
EMINENT DOMAIN AND YOUR LOCAL ORDINANCES

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Topics

- **Ordinances Overview**
- **“Saving” Ordinances**
- **Potential options when there is a taking and the local government refuses a variance**
- **Dangerous Changes in the Law**

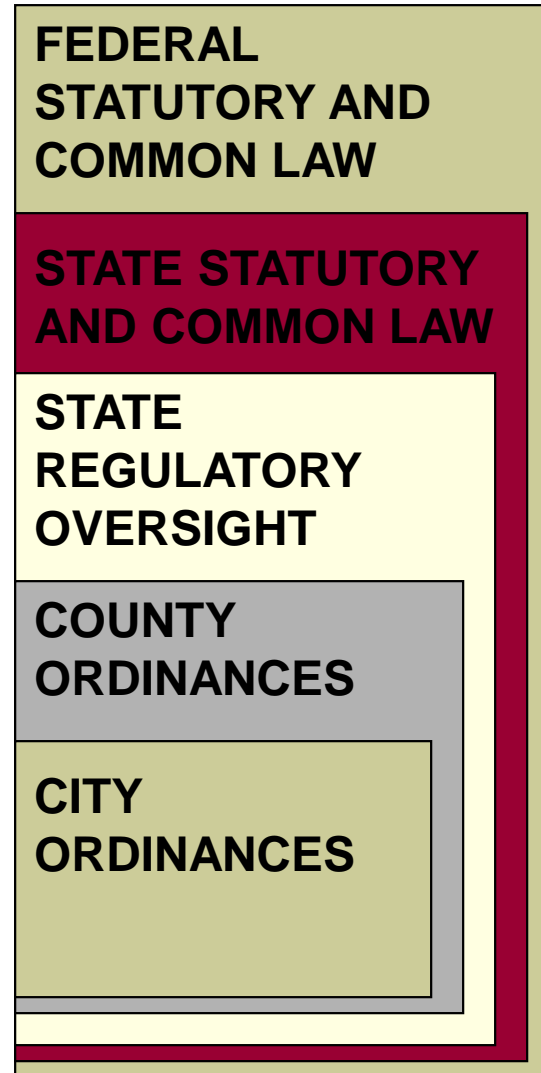


Ordinances Overview

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Ordinances Generally

- Local Laws created by Cities or Counties
- Most likely set of laws to impact your daily life (politics, and the law are local)
- At least 318 separate sets of ordinances in Florida
- www.municode.com (but be careful, they do not always update that frequently)



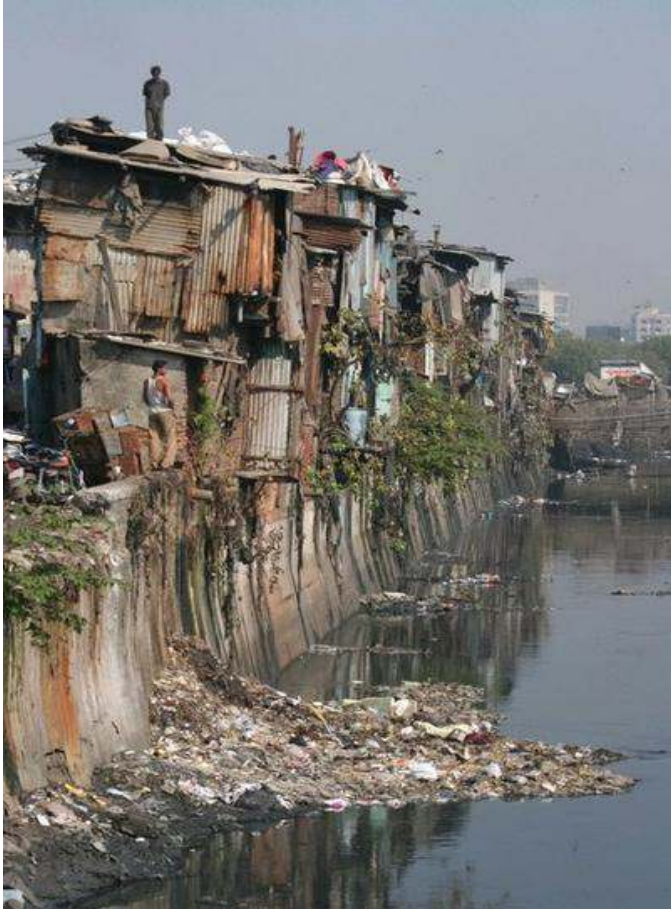
Ordinances Generally

- Vary greatly from one jurisdiction to another:
 - Some Cities have a handful of pages while others have multiple volumes.
- Come from one of a few places:
 - Adopting 'uniform' type ordinances
 - Staff requests to streamline processes/fix things
 - Commissioner requests for action
 - County/City Attorney recommendations to deal with issues or new case law.

Ordinances - Issues

- **Usually (but not always) reviewed by attorney.**
- **Occasionally indecipherable or poorly worded.**
- **Often more susceptible to political forces/public outcry than statutory law.**
- **May be illegal or amount to unconstitutional violation of rights.**
- **Staff interpretation and consistency**
 - **The vaguer the ordinance, the more open to interpretation and the more staff discretion.**

GOVERNMENT'S JOB / PURPOSE OF PLANNING AND ZONING:



**ENFORCE THE POLICE
POWERS**

PROTECT THE HEALTH,
SAFETY, WELFARE (SOME
SAY AESTHETICS) OF THE
COMMUNITY

ORDINANCES RESTRICTING LAND USES

- Setbacks
- Parking minimums/configurations
- Landscaping requirements
- Minimum/Maximum Floor Area Ratio
- Lot size
- Open Space
- Curb Cuts
- Drainage/retention
- Other site configuration requirements
- Is the property “grandfathered” and will the taking trigger a requirement that it be brought to current code?

Impact of Taking and Ordinances

- **IN THE ABSENCE OF A SAVING ORDINANCE OR VARIANCE, IF THE TAKING WOULD MAKE THE LOT VIOLATE THESE ORDINANCES, THE IMPACTS ON THE PROPERTY COULD BE SEVERE**
 - **Potential that Property could be an unbuildable/uneconomic remainder**
 - **Easiest to deal with since land has only nominal value and no uses**
 - **Potential that Property could be Less Useful;**
 - **Potential that Highest and Best Use Could Change;**
- **These two require assistance from Planners and Engineers to investigate Cures.**

Uneconomic Remainders



Uneconomic Remainders



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The Eminent Domain Case

- The Main Question Pertaining to Compensation is the “reasonably probable” standard. Thus, Owners’ Planners can opine based on the set up whether the government could/would grant relief.
 - “The granting of an earlier and isolated variance or change may be irrelevant, but the granting of many similar variances or changes may be highly persuasive. Expert testimony as to “reasonable probability” is impermissible if based merely on speculation or groundless prognostication, but can be admitted where necessary to explain previously admitted factual evidence tending to prove or disprove the existence of a reasonable probability. That testimony may include an evaluation of the degree of probability that reasonably exists, since contingencies of this type may vary in their probability.”
 - Broward v. Patel, 641 So.2d 40, 43 (Fla. 1994)

The Eminent Domain Case

- **Determining reasonable Probability requires examination of the ordinance at issue and the local government's policies regarding variances in the context of takings.**
- **Danger is if Owner accepts an offer based on what is “reasonably probable” and the cure or variance is not approved by local government in reality.**
- **Best method: In the absence of a Saving Ordinance, discuss client's option to actually apply for permit/variance.**

Factors to Consider

- Timing- How long will it take to get permitted?
 - Impact on the Case
 - Impact on construction
- Cost of attaining variance/permit
 - Not Necessarily paid in full by condemning authority
 - Client may have to “front” certain costs

Where the Taking Creates Non-conformity:

“Saving” Ordinances

The Saving Ordinance Continuum

“it is what it is”

“We’re here to help”



Example 1:
No Relief
From Taking;
All property
must meet all
codes

Example 3: All
property
(regardless of
taking) must seek
variance through
normal avenues

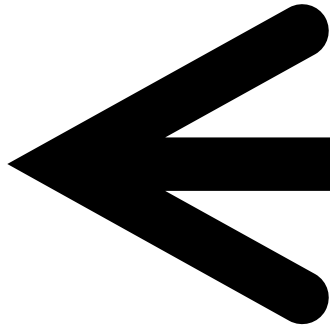
Example 4:
Some Relief
From Taking; All
property must
meet certain
codes

Example 2:
Any Property
made non-
conforming
by taking
automatically
considered
conforming

OR

Example 5: Discretion Given to Staff to
determine if Police Powers are met and
Condemning Authority can apply for
cure/variance from staff

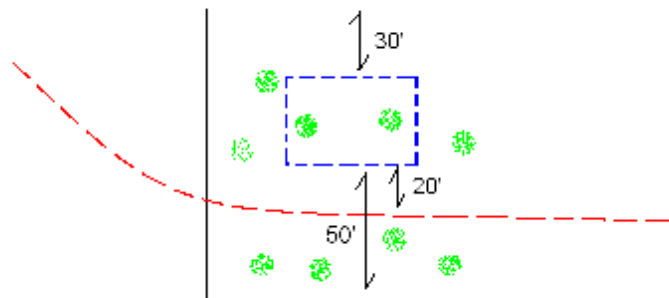
The Saving Ordinance Continuum



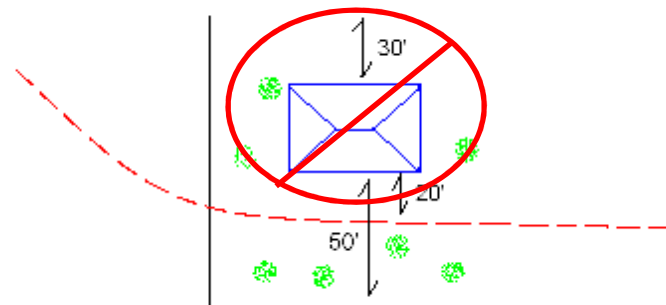
**Example 1:
No Relief
From Taking;
All property
must meet all
codes**

Example 1: No Saving

- If Parcel is non-conforming in the after and there is no saving ordinance:
 - Drop in Highest Best Use or
 - Total Wipeout – condemning authority must pay for whole property (less nominal value)



Unbuilt lot with available building foot print; useless remainder



Lot with building made non-conforming by taking; building comes down

Why Would Any City have one of These?

- Good question, but they are out there
- City of Ocoee- no saving ordinance and no variance ordinance; indications that staff has construed this to mean “after” must meet code
- Arguments go as follows:
 - Ordinances exist for a reason
 - If we give staff discretion, there will be inconsistencies which lead to lawsuits (§1983)
 - If we give variances, it becomes spot zoning
 - Trying to avoid this:



AUSTIN INDUSTRIES

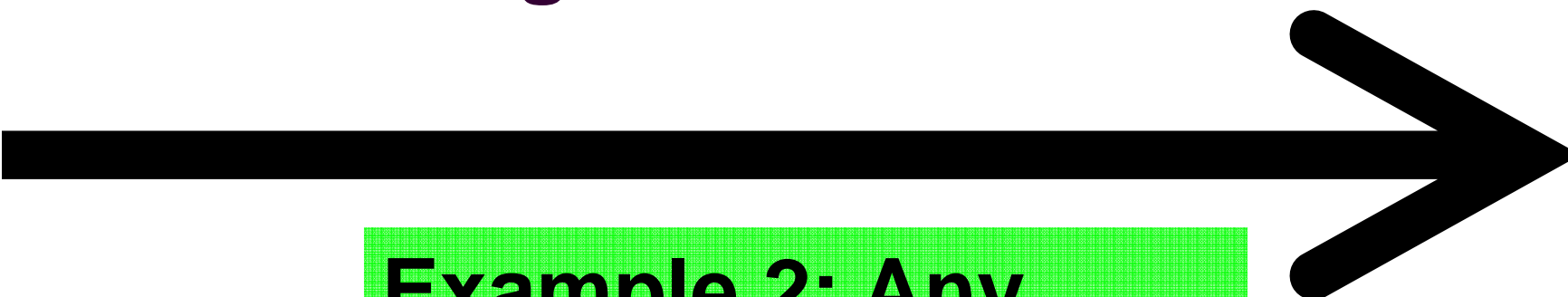
Hillsborough Ave. Tampa
Doors basically open into major roadway
Front Porch steps end inches from sidewalk
No vegetation along Roadway
Screams “blight” & danger

Other Examples

- Church in Northeast
- Imagine the mess when hundreds of people are filing in or out onto this tiny sidewalk!



The Saving Ordinance Continuum



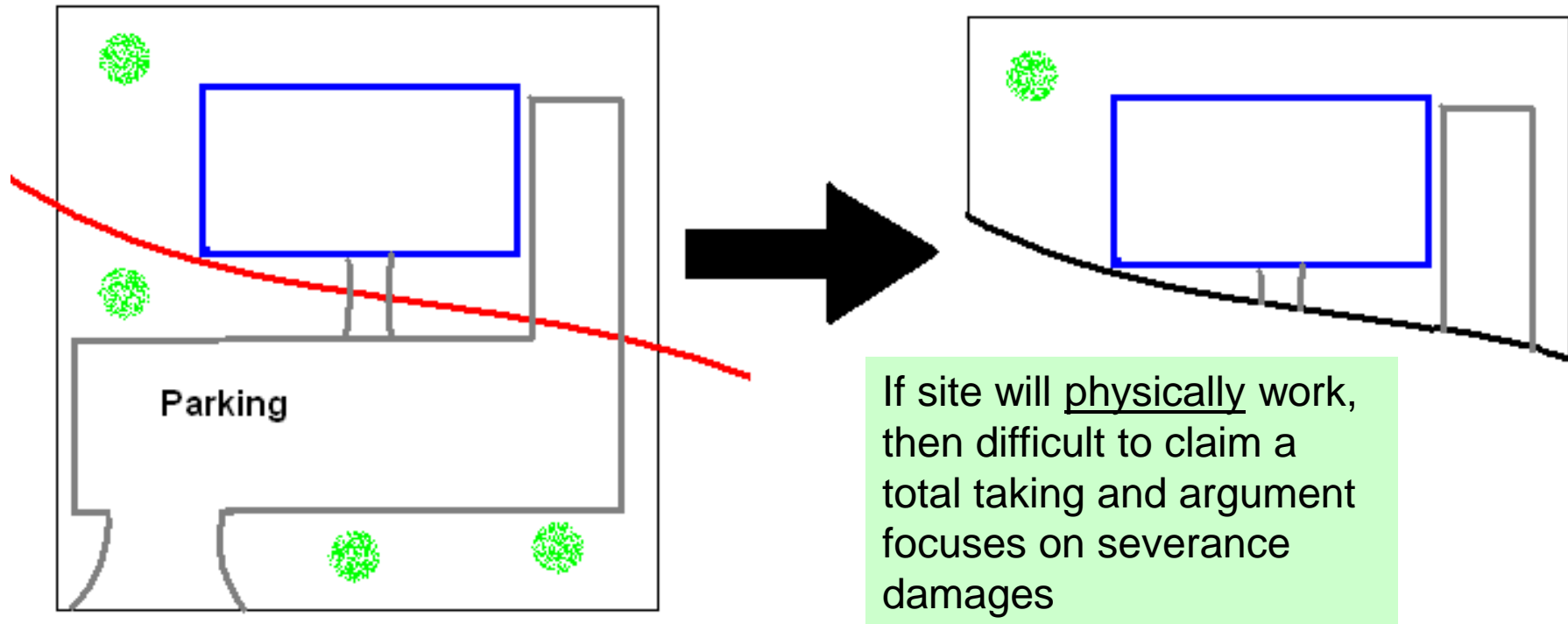
**Example 2: Any
Property made non-
conforming by
taking automatically
considered
conforming**

Opposite End of the Spectrum

- Example 2: Property Cannot be made nonconforming by taking.



“Legally Permissible” taken out of the HBU Equation



CITY OF FORT WORTH, TX

7.108 Exercise of Eminent Domain

A lot, tract or parcel occupied by a lawful structure that complies with the development regulations or a use of land that complies with the use regulations shall not be rendered nonconforming due to the acquisition of right-of-way by the exercise of eminent domain or threat of eminent domain by a governmental entity. Such designation shall apply only to noncompliance that results from the acquisition of right-of-way, but shall not apply to noncompliance that results from future zoning ordinance amendments.

Total Saving Ordinances

- **Good for Condemning Authority – cure issues become isolated to physically possible and market based**
- **Can be bad for local governments – in extreme cases causes very unsightly neighborhoods**
- **Non-conformity can be a contributing factor to a determination of blight down the road**



747
AUSTIN INDUSTRIES

LOST



SIDEWALK

HAVE YOU SEEN OUR SIDEWALK? Sorry guys,
Random cracks, Super Hair, Missing since March
2006. We miss it dearly. If you have any info,
please email us at info@grayrob.com.
Thank you.

Can we have a sidewalk?

Please? Pretty please?

With a cherry on top?

Aww, come on guys...

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Further Down the Spiral

Medford, Oregon

“(6) The taking by eminent domain action of a portion of an existing legal nonconforming lot shall not affect the legal right of the owner to use the remainder of such lot in any manner that would have been legal prior to the taking.”

So a substandard lot can become even more substandard if part of it is taken?!?

The Saving Ordinance Continuum

Example 3: All property (regardless of taking) must seek variance through normal avenues

No Condemnation Provision, but Variance Board

■ City of Titusville

Sec. 169. Powers of board of adjustment.

The board of adjustment shall have the following powers:

- (1) To hear and decide appeals where it is alleged there is error in any order, requirement, decision, or determination made by an administrative official in the enforcement of this Charter or of any ordinance adopted pursuant thereto.
- (2) To hear and decide special exceptions to the terms of the ordinance upon which such board is required to pass under such ordinance.
- (3) To authorize upon appeal in specific cases such variance from the terms of the ordinance where, owing to special conditions, a literal enforcement of the provisions of the ordinance will result in unnecessary hardship, and so justice done.

No Condemnation Provision, but Variance Board

- Variance Board Could Grant Relief
- Condemning Authority has no right to take property before board
- Condemning Authority will have to wait for decision AND hope/rely on owner to undertake request for variance
- “Unnecessary Hardship” So vague, no way to predict outcome
- Fight becomes “what is reasonably probable?”

The Saving Ordinance Continuum

**Example 4: Some
Relief From Taking;
All property must
meet certain codes**

Example 4: Some Variances

Seminole County, FL

Sec. 70-275. Nonconforming or substandard lots created by eminent domain proceedings.

Any lot or parcel that shall be made nonconforming or substandard after the effective date of this land development code as a result of eminent domain proceedings instituted by the city or other governmental agency, or through a voluntary conveyance by such lot or parcel owner in lieu of formal eminent domain proceedings, which lot or parcel **except for such eminent domain or voluntary conveyance would be an otherwise conforming lot or parcel**, shall be deemed to be a conforming lot or parcel for all purposes under this chapter. **However, such lot/parcel shall meet district lot/parcel setback and minimum building area requirements.**

Seminole County Issues

- **“Except for such eminent domain or voluntary conveyance would be an otherwise conforming lot or parcel”**
 - Does a condemnation of a legally non-conforming lot require bringing the entire property into conformity?
- **“However, such lot/parcel shall meet district lot/parcel setback and minimum building area requirements.”**
 - So apparently no variances at all for these factors.
- **Who decides? Is this a staff issue? Need to go before a variance board? The whole commission?**
 - Vagueness is once again dangerous.

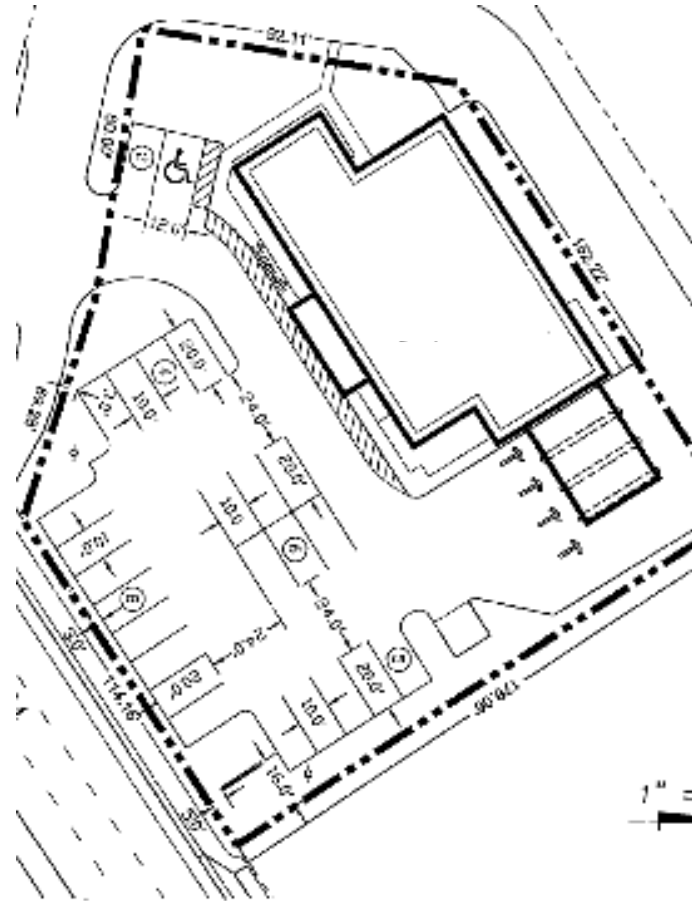
Strip Taking for 434

- Taking of Parking Area
- Taking of Sign
- Taking of County Required Landscape Buffer



Proposed Partial Cure

- Reconfigure Parking
- Move Sign
- Still Need Relief from Landscape Buffer



Letter From Staff

PLANNING AND DEVELOPMENT DEPARTMENT
Development Review Division



October 14, 2008

RE: κ, West SR 434

Dear Mr.

Thank you for submitting your proposed site plan for the κ on west S.R. 434. Seminole County Development Review has no issues with your proposed layout and parking reduction. A variance is hereby approved to go forward with design and permitting of the site as proposed.

If you have any questions or concerns, do not hesitate to call or email.

Sincerely,
SEMINOLE COUNTY

A handwritten signature in black ink, appearing to read "Laurence Poliner".

Laurence Poliner, Development Review Manager
DEVELOPMENT REVIEW DIVISION

- **Note: NOT a final permit and should not be relied on as such (see case law discussion infra)**
- **Issue: How Much Reliance Can we Place on this?**
- **Is this a code interpretation issue (up to staff), or a variance (up to Board of A & A)?**

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The Saving Ordinance Continuum

Example 5: Discretion Given to Staff to determine if Police Powers are met and Condemning Authority can apply for cure/variance from Staff

Orange County, FL

Entire Provision included in your packet, I'll just hit the high points:

- Eminent Domain is Costly (time and money)
- Allowing county staff, pursuant to established guidelines/ procedures to grant waivers or to apply for variances on behalf of affected property owners serves a valid public purpose.
- The managers of the applicable department may grant waivers or exceptions, or to seek variances on behalf of owners of property.
- The department manager or his designee shall provide a copy of a letter to the County that the waiver or exception does not adversely affect the public health, safety or welfare.
- The condemning authority or the landowner may apply to the appropriate department manager for a waiver or exception.
- If the waiver or exception is denied by the department manager, the owner or condemning authority may apply for a variance before the appropriate board.

Orange County, FL

If existing lots, parcels, structures or uses become nonconforming:

- **Existing characteristics of use which become nonconforming or increase in nonconformity as a result of a taking, including but not limited to, minimum lot size, setbacks, open space, off-street parking, landscape requirements, drainage and retention shall meet code requirements to the greatest extent possible and to the satisfaction of the appropriate department manager.**
- **In granting any waiver or exception to code requirements, the manager shall determine no adverse impact to visual, safety, aesthetic or environmental concerns of neighboring properties; the safety of pedestrians or operators of motor vehicles; and Preserve off-street parking as much as practicable.**

Orange County, FL

- If a structure or parking must be moved as a result of taking or safety concerns, it may be rebuilt provided no harm to public interests (manager's discretion)
- Where part of a principal structure is taken, the reconstruction of the taken structure (same size and use) may be permitted. The reconstruction must meet code to the greatest extent possible, to the satisfaction of the appropriate department manager or designee and building official. The reconstructed structure shall thereafter be deemed conforming.
- Signs may be relocated, but must meet setbacks and (again) determination of no public harm

Orange County, FL

BUT there is a Catch All: (Sec 30-643)

“this article shall not be interpreted to allow for the continued existence of building or other safety code violations that are determined to be an immediate threat to the public health, safety or welfare. The appropriate building officials and inspectors are hereby authorized to take any and all necessary steps to enforce all applicable building and safety codes even though the subject property is part of a condemnation action.”

Orange County, FL

- Sec. 30-642 gives staff authority to testify to likelihood of variances based on:
 - History of similar variances, waivers or exceptions being granted
 - Analysis of why the variance, waiver or exception would not adversely affect surrounding property owners.
 - Analysis of the hardship imposed by the condemnation action initiated by the governmental or public agency.
 - Analysis of any other criteria normally considered by the appropriate boards
 - That the variance, waiver or exception would not adversely affect the public health, safety or welfare.

Citrus County

- Materials in your packet
- Provides for Administrative Variances which may be applied for by either the property owner or the condemning authority
- Floor area ratio and density are automatically conforming
- County Staff given power by Commission to grant most other variances (setbacks, open space, landscaping, parking etc.)
- Works well because streamlined, particular person placed in charge of issuance of variances and discretion is for specific types of variances
- Also contains references to Florida Statutes re: Health, Safety and Welfare; requirement that variance be as small as possible and not adversely impact adjacent landowners
- Provides for appeals process in case of denial

Staff Discretion

- **If properly defined and funneled through one individual who has responsibility for consistency, best possible position. Allows quick determination of variances and allows either party to apply for the variance to show their cure plan will work**
- **Keeps process short and outcome reasonable**

Condemning Authorities: Help us Help You!

- **Planning enough Pre-OT time into schedules can help the parties get on the same page regarding the taking**
 - **Conversations with the local government may show that a small change to the configuration of the taking may significantly change the damages**
- **Recognize that failure to fully permit the cure/ attain a variance is a ticking time bomb.**
- **When Condemning Authorities adequately plan for this in setting their time tables, extremely helpful**
- **Also, when condemning authority is proposing a cure, the further down the permitting path they travel, the quicker a feasibility determination can be reached.**

What to do when the Local Government Will Not Listen

- As mentioned before, Ordinances come in all different types
- Occasionally, the impact of the Ordinance is unconscionable and the Government will not listen (to either the land owner or the condemning authority)
- If both parties are on the same page, potential other avenues include appeal to variance board, §1983 Action, declaratory judgment inside/outside eminent domain case

A Brief Story: Surfing Too Close to the Pier



Photo taken from
Pensacola Beach Pier

Escambia County
Ordinance:

“No one may surf
within 500 feet
of a pier in
Pensacola Bay
on the Gulf of
Mexico.”

Surfing Too Close to the Pier

■ Relevant Facts:

- 20+ people in the water; 3 came out when summoned by Sheriff
- Pier had been destroyed by Hurricane Opal and had not been rebuilt (only Pilings)
- Pensacola Bay is on the opposite side of the island from the Gulf of Mexico

■ Judge's Ruling:

- Ordinance is being selectively applied (only a few arrested)
- “Staff” interpretation is unreasonable (No Pier!)
- Ordinance is impermissibly vague (couldn't know what isn't allowed from reading)
- Ordinance doesn't make sense as written (“Or” vs “On”)

Surfing Too Close to the Pier

Lessons:

- There are all kinds of ordinances governing a wide variety of actions.
- If the ordinance seems unduly oppressive and staff/ is unwilling to consider variance, consider
 - (1) request relief from Zoning Adjustment/Appeals Board (if one exists) or
 - (2) a separate declaratory action against local government
 - (3) §1983 Action based on equal protection or due process
 - (4) challenge the application within the Eminent Domain case (probably won't work, see *Florida Inland Nav. Dist. v. Humphrys*, 616 So.2d 494 (Fla. 5th DCA 1993))
 - trial court ruled that certain Brevard County setback ordinances did not apply to the Humphryses' remaining property as a result of a motion filed by FIND asking the trial court "to adjudicate issues of law." In effect, it operated as a motion in limine seeking a trial court ruling which would preclude the Humphryses from claiming additional severance damages on the basis that they would be prohibited from constructing single or multifamily dwellings on their remaining property within 1,000 feet of the FIND construction project. This ruling, of course, could not be a legal benefit to the Humphryses in regard to any subsequent zoning dispute they may have with Brevard County for the simple reason that the latter was not a party to this litigation.

Specific Issues

- What about when the **Condemning Authority is the local government?**
- What is the **Public Perception of these Ordinances (Martin County Case Study)**

What about when the Condemning Authority is the Local Government?

- Need to be extra careful regarding allowing variances and nonconformity
- Potential for accusations of “bargaining away police powers” – i.e. no contract zoning
 - “The protection of public health, public morals, and public safety is a duty which the state owes to its inhabitants, and they have authorized it to do such things as are necessary for the performance of this duty; it is a sacred trust, and the police power is derived from the necessities of its execution. It is well settled that the state cannot divest itself, by contract or otherwise of its police power” - *Florida East Coast Ry. Co. v. City of Miami*, 79 So. 682 (Fla. 1918).

Case in Point

- City of Kissimmee Condemning Right of Way
- Request by Property owner to leave certain improvements in/immediately adjacent to Right of Way
- Needed determination by City Staff that remaining condition was not danger to public health, safety or welfare prior to agreeing to owners' request.

Stairs at Issue



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Stairs at Issue



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Case Study: Martin County

- Beware Public Perception!!!
- Martin County Preparing for FDOT project Called “Indian St. Bridge”
- County Passed Ordinance 818 giving FDOT the right to petition for variances on owners’ behalf



Case Study: Martin County

- **Martin County Ordinance 818:**
 - **County Commission must approve Waivers by Project**
 - **For Undeveloped lots - waiver only for minimum lot size**
 - **For Developed lots requiring no moving of structure – “including but not limited to” lot size, landscaping etc.**
 - **For Developed lots requiring moving of structures – “including but not limited to” parking, landscaping, stormwater, dumpsters, lights and signs**
 - **Both Condemning Authority and Owner can apply**
 - **Heard by Board of Zoning Adjustments (Public Hearing)**
 - **Board must find that variance won’t adversely impact health, safety, aesthetics, environmental conditions and cannot promote continuation of existing “unfeasible” or “impractical” uses made so by impact of taking.**

Martin County: The Fallout

- Major Citizen Uproar
- Chief complaint was that County was “selling them out”
- Argued FDOT should have to pay and should not be let off the hook
- News stories related to the fallout are in the packet
- **“Dana Earle McPherson, a lawyer representing landowners in eminent domain cases, said the ordinance will reduce the value of condemned properties and allow FDOT to blame Martin County. ‘The dirty little secret that makes condemning authorities like FDOT quake is a word called damages,’ McPherson said. ‘That’s what they’re trying to avoid paying.’”**

DANGER AHEAD!!!

**CITRUS COUNTY v. HALLS RIVER
DEVELOPMENT, INC.**

--- So.2d ----, 2009 WL 722053 (5th DCA)

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FACTS

- 1989 - County Commission adopts Comp Plan designating the property as "Mixed Use" ("MXU") which permitted, among other uses, a multifamily condominium.
- 1996 - County submitted Plan changes to the DCA. After the DCA approved, the Commission adopted.
- That Plan amendment included changing the Halls River property classification from MXU to CL (1 unit per 20 acres).
- County changed the Property classification from MXU to CL in the Plan and on the FLU Map, BUT did not update the Land Development Code or the zoning maps which continued to reflect that the property was zoned MXU.
- These were not amended because the County believed that the 1996 amendment allowed it to continue to approve development at higher densities in the areas reclassified from MXU to CL.

Hall's River

- Before entering into a contract in February 2000, Owner contacted County Staff to confirm that the proposed condominium project could be built.
- Hall's River purchases in January 2001
- “The County staff assured Mr. Longacre that development of multifamily condominiums was a proper use for the property.” After a few modifications to the project, he gained staff recommendation for approval.
- Also obtained SWFWMD & Army Corps permits.
- On February 12, 2002 after public hearing Citrus County Commission approved the project 3-2.

Hall's River

- **The project's opponents filed several lawsuits against the County challenging the project's approval.**
- **In November 2002, the trial court overturned the Commission's approval of the project, concluding that the Plan, which had designated the property as CL since 1997, controlled over the LDC's MXU designation.**

5th District Held NO Bert Harris:

- First, Held the use was unreasonable:
 - Halls River's intended use of the property for a condominium was not reasonable given the Plan's CL designation for the property. **Even though the County candidly admits that its staff misinformed Halls River regarding the allowable uses of the property, Halls River, like the County, should have known that the property's CL designation in the Plan would control over the LDC's MXU designation.**

Halls River failed to establish a vested right based on a theory of equitable estoppel

- Equitable estoppel may be invoked against the government when an owner (1) relying in good faith (2) upon some act or omission of the government (3) has made such a substantial change in position or incurred such extensive obligations and expenses that it would be highly inequitable and unjust to destroy the rights that the owner has acquired.
- However, estoppel should be invoked against the government only in exceptional circumstances.
- And, most importantly, the doctrine of estoppel does not generally apply to transactions that are forbidden by law or contrary to public policy.
- Once the Plan, as amended, was approved by the DCA in 1997, the County was without discretion to undertake development actions inconsistent with it.
- The County acted beyond its lawful authority in approving the project. “Halls River never had a lawful right to the proposed use for a multifamily dwelling, the County staff's misadvice notwithstanding.”
- We recognize that almost universally, the result in this case will be seen as unduly harsh. There is no doubt that Halls River was misled to its detriment by the County's unintentional misadvice.

Lessons from Hall's River

- **Good News – Still Could be Reconsidered or go up to Fla. Supreme Court**
- **Bad News – Makes clear that reliance on staff or even commission action is not the end when it comes to land development, variances, whether something meets or fails the vague police powers and the like.**

The Lynchpin Question:

- **How do we Ensure Owner is not under compensated if Cure/Partial Cure is Proposed?**

ANSWER

**Get that Permit in Hand!!
(and probably start construction)**

**This is the ONLY safe way to ensure
the proposed cure will be allowed by
the local government**

Anything less is flirting with disaster

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