F.3d at 1337 (affirming the dismissal of an unjust enrichment claim under Florida law because the plaintiffs only "'indirectly' conferred a benefit on Defendants"); Extraordinary Title Servs. v. Fla. Power & Light Co., 1 So. 3d 400, 404 (Fla. Dist. Ct. App. 2009) (affirming the dismissal of an unjust enrichment claim because the plaintiff "ha[d] not conferred a direct benefit" on the defendant). As the district court correctly noted, municipal police and fire services directly benefit the residents and owners of homes in the City of Miami, not the financial institution that holds the loans on those properties. And tax laws and zoning ordinances are quite clearly not direct benefits conferred on Bank of America: they are laws of general applicability that, indeed, apply to all residents of Miami. No Florida caselaw suggests that these benefits are direct enough to sustain an unjust enrichment claim.

Finally, the City has failed to allege facts to show that circumstances are such that it would be inequitable for the Bank to retain such benefits without

compensation. Even assuming that these municipal services did confer a cognizable benefit on the Bank as the owner of foreclosed property, the City does not challenge the district court's determination that the Bank was legally entitled to those services. Cf. State Farm Fire & Cas. Co. v. Silver Star Health & Rehab, 739 F.3d 579, 584 (11th Cir. 2013) ("If an entity accepts and retains benefits that it is not legally entitled to receive in the first place, Florida law provides for a claim of unjust enrichment."). The City has provided no arguments and cited no Florida caselaw explaining why the Bank would not be entitled to police and fire protection like any other property owner.

The Florida Supreme Court has not ruled on whether an unjust enrichment claim exists under these circumstances. But given the complete lack of supporting Florida caselaw, we decline to invent a novel basis for unjust enrichment under Florida law today. Accordingly, we affirm the district court's order dismissing the City's unjust enrichment claim.

IV. Conclusion

Nothing we have said in this opinion should be taken to pass judgment on the ultimate success of the City's claims. We hold only that the City has constitutional standing to bring its FHA claims, and that the district court erred in dismissing those claims with prejudice on the basis of a zone of interests analysis,

a proximate cause analysis, or the inapplicability of the continuing violation doctrine.

The judgment of the district court is AFFIRMED in part, REVERSED in part, and REMANDED for further proceedings consistent with this opinion.

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.,* 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

BANK OF AMERICA CORP. ET AL. *v.* CITY OF MIAMI, FLORIDA

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 15–1111. Argued November 8, 2016—Decided May 1, 2017*

The City of Miami filed suit against Bank of America and Wells Fargo (Banks), alleging violations of the Fair Housing Act (FHA or Act). The FHA prohibits, among other things, racial discrimination in connection with real-estate transactions, 42 U. S. C. §§3604(b), 3605(a), and permits any "aggrieved person" to file a civil damages action for a violation of the Act, §§3613(a)(1)(A), (c)(1). The City's complaints charge that the Banks intentionally targeted predatory practices at African-American and Latino neighborhoods and residents, lending to minority borrowers on worse terms than equally creditworthy nonminority borrowers and inducing defaults by failing to extend refinancing and loan modifications to minority borrowers on fair terms. The City alleges that the Banks' discriminatory conduct led to a disproportionate number of foreclosures and vacancies in majority-minority neighborhoods, which impaired the City's effort to assure racial integration, diminished the City's property-tax revenue, and increased demand for police, fire, and other municipal services. The District Court dismissed the complaints on the grounds that (1) the harms alleged fell outside the zone of interests the FHA protects and (2) the complaints failed to show a sufficient causal connection between the City's injuries and the Banks' discriminatory conduct. The Eleventh Circuit reversed.

Held:

1. The City is an "aggrieved person" authorized to bring suit under the FHA. In addition to satisfying constitutional standing require-

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*Together with No. 15–1112, *Wells Fargo & Co. et al.* v. *City of Miami, Florida,* also on certiorari to the same court.

ments, see *Spokeo, Inc.* v. *Robins*, 578 U. S. ___, ___, a plaintiff must show that the statute grants the plaintiff the cause of action he or she asserts. It is presumed that a statute ordinarily provides a cause of action "only to plaintiffs whose interests 'fall within the zone of interests protected by the law invoked.'" *Lexmark Int'l, Inc.* v. *Static Control Components, Inc.*, 572 U. S. ___, ___.

The City's claims of financial injury are, at the least, "arguably within the zone of interests" the FHA protects. *Association of Data Processing Service Organizations, Inc.* v. *Camp*, 397 U. S. 150, 153. The FHA defines an "aggrieved person" as "any person who" either "claims to have been injured by a discriminatory housing practice" or believes that such an injury "is about to occur," 8 U. S. C. §3602(i). This Court has said that the definition of "person aggrieved" in the original version of the FHA "showed 'a congressional intention to define standing as broadly as is permitted by Article III of the Constitution,' " *Trafficante* v. *Metropolitan Life Ins. Co.*, 409 U. S. 205, 209; and has held that the Act permits suit by parties similarly situated to the City, see, *e.g., Gladstone, Realtors* v. *Village of Bellwood*, 441 U. S. 91 (village alleging that it lost tax revenue and had the racial balance of its community undermined by racial-steering practices). Against the backdrop of those decisions, Congress did not materially alter the definition of person "aggrieved" when it reenacted the current version of the Act.

The Banks nonetheless contend that the definition sets boundaries that fall short of those the Constitution sets. Even assuming that some form of their argument is valid, this Court concludes that the City's financial injuries fall within the zone of interests that the FHA protects. The City's claims are similar in kind to those of the Village of Bellwood, which the Court held in *Gladstone*, *supra*, could bring suit under the FHA. The Court explained that the defendants' discriminatory conduct adversely affected the village by, among other things, producing a "significant reduction in property values [that] directly injures a municipality by diminishing its tax base, thus threatening its ability to bear the costs of local government and to provide services." *Id.,* at 110–111. The City's alleged economic injuries thus arguably fall within the FHA's zone of interests, as this Court has previously interpreted that statute. *Stare decisis* principles compel the Court's adherence to those precedents, and principles of statutory interpretation demand that the Court respect Congress' decision to ratify those precedents when it reenacted the relevant statutory text. Pp. 5–9.

2. The Eleventh Circuit erred in concluding that the complaints met the FHA's proximate-cause requirement based solely on the finding that the City's alleged financial injuries were foreseeable results

Syllabus

of the Banks' misconduct. A claim for damages under the FHA is akin to a "tort action," *Meyer* v. *Holley*, 537 U. S. 280, 285, and is thus subject to the common-law requirement that loss is attributable "'to the proximate cause, and not to any remote cause,'" *Lexmark*, 572 U. S., at ___. The proximate-cause analysis asks "whether the harm alleged has a sufficiently close connection to the conduct the statute prohibits." *Id.,* at ___. With respect to the FHA, foreseeability alone does not ensure the required close connection. Nothing in the statute suggests that Congress intended to provide a remedy for any foreseeable result of an FHA violation, which may "'cause ripples of harm to flow'" far beyond the defendant's misconduct, *Associated Gen. Contractors of Cal., Inc.* v. *Carpenters*, 459 U. S. 519, 534; and doing so would risk "massive and complex damages litigation," *id.,* at 545. Rather, proximate cause under the FHA requires "some direct relation between the injury asserted and the injurious conduct alleged." *Holmes* v. *Securities Investors Protection Corporation*, 503 U. S. 258, 268. The Court has repeatedly applied directness principles to statutes with "common-law foundations." *Anza* v. *Ideal Steel Supply Corp.*, 547 U. S. 451, 457. "'The general tendency'" in these cases, "'in regard to damages at least, is not to go beyond the first step.'" *Hemi Group, LLC* v. *City of New York*, 559 U. S. 1, 10. What falls within that step depends in part on the "nature of the statutory cause of action," *Lexmark*, *supra*, at ___, and an assessment "'of what is administratively possible and convenient,'" *Holmes*, *supra*, at 268.

The Court declines to draw the precise boundaries of proximate cause under the FHA, particularly where neither the Eleventh Circuit nor other courts of appeals have weighed in on the issue. Instead, the lower courts should define, in the first instance, the contours of proximate cause under the FHA and decide how that standard applies to the City's claims for lost property-tax revenue and increased municipal expenses. Pp. 10–12.

No. 15–1111, 800 F. 3d 1262, and No. 15–1112, 801 F. 3d 1258, vacated and remanded.

BREYER, J., delivered the opinion of the Court, in which ROBERTS, C. J., and GINSBURG, SOTOMAYOR, and KAGAN, JJ., joined. THOMAS, J., filed an opinion concurring in part and dissenting in part, in which KENNEDY and ALITO, JJ., joined. GORSUCH, J., took no part in the consideration or decision of the cases.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

Nos. 15–1111 and 15–1112

BANK OF AMERICA CORPORATION, ET AL., PETITIONERS
15–1111 *v.*
CITY OF MIAMI, FLORIDA

WELLS FARGO & CO., ET AL., PETITIONERS
15–1112 *v.*
CITY OF MIAMI, FLORIDA

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

[May 1, 2017]

JUSTICE BREYER delivered the opinion of the Court.

The Fair Housing Act (FHA or Act) forbids

> "discriminat[ing] against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race . . . ." 42 U. S. C. §3604(b).

It further makes it unlawful for

> "any person or other entity whose business includes engaging in residential real estate-related transactions to discriminate against any person in making available such a transaction, or in the terms or conditions of such a transaction, because of race . . . ." §3605(a).

The statute allows any "aggrieved person" to file a civil action seeking damages for a violation of the statute. §§3613(a)(1)(A), 3613(c)(1). And it defines an "aggrieved person" to include "any person who . . . claims to have been injured by a discriminatory housing practice." §3602(i).

The City of Miami claims that two banks, Bank of America and Wells Fargo, intentionally issued riskier mortgages on less favorable terms to African-American and Latino customers than they issued to similarly situated white, non-Latino customers, in violation of §§3604(b) and 3605(a). App. 185–197, 244–245, 350–362, 428. The City, in amended complaints, alleges that these discriminatory practices have (1) "adversely impacted the racial composition of the City," *id.,* at 232, 416; (2) "impaired the City's goals to assure racial integration and desegregation," *ibid.*; (3) "frustrate[d] the City's longstanding and active interest in promoting fair housing and securing the benefits of an integrated community," *id.,* at 232–233, 416–417; and (4) disproportionately "cause[d] foreclosures and vacancies in minority communities in Miami," *id.,* at 229, 413. Those foreclosures and vacancies have harmed the City by decreasing "the property value of the foreclosed home as well as the values of other homes in the neighborhood," thereby (a) "reduc[ing] property tax revenues to the City," *id.,* at 234, 418, and (b) forcing the City to spend more on "municipal services that it provided and still must provide to remedy blight and unsafe and dangerous conditions which exist at properties that were foreclosed as a result of [the Banks'] illegal lending practices," *id.,* at 233–234, 417. The City claims that those practices violate the FHA and that it is entitled to damages for the listed injuries.

The Banks respond that the complaints do not set forth a cause of action for two basic reasons. First, they contend that the City's claimed harms do not "arguably" fall within the "zone of interests" that the statute seeks to protect,

Association of Data Processing Service Organizations, Inc. v. *Camp*, 397 U. S. 150, 153 (1970); hence, the City is not an "aggrieved person" entitled to sue under the Act, §3602(i). Second, they say that the complaint fails to draw a "proximate-cause" connection between the violation claimed and the harm allegedly suffered. In their view, even if the City proves the violations it charges, the distance between those violations and the harms the City claims to have suffered is simply too great to entitle the City to collect damages.

We hold that the City's claimed injuries fall within the zone of interests that the FHA arguably protects. Hence, the City is an "aggrieved person" able to bring suit under the statute. We also hold that, to establish proximate cause under the FHA, a plaintiff must do more than show that its injuries foreseeably flowed from the alleged statutory violation. The lower court decided these cases on the theory that foreseeability is all that the statute requires, so we vacate and remand for further proceedings.

I

In 2013, the City of Miami brought lawsuits in federal court against two banks, Bank of America and Wells Fargo. The City's complaints charge that the Banks discriminatorily imposed more onerous, and indeed "predatory," conditions on loans made to minority borrowers than to similarly situated nonminority borrowers. App. 185–197, 350–362. Those "predatory" practices included, among others, excessively high interest rates, unjustified fees, teaser low-rate loans that overstated refinancing opportunities, large prepayment penalties, and—when default loomed—unjustified refusals to refinance or modify the loans. *Id.,* at 225, 402. Due to the discriminatory nature of the Banks' practices, default and foreclosure rates among minority borrowers were higher than among otherwise similar white borrowers and were concentrated

in minority neighborhoods. *Id.,* at 225–232, 408–415. Higher foreclosure rates lowered property values and diminished property-tax revenue. *Id.,* at 234, 418. Higher foreclosure rates—especially when accompanied by vacancies—also increased demand for municipal services, such as police, fire, and building and code enforcement services, all needed "to remedy blight and unsafe and dangerous conditions" that the foreclosures and vacancies generate. *Id.,* at 238–240, 421–423. The complaints describe statistical analyses that trace the City's financial losses to the Banks' discriminatory practices. *Id.,* at 235–237; 419–420.

The District Court dismissed the complaints on the grounds that (1) the harms alleged, being economic and not discriminatory, fell outside the zone of interests the FHA protects; (2) the complaints fail to show a sufficient causal connection between the City's injuries and the Banks' discriminatory conduct; and (3) the complaints fail to allege unlawful activity occurring within the Act's 2-year statute of limitations. The City then filed amended complaints (the complaints now before us) and sought reconsideration. The District Court held that the amended complaints could solve only the statute of limitations problem. It consequently declined to reconsider the dismissals.

The Court of Appeals reversed the District Court. 800 F. 3d 1262 (CA11 2015); 801 F. 3d 1258 (CA11 2015). It held that the City's injuries fall within the "zone of interests," *Lexmark Int'l, Inc.* v. *Static Control Components, Inc.*, 572 U. S. ___, ___ (2014) (slip op., at 10), that the FHA protects. 800 F. 3d, at 1274–1275, 1277 (relying on *Trafficante* v. *Metropolitan Life Ins. Co.*, 409 U. S. 205 (1972); *Gladstone, Realtors* v. *Village of Bellwood*, 441 U. S. 91 (1979); and *Havens Realty Corp.* v. *Coleman*, 455 U. S. 363 (1982)); 801 F. 3d, at 1266–1267 (similar). It added that the complaints adequately allege proximate cause. 800 F. 3d, at 1278; 801 F. 3d, at 1267. And it

remanded the cases while ordering the District Court to accept the City's complaints as amended. 800 F. 3d, at 1286; 801 F. 3d, at 1267.

The Banks filed petitions for certiorari, asking us to decide whether, as the Court of Appeals had in effect held, the amended complaints satisfied the FHA's zone-of-interests and proximate-cause requirements. We agreed to do so.

II

To satisfy the Constitution's restriction of this Court's jurisdiction to "Cases" and "Controversies," Art. III, §2, a plaintiff must demonstrate constitutional standing. To do so, the plaintiff must show an "injury in fact" that is "fairly traceable" to the defendant's conduct and "that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc.* v. *Robins*, 578 U. S. ___, ___ (2016) (slip op., at 6) (citing *Lujan* v. *Defenders of Wildlife*, 504 U. S. 555, 560–561 (1992)). This Court has also referred to a plaintiff's need to satisfy "prudential" or "statutory" standing requirements. See *Lexmark,* 572 U. S., at ___–___, and n. 4 (slip op., at 6–9, and n. 4). In *Lexmark*, we said that the label "'prudential standing'" was misleading, for the requirement at issue is in reality tied to a particular statute. *Ibid.* The question is whether the statute grants the plaintiff the cause of action that he asserts. In answering that question, we presume that a statute ordinarily provides a cause of action "only to plaintiffs whose interests fall within the zone of interests protected by the law invoked." *Id.,* at ___ (slip op., at 10) (internal quotation marks omitted). We have added that "[w]hether a plaintiff comes within 'the zone of interests' is an issue that requires us to determine, using traditional tools of statutory interpretation, whether a legislatively conferred cause of action encompasses a particular plaintiff's claim." *Id.,* at ___ (slip op., at 8) (some internal quotation marks

omitted).

Here, we conclude that the City's claims of financial injury in their amended complaints—specifically, lost tax revenue and extra municipal expenses—satisfy the "cause-of-action" (or "prudential standing") requirement. To use the language of *Data Processing*, the City's claims of injury it suffered as a result of the statutory violations are, at the least, "*arguably* within the zone of interests" that the FHA protects. 397 U. S., at 153 (emphasis added).

The FHA permits any "aggrieved person" to bring a housing-discrimination lawsuit. 42 U. S. C. §3613(a). The statute defines "aggrieved person" as "any person who" either "claims to have been injured by a discriminatory housing practice" or believes that such an injury "is about to occur." §3602(i).

This Court has repeatedly written that the FHA's definition of person "aggrieved" reflects a congressional intent to confer standing broadly. We have said that the definition of "person aggrieved" in the original version of the FHA, §810(a), 82 Stat. 85, "showed 'a congressional intention to define standing as broadly as is permitted by Article III of the Constitution.'" *Trafficante*, *supra*, at 209 (quoting *Hackett* v. *McGuire Brothers, Inc.*, 445 F. 2d 442, 446 (CA3 1971)); see *Gladstone, supra*, at 109 (similar); *Havens Realty*, *supra*, at 372, 375–376 (similar); see also *Thompson* v. *North American Stainless, LP*, 562 U. S. 170, 176 (2011) ("Later opinions, we must acknowledge, reiterate that the term 'aggrieved' [in the FHA] reaches as far as Article III permits"); *Bennett* v. *Spear*, 520 U. S. 154, 165–166 (1997) ("[*Trafficante*] held that standing was expanded to the full extent permitted under Article III by §810(a) of the Civil Rights Act of 1968").

Thus, we have held that the Act allows suits by white tenants claiming that they were deprived benefits from interracial associations when discriminatory rental practices kept minorities out of their apartment complex,

Trafficante, 409 U. S., at 209–212; a village alleging that it lost tax revenue and had the racial balance of its community undermined by racial-steering practices, *Gladstone*, 441 U. S., at 110–111; and a nonprofit organization that spent money to combat housing discrimination, *Havens Realty*, 455 U. S., at 379. Contrary to the dissent's view, those cases did more than "sugges[t]" that plaintiffs similarly situated to the City have a cause of action under the FHA. *Post*, at 5. They held as much. And the dissent is wrong to say that we characterized those cases as resting on "ill-considered dictum." *Post*, at 4 (quoting *Thompson*, *supra*, at 176). The "dictum" we cast doubt on in *Thompson* addressed who may sue under Title VII, the employment discrimination statute, not under the FHA.

Finally, in 1988, when Congress amended the FHA, it retained without significant change the definition of "person aggrieved" that this Court had broadly construed. Compare §810(a), 82 Stat. 85, with §5(b), 102 Stat. 1619–1620 (codified at 42 U. S. C. §3602(i)) (changing "person aggrieved" to "aggrieved person" and making other minor changes to the definition). Indeed, Congress "was aware of" our precedent and "made a considered judgment to retain the relevant statutory text," *Texas Dept. of Housing and Community Affairs* v. *Inclusive Communities Project, Inc.*, 576 U. S. ___, ___ (2015) (slip op., at 13). See H. R. Rep. No. 100–711, p. 23 (1988) (stating that the "bill adopts as its definition language similar to that contained in Section 810 of existing law, as modified to reaffirm the broad holdings of these cases" and discussing *Gladstone* and *Havens Realty*); cf. *Lorillard* v. *Pons*, 434 U. S. 575, 580 (1978) (Congress normally adopts our interpretations of statutes when it reenacts those statute without change).

The Banks do not deny the broad reach of the words "aggrieved person" as defined in the FHA. But they do contend that those words nonetheless set boundaries that fall short of those the Constitution sets. Brief for Petition-

ers in No. 15–1112, p. 12 (Brief for Wells Fargo); Brief for Petitioners in No. 15–1111, pp. 19–20 (Brief for Bank of America). The Court's language in *Trafficante*, *Gladstone*, and *Havens Realty*, they argue, was exaggerated and unnecessary to decide the cases then before the Court. See Brief for Wells Fargo 19–23; Brief for Bank of America 27–33. Moreover, they warn that taking the Court's words literally—providing everyone with constitutional standing a cause of action under the FHA—would produce a legal anomaly. After all, in *Thompson*, 562 U. S., at 175–177, we held that the words "'person claiming to be aggrieved'" in Title VII of the Civil Rights Act of 1964, the employment discrimination statute, did not stretch that statute's zone of interest to the limits of Article III. We reasoned that such an interpretation would produce farfetched results, for example, a shareholder in a company could bring a Title VII suit against the company for discriminatorily firing an employee. *Ibid.* The Banks say it would be similarly farfetched if restaurants, plumbers, utility companies, or any other participant in the local economy could sue the Banks to recover business they lost when people had to give up their homes and leave the neighborhood as a result of the Banks' discriminatory lending practices. Brief for Wells Fargo 18–19; Brief for Bank of America 22, 24–25. That, they believe, cannot have been the intent of the Congress that enacted or amended the FHA.

We need not discuss the Banks' argument at length, for even if we assume for argument's sake that some form of it is valid, we nonetheless conclude that the City's financial injuries fall within the zone of interests that the FHA protects. Our case law with respect to the FHA drives that conclusion. The City's complaints allege that the Banks "intentionally targeted predatory practices at African-American and Latino neighborhoods and residents," App. 225; *id.,* at 409 (similar). That unlawful conduct led to a "concentration" of "foreclosures and vacancies" in

those neighborhoods. *Id.,* at 226, 229, 410, 413. Those concentrated "foreclosures and vacancies" caused "stagnation and decline in African-American and Latino neighborhoods." *Id.,* at 225, 409. They hindered the City's efforts to create integrated, stable neighborhoods. *Id.,* at 186, 351. And, highly relevant here, they reduced property values, diminishing the City's property-tax revenue and increasing demand for municipal services. *Id.,* at 233–234, 417.

Those claims are similar in kind to the claims the Village of Bellwood raised in *Gladstone*. There, the plaintiff village had alleged that it was "'injured by having [its] housing market . . . wrongfully and illegally manipulated to the economic and social detriment of the citizens of [the] village.'" 441 U. S., at 95 (quoting the complaint; alterations in original). We held that the village could bring suit. We wrote that the complaint in effect alleged that the defendant-realtors' racial steering "affect[ed] the village's racial composition," "reduce[d] the total number of buyers in the Bellwood housing market," "precipitate[d] an exodus of white residents," and caused "prices [to] be deflected downward." *Id.,* at 110. Those circumstances adversely affected the village by, among other things, *producing a "significant reduction in property values [that] directly injures a municipality by diminishing its tax base, thus threatening its ability to bear the costs of local government and to provide services." Id.,* at 110–111 (emphasis added).

The upshot is that the City alleges economic injuries that arguably fall within the FHA's zone of interests, as we have previously interpreted that statute. Principles of *stare decisis* compel our adherence to those precedents in this context. And principles of statutory interpretation require us to respect Congress' decision to ratify those precedents when it reenacted the relevant statutory text. See *supra*, at 7.

III

The remaining question is one of causation: Did the Banks' allegedly discriminatory lending practices proximately cause the City to lose property-tax revenue and spend more on municipal services? The Eleventh Circuit concluded that the answer is "yes" because the City plausibly alleged that its financial injuries were foreseeable results of the Banks' misconduct. We conclude that foreseeability alone is not sufficient to establish proximate cause under the FHA, and therefore vacate the judgment below.

It is a "'well established principle of [the common] law that in all cases of loss, we are to attribute it to the proximate cause, and not to any remote cause.'" *Lexmark*, 572 U. S., at ___ (slip op., at 13). We assume Congress "is familiar with the common-law rule and does not mean to displace it *sub silentio*" in federal causes of action. *Ibid.* A claim for damages under the FHA—which is akin to a "tort action," *Meyer* v. *Holley*, 537 U. S. 280, 285 (2003)—is no exception to this traditional requirement. "Proximate-cause analysis is controlled by the nature of the statutory cause of action. The question it presents is whether the harm alleged has a sufficiently close connection to the conduct the statute prohibits." *Lexmark*, *supra*, at ___ (slip op., at 14).

In these cases, the "conduct the statute prohibits" consists of intentionally lending to minority borrowers on worse terms than equally creditworthy nonminority borrowers and inducing defaults by failing to extend refinancing and loan modifications to minority borrowers on fair terms. The City alleges that the Banks' misconduct led to a disproportionate number of foreclosures and vacancies in specific Miami neighborhoods. These foreclosures and vacancies purportedly harmed the City, which lost property-tax revenue when the value of the properties in those neighborhoods fell and was forced to spend more on mu-

nicipal services in the affected areas.

The Eleventh Circuit concluded that the City adequately pleaded that the Banks' misconduct proximately caused these financial injuries. 800 F. 3d, at 1282. The court held that in the context of the FHA "the proper standard" for proximate cause "is based on foreseeability." *Id.*, at 1279, 1282. The City, it continued, satisfied that element: Although there are "several links in the causal chain" between the charged discriminatory lending practices and the claimed losses, the City plausibly alleged that "none are unforeseeable." *Id.*, at 1282.

We conclude that the Eleventh Circuit erred in holding that foreseeability is sufficient to establish proximate cause under the FHA. As we have explained, proximate cause "generally bars suits for alleged harm that is 'too remote' from the defendant's unlawful conduct." *Lexmark*, *supra*, at ___ (slip op., at 14). In the context of the FHA, foreseeability alone does not ensure the close connection that proximate cause requires. The housing market is interconnected with economic and social life. A violation of the FHA may, therefore, "'be expected to cause ripples of harm to flow'" far beyond the defendant's misconduct. *Associated Gen. Contractors of Cal., Inc.* v. *Carpenters*, 459 U. S. 519, 534 (1983). Nothing in the statute suggests that Congress intended to provide a remedy wherever those ripples travel. And entertaining suits to recover damages for any foreseeable result of an FHA violation would risk "massive and complex damages litigation." *Id.,* at 545.

Rather, proximate cause under the FHA requires "some direct relation between the injury asserted and the injurious conduct alleged." *Holmes* v. *Securities Investors Protection Corporation*, 503 U. S. 258, 268 (1992). A damages claim under the statute "is analogous to a number of tort actions recognized at common law," *Curtis* v. *Loether*, 415 U. S. 189, 195 (1974), and we have repeatedly applied

directness principles to statutes with "common-law foundations," *Anza* v. *Ideal Steel Supply Corp.*, 547 U. S. 451, 457 (2006). "'The general tendency'" in these cases, "'in regard to damages at least, is not to go beyond the first step.'" *Hemi Group, LLC* v. *City of New York*, 559 U. S. 1, 10 (2010). What falls within that "first step" depends in part on the "nature of the statutory cause of action," *Lexmark*, *supra*, at ___ (slip op., at 14), and an assessment "'of what is administratively possible and convenient,'" *Holmes*, *supra*, at 268.

The parties have asked us to draw the precise boundaries of proximate cause under the FHA and to determine on which side of the line the City's financial injuries fall. We decline to do so. The Eleventh Circuit grounded its decision on the theory that proximate cause under the FHA is "based on foreseeability" alone. 800 F. 3d, at 1282. We therefore lack the benefit of its judgment on how the contrary principles we have just stated apply to the FHA. Nor has any other court of appeals weighed in on the issue. The lower courts should define, in the first instance, the contours of proximate cause under the FHA and decide how that standard applies to the City's claims for lost property-tax revenue and increased municipal expenses.

IV

The judgments of the Court of Appeals for the Eleventh Circuit are vacated, and the cases are remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE GORSUCH took no part in the consideration or decision of these cases.

SUPREME COURT OF THE UNITED STATES

Nos. 15–1111 and 15–1112

BANK OF AMERICA CORPORATION, ET AL., PETITIONERS
15–1111 *v.*
CITY OF MIAMI, FLORIDA

WELLS FARGO & CO., ET AL., PETITIONERS
15–1112 *v.*
CITY OF MIAMI, FLORIDA

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

[May 1, 2017]

JUSTICE THOMAS, with whom JUSTICE KENNEDY and JUSTICE ALITO join, concurring in part and dissenting in part.

These cases arise from lawsuits filed by the city of Miami alleging that residential mortgage lenders engaged in discriminatory lending practices in violation of the Fair Housing Act (FHA). The FHA prohibits "discrimination" against "any person" because of "race, color, religion, sex, handicap, familial status, or national origin" with respect to the "sale or rental" of "a dwelling." 42 U. S. C. §3604; accord, §3605(a); §3606. Miami's complaints do not allege that any defendant discriminated against it within the meaning of the FHA. Neither is Miami attempting to bring a lawsuit on behalf of its residents against whom petitioners allegedly discriminated. Rather, Miami's theory is that, between 2004 and 2012, petitioners' allegedly discriminatory mortgage-lending practices led to defaulted loans, which led to foreclosures, which led to

vacant houses, which led to decreased property values, which led to reduced property taxes and urban blight. See 800 F. 3d 1262, 1268 (CA11 2015); 801 F. 3d 1258, 1266 (CA11 2015). Miami seeks damages from the lenders for reduced property tax revenues and for the cost of increased municipal services—"police, firefighters, building inspectors, debris collectors, and others"—deployed to attend to the blighted areas. 800 F. 3d, at 1269; 801 F. 3d, at 1263.

The Court today holds that Congress intended to remedy those kinds of injuries when it enacted the FHA, but leaves open the question whether Miami sufficiently alleged that the discriminatory lending practices caused its injuries. For the reasons explained below, I would hold that Miami's injuries fall outside the FHA's zone of interests. I would also hold that, in any event, Miami's alleged injuries are too remote to satisfy the FHA's proximate-cause requirement.

I

A plaintiff seeking to bring suit under a federal statute must show not only that he has standing under Article III, *ante*, at 5, but also that his "complaint fall[s] within the zone of interests protected by the law" he invokes, *Lexmark Int'l, Inc.* v. *Static Control Components, Inc.*, 572 U. S. ___, ___ (2014) (slip op., at 7) (internal quotation marks omitted). The zone-of-interests requirement is "root[ed]" in the "common-law rule" providing that a plaintiff may "recover under the law of negligence for injuries caused by violation of a statute" only if "the statute 'is interpreted as designed to protect the class of persons in which the plaintiff is included, against the risk of the type of harm which has in fact occurred as a result of its violation.'" *Id.*, at ___, n. 5 (slip op., at 11, n. 5) (quoting W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Law of Torts §36, pp. 229–230 (5th ed. 1984)).

We have "made clear" that "Congress is presumed to legislate against the background" of that common-law rule. *Lexmark*, 572 U. S., at ___ (slip op., at 10) (internal quotation marks omitted). We thus apply it "to all statutorily created causes of action . . . unless it is *expressly* negated." *Ibid.* (emphasis added; internal quotation marks omitted). "Whether a plaintiff comes within the zone of interests is an issue that requires us to determine, using traditional tools of statutory interpretation, whether a legislatively conferred cause of action encompasses a particular plaintiff's claim." *Id.*, at ___ (slip op., at 8) (internal quotation marks omitted).

A

Nothing in the text of the FHA suggests that Congress intended to deviate from the zone-of-interests limitation. The statute's private-enforcement mechanism provides that only an "aggrieved person" may sue, §3613(a)(1)(A), and the statute defines "aggrieved person" to mean someone who "claims to have been injured by a discriminatory housing practice" or who believes he "will be injured by a discriminatory housing practice that is about to occur," §§3602(i)(1), (2). That language does not hint—much less expressly provide—that Congress sought to depart from the common-law rule.

We have considered similar language in other statutes and reached the same conclusion. In *Thompson* v. *North American Stainless, LP*, 562 U. S. 170 (2011), for example, we considered Title VII's private-enforcement provision, which provides that "'a person claiming to be aggrieved'" may file an employment discrimination charge with the Equal Employment Opportunity Commission. *Id.*, at 173 (quoting §2000e–5(b)). We unanimously concluded that Congress did not depart from the zone-of-interests limitation in Title VII by using that language. *Id.*, at 175–178. And in *Lexmark*, we interpreted a provision of the Lan-

ham Act that permitted "any person who believes that he or she is likely to be damaged by a defendant's false advertising" to sue. 572 U. S., at ___ (slip op., at 10) (internal quotation marks omitted). Even when faced with the broader "any person" language, we expressly rejected the argument that the statute conferred a cause of action upon anyone claiming an Article III injury in fact. We observed that it was unlikely that "Congress meant to allow all factually injured plaintiffs to recover," and we concluded that the zone-of-interests test was the "appropriate tool for determining who may invoke the cause of action" under the statute. *Id.,* at ___, ___ (slip op., at 10, 11) (internal quotation marks omitted).

To be sure, some language in our older precedents suggests that the FHA's zone of interests extends to the limits of Article III. See *Trafficante* v. *Metropolitan Life Ins. Co.*, 409 U. S. 205, 209 (1972); *Gladstone, Realtors* v. *Village of Bellwood*, 441 U. S. 91, 109 (1979); *Havens Realty Corp.* v. *Coleman*, 455 U. S. 363, 372 (1982). But we have since described that language as "ill-considered" dictum leading to "absurd consequences." *Thompson*, 562 U. S., at 176. And we have observed that the "holdings of those cases are compatible with the "'zone of interests' limitation" described in *Thompson*. *Ibid.* That limitation provides that a plaintiff may not sue when his "interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot be assumed that Congress intended to permit the suit." *Id.*, at 178 (internal quotation marks omitted). It thus "exclud[es] plaintiffs who might technically be injured in an Article III sense but whose interests are unrelated to the statutory prohibitions." *Ibid.*

B

In my view, Miami's asserted injuries are "so marginally related to or inconsistent with the purposes" of the FHA

that they fall outside the zone of interests. Here, as in any other case, the text of the FHA defines the zone of interests that the statute protects. See *Lexmark, supra*, at ___ (slip op., at 9). The FHA permits "[a]n aggrieved person" to sue, §3613(a)(1)(A), if he "claims to have been injured by a *discriminatory housing practice*" or believes that he "will be injured by a *discriminatory housing practice* that is about to occur," §§3602(i)(1), (2) (emphasis added). Specifically, the FHA makes it unlawful to do any of the following on the basis of "race, color, religion, sex, handicap, familial status, or national origin": "refuse to sell or rent . . . a dwelling," §3604(a); discriminate in the "terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith," §3604(b); "make, print, or publish . . . any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination," §3604(c); "represent to any person . . . that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available," §3604(d); "induce any person to sell or rent any dwelling by representations regarding the entry or prospective entry into the neighborhood of a person or persons of" certain characteristics, §3604(e); or discriminate in the provision of real estate or brokerage services, §§3605, 3606. The quintessential "aggrieved person" in cases involving violations of the FHA is a prospective home buyer or lessee discriminated against during the home-buying or leasing process. Our cases have also suggested that the interests of a person who lives in a neighborhood or apartment complex that remains segregated (or that risks becoming segregated) as a result of a discriminatory housing practice may be arguably within the outer limit of the interests the FHA protects. See *Trafficante*, *supra*, at 211 (concluding that one purpose of the FHA was to promote "truly integrated and balanced

living patterns" (internal quotation marks omitted)).

Miami's asserted injuries are not arguably related to the interests the statute protects. Miami asserts that it received "reduced property tax revenues," App. 233, 417, and that it was forced to spend more money on "municipal services that it provided and still must provide to remedy blight and unsafe and dangerous conditions," *id.*, at 417; see also *ante*, at 2. The city blames these expenditures on the falling property values and vacant homes that resulted from foreclosures. But nothing in the text of the FHA suggests that Congress was concerned about decreased property values, foreclosures, and urban blight, much less about strains on municipal budgets that might follow.

Miami's interests are markedly distinct from the interests this Court confronted in *Trafficante*, *Gladstone*, and *Havens*. In *Trafficante*, one white and one black tenant of an apartment complex sued on the ground that the complex discriminated against nonwhite rental applicants. 409 U. S., at 206–208. They argued that this discrimination deprived them of the social and economic benefits of living in an integrated community. *Id.*, at 208. In *Gladstone*, residents in a village sued based on alleged discrimination in the home-buying process. 441 U. S., at 93–95. They contended that white home buyers were steered away from a racially integrated neighborhood and toward an all-white neighborhood, whereas black home buyers were steered away from the all-white neighborhood and toward the integrated neighborhood. *Id.*, at 95. The plaintiffs thus alleged that they were "denied their right to select housing without regard to race." *Ibid.* (internal quotation marks omitted). The village also sued, alleging that the FHA violations were affecting its "racial composition, replacing what is presently an integrated neighborhood with a segregated one" and that its budget was strained from resulting lost tax revenues. *Id.*, at 110. Finally, in *Havens*, one white and one black plaintiff sued

after having posed as "testers," for the purpose of "collecting evidence of unlawful steering practices." 455 U. S., at 373. According to their complaint, the owner of an apartment complex had told the white plaintiff that apartments were available, but had told the black plaintiff that apartments were not. *Id.*, at 368. The Court held that the white plaintiff could *not* sue, because he had been provided truthful information, but that the black plaintiff *could* sue, because the FHA requires truthful information about housing without regard to race. *Id.*, at 374–375. In all three of these cases, the plaintiffs claimed injuries based on racial steering and segregation—interests that, under this Court's precedents, at least arguably fall within the zone of interests that the FHA protects.

Miami's asserted injuries implicate none of those interests. Miami does not assert that it was injured based on efforts by the lenders to steer certain residents into one neighborhood rather than another. Miami does not even assert that it was injured because its neighborhoods were segregated. Miami therefore is not, as the majority describes, "similarly situated" to the plaintiffs in *Trafficante*, *Gladstone*, and *Havens*. *Ante,* at 7. Rather, Miami asserts injuries allegedly resulting from foreclosed-upon and then vacant homes. The FHA's zone of interests is not so expansive as to include those kinds of injuries.

C

The Court today reaches the opposite conclusion, resting entirely on the brief mention in *Gladstone* of the village's asserted injury of reduced tax revenues, and on principles of *stare decisis*. See *ante*, at 9. I do not think *Gladstone* compels the conclusion the majority reaches. Unlike these cases, *Gladstone* involved injuries to interests in "racial balance and stability," 441 U. S., at 111, which, our cases have suggested, arguably fall within the zone of interests protected by the FHA, see *supra*, at 6. The fact that the

village plaintiff asserted a budget-related injury *in addition to* its racial-steering injury does not mean that a city alleging *only* a budget-related injury is authorized to sue. A budget-related injury might be necessary to establish a sufficiently concrete and particularized injury for purposes of Article III, but it is not sufficient to satisfy the FHA's zone-of-interests limitation.

Although the Court's reliance on *Gladstone* is misplaced, its opinion today is notable primarily for what it does not say. First, the Court conspicuously does not reaffirm the broad language from *Trafficante*, *Gladstone*, and *Havens* suggesting that Congress intended to permit any person with Article III standing to sue under the FHA. The Court of Appeals felt bound by that language, see 800 F. 3d, at 1277; 801 F. 3d, at 1266, and we granted review, despite the absence of a circuit conflict, to decide whether the language survived *Thompson* and *Lexmark*, see Brief for Petitioner in No. 15–1111, p. i ("By limiting suit to 'aggrieved person[s],' did Congress require that an FHA plaintiff plead more than just Article III injury-in-fact?"); Brief for Petitioner in No. 15–1112, p. i ("Whether the term 'aggrieved' in the Fair Housing Act imposes a zone-of-interests requirement more stringent than the injury-in-fact requirement of Article III"). Today's opinion avoids those questions presented and thus cannot be read as retreating from our more recent precedents on the zone-of-interests limitation.

Second, the Court does not reject the lenders' arguments about many other kinds of injuries that fall outside of the FHA's zone of interests. We explained in *Thompson* that an expansive reading of Title VII's zone of interests would allow a shareholder "to sue a company for firing a valuable employee for racially discriminatory reasons, so long as he could show that the value of his stock decreased as a consequence." 562 U. S., at 177. Petitioners similarly argue that, if Miami can sue for lost tax revenues under

the FHA, then "plumbers, utility companies, or any other participant in the local economy could sue the Banks to recover business they lost when people had to give up their homes and leave the neighborhood as a result of the Banks' discriminatory lending practices." *Ante*, at 8 (citing petitioners' briefs). The Court today decides that it "need not discuss" this argument because *Gladstone* and *stare decisis* compel the conclusion that Miami can sue. *Ante*, at 8. That conclusion is wrong, but at least it is narrow. Accordingly, it should not be read to authorize suits by local businesses alleging the same injuries that Miami alleges here.

II

Although I disagree with its zone-of-interests holding, I agree with the Court's conclusions about proximate cause, as far as they go. The Court correctly holds that "foreseeability alone is not sufficient to establish proximate cause under the FHA." *Ante*, at 10. Instead, the statute requires "'some direct relation between the injury asserted and the injurious conduct alleged.'" *Ante*, at 11 (quoting *Holmes* v. *Securities Investor Protection Corporation*, 503 U. S. 258, 268 (1992)).

After articulating this test for proximate cause, the Court remands to the Court of Appeals because it "decline[s]" to "draw the precise boundaries of proximate cause under the FHA" or to "determine on which side of the line the City's financial injuries fall." *Ante*, at 12. But these cases come to the Court on a motion to dismiss, and the Court of Appeals has no advantage over us in evaluating the complaint's proximate-cause theory. Moreover, the majority opinion leaves little doubt that neither Miami nor any similarly situated plaintiff can satisfy the rigorous standard for proximate cause that the Court adopts and leaves to the Court of Appeals to apply. See *ante*, at 11 ("The general tendency in these cases, in regard to damages

at least, is not to go beyond the first step" (internal quotation marks omitted)).

Miami's own account of causation shows that the link between the alleged FHA violation and its asserted injuries is exceedingly attenuated. According to Miami, the lenders' injurious conduct was "target[ing] black and Latino customers in Miami for predatory loans." Brief for Respondent in No. 15–1111, p. 4 (internal quotation marks omitted). And according to Miami, the injuries asserted are its "loss of tax revenues" and its expenditure of "additional monies on municipal services to address" the consequences of urban blight. *Id.*, at 6.

As Miami describes it, the chain of causation between the injurious conduct and its asserted injuries proceeds as follows: As a result of the lenders' discriminatory loan practices, borrowers from predominantly minority neighborhoods were likely to default on their home loans, leading to foreclosures. *Id.*, at 5–6. The foreclosures led to vacant houses. *Id.*, at 6. The vacant houses, in turn, led to decreased property values for the surrounding homes. *Ibid.* Finally, those decreased property values resulted in homeowners paying lower property taxes to the city government. *Ibid.* Also, Miami explains, the foreclosed-upon, vacant homes eventually led to "vagrancy, criminal activity, and threats to public health and safety," which the city had to address through the expenditures of municipal resources. *Ibid.* And all this occurred, according to Miami, between 2004 and 2012. See *ibid.* The Court of Appeals will not need to look far to discern other, independent events that might well have caused the injuries Miami alleges in these cases.

In light of this attenuated chain of causation, Miami's asserted injuries are too remote from the injurious conduct it has alleged. See *Associated Gen. Contractors of Cal., Inc.* v. *Carpenters*, 459 U. S. 519, 532, n. 25 (1983). Indeed, any other conclusion would lead to disquieting con-

sequences. Under Miami's own theory of causation, its injuries are one step further removed from the allegedly discriminatory lending practices than the injuries suffered by the neighboring homeowners whose houses declined in value. No one suggests that those homeowners could sue under the FHA, and I think it is clear that they cannot. Accordingly, I would hold that Miami has failed to sufficiently plead proximate cause under the FHA.

III

For the foregoing reasons, I would reverse the Court of Appeals.

Amended 6/9/15

Introduced by Council Members Lee, Jones, Gulliford, Crescimbeni, Anderson, Love and Bishop and amended by the Finance Committee:

ORDINANCE 2015-340-E

AN ORDINANCE AMENDING CHAPTER 179 (MORTGAGE FORECLOSURE REGULATION), *ORDINANCE CODE*; AMENDING SECTIONS 179.102 (DEFINITIONS), 179.104 (INSPECTION AND REGISTRATION OF VACANT REAL PROPERTY BY MORTGAGE HOLDING MORTGAGES IN DEFAULT) AND 179.106 (SECURITY REQUIREMENTS), *ORDINANCE CODE*, TO INCREASE THE REGISTRATION FEE FROM $150.00 TO $250.00; REQUIRING AN ANNUAL RENEWAL FEE; PROVIDING FOR A FINE IN THE AMOUNT OF $500.00 FOR THOSE MORTGAGEES WHO DO NOT REGISTER PROPERTIES AS REQUIRED UNDER CHAPTER 179; CREATING A NEW SECTION 179.110 (ADOPTION OF POLICY AND RULES AND REGULATION; DECLARATION OF MUNICIPAL PURPOSE), *ORDINANCE CODE*, PERTAINING TO ADOPTION OF A POLICY BY THE HOUSING & COMMUNITY DEVELOPMENT DIVISION OF THE PLANNING AND DEVELOPMENT DEPARTMENT FOR AUTHORIZED USE OF FUNDS IN REGISTRY AND DECLARING A PUBLIC PURPOSE FOR EXPENDITURE OF THE FUNDS; CREATING A NEW SECTION 179.111 (EXPENDITURE OF FUNDS; MONITORING AND COMPLIANCE), *ORDINANCE CODE*, FOR EXPENDITURE OF FUNDS AND PROVIDING FOR INTERNAL TRACKING AND COMPLIANCE; CREATING A NEW SECTION 179.112 (AUDITING RIGHTS; INSPECTION OF BOOKS AND RECORDS; MONTHLY AND ANNUAL REPORTS),

ORDINANCE CODE, FOR AUDITING RIGHTS, INSPECTION OF BOOKS AND RECORDS, AND MONTHLY AND ANNUAL REPORTS; PROVIDING FOR ADOPTION BY COUNCIL OF A POLICY FOR THE EXPENDITURE OF FUNDS CONSISTENT WITH THIS CHAPTER AND ANNUAL REVIEW OF THE POLICY; PROVIDING FOR REVIEW OF THE REGISTRATION FEE AND OTHER FEES ANNUALLY FOLLOWING THE FIRST TWO YEARS OF ENACTMENT; PROVIDING FOR SEVERABILITY; PROVIDING AN EFFECTIVE DATE.

WHEREAS, in 2010 the Jacksonville City Council adopted Ordinance 2010-327-E to create a foreclosed property registry for mortgaged real property which is in default, distress or in the process of foreclosure; and

WHEREAS, the foreclosed property registry established a process to mitigate the level of deteriorating property within the City of Jacksonville by providing that funds from the registration of properties, in addition to covering administrative costs of the registry, go into programs for foreclosure intervention programs and code enforcement; and

WHEREAS, there are certain areas within the City that suffer from blighted conditions and devaluation in property values at a greater intensity and frequency than other areas of the City, particularly in the following zip codes: 32202, 32205, 32206, 32208, 32209, 32254 due to the lack of adequate maintenance of properties subject to mortgages that are in default or have been foreclosed; and

WHEREAS, the City desires to establish a policy so that those neighborhoods and communities most negatively affected by the ongoing lack of adequate maintenance of properties subject to

mortgages in default or that have been foreclosed can be eligible for funding for community development and maintenance, in addition to foreclosure intervention programs and code enforcement; and

WHEREAS, the City of Jacksonville further finds that improvements and efficiencies can be made to the current registration process to enhance the program; and

WHEREAS, the City Council of the City of Jacksonville has determined that the following additions and modifications to the City's *Ordinance Code* will meet a public purpose by serving and contributing to the promotion and protection of the general health, safety and welfare of the residents of the City of Jacksonville; and,

WHEREAS, upon passage, duly noticed public hearings as required by law will have been held by the City Council of the City of Jacksonville, at which public hearings all residents and interested persons were given an opportunity to be heard; now therefore

BE IT ORDAINED by the Council of the City of Jacksonville:

Section 1. Recitals Incorporated. The above recitals are true and correct and by this reference are incorporated herein and made an integral part hereof.

Section 2. Amending Chapter 179 (Mortgage Foreclosure Regulation), Ordinance Code. Chapter 179 (Mortgage Foreclosure Regulation) is amended to read as follows:

CHAPTER 179. MORTGAGE FORECLOSURE REGISTRATION

* * *

Sec. 179.102 Definitions.

The following words, terms and phrases, when used in this Chapter, shall have the meanings ascribed to them, except where the context clearly indicates a different meaning. Where the context

will permit and no definitions are provided herein, the definitions provided in the Florida Building Code shall apply.

Abandoned real property means any real property that is ~~vacant, and is~~ under a public notice of default, notice of mortgagee's sale, pending tax assessor's lien sale, or is pending a mortgage foreclosure, ~~or notice of mortgagee's sale, or lien sale~~ and/or properties that have been the subject of a mortgage foreclosure sale where title is retained by the mortgagee, and/or any properties transferred under a deed-in-lieu of foreclosure sale, a short sale or any other legal means.

Annual registration shall mean 12 months from the date of the first action that required registration, as determined by the City of Jacksonville's Housing and Community Development Division, or its designee, and every subsequent 12 months. The date of the initial registration may be different than the date of the first action that required registration.

Default means ~~that the mortgagee has filed a foreclosure action or public notice of default on the mortgage. A mortgage shall be considered in default at such time as the mortgagee declares said mortgage to be in default either in writing, by recording a lis pendens, by commencing foreclosure proceedings; or by any other actions demonstrating a breach of a security covenant on a property.~~ a claim by a mortgagee, or other lien holder, that the mortgagor has not complied with the terms of the mortgage on the property or other evidence of the debt referred to in the mortgage.

Enforcement officer means any fulltime law enforcement officer, building official, fire inspector or code enforcement officer employed by the City of Jacksonville.

Evidence of vacancy means any condition that on its own, or combined with other conditions present, would lead a reasonable

person to believe that the property is vacant. Such conditions may include, but are not limited to: overgrown and/or dead vegetation; electricity, water or other utilities turned off; stagnant swimming pool; or statements by neighbors, passers-by, delivery agents or government agents.

Foreclosure means ~~the judicial process by which a property, placed as security for a mortgage loan, after a judicial process, is to be sold at an auction to satisfy a debt upon which the borrower has defaulted~~. the legal process by which a mortgagee, or other lien holder, terminates or attempts to terminate a property owner's equitable right of redemption to obtain legal and equitable title to the real property subject to the lien held by that mortgagee or other lien holder. This definition shall include, but is not limited to, public notice of default, deed-in-lieu of foreclosure, sale to the mortgagee or lien holder prior to certificate of title, certificate of title and all other processes, activities and actions, by whatever name, associated with the described process. The process is not concluded until title to the property is transferred to a third party either before or after certificate of title or until the legal process is dismissed.

"Local" means within the boundaries of the City of Jacksonville, Florida.

"Local Agent" means the property manager or agent designated by the mortgagee upon registration as required under this Chapter. The Local Agent's office must be located within twenty (20) miles of the City of Jacksonville.

"Mortgagee" means the creditor, including but not limited to, trustees; servicing companies; lenders; any agent, servant or employee of the creditor; any successor in interest; or any assignee of the creditor's rights, interests or obligations under the mortgage agreement.

"Owner" means every person, entity, or service company, who alone or severally with others:

1) has legal or equitable title to any dwelling, dwelling unit, mobile dwelling unit, residential building, residential structure, residential parcel of land, vacant or otherwise, including but not limited to, a mobile home park; or

2) has care, charge or control of any dwelling, dwelling unit, mobile dwelling unit, residential building, residential structure or residential parcel of land, vacant or otherwise, including a mobile home park, in any capacity, including but not limited to, agent, executor, executrix, administrator, administratix, trustee or guardian of the estate of the holder of legal title; or

3) is a mortgagee in possession of any such property, or is a mortgagee with actual control of access to the property by any means including, but not limited to, changing locks or putting on a lock box; or

4) is an agent, trustee or other person appointed by the courts and vested with possession or control of any such property.

Vacant means any building or structure that is not lawfully occupied or inhabited by human beings as evidenced by the conditions set forth in the definition of "*Evidence of Vacancy*" above.

* * *

Sec. 179.104. Inspection and registration of ~~vacant~~ foreclosed real property by mortgagee holding mortgages in default.

(a) Any mortgagee who holds a mortgage on real property located within the City of Jacksonville shall perform an inspection of the property upon default by the mortgagor or prior to the issuance of a notice of default. ~~If the property is found to be vacant or shows evidence of vacancy, it shall be deemed vacant or abandoned and the mortgagee shall, within~~.

(b) Property inspected pursuant to subsection (a) above that ~~is occupied but~~ remains in default, shall be inspected ~~on a regular basis~~ every 30 days by the mortgagee or mortgagee's designee.

(c) Within ten (10) days of the date any mortgagee declares its mortgage to be in default, the mortgagee shall register the real property with the City of Jacksonville's Housing & ~~Neighborhood Department~~ Community Development Division, or its designee, on forms promulgated by the ~~Housing & Neighborhood Department,~~ Housing & Community Development Division, or other manner as directed, and, at the time of registration, indicate whether the property is vacant, shows evidence of vacancy or is occupied, and shall designate in writing a ~~local property manager~~ Local Agent to inspect, maintain and secure the real property subject to the mortgage in default. A separate registration is required for each property, whether it is found to be vacant or occupied.

(d) Registration pursuant to this section shall contain at a minimum the name of the mortgagee, the mailing address of the mortgagee, e-mail address, ~~and~~ telephone number, and name of the ~~local property manager~~ Local Agent and said person's address, e-mail address, and telephone number. The ~~local property manager~~ Local Agent shall be responsible to inspect, secure and maintain the property. The ~~property manager~~ Local Agent named in the registration shall be located within twenty (20) miles of the City of Jacksonville and available to be contacted by the City, Monday through Friday between 9:00 a.m. and 5:00 p.m., legal holidays ~~and lunch hours~~ excepted.

(e) At the time of registration each ~~Each~~ registrant shall pay a non-refundable annual registration fee of ~~$150.00~~ $250.00 for each registration. Subsequent annual registrations and fees in the amount of $250.00 are due within 30 days of the expiration of the

previous registration. Said fees shall be used to offset the costs of (1) registration and registration enforcement, (2) code enforcement and mitigation related to blighted and deteriorating foreclosed properties that were owner-occupied, (3) post-closing counseling and foreclosure intervention limited to owner-occupied persons in default, which may include cash and mortgage modification assistance~~.~~ ,and (4) may be used for any related purposes as may be adopted in the policy set forth in Section 179.110 below. Said fees shall be deposited to a special account in the ~~Planning and Development Department~~ Housing & Community Development Division dedicated to the cost of implementation and enforcement of this ordinance, combatting blight in affected neighborhoods consistent with the policy adopted by the Housing & Community Development Division in Section 179.110, and any registries so required. None of the funds provided for in this section shall be utilized for the legal defense of foreclosure actions.

(f) ~~This section shall also apply to properties that have been the subject of a foreclosure sale where title is transferred to the mortgagee as well as any properties transferred to the mortgagee under a deed in lieu of foreclosure~~. Beginning on July 1, 2015, each individual property on the registry that has been registered for twelve months or more prior to that date shall have thirty (30) days to renew the registration and pay the $250.00 annual renewal fee. The anniversary date for annual renewal of registration for these properties shall be deemed to be July 1 each subsequent year. Properties registered less than twelve months prior to July 1, 2015 shall use the date of initial registration as their annual renewal date and shall pay the $250.00 annual renewal date on the anniversary of the initial registration each subsequent year.

(g) If the defaulted mortgage and/or servicing on a property is sold or transferred, the new mortgagee is subject to all the terms of this Chapter. Within ten (10) days of the transfer, the new mortgagee shall register the property or update the existing registration and pay a registration update fee of $50.00. Any and all previous unpaid fees, regardless of who the mortgagee was at the time of registration was required, including but not limited to unregistered periods during the foreclosure process shall be the responsibility of the new mortgagee and are due and payable with the updated registration.

(h) If the mortgagee of a foreclosed real property sells or transfers the property in a non-arm's length transaction to a related entity or person, the transferee is subject to all the terms of this Chapter, and within ten (10) days of the transfer the transferee shall register the property or update the existing registration and pay a registration update fee of $50.00. Any and all previous unpaid fees, regardless of who the mortgagee was at the time registration was required, including but not limited to unregistered periods during the foreclosure process, are the responsibility of the new owner of the foreclosed property and are due and payable with the updated registration.

(i) If the property is not registered and the registration fee is not paid within thirty (30) days of when the registration is required pursuant to this section, a late fee of $50.00 per property shall be charged and shall be due and payable with the registration. This section shall apply to the initial registration and registrations required by subsequent owners of the defaulted mortgage and/or foreclosed property. Each period where the registration fee is late shall be assessed a late charge of $50.00. Registrations delinquent greater than 30 days are subject to additional fines as described by Section 179.106(g) herein.

(j) This section shall also apply to properties that have been the subject of a foreclosure sale where title is transferred to the mortgagee as well as any properties transferred to the mortgagee under a deed in lieu of foreclosure or by any other legal means.

~~(g)~~ (k) Properties subject to this section shall remain subject to ~~under~~ the annual registration requirement, and the inspection, security, and maintenance standards of this section as long as ~~they remain vacant or subject to having been declared by a mortgagee to be~~ the mortgage is under foreclosure or in default.

~~(h) Any person or other legal entity that has registered a property under this ordinance must report any change of information contained in the registration within ten (10) days of the change.~~

~~(i)~~ (l) Failure of the mortgagee and/or property owner of record to properly register or to modify the registration from time to time to reflect a change of circumstances as required by this ordinance is a violation of this chapter and shall be subject to enforcement by any of the enforcement means available to the City of Jacksonville.

~~(j)~~ (m) Pursuant to any judicial finding and determination that any property is in violation of this chapter the City may take the necessary action to ensure compliance with and place a lien on the property for the cost of the work performed to benefit the property and to bring it into compliance.

* * *

Sec. 179.106. Security requirements.

(a) Properties subject to this Chapter shall be maintained in a secure manner so as not to be accessible to unauthorized persons.

(b) A "secure manner" shall include, but not be limited to, the closure and locking of windows, doors, gates and other openings of such size that may allow a child or adult to access the interior

of the property and/or structure. Broken windows shall be secured by reglazing or boarding.

(c) If a mortgage on a property is in default, and the property has become vacant or abandoned, a ~~local property manager~~ Local Agent shall be designated by the mortgagee to perform the work necessary to bring the property into compliance with the code of ordinances and the ~~local property manager~~ Local Agent must perform regular inspections to verify compliance with the requirements of this section, and any other applicable laws or ordinances of the City of Jacksonville.

(d) When a property subject to this Chapter becomes vacant or abandoned, it shall be posted with the name and twenty four (24) hour contact telephone number of the ~~local property manager~~ Local Agent. The sign shall be placed in a window facing the street and shall be visible from the street. The posting shall be no less than 18 inches x 24 inches and shall be of a font that is legible from a distance of 45 feet. The posting shall contain the following language with supporting information:

THIS PROPERTY IS MANAGED BY

AND IS INSPECTED ON A REGULAR BASIS.

THE PROPERTY MANAGER CAN BE CONTACTED

BY TELEPHONE AT

OR BY EMAIL AT

(e) The posting required in subsection (d) above shall be placed on the interior of a window facing the street to the front of the property so that it is visible from the street, or secured to the exterior of the building/structure facing the street to the front of the property so that it is visible from the street or if no such area exists, on a stake of sufficient size to support the posting in a location that is at all times visible from the street to the front of the property but not readily accessible to vandals.

Exterior posting shall be constructed of and printed with weather-resistant materials.

(f) Failure of the mortgagee and/or property owner of record to properly inspect and secure a property subject to this Chapter, and post and maintain the signage noted in this section, is unlawful and a Class C violation and shall be subject to enforcement by any of the enforcement means available to the City of Jacksonville. Pursuant to a finding and determination, the City of Jacksonville may take the necessary action to ensure compliance with this section, and recover costs and expenses in support thereof.

(g) Failure of the mortgagee to register a property pursuant to this Chapter shall authorize the City to impose a civil penalty in the amount of $500.00 against the mortgagee for each offense. Upon written notice of noncompliance from the City or its designee, the mortgagee shall have 20 days from the date of the notice of noncompliance to pay the registration fee and any additional fees (such as any late fee or update fee noted within the letter of noncompliance). If the mortgagee fails to timely make these payments within the time allotted above, the $500.00 civil penalty shall be imposed upon mortgagee and shall be payable to the City of Jacksonville within 15 days of receipt of notice of delinquent payment, along with any other registration fees which have not been paid by that date. The provisions of this section are cumulative with and in addition to other available remedies. Moreover, the Housing and Community Development Division Staff of the Planning and Development Department is authorized and empowered to refer the Notice of Noncompliance to the City Code Enforcement Special Magistrate for disposition.

* * *

Sec. 179.110. Adoption of policy and rules and regulations; declaration of municipal purpose.

Subject to the review and approval of City Council, the Housing and Community Development Division of the Planning and Development Department is authorized and empowered to adopt any policies, rules and regulations necessary, and expend funds as may be reasonably necessary and available to carry out the terms of this Chapter, the expenditure of such funds having been declared a proper public purpose herein.

Sec. 179.111. Expenditure of funds; monitoring and compliance.

The City fee collected for Foreclosed Land Registry shall be deposited in sub fund 1N1. Council shall authorize all appropriations from the sub fund. The Planning and Development Department, where Housing and Community Development operates, shall commit to tracking expenses through a tiered strategy system policy, adopted by City Council, and shall concurrently submit annual reports to the Council Auditor's Office and the Finance Committee. The expenditures from the Foreclosed Land Registry shall be tracked allocating those funds to show how the funds were requested, issued, and used in relation to the tiered strategy policy and personnel. Such detail shall be in accordance with instructions provided by the Council Auditor's Office. The annual reporting of activity will provide the ability to substantiate the appropriate use of the Foreclosed Land Registry fees in all years going forward as of October 1, 2015 with the first report made available sixty days after fiscal year end.

Section 179.112. Auditing Rights; Inspection of Books and Records; Monthly and Annual Reports.

If the City selects a vendor to administer the provisions of

this Chapter through a contractual arrangement, the following auditing provisions shall apply to the selected vendor and shall be included in the contract with the vendor. The Planning and Development Department, where Housing and Community Development operates, and the City Council Auditors, shall have the right, during normal business hours, to enter the vendor's business property, upon reasonable prior notice, to inspect the operations and facilities of the vendor and to audit, inspect and examine the vendor's books and records and state and federal tax returns, insofar as they relate to compliance with the contractual provisions, this Chapter and any rules adopted by the Planning and Development Department pursuant hereto. This information shall include, but not be limited to, the following: billing rates, billing amounts, accounts receivable and list of accounts. Additionally, the City Council Auditors may communicate directly with customers (mortgagees in this case) for the purpose of confirming compliance with this Section. To the extent authorized by Section 119.165, *Florida Statutes*, or other applicable law, this information shall remain confidential. Refusal to permit inspection shall be cause for suspension or revocation of the vendor contract. The vendor shall deliver to the Planning and Development Department a true and correct monthly report of gross receipts generated during the previous month for all registrations, fees, and penalties within the City on or before the last day of each month. The vendor shall, on or before 90 days following the close of the City's fiscal year, deliver to the Planning and Development Department a statement of its annual gross receipts generated from accounts within the City reflecting gross receipts within the City for the preceding City fiscal year. The statement shall be audited by an independent certified public accountant licensed to do business in the state, and shall be accompanied by the certified

public accountant's opinion of its accuracy without qualifications or reservations.

* * *

Section 3. Adoption of policy on expenditure of funds. The Housing & Community Development Division of the Planning and Development Department has established a policy for the expenditure of funds deposited in the Foreclosed Property Registry consistent with the purpose of combatting blight, particularly in neighborhoods and communities inordinately impacted by the mortgage foreclosure crisis, and to counteract the deterioration of properties in the registry and to reduce the devaluation of surrounding properties caused by deteriorating properties subject to mortgage foreclosure. The City of Jacksonville hereby adopts the policy created by the Housing and Community Development Division attached hereto as **Exhibit 1** and incorporated herein by reference. This policy is subject to annual review by the Housing and Community Development Division. Should the Housing and Community Development Division determine that modifications to the policy are necessary or recommended, the Housing and Community Development Division shall file legislation through the Mayor's Office to have such modifications to the policy adopted by the Council.

Section 4. Review of registration fees and fees related to the foreclosed property registry. All fees related to Chapter 179 approved in this Ordinance shall be in effect for at least two (2) City budget fiscal years from the Effective Date of this Ordinance. This will provide time for the Housing and Community Development Division to determine if said fees are reasonable and appropriate, and in concert with the modifications to the Chapter. After the completion of two (2) City budget fiscal years, the

Housing & Community Development Division of the Planning and Development Department shall internally review the fee structure provided for herein to assess the need to modify the fee structure. Following that review, which may be in conjunction with the submission of its annual budget proposal each year, the Housing & Community Development Division of the Planning and Development Department shall review the fee structure approved herein and make a recommendation in writing to the Council as to any changes to the fee structure, or may on its own directive, file legislation through the Mayor's Office to amend the fee structure.

Section 5. Severability. It is hereby declared to be the intention of the City Council of the City of Jacksonville that the sections, paragraphs, sentences, clauses and phrases of this ordinance are severable, and if any phrase, clause, sentence, paragraph or section of this ordinance shall be declared unconstitutional by the valid judgment or decree of a court of competent jurisdiction, such unconstitutionality shall not affect any of the remaining phrases, clauses, sentences, paragraphs and sections of this Ordinance.

Section 6. Effective Date. This ordinance shall become effective upon signature by the Mayor or upon becoming effective without the Mayor's signature.

Form Approved:

/s/ Paige Hobbs Johnston
Office of General Counsel
Legislation prepared by: Paige H. Johnston
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United States Department of Housing and Urban Development
Case No. 04-13-0040-8

Conciliation Agreement

Under the Fair Housing Act (Title VIII)

Between

Jacksonville Area Legal Aid, Inc.
(Complainant)

And

Wells Fargo Bank, N.A.,
(Respondent)

Approved by the Assistant Secretary for Fair Housing and Equal Opportunity on behalf of the United States Department of Housing and Urban Development

Effective Date: _____, 2013

I. PARTIES

A. Complainant

Jacksonville Area Legal Aid, Inc.
126 West Adams Street
Jacksonville, FL 32202

Representing Complainant:

Allison E. Albert, Esq.
David Cronin, Esq.
Jacksonville Area Legal Aid, Inc.
126 West Adams Street
Jacksonville, FL 32202
(904) 356-8371
allison.albert@jaxlegalaid.org

B. Respondent

Wells Fargo Bank, N.A.
101 N. Phillips Avenue
Sioux Falls, SD 57104

Representing Respondent:

Anand S. Raman
Joseph L. Barloon
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
1440 New York Avenue, NW
Washington, DC 20005
(202) 371-7000
anand.raman@skadden.com
joseph.barloon@skadden.com

II. STATEMENT OF POSITIONS

A. Complainant's Position

1. On October 16, 2012, Complainant filed a complaint (the "Complaint") with the U.S. Department of Housing and Urban Development ("HUD") against

Wells Fargo Bank, N.A., pursuant to 42 U.S.C. §§ 3604, 3605 and 3610. Complainant asserts that Respondent has violated the Fair Housing Act (the "Act") by maintaining and marketing Real Estate Owned ("REO") properties in predominantly White areas in materially better condition than such properties in predominantly African-American, Latino, and other non-White communities ("minority neighborhoods").

B. Respondent's Position

2. Respondent denies that it has violated the Fair Housing Act or engaged in differential treatment of REO properties on the basis of race, national origin or any other prohibited basis. Respondent avers that it is firmly committed to the principles of home ownership, fair housing, and equal opportunity and has invested heavily in minority neighborhoods in Duval County and throughout the nation.

3. Respondent asserts that throughout the period of time at issue in this proceeding and to the present, it has managed REO properties in a responsible manner and without regard to the racial composition of the communities it serves. Respondent asserts that it has implemented industry-leading policies and procedures for managing REO properties, and that these policies and procedures were and are applied to REO property maintenance and marketing without regard for race, national origin, or any other impermissible factor.

4. Respondent enters this settlement solely for the purpose of avoiding contested litigation with Complainant, and to instead devote its resources to its REO maintenance and marketing responsibilities, and to providing important and meaningful assistance to minority communities throughout the nation.

5. Respondent notes that it has not been advised by HUD of any allegation that any of Respondent's employees discriminated intentionally on the basis of race or national origin. Respondent not only denies that it discriminated unlawfully, but affirmatively asserts that it has fulfilled its responsibilities with respect to REO maintenance and marketing without regard to race or national origin, and that its community investment efforts have benefitted communities of all racial compositions.

C. Conciliation

6. HUD has not reached a determination regarding the complaint pursuant to 42 U.S.C. § 3610(g) and has made no findings regarding the allegations. Nonetheless, the Assistant Secretary of Housing and Urban Development for Fair Housing and Equal Opportunity ("Assistant Secretary"), Complainant and Respondent (collectively, the "Parties") have engaged in discussions in an effort to resolve the matter voluntarily. Although the Parties have differing views of the operative facts and legal framework, they share a commitment to the principles of fair housing and equal treatment. Accordingly, the Parties and HUD have been able to reach an agreement satisfactory to the Parties and which HUD deems to be in the public interest.

III. AGREEMENT

A. Term of Agreement

7. This Conciliation Agreement ("Agreement") shall be in effect for a period of 18 months from the effective date of the Agreement, unless Respondent, Complainant and the Assistant Secretary shall agree to an extension for purposes of completing the actions mandated by the Agreement.

B. Effective Date

8. The Parties expressly agree that this Agreement constitutes neither a binding contract under state or federal law nor a conciliation agreement pursuant to the Fair Housing Act, unless and until such time as it is approved by the parties and by the Assistant Secretary. This Agreement shall become effective on the date on which it is approved by the Assistant Secretary.

C. General Provisions

9. The Parties acknowledge that this Agreement is a voluntary and full settlement of the disputed complaint. No party has been coerced, intimidated, threatened, or in any way forced to become a party to this Agreement. The Parties have read and fully understand the significance of the terms set forth herein. Each person who signs this Agreement in a representative capacity warrants that his or her execution of this Agreement is duly authorized, executed and delivered by and for the entity for which he or she signs.

10. It is understood that the Respondent denies any violation of law and that this Agreement does not constitute an admission by the Respondent or evidence of a determination by HUD of any violation of the Act or any other law.

11. This Agreement, after it has been approved by the Assistant Secretary, is binding upon HUD, as well as the Complainant, the Respondent, and their respective employees, successors and assigns.

12. It is understood that, pursuant to Section 801(b)(4) of the Act, upon approval of this Agreement by the Assistant Secretary, this Agreement is a public document. However, HUD will hold confidential all information of a personal or proprietary nature concerning Parties to this Agreement that is not contained in the body of the Agreement.

13. This Agreement is intended to fully and finally resolve all claims that were or could have been asserted based on the subject matter of or facts alleged in Complainant's Complaint. However, this Agreement does not in any way limit or restrict HUD's authority to investigate any other complaint involving Respondent made pursuant to the Fair Housing Act, or any other complaint within HUD's jurisdiction.

14. No amendments to, modifications of, or waiver of any provision of this Agreement shall be effective unless all of the following conditions are met: (a) all signatories or their successors to the Agreement are notified in advance and agree to the proposed amendment, modification or waiver; (b) the amendment, modification, or waiver is in writing; and (c) the amendment, modification, or waiver is approved and signed by the Parties and the Assistant Secretary, or his designee. Any such amendment, modification, waiver or consent shall be effective only in the specific instance and for the specific purpose for which given.

15. The Parties agree that this Agreement may be executed by the Parties' signatures of consent on separate pages. The separate pages will be attached to the body of the Agreement to constitute one document. The Parties agree that signature pages received via electronic transmission will be considered official, provided that the original copy of the signature page is forwarded to HUD immediately upon signing of the Agreement. Both the original and any electronically transmitted signature pages will be retained in the official case file.

16. In exchange for Respondent's compliance with the provisions of this Agreement, the Complainant hereby forever waives, releases and covenants

not to sue HUD or the Respondent, or its employees, assigns or successors, with regard to any and all claims, damages and injuries of whatever nature, whether presently known or unknown, arising out of the facts alleged in or the same subject matter as HUD Case No. 04-13-0040-8 or which could have been filed in any action or suit arising from such facts or subject matter.

17. Respondent hereby forever waives, releases and covenants not to sue HUD or the Complainant, or its employees, assigns or successors, with regard to any and all claims, damages and injuries of whatever nature, whether presently known or unknown, arising out of the facts alleged in or the same subject matter as HUD Case No. 04-13-0040-8 or which could have been filed in any action or suit arising from such facts or subject matter. As a further material consideration of Respondent entering into this Agreement, Complainant shall refrain from making any disparaging comments about Respondent as to any subject encompassed within the Complaint.

18. Respondent acknowledges that it is unlawful to retaliate against any person because that person has made a complaint, testified, assisted or participated in any manner in a proceeding under the Act and that any such act of retaliation constitutes a material breach of this Agreement and a violation of the Act. If any provision of this Agreement is determined to be invalid or unenforceable for any reason, then such provision shall be treated as severed from the remainder of this Agreement, and shall not affect the validity and enforceability of all the other provisions of this Agreement as long as such severance does not materially change the rights and obligations of the Parties.

D. Confidentiality and Non-Disclosure

i. Matters Subject to Confidentiality

19. Complainant and Respondent agree that the following matters (the "Confidential Matters") are, and shall remain, strictly confidential: (i) all negotiations, discussions, communications or correspondence between Complainant and Respondent, or their respective counsel, with respect to any matter relating to this Agreement or the terms thereof; and (ii) any future negotiations, discussions, communications or correspondence between Complainant and Respondent, or their respective counsel, with respect to any matter relating to this Agreement or the terms thereof, or regarding facts alleged in or the same subject matter as HUD Case No. 04-13-0040-8 or which could have been filed in any action or suit arising from such facts or subject matter.

ii. Prohibition Against Disclosure

20. In recognition of the confidential nature of the Confidential Matters, the Parties agree that, subject to the exclusions identified in Paragraph 21 below, they shall not disclose, discuss or communicate in any manner whatsoever the Confidential Matters to anyone. In particular, the Parties agree that they shall refrain in all instances from making any comments or statements regarding the Confidential Matters to persons other than those enumerated in Paragraph 21 below.

iii. Limited Disclosure

21. Notwithstanding the limitations set out in Paragraph 20, above, the Parties agree that Confidential Matters may be disclosed to: (1) counsel for the Parties; (2) individuals who are affiliated or associated in a professional capacity with the Parties, so long as such disclosure is reasonably necessary to effectuate the terms and conditions of the settlement or to comply with legal, regulatory, or auditing requirements; (3) any competent public authority to which a Party is obligated to report the fact or terms of the Agreement, including HUD; (4) as required by order of any court of competent jurisdiction; or (5) as required by order of any administrative agency, including HUD.

22. Prior to making any disclosures pursuant to Paragraphs 21(4) or 21(5), the Party seeking disclosure shall provide reasonable prior written notice to the legal counsel to the Parties as identified in this Agreement such that they may take any steps necessary to prevent or limit disclosure.

iv. Remedies

23. The Parties hereto agree that in the event of a breach of the Confidentiality and Non-Disclosure provisions of this Agreement: (a) each and every term of this Agreement shall remain in full force and effect; and (b) the exclusive remedies of the non-breaching Party shall be, at the non-breaching Party's election, injunctive relief and/or damages.

IV. RELIEF IN THE PUBLIC INTEREST

24. Respondent has agreed to implement enhancements to its REO maintenance and marketing standards satisfactory to HUD.

V. RELIEF FOR COMPLAINANT

25. Within 30 days of the effective date of this Agreement, Respondent shall provide, via wire transfer or any other mutually agreed upon method, $535,000 to Complainant in full and final satisfaction of this matter.

26. Of the amount referenced in Paragraph 25, $450,000 shall be used for programs in minority communities to address neighborhood stabilization, development, and property rehabilitation, as approved by HUD. Such funds shall be distributed no later than 18 months after the date of this Agreement.

27. Of the amount referenced in Paragraph 25, $45,000 is intended to finance the costs Complainant incurs in administering the programs and services identified in Paragraph 26.

28. Of the amount referenced in Paragraph 25, $40,000 is intended as payment to Complainant.

29. Complainant will make periodic reporting to HUD and Respondent regarding the use of the relief funds. Complainant will submit to HUD and Respondent a quarterly report on the 15th day of the month after the calendar quarter ("Quarterly Report"). The first Quarterly Report will be due on the 15th day of the month after the close of the first full calendar quarter elapsed since the initial distribution of grant funds to the recipient. If the due date falls on a Saturday, the Quarterly Report is due the Friday before. If the due date falls on a Sunday, the Quarterly Report is due the Monday after.

30. In the Quarterly Report, Complainant will report the progress of its grant for the previous quarter, including but not limited to progress against its schedule and budget, expenditures to date, and a narrative statement on its progress. Complainant should also include, as appropriate, best practices and lessons learned from the date of the prior Quarterly Report.

VI. EVALUATING AND MONITORING COMPLIANCE

A. Reporting and Recordkeeping

31. For the duration of this Agreement, Respondent shall retain all records relating to its obligations under this Agreement. HUD shall have the right to review and copy such records upon request.

32. On the one year anniversary of the effective date of this Agreement, Respondent shall make a report to HUD on its progress in fulfilling the goals of this Agreement.

33. HUD may review and shall determine compliance with the terms of this Agreement during the term of this Agreement. Respondent and Complainants agree to provide full cooperation in any such monitoring review undertaken by HUD.

34. Whenever HUD has reasonable cause to believe that Respondent has breached this Agreement, the matter may be referred to the Attorney General of the United States, to commence a civil action in the appropriate U.S. District Court, pursuant to §§ 810(c) and 814(b)(2) of the Act.

35. All certifications and documentation of compliance required under this Agreement shall be submitted to:

U.S. Department of Housing and Urban Development
Fair Housing Enforcement Center
ATTENTION: CONCILIATION REVIEW
San Francisco Regional Office – Region IX
600 Harrison Street, 3rd Floor
San Francisco, CA 94107-1300

SIGNATURE PAGE

SIGNATURES

For Complainant, Jacksonville Area Legal Aid



James Kowalski, Director

5 JUNE 2013

Date

For Respondent Wells Fargo Bank, N.A.

Michael J. DeVito
EVP, Head of Default Servicing

6-5-2013
Date

Approved:

On Behalf of the Department of Housing and Urban Development



By: Sara K. Pratt
Deputy Assistant Secretary for Enforcement and Programs

6/5/13
Date

Conciliators: Catherine Ross-Perry
Sara K. Pratt

U.S. Department of Housing and Urban Development
Fair Housing Enforcement Center
ATTENTION: CONCILIATION REVIEW
Fair Housing Enforcement Headquarters
U.S. Department of Housing and Urban Development
451 7th Street, SW
Washington, DC 20410

Report on the Wells Fargo Settlement
United States Department of Housing and Urban Development
Case No. 04-13-0040-8
Conciliation Agreement Under the Fair Housing Act (Title VIII)
Between Jacksonville Area Legal Aid, Inc. (Complainant)
And Wells Fargo Bank, N.A., (Respondent)

Jacksonville Area Legal Aid, Inc. worked on two projects for the Wells Fargo settlement fund. One project created an accessible, single-family home for disabled tenants ($50,000) and the other ($400,00) renovated homes of at-risk middle school students:

I. ACCESSIBLE SINGLE-FAMILY HOMES

A part of the settlement funds built a single-family home at 1056 Powhattan Street in the New Town neighborhood for disabled tenants. The City Council deeded two parcels of property to Northwest Jacksonville Community Development Corporation (NJCDC). NJCDC demolished the two homes on the lots(which were beyond renovation). The City contributed $50,000 toward the cost of this home. NJCDC filed a quiet title action so the property is insurable by a title insurance company. JALA spent $50,000 of the settlement funds and raised another $31,569. The City agreed to fill the gap, which resulted in a contribution of $98,507.

The home is finished and JALA and NJCDC obtained additional donations to furnish it. JALA and NJCDC held an open house on Dec. 21, 2016. A photo of the house and the ribbon cutting is attached.

The project created an accessible rental home for disabled people who are able to live alone and want to stay in their neighborhood. The home is environmentally responsible and designed for disabled tenants. The first tenants are a family with a

disabled person. The family was homeless and the Sulzbacher Center recommended the family to NJCDC. They moved in during the month of February 2017. This home makes available desperately needed accessible housing for people of limited financial resources who live with disabilities and will have a meaningful positive impact for decades to come.

II. RENOVATED HOMES FOR MIDDLE SCHOOL STUDENTS

JALA (Jacksonville Area Legal Aid) chose to improve the quality of living conditions of middle school students and their families, which will allow the youth to focus more intensely on schoolwork. Students' academic lives are directly influenced by the living conditions in their households. JALA partnered with Communities In Schools of Jacksonville (CIS), Jewish Family and Community services (JFCS), and Operation New Hope to identify at risk middle school students, who live in single-family homes in need of repair. A family member must own the home and sign a deferred payment loan, which will expire in ten years. JFCS is responsible for finding the at-risk youth through their Achievers for Life program. JFCS sends the referral to Operation New Hope, who determines the work needed and arranges the physical repairs.

JFCS and CIS will jointly track the progress made by the student as he/ she moves through their school years into high school. The goal is to have a positive impact on the youth, making them more successful by providing a safe and sound home. Factors to determine if a youth is at risk include:

- Low FCAT scores in Reading and/or Math
- Excessive Absences
- Low Grades in Math and/or Language Arts

Once the repairs are complete, CIS will track the students' progress. The objective of this project is to explore whether there is a correlation between the home repairs and the students' success in school. The way JFCS and CIS measure success of the students include:

1. Whether school absences for AFL students decrease
2. Whether AFL students' GPAs improve
3. Whether AFL promotion rates improved in contrast to the Comparison Group rate and
4. Whether AFL students gain points in FCAT Reading, a higher gain than the average DCPS student (whose reading skills are initially better)

Progress thus far

As of December 2016, this project repaired 15 homes and spent $342,360.44. Repair of two more homes is underway. The internal repairs significantly improved the quality of life for the families and the external repairs increased home values for the neighborhood also. Repairs, especially roof repairs preserved the value of the family's largest and most important asset and the property values of the surrounding area. The families were able to avoid borrowing money and risk using their homes as collateral for the loan. The project created stable homes for the owners and the neighborhood. The community benefited from improved housing stock (which maintains property values), less stressed families and more successful students.

United Way is tracking the progress of the children and will let us know what they discover. JALA will learn if the project has a positive impact on the youth, making them more successful by providing a safe and sound home. Anticipated community benefits include: lowering the drop-out rate, raising FCAT scores, and improving homes that are blighted or unsafe. The partners will measure these benefits through the success of the students from middle school grades through high school graduation.

We are grateful for the opportunity to design and oversee this project. Working with other non-profits has increased communication among different types of service providers and created relationships which will help strengthen communities. By bringing different areas of expertise together, we were able to take a more holistic approach to safer homes for children and their families and encouraging children to succeed in school. A joint approach by housing and education non-profits was more effective than what either could accomplish without the other.

(See attached for description of work and photos)

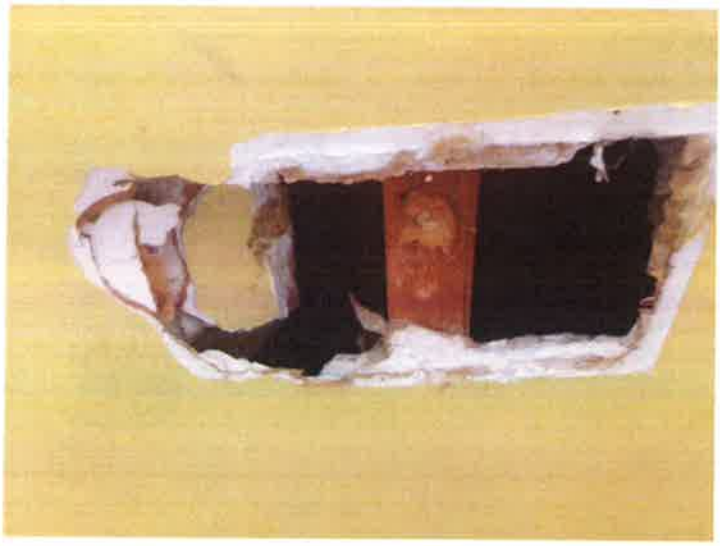
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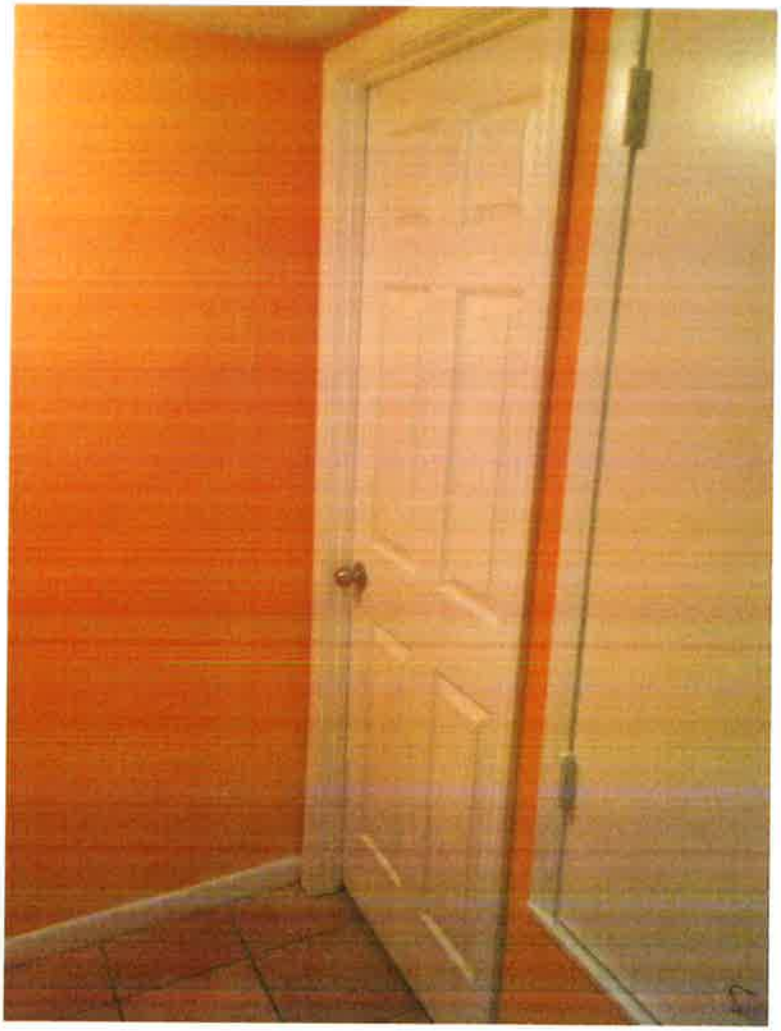
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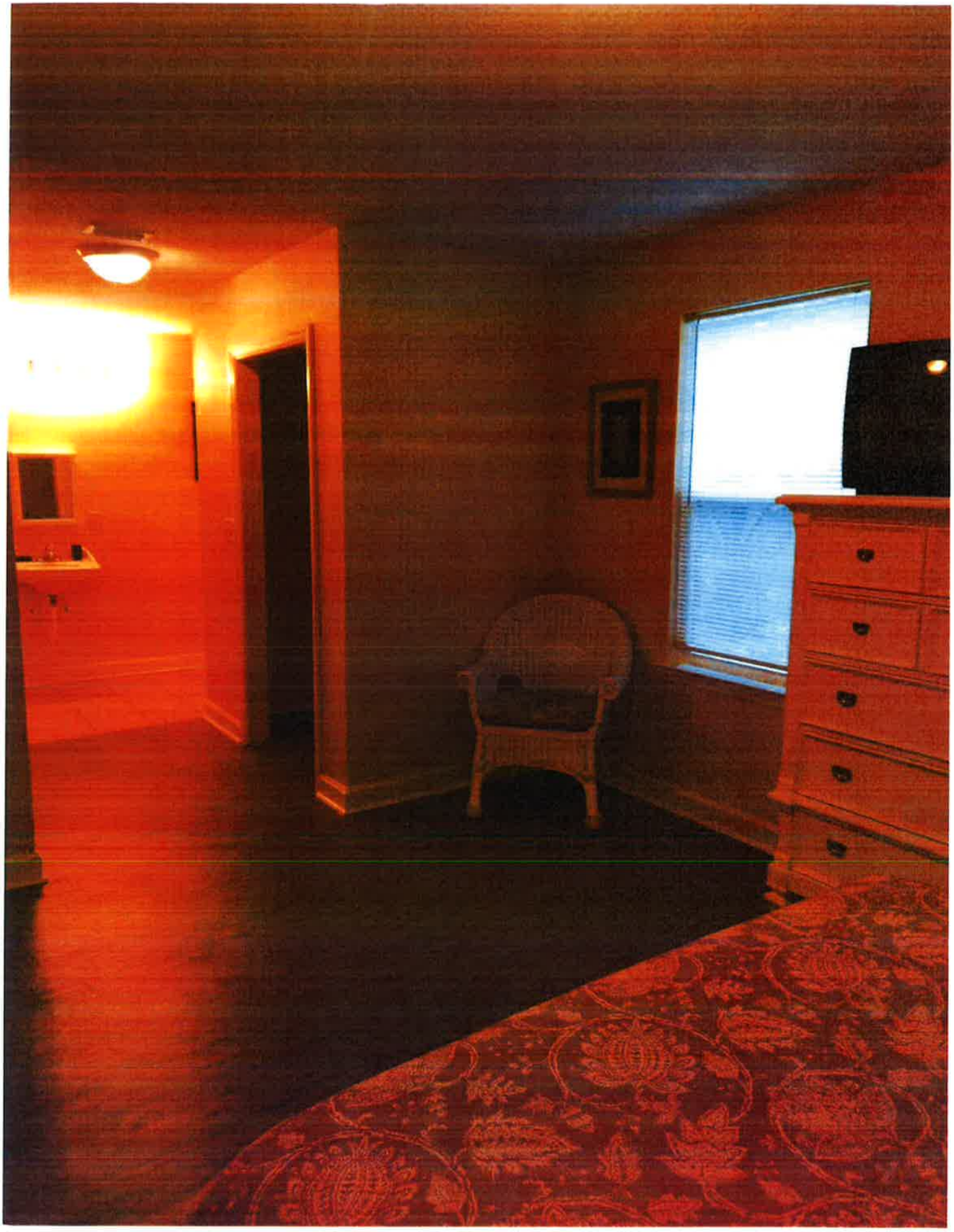


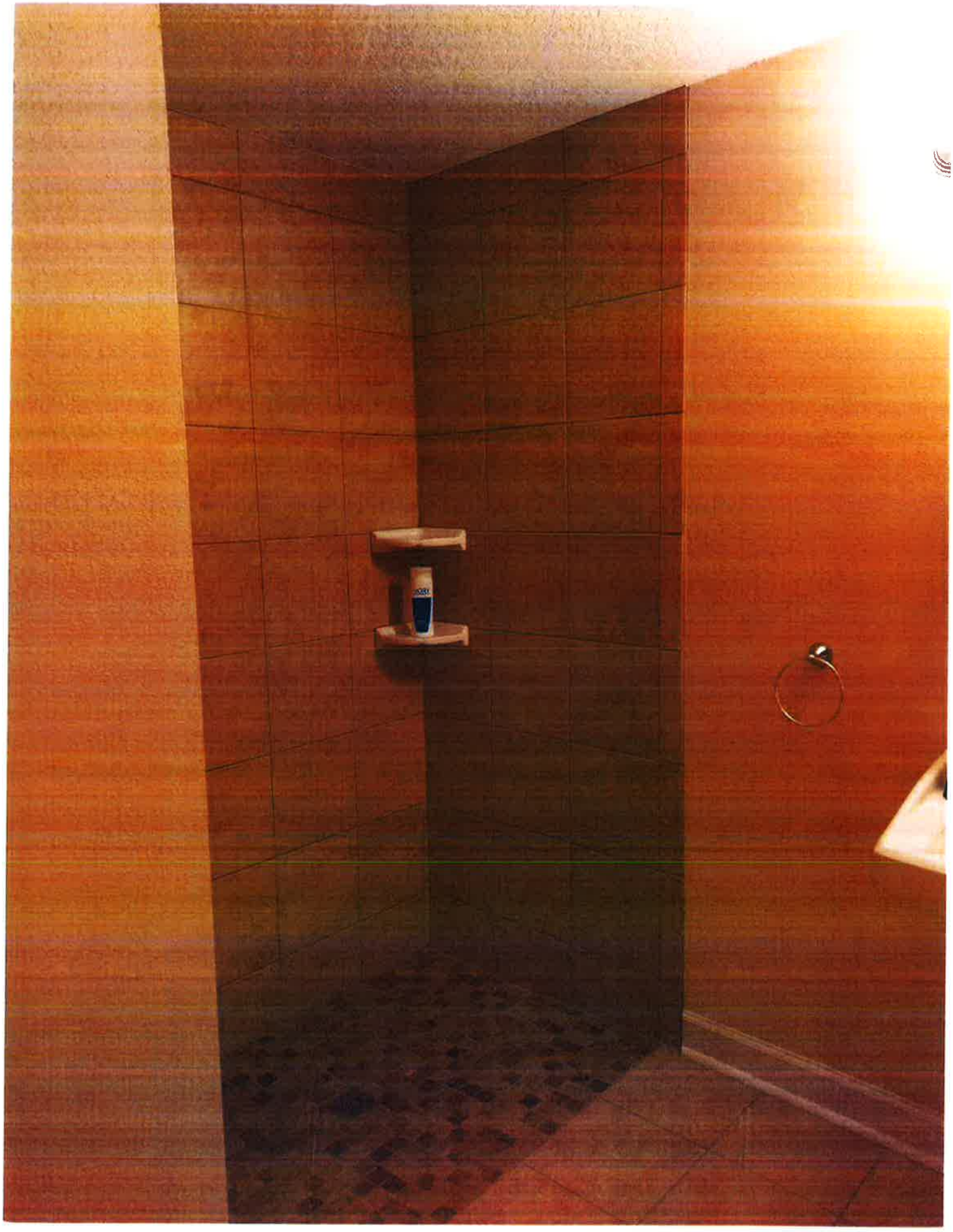
Before:



After:







Care and Feeding of Appointed Boards – Who's Really Your Client?

Presented By:

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St. Johns County

Creation of Appointed Boards

- Why create appointed boards?
  - Required by statute or rule
    - Tourist Development Council (Section 125.0104, F.S.)
    - Local planning agency (Section 163.3174, F.S.)
    - Affordable Housing Advisory Committee (Section 420.9076, F.S.)
  - Subject requiring specialized expertise
    - Historical Resources Review Board
    - Contractor Review Board
  - County Commission seeks citizen input with respect to subject area
    - Library Advisory Board
    - Recreation Advisory Board

Creation of Appointed Boards

- Considerations
  - Board duties
    - Provide clear identification of board's duties
    - Interaction with Board of County Commissioners
  - Member qualifications
    - It is important to ensure that a board has qualified members, BUT…
    - If qualifications are too specific, it will be difficult to fill vacancies
  - Duration of board's existence
    - Permanent vs. temporary
  - Level of autonomy given to board
    - Bylaws, election of officers, etc.

Selection of Members

- Application Process
  - Advertisement of vacancies
    - How long to advertise?
      - Application deadline vs. open until filled
      - May depend on nature of board
    - Where to post notice of vacancy?
      - Local newspaper
      - County website
      - Social media
    - What questions to ask?
      - Qualifications
      - Subject area interest
      - Likelihood of potential conflicts

Selection of Members

- Evaluating potential conflicts
  - Does the applicant have an officer or director position or an ownership interest of greater than 5% in a company that does business with the County?
  - Is the applicant subject to the regulation of the board he or she is applying to?
  - Is the applicant likely to have recurring voting conflicts if appointed to the board?

Training Members

- State Code of Ethics
- Voting Conflicts
- Gifts
- Financial Disclosure
- Sunshine Law
- Public Records

Training Members

- Provide training materials prior to application
  - "As a member of an advisory committee, you will be obligated to follow any applicable laws regarding Government in the Sunshine, the State Code of Ethics for Public Officers, and Florida's Public Records Law. The consequences of violating these laws may include criminal penalties, civil fines, and the voiding of any committee action and of any subsequent action by the Board of County Commissioners. In order to be familiar with these laws, you must review the Training Materials located on the County website before your application is deemed complete."
  - "I certify that I have reviewed the following Ethics Training Resources…"
- Follow up with in-person training following appointment.

Staff Support

- Each advisory committee should have a staff member assigned to it for support purposes.
  - Meeting notices
  - Taking meeting minutes
  - Communications to and from committee members
- There should be a designated point of contact within the County Attorney's office to address questions of a legal nature
  - Government in the Sunshine
  - Public Records
  - Ethics questions

Government in the Sunshine

- Basic requirements: Section 286.011, Florida Statutes
  - Meetings shall be open to the public
  - Reasonable notice of meetings shall be provided
  - Minutes shall be promptly recorded and open to public inspection

Government in the Sunshine

- What is a meeting?
  - Any gathering of two or more members of a board or commission to discuss some matter on which foreseeable action will be taken by the board or commission.
  - Includes use of third-party intermediary.
  - Includes inaudible discussion or passing notes even if these occur during a public meeting.

Government in the Sunshine

- Potential areas of concern:
  - Board members often know and work with each other outside the context of the advisory board.
    - Especially true for smaller counties or for boards that address a specialized area that interests a small segment of the community.
    - Emphasize the importance of awareness.
  - Boards may wish to create sub-committees to examine a particular issue and report back to the board as a whole.
    - Sub-committees are still subject to Government in the Sunshine!
    - Discourage the use of sub-committees unless there is a pressing reason.

Public Records

- Advisory committees are subject to the requirements of Florida's public records law.
- Emails
  - Most advisory committee members will use their private email addresses for committee-related correspondence.
  - Creates problems with respect to production and retention of records.
  - Consider providing County email addresses to advisory committee members.

State Code of Ethics

- Standards of Conduct (Section 112.313, Florida Statutes)
  - Solicitation or acceptance of gifts
  - Doing business with one's agency
    - Situation may arise where advisory board member is personally involved with transaction or where the advisory board member is an officer, director, or owns for than a 5% interest in a business doing business with the agency.
  - Unauthorized compensation
  - Conflicting employment or contractual relationship

State Code of Ethics

- Standards of Conduct (Section 112.313, Florida Statutes)
  - The prohibitions on doing business with one's agency and conflicting employment or contractual relationships may be waived under certain circumstances.
    - Full disclosure of the transaction or relationship prior to the waiver.
    - An affirmative vote by the appointing body by two-thirds of that body.
  - Look at the definition of "advisory body" under Section 112.312.
    - Total budget must be less than 1 percent of the budget of each agency it serves or $100,000, whichever is less.
    - Powers must be purely advisory in nature – no final determination or adjudication of personal or property rights, duties, or obligations.

State Code of Ethics

- Financial Disclosures (Section 112.3145, Florida Statutes)
  - Who is required to file?
    - Members of boards having the power to enforce local code provisions;
    - Members of boards that have the power to recommend, create, or modify land planning or zoning, including:
      - Planning and zoning boards;
      - Board of adjustments;
      - Board of appeals;
      - Community redevelopment agency board.
    - Members of pension or retirement boards having the power to invest pension or retirement funds;
    - Other appointed members of local government boards who are required to file a statement of financial interests by the appointing authority or enabling legislation creating the board.

State Code of Ethics

- Financial Disclosures (Section 112.3145, Florida Statutes)
  - What is required to be filed?
    - Annual limited disclosure of financial interests (Commission on Ethics Form 1)
    - Quarterly report of clients represented for a fee before agencies at the officer's level of government (Commission on Ethics Form 2)
    - Final disclosure of financial interests within 60 days of leaving office (Commission on Ethics Form 1F)
  - Disclosures are filed with the Supervisor of Elections.
  - The appointing body has a duty to inform newly appointed officers of their duty to comply with financial disclosure requirements no later than the date of appointment.

State Code of Ethics

- Voting Conflicts (Section 112.3143, Florida Statutes)
  - General rule: No county, municipal, or other local public officer shall vote in an official capacity upon any measure which would inure to his or her special private gain or loss, or that of a:
    - Principal by which he or she is retained;
    - Parent organization or subsidiary of a corporate principal by which he or she is retained; or
    - Relative or business associate.
  - For appointed officials, there is an additional prohibition from participating in any matter where there is a conflict.
    - Participate: Any attempt to influence a decision by oral or written communication.

State Code of Ethics

- Voting Conflicts (Section 112.3143, Florida Statutes)
  - Difference in disclosure requirements for elected and appointed officers:
    - Elected officers:
      - Public statement of the nature of the conflict prior to the vote being taken; and
      - Filing of a memorandum stating the nature of the conflict within 15 days of the vote being taken.
    - Appointed officers:
      - Filing of a memorandum stating the nature of the conflict prior to the meeting in which consideration of the matter will take place;
      - If conflict is unknown, or if disclosure has not been made, prior to the meeting, the memorandum shall be filed within 15 days following oral disclosure of the conflict.
      - Memorandum of conflict shall be read publicly at the next meeting held subsequent to the filing.

State Code of Ethics

- Gifts and Honoraria (Sections 112.3148 and 112.3149, Florida Statutes)
  - Any appointed officer who is required to file a financial disclosure is a reporting individual for the purposes of reporting gifts and honoraria.
  - Prohibitions include:
    - Soliciting a gift or knowingly accepting an honorarium from vendors doing business with the agency, political committees, or lobbyists who lobby the agency;
    - Soliciting an honorarium related to the reporting individual's public duties; and
    - Knowingly accepting any gift from vendors, political committees, or lobbyists with a value in excess of $100.
  - Gifts received having a value in excess of $100 and any payment or provision of expenses in connection with an honorarium event must be reported to the Commission on Ethics no later than July 1 of each year.

Bar Ethics

- Florida Bar Rule 4-1.7: Conflict of Interest; Current Clients
  - A lawyer must not represent a client if:
    - The representation of one client will be directly adverse to another client; or
    - There is a substantial risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person, or by a personal interest of the lawyer.
  - A lawyer may represent a client if:
    - The lawyer will be able to provide competent and diligent representation to each affected client;
    - The representation is not prohibited by law;
    - The representation does not involve asserting a position adverse to another client when the lawyer represents both clients in the same proceeding; and
    - Each affected client gives informed consent, either in writing or clearly stated on the record at a hearing.
  - The lawyer must provide an explanation of the common representation and the advantages and risks involved.

Bar Ethics

- Florida Bar Rule 4-1.7: Conflict of Interest; Current Clients
  - Sources of potential conflict:
    - Representing an appointed board in litigation;
      - Typically, appointed boards are not entities that can be sued on their own behalf. However, there are some exceptions:
        - Industrial Development Authorities
        - Housing Finance Authorities
        - Community Redevelopment Agencies
        - Dependent Special Districts
    - Representing an individual member of an advisory board in litigation connected with the performance of official duties; or
    - Providing legal advice to County staff, one or more advisory boards, and/or the Board of County Commissioners with respect to the same matter.

Bar Ethics

- Florida Bar Ethics Opinion 59-25
  - It is improper for a lawyer who acts as special counsel to a city to appear before the city council or file suit against the city on behalf of private clients even with respect to matters unrelated to the lawyer's representation of the city.
- Florida Bar Ethics Opinion 75-33
  - A private attorney representing a municipality may ethically represent private clients adverse to the municipality and appear before municipal boards in matters unrelated to the representation of the municipality.
    - Proposed representation of the municipality was for a limited purpose;
    - The legal issues in the matters at hand (labor relations and a condemnation action) were not so related that independent professional judgment on behalf of one client was likely to be adversely affected by the representation;
    - Government in the Sunshine requirements eliminated the appearance of professional impropriety due to the need for advance public disclosure of the dual representation.

Bar Ethics

- Florida Bar Ethics Opinion 72-12
  - A lawyer may act as legal advisor to both the Zoning Commission and the Board of Zoning Appeals, provided that, at the higher level of authority, he never steps outside the role of advisor to become an advocate for the result reached at the lower level.
- Florida Bar Ethics Opinion 77-30 (Reconsideration)
  - Whether a county attorney may represent an individual county commissioner before the Florida Commission on Ethics depends on the individual circumstances of the matter. Both the individual commissioner and the county must give informed consent, and consent on the part of the county must be given by someone other than the individual commissioner being represented.

Bar Ethics

- Florida Bar Rule 4-1.9: Conflict of Interest; Former Clients
  - With respect to former clients, a lawyer shall not:
    - Represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the former client's unless the former client gives informed consent;
    - Use information relating to the representation to the disadvantage of the former client; or
    - Reveal information relating to the representation except as permitted or required by Bar rules.
  - Use the same analysis as with Rule 4-1.7 in determining whether a conflict exists with respect to a former client.

Bar Ethics

- Florida Bar Rule 4-1.13: Organization as Client
  - A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.
  - If a lawyer is aware of violations of the law by officers or employees of the organization, the lawyer shall proceed as is reasonably necessary in the best interest of the organization.
    - Considerations:
      - Seriousness of the violation and its consequences
      - Scope and nature of representation
      - Responsibility in the organization and apparent motivation of the person involved;
      - Organization's policies concerning such matters; and
      - Other relevant considerations.
    - Measures taken shall be designed to minimize disruption of the organization and the risk of revealing information relating to representation to persons outside the organization.
  - Individual directors, officers, or employees may be represented with informed consent pursuant to Rule 4-1.7.

Constitutional Issues

- Dual Officeholding (Article II, Section 5, Florida Constitution)
  - "No person shall hold at the same time more than one office under the government of the state and the counties and municipalities therein, except that a notary public or military officer may hold another office, and any officer may be a member of a constitution revision commission, taxation and budget reform commission, constitutional convention, or statutory body having only advisory powers."

Constitutional Issues

- Dual Officeholding (Article II, Section 5, Florida Constitution)
  - What is an office?
    - Not defined in the Constitution.
      - *State ex rel. Holloway v. Sheats*: "The term 'office implies a delegation of a portion of the sovereign power to, and the possession of it by, the person filling the office, while an 'employment does not comprehend a delegation of any part of the sovereign authority." 83 So. 508, 509 (Fla. 1919).
      - AGO 2002-49: "In determining whether a particular position is an employment or office, careful consideration must be given to the powers and responsibilities imposed upon that position by statute, charter, or ordinance."
    - What is the source of the powers being exercised?

Constitutional Issues

- Dual Officeholding (Article II, Section 5, Florida Constitution)
  - Characteristics of public office (*Glendinning v. Curry*, 14 So.2d 794, 799 (Fla. 1943)):
    - Authority conferred by law;
    - A fixed tenure of office; and
    - The power to exercise some portion of the sovereign functions of government.
  - Whether a position is an office or employment is a fact-specific question.
    - Look to nature of duties, not job title.

Constitutional Issues

Office	Employment
Elected member of City pension board (AGO 2002-49)	Deputy Clerk (AGO 88-56)*
Fire chief of municipal fire department (AGO 80-97)	Firefighters responsible for general firefighting and rescue functions (AGO 93-39)
Law enforcement officers (AGO 91-80)	Administrative law enforcement officers without arrest powers (AGO 89-10)

*But see opinion for discussion of incompatibility of holding position as Deputy Clerk simultaneously with being a County Commissioner.

Constitutional Issues

- Dual Officeholding (Article II, Section 5, Florida Constitution)
  - The dual officeholding prohibition does not apply to positions in independent special districts. (AGO 2002-22).
    - Dependent special district offices are considered offices for purposes of the dual officeholding prohibition. (AGO 2008-61).
  - An officer may perform *ex officio* the functions of an additional office. (AGO 94-98).
    - Example: A member of a local planning agency sitting on an affordable housing advisory committee pursuant to Section 420.9076, Florida Statutes.

Constitutional Issues

- Dual Officeholding (Article II, Section 5, Florida Constitution)
  - Statutory bodies holding only advisory powers:
    - AGO 2008-15: A board is a statutory body if it was created by legislative enactment of the governing body.
    - AGO 2005-59: "In situations where a committee merely makes non-binding recommendations and has not otherwise been delegated any powers to make factual determinations or exercise any portion of the municipality's sovereign power, there would not appear to be an office subject to the dual officeholding prohibition."
      - Powers must be entirely advisory, not simply substantially or predominantly advisory.
      - A board whose decisions are final unless appealed does not fall within the exception for advisory bodies.

Constitutional Issues

- Dual Officeholding (Article II, Section 5, Florida Constitution)
  - What happens if a member simultaneously holds multiple offices?
  - Technically, this is impossible.
    - *Holley v. Adams*, 238 So.2d 401, 407 (Fla. 1970): "The acceptance of an incompatible office by one already holding office operates as a resignation of the first."

Removal of Members

- Simplest way to approach is to address removal in the legislation creating the advisory body.
  - Serving at pleasure of the Board of County Commissioners
  - Limiting to removal for cause
- Some boards may be governed by statute with respect to removal.
  - Section 159.45, Florida Statutes: Industrial Development Authority members may be removed "for misfeasance, malfeasance, or willful neglect of duty."
  - Section 159.607, Florida Statutes: Housing Finance Authority members may be removed without cause by a three-fifths vote of the County's governing body or for neglect of duty or misconduct by a majority vote of the governing body.
    - Requires the member to be provided a copy of the charges at least 10 days prior to the hearing and to be given the opportunity to be heard in person or by counsel.
  - Section 162.05: Code Enforcement Board members "may be suspended and removed for cause" as provided in ordinances of the local governing body.
- Section 112.50, Florida Statutes: The Governor's powers to suspend officers reside concurrently with any statutory or municipal charter provision providing for removal from office.

Removal of Members

- Removal of members of the governing body of a special district:
  - If the member exercises the powers and duties of a state or county officer, the member is subject to removal by the Governor under Article IV, Section 7(a) of the Florida Constitution.
    - *In re Advisory Opinion to Governor – School Board – Suspension Authority*, 626 So.2d 684 (Fla. 1993): County officers are identified as the county commissioners, constitutional officers, school board members, and an elected superintendent of schools.

Removal of Members

- Removal of members of the governing body of a special district:
  - If the member does not exercise the powers and duties of a state or county officer, the member is subject to the suspension and removal procedures of Section 112.51, Florida Statutes.
  - Section 112.51, Florida Statutes:
    - Provides for suspension from office by Governor for:
      - Misfeasance
      - Malfeasance
      - Neglect of duty
      - Habitual Drunkenness
      - Incompetence
      - Permanent inability to perform official duties
      - Arrest for a felony or misdemeanor related to official duties

Removal of Members

- Removal of a public official when a method is not otherwise provided
  - Section 112.52, Florida Statutes, provides for suspension from office by the Governor for:
    - Indictment for commission of any felony; or
    - Indictment for commission of a misdemeanor arising directly out of official duties.
  - If convicted, the public official may be removed from office by the Governor.

Removal of Members

- First Amendment
- *McKinley v. Kaplan*, 262 F.3d 1146 (11th Cir. 2001).
  - At-will advisory board member was removed from office after making a public statement that was critical of County policy.
  - The Eleventh Circuit found that the County's interest in removal outweighed the board member's First Amendment rights.
    - Government has an interest in staffing offices with employees they fully trust, especially in advisory or policy-making roles.
    - Board member served as an appointed representative of the County and failed to support the County's interests.
    - Board member was removable from position with or without cause.

Recommendations

- When creating an advisory board, provide a clear identification of duties.
- Unless there is a statute to the contrary, provide that advisory board members serve at-will.
- Provide for some formal interaction between advisory board and Board of County Commissioners, especially for boards that are purely advisory in nature.
- Provide for member qualifications, but don't get so specific that you can't fill vacancies.
- Consider having members provide annual update of applications.
- Provide sufficient training for members to be able to comply with Government in the Sunshine and ethics laws.
- Make sure there is a designated staff support for members to contact with questions.

Questions?

FACA ANNUAL CLE SEMINAR
JUNE 28, 2017

PROCUREMENT STANDARDS UNDER THE FEDERAL UNIFORM GRANTS GUIDANCE

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R. Brian Tipton, Esq., is a practicing attorney with more than a decade's experience working with nonprofits and grant-funded organizations across the United States. Currently, Brian is Managing Director with The Private Client Law Group in Atlanta, where he heads the firm's tax-exempt and grant-funded organizations practice. Brian is a summa cum laude graduate of the Louisiana State University and the Cumberland School of Law of Samford University. He regularly advises and represents grant-funded entities in the areas of regulatory compliance, audits, funding source disputes, administrative appeals, and litigation. Brian also consults with organizations on governance, human resources, programmatic, and corporate matters, and develops and presents training programs for nonprofits and grant-funded entities.

AGENDA

- BACKGROUND
  - THE OMB SUPER CIRCULAR
  - IMPLEMENTATION AND DEADLINES
  - SOURCE FOR PROCUREMENT STANDARDS
- PROCUREMENT VS. SUBAWARDS
- THE PROCUREMENT STANDARDS
  - CONFLICTS OF INTEREST
  - PROHIBITIONS
  - REQUIRED TERMS AND PROVISIONS
  - METHODS OF PROCUREMENT
- QUESTION AND ANSWER PERIOD

BACKGROUND

- OMB CIRCULARS PROVIDED BASIC ROAD MAP FOR MANAGING FEDERAL GRANTS
- PROVIDED GUIDANCE FOR FEDERAL FUNDING SOURCES, GRANTEES (RECIPIENTS), SUBGRANTEES (SUBRECIPIENTS), AND AUDITORS
- CIRCULARS WERE NOT BINDING REGULATIONS THEMSELVES (ALTHOUGH WERE PREVIOUSLY CODIFIED IN C.F.R.)
  - TEMPLATE FOR REGULATIONS
  - ADOPTED BY INDIVIDUAL GRANT FUNDING AGENCIES

BACKGROUND

- KEY PURPOSE OF OMB CIRCULARS WAS TO **PROMOTE UNIFORMITY**
  - Some variations among funding sources
  - Permission for significant deviations
- ESTABLISHED A **CEILING FOR FEDERAL GRANT FUNDING AGENCIES**
- ESTABLISHED A **FLOOR FOR FEDERAL GRANTEES**

BACKGROUND

OMB CIRCULARS	• FORMERLY CODIFIED IN TITLE 2 OF THE C.F.R. • WWW.WHITEHOUSE.GOV/OMB
UNIFORM ADMINISTRATIVE REQUIREMENTS	• A-102 (STATES AND LOCAL GOVERNMENTS) [SEE OMB CHART FOR FEDERAL AGENCY ADOPTION] • A-110 (NONPROFITS)
COST PRINCIPLES	• A-87 (STATES AND LOCAL GOVERNMENTS) • A-122 (NONPROFITS) • A-21 (EDUCATIONAL INSTITUTIONS)
AUDITS	• A-133 • STATES, LOCAL GOVERNMENTS & NONPROFITS

BACKGROUND

2 SETS OF ADMINISTRATIVE REQUIREMENTS

- OMB CIRCULAR A-102 (THE "COMMON RULE")
- OMB CIRCULAR A-110 (2 C.F.R. PT. 215)

APPLIED TO DIFFERENT TYPES OF GRANTEES

- A-102 = STATE, LOCAL & TRIBAL GOVERNMENTS
- A-110 = HIGHER EDUCATION, HOSPITALS & NONPROFITS

BACKGROUND

- **FEBRUARY 28, 2012**
  - ADVANCE NOTICE OF PROPOSED GUIDANCE
  - SOUNDING BOARD/"WARNING SHOT"
- **FEBRUARY 1, 2013**
  - PROPOSED GUIDANCE
  - SUMMARY IN FEDERAL REGISTER/FULL TEXT ONLINE
- **DECEMBER 26, 2013**
  - "FINAL" UNIFORM GUIDANCE
  - NOT REALLY "FINAL"
- **DECEMBER 19, 2014**
  - INTERIM FINAL REGULATIONS

BACKGROUND

- EFFECTIVE **DECEMBER 26, 2013: FEDERAL AGENCIES**
- GENERALLY EFFECTIVE **DECEMBER 26, 2014: NONFEDERAL ENTITIES**
  - NEW AWARDS
  - ADDITIONAL FUNDING FOR EXISTING AWARDS
- EFFECTIVE **FISCAL YEARS** BEGINNING ON OR AFTER **DECEMBER 26, 2014**
  - **AUDIT REQUIREMENTS**
  - NONFEDERAL ENTITIES

BACKGROUND

- COFAR: Periodically has released answers to Frequently Asked Questions
- MOST RECENTLY UPDATED IN SEPTEMBER 2015: https://cfo.gov/wp-content/uploads/2015/09/9.9.15-Frequently-Asked-Questions.pdf
- COFAR FAQ: Serve as informal guidance for the Super Circular and its implementation

BACKGROUND

- Codified at **2 C.F.R. pt. 200**
- Structure
  - Subpart A = Acronyms and Definitions
  - Subpart B = General Provisions
  - Subpart C = Pre-Award Requirements and Contents of Federal Awards
  - Subpart D = Post Award Requirements
  - Subpart E = Cost Principles
  - Subpart F = Audit Requirements
  - Followed by 11 appendices

BACKGROUND

- SUBPART D (THE .300'S) OF THE SUPER CIRCULAR GENERALLY CORRESPOND TO THE POST-AWARD AND AFTER-THE-AWARD REQUIREMENTS OF PRIOR CIRCULARS AND GO TO THE HEART OF PERFORMANCE

KEY PROVISIONS

- Performance measurement
- Fiscal management systems
- Internal controls
- Payment requirements
- Cost-sharing
- Property management
- Procurement
- Records retention
- Remedies
- Close-out

BACKGROUND

- OMB SUPER CIRCULAR REPLACES EXISTING CIRCULARS A-102 AND A-110
- NOT NECESSARILY NEW REQUIREMENTS
- SUPER CIRCULAR DRAWS ON REQUIREMENTS FROM EXISTING CIRCULARS
  - GENERALLY FOLLOWS LANGUAGE FROM EXISTING CIRCULAR A-110
  - **MAJOR EXCEPTION: PROCUREMENT REQUIREMENTS DRAW ON COMMON RULE**

BACKGROUND

- TWO IMPORTANT DEFINITIONS TO KEEP IN MIND
  - **MUST = MANDATORY (REQUIRED)**
  - **SHOULD = NOT MANDATORY BUT A RECOMMENDED (BEST PRACTICE)**
- REMEMBER "SHOULD" VERSUS "MUST" DISTINCTION AS YOU READ PROCUREMENT STANDARDS
- **NOTE FREQUENT USE OF "MUST" RATHER THAN "SHOULD"**

PROCUREMENT VS. SUBAWARD

- SUPER CIRCULAR ADDRESSES DISTINCTION BETWEEN "CONTRACTORS" AND SUBRECIPIENTS IN SUBPART D (§ 330)
- USES TERM "CONTRACTOR" RATHER THAN VENDOR
  - "A **subaward** is for the purpose of carrying out a portion of a federal award and creates a federal assistance relationship with the subrecipient."
  - "A **contract** is for the purpose of obtaining goods and services for the non-federal entity's own use and creates a procurement relationship with the contractor."
- **TERMINOLOGY USED (CONTRACT OR SUBAWARD) NOT DETERMINATIVE OF RELATIONSHIP**

PROCUREMENT VS. SUBAWARD

- COFAR FAQ 200.23-2
- What clarification can OMB and COFAR provide regarding changes to the term contractor and the elimination of the term vendor?
- In existing guidance, the COFAR has found that some confusion results from the fact that OMB Circular A-133 makes a distinction between subrecipients and “vendors” while other circulars describe either subawards or “subcontracts”.
- For purposes of the Uniform Guidance, when a non-Federal entity provides funds from a Federal award to a non-Federal entity, the non-Federal entity receiving these funds may be either be a subrecipient or a contractor. The term contractor is used for purposes of consistency and clarity to replace areas in the previous guidance that referred to vendors, though substantively in the previous guidance, these two terms have always had the same meaning.

PROCUREMENT VS. SUBAWARD

- COFAR FAQ 200.23-2 (CONTINUED)
- What clarification can OMB and COFAR provide regarding changes to the term contractor and the elimination of the term vendor?
- [I]t is the substance of the award that determines how it should be treated, even though the pass-through entity or non-Federal entity receiving the award may call it by a different name.
- So, if a pass-through entity makes an award that it calls a “contract”, but which meets the criteria under section 200.330 to be a subaward to a subrecipient, the non-Federal entity must comply with the provisions of the Uniform Guidance relevant to subawards, regardless of the name used by the pass-through entity to refer to the award agreement.
- Likewise, any Federal awards that meet the criteria under section 200.330 for the non-Federal entity to be considered a contractor, whether the non-Federal entity providing the funds calls it a “vendor agreement” or a “subcontract”, the non-Federal entity must comply with the provisions of the Uniform Guidance relevant to a contractor.

PROCUREMENT STANDARDS

- ALTHOUGH MANY PROVISIONS OF SUPER CIRCULAR BASED ON EXISTING OMB CIRCULAR A-110, **PROCUREMENT STANDARDS (§§ 317-326) BASED ON A-102 FOR GOVERNMENTAL ENTITIES**

- **STATES:** Follow policies and procedures used for procurement using nonfederal funds but will include contract (§ 326) and recovered materials provisions (§ 322)

- **OTHER NONFEDERAL ENTITIES:** Must follow procurement procedures that conform to full set requirements in OMB Super Circular (§§ 318-326)

PROCUREMENT STANDARDS

- GENERAL PROVISIONS FOR PROCUREMENT STANDARDS FOUND IN SUPER CIRCULAR § 318
- NONFEDERAL ENTITIES MUST **USE OWN PROCUREMENT PROCEDURES** [§ 318(a)]
  - Must meet applicable State, local & tribal requirements
  - Must conform to Federal law (including procurement standards in Super Circular)
- MUST **MAINTAIN OVERSIGHT** TO ENSURE PERFORMANCE IN ACCORDANCE WITH TERMS AND CONDITIONS OF PURCHASE AGREEMENTS [§ 318(b)]
- **NON-FEDERAL ENTITY RESPONSIBLE** FOR **SETTLING** CONTRACTUAL AND ADMINISTRATIVE **ISSUES** [§ 318(k)]

PROCUREMENT STANDARDS

- MUST MAINTAIN **WRITTEN STANDARDS OF CONDUCT** [§ 318(c)]
- MUST COVER **CONFLICTS OF INTEREST OF EMPLOYEES, OFFICERS & AGENTS** ENGAGED IN ALL STAGES OF PROCUREMENT PROCESS (SELECTION, AWARD, AND ADMINISTRATION OF CONTRACTS).
  - Applies to real or apparent conflicts of interest
  - Also prohibits soliciting or accepting gratuities, favors, or things of value from contractors or parties to subcontracts (subject to limited exceptions under organization's policies)
  - Must provide for penalties for violations
- MUST ALSO HAVE **ORGANIZATIONAL CONFLICT OF INTEREST POLICY** IF HAVE ANY SUBSIDIARIES

PROCUREMENT STANDARDS

- MUST AVOID PURCHASING UNNECESSARY OR DUPLICATIVE ITEMS [§ 318(d)]
  - Consolidating/breaking down procurements
  - Lease/purchase analysis
  - Other appropriate analysis to determine most economical method
- ENCOURAGE INTERGOVERNMENTAL OR INTER-ENTITY PROCUREMENT AGREEMENTS (BUYING POOLS) [§ 318(e)]
- ENCOURAGE USE OF FEDERAL EXCESS OR SURPLUS PROPERTY [§ 318(f)]
- ENCOURAGE USE VALUE ENGINEERING CLAUSES [§ 318(g)]

PROCUREMENT STANDARDS

- MUST AWARD CONTRACTS ONLY TO **RESPONSIBLE CONTRACTORS** WITH ABILITY PERFORM SUCCESSFULLY [§ 318(h)]
  - Contractor integrity
  - Public policy compliance
  - Past performance
  - Financial/technical resources

PROCUREMENT STANDARDS

- PROCUREMENT **RECORDS MUST SUFFICIENTLY DETAIL HISTORY OF TRANSACTION** [§ 318(i)]
  - Reason for procurement method
  - Selection of contract type
  - Contractor selection or rejection
  - Price basis

PROCUREMENT STANDARDS

SUPER CIRCULAR ALSO ADDRESSES RECORDS RETENTION IN SUBPART D (§ 333)

- SUPER CIRCULAR KEEPS GENERAL 3 YEAR RECORD RETENTION PERIOD
  - Litigation, claim, or audit begun before 3 year period
  - Awarding agency notifies to extend period
  - Program income transactions
- SUPER CIRCULAR PREFERENCE FOR OPEN MACHINE-READABLE RECORDS (§ 335)

PROCUREMENT STANDARDS

- REQUIREMENT FOR ADEQUATE COMPETITION (QUALIFYING LANGUAGE ELIMINATED) (§ 319)
- SITUATIONS RESULTING IN RESTRICTION OF COMPETITION INCLUDE:
  - Placing unreasonable requirements on firms in order for them to qualify to do business
  - Requiring unnecessary experience and excessive bonding
  - Noncompetitive pricing practices between firms or between affiliated companies
  - Noncompetitive contracts to consultants that are on retainer contracts
  - Organizational conflicts of interest
  - Specifying only a “brand name” product instead of allowing “an equal” product based on required performance
  - Any arbitrary action in the procurement process

PROCUREMENT STANDARDS

- NON-FEDERAL ENTITIES **MUST NOT USE STATE OR LOCAL GEOGRAPHICAL PREFERENCES** IN EVALUATING BIDS OR PROPOSALS [§ 319(b)]
- MUST HAVE WRITTEN PROCEDURES FOR PROCUREMENT TRANSACTIONS [§ 319(c)]
  - Clear & accurate description of technical requirements (but not unduly restrictive of competition)
  - Identify all requirements and all evaluative factors
- ANY PREQUALIFIED LISTS ADEQUATE AND UP-TO-DATE [§ 319(d)]

PROCUREMENT STANDARDS

- THE SUPER CIRCULAR OUTLINES 5 METHODS FOR PROCUREMENT (§ 320)
  - **MICRO-PURCHASES** ($3,000 OR LESS, EXCEPT PROVIDED IN FAR OR BY STATUTE)*
  - **SMALL PURCHASE PROCEDURES**
    - UNDER THE SIMPLIFIED ACQUISITION THRESHOLD
    - THRESHOLD CURRENTLY $150,000 BUT SUPER CIRCULAR NOW TIES TO FAR
  - **SEALED BIDS**
  - **COMPETITIVE PROPOSALS**
  - **NONCOMPETITIVE PROPOSALS**
- PROPOSED PROCUREMENT TRANSACTIONS SUBJECT TO REVIEW BY FEDERAL AWARDING AGENCY OR PASS-THROUGH IN CERTAIN CIRCUMSTANCES (§ 324)

PROCUREMENT STANDARDS

MICRO-PURCHASE

- AVAILABLE WHEN AGGREGATE DOLLAR AMOUNT:
  - **Generally** does **not exceed $3,000 or current FAR** (or $2,000 if subject to Davis-Bacon Act) **[Tied to FAR]**
  - **<u>But see newer $10,000 statutory limits</u>**
- MUST **EQUITABLY DISTRIBUTE MICRO-PURCHASES ACROSS QUALIFIED VENDORS**
- **NOT** REQUIRED SOLICIT COMPETITIVE QUOTATIONS IF PRICE BELIEVED BE REASONABLE
- SUB-SPECIES OF SMALL PURCHASE PROCEDURES

PROCUREMENT STANDARDS

SMALL PURCHASE PROCEDURES

- SIMPLIFIED, INFORMAL PROCEDURES FOR PURCHASES **NOT** EXCEEDING SIMPLIFIED ACQUISITION THRESHOLD
- **SIMPLIFIED ACQUISITION THRESHOLD** NOW **$150,000** (BUT SUPER CIRCULAR NOW TIES TO FAR)
- MUST OBTAIN PRICE OR RATE **QUOTATIONS** FROM **ADEQUATE NUMBER** OF QUALIFIED SOURCES

PROCUREMENT STANDARDS

- COFAR FAQ 200.320-1
- How are procurements of micro-purchase and small purchases under the simplified acquisition threshold less burdensome than those above it?
- [A]ll purchases under the simplified acquisition threshold (including micro-purchases) require fewer terms and conditions, have a lesser competition standard than purchases over the simplified acquisition threshold, can be solicited informally, and do not require a cost or price analysis.
- Purchases of supplies or services under $3,000 are treated as “micro-purchases.” The purchase orders may be awarded without soliciting any competitive quotations if the non-Federal entity considers the costs to be reasonable. The non-Federal entity must, to the extent practicable, distribute these purchases equitable among qualified suppliers.
- For example, a purchase of computer paper in the amount of $2,000 can be treated as “a micro-purchase.” No rate competitive quotations are necessary for the purchase. A cost or price analysis is not required. However, in accordance with the non-Federal entity’s written policies . . . the non-Federal entity must consider whether to make the purchase from any one of a number of office supply stores. Such policies may dictate the purchase of computer paper to rotate among qualified suppliers if they offer the same rates.

PROCUREMENT STANDARDS

- COFAR FAQ 200.320-1 (CONTINUED)
- How are procurements of micro-purchase and small purchases under the simplified acquisition threshold less burdensome than those above it?
- Purchases under the simplified acquisition threshold are purchases for goods or services meeting the small purchase threshold (currently at $150,000). [A]ll purchases between $3,000 and $150,000 can use the “small purchase procedures” . . . which describes the procedures as “relatively simple and informal.” It states that “price or rate quotations must be obtained from an adequate number of qualified sources.” It leaves the discretion of the non-Federal entity written policy to determine the “adequate” number of qualified sources (i.e., any number greater than one) and the methods of methods of obtaining the price or rate quotations (e.g., it can be in writing, orally, vendor price list on website, or generated via online search engine). Section 200.323 also excludes the small purchases from any requirements for cost or price analysis.

PROCUREMENT STANDARDS

SEALED BIDS (ALSO KNOWN AS FORMAL ADVERTISING)

- FIRM FIXED PRICE CONTRACT AWARDED TO LOWEST RESPONSIBLE AND RESPONSIVE BIDDER (BUT CAN REJECT ALL BIDS IF SOLID REASON)
- PREFERRED METHOD FOR CONSTRUCTION PROJECTS
- TO USE SEALED BIDS, MUST HAVE:
  - Complete and adequate specifications
  - At least two responsible bidders willing and able to compete
  - Procurement can be made using fixed price contract based primarily on price
- PROCEDURE:
  - Public advertising of bid invitation and solicitation of sufficient number of bids with adequate time for response
  - Invitation must include specifications and other information sufficient for bidders to respond
  - Public opening of bids at prescribed time & place (Governmental entities)

PROCUREMENT STANDARDS

COMPETITIVE PROPOSALS [ALSO KNOWN AS REQUEST FOR PROPOSALS (RFP)]

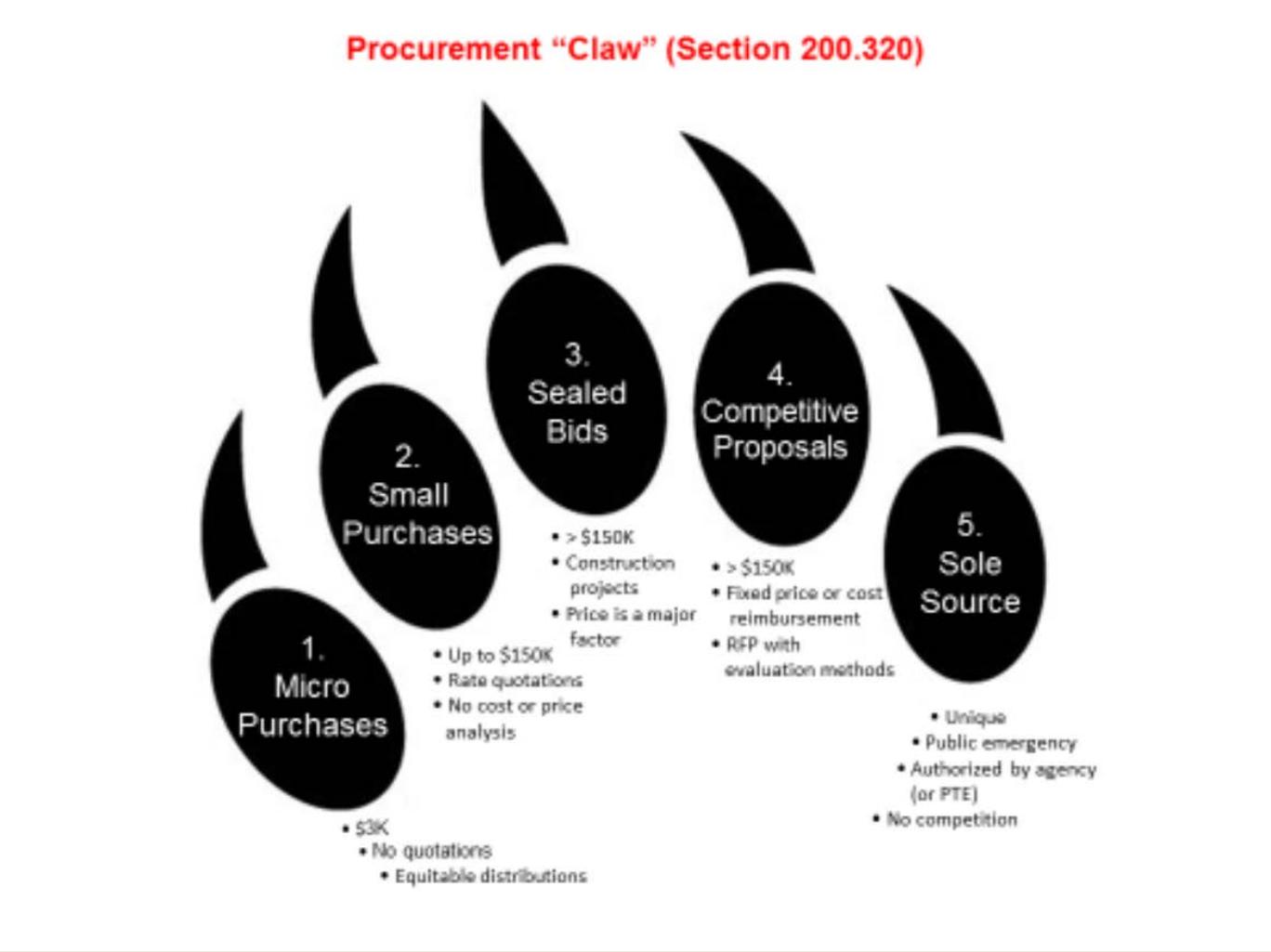
- MULTIPLE SOURCES SUBMIT OFFERS
- GENERALLY RESULTS IN AWARD OF FIXED PRICE OR COST-REIMBURSEMENT CONTRACT
- USED WHEN CONDITIONS NOT APPROPRIATE FOR SEALED BIDS
- PROCEDURE:
  - Requests must be publicized and contain relevant evaluative factors (including relative importance)
  - All responses must be considered to maximum extent practicable
  - Must have written method for evaluating proposals and selecting winner
  - Must award contract to proposer with most advantageous proposal, considering price (if applicable) and other factors

PROCUREMENT STANDARDS

NONCOMPETITIVE PROPOSALS (ALSO KNOWN AS SOLE-SOURCE PROCUREMENT)

- PROPOSAL SOLICITED FROM A SINGLE SOURCE
- USED WHEN FOLLOWING CONDITIONS APPLY:
  - Only a single source for item
  - Public emergency or exigent circumstances
  - Awarding agency or pass-through entity has authorized noncompetitive proposals after written approval requested
  - Determination that inadequate competition exists

PROCUREMENT STANDARDS



PROCUREMENT STANDARDS

- NON-FEDERAL ENTITIES MUST MAKE ALL NECESSARY **AFFIRMATIVE STEPS** TO USE **MINORITY AND WOMEN'S BUSINESSES AND LABOR SURPLUS AREA FIRMS** (§ 321)
  - Placing qualified firms on solicitation lists
  - Assuring that such businesses are solicited when potential sources
  - Dividing total requirements (when feasible)
  - Establishing delivery schedules that encourage such businesses to participate
  - Using appropriate services and assistance
- IF SUBCONTRACTS USED, MUST REQUIRE PRIME CONTRACTOR TO TAKE SUCH STEPS ALSO

PROCUREMENT STANDARDS

- COST OR PRICE ANALYSIS MUST BE PERFORMED FOR EVERY PROCUREMENT **IN EXCESS OF SIMPLIFIED ACQUISITION THRESHOLD** (§ 323)
- MUST NEGOTIATE PRICE SEPARATELY WHENEVER PRICE ANALYSIS OR NO PRICE COMPETITION
  - Complexity of work
  - Contractor's risk
  - Degree of subcontracting
  - Past performance
  - Profit rates for industry for similar work in that geographic area

PROCUREMENT STANDARDS

- BONDING REQUIREMENTS APPLY TO FACILITIES IMPROVEMENT CONTRACTS AND SUBCONTRACTS EXCEEDING SIMPLIFIED ACQUISITION THRESHOLD (§ 325)
- MINIMUM REQUIREMENTS
  - Bid guarantee (5% bid price)
  - Performance bond (100% contract price)
  - Payment bond (100% contract price)

PROCUREMENT STANDARDS

- CONTRACTS MUST CONTAIN APPLICABLE PROVISIONS FROM APPENDIX II
  - IN EXCESS OF SIMPLIFIED ACQUISITION THRESHOLD, MUST ADDRESS REMEDIES FOR BREACH
  - IN EXCESS OF $10,000 MUST ADDRESS TERMINATION FOR CAUSE AND FOR CONVENIENCE
  - EEOC CLAUSE (IF FEDERALLY ASSISTED CONSTRUCTION CONTRACT)
  - DAVIS-BACON ACT COMPLIANCE CLAUSE
  - COPELAND ANTI-KICKBACK ACT COMPLIANCE
  - CONTRACT WORK HOURS AND SAFETY STANDARDS CLAUSE
  - RIGHTS TO INVENTIONS
  - CLEAN AIR ACT AND FEDERAL WATER POLLUTION CONTROL ACT CLAUSES
  - ENERGY EFFICIENCY STANDARDS
  - COMPLIANCE WITH DEBARMENT AND SUSPENSION REQUIREMENTS
  - BYRD ANTI-LOBBYING AMENDMENT

PROCUREMENT STANDARDS

- VARIOUS TYPES OF PROCUREMENT INSTRUMENTS (CONTRACTS) POSSIBLE
  - Fixed price
  - Reimbursement contracts
  - Purchase orders
  - Incentive contracts
- COST-PLUS-A-PERCENTAGE-OF-COST AND PERCENTAGE-OF-CONSTRUCTION-COST CONTRACTS ARE **NOT** ALLOWED

PROCUREMENT STANDARDS

- AUTHORITY FOR GRACE PERIOD FOR PROCUREMENT FOUND IN § 110 (EFFECTIVE/APPLICABILITY DATE)
- RECENTLY AMENDED TO EXTEND GRACE PERIOD (AGAIN)
  - Now § 110 provides grace period up to **THREE full fiscal years** from general effective date of Super Circular
  - "As such, the effective date for implementation of the procurement standards for non-Federal entities will start for fiscal years beginning on or after December 26, 2017."

QUESTION & ANSWER PERIOD

- WHAT ARE YOUR QUESTIONS?



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ACQUISITION – PRE-CONDEMNATION CONSIDERATIONS FOR CONDEMNORS -- Matthew G. ("Guy") Minter, County Attorney, Marion County, Florida

In many situations, the cost of property acquisition for road right-of-way and other projects may represent a very significant portion of the costs of the entire project. While the vision of a successful eminent domain lawyer may evoke scenes of powerful cross-examinations of expert witnesses, this discussion encourages practitioners to embrace the reality that you may help your client achieve the most cost-effective project by careful advance planning and analysis that may enable your agency to avoid initiating condemnation altogether. Or, in the event that condemnation is necessary, effective pre-condemnation activities may help you reduce liability for the property owner's attorney fees and expert witness costs. This discussion will include coverage of maps of reservation, statutory conditions precedent to the exercise of eminent domain, statutory prohibitions on the exercise of the power of eminent domain, pre-condemnation blight, advance acquisition of real property, the effect of planning and zoning actions on eminent domain proceedings, and whether a "quick-take" or "slow-take" procedure should be utilized.

I. GENERAL THOUGHTS ABOUT ADVICE AT SEMINARS.

As with all presentations, there are no absolute truths, no sorcerer's stones.

Nobody ever defended anything successfully, there is only attack and attack and attack some more. George S. Patton.

This is an inspiring quote for litigators. But General Patton, an avid student of military history, seems to have overlooked significant evidence to the contrary, of which he was well aware.

Before the final day of the battle at Gettysburg on July 3, 1863, and Maj. Gen. George E. Pickett's disastrous charge into the Northern defenses, Robert E. Lee said, ***"The enemy is there, and I am going to strike him."*** [This, against the advice of General Longstreet.] [Pickett's Charge, 20] Today, we all know the result of that attack. Patton's great-uncle, Col. Waller T. Patton, participated in Pickett's Charge,

and died from mortal wounds sustained leading Confederate forces against the Union position on Cemetery Ridge.] However, in contrast, Patton's grandfather, Col. George S. Patton, Sr., died at the Third Battle of Winchester on September 19, 1864, defending a position against General Sheridan's attacking forces.

The Point is that there is no one strategy that is successful against all foes, in all situations, at all times. For the litigator, it is a mistake to think that what was a winning strategy or trial theme in your last trial will produce the same results in your next trial.

II. THE ARGUMENT FOR ADVANCE PLANNING – FOR EARLY INVOLVEMENT IN THE DEVELOPMENT OF A PROJECT.

To fight and conquer in all your battles is not supreme excellence; supreme excellence consists in breaking the enemy's resistance without fighting. Therefore, the skillful leader subdues the enemy's troops without any fighting; he captures their cities without laying siege to them; he overthrows their kingdoms without lengthy operations in the field. *Sun Tzu, Art of War*

Eminent domain cases present a rare opportunity for the condemning authority's attorney to be the architect in both avoiding the need for a trial, and in molding the issues to be determined at trial – in making the critical choice of the location of the field of battle.

New Orleans Attorney Dominic Gianna has written a popular book on opening statements, Winning in the Beginning, by Winning the Beginning**.** Thomson Reuters 2015-2016 Ed. In this portion of the presentation, I'm not going to be talking about Opening Statements, I just want to borrow the title as a theme for my message. To put it another way, **if you don't Win in the Beginning, you may well Lose in the End!**

It is a painful truism that we often learn more from our mistakes and failures than from our successes. I want to share with you things I've learned from painful experience, so that if you really listen, you may skip some of this pain . . . you'll move on to have different pain, but at least you'll keep the evolution moving in a positive direction.

For those of you eminent domain lawyers who are already aware of events that can affect your case long before you file a Petition modeled after The Florida Bar "blue book" on Eminent Domain, you can take a coffee break. This is for those trial attorneys who don't want to have the experience of being in a trial, and firmly

believing in the quality of your experts and the justness of your cause, and learning too late that your case was lost before you received it from your client.

III. THE IMPORTANCE OF CONTEXT.

Before jumping to specifics, it is important to consider the nature of the type of case you are prosecuting for the county. Referring to the above-referenced words of Sun Tzu, is there really an "enemy" in your case? Exactly who is the defendant / respondent in your case. Is he or she not a citizen and property owner of your community, one for whom your agency is supposed to be a service –provider, rather than an "attacker"? Who is the initiator and aggressor in your litigation? Have you personally ever been on the receiving end of an eminent domain petition? Do you know anyone who has? Do you (or members of the acquisition team) quickly assume that the property owner is motivated by outrageous demands or bad faith? Have you ever put yourself in the shoes of a property owner who receives your good faith offer in a down economy, and your offer is not even sufficient to pay off the mortgage for the property? If it comes to pass that there is an 'enemy' on the other side of the case, more likely than not, it will be the opposing counsel or opposing expert witnesses, rather than the property owner. Never forget:

> The power of eminent domain is an attribute of the sovereign. It is not a vesture of the state conferred by constitution or statute. It is circumscribed by the constitution and statute in order that cherished rights of the individual may be safeguarded. *It is one of the most harsh proceedings known to the law*, consequently when the sovereign delegates the power to a political unit or agency *a strict construction will be given against the agency asserting the power*. *Peavy-Wilson Lumber Co. v. Brevard County, 159 Fla. 311, 314, 31 So.2d 483, 485 (1947)* (emphasis added)*; Rukab v. City of Jacksonville Beach, 811 So.2d 727, 730 (Fla. 1st DCA 2002).*

IV. A FEW COMMENTS ON HISTORICAL PERSPECTIVE.

> Come gather 'round people
> Wherever you roam
> And admit that the waters
> Around you have grown
> And accept it that soon
> You'll be drenched to the bone
> If your time to you is worth savin'

Then you better start swimmin' or your sink like a stone
For the times they are a-changin'

The Times They Are A-Changin', first stanza, Bob Dylan, 1964

a. Eminent Domain During the Reagan Presidency
b. *FDOT v. Amarillo Partners, Inc., 849 So.2d 279 (Fla. 2003)*
c. *Kelo v. City of New London, 545 U.S. 469 (2005)*
d. Current public (and, more importantly, juror) attitudes about the government, in general, and eminent domain in particular.
e. See **Exhibit A** -- Jury awards businessman 66 times the DOT's initial offer.

V. HOW DO YOU SEE YOURSELF? WHAT IS YOUR ROLE?

How do you think you fit into the project or acquisition team? Do you have a clear sense of the priorities of the project team in terms of the ultimate development of the project, the timing of the project, and controlling the costs of the project? How do you define success for your role?

VI. SPECIFIC CONSIDERATIONS FOR PRE-CONDEMNATION PLANNING AND ACTIVITIES. *First, what is the "beginning" for you? At what point do you get involved in the project that requires land acquisition?*

a. Are there any alternatives to condemnation?
    1. Public-private economic development agreements where right of way is donated in exchange for public construction of roadways and capital facilities.
    2. Voluntary acquisitions not under threat of condemnation. §125.355, Fla. Stat.
    3. Special requirements related to utility systems. §125.3401, Fla. Stat.
b. Project priorities, budget, and important deadlines. Is the project in the current TIP?
c. Is there any federal funding involved?
d. Does the project involve a joint agreement between the County and FDOT, or other entity?
e. Be aware of statutory prohibitions and limitations on a county's use of eminent domain. §127.01(1)(b) and (2), Fla. Stat.; §73.014, Fla. Stat.; §73.013, Fla. Stat. Except for §127.01(2), Fla. Stat., a county may

condemn private property located in another county. Example of Charlotte County's condemnation of the General Development Utilities (GDU) water treatment plant located in DeSoto County.

f. Consideration of §§ 337.27(1), and 337.273, Fla. Stat., as authorized by §127.01(1)(b), Fla. Stat.

g. Selection of the parcels or property interests to be acquired – the "five factors" of 1. Availability of alternate alignments, or parcels; 2. Costs; 3. Environmental factors; 4. Long-range area planning; and 5. Safety. See, e.g., *Hillsborough County v. Sapp, 280 So.2d 443 (Fla. 1973); Chipola Nurseries, Inc. v. Div. of Admin, DOT, 294, So.2d 357, 361 (Fla. 1st DCA 1974); Hillsborough County v. Lutz Realty & Inv. Co., 553 So.2d, 1320, 1324 (Fla. 2d DCA 1989); Pasco County v. Franzel, 569 So.2d 877, 879 (Fla. 2d DCA 1990); City of Cocoa v. Holland Properties, 625 So.2d 17, 19 (Fla. 5th DCA 1993).*

   For significant roadway projects, the Florida DOT and local governments generally follow a five-phase transportation development process, including: 1. Long Range Planning; 2. Project Development and Environmental Study (PD&E) – typically, the PD&E study prepared by an engineering firm will evaluate the "five factors" set out above, and recommend project alternatives to the local government. Nevertheless, the eminent domain attorney must ensure that the selection of parcels or alignments is made by the county commission, and not by the engineering firm. The choice of selection should involve some deliberation on the record, and not just be a rubber stamp of the engineer's recommendation. As the late Judge Spector noted in *Chipola Nurseries, Inc., at 361,* "an engineer's transit has no social conscience."

h. What process is used for selection of the appraiser? Does the attorney have authority to hire expert witnesses such as appraisers, engineers and land planners, without going through the county's standard procurement process? If the selection is handled by the procurement department, is the selection based on the lowest responsive and responsible bidder? If so, consider the "consequences" of this approach for your litigation.

i. Evaluate project impacts to each acquisition parcel, with either the design engineer, or with your in-house county engineer staff, including such issues as: 1. The takes leaves the site "non-conforming" under your LDC in any respect; 2. The take eliminates or impairs access to the site; 3. There are change of grade issues that adversely affect the remainder; 4.

The take makes it impossible for trucks of certain sizes to enter the site, or have proper internal circulation; 5. The take eliminates or reduces parking spaces; signage, or stormwater facilities; 6. The take creates significant proximity damages, such as reducing a residential driveway from 22' to 12', or creates significant noise issues. Determine before the parcels are referred to the appraiser whether accommodations such as median cuts in the new roadway can be made. To the extent you can have these matters addressed before your appraiser begins his or her appraisal, they can significantly reduce project impacts, or at least enable your appraiser to properly consider and value the impacts – thus giving the opposing appraiser less of a basis to find extra severance damages in order to exceed your appraiser's value conclusion. Cures that are identified and committed to up front by the condemning authority can eliminate a later claim for "non-monetary benefits" by the property owner's attorney, if the items are negotiated at a later date.

j. Carefully review each appraisal to determine whether the report follows the correct law, and whether it is supported by valid market data. Interview the appraiser to verify that he or she has properly "confirmed" all comparable sales, and that none of them are "distress" sales or other "less-than-arms-length" transactions. Give special attention to the appraiser's determination of "the larger tract," and what elements, if any, were determined to be causes of severance damages.
k. Notwithstanding §73.071(2), Fla. Stat., which specifies the "date of valuation," determine whether the appraiser has analyzed whether there has been any unreasonable project delay which might require consideration of an earlier date of valuation.
l. Has the appraiser considered any possible issues of "condemnation blight."
m. Has the appraiser properly considered the "scope of the project," under §73.071(5), Fla. Stat.
n. Does the appraisal report comply with the most recent edition of the Uniform Standards of Professional Appraisal Practice (USPAP)?
o. In some cases, it may be possible to utilize the availability of alternate routes or parcels as a basis for creating some market dynamics in the context of determining whether a voluntary acquisition (not under threat of condemnation) may be accomplished at a good price from one or the other alternative. In order to take this approach, care must be taken not

to use a boilerplate eminent domain pre-suit letter to convey offers to property owners – otherwise, you may be exposed to higher attorney fees.

p. If you decide to proceed with making a threat-of-condemnation pre-suit written offer as required by §73.015, Fla. Stat., keep in mind that the monetary offer in this letter will form the basis for computation of the property owner's attorney's fees, based on the "betterment" obtained for the client. Therefore, consider whether there would be merit to include a "premium" over and above the appraised value for the parcel, in the initial offer. Also, consider whether your offer should include an offer of any "cure" of mitigation of project impacts, beyond what is accounted for in the appraised value. Be aware that the written offer must be unconditional – it must not be subject to county commission approval. That is, if the property owner accepts the offer, you have a binding contract.

q. Give special attention to the requirements for business owners under §73.071, Fla. Stat. If the acquisition will result in loss of parking spaces, consider obtaining photographic evidence and documentation of the percentage of parking spaces actually used on an average day, well before the petition is filed.

r. Decide whether to use a "slow-take" proceeding under Ch. 73, Fla. Stat., or a "quick-take" proceeding under Ch. 74, Fla. Stat. Discuss, *Jacksonville Port Authority v. Keystone Coal Company*, Case No. 2005-CA-007802 (Fla. 4th Judicial Circuit Court 2008), which resulted in a jury verdict of $67,410,000 – Florida's largest state court eminent domain award. Also, Charlotte County's acquisition of the GDU water plant in DeSoto County – see *General Dev. Utilities v. Charlotte County, 620 So.2d 1035 (Fla. 2d DCA 1993).*

s. Discussion of planning and zoning decisions and eminent domain. Volusia County's I-4 / SR. 472 interchange project at the City of Deltona.

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$995,000 – EMINENT DOMAIN

Jury says DOT owes 66 times its land offer Jurors award $995,000 to Durham businessman; State had offered $14,959

Heraldsun.com (http://www.heraldsun.com/)

The state thought $14,959 was the right price to pay a Durham businessman for two road easements at a busy Durham intersection. Durham County jurors were of a different mind. This week, the jurors decided the Department of Transportation must pay Holmes Oil Co. $995,000 for the land — 66 times the DOT's initial offer. Two Holmes lawyers, as well as other attorneys familiar with such cases, said 66 was perhaps the largest multiplier ever achieved in a local condemnation action. The next highest multiplier anyone could remember was 13. "In all my 15 years practicing eminent domain law, it is the highest multiple I can recall ever being paid in a DOT case," lawyer Emmett Haywood said Friday of the Holmes verdict. The DOT did not indicate whether it would appeal.

Attorney Spurgeon Fields, representing the DOT, had no comment Friday. Haywood, who represented Holmes, along with attorney Jay Ferguson, said the law requires DOT to pay not only for the land it takes, but also for damages to what's left. "The DOT wants to put blinders on and say they should just pay for what they are taking and not pay for any of the damages they are causing," Haywood said. In the Holmes case, an appraiser testified that the company's gas station and convenience store complex at N.C. 54 and N.C. 55 was left a "dysfunctional mess" by the DOT's condemnation, which was undertaken to widen the highway there. The appraiser estimated damages to Holmes at $850,000. "The backbone of our economy is small business," said Haywood. "Holmes Oil operates 19 convenience stores today and employs 160 people. Government gives subsidies to the big companies to relocate here, but yet that same government doesn't want to help the small business, which is being hurt by the government's own actions."

According to Haywood, the Holmes case points to a need for reform in the "just-compensation" clause that controls condemnation payments. "The government's right to seize someone's property is one of its greatest powers," she said. "If the property owner has to fight to be paid fairly and has to pay his own real estate appraiser, attorney, engineer and other experts, how can this be just compensation?" The DOT's highest offer for the Holmes property, made not long before trial, was $25,000 — still magnitudes below the $995,000 jury verdict. Ferguson said Friday that even though only a small portion of the Holmes property was condemned, the remaining portion became far less valuable — largely because the gas station and convenience store was left with only one driveway entrance instead of two. "It will no longer have suitable access," said Ferguson. "Mr. Holmes doesn't know if he can continue to operate or not." The DOT, he said, uses all its power to take people's property as cheaply as possible. So when the DOT takes only a portion of the property, it's vital for landowners to understand the full impact, he said. "While sometimes only small portions of a piece of property are taken, the impact can be devastating," Ferguson said. For that reason, it is critical to have engineers, appraisers and other experts evaluate the damages caused by DOT, he said. "When landowners are having their property taken by the government, they should know that the government is trying to get the property at a rock-bottom price, and they don't

have to accept what the government is offering," the lawyer said. "Our Constitution requires that landowners be given full and fair compensation for their property. Landowners should never settle for less."

The Holmes case was not Ferguson's first victory against the DOT in a condemnation action. Three years ago, he won $98,219 for Irving and Gloria Whitney over 0.07 of an acre the state condemned to widen Cheek Road at Midland Terrace. That jury award was more than 13 times the DOT offer of $7,300. DOT also has endured several other higher jury-awarded sums here in recent years: *Last winter, a jury decided DOT must pay $66,509.62 for 1,271 square feet of land at N.C. 55 and Sedwick Road, near Interstate 40. At one point, DOT had offered only about $900 for the property, but it eventually upped the ante to $14,605.

*Last year, to avoid the uncertainty of a jury trial, DOT agreed to pay an investment company $950,000 for 0.1 acre at Hillandale Road and Interstate 85. The state's original offer was $165,000.

*In 2003, DOT indicated it would pay $207,000 for property occupied by the former Pan-Pan diner, also at Hillandale Road and I-85. Jurors awarded more than $1 million after deliberating only 15 minutes.

*In November 2004, another jury deliberated just 11 minutes before deciding the state should pay $2.3 million for 0.6 acre it took from a Howard Johnson's hotel at the same roadway construction site. The jury award was more than seven times the $291,000 state officials initially were willing to pay.

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Location, location, location goes the real estate mantra, and Irv Whitney figured the location of his little piece of God's green earth on Cheek Road was worth a lot more than the state Department of Transportation was willing to pay for a sliver. Five years ago, DOT took 0.07 acre of Whitney's land for a widening project, paying him $7300. Them's fightin' figures, or so Whitney might have said. He filed suit against DOT. Last week, a Durham County jury awarded Whitney $98,219 – 13 times the amount DOT paid him – for that 0.07 acre.

Was the award fair to the taxpayers of North Carolina? No. Was it fair to Whitney? You bet it was. As Whitney put it, his 3.6 acres on Cheek Road is "pretty much our 401(k) plan." The 0.07 acre taken by the DOT thus had far more importance to Whitney and his wife than anyone else.

DOT took 3,049 square feet of Whitney's land. The Jury award in effect set the price at $32.21 a square foot. In Whitney's defense, we should note that if a house in good condition had been on his 3,049 square feet, DOT likely would have paid much more than $98,219.

Whitney's attorney, Jay Ferguson, engineered the courtroom victory. This is Lawyer Ferguson's second trump of DOT. Two years ago, he won a jury award of $135,475 for a Wake Forest couple that had been offered $34,500 for part of their property.

Moral of these stories: If you think government is shortchanging you in a property taking, get an independent appraisal, a sharp lawyer and go to court. You might win the legal Powerball, just as Irv Whitney did.

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DIRECTIONS

Pre-Suit Preparation, Getting Your Order of Taking, After the OT

PREPARING TO FILE SUIT, OBTAINING AN ORDER OF TAKING AND WHAT COMES NEXT

JACK N. GUTMAN
SENIOR ASSISTANT COUNTY ATTORNEY
PASCO COUNTY, FLORIDA

WHAT YOU WILL NEED

YOUR FILE SHOULD CONTAIN OR YOU WILL NEED TO OBTAIN:

- AT LEAST TWO CERTIFIED COPIES OF THE RESOLUTION OF NECESSITY.
- LEGAL DESCRIPTIONS AND SKETCHES FOR EACH OF THE PARCELS TO BE ACQUIRED.
- MOST CURRENT SET OF RIGHT OF WAY MAPS OR SPECIFIC PURPOSE SURVEY.
- MOST CURRENT SET OF CONSTRUCTION PLANS.

WHAT YOU WILL NEED (cont.)

- APPRAISALS- IF YOUR MOST RECENT APPRAISAL WILL BE MORE THAN 4 MONTHS OLD BY THE TIME OF YOUR ORDER OF TAKING HEARING YOU SHOULD ORDER AN APPRAISAL UPDATE. LETTER APPRAISAL UPDATE WILL SUFFICE. ALTHOUGH THERE IS NO CASE ON POINT CHALLENGING AN APPRAISAL AT AN ORDER OF TAKING FOR REMOTENESS, AT A VALUATION TRIAL IT HAS BEEN HELD THAT AN APPRAISAL DONE MORE THAN 4 MONTHS PRIOR TO THE ORDER OF TAKING WAS TOO REMOTE TO BE VALID**. CULBERTSON V. STATE ROAD DEPARTMENT**, 165 SO. 2D 255, (FLA. 1ST DCA 1964).

Suit Prep. (cont.)

- CURRENT TITLE COMMITMENTS AND LIST OF OWNERS AND ENCUMBRANCES.
- AS PRESIDENT REAGAN ONCE SAID “TRUST BUT VERIFY”.
- F.S. 73.021 REQUIRES THAT ANYONE THAT MAY HAVE AN INTEREST IN THE PROPERTY BE NAMED INCLUDING LIEN HOLDERS AND JUDGMENT CREDITORS.
- DO YOUR OWN SEARCH ON THE OFFICIAL RECORDS TO SEE IF ANYTHING HAS BEEN MISSED.

Suit Prep. (cont.)

- MAKE SURE THAT YOUR STATUTORY NOTIFICATIONS PURSUANT TO THE PRESUIT NEGOTIATION STATUTE, 73.015 HAVE BEEN SENT OUT. MAKE SURE YOU HAVE PROOF OF RECEIPT (GREEN CARDS OR PRINT OUT FROM USPS.COM). MAKE SURE YOUR NOTICE TO OWNER HAS BEEN SENT OUT PROPERLY. SHOULD BE MAILED TO THE OWNER AS LISTED ON THE TAX ROLLS. MAKE SURE YOUR NOTICE TO BUSINESS OWNERS HAVE BEEN SENT OUT TO BUSINESSES OPERATING ON THE SUBJECT PROPERTY.

- DO A SITE VISIT TO VERIFY ALL BUSINESSES NOTICED. SEE IF BUSINESSES WERE INADVERTENTLY OMITTED. SENDING A NOTICE DOES NOT CREATE A RIGHT TO BUSINESS DAMAGES BUT KEEPS YOU IN COMPLIANCE WITH THE CONDITIONS PRECEDENT TO FILING SUIT. MAKE SURE YOU HAVE PROOF OF RECEIPT (AS ABOVE).

Suit Prep. (cont.)

- MAKE SURE YOU SEND OUT AND HAVE IN YOUR FILE YOUR NOTIFICATION TO D.E.P. OR THE WATER MANAGEMENT DISTRICT PURSUANT TO F.S. 373.023(3). THIS IS A CONDITION PRECEDENT TO THE ACTION. HAVE PROOF OF RECEIPT (GREEN CARD) IN FILE.

- VERIFY THAT PERMITS FOR THE PROJECT ARE EITHER ALREADY IN HAND OR IF NOT IN HAND WHETHER YOUR PROJECT MANAGER REASONABLE EXPECTS TO HAVE PERMITS IN HAND PRIOR TO THE START OF CONSTRUCTION. **SEADADE INDUSTRIES, INC V. FLORIDA POWER AND LIGHT CO.**, 245 So. 2d 209.

Suit Prep. (cont.)

- COPY OF FIRST WRITTEN OFFER TO PROPERTY OWNER AND PROOF OF RECIEPT (GREEN CARD). THE BEST PRACTICE IS TO HAVE A RESOLUTION FROM YOUR BOCC AUTHORIZING YOUR REAL ESTATE MANAGER (or whoever else it is that will be signing the written offer) TO MAKE BINDING AND NON-CONDITIONAL OFFERS IN THE AMOUNT OF THE COUNTY'S APPRAISED VALUE. A CONDITIONAL OFFER HAS BEEN FOUND NOT TO BE A VALID FIRST WRITTEN OFFER FOR PURPOSE OF THE CALCULATION OF ATTORNEYS FEES, CITY OF BOYTON BEACH V. JANOTS, 929 So. 2d. 1099 (Fla. 4th DCA 2006). SAME ARGUMENTS CAN BE ADVANCED REGARDING PRESUIT NEGOTIATION REQUIREMENTS.

Suit Prep. (cont.)

- DELEGATIONS: (NEED TO BE DEALT WITH AS PART OF RESOLUTION OF NECESSITY PREPARATION). RESOLUTION SHOULD DELEGATE TO ENGINEER WHO WILL BE TESTIFYING AT THE ORDER OF TAKING OR TRIAL THE AUTHORITY TO MAKE BINDING COMMITMENTS REGARDING THE DESIGN AND CONSTRUCTION OF THE PROJECT. SHOULD OPPOSING COUNSEL ATTEMPT TO ATTACK THE VALIDITY OF YOUR APPRAISAL ARGUING DOOMSDAY SCENARIOS, YOUR ENGINEERING WITNESS CAN NIP THIS IN THE BUD IF THEY ARE DELEGATED THE AUTHORITY TO MAKE BINDING COMMITMENTS. See, **CENTRAL & SOUTHERN FLORIDA FLOOD CONTROL DISTRICT V. WYE RIVER FARMS, INC**., 297 So. 2d. 323 (Fla 4th DCA 1974); **TRAILER RANCH V. CITY OF POMPANO BEACH**, **500** So. 2d. 503 (Fla. 1986).

Suit Prep. (cont.)

- EASEMENTS: EASEMENTS AND TEMPORARY CONSTRUCTION EASEMENTS CAN BE TRICKY. TO AVOID DOOMSDAY SCENARIOS AND ATTACKS ON YOUR APPRAISAL VALIDITY ALL EASEMENTS SHOULD HAVE TERM SHEETS AND DEFINED DURATIONS FOR TEMPORARY EASEMENTS. THE TERM SHEETS SHOULD DEFINE THE USES OF THE EASEMENT BY THE CONDEMNING AUTHORITY AND ATTEMPT TO DEFINE THE PERMITTED EASEMENT USES FOR THE PROPERTY OWNER. THE TERM SHEET SHOULD DEFINE WHETHER THE EASEMENT IS EXCLUSIVE OR NON EXCLUSIVE.

Suit Prep. (cont.)

- EASEMENTS (CONT): THE BEST PRACTICE IS TO HAVE THE EASEMENT TERMS AND DURATION DEFINED AND INCLUDED AS PART OF THE RESOLUTION OF NECESSITY TO AVOID A CHALMERS CHALLENGE TO YOUR PETITION IF YOU ATTEMPT TO ONLY DEFINE THE TERMS AND DURATION IN THE PETITION.

- CHALMERS V. FLORIDA POWER AND LIGHT, 245 So. 2d. 285 (Fla. 1st DCA 1971) WHERE RESOLUTION SILENT AS TO ESTATE OR INTEREST , COURT HAS NO JURISDICTION EVEN THOUGH PETITION ALLEGEDLY SOUGHT AN EASEMENT; CAN'T DELEGATE DETERMINATION OF ESTATE OR INTEREST OR NECESSITY TO AN ATTORNEY OR AN EMPLOYEE.

- NOT UNCOMMON FOR OWNER'S ATTORNEY TO FILE MOTION TO DISMISS PETITION IF EASEMENT TERMS LIMITED TO PETITION. DEAL WITH EASEMENT SPECIFICS IN YOUR RESOLUTION OF NECESSITY TO AVOID BEING HELD CAPTIVE.

Suit Prep. (cont.)

- TRY TO LIMIT THE NUMBER OF PARCELS TO INCLUDE IN A SINGLE LAWSUIT TO 4 OR 5 MAX. BECOMES A LOGISITICAL NIGHTMARE FOR THE CLERK AND THE JUDGE IF TOO MANY PARCELS ARE INCLUDED IN A SINGLE LAWSUIT.

- SEE THE EMINENT DOMAIN SUIT CHECKLIST INCLUDED IN THE MATERIALS FOR OTHER CONSIDERATIONS RELATED TO WHAT SHOULD BE INCLUDED IN YOUR PETITION, LIS PENDENS AND DECLARATION OF TAKING.

The Order Of Taking Hearing

- EMINENT DOMAIN IS GOVERNED BY CHAPTERS 73 AND 74 FLORIDA STATUTES
- F.S. 73.021 AND 74.031 SET FORTH THE BASIC ELEMENTS THAT YOU WILL NEED TO ESTABLISH TO OBTAIN AN ORDER OF TAKING
- PUBLIC PURPOSE
- NECESSITY
- GOOD FAITH ESTIMATE OF VALUE BASED ON A VALID APPRAISAL

Order of Taking (cont.)

- ONCE THE CONDEMNING AUTHORITY MAKES A *PRIMA FACIE* CASE THE PROPERTY OWNER MUST EITHER CONCEDE NECESSITY OR THE BURDEN SHIFTS TO THE PROPERTY OWNER TO SHOW EITHER BAD FAITH OR AN ABUSE OF DISCRETION. **Canal Authority v. Miller**, 243 So. 2d 131 (Fla 1970).

- NEED ONLY ESTABLISH REASONABLE NECESSITY AND NEED NOT PROVE ABSOLUTE NECESSITY.

- A COURT IS NOT AUTHORIZED TO SUBSTITUTE ITS JUDGMENT FOR THAT OF A GOVERNMENTAL BODY ACTING WITHIN THE SCOPE OF ITS LAWFUL AUTHORITY. THIS INCLUDES BOTH THE AMOUNT AND LOCATION OF LAND TO BE ACQUIRED. **MILLER**

Order of Taking (cont.)

- THE AUTHORITY OF THE COURT IS NOT TO RE-ENGINEER THE PROJECT FOR THE CONDEMNOR. ROLE OF THE COURT IS LIMITED TO MAKING SURE THE CONDEMNOR HAS ACTED IN GOOD FAITH AND HAS NOT ABUSED ITS DISCRETION. **HILLSBOROUGH COUNTY V. SAPP**, 280 SO. 2D. 443 (FLA. 1973).

- WHAT IS THE STANDARD FOR ABUSE OF DISCRETION? IF REASONABLE MEN COULD DIFFER AS TO THE PROPRIETY OF THE ACTION TAKEN THEN THE ACTION TAKEN IS NOT UNREASONABLE AND THERE CAN BE NO FINDING OF AN ABUSE OF DISCRETION. **SCHOOL BD. OF BROWARD COUNTY V. VIELE**, 459 SO. 2D. 354 (FLA 4TH DCA 1984).

- TO OVERTURN ENGINEERING DETERMINATIONS OF NECESSITY PROPERTY OWNER WOULD HAVE THE BURDEN OF SHOWING THAT NO REASONABLE ENGINEER COULD HAVE SELECTED LOCATION OR AMOUNT OF PROPERTY NECESSARY OR THAT NO REASONABLE ENGINEER COULD HAVE DETERMINED PROPERTY NECESSARY.

Order of Taking (Cont.)

- BASED ON AN ABUSE OF DISCRETION STANDARD, THE LAW IS TILTED IN FAVOR OF THE CONDEMNING AUTHORITY IN THE ORDER OF TAKING PHASE OF THE CONDEMNATION PROCESS.
- MOST ATTEMPTS TO DEFEAT AN ORDER OF TAKING OFTEN FOCUS ON THE NECESSITY COMPONENT AND MORE SPECIFICALLY ON ISSUES CONCERNING THE EVALUATION OF THE GOVERNING BODY AS TO FIVE FACTORS PRIOR TO A RESOLUTION.
- S.C.A.L.E. (SAFETY, COSTS, ALTERNATIVES, LONG RANGE PLANNING, ENVIRONMENTAL CONSIDERATIONS).
- IT IS IMPERATIVE THAT PRIOR TO A RESOLUTION OF NECESSITY BEING VOTED ON BY A BOARD, THAT THESE 5 FACTORS BE EVALUATED WHETHER BY ROUTE STUDY OR ENGINEERING MEMORANDUM AND BE PRESENTED TO THE BOARD AS A REGULAR AGENDA ITEM.

Order of Taking (Cont.)

- MOST OT'S THAT ARE CHALLENGED ARE WHERE THERE ARE DEFICIENCIES IN THIS PROCESS. EX. FOUR STAR FUEL

- SCHEDULING THE HEARING. GENERALLY ALLOW 60 DAYS FROM SERVICE OF PROCESS TO HEARING DATE. ALLOWS OWNER'S COUNSEL SUFFICIENT TIME FOR DISCOVERY AND AVOIDS REQUESTS FOR CONTINUANCE OF HEARING DUE TO LACK OF ADEQUATE PREPARATION TIME. IF POSSIBLE COORDINATE HEARING DATES WITH OPPOSING COUNSEL AS OPPOSED TO UNILATERAL SCHEDULING.

Order of Taking (Cont.)

- WHAT TO BRING:

- COPIES OF NOTICE TO OWNERS AND PROOF OF RECEIPT. SAME FOR NOTICE TO BUSINESS OWNERS.

- COPY OF DEP OR SWFMD LETTER AND PROOF OF RECEIPT.

1. PROOF OF SERVICE OF PROCESS, EXECUTED ATTORNEY ACCEPTANCE OF SERVICE FORMS, AFFIDAVIT OF PUBLICATION.

2. CONSTRUCTION PLANS OR SHEETS FROM PLANS RELEVANT TO PARCELS.

3. RIGHT OF WAY MAPS OR SPECIFIC PURPOSE SURVEYS.

4. LEGAL DESCRIPTIONS AND PARCEL SKETCHES.

Order of Taking (Cont.)

7. FIRST WRITTEN OFFER AND PROOF OF RECEIPT

8. APPRAISAL REPORTS AND UPDATES

9. ROUTE STUDY AND/OR ENGINEERING MEMO OF NECESSITY

10. CERTIFIED COPY OF PROJECT RESOLUTION

11. DELEGATIONS OF AUTHORITY

12. ORDER OF TAKING MEMORANDUM OF LAW (SUBMIT AT LEAST A WEEK PRIOR TO HEARING-NEVER ASSUME JUDGE KNOWS ANYTHING ABOUT EMINENT DOMAIN).

Order of Taking (Cont.)

WHO TO BRING:

A. PROJECT ENGINEER: WILL TESTIFY REGARDING PUBLIC PURPOSE, NECESSITY AND S.C.A.L.E. FACTORS, WILL INTRODUCE RELEVANT CONSTRUCTION PLANS, RIGHT OF WAY MAPS, RESOLUTION AND SKETCHES AND LEGALS THROUGH THEM.

B. APPRAISER: WILL TESTIFY AS TO GOOD FAITH ESTIMATE OF VALUE.

C. SURVEY PROFESSIONALS: THAT PREPARED RIGHT OF WAY MAPS OR SPECIFIC PURPOSE SURVEY IN THE EVENT BOUNDARIES, PARENT TRACT, OR MAINTAINED RIGHT OF WAY DISPUTES ARISE.

Order of Taking (Cont.)

D. ACQUISITION AGENT: IF ISSUES EXIST AS TO PRE-SUIT NEGOTIATIONS AND STATUTORY NOTIFICATIONS.

E. ENGINEER(S) THAT PREPARED ROUTE STUDY OR POND SITING REPORTS IF ISSUES AS TO SCALE FACTORS SHOULD ARISE.

Order of Taking (Cont.)

- EXTENDED OCCUPANCY: F.S. 74.051(4) ALLOWS THE COURT TO DETERMINE THE TIME AND TERMS UPON WHICH POSSESSION OF THE PROPERTY BEING ACQUIRED SHALL BE SURRENDERED.

- MUST KNOW, GOING INTO THE ORDER OF TAKING, WHAT THE PRODUCTION SCHEDULE IS FOR YOUR PROJECT. WHEN MUST THE RIGHT OF WAY BE CLEARED? WHAT IS THE LET DATE? WHAT IS THE UTILITY RELOCATION SCHEDULE? WHEN IS CONSTRUCTION SLATED TO BEGIN? WITHOUT THIS INFORMATION, THE COURT MAY GRANT AN EXTENDED OCCUPANCY REQUEST WHICH COULD INTERFERE WITH THE PROJECT SCHEDULE.

- STIPULATIONS: STIPULATIONS TO AN ORDER OF TAKING ARE GOOD, BUT, IN MOST CASES, STILL NEED TO PUT ON EVIDENCE OF PUBLIC PURPOSE, NECESSITY AND A GOOD FAITH ESTIMATE OF VALUE.

Order of Taking (cont.)

- OFTEN TIMES A PROPERTY HAS NUMEROUS SUBORDINATE INTERESTS NAMED IN THE SUIT THAT ARE NOT A PARTY TO THE STIPULATED ORDER OF TAKING. (TENANTS, EASEMENT HOLDERS, MORTGAGEES, LIEN HOLDERS AND JUDGEMENT CREDITORS). UNLESS THEY ARE NAMED, SERVED AND NOTICED FOR THE HEARING AND TESTIMONY PUT ON, THOSE INTERESTS HAVE NOT BEEN ACQUIRED AND YOUR TAKING WILL BE SUBJECT TO THOSE INTERESTS.

- COMMON STIPULATION REQUESTS: OFTEN TIMES PROPERTY OWNER'S ATTORNEYS WANT SOMETHING IN EXCHANGE FOR THEIR CLIENTS STIPULATION TO THE ORDER OF TAKING. SOME COMMON REQUESTS ARE: EXTENDED POSSESSION, COMPENSATION FLOORS, COMMITMENTS ON DESIGN SUCH AS ACCESS, DRIVEWAYS AND MEDIAN OPENINGS, DEPOSIT OF BUSINESS DAMAGE COUNTEROFFER. EACH REQUEST HAS TO BE EVALUATED ON ITS OWN MERITS TO SEE IF AGREEING TO THE REQUEST IS WORTH THE STIPULATION YOU ARE REQUESTING.

Order of Taking (cont.)

- NON MONETARY BENEFIT ATTORNEY'S FEES PURSUANT TO F.S. 73.092(2).

- CAN'T EMPHASIZE ENOUGH, SEEK WAIVER OF NON MONETARY BENEFIT ATTORNEY FEE IN EXCHANGE FOR ANY DESIGN CONCESSIONS.

- ANYTIME YOU AGREE TO A DESIGN CHANGE, WHETHER IT BE ACCESS, DRIVEWAYS ETC. THAT SERVES TO MITIGATE A POTENTIAL SEVERANCE DAMAGE CLAIM, SEEK A WAIVER OF NMB ATTORNEY FEES IN EXCHANGE FOR THE CONCESSION. THIS IS TRUE WHETHER IT BE IN EXCHANGE FOR A STIPULATED OT OR IN EXCHANGE FOR A FINAL SETTLEMENT OF THE CASE. IF YOU DO NOT DO THIS, YOU ARE SETTING YOUR CLIENT UP FOR A TRAP DOWN THE ROAD FOR A CLAIM OF NMB ATTORNEY FEES.

Order of Taking (cont.)

- BURDEN OF PROOF: INITIALLY THE CONDEMNING AUTHORITY IS OBLIGATED TO SHOW A REASONABLE NECESSITY. ONCE EVIDENCE OF REASONABLE NECESSITY IS SHOWN, THE LANDOWNER MUST EITHER CONCEDE NECESSITY OR BE PREPARED TO SHOW EITHER BAD FAITH OR ABUSE OF DISCRETION. **CANAL AUTHORITY V. MILLER**, 243 SO. 2D. 131 (FLA 1970); **CATHOLIC BURSE ENDOWMENT FUND, INC. V. STATE ROAD DEPT**., 180 SO.2D 513 (FLA 2D DCA 1965)

- ABSENT ABUSE OF DISCRETION OR BAD FAITH, A COURT IS NOT AUTHORIZED TO SUBSTITUTE ITS JUDGMENT FOR THAT OF THE GOVERNMENTAL BODY ACTING WITHIN THE SCOPE OF ITS LAWFUL AUTHORITY.

- COURTS WILL NOT INTERFERE IN EXERCISE OF DISCRETION EVEN IF THEY BELIEVE THE DECISION TO BE UNWISE, UNECONOMICAL OR ADVANTAGEOUS.

Order of Taking-Conclusion

- DEPOSIT MUST BE MADE WITHIN 20 DAYS OF THE DATE OF YOUR ORDER OF TAKING. ON DAY 21 THE ORDER IS NOT VOIDABLE BUT VOID. **MCMURRER V. MARION COUNTY**, 936 SO.2D 19 (FLA. 5TH DCA 2006).

- DON'T JUST SUBMIT THE ORDER TO YOUR FINANCE DEPARTMENT OR COMPTROLLER AND ASSUME THE DEPOSIT WILL BE MADE. NEED TO MONITOR AND STAY ON TOP OF OTHER DEPARTMENTS THAT ARE RESPONSIBLE FOR MAKING DEPOSIT INTO THE COURT'S REGISTRY.

Post OT Thru Trial

- BUSINESS DAMAGE CLAIMS: OFTEN TIMES CLAIMS ARE SUBMITTED PRE SUIT WITH THE BARE MINIMUM FINANCIAL DATA PROVIDED, IN ACCORDANCE WITH F.S. 73.015.

- ONCE SUIT IS FILED, GET WITH YOUR BUSINESS DAMAGE EXPERT AND REQUEST A COMPREHENSIVE LIST OF ALL THE INFORMATION THEY NEED TO ADEQUATELY ASSESS THE CLAIM. ALSO, ASK FOR A LIST OF RELEVANT QUESTIONS THAT THEY WOULD LIKE ANSWERED BY BUSINESS OWNER OR REPRESENTATIVE. PREPARE REQUESTS FOR PRODUCTION AND INTERROGATORIES BASED ON THIS INFORMATION. KNOWLEDGE IS POWER.

- TO PREPARE FOR LITIGATING YOUR BUSINESS DAMAGE CLAIM READ **SYSTEM COMPONENTS CORPORATION V. FDOT,** 14 SO.3D 967 (FLA. 2009). OPINION READS LIKE A TREATISE ON THE LAW PERTAINING TO BUSINESS DAMAGES IN EMINENT DOMAIN CASES.

Post OT Thru Trial

- TRADITIONAL DISCOVERY OUTSIDE THE PARAMETERS OF A TRIAL ORDER IS DIFFICULT AND OFTEN TIMES RESULTS IN CLAIMS OF WORK PRODUCT OR A RESPONSE THAT OPINIONS AND REPORTS ARE NOT READY.

- ALMOST EVERY EMINENT DOMAIN CASE GOES TO MEDIATION. MOST CIRCUITS REQUIRE MEDIATION BEFORE YOU CAN GO TO TRIAL.

- IT IS BENEFICIAL FOR THE CONDEMNOR TO MEDIATE EARLY IN THE CASE AS OPPOSED TO AFTER A TRIAL ORDER IS ENTERED:

Post OT Thru Trial

1. COST SAVINGS. OPPORTUNITY TO RESOLVE THE CASE EARLY PRIOR TO TRIAL RELATED ACTIVITIES TAKING PLACE.

2. ALMOST ALL STIPULATED OR COURT ORDERED MEDIATION ORDERS CONTAIN REPORT EXCHANGE AGREEMENTS OR REQUIREMENTS. OFTEN TIMES 30 DAYS PRIOR TO MEDIATION. MEDIATING EARLY GIVES YOU ACCESS TO THE OTHER SIDES REPORTS SOONER THAN WAITING TO RECEIVE THEM PURSUANT TO THE DEADLINES IN A TRIAL ORDER.

3. MOST IMPORTANTLY, IT GIVES YOU THE CHANCE TO FIX ANY MISTAKE IN YOUR EXPERT'S ANALYSIS AND GET A NEW APPRAISAL DONE IF YOU NEED IT. IF YOU WAIT TO MEDIATE AFTER A TRIAL ORDER IS IN PLACE, YOU MAY BE PAST THE DEADLINE TO FIX YOUR REPORTS AND MAY BE STUCK WITH YOUR MISTAKES.

Post OT Thru Trial

OFTEN TIME IN MEDIATION YOU FIND OUT THINGS THAT YOUR EXPERTS MISSED OR GOT WRONG. MEDIATING EARLY GIVES YOU A CHANCE TO CORRECT OR START OVER.

PRE-MEDIATION: ONCE YOU GET THE OTHER SIDES REPORTS, LET YOUR EXPERTS REVIEW AND PROVIDE YOU FEEDBACK THAT YOU CAN UTILIZE IN MEDIATION.

PRE-MEDIATION CONFERENCE: PRIOR TO THE MEDIATION, GET YOUR EXPERTS TOGETHER IN A MEETING, WITH YOUR CLIENT TO DISCUSS THE CASE. DISCUSS THE STRENGTHS AND THE WEAKNESSES. ITS IMPORTANT THAT YOUR CLIENT HAVE A REALISTIC VIEW OF THE CASE AND BE PREPARED TO MEDIATE ACCORDINGLY.

Post OT Thru Trial

MEDIATION SUMMARY: HELP THE MEDIATOR UNDERSTAND THE CASE SO THEY FORMULATE A STRATEGY IN ADVANCE OF THE MEDIATION FOR REACHING AGREEMENT ON DISPUTED ISSUES. A SUMMARY NEED NOT BE A MINI NOVELLA BUT SHOULD INCLUDE A SIDE BY SIDE COMPARISON OF THE CONCLUSIONS FROM EACH SIDES VALUES SO THAT IT BECOMES APPARENT WHERE THE DIFFERENCES LIE.

A BRIEF SUMMATION AS TO WHERE YOU ARE DIFFERENT AND WHY YOU ARE DIFFERENT WILL ASSIST THE MEDIATOR IN FORMULATING A STRATEGY FOR DEALING WITH THOSE ISSUES IN ADVANCE OF THE MEDIATION. IN MOST CASES, ITS UNREALISTIC TO ASSUME THAT THE MEDIATOR WILL READ EACH SIDES WHOLE APPRAISAL COVER TO COVER.

Post OT Thru Trial

- MAKE IT CLEAR TO OPPOSING COUNSEL THAT YOU AND YOUR CLIENT INTEND ON SETTLING EVERYTHING AT MEDIATION AND TO BE PREPARED TO HAVE INVOICES AVAILABLE TO RESOLVE FEES AND COSTS.

- NOT A GOOD IDEA TO SETTLE THE CASE WITHOUT RESOLVING OUTSTANDING APPORTIONMENT ISSUES OR FEES AND COSTS ISSUES.

- APPORTIONMENT CAN BE A RUNAWAY TRAIN WITH THE CONDEMNOR FINANCING THE APPORTIONMENT BATTLE PURSUANT TO FS 73.092(2) AND 73.091.

Post OT Thru Trial

- IF A PROPERTY OWNER AND THEIR ATTORNEY LIKE A SETTLEMENT THEY HAVE INCENTIVE TO WORK OUT FEES AND COSTS. IF YOU SETTLE AND LEAVE THAT ISSUE OPEN THEY LOSE THAT INCENTIVE AND ACTUALLY HAVE AN INCENTIVE TO LITIGATE.

- IF YOU MAKE DESIGN RELATED CONCESSIONS, INSIST ON A WAIVER OF NON-MONETARY BENEFIT ATTORNEYS FEES OR BE PREPARED FOR WHAT'S SURE TO COME NEXT.

Post OT Thru Trial

- MOTION PRACTICE: BEST SERVED TO WAIT UNTIL AFTER MEDIATION TO FILE MOTIONS WHICH ATTEMPT TO LIMIT OR EXCLUDE VARIOUS CLAIMS BASED ON COMPENSABILITY ISSUES.

- WHILE ISSUE IS PENDING, YOU HAVE LEVERAGE ON ISSUE AT MEDIATION. IF YOU FILE MOTION IN ADVANCE OF MEDIATION AND DO NOT PREVAIL YOU LOSE YOUR LEVERAGE IN NEGOTIATIONS.

Post OT Thru Trial

- OFFERS OF JUDGMENT: BEST TO MEDIATE EARLY AND WAIT UNTIL AFTER MEDIATION TO EXTEND OFFER OF JUDGMENT. MEDIATING LATE CAN PRECLUDE EFFECTIVE USE OF OJ STATUTE. HOLD A LITTLE MONEY BACK AT MEDIATION AND GIVE A BUMP THROUGH OJ.

- IF OJ MADE BEFORE MEDIATION THERE IS AN EXPECTATION THAT YOU BEGIN NEGOTIATIONS AT OJ NUMBER. OJ SHOULD BE BEST AND MOST REALISTIC NUMBER THAT YOU BELIEVE YOU CAN BEAT AT TRIAL.

Post OT Thru Trial

- CITY OF FORT LAUDERDALE V. CASINO REALTY INC., 313 SO. 2D. 649 (FLA 1975) IS AN ESSENTIAL CASE TO HAVE IN TRIAL NOTEBOOK.

- DETAILS STRUCTURE OF AN EMINENT DOMAIN TRIAL, BURDENS OF PROOF AND PRESENTATION OF ARGUMENTS AND EVIDENCE.

- CONDEMNING AUTHORITY HAS BURDEN OF PROOF AS TO VALUE OF LAND AND IMPROVEMENTS TAKEN.

Post OT Thru Trial

- PROPERTY OWNER HAS BURDEN OF PROOF AS TO SEVERANCE DAMAGES, BUSINESS DAMAGES AND MOVE COSTS.
- CONDEMNING AUTHORITY GOES FIRST IN VOIR DIRE AND OPENING STATEMENT.
- IF SUBSTANTIAL ISSUE IN CASE IS PROPERTY VALUE, CONDEMNING AUTHORITY GETS THE SANDWICH IN CLOSING.

Post OT thru Trial

- IF SUBSTANTIAL ISSUE IN THE CASE IS DAMAGES THEN PROPERTY OWNER GETS THE SANDWICH IN CLOSING.

- IF THERE IS DISAGREEMENT OVER WHAT THE “SUBSTANTIAL ISSUE” OF THE CASE IS, COURT WILL DECIDE.

- COURT CONTROLS ORDERLY PRESENTATION OF EVIDENCE AND CAN REQUIRE ONE SIDE TO PUT ALL ITS EVIDENCE ON AT ONE TIME, REGARDLESS OF BURDEN OF PROOF.

Post OT Thru Trial

- IF COURT REQUIRES YOU TO PUT YOUR REBUTTAL EVIDENCE ON DURING CASE IN CHIEF, CAN ONLY REBUT AS TO NEW ISSUES RAISED DURING OTHER SIDES CASE.

- EMAIL JGUTMAN@PASCOCOUNTYFL.NET AND WILL GLADLY EMAIL YOU THIS POWER POINT PRESENTATION.

Emergency Management – FEMA Reimbursement: A Local Government Perspective

Albert J. Hadeed, Flagler County Attorney

Adam Ferguson, Monroe County Floodplain Program

Overview

- “FEMA Reimbursements”
  - Subgrants from the State of Florida passed through FEMA’s “Public Assistance” or “P.A.” Program that follows a Major/Presidential Disaster Declaration
  - Primary Purpose is to assist States and Local Governments* in restoring damaged facilities to Pre-Disaster Condition and Function.
  - Also helps cover the increased costs incidental to undertaking certain Emergency Protective Measures and the Costs of Storm-Related Debris Removal

Legal Authorities and Framework

- Statutory Authorization – Robert T. Stafford Emergency Relief and Disaster Assistance Act, As Amended, and Related Authorities [42 U.S.C. 5121-5207]
  - Section 406. "Repair, Restoration, and Replacement of Damaged Facilities."
- Regulations
  - Programmatic – 44 CFR Part 206
  - Administrative – 2 CFR Part 200 et seq
- Agency Guidance/Publications
  - FEMA has been working to consolidate what were previously multiple essential publications
  - Currently – FP 104-009-2 "Public Assistance Program and Policy Guide" (April 2017) – is the applicable Programmatic Guide
  - For Stafford Act "Disasters" Declared prior to April, 1st, 2017, previous versions of this document and its preceding documents apply

Availability of Public Assistance Funds

- The “P.A.” Program is made available to States and Eligible Applicants following a Presidential or “Major” Disaster Declaration under the Stafford Act.
  - Generally Covers the Cost to Repair or Replace Eligible Facilities to Pre-Disaster Design and Function in Accordance with Applicable Codes and Standards [“Permanent Work”]
  - Can Also Cover Certain Costs Incurred Before the Declaration Taken to Save Lives, Protect Public Health and Safety, and Prevent Damage to Improved Public and Private Property [“Emergency Work”]
    - This includes the cost of storm-caused debris removal, monitoring, and disposition from public areas, and in special circumstances, private property as well.

Public Assistance “Types” and “Categories”

- Public Assistance is Organized into two Types and seven Categories of Eligible Work
  - Types
    - Emergency Work (Contains Categories A & B)
    - Permanent Work (Contains Categories C through G)
  - Categories
    - Category A – Debris Removal
    - Category B – Emergency Protective Measures
    - Category C – Roads and Bridges
    - Category D – Water Control Facilities
    - Category E – Buildings and Equipment
    - Category F – Utilities
    - Category G – Parks, Recreational Areas, and Other Facilities

Focus: “Emergency Work”

- **Category A – Debris Removal**
  - Debris removal activities, such as clearance, removal, and disposal, are eligible as Category A if the removal is in the public interest based on whether the work:
    - Eliminates immediate threats to lives, public health, and safety;
    - Eliminates immediate threats of significant damage to improved public or private property;
    - Ensures economic recovery of the affected community to the benefit of the community at large

- **Category B – Emergency Protective Measures**
  - Emergency protective measures conducted before, during, and after an incident are eligible if the measures:
    - Eliminate or lessen immediate threats to lives, public health, or safety;
    - OR Eliminate or lessen immediate threats of significant additional damage to improved public or private property in a cost-effective manner

Focus: “Permanent Work”

- Cat C – Roads and Bridges – Repair, Replacement, or Improvement of Damaged Roads, Bridges, Culverts, etc.
- Cat D – Water Control Facilities – Repair or Restoration of Non-Federal Channels, Coastal Shoreline Protection Structures, etc.
- Cat E – Buildings and Equipment – Repair or Replacement of Facilities, their Systems, Contents, and Various Types of Equipment
- Cat F – Repair or Replacement of Sanitary Sewer, Potable Water, Electricity Generation/Transmission Infrastructure
- Cat G – Parks, Recreational, Other – Recreational Facilities, Publically-Owned Facilities that do not Fit into Other Categories

Public Assistance Project Lifecycle

- Disaster Strikes! – Respond and Track Force Account Labor, Equipment and Damage to Municipal/County Infrastructure
- Declaration Granted – Begin Assembling and Organizing Damage, Insurance, and Force Account Labor/Equipment Information
- Applicant Briefing – Initial P.A. Meeting Held Jointly by FEMA and FDEM – Bring your 90-49s (Request for Public Assistance)
- Kickoff Meeting – Be Ready to Describe Your "Damages"; Assign Staff to Assist FEMA and FDEM with Writing Project Worksheets ("PWs")
- Site Visits and PW Development – Work with FDEM/FEMA to Agree on Scope and Costs; Clear Applicable Reviews and Receive Approval
- Implement, Monitor, and Manage the Work – Follow Reporting Requirements and Stay Within the Scope. Always Inform FDEM/FEMA of ANY CHANGEs Prior to Implementing Them
- Reimbursement and Closeout – Submit All Documentation and Receive Payments or Adjustments Based on Actual Costs

Strategy for Success with P.A.

- Pre-Event – Get Organized
  - Inventory Assets and Critical Infrastructure
  - Reproduce Copies of all Insurance Policies; Ensure Appropriate Coverage
  - Ensure Emergency Declaration/Proclamations Code/Ordinance is Consistent with Program Language
  - Prepare for Post-Disaster Procurement
  - Familiarize Finance Section with the Accounting and Grant Management Aspects of the Program
- The “Event’ and Going Forward
  - Track Force Account Labor
  - Where Feasible, Document Damage and Effects of Event
  - Follow Federal Procurement Policies
  - Look for Opportunities to Improve Facilities/Infrastructure or Include Hazard Mitigation in PWs.
  - Monitor and Actively “Work” Your PWs.
  - Keep a Record of All Meetings and Inspections with FEMA or FDEM Representatives

Specific Focus: Documentation

- Single Most Important Thing Entities Can Do to Ensure a Robust Recovery through P.A.
- Pre-Event
  - Document (with Photos and Date Stamps) Condition of Facilities, Equipment, and Infrastructure
    - Include Location, Maintenance and Repair Logs
  - Review Local Policies and Procedures in Light of Stafford Act Requirements
- Common Scenarios for Documentation Issues:
  - Force Account Labor and Equipment Usage
  - Overtime Policies for Certain Employees
  - Pre-Disaster Capacity of a Facility
  - “Deferred Maintenance”
  - Procurement Policies and Non-Competitive Contracts

Specific Focus: Emergency Proclamations

- Entities Should Ensure that the Language in their Emergency Proclamations Align with FEMA's and Florida Statutory and Regulatory Requirements
  - Clearly Defining the "Emergency" and "Exigent" Circumstances
  - Identifying Legal Responsibility and Scope of Authority
- Examples and Samples:
  - See Samples in the Accompanying Exhibits to this Presentation

Specific Focus: Disaster/Emergency Procurement

- Most Common Basis for FEMA Seeking to Recoup Funding from Applicants
- FEMA Focuses on:
  - Full and Open Competition
  - Type and Management of Contracts
  - Piggybacking on Existing Contracts
  - Required Contractual Clauses
  - Documentation of Procurement History and Conformance with Existing Written Procedures
- Examples of Recent Issues:
  - FEMA's Public Assistance Appeals Database
    - https://www.fema.gov/appeals

Specific Focus: Insurance

- FEMA acts as the Insurer of Last Resort:
  - It Expects Applicants to Obtain and Maintain Adequate Levels of Insurance
  - Anticipated Insurance Proceeds are Deducted from PWs at Approval
  - Would-Be Value of Flood Insurance is Deducted for the Special Flood Hazard Areas ("Flood Zones")
  - Necessity for Understanding Post-Disaster Insurance Requirements for FEMA-Funded Improvements

Specific Focus: FEMA Determinations and Appeals

- Develop and Maintain Relationships with FDEM – it is your Advocate for Solving Problems and Challenging FEMA Decisions
- FEMA Project Specialists are Granted A Great Deal of Discretion to Make Eligibility Decisions, Resulting High Variability within the Same Field Operation
- Do Not Sign a PW that You Believe is Incorrect or Omits Important/Eligible Items or Wrongly Deducts Funding
- Understand FEMA's Chain of Command within the Field Operation; Request Meetings with Supervisors for Pending Adverse Determinations
  - Informal Meetings and Conversations can Often Resolve Issues
- Nearly All Official FEMA Decisions/Determinations are Appealable:
  - First Appeal is to the FEMA Regional Administrator
  - Second Appeal is to the FEMA [HQ] Assistant Administrator for Recovery

Specific Focus: FEMA Determinations and Appeals, contd.

- Important Aspects to FEMA Programmatic Appeals:
  - Keep it Simple – Follow FEMA's Guidance in Preparing Appeals (see list of important documents)
  - Meet Deadlines – FEMA is not Required to Grant an Extension of Time for an Applicant to Submit an Appeal; Give FDEM Adequate Time to Review and Process for Your Entity
  - Understand the Requirements and their Purpose
- Do…
  - Know the Respective Burdens in Place:
    - Applicant to Provide Adequate Documentation Demonstrating Eligibility, and Why FEMA's Determination was in Error
    - FEMA to Make Determinations that are Not Arbitrary, Capricious, etc.
- Do Not…
  - Throwing Paper and Volume at FEMA Will not Work
  - Assume a FEMA Specialist's Opinion Binds the Agency on Final Eligibility

Concluding Thoughts:

- County/Municipal Attorneys are Not Typically Tasked with Monitoring or Implementing the P.A. Program, But the Nature of Our Positions Inevitably Draw us into the Process.
- Single Most Important Takeaway Should Be to Review Your Relevant Internal Policies and Procedures, Creating New Ones if Necessary, to Ensure Compliance with FEMA Procurement/2 CFR Part 200 and Programmatic Eligibility Criteria.
- Consider Pre-Qualifying Disaster Recovery-Focused Contractors:
  - Get Prepared to Track Your Force Account Labor and Equipment
  - Have Experts on Call to Help with Initial Disputes on Eligibility
  - Realize the ROI and Value Added from Having Subject Matter Experts Available
  - Structure RFP to Ensure the Contractor will be Adequately Staffed to Provide Timely and Effective Performance

EMERGENCY MANAGEMENT - FEMA REINBURSEMENT: A LOCAL GOVERNMENT PERSPECTIVE

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FLAGLER COUNTY, FLORIDA
PROCLAMATION DECLARING
STATE OF LOCAL EMERGENCY
(Hurricane Matthew)

WHEREAS, Chapter 12, Flagler County Code, and Section 252.38(3), Florida Statutes, authorize Flagler County to declare a state of local emergency and to waive the procedures and formalities otherwise required of political subdivisions by law; and

WHEREAS, a state of local emergency proclamation is allowed for seven (7) days with appropriate extensions pursuant to law; and

WHEREAS, the National Hurricane Center predicts that from October 6 and continuing through October 8, 2016, a Hurricane named Matthew will be traveling along the East Coast and possibly through the Florida peninsula; and

WHEREAS, on October 3, 2016 the Honorable Rick Scott, Governor of the State of Florida, issued Executive Order Number 16-230 declaring a state of emergency in the State of Florida due to Hurricane Matthew; and

WHEREAS, Hurricane Matthew is traversing the northern Caribbean Sea with present maximum sustained winds of 145 miles per hour and may strengthen in force as it approaches Florida; and

WHEREAS, Hurricane Matthew poses a severe threat to the entire State of Florida, including Flagler County; and

WHEREAS, the Governor's declaration of emergency extends to every county in Florida and for that purpose the State has activated its Division of Emergency Management to execute the State's Comprehensive Emergency Management Plan to cope with the emergency; and

WHEREAS, there is the potential for damage to public buildings, public communications systems, public streets and roads, public drainage systems, and to commercial and residential buildings countywide; and

WHEREAS, Flagler County should take timely precautions to protect public and private property and members of the public from the potential effects of Hurricane Matthew; and

WHEREAS, it is the recommendation of the County Administrator and the Public Safety Emergency Manager that a state of local emergency be declared for Flagler County and that this Proclamation declaring a state of local emergency be adopted.

NOW THEREFORE, BE IT RESOLVED AS FOLLOWS:

1. I, Barbara S. Revels, as Chair of the Flagler County, Florida, Board of County Commissioners, in accordance with the powers vested in me pursuant to Chapter 252, Florida Statutes, and Section 12-34, Flagler County Code, do hereby proclaim the existence of a state of local emergency in Flagler County, Florida, as identified above. This Proclamation shall commence at 12:00 PM on October 4, 2016 and shall terminate automatically seven (7) days from this date unless terminated earlier or extended by a document of equal dignity herewith.

2. Pursuant to Section 12-34(a)(2), Flagler County Code, this Proclamation authorizes the County Administrator and, in his absence, the Deputy County Administrator and, in both of their absence, the Public Safety Emergency Manager, to take all actions necessary and appropriate to protect human life and property, including the promulgation of rules and orders as may be necessary subject to the limitations of Section 252.33, Florida Statutes. All rules and orders promulgated hereunder shall be filed with the Clerk of the Court. This declaration further authorizes the County Administrator and, in his absence, the Deputy County Administrator and, in both of their absence, the Public Safety Emergency Manager, to utilize all lawful authority granted to Flagler County by the Flagler County Comprehensive Emergency Management Plan and by Federal, State or County Emergency Management Laws, Rules, Regulations, Orders and, including, but not limited to, Section 252.46 and Section 252.38(3)(a), Florida Statutes, and Section 12-34, Flagler County Code. Any such actions taken shall be reported to or reviewed by the Board of County Commissioners as is practical under the circumstances.

3. All existing laws, ordinances, and rules inconsistent with the provisions of Sections 252.31 to Section 252.905, Florida Statutes, inclusive, or inconsistent with any rule or order specifically promulgated under this declaration shall be suspended during the period of time and to the extent that such conflict exists.

4. The County Administrator may suspend, toll or extend the time requirements, notice requirements and deadlines for final action on applications for permits, licenses, rates and other approvals under the Flagler County Code, to the extent necessary to accommodate the emergency.

5. Pursuant to Section 252.38(3)(a), Florida Statutes, the County hereby exercises its authority and waives the procedures and formalities otherwise required of a political subdivision by law, pertaining to:

    - Performance of public work and taking whatever prudent action is necessary to ensure the health, safety, and welfare of the community;
    - Entering into contracts;
    - Incurring obligations;
    - Employment of permanent and temporary workers;
    - Utilization of volunteer workers;
    - Rental of equipment;
    - Acquisition and distribution, with or without compensation, of supplies, materials, and facilities; and
    - Appropriation and expenditure of public funds

6. Any person violating any rule or order issued pursuant to this Proclamation or any person who willfully fails or refuses to comply with the order or orders of any duly authorized law enforcement officer or personnel charged with the responsibility for the enforcement of such orders shall, upon conviction therefor, be punished as provided by Section 252.50, Florida Statutes, and by such other laws as may be applicable to the offense.

7. The continued state of emergency declared by this Proclamation may be modified in whole or in part or may be terminated upon the joint recommendation of the County Administrator and the Public Safety Emergency Manager, by action of the Chairman of the Board of County Commissioners, or, if the Chairman is unavailable, according to the order of succession prescribed by Section 12-34, Flagler County Code, with ratification in any event by the Board of County Commissioners as soon as is practicable at a regular or special meeting. This declaration shall remain in effect for no longer than seven (7) days unless terminated or modified earlier, or extended in accordance with law.

8. If any provision of this Proclamation is invalidated by a court of competent jurisdiction, such invalidity shall not affect the remaining

provisions of this Proclamation, which shall have the full force and effect of law.

DONE AND ORDERED in Flagler County, Florida, this 4th day of October 2016, at 12:00 P.M.

FLAGLER COUNTY BOARD OF COUNTY COMMISSIONERS

Barbara S. Revels, Chair

CONCURRENCE:

Craig M. Coffey, County Administrator

Stephen R. Garten, Public Safety Emergency Manager

APPROVED AS TO FORM:

Al Hadeed, County Attorney

Inst No: 2017001513 1/13/2017 9:14 AM
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RECORDED IN THE RECORDS OF
Tom Bexley Clerk of the Circuit Court & Comptroller
Flagler FL

FLAGLER COUNTY, FLORIDA
PROCLAMATION EXTENDING
STATE OF LOCAL EMERGENCY
(Hurricane Matthew)

WHEREAS, based on the recommendation of the Public Safety Emergency Manager, the Sheriff, and the County Administrator in preparation for the imminent impact of Hurricane Matthew on Flagler County, the Chair of the Board of County Commissioners of Flagler County, Florida issued a Proclamation declaring a state of local emergency, dated October 4, 2016; and

WHEREAS, Hurricane Matthew passed along the County's coastline on October 7, 2016, destroying large swaths of the County's coastline, flooding hundreds of homes, and leaving the vast majority of the County's residents without electrical power; and

WHEREAS, on October 11th, and every seventh day thereafter, based on the further recommendation of the County Administrator and the Public Safety Emergency Manager, the Chair of the Board of County Commissioners extended the state of local emergency declared for Flagler County for additional seven day periods; and

WHEREAS, the Board of County Commissioners ratified the Proclamations declaring and extending the local state of emergency by unanimous vote at public meetings following each of the Proclamations; and

WHEREAS, the entire coastline of the County suffered heavy damage from the storm, and the County is actively engaged in disposing of debris removed from public and private right of ways, removing debris from the beaches, repairing dunes and dune walkovers, and rebuilding significant portions of State Road A1A; and

WHEREAS, extending the declaration of state of local emergency facilitates the County's ability to effectively respond to emergency conditions along the beaches and otherwise implement emergency protective measures to mitigate future losses.

NOW THEREFORE, in accordance with the emergency power vested in the County pursuant to Chapter 252, Florida Statutes, and Section 12-34 of the Flagler County Code of Ordinances, it is hereby proclaimed that:

1. The state of local emergency declared on October 4, 2016, extended by emergency proclamations every seventh day thereafter and duly ratified by the Board of County Commissioners, is hereby extended for 7 days from the effective date of this Proclamation, unless terminated or modified earlier or extended in accordance with law.

2. All emergency powers authorized by the Proclamation of October 4, 2016, declaring a state of local emergency, and extended every seventh day thereafter are hereby retained and continued for the duration of this Proclamation.

DONE AND ORDERED in Flagler County, Florida, this 10th day of January 2017.

FLAGLER COUNTY BOARD OF COUNTY COMMISSIONERS

Nathan McLaughlin, Chairman

CONCURRENCE:

Craig M. Coffey, County Administrator

Stephen R. Garten, Public Safety Emergency Manager

APPROVED AS TO FORM:

Al Hadeed, County Attorney

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RECORDED IN THE RECORDS OF
Gail Wadsworth Clerk of the Circuit Court & Comptroller
Flagler FL

FLAGLER COUNTY EMERGENCY ORDER NO. 2016-01

AN ORDER PROHIBITING THE SALE OF ALCOHOL AND IMPLEMENTING A CURFEW DURING THE DECLARED STATE OF EMERGENCY FOR HURRICANE MATTHEW

WHEREAS, the Governor of the State of Florida issued Executive Order 16-230, dated October 3, 2016, declaring a state of emergency for the entire State of Florida; and

WHEREAS, the Executive Order 16-230, in accordance with Section 252.38, Florida Statutes authorizes political subdivisions to take whatever prudent action is necessary to ensure the health, safety, and welfare of the community; and

WHEREAS, the Chair of the Board of County Commissioners of Flagler County, Florida issued a Proclamation declaring a state of local emergency, dated October 4, 2016; and

WHEREAS, the Proclamation, in accordance with Chapter 252, Florida Statutes and Section 12-34 of the Flagler County Code of Ordinances, authorizes the County to take all necessary action and issue any necessary orders to protect human life and property; and

WHEREAS, such orders when filed with the Clerk of Court have the force of law, and all existing laws, ordinances, and rules which are in conflict are suspended to the extent of such conflict pursuant to Section 252.46(2), Florida Statutes; and

WHEREAS, a violation of a duly promulgated order is a second degree misdemeanor punishable by a fine of up to $500.00 for each offense and by a term of imprisonment of up to sixty (60) days for each offense, in accordance with Section 252.50, Florida Statutes; and

WHEREAS, the National Hurricane Center advises that Hurricane Matthew has the potential to cause catastrophic damage to the County's infrastructure and will cause significant debris to impede roadways; and

WHEREAS, the County's Emergency Management Director and the Flagler County Sheriff have recommended the imposition of a dusk to dawn curfew within the geographic boundaries of Flagler County until the Local State of Emergency is lifted in order to ensure the protection of life and property; and

WHEREAS, it is necessary to keep law enforcement personnel available during this emergency without the distraction of having to monitor non-emergency and unauthorized traffic or movement; and

WHEREAS, the County's Emergency Management Director and the Flagler County Sheriff have recommended the prohibition on the sale of alcoholic beverages within the geographic boundaries of Flagler County until the Local State of Emergency is lifted in order to ensure the protection of life and property; and

NOW THEREFORE, it is hereby ordered:

Section 1. The sale of alcoholic beverages is prohibited within the geographic boundaries of Flagler County effective immediately until this Emergency Order is rescinded or the Proclamation Declaring a State of Local Emergency is lifted.

Section 2. There is hereby implemented a curfew within the geographic boundaries of Flagler County east of Interstate 95 daily from 7 p.m. until 7 a.m. beginning on October 6, 2016 and continuing until this Emergency Order is rescinded or the Proclamation Declaring a Local State of Emergency is lifted. This curfew does not apply to law enforcement personnel; federal, state and local firefighting, emergency medical and emergency management personnel; County employees detailed to work on the emergency, Salvation Army and Red Cross personnel and volunteers; National Guard personnel; electric utility personnel; water and wastewater utility personnel; communications utility personnel; individuals involved in medical emergencies; and others specifically authorized by the County's Emergency Management Director.

Section 3. This Emergency Order will take effect upon filing with the Clerk of Courts of Flagler County in accordance with Section 252.46(2), Florida Statutes.

DONE AND ORDERED, this 6th day of October, 2016.

Nathan McLaughlin, Vice Chair of the
Flagler County Board of County
Commissioners

CONCURRENCE:

Craig Coffey, County Administrator

Stephen Garten, Director
Emergency Services Department

APPROVED AS TO FORM:

for Al Hadeed

Al Hadeed, County Attorney

Inst No: 2016032617 10/11/2016 8:50 AM
BK:2161 PG:1344 PAGES:3
RECORDED IN THE RECORDS OF
Gail Wadsworth Clerk of the Circuit Court & Comptroller
Flagler FL

FLAGLER COUNTY EMERGENCY ORDER NO. 2016-03

AN ORDER PROHIBITING THE ENTRY OF THE PUBLIC ONTO THE BEACHES OF FLAGLER COUNTY UNTIL DANGEROUS DEBRIS CAN BE CLEARED AND SAFE ACCESS RESTORED AND IMPOSING A DAILY CURFEW IN THE CITY OF FLAGLER BEACH EAST OF THE INTRACOASTAL WATERWAY BETWEEN THE HOURS OF 7 PM AND 7 AM

WHEREAS, the Chair of the Board of County Commissioners of Flagler County, Florida issued a Proclamation declaring a state of local emergency in anticipation of Hurricane Matthew, dated October 4, 2016; and

WHEREAS, the Proclamation, in accordance with Chapter 252, Florida Statutes, and Section 12-34 of the Flagler County Code of Ordinances, authorizes the County to take all necessary action and issue any necessary orders to protect human life and property; and

WHEREAS, such orders when filed with the Clerk of Court have the force of law, and all existing laws, ordinances, and rules which are in conflict are suspended to the extent of such conflict pursuant to Section 252.46(2), Florida Statutes; and

WHEREAS, a violation of a duly promulgated order is a second degree misdemeanor punishable by a fine of up to $500.00 for each offense and by a term of imprisonment of up to sixty (60) days for each offense, in accordance with Section 252.50, Florida Statutes; and

WHEREAS, the County issued Emergency Order 2016-01 as amended by Emergency Order 2016-02 imposing a dusk to dawn curfew on the barrier island of the County, among other things; and

WHEREAS, the County Administrator, the County's Public Safety Emergency Manager and the Flagler County Sheriff have recommended a modification of the dusk to dawn curfew to apply only to the City of Flagler Beach east of the Intracoastal Waterway at the request of City officials; and

WHEREAS, further, as a result of Hurricane Matthew, the beaches of the County are littered with dangerous debris from destroyed sections of piers, dune walkovers, roads, and ocean front facilities, along with general litter, all of which are subject to

movement by tidal action and greater than normal waves driving more litter and debris onto the beach; and

WHEREAS, in order to prevent injury and loss of life, the County Administrator, the County's Public Safety Emergency Manager and the Flagler County Sheriff have recommended the prohibition of persons on the beaches of the County until the debris can be reasonably cleared and access points made safe.

NOW THEREFORE, it is hereby ordered:

Section 1. The entry of persons onto the dunes, dune walkovers and beaches within the geographic boundaries of Flagler County is prohibited until the beaches can be reasonably cleared of debris and the access points made safe as determined by the County Administrator and the County's Public Safety Emergency Manager in conjunction with the Flagler County Sheriff. This prohibition does not apply to law enforcement personnel; federal, state and local firefighting, emergency medical and emergency management personnel; public employees detailed to work on the emergency; National Guard personnel; and others specifically authorized by the County's Public Safety Emergency Manager.

Section 2. There is hereby implemented a curfew within the municipal boundaries of the City of Flagler Beach east of the Intracoastal Waterway daily from 7 p.m. until 7 a.m. beginning October 10, 2016 and continuing until this Emergency Order is rescinded or the Proclamation Declaring a Local State of Emergency is lifted. This curfew does not apply to law enforcement personnel; federal, state and local firefighting, emergency medical and emergency management personnel; County employees detailed to work on the emergency, Salvation Army and Red Cross personnel and volunteers; National Guard personnel; electric utility personnel; water and wastewater utility personnel; communications utility personnel; individuals involved in medical emergencies; and others specifically authorized by the County's Public Safety Emergency Manager.

Section 3. This Emergency Order will take effect upon filing with the Clerk of Courts of Flagler County in accordance with Section 252.46(2), Florida Statutes.

DONE AND ORDERED, this 10th day of October, 2016.

Craig Coffey, County Administrator

APPROVED AS TO FORM:

Al Hadeed, County Attorney

Stephen Garten, Public Safety Emergency Manager

FLAGLER COUNTY EMERGENCY ORDER NO. 2016-04

AN ORDER LIFTING THE DAILY CURFEW IN THE CITY OF FLAGLER BEACH EAST OF THE INTRACOASTAL WATERWAY BETWEEN THE HOURS OF 7PM AND 7AM IMPOSED

WHEREAS, the Chair of the Board of County Commissioners of Flagler County, Florida issued a Proclamation declaring a state of local emergency in anticipation of Hurricane Matthew, dated October 4, 2016; and

WHEREAS, the Proclamation, in accordance with Chapter 252, Florida Statutes, and Section 12-34 of the Flagler County Code of Ordinances, authorizes the County to take all necessary action and issue any necessary orders to protect human life and property; and

WHEREAS, to ensure the protection of life and property, the County issued Emergency Order 2016-03 imposing a dusk to dawn curfew within the municipality of Flagler Beach east of the Intracoastal Waterway, among other things; and

WHEREAS, as a result of the improved situation within the municipality of Flagler Beach due to significant recovery efforts, the County Administrator, the County's Public Safety Emergency Manager and the Flagler County Sheriff have recommended ending the curfew; and

NOW THEREFORE, it is hereby ordered:

Section 1. Section 2 of Emergency Order 2016-03 imposing a curfew from 7 p.m. to 7 a.m. within the municipality of Flagler Beach east of the Intracoastal Waterway is hereby rescinded effective this date.

Section 2. This Emergency Order will take effect upon filing with the Clerk of Courts of Flagler County in accordance with Section 252.46(2), Florida Statutes.

DONE AND ORDERED, this 11th day of October, 2016.

Craig M. Coffey

Craig Coffey, County Administrator

APPROVED AS TO FORM:

Al Hadeed, County Attorney

Stephen R. Garten

Stephen Garten, Public Safety Emergency Manager

Inst No: 2017015518 5/2/2017 3:04 PM
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RECORDED IN THE RECORDS OF
Tom Bexley Clerk of the Circuit Court & Comptroller
Flagler FL

PROCLAMATION DECLARING A STATE OF LOCAL EMERGENCY FLAGLER COUNTY, FLORIDA RELATED TO FOREST AND BRUSH FIRES

WHEREAS, Chapter 12, Flagler County Code, and Section 252.38, Florida Statutes, provide authority for a political subdivision such as Flagler County to declare a state of local emergency and to waive the procedures and formalities otherwise required of political subdivisions by law; and

WHEREAS, a state of local emergency proclamation is allowed for seven (7) days with appropriate extensions pursuant to law; and

WHEREAS, the National Weather Service concludes that a rainfall deficit currently exists in North Florida that has created a high fire danger and its weather forecasts show a continuing high burn potential for Flagler County and surrounding areas; and

WHEREAS, on the 11th day of April 2017, the Honorable Rick Scott, Governor of the State of Florida, issued Executive Order Number 17-120, declaring a state of emergency in the State of Florida due to the extremely high drought index and the large wildfires already burning in various parts of the State; and

WHEREAS, the Flagler County Fire Rescue Chief advises that the risk of forest and brush fires in Flagler County is high given weather and ecological conditions and that fireworks and open fires could cause wildfires that pose a severe threat to health, safety and property of residents and visitors within the County; and

WHEREAS, it is the recommendation of the County Administrator, the County's Public Safety Emergency Manager, and the County Fire Rescue Chief that a state of local emergency due to the threat of wildfires be declared for Flagler County and that this Proclamation declaring a state of local emergency be adopted; and

WHEREAS, it is necessary to declare an emergency in order to protect human and animal life and to avert the overwhelming destruction of property that could result from a wildfire; and

WHEREAS, this Proclamation, in accordance with Section 252.46, Florida Statutes, and Section 12-34 of the Flagler County Code of Ordinances, authorizes the County to take all necessary action and issue any necessary orders to protect human life and property; and

WHEREAS, such orders when filed with the Clerk of Court have the force of law, and all existing laws, ordinances, and rules which are in conflict are suspended to the extent of such conflict pursuant to Section 252.46(2), Florida Statutes; and

WHEREAS, a violation of a duly promulgated order is a second degree misdemeanor punishable by fine of up to $500.00 for each offense and by a term of

imprisonment of up to sixty days for each offense, in accordance with Section 252.50, Florida Statutes.

NOW THEREFORE, BE IT RESOLVED AS FOLLOWS:

1. I, Nate McLaughlin, as Chair of the Flagler County, Florida, Board of County Commissioners, in accordance with the powers vested in me pursuant to Chapter 252, Florida Statutes, and Section 12-34, Flagler County Code, do hereby proclaim the existence of state of local emergency in Flagler County, Florida, as identified above commencing at the date and time of my execution of this Proclamation and terminating automatically seven (7) days from this date unless terminated earlier or extended by a document of equal dignity herewith.

2. Pursuant to Section 12-34(a)(2), Flagler County Code, this Proclamation authorizes the County Administrator and, in his absence, the Deputy County Administrator and, in both of their absence, the Public Safety Emergency Manager, to take all actions necessary and appropriate to protect human life and property. This Proclamation further authorizes the County Administrator and, in his absence, the Deputy County Administrator and, in both of their absence, the Public Safety Emergency Manager, to utilize all lawful authority granted to Flagler County under federal, State or County emergency management laws, rules and regulations, including, but not limited to, Section 252.38(3)(a), Florida Statutes, and Section 12-34, Flagler Count Code. Any such actions taken shall be reported to the Board of County Commissioners as is practical under the circumstances.

3. In addition, pursuant to Section 252.38(3)(a), Florida Statutes, under any wildfire condition, the County is hereby empowered to exercise its authority and when necessary waive the procedures and formalities otherwise required of a political subdivision by law, pertaining to:

    - Performance of public work and taking whatever prudent action is necessary to ensure the health, safety, and welfare of the community;
    - Entering into contracts;
    - Incurring obligation;
    - Employment of permanent and temporary workers;
    - Utilization of volunteer workers;
    - Rental of equipment;
    - Acquisition and distribution, with or without compensation, of supplies, materials, and facilities; and
    - Appropriation and expenditure of public funds.

4. Pursuant to Section 252.46, Florida Statutes, and to prevent the careless ignition of dry vegetation, the following emergency prohibitions are hereby ordered and enacted:

    a. The sale, use and/or discharge of any firework as defined in Section 5 herein is prohibited, except that the foregoing prohibition does not apply to: the manufacture, sale and testing of fireworks and pyrotechnics by licensed pyrotechnic wholesale manufacturers who have operated in Flagler County for five or more years; displays by licensed pyrotechnics approved by the County Fire Rescue Chief or his designee; and any burning authorized by the Department of Agriculture and Consumer Services, Florida Forest Service;

    b. Open burning, burning of lawn debris, and use of open fire pits and containers are prohibited, not including the attended and monitored use of propane barbeque grills;

    c. No matches or cigarettes, or any other item likely to cause a fire are to be thrown from vehicles; and

    d. Parking vehicles with catalytic converters in high grassy areas is prohibited.

5. For purposes of this Emergency Proclamation and order, the term "firework" means any combustible or explosive composition or substance or combination of substances or any article prepared for the purpose of producing a visible or audible effect by combustion, explosion, deflagration, or detonation. This term includes, but is not limited to, blank cartridges and toy cannons in which explosives are used, the type of balloons which require fire underneath to propel them, firecrackers, torpedoes, bottle rockets, skyrockets, roman candles, aerial bombs, sparklers, snake or glow worms, trick noise makers, snappers, trick matches and any fireworks containing any explosives or flammable compound or any tablets or other device containing any explosive substance.

6. Any person violating any order issued pursuant to this Proclamation or any person who willfully fails or refuses to comply with the order or orders of any duly authorized law enforcement officer or personnel charged with the responsibility for the enforcement of such orders shall, upon conviction therefor, be punished in accordance with Section 252.50, Florida Statutes.

7. The continued state of emergency declared by this Proclamation may be modified in whole or in part or may be terminated upon the joint recommendation of the County Administrator and Public Safety Emergency Manager, by action of the Chairman of the Board of County Commissioners, or if the Chairman is unavailable, according to the order of succession prescribed by Section 12-34, Flagler County Code, with ratification in any event by the Board of County

Commissioners as soon as is practicable at a regular or special meeting. This order shall remain in effect for no longer than seven (7) days unless sooner rescinded or extended in accordance with law.

8. If any provision of this Proclamation is invalidated by a court of competent jurisdiction, such invalidity shall not affect the remaining provisions of this Proclamation, which shall have the full force and effect of law.

DONE AND ORDERED at Flagler County, Florida, this 1st day of May, 2017, at 09:00 A.M.

Nate McLaughlin, Chair
Flagler County Board of County
Commissioners

CONCURENCE:

Craig M. Coffey, County Administrator

Stephen Garten,
Public Safety Emergency Manager

Don Petito, County Fire Rescue Chief

APPROVED AS TO FORM;

Albert J. Hadeed, County Attorney

FEMA

Fact Sheet

Debris Removal from Private Property

Generally, debris removal from private property following a disaster is the responsibility of the property owner. Following a disaster local officials may implement various options to assist residents in the collection and disposal of debris which was a result of the disaster. Communities may develop drop sites where residents bring their debris or implement a curbside collection program, among other options. Voluntary Agencies may also offer disaster survivors help in clearing their property of disaster debris.

In certain circumstances, FEMA may reimburse eligible applicants (State, Tribal, and local governments or certain private non-profit) under the Public Assistance program for various methods of debris removal from private property. FEMA will reimburse eligible applicants for the cost of removing debris from streets and other rights of way. In extraordinary circumstances, State, Tribal or local officials may invoke their authority to declare that debris on private property is a health and safety threat to the public-at-large. This usually occurs in large-scale disasters where enormous quantities of debris are deposited on private property over a large area resulting in widespread immediate threats to the public-at-large. In such instances, the local government or its contractor will enter private property to address the public health threat by removing debris. The eligible applicant may request prior approval from FEMA for the reimbursement of private property debris removal conducted for a health and safety threat.

Statutory and Regulatory Authorities

Sections 403(a)(3)(A) and 407 of the Stafford Act, 42 U.S.C. 5170b and 5173, respectively, provide FEMA authority to fund an eligible applicant's debris removal from private property provided that the appropriate State or local government public health authority or other public entity that has legal authority determines that disaster-generated debris on private property in the designated area constitutes an immediate threat to life, public health, and safety; and that removal of the debris is in the public interest. The State or local government must also arrange an unconditional authorization for removal of the debris, and agrees to indemnify the Federal government against any claim arising from the removal. FEMA regulations at 44 CFR 206.224 define "public interest."

Any State or local government that intends to seek reimbursement to remove debris from private property within a designated area will, prior to commencement of work, submit a written request for reimbursement to, and receive approval from, the Federal Coordinating Officer (FCO). The FCO would identify an area(s) eligible for private property debris removal. The State and local government would identify specific properties for such debris removal.

The FCO makes a determination as to areas eligible for private property debris removal based on the Public Assistance applicant's showing of the following:

1) Public Interest (44 CFR 206.224)

Debris removal is in the public interest when it is necessary to:

- eliminate immediate threats to life, public health, and safety; or
- eliminate immediate threats of significant damage to improved public or private property; or
- ensure economic recovery of the affected community to the benefit of the community-at-large.

FEMA will work with states affected by a disaster to designate those areas where the debris is so widespread that removal of the debris from private property is in the "public interest" pursuant to 44 CFR 206.224, and thus is eligible for FEMA Public Assistance reimbursement. This determination is made on a case-by-case basis.

2) Documentation of Legal Responsibility (44 CFR 206.223(a)(3))

A detailed explanation documenting the requesting State or local government's legal responsibility at the time of disaster to enter private property to remove debris in order to address immediate threats to public health and safety, and confirmation that all legal processes and unconditional authorization requirements (e.g., right-of-entry, including indemnification provisions) for such action have been satisfied.

3) No Duplication of Benefits

FEMA is prohibited by Section 312 of the Stafford Act 42 U.S.C. 5155, from providing assistance to an entity that may receive benefits from any other source. The local government is obligated as a condition of the grant to ensure that there will be no duplication of benefits, such as from insurance proceeds. The right-of-entry or other permit should include information about property insurance covering debris removal.

4) Eligible and Ineligible Debris

FEMA policy DAP 9523.13 Section VII.F elaborates on what debris is eligible and ineligible for removal from private property. Generally, commercial property is not considered eligible for debris removal. All FEMA policies can be found at www.fema.gov.

###

"FEMA's mission is to support our citizens and first responders to ensure that as a nation we work together to build, sustain, and improve our capability to prepare for, protect against, respond to, recover from, and mitigate all hazards."

May 2016

eDiscovery and Public Records Applications

June 29, 2017
FACA Annual Conference



Michelle Jordan
Blankenship Jordan PA



Todd Eastman
Logikcull.com

logikcull.com

Agenda

- The Florida public records landscape
- Risks, horror stories and penalties for non-compliance
- Parallels between open records response and eDiscovery
- The basics of eDiscovery - What attorneys need to know
- Practical guidance and takeaways for open records response

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“Living in a constant state of discovery”

- Limited work product exemption under Section 119
- Protections that are available in civil discovery aren’t available under public records laws
- Native files, which can pose particular problems, are often at issue
- Data is growing in terms of size, forms and repositories (e.g. social media, mobile devices)

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Worst case scenarios and horror stories

- Sanctions

like this...



- Payment of fees and costs

- Overhead costs that can’t be passed through to requestors

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Parallels from the eDiscovery world

Documents and data must be...

- Preserved*
- Collected
- Searched, reviewed and redacted for privilege
- Produced to requested parties

*Integrity of data must be maintained at all stages

logikcull.com

Parallels from the eDiscovery world

Technology can be...

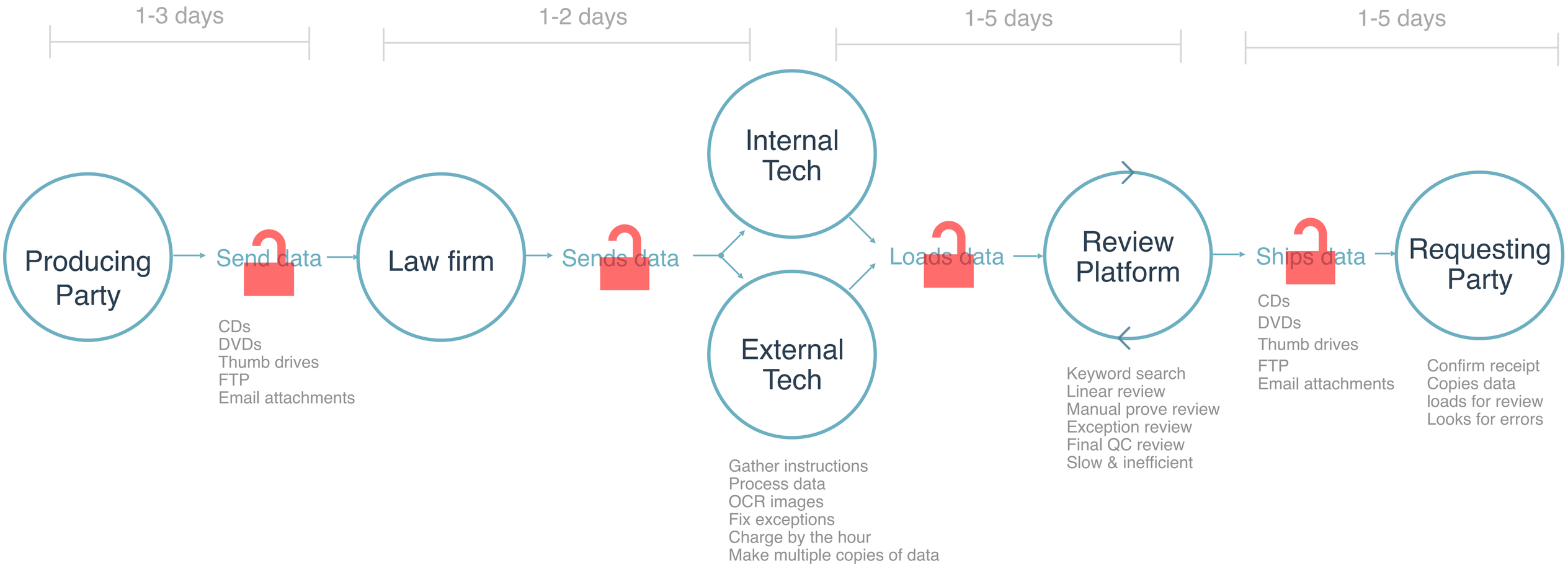
- Clunky, hard to use, and training-intensive
- Expensive and include hidden fees
- Inaccessible (e.g. on-premise solutions, seat-licenses, need certain operating systems)

The process can...

- Be manual and time-consuming
- Be risky and insecure
- Involve many different parties and custodians

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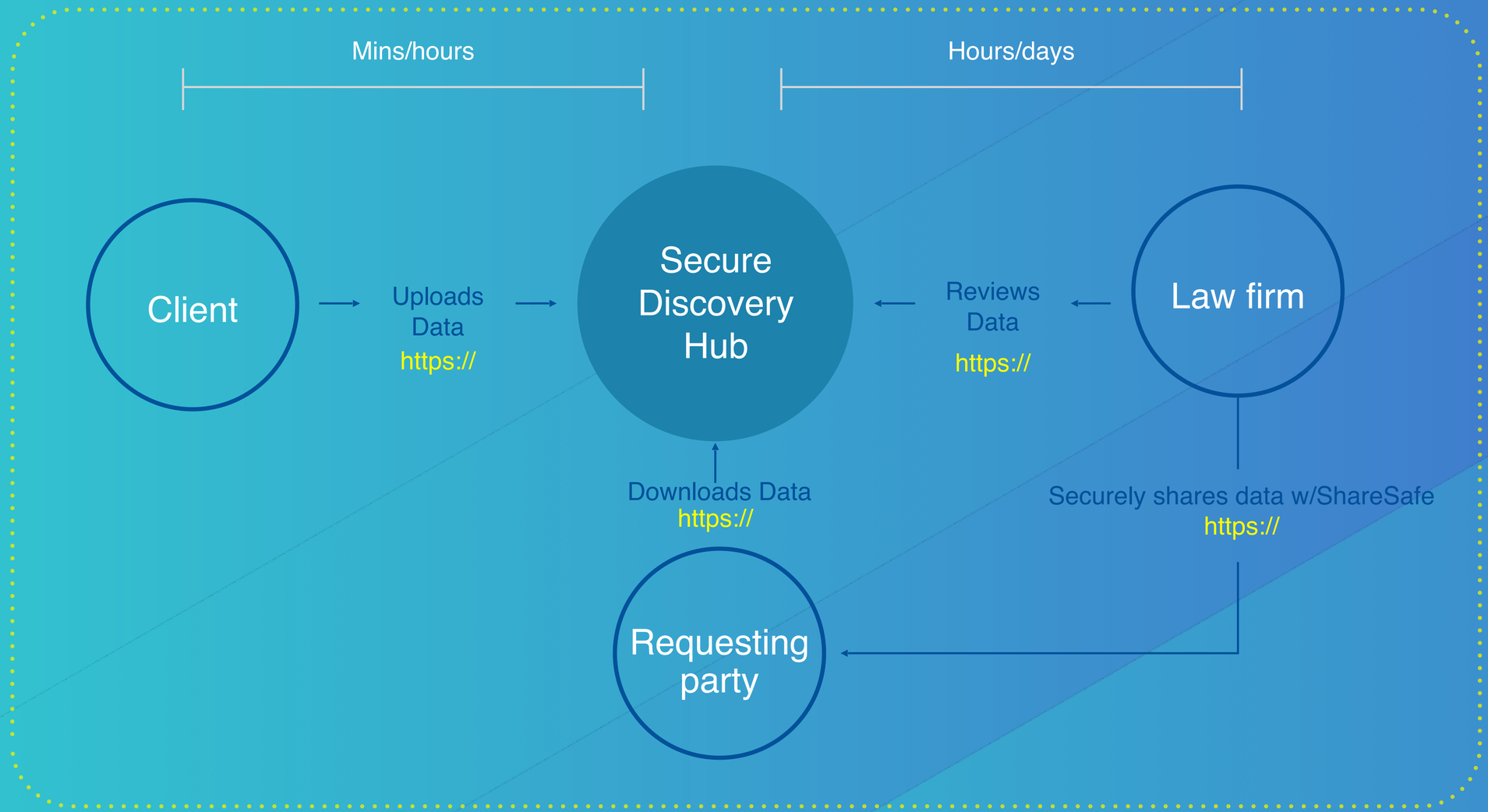
How the eDiscovery process works



logikcull

Transforming the EDRM

Data stays in 1 secure place in a closed-loop system



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Guidance and Takeaways - Limiting Record Creation

- Limit use of personal devices where possible
- On government-issued devices, limit communications (e.g. Turn off wi-fi and texting)
- Reconsider stipend policy for personal devices

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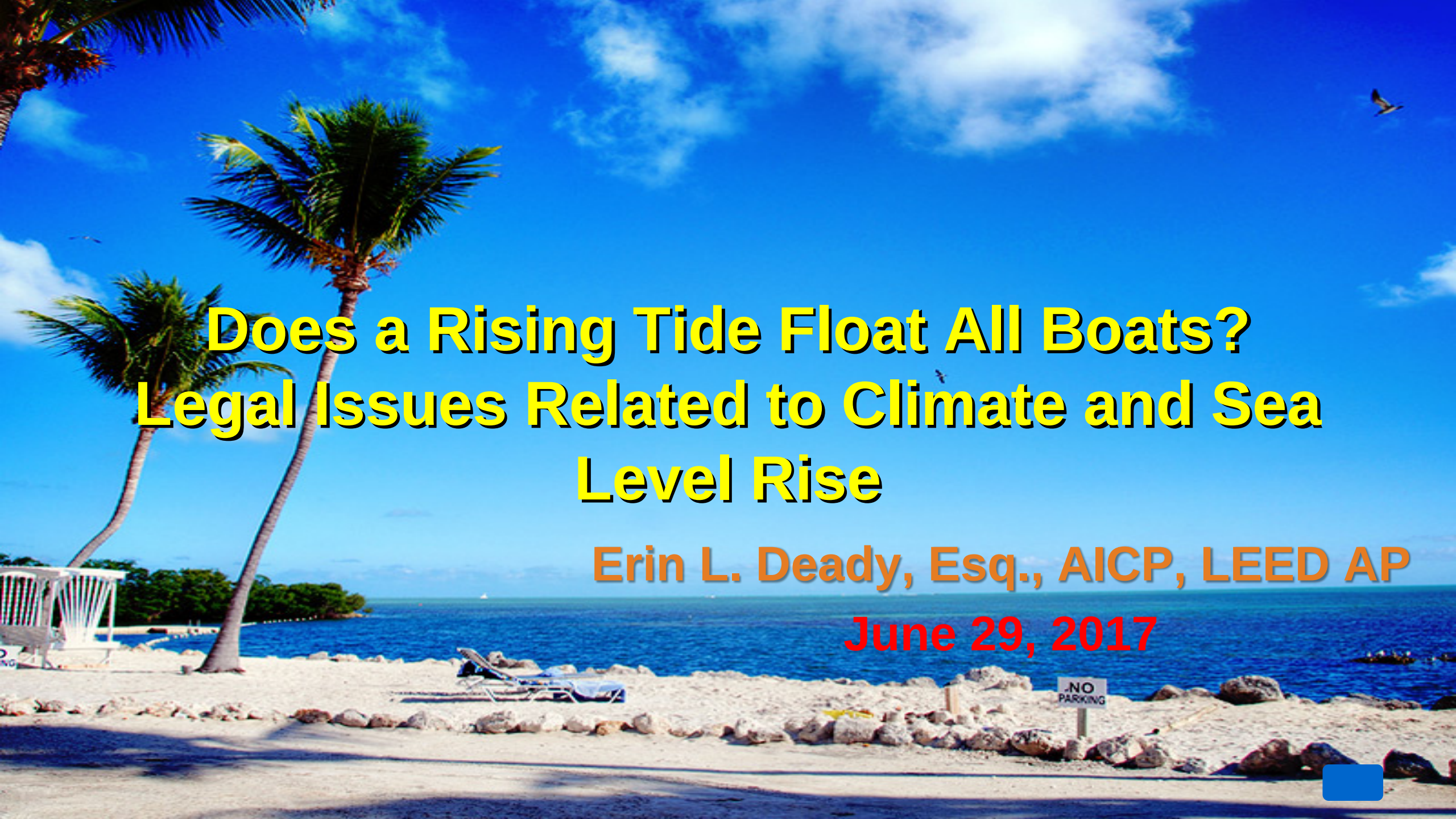
Guidance and Takeaways - Understand Your Obligations

- You don’t know what you don’t know - Ask for help!
- Florida attorneys must meet minimum tech competence standards: mandatory technology CLE
- Be familiar with the law in your jurisdiction
- Preservation is crucial - this includes metadata

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Guidance and Takeaways - Identify the Right Technology

- When dealing with records, limit use of manual and/or off-the-shelf tools (e.g. Outlook, Adobe Acrobat)
- Seek out technology that is appropriate for the task at hand
- When considering price, keep in mind the cost of inefficiency and risk



Does a Rising Tide Float All Boats? Legal Issues Related to Climate and Sea Level Rise

Erin L. Deady, Esq., AICP, LEED AP

June 29, 2017

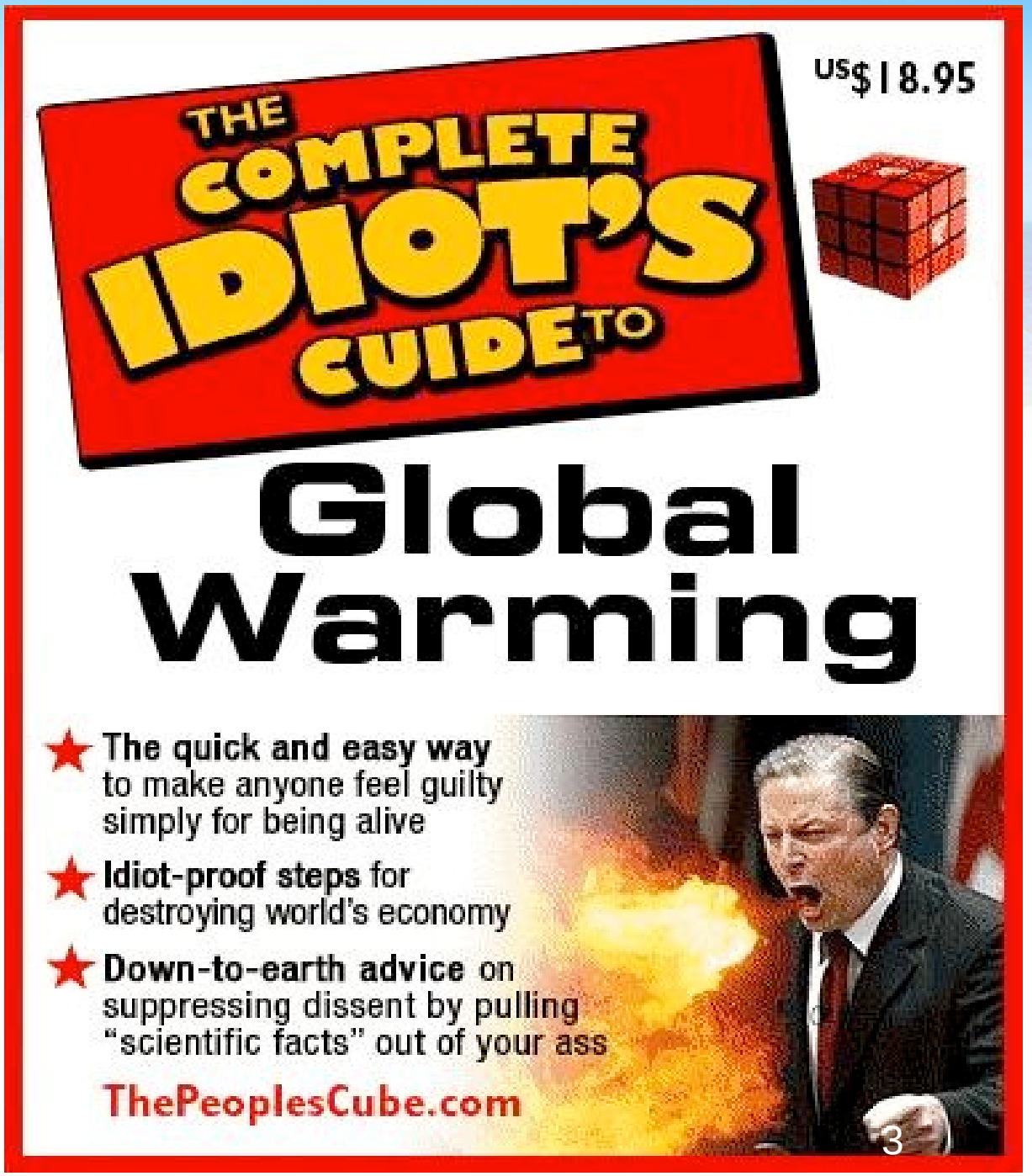
Communicating About Climate and Sea Level Rise Issues



Gainesville, May 11, 2017

- What facts do we communicate?
- How do we take the science and plan ahead?
- What policies do we need to put in place to do that?
- Who's planning and who needs to start planning?
- What are we required to start doing and are we exposed to liability?

PART 1:
THE BIG PICTURE AND HOW IT IMPACTS THE LOCAL DISCUSSION

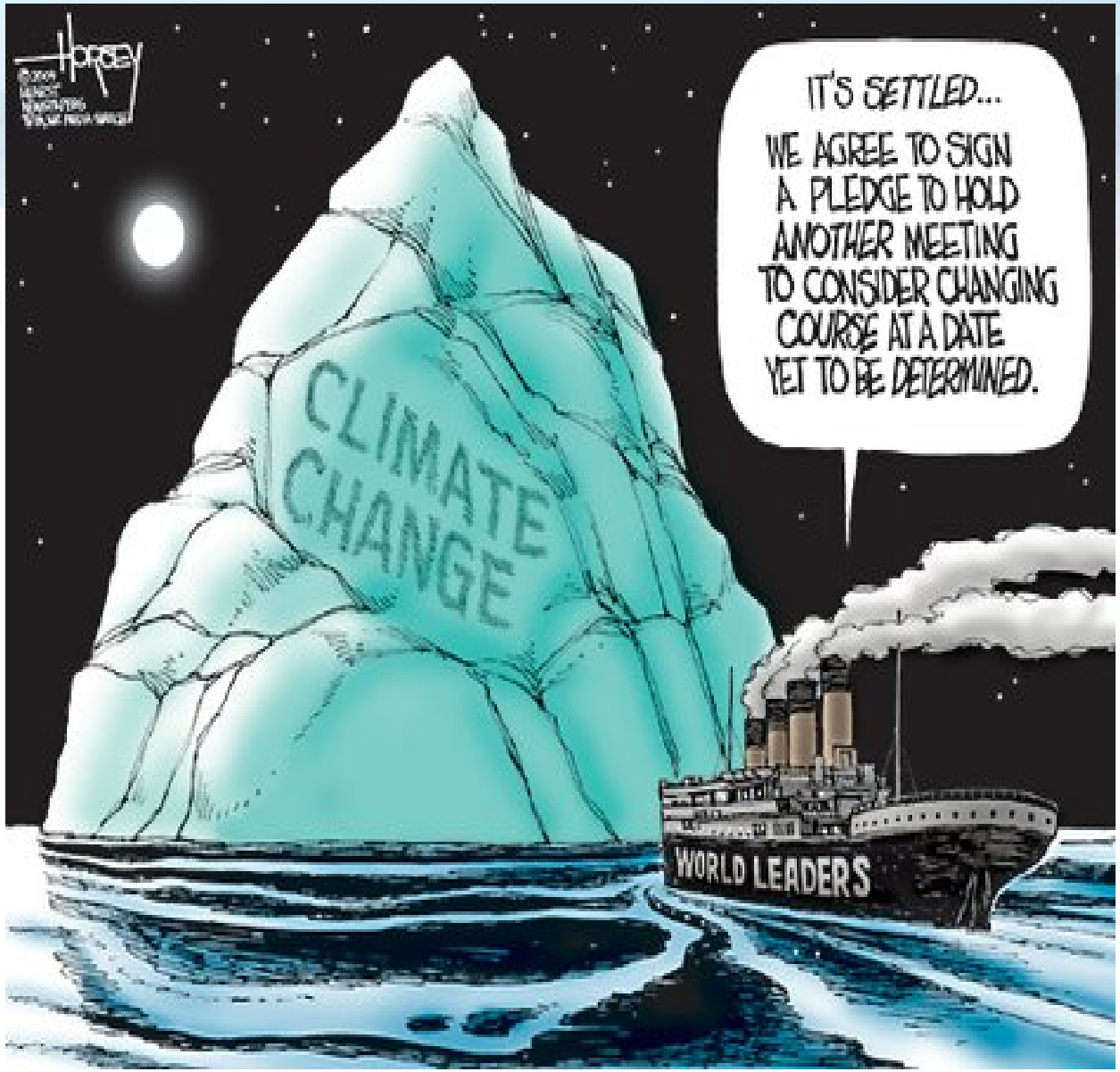


International Climate Agreements

Agreement	Targets Established	Signatories	U.S. Ratification
United Nations Framework Convention on Climate Change (UNFCCC) 1994, Rio	**Voluntary** goal of reducing GHGEs from developed countries to 1990 levels by 2000	198 Countries ("Parties") have signed on and ratified	Treaty and received US Senate ratification
Kyoto Protocol 2005	**1st Commitment period: Binding** targets to reduce GHGEs 5.2% below 1990 levels by 2012 **2nd Commitment period**: 18% below 1990 from 2013 to 2020	Focus on "developed" Countries (37 total + EU)- over 120 countries signed	U.S. non-"ratifier"
Copenhagen Accord 2009	4% below 1990 levels by 2020 – **not binding.** Cuts in emissions required to hold the increase in global temperature below 2 degrees Celsius	114 Parties- Submit individual plans	No U.S. Senate Ratification needed
Paris Agreement December 12, 2015	Global rise in temperature "well below" 2 degrees Celsius + limit increase to 1.5 degrees Celsius (**you chose your target and plan to achieve it "NDCs"**)	195 Countries (developed/non-developed)	Acceptance & approval are both methods to bind a nation

Why the Paris Accord is Different

- Nationally determined contributions (non-binding)
  - “Legally binding” for CO2-reduction plans but no specified reductions or penalty process for failure to meet the binding aspects
- 5 year reporting & goal review (start 2023)
- Developed countries agree to $$ help $100 billion/year in climate finance by 2020, and continue mobilizing finance at the level of $100 billion a year until 2025 (US $3 Billion commitment made)
- No legal mitigation or finance targets, so Agreement considered an “executive agreement” rather than a treaty therefore no U.S. Senate ratification needed
- 195 Countries signed on (not Syria or Nicaragua).
- 4 years to exit Paris, 1 year UNFCCC



Why it Matters at the Local Level

- Funding burden for adaptation (flooding, road elevation, beaches and shorelines, etc.)
- Data, tools and resources for actionable science
- State/local government "commitments to uphold" Paris Accord-
  - Option 1- "yeah we like it we should support it"
  - Option 2- "we are going to 'uphold' at the local level"- could mean GHG targets, reporting, etc.
- Commitments to Paris Accord regardless of Federal withdrawal:
  - Mayor's National Climate Agenda (Local Governments)
  - United States Climate Alliance (States)
  - Outright passage of legislation (Hawaii)
  - Miscellaneous (http://www.wearestillin.com/)

US Approach to GHG Reductions

- Response within U.S. (Prior to Paris):
  - Attempts @ legislation, 3 attempts at GHG reduction standards
  - Section 1605(b) of the 1992 Energy Policy Act has program to track GHG emissions, weak reporting standards, no verification, and no penalties for companies that do not report
  - *Mass v. EPA*: EPA has authority to regulate CO_2 as pollutants based on the definition provided in CAA section 302(g)
- Endangerment finding = 6 GHGs may be reasonably anticipated to endanger public health and welfare, and four of them—CO2, methane, NOx and hydrofluorocarbons—are emitted from automobiles, which would allow their regulation under CAA section 202
- Additional Federal Rulemaking



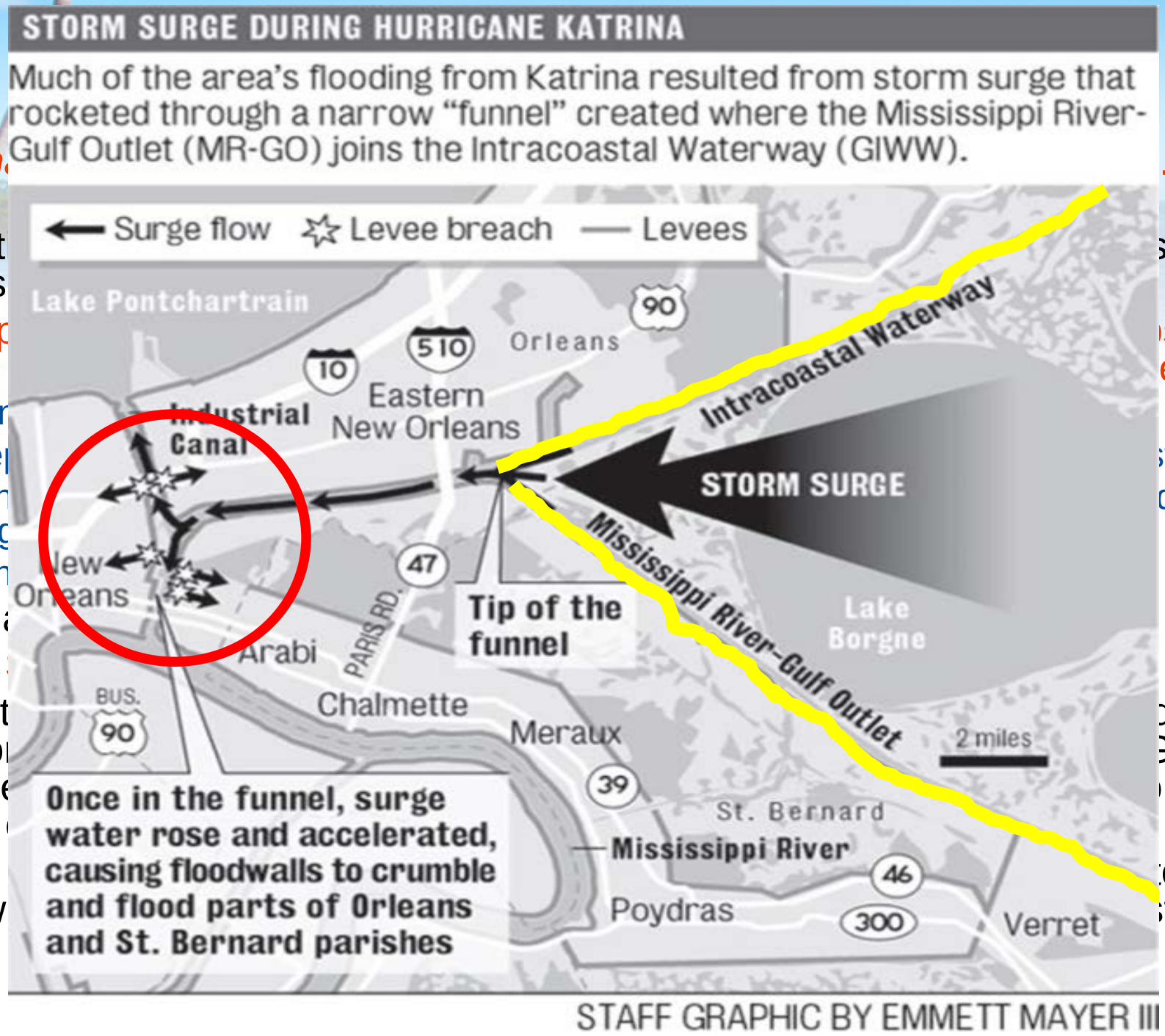
The Law: Where Does Climate Change Show Up?

- ESA
- NEPA
- CAA
- CWA
- MMPA
- FOIA/1st A
- Energy Policy Act
- Global Climate Change Research Act
- Corporate Reporting/Securities Disclosure
- FTC

785 total cases as of June 2017

- "Cap-and-trade" regulation where GHGE's are capped and allocated through the
- senting a
- ivate),
- o much
- Green & Energy Building/Codes (New Mexico case)
- Money damages and insurance coverage (common law claims)
- Protestors and scientists
- Protect my future

- *In re Katrin* .2d 644 (E.D. La. 2009).
- 400+ plaint smanagement of the Mississ
- 7 of these p s appeals to 5th Circuit and ent (grossly).
  - No defer
  - No excep storm surge effect)
  - Should h der adapting to a changing
  - Negligen
- Scientific da
- Just under
- The U.S. 5t d itself, finding that the Co GO at its originally de nary function exception"
- "The Flood e immunity, no matter how truction of the levees"



New Life for Katrina Theories- Temporary Takings (St. Barnard Parish v. US)

- Case originally filed 2005. Federal judge (5/1/15) rules that Corps' construction and absent maintenance of MRGO created a “temporary taking" under the 5th Amendment
- MRGO contributed to incre…iding wetlands, eroding natural protection and increasing fl…
  - "Certainly by 2004, the Army …nize that a hurricane inevitably would provide the meteorological co…ated by a substantially expanded and eroded MR-GO and the resul… the St. Bernard Parish for centuries," Braden wrote
- May 4, 2016 Judge rules th…ues in St. Bernard Parish and the Lower 9th Ward of $3.1…ers (temporary taking)
- Appeal July 6, 2016 by Jus… Federal Circuit), relying heavily on: *Arkansas Game and F*…12), USC holds that it’s possible for government-induced, te…ng" of property under the Fifth Amendment to the U.S. Co…uld be owed to the owner of the flooded property.




BURNSIDE
CHICAGO
INDUSTRIAL
CORRIDOR
14'-2"
30

Man

- Mann files action (in 2012 infliction of emotional dist Institute and National Rev
- Articles accused him of d injuring his reputation
  - "Mann could be said to science, except for ins molested and tortured science that could hav and planet…"
- Trial court upholds Mann' appellate court

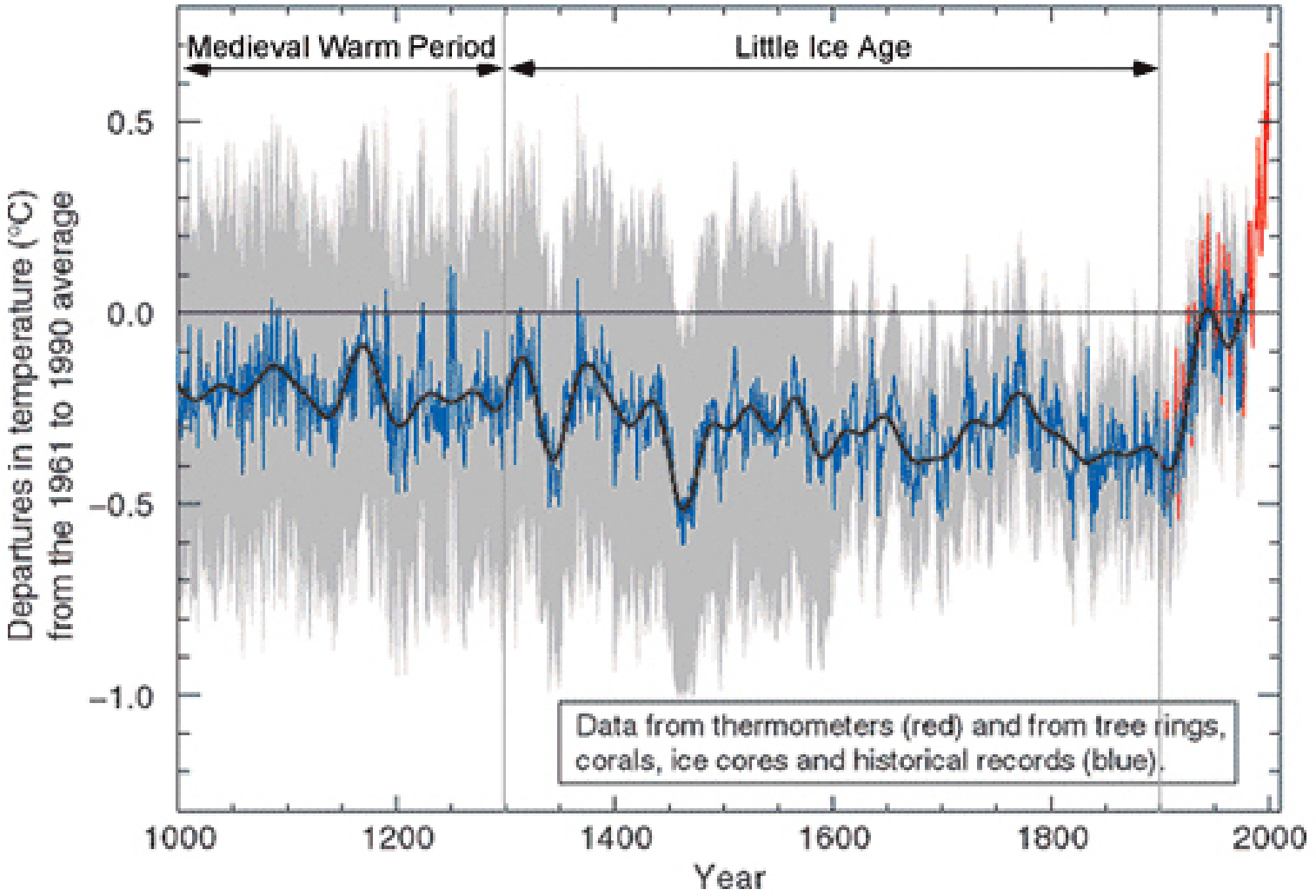
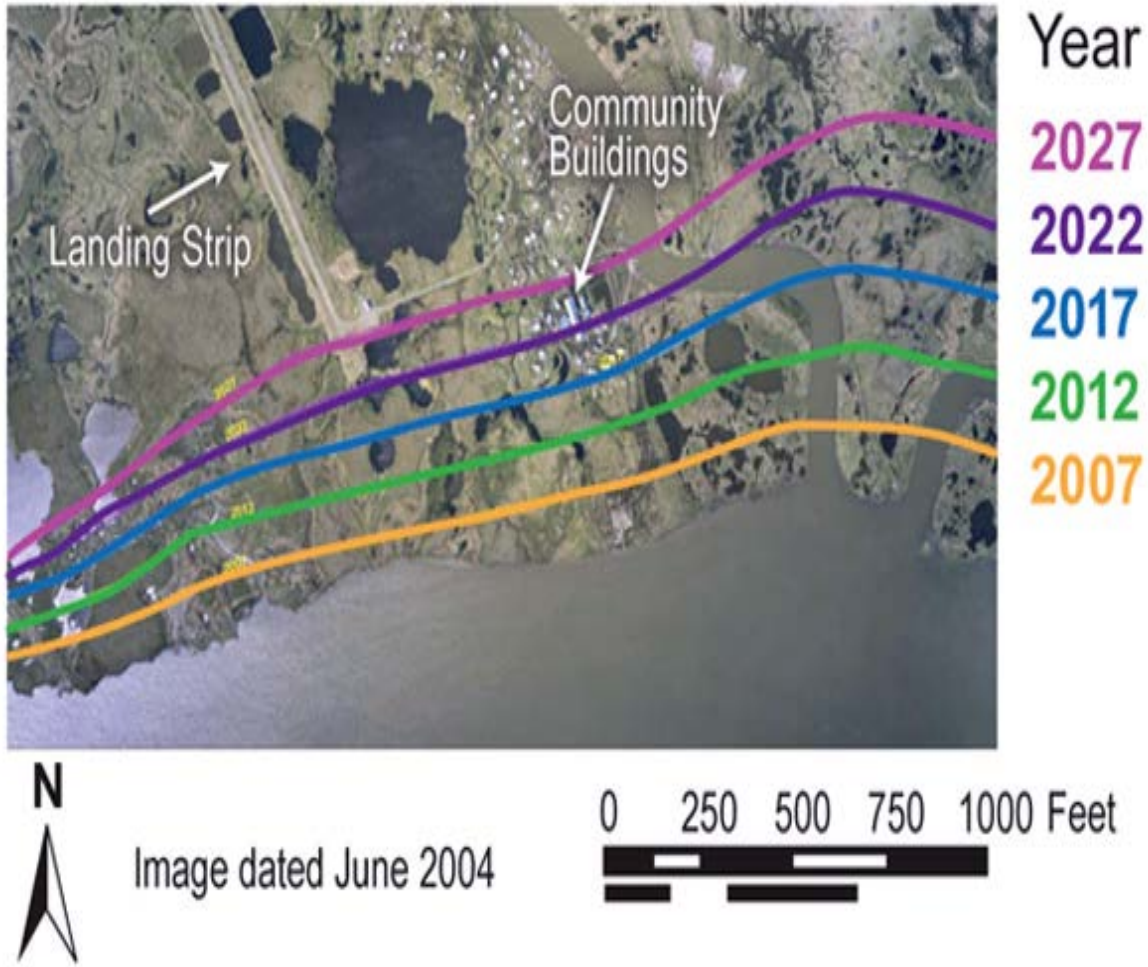


Figure 1. Mann's "hockey stick" temperature history for the past 1,000 years, including region of uncertainty (gray area) and time periods of the Medieval Warm Period and Little Ice Age—events that are largely absent in this record. (adapted from the IPCC's Third Assessment Report).

Case Studies in Relocation





could become environmental refugees by 2050

Planning for New Transportation Systems



Newtok, AK
Charles Mason
NY Times
In Planning August/
September 2016

Kivalina & Steadfast- Who is Going to Move the Alaskan Tribe?

- Nuisance claim for $ from the energy industry for flooding damage caused by climate change.
- Supreme Court passes May 20, 2013 on reconsideration of appellate dismissal.
- "…if an individual driving a car (and thus contributing to emissions) could also be a defendant, and if so, how a court could determine who was liable"? - CAUSATION
- Steadfast had no duty under the CGL policies issued by it to defend its insured, AES Corp., against climate change/global warming-based causes of action (Vacated, Rehearing and Reaffirmed 4/20/12)
- Steadfast: did the damage result from an "occurrence"? Answer: No (x2)
- "If an insured **knew or should have known** that certain results would follow from his acts or omissions, there is no 'occurrence' within the meaning of a CGL policy…"



Kivalina, Alaska

Other Evolving Legal Aspects

NFIP Reform

- FIRM Existing Flood Risk
- Technical Mapping Advisory Council
- Future flood risk

CRS

- Sea Level Rise Credits ~ 500 pts.
- Mapping
- Improvement of rating score
- Example- County x receives a CRS score of 5, but to improve to a 4, these points are pivotal.

Corps of Engineers

- Corps “(Engineer Technical Letter 1100-2-1) covering "Procedures to Evaluate Sea Level Change: Impacts, Responses and Adaptation” (July 2014)
- Previous “Incorporating Sea-Level Change Considerations in Civil Works Programs”

NEPA

- Agency experience and expertise to determine whether an analysis of GHG emissions/climate change impacts would be useful
- “Rule of reason” to ensure that the type and level of analysis is appropriate for the anticipated environmental effects of the project.
- 8/2/16 Guidance- # on GHGEs if feasible & indirect effects
- Early 2017- CEQ directed to withdraw

FFRMS

- Federal investments implemented through Hazard Mitigation Assistance Grants and the Public Assistance Program
- FEMA grants for construction activities in or affecting a floodplain
- Land, land use, construction for “federal projects”

Florida Policy on GHG Reductions and Climate

- EO 07-127: Reduction of emissions to 2000 levels by 2017, to 1990 levels by 2025, and by 80% of 1990 levels by 2050 & California vehicle emission standards reductions (22% by 2012 and 30% by 2016).
- Building Efficiencies/Energy Code, Chapter 553, F.S. increasing standards
- HB 7123: Model Green Building Code (2007)
- HB 697 (GHG reduction strategies in local government's Comprehensive Plan). Some requirements later eliminated.
- HB 7135 (State and Local Government Buildings "greener")
- HB 7179 (PACE)- wind resistance/energy efficiency initiatives for financing (future use for flood mitigation?)
- Adaptation Action Areas (2011)
- HB 7117 (Energy Bill- 2012)- increase solar output
- 2015- 5 Bills Passing Related to flood insurance, wind insurance, construction standards/building codes, Citizen's insurance, Peril of Flood (SB 1094)
- 2016- Solar Constitutional Amendments
- 2017- SB 90 on solar disclosures and Amendment 4 Implementation

Florida's Law (Chapter 163, F.S.):
How Far Does it Go?

- **Comp Planning standards on data:** "Appropriate" and "professionally accepted" data (science on GHG emissions and climate change?)
- **Types of principles in planning:** "Use ecological planning principles and assumptions in the determination of the suitability of permitted development."
- **Its "sprawl" if:** (VIII) plan or plan amendment allows for land use patterns or timing which disproportionately increase cost in time, money or energy of providing & maintaining facilities / services, including roads, potable water.
- **"Discourage the proliferation" of sprawl if:** project incorporates a development pattern or urban form that achieves four (4) or more of the following…. (IV) promotes conservation of water and energy.
- **Conservation element:** must contain principles, guidelines and standards for conservation that provide long term goals to protect air quality …
- **Use of mapping tools:** CHHAs and AAAs? Define and provide permissive designations of areas.

Other Authority Related to Infrastructure Vulnerability

- Section 163.3177, F.S. – limit expenditures & protect human life in coastal areas
- Section 163.3178, F.S. – restrict development activities; hazard mitigation; redevelopment; coastal high hazard areas (below Cat 1 storm determined by SLOSH); levels of service for infrastructure
- Section 163.3177, F.S. requires annual reviews of the Capital Improvements Elements to update the Five-Year Capital Improvement Schedule with projects to ensure that adopted level of service standards for public facilities will be achieved and maintained for the five-year period

FLORIDA DEPARTMENT of ECONOMIC OPPORTUNITY

Basic Legal Concepts in Government Ac ital

But wait, *n's County*)…

1. What is the main no duty to "upgrade". v. upgrade obligation el rise yet…

2. What actions car whether road design taken or not? Plannir etionary versus operations.

3. Why is planning ction as designed versus operation important?

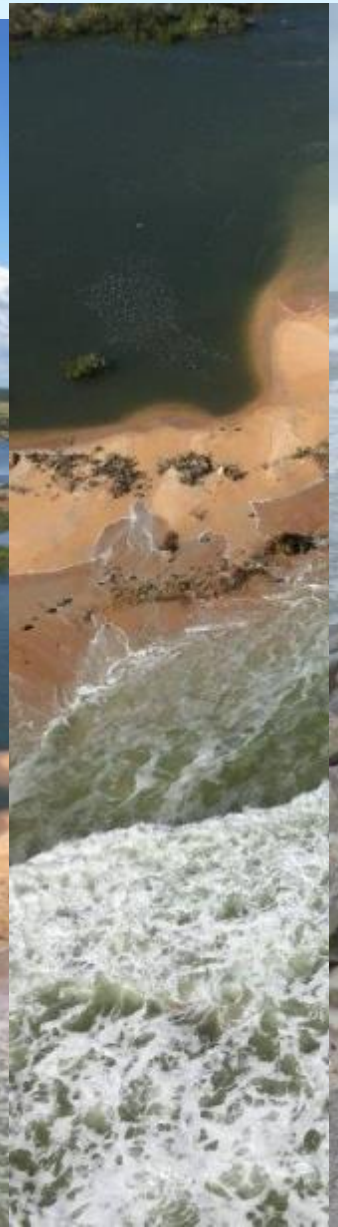
4. Sovereign Immu Tort Claims Act. odernize capital widening). Nor liability de (planning level).



Terrell Fornay, Reposted PB Post 6/7/27

St. John's County Post *Jordan* / Post Matthew







What are local governments doing?

Adaptation Action Areas

- 195 local governments have Coastal Management Element
  - 161 municipalities and 34 counties
- As of May 2017:
  - Approximately 43 (22%) explicitly mention or address sea level rise in their Comprehensive Plans
  - Eleven (11) mention AAAs in their Comprehensive Plans
    - Five (5) have a physical designation:
      - Satellite Beach designates Coastal High Hazard Areas as AAAs
      - Village of Pinecrest designates AAAs
      - Broward County sand bypass project at Port Everglades
      - Ft. Lauderdale 16 areas 38 stormwater projects
      - Yankeetown designated natural resource AAA

Flood Peril Legislation (SB 1094)

What are the principle requirements?

- Development and redevelopment principles, strategies, and engineering solutions that reduce flood risks and losses
- Elevation certificates submitted to DEM
- “Flexible” flood insurance coverage
- Other provisions such as flood insurance policy requirements

1. Development and redevelopment principles and strategies, that reduce the flood risk in coastal areas from high-tide events, storm surge, flash floods, stormwater runoff, and the related impacts of sea-level rise.
2. Best practices for the removal of coastal real property from FEMA flood zones
3. Site development techniques that may reduce losses and claims made under flood insurance policies
4. Be consistent with, or more stringent than, the flood-resistant construction requirements in the Florida Building Code and flood plain regulations
5. Construction activities consistent with Chapter 161.
6. Encourage local governments to participate in the National Flood Insurance Program Community Rating System

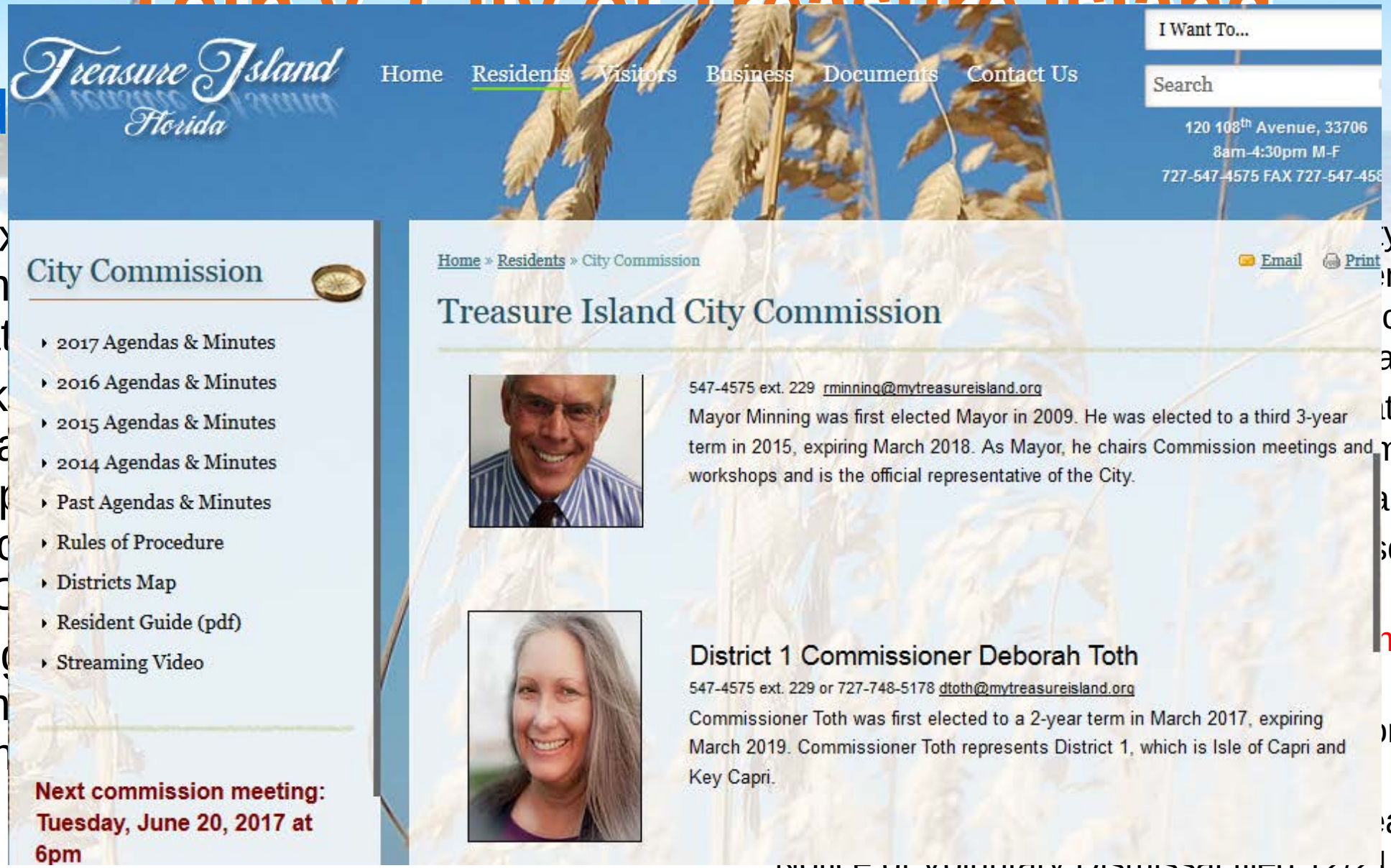
Recent and Current EAR Based Amendments

In Compliance with SB 1094			
West Palm Beach	☺	Yankeetown	☺
Ponce Inlet	☺	North Miami	☺
Santa Rosa County	☺	Palm Bay	☺
Boynton Beach	☺	Clearwater	☺
Jupiter	☺	Broward County	☺
Jupiter Inlet Colony	☺	Pinecrest	☺
Sunny Isles Beach	☺		

Toth v. City of Treasure Island

Amend

- Crux
  com
  relat
- Link
  Initia
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  DEC
- Alleg
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  Elen



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Notice of Voluntary Dismissal filed 12/21/16

City of West Palm Beach: Coastal Amendments

- Submitted proposed comprehensive plan amendment, complete as of November 16, 2016
  - Stormwater master plan, freeboard, CRS
- DEO reviewed and sent response letter back January 17, 2017
- Objection 2: DEO expressly identified need for revision based on SB1094 requirements
- City submitted Final Adopted Proposed Comprehensive Plan Amendment on March 3, 2017
  - specifically addressed Objection 2
  - included revised language addressing Peril of Flood
- DEO approved amendments April 19, 2017

- Added maps of 1, 2, 3' SLR from Compact
- Provided more "date certain commitments"
- Provided "data and analysis"
- Re-emphasized applicability or non-applicability of certain requirements

Sample Planning Strategy

How do these requirements relate to or affect planning activities and infrastructure investments in the short- and mid-term?



Short Term

- Compliance (POF) Strategy (timeline and scope)
- Frame "development"
- Short term capital projects
- AAAs

Mid Term

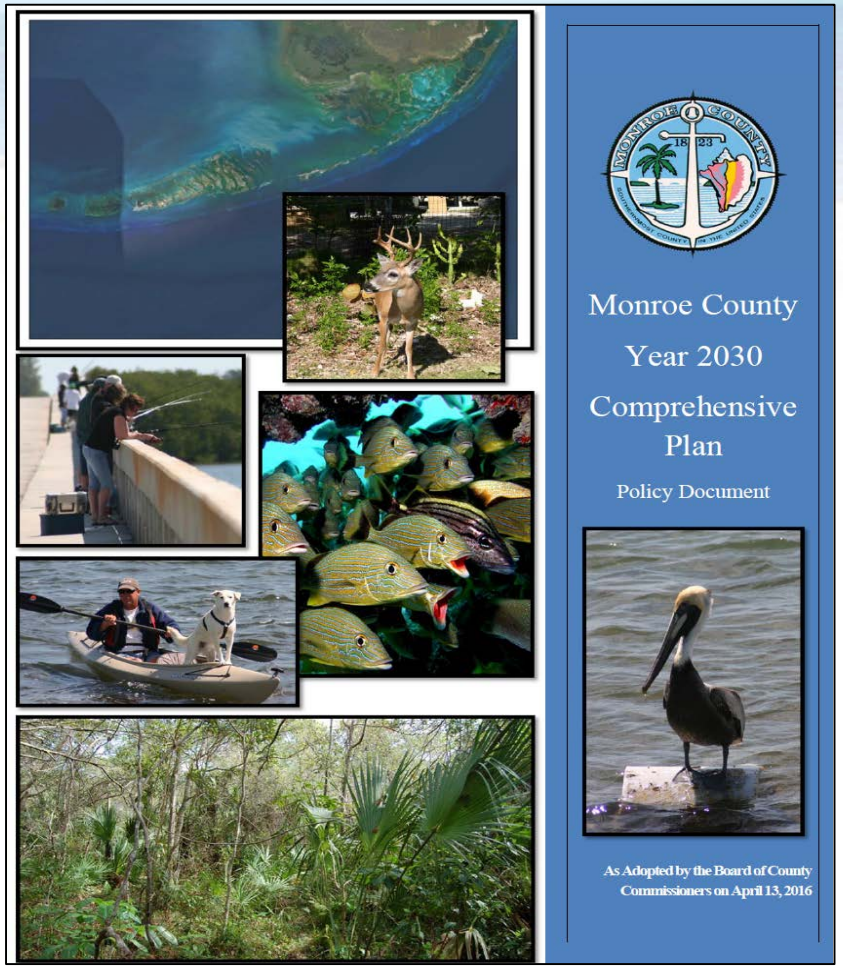
- Comp Plan Goals, Objectives and Policies
- Review land uses

Long Term

- LDRs: Development / design standards
- Areas subject to flooding
- ESLs
- Infrastructure LOS

Monroe County Case Study

- Decision to create new Energy and Climate Element
- References to sea level rise in the Coastal Management Element of their updated Comprehensive Plan
- SLR factor to consider in Capital Improvements Element
- Comprehensive Plan Amendment through 2030 approved by DEO June 2016



Decision Making Paradigm Shift



Land and Infrastructure-

Species, Habitat considerations

Adaptation/Mitigation for infrastructure

Policy Implementation-

Departmental Collaboration,

Comp Plan, Code, Legal Issues





Project Planning-

Addressing Priority Vulnerabilities,

Budget Implications (New Cost Considerations),

Also Departmental Collaboration

GreenKeys: Climate/Sea Level Rise Analysis

Nuisance Flooding	• NOAA Digital COAST 2030 and 2060 scenarios
Water/ Wastewater	• FKAA As Built Drawings and GIS 2030 and 2060 scenarios
Water Supply	• USGS Integrated surface - groundwater model to determine saltwater intrusion impacts for wellfields at 2030 and 2060
Roads	• FDOT Sketch Tool and County Pavement Condition Index (2014) 2030 and 2060 scenarios
Habitat	• Sea Level Affecting Marsh Model (SLAMM), the Florida Cooperative Land Cover Classification (FCLCC), the Critical Lands and Waters Identification Project (CLIP), Monroe County's "Habitat" shapefile and Strategic Habitat Conservation Area (SHCA)
Electric Utility	• FKEC and Keys Energy facilities data and GIS 2030 and 2060 scenarios
County Facilities	• Point locations of County-owned buildings (2006 GIS Mapping) 2030 and 2060 scenarios
Elevation Data	• 2008 Department of Emergency Management LiDAR (Light Detection and Ranging)

Increase in “Nuisance Flooding”



1980-1982

.67 per year



2010-2012

2.3 per year

3x 2010



2030 at 3”

20 per year

9x 2010



2030 at 7”

78 per year

34x 2010



2060 at 9”

139 per year

60x 2010

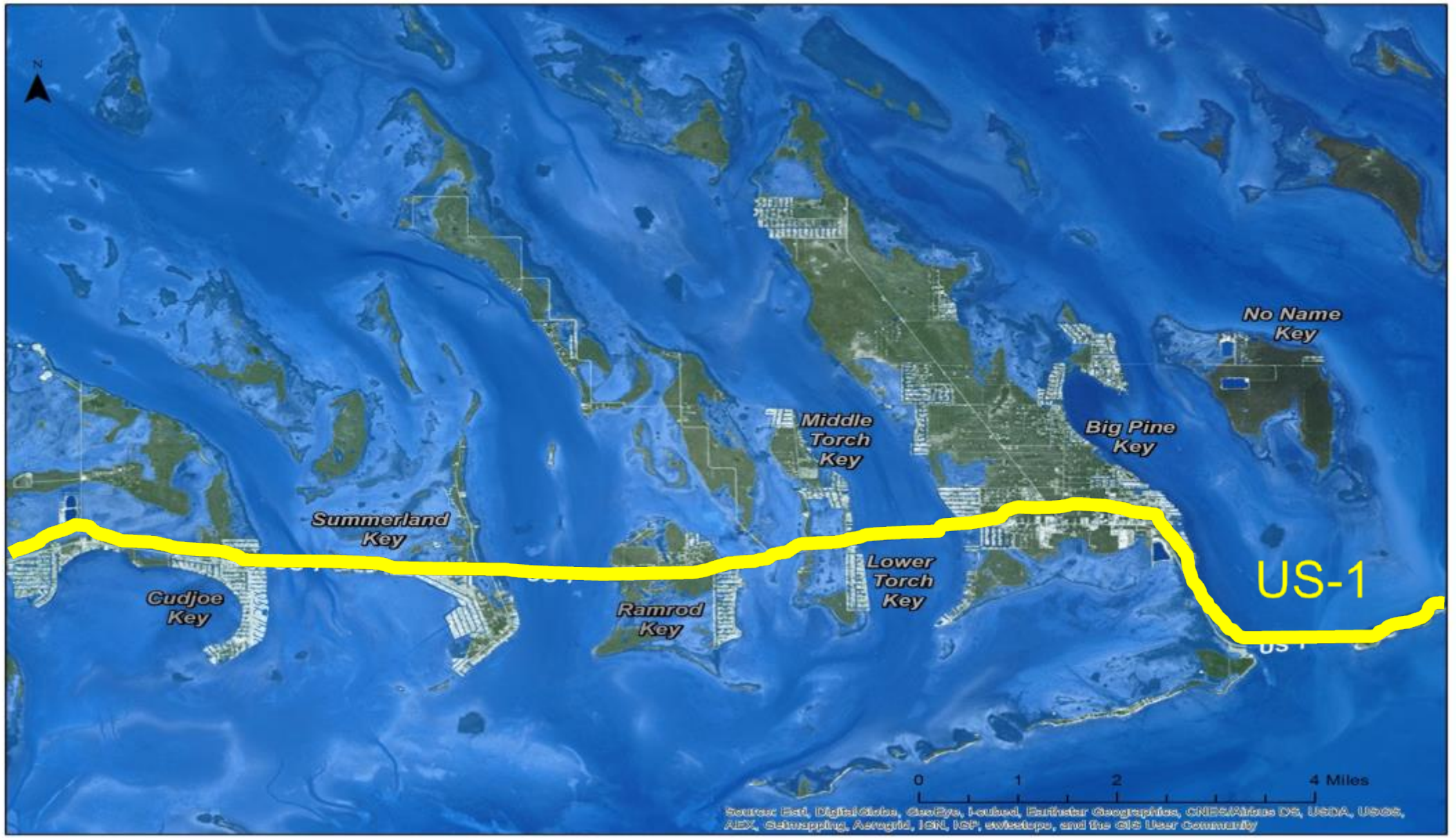


2060 at 24”

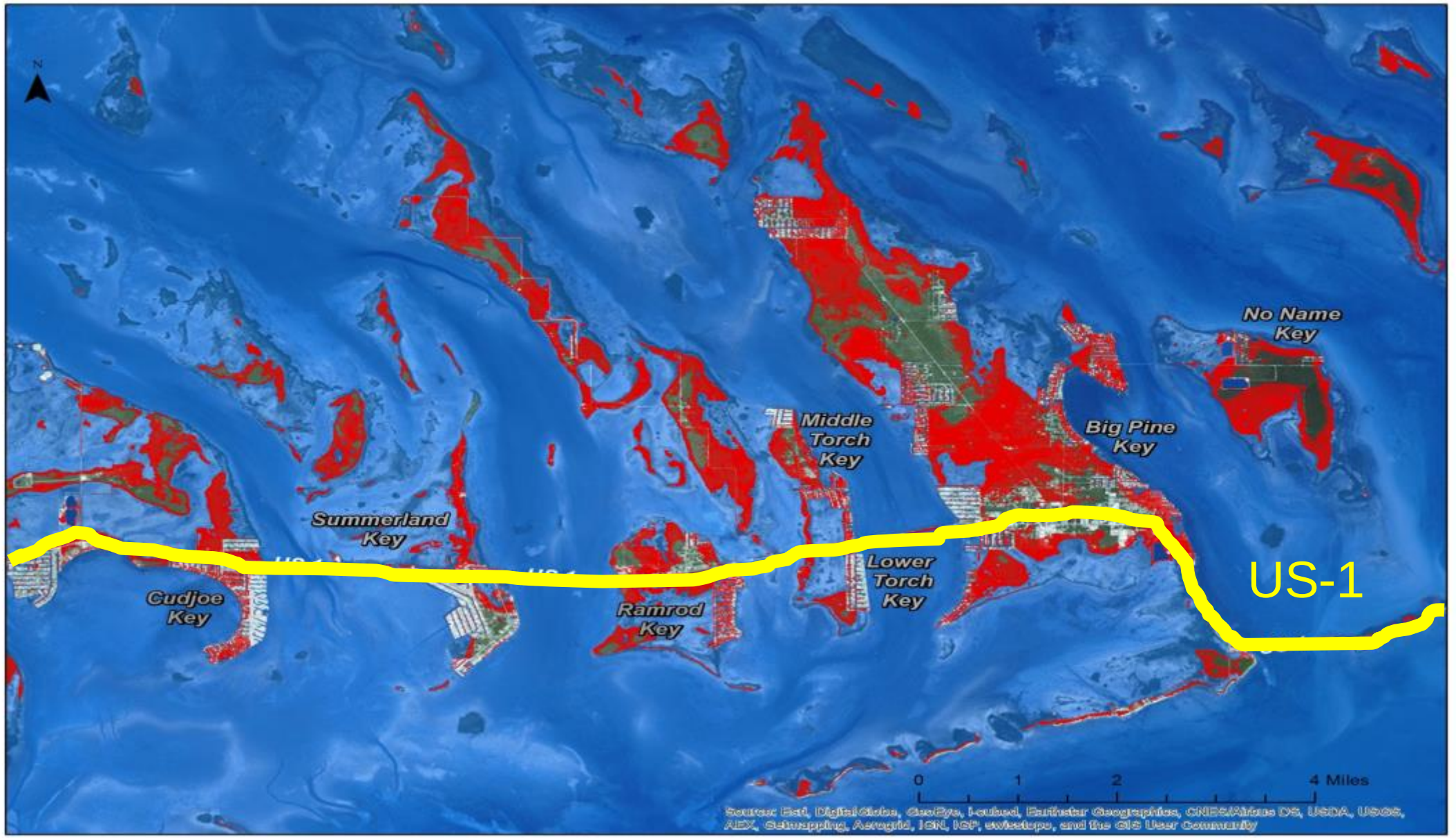
672 per year

Flooding more than 1x per day

Big Pine Key and Vicinity, Present Day



Big Pine Key and vicinity, 24 inches Sea Level Rise (2060, High Scenario)



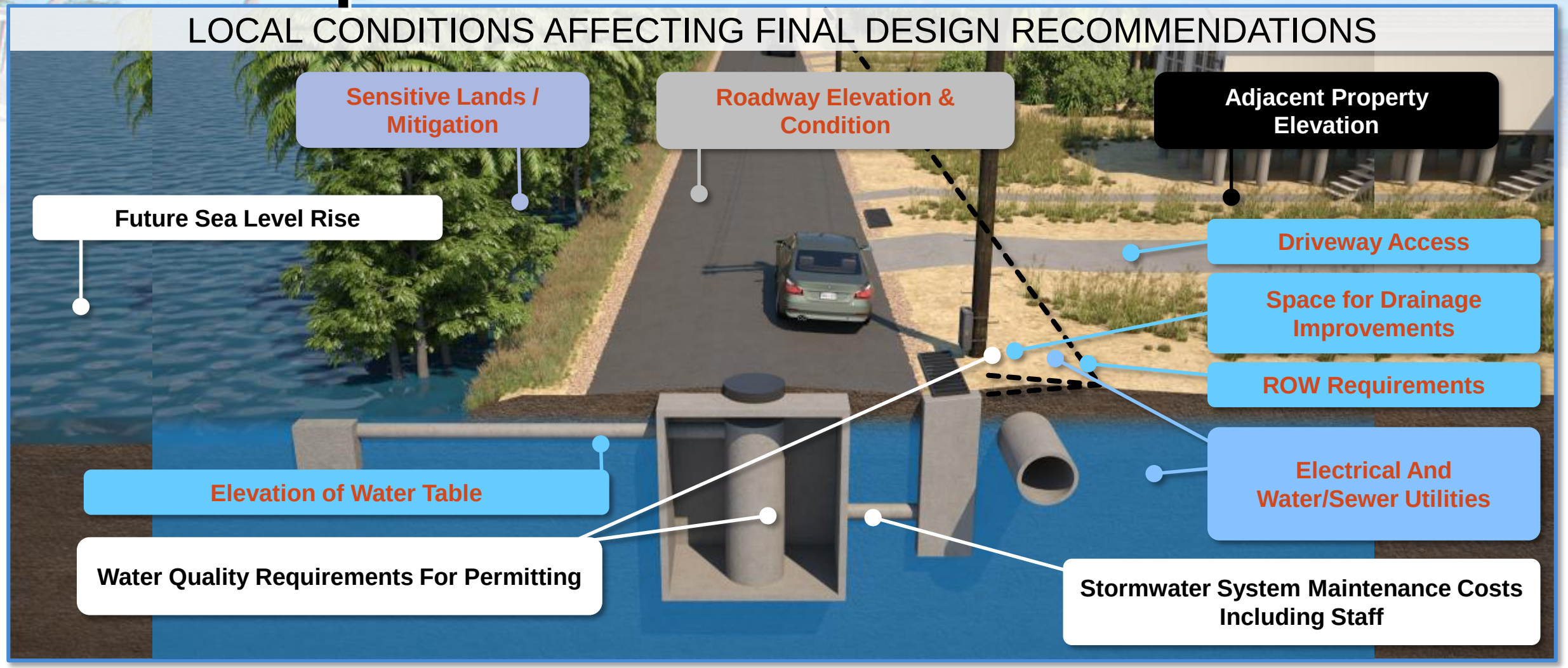
BIG PICTURE Issues from GreenKeys! Plan Development

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Implementation Considerations

LOCAL CONDITIONS AFFECTING FINAL DESIGN RECOMMENDATIONS



Appendix 1: Road Design Methodology

Final Roads Report: Appendix 1 narratively describes the steps in the process so they can be applied in other areas	Tidal datum based on current tidal epoch MHHW (NAVD88)	Elevation addition to not exceed 7 days of flooding annually based on 2015 sea level	Sea level rise estimate using IPCC AR5 Median (2015 to 2040)	Resulting target minimum elevation for roads (2040)** (NAVD88)
Sands Community	-1.1”	6.0”	5.4”	10.3”
Twin Lakes Community	-7.0”	6.0”	5.4”	4.4”

The negative values are in relation to the NAVD88 datum, where zero is a point approximately equal to the low point of the roadways in the two communities.

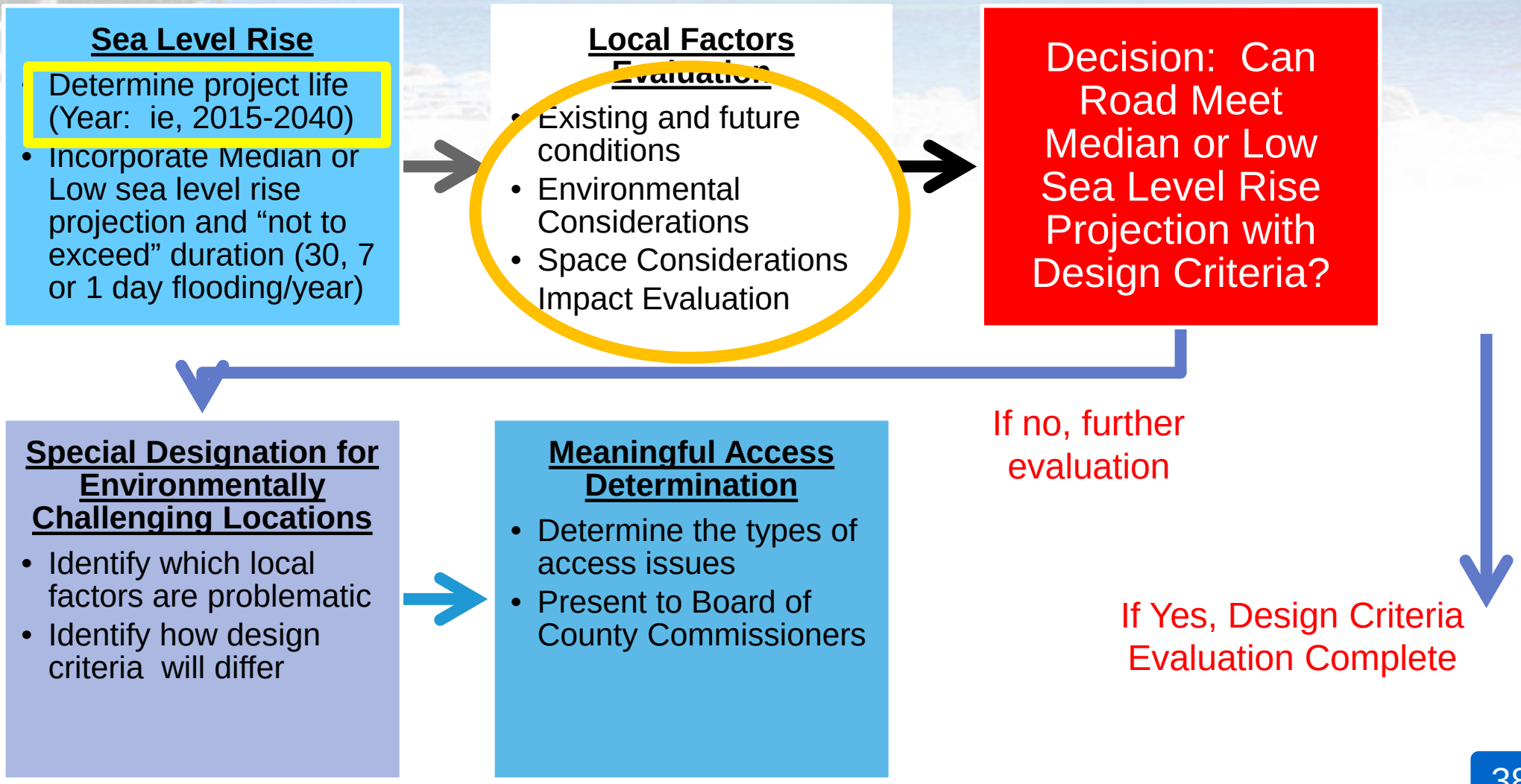
Initial Results – Conceptual Cost Estimates for Design Scenarios

	Twin Lakes – Key Largo		Sands Community – Big Pine	
Elevation	Length of Roadway Elevated	Total Roadway and Drainage Cost	Length of Roadway Elevated	Total Roadway and Drainage Cost
6"	0.25 miles	$0.92 million	0.3 miles	$2.22 million
12"	0.7 miles	$4 million	0.35 miles	$2.63 million
18"	0.8 miles	$5.8 million	1.3 miles	$8.9 million
28"	0.9 miles	$7.3 million	1.5 miles	$10.5 million

Costs factored in: Maintenance of traffic, mobilization, design, construction, 15% of costs for construction engineering and inspection, 25% contingency and stormwater features.

Costs not factored in: right-of-way (~12" is threshold), driveway improvements

Draft Ordinance Process Flow for Road Design



Local Conditions Analysis/Evaluatio

- Physical site constraints;
- Current road conditions and elevations;
- Current elevation of adjacent properties;
- Sensitivity of the land or mitigation requirements to be met;
- Water quality requirements;
- Right of way needs;
- Availability of land to accommodate drainage;
- Elevation of water table in relation to road elevation;
- Impacts to access for private property (driveways);
- Future maintenance needs and costs including staffing requirements; and
- Number of developed properties that the subject road services as the sole means of access.



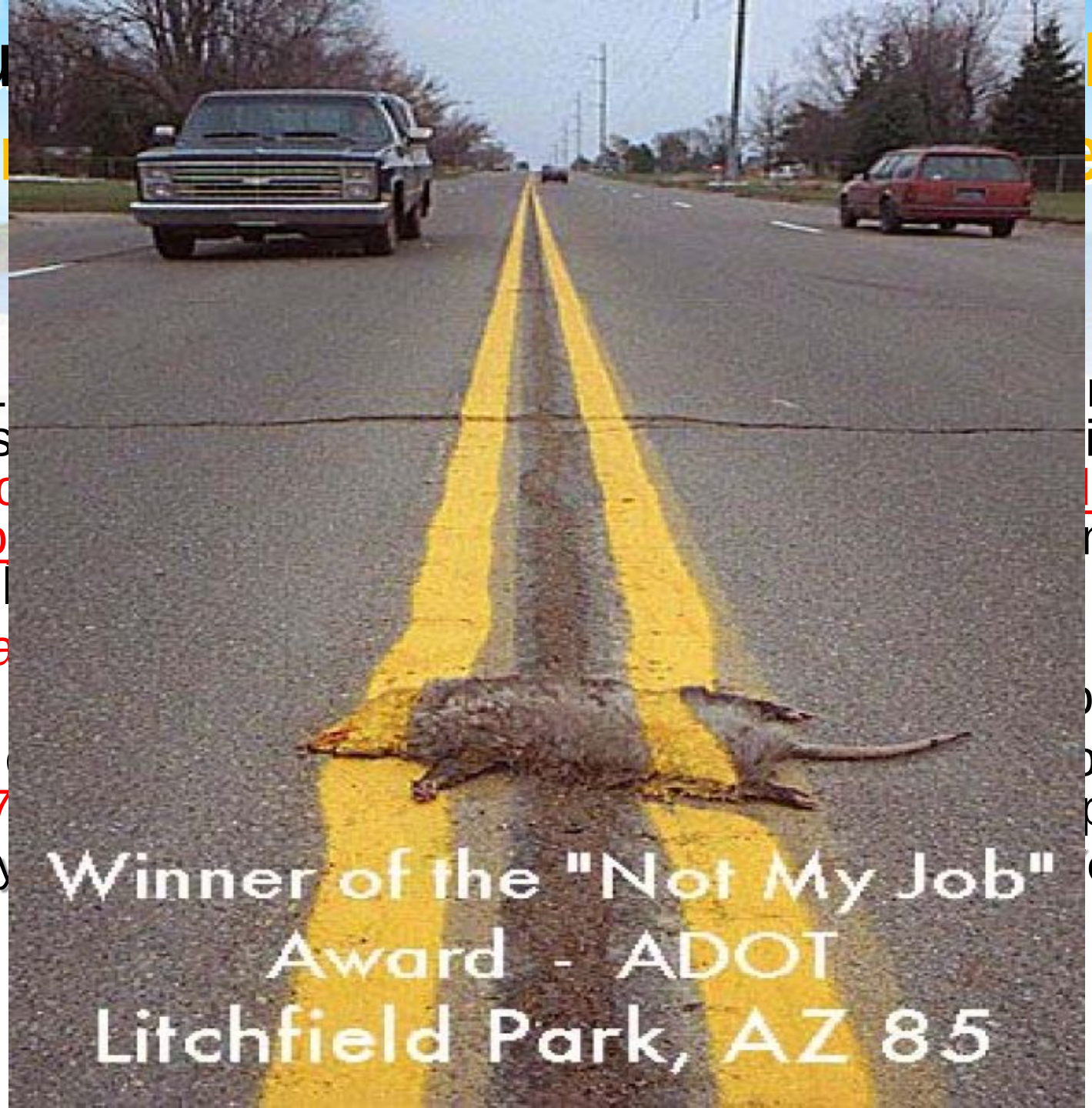
Resolution #1: Approve Final Report and Move Forward with Pilot Communities Design

- Appro The Sands
- Directs ard with the de Sectio oject: The Sa
  - Rai
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  - Co



Resolu Design Standar e Roads

- Appendix 1 roe County Pilot Roads ies will serve as an appro ling + Median SLR by pro mprovement project until
- Move forwa identify near-term roads oding.
- The Board o budget funds in the FY17 project.
  - GreenKey ear Work Plan



Publi . U.S.

- Plaintiffs- dians and Dr. Jame:
  - Allegatic missions to get out c n their constitut ated and (2) an order ights and directing 02 emissions
- Defendar MTD



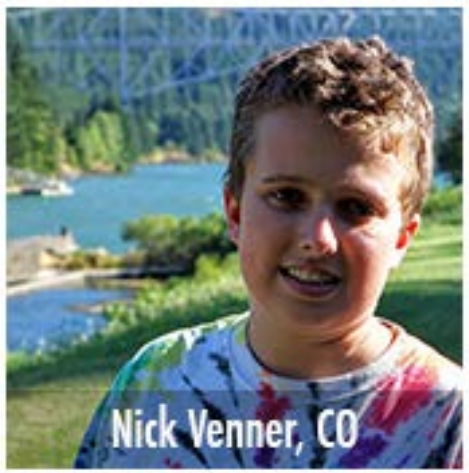
















US: Your MTD is DENied

- 11/10/16 – “This lawsuit is not about proving that climate change is happening or that human activity is driving it. For the purposes of th e undisputed. The questions before t r defendants are responsible for so by climate change, 2) whether plaintif lants' climate change policy in c s Court can direct defendants to cha running afoul of the separation of pow





- Global/nat nd and that w be on the commitme nd local gove are:
- Climate ch ans infrastruct re be perforn
- Refocus o engage implemen
- Data is not the enemy- lack of preparation is
- Local Regulations evolving
- Hot Topics: Customary Use, Seawalls, Funding

Thank You

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www.erindeadylaw.com

ERIN L. DEADY, P.A.

FLORIDA ASSOCIATION OF COUNTY ATTORNEYS

Attack of the Mini Cell Towers in Public Rights-of-Way
June 29, 2017

GARY I. RESNICK
GrayRobinson

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2017: The Year of Wireless Broadband Infrastructure

The growth in wireless data traffic is expected to grow 5 times by 2020.

Over the next 7 years, advanced services, including 5G-capable networks, are expected to create up to 3 million jobs and result in $275 billion in network investment.

Once these new networks are up and running, it is projected they will create another 22 million jobs and produce up to $12.3 trillion of goods and services by 2035.

It is estimated that between 100,000 and 150,000 small cells will be deployed by the end of 2018, with 455,000 expected by 2020, and approximately 800,000 by 2026.

And where will all of these small cells be deployed?

IN YOUR COMMUNITY'S PUBLIC RIGHTS-OF-WAY

So, What is 5G and the Internet of Things?

5G is 5th generation wireless technology promising faster and higher capacity data transmission that is needed for the Internet of Things.

The Internet of Things (IoT) is the wireless connection of devices – billions of them – to the Internet, such as driverless cars, kitchen appliances, utility meters – and even "smart" toothbrushes and mattresses.

But while 5G promises super fast wireless broadband, it requires a lot of small cell facilities clustered in urban areas to provide coverage and capacity.

Terms to Understand

Coverage

The geographic area where mobile service is provided. Coverage is needed to increase wireless access and availability within an area.

Capacity

The amount of traffic a network can handle at one time without getting congested. Additional capacity is needed to handle the transmission of photos and videos over the network as smartphones and other devices become ubiquitous.

What is a Small Cell?

- Low-powered cellular radio access nodes with limited range. "Small cell" refers to the Coverage area, not necessarily the size of the infrastructure.
- The term includes femtocells (the most common form of small cells), picocells, and microcells.
- They are "small" compared to traditional macro towers. Often characterized as the size of a pizza box or no larger than a laptop or about the size of a paperback book.
- But recently enacted state legislation often defines "small wireless facilities" as antenna installations of no more than 6 cubic feet, with associated equipment no more than 28 cubic feet in volume.
- And watch out for 120-foot monopoles!



Micro



Pad RRU



Pico



Femto/Nano



Qcell


PIZZA
BUON










15.12.2015





But Not Everything is Perfect

- 5G wave frequencies do not travel easily through buildings – so "small cell" antennas will have to be densely placed on utility poles, street lights, signage structures, and other structures in the public rights-of-way. This is referred to as "densification."
- 5G still requires macro towers.
- 5G requires a lot of fiber backhaul to get network data to a point where it can be distributed over a network.
- 5G is best suited for densely populated areas – it is not a fix for the lack of connectivity in rural and unserved America.

State Preemption of Local ROW Authority Over Wireless Infrastructure

- Industry-supported legislation discussed or introduced in approximately two dozen states to date.
- Bills enacted in Minnesota, Arizona, Colorado, Indiana, Iowa, Texas, Ohio, and Virginia.
- Court fight ongoing in Ohio; recent decision finds legislation violated the state's "single subject" rule.
- Bills currently moving through the legislative process in California and Wisconsin.
- Florida legislation waiting for governor's signature.

Florida HB 687: Advanced Wireless Infrastructure Deployment Act

Establishes a process by which "wireless providers" – which includes both service providers AND those that build or install wireless equipment, facilities, and support structures – may place "small wireless facilities" in the public rights-of-way that are under the control of a county or municipality.

The Act specifically excludes the Florida Department of Transportation and its rights-of-way.

The Act becomes effective July 1, 2017.

The Act provides that:

Except as provided, a city or county cannot:

- Prohibit,
- Regulate, or
- Charge for

the collocation of small wireless facilities in the public rights-of-way.

However, most Florida cities/counties waived permit fees in exchange for a higher Communications Services Tax per Section 337.401(3). CST and pass through provider fees are not affected by the Act.

What is a “Small Wireless Facility”?

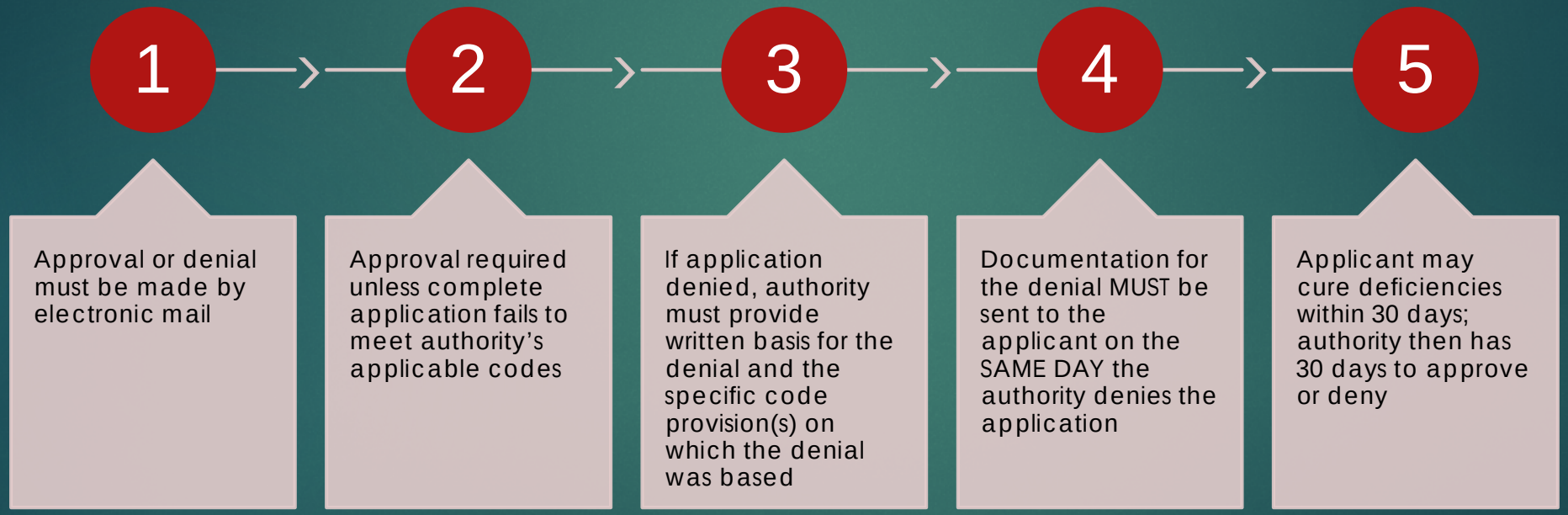
The Act defines as:

- Deployments with enclosed or exposed antennas no more than 6 cubic feet in volume; and
- All other associated wireless equipment that is no more than 28 cubic feet in volume

Requirements for Processing Applications

- The authority has 14 days to determine if an application is complete, and, if not, to provide notice to the applicant of the *specifically identified* missing information.
- A complete application must be approved or denied within 60 days.
- The parties may mutually agree to extend the 60-day application review process (Practice hint: get any agreement to extend the period in writing).
- Failure to grant or deny the application within the 60-day review period results in a "deemed granted" application.

Notification Procedure



Consolidated Applications

At the applicant's discretion, a consolidated application may be filed for the collocation of up to 30 small wireless facilities in a single application.

If approved, a consolidated application results in the issuance of a single permit.

The authority may, at its option, remove from a consolidated application any facility for which incomplete information has been received or that is subsequently denied by the authority.

Requests for Application Modifications

- Within 14 days after an application is filed, the authority may propose a new location for the proposed installation.
- Parties may negotiate the new location, and any objective design standards, for 30 days.
- If the applicant accepts the modification, they must notify the authority and the application is deemed granted for the new location.
- If no agreement is reached, the applicant must notify the authority and the original application must be acted on within 90 days from the date of filing.
- Any required notifications must be in writing and provided via electronic mail.

Height Limitations

- An authority may limit the height of a small wireless facility to no more than 10 feet above the pole or structure on which the small wireless facility is to be collocated.
- A new pole is limited to the height of the tallest existing utility pole, as of July 1, 2017, located in the same ROW and within 500 feet of the proposed new pole.
- If there is no existing pole within 500 feet, the new pole is limited to 50 feet.

Make-Ready Work

- Authority may not require more make-ready work than is required to meet applicable codes or industry standards.
- Make-ready work fees may not include costs relating to preexisting damage or prior noncompliance.
- Make-ready work fees, including any pole replacement, may not exceed actual costs or the amount charged to communications providers other than wireless service providers for similar work.
- Make-ready work fees may NOT include any consultant fee or expense.

An Authority may deny an application for collocation of a small wireless facility if it:

- Materially interferes with the safe operation of traffic control equipment;
- Materially interferes with sight lines or clear zones for transportation, pedestrians, or public safety purposes;
- Materially interferes with the ADA or similar federal or state standards concerning pedestrian access or movement;
- Materially fails to comply with the 2010 edition of the FL DOT Utility Accommodation Manual; or
- Fails to comply with applicable codes.

What are Applicable Codes?

- Uniform building, fire, electrical, plumbing, or mechanical codes adopted by a recognized national code organization or local amendments to those codes solely to address threats of destruction of property or injury to persons;
- Local codes or ordinances adopted to implement this Act;
- Objective design standards adopted by ordinance.

What are Objective Design Standards?

- May require new or replacement poles be of similar design, material, and color;
- May require ground-mounted equipment to meet reasonable spacing requirements;
- May require a small wireless facility to meet reasonable location context, color, stealth, and concealment requirements.

NOTE: Authority may waive such standards if not reasonably compatible to a particular location or impose an excessive expense. Any waiver request must be granted or denied within 45 days of receipt.

Cities and Counties May Impose Reasonable and Nondiscriminatory Provisions Adopted by Ordinance addressing:

Registration, permitting, insurance coverage, indemnification, performance bonds, security funds, force majeure, abandonment, authority liability, and authority warranties

Costs and Fees Cannot be Imposed for:

- Routine maintenance
- Replacement of equipment of substantially same or smaller size
- Placement of micro wireless facilities (max of 24x15x12 inches) on suspended cables by an authorized communications provider with authorized access to the ROW and remitting taxes under Chapter 202

NOTE: Rates for collocation on authority utility poles may not exceed $150 per pole annually.

Undergrounding of Facilities

A wireless provider shall comply with an authority's nondiscriminatory undergrounding requirements that prohibit above-ground structures in the public rights-of-way.

NOTE: An authority may waive any such requirements.

A word of caution: The FCC has signaled its concern that undergrounding requirements conflict with the installation of wireless facilities.

Enforcement of Historic Preservation Zoning Regulations and HOA Restrictions

An authority may enforce historic preservation regulations under federal law and local codes, administrative rules, or regulations adopted by ordinance in effect on July 1, 2017, that are applicable to a historic area designated by the state or local authority.

NOTE: A city or county may waive any such ordinances or requirements.

HOA Restrictions Apply

Exclusions and Restrictions

The Act does not apply to:

- Collocations on privately owned utility poles or utility poles owned by electric cooperatives or municipal electric utilities.
- Privately owned wireless support structures or other private property without the consent of the owner.
- Retirement communities with more than 5,000 residents with underground utilities for electric transmission or distribution.
- Coastal barrier islands of less than 5 square miles, fewer than 10,000 residents, with voter approved debt to finance undergrounding of electric utilities.

Current Efforts by the FCC to (Further) Preempt Local ROW Authority

- Mobilitie Petition for Declaratory Ruling (WT Docket No. 16-421) – Waiting for Commission action that could establish guidelines on what constitutes fair and reasonable compensation for the use of public rights-of-way

- Wireless Notice of Proposed Rulemaking (WT Docket Nos. 17-79 and 15-180 – Comments due June 15, 2017; reply comments due July 17, 2017

- Wireline Notice of Proposed Rulemaking (WC Docket No. 17-84) – Comments due June 15, 2017; reply comments due July 17, 2017

Potential FCC Impact on State Wireless Legislation

- Could impose shorter timelines within which to act on wireless broadband infrastructure deployment applications.
- Could impose limitations on undergrounding ordinances.
- Could weaken historical preservation and environmental impact reviews.
- Could limit the use of third party consultants in the review process by restricting compensation.
- Could impose a “deemed granted” remedy for the failure to take action on applications within proscribed timeframes.
- Could place further restrictions on the use of moratoria.
- And more . . .

So, Now What?

- Review and amend existing codes to comply with HB 687, federal law, and FCC regulations and that they are as strong as they can be.
- Review current wireless broadband infrastructure application processes to ensure you can comply with required timeframes.
- Review applications to make sure you are asking for all the information you are entitled to obtain from the applicant.
- Develop “objective design standards” that fit your community’s needs and interests.
- Consider undergrounding options.

2017 FAC Legislative Review

FAC Annual Conference

FAC Public Policy Team

June, 2017

FAC 2017 Legislative Review

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FAC 2017 Legislative Review

- **3000+ bills filed**
- **@250 bills passed**

FAC experienced success in addressing many of its priorities:

- 3 major bills addressing the impact of the opioid epidemic
- A respectable level of beach funding (($50 million + $13 million (Matthew))
- Implementing legislation for renewable energy constitutional amendment that protects existing projects from tax exemptions
- Potential preservation of 10% cap on assessments of non-homestead property
- Protection from burdensome administrative rules with regards to the notice of pollution activity
- A relatively modest impact from the 2017 tax package that included a reduction in the commercial lease sales tax
- $85 million Florida Job Growth Grant Fund for infrastructure and workforce development

FAC 2017 Legislative Review

FAC also enjoyed success in having their voices heard as several bills failed to pass:

- Red light camera repeal
- Constitutional Officers / Charter Preemption
- Vacation Rentals
- Local Government Super Preemption
- Local Business Taxes
- Community Redevelopment Agencies

As a result of the 2017 session, Counties will face many policy-related challenges:

- Transportation Network Companies
- Drones & Personal Delivery Vehicles
- Small Cells/ Advanced Wireless Infrastructure Deployment (5G)
- Increased Homestead Exemption
- Implementing Medical Marijuana

FAC 2017 Legislative Review

Increased Homestead Exemption

- HJR (HB) 7105 (Rep. LaRosa / Sen. Lee)
- Ballot Language – Increased Homestead Property Tax Exemption. Proposing an amendment to the State Constitution to increase the homestead exemption by exempting the assessed valuation of homestead property greater than $100,000 and up to $125,000 for all levies other than school district levies.

- **Effective Date:** January 1, 2019

HB 7107 (Rep. LaRosa / Sen. Lee)

- Negates the traditional method of computing the rolled-back rate and the maximum millage to force absorption of impact
- Fiscally constrained county offset appropriation

How did we get here?

- Senate (1774); House (7105); & the "Big" trade for "Lake O"

FAC 2017 Legislative Review

Advanced Wireless Infrastructure Deployment ACT (Small Cells / 5G)

- HB 687 (Rep. LaRosa / Sen. Hutson)

- Limited Preemption to collocate small wireless facilities in the public rights of way
  - Minimum separation distances are prohibited
  - Streamlined permitting
    - Streamlined application
    - 60 days
    - Consolidated application for up to 30 sites

- Local Governments may:
  - Enforce applicable codes (building, fire, etc…)
  - Apply objective design standards by ordinance for small facilities, and new or replacement poles
    - Contextual location, color, stealth and concealment

FAC 2017 Legislative Review

Advanced Wireless Infrastructure Deployment ACT (Small Cells / 5G)

- Local Governments may (CONTINUED…):
  - Deny collocation if small wireless facilities interfere with:
    - Safe operation of traffic control equipment
    - Sight lines or clear zones for transportation or public safety
    - Compliance with ADA or similar laws
    - Compliance with 2010 FDOT Utility Accommodation Manual
  - Negotiate alternative location of facilities (14 days)(30 days)
  - Apply and enforce height restrictions – 10 feet above existing structures; tallest existing poles within 500 feet (ROW); or 50 feet
  - Apply and enforce insurance and performance bonds
  - Require "Make-Ready" work at telcom's expense
  - Rate for collocation attachments is $150 per year per pole
  - Limit 3rd party infrastructure companies (MOBILITIE) to only do contract work for traditional telecom

FAC 2017 Legislative Review

Medical Marijuana

- HB 8A (Sen. Bradley)
- Passed during special election 2017A

County Stuff

- No sales tax on marijuana or delivery devices
- Cultivation and processing regulations preempted to State
- Allows governments to ban
- If no ban, regulate similar to pharmicies
- Safe Zones – 500 feet from schools unless waived by local governments

Other Stuff

- Maximum of 25 licenses (@ 200k patients) 10 –added by October 2017
- Maximum of 35 dispensaries per license
- Dispensary location determined by zone & proportionate share of population
- Employers will be able to continue “drug-free” workplace policies
- Expanded uses include “nonmalignant chronic pain”

FAC 2017 Legislative Review
2017 Upcoming FAC Events

1. NACo Annual Conference – July 21, 2017; Columbus, Ohio
3. **Policy Conference – September 27, 2017; Osceola County**
4. Legislative Committee Weeks – September; Tallahassee
5. Legislative Committee Weeks – October; Tallahassee
6. **Legislative Conference – November 15, 2017; Sarasota County**
7. Legislative Committee Weeks – November; Tallahassee
8. Legislative Committee Weeks – December; Tallahassee
9. **First Day of 2018 Session: January 9th, 2018; Tallahassee**

Questions, Discussion & Guidance



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