A to Z of Land Use Law for Planners in 90 Minutes

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AGENDA

A. GENERAL OVERVIEW OF THE LAW

B. THREE LAND USE LAW QUESTIONS

1. Can the local government stop/condition the developer’s project if the neighbors object at the public hearing?

2. Can the local government require the developer to pay fees and/or dedicate land in order to get their project approved?

3. Will the developer be successful in their takings claim if the local government:
   (a) Denies their project
   (b) Adds too many conditions
   (c) Requires too many fees
   (d) Requires too much land to be dedicated.
Section A.

GENERAL OVERVIEW OF THE LAW
Why Should Planners Have A Working Knowledge of Land Use Law to Be an Effective Planner?

- It is part of most Masters of Urban & Regional Planning (MURP) Programs
- On the AICP Exam
- “If a police officer must know the Constitution, then why not a planner?”
  –USCT Justice Brennan
- Hard to separate planning issues from legal issues- both are interrelated
## WHAT IS THE LAW?

<table>
<thead>
<tr>
<th>Federal</th>
<th>State</th>
<th>Local</th>
</tr>
</thead>
<tbody>
<tr>
<td>▶ Executive Order (President)</td>
<td>▶ Executive Order (Governor)</td>
<td>▶ Ordinances</td>
</tr>
<tr>
<td>▶ Statutes (U.S. Congress)</td>
<td>▶ Statutes (Legislature)</td>
<td>▶ Zoning Code</td>
</tr>
<tr>
<td>▶ Court Decisions (Federal Courts)</td>
<td>▶ Court Decisions (State Courts)</td>
<td>▶ Site Plan Approval</td>
</tr>
<tr>
<td></td>
<td></td>
<td>(County/ City Elected Officials)</td>
</tr>
</tbody>
</table>
How Many Constitutions Are There in the United States?

51
What Laws Do I Need to Know as a Florida Planner?

- Federal Law (All of it)
- State Law (Only Florida’s)
- Regional Law (Only your specific region)
- County Law (Only your specific county)
- Local Law (Only your specific city)
- Private Restrictions (Only your specific property)
Are the “Fair Share” Regional Affordable Housing Requirements Established by the Supreme Court of New Jersey in the Mount Laurel Decision Applicable to Florida?

NO
All of the Law Can be Placed Into Two Buckets

**CODE**

STATUTES,
ADMINISTRATIVE CODES,
ORDINANCES,
REGULATIONS, RULES,
(EVERYTHING THAT IS NOT A COURT DECISION)

**CASES**

ALL COURT DECISIONS
EXAMPLE OF “CODE”

**FEDERAL:** EPA/ DOT/ HUD/ FAA/ ACOE/ADA

**STATE:** DEP/ DOT/ DRI/ F.S. 163

**REGIONAL:** SFRPC/ SFWMD

**COUNTY:** Environmental/ Concurrency/ Platting Ordinances

**LOCAL:** Comprehensive Plan/ Zoning Code/ Subdivision Regulations/Site Plan Regulations/ Development Orders/ Building Permit/ Certificate of Occupancy
### EXAMPLES OF “CASES”

#### FEDERAL
- U.S. Supreme Court
- U.S. Court of Appeals (11th Circuit)
- U.S District Court (Several districts in Florida)

#### STATE
- Florida Supreme Court
- Florida District Court of Appeal (Several Districts in Florida)
- Florida Circuit (Trial) Court (Many circuits in Florida)

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"STARE DECISIS": To abide by or adhere to decided cases
What Law Controls in a Conflict?

IT DEPENDS

- Supremacy Clause
- Did a Higher Government Preempt/Fill the Field?
- Home Rule vs Dillon’s Rule
  - County/ City Charter
What is Land Use Law?

Any Government Law (Code or Case) that controls the use of the land

Example: Zoning Code
Land Use Law Is **Not** An Absolute Science

Property Rights

- Right to Develop My Property

Public Interest

- Protect the Public from Nuisances on your Property

**BALANCE**
“Police Power”

The Legal Basis that Allows Local Government to Control/Regulate the Use of Land in their Jurisdiction

To Protect Public Health, Safety, Morals and Welfare
“Police Power”

Is Very, Very Broad and Local Government Has A Lot of Discretion in Regulating the Use of Land in Their Jurisdiction

The House Usually Wins!
THERE ARE LIMITS TO POLICE POWER

Procedural Due Process (Notice, Hearing, Opportunity to be heard)

Substantive Due Process (Must advance a legitimate government interest)

Equal Protection (Fairness)
THERE ARE LIMITS TO POLICE POWER

1ST Amendment: Freedom of Speech/Religion

5th Amendment: Government CANNOT Take Your Property Without Paying For It

14th Amendment: Makes the Bill of Rights (1st 10 amendments) applicable on state/local governments
THERE ARE LIMITS TO POLICE POWER

<table>
<thead>
<tr>
<th>Fundamental Rights</th>
<th>Guaranteed by U.S. Constitution/Bill of Rights</th>
</tr>
</thead>
<tbody>
<tr>
<td>Strict Scrutiny</td>
<td>Compelling Interest</td>
</tr>
<tr>
<td>Intermediate Scrutiny</td>
<td>Important Interest</td>
</tr>
<tr>
<td>No Fundamental Right</td>
<td>Fairly Debatable/Rational Basis <strong>ONLY</strong></td>
</tr>
</tbody>
</table>
HOW DOES A COURT DECIDE?

IT DEPENDS

BALANCE
HOW DOES A COURT DECIDE?

► Presumption of Validity
► Cannot be Arbitrary or Capricious
  (Must be based on substantial competent evidence- need to create a good Record)
► Fairly Debatable
► Judicial Deference to Local Government

The House Usually Wins!
HOW DOES A COURT DECIDE?

**Legislature Action** (Large Area Comprehensive Plan Amendment/ Large Area Rezoning)
- Local government has almost absolute discretion

**Quasi-Judicial Action** (Small Area Rezoning/Site Plan Approval)
- Local government must be fair in applying the code to the development application

**Administrative Action** (Building Permit)
- Local government must issue the final building permit if it meets all applicable regulations- NO discretion for elected officials.
TWO MOST IMPORTANT PHRASES YOU LEARNED SO FAR TODAY

IT DEPENDS

BALANCE
IF I AM A PLANNER, HOW DO I KNOW WHAT “IT DEPENDS” AND “BALANCE” REALLY MEAN?

- Go Ask the County / City Attorney
- It Is Not Your Job to Be an Attorney: However, Hopefully You Will Now Be Able to SPOT THE ISSUES So You Know When To Speak To An Attorney.
TRANSITION IN THE PRESENTATION

Moving From General Concepts of the Law to Applying It to Specific Land Use Law Situations
THREE LAND USE LAW QUESTIONS

1. Can the local government stop/condition the developer’s project if the neighbors object at the public hearing?

2. Can the local government require the developer to pay fees and/or dedicate land in order to get their project approved?

3. Will the developer be successful in their takings claim if the local government:
   (a) Denies their project
   (b) Adds too many conditions
   (c) Requires too many fees
   (d) Requires too much land to be dedicated.
1. Can the local government stop/condition the developer’s project if the neighbors object at the public hearing?

QUESTION RESTATED:

Can politics beat out property owner’s or developer’s rights so that elected officials can get re-elected?
2. Can the local government require the developer to pay fees and/or dedicate land in order to get their project approved?

QUESTION RESTATED:

Can the government take advantage of property owners or developers since they are the “government”?
3. Will the developer be successful in their takings claim if the local government:
   a) Denies their project
   b) Adds too many conditions
   c) Requires too many fees
   d) Requires too much land to be dedicated.

QUESTION RESTATED:

Can property owners and developers sue the s%#! out of the government if they do not get what they want?
ANSWER TO THREE QUESTIONS

IT DEPENDS
Land Use Law Is Not An Absolute Science

Property Rights
Right to Develop My Property

Public Interest
Protect the Public from Nuisances on your Property

BALANCE
“TUG OF WAR” BETWEEN GOVERNMENT AND DEVELOPER

<table>
<thead>
<tr>
<th>LOCAL GOVERNMENT</th>
<th>POLICE POWER/ NO TAKING = NO $$$</th>
</tr>
</thead>
<tbody>
<tr>
<td>DEVELOPER</td>
<td>INVERSE CONDEMNATION YES TAKING = YES $$$</td>
</tr>
</tbody>
</table>

Matter of Degree When a Court Decides
Example of How a Court Would Decide If It Is A Taking (Smart Phone Scenario)

<table>
<thead>
<tr>
<th>Government Takes Your Phone</th>
<th>Eminent Domain</th>
<th>Yes, Physical Taking</th>
</tr>
</thead>
<tbody>
<tr>
<td>Government Requires You To Turn Your Phone Off On The Plane</td>
<td>Police Power</td>
<td>No Taking</td>
</tr>
<tr>
<td>Government Lets You Buy A Phone But Does Not Let You Turn It On</td>
<td>Inverse Condemnation</td>
<td>Yes, Regulatory Taking</td>
</tr>
<tr>
<td>Government Requires You to Turn It Off When _____, When _____, and ________</td>
<td>Not Sure</td>
<td>??? Taking</td>
</tr>
</tbody>
</table>
THERE IS NO “BRIGHT-LINE” CRITERIA TO DECIDE IF A TAKING HAS OCCURRED

► IF THE REGULATION GOES “TOO FAR” IT WILL BE RECOGNIZED AS A TAKING  
(PENNSALVANYA COAL VS. MAHON 1922)

► WHAT DOES GOES “TOO FAR” MEAN?

► COURT NEEDS TO DECIDE, AFTER BALANCING SEVERAL FACTORS (OR JUST FLIPPING A COIN). SINCE THE FINAL OUTCOME IS UNCLEAR, THIS PUTS PRESSURE ON ALL PARTIES TO SETTLE.
PENN CENTRAL
# MAJOR TAKINGS CASES IN LAND USE LAW

<table>
<thead>
<tr>
<th>LORETTO</th>
<th>PENN CENTRAL</th>
<th>LUCAS</th>
</tr>
</thead>
<tbody>
<tr>
<td>100% PHYSICAL TAKING OF CERTAIN PROPERTY RIGHTS</td>
<td>BALANCE (3) FACTORS:</td>
<td></td>
</tr>
<tr>
<td>(1) CHARACTER OF GOVERNMENT ACTION</td>
<td></td>
<td></td>
</tr>
<tr>
<td>(2) ECONOMIC IMPACT OF REGULATION ON OWNER</td>
<td></td>
<td></td>
</tr>
<tr>
<td>(3) OWNER’S INVESTMENT-BACKED EXPECTATIONS</td>
<td>100% REGULATORY TAKING OF ALL PROPERTY RIGHTS</td>
<td></td>
</tr>
<tr>
<td>“TOO FAR” TEST RESTATEPED</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
NOLLAN CASE

New Nollan House

Pania County Park

The Cove
KOONTZ CASE
## MAJOR TAKING CASES IN LAND USE LAW

<table>
<thead>
<tr>
<th>NOLLAN</th>
<th>LAND USE EXTRACTION</th>
<th>ESSENTIAL NEXUS</th>
</tr>
</thead>
<tbody>
<tr>
<td>DOLAN</td>
<td>LAND USE EXTRACTION</td>
<td>ROUGH PROPORIONALITY</td>
</tr>
<tr>
<td>KOONTZ</td>
<td>MONETARY EXTRACTION</td>
<td>APPLIED NOLLAN/DOLAN TWO-PART TEST</td>
</tr>
<tr>
<td>MURR</td>
<td>DECIDED IN FAVOR OF THE GOVERNMENT IN JUNE 2017</td>
<td>THE IMPACT OF THE CASE IS STILL T/B/D</td>
</tr>
</tbody>
</table>
FIRST ENGLISH
TAHOE SIERRA
### TEMPORARY TAKING VS. MORATORIUM

<table>
<thead>
<tr>
<th>FIRST ENGLISH</th>
<th>Temporary taking can be compensated for (but NO compensation for “normal” governmental administrative delays)</th>
</tr>
</thead>
<tbody>
<tr>
<td>TAHOE SIERRA</td>
<td>32 month moratorium OK</td>
</tr>
</tbody>
</table>

Local government 6-month moratorium to study medical marijuana dispensaries are most likely valid (but still depends)
1. Can the local government stop/condition the developer’s project if the neighbors object at the public hearing?

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THREE MOST IMPORTANT PHRASES YOU LEARNED SO FAR

IT DEPENDS

BALANCE

SETTLE
EUCLIDIAN ZONING

Cleveland Tractor Ambler Realty Tract factory
SMART GROWTH
## EUCLIDIAN ZONING (SEPERATION OF USES) VS. SMART GROWTH (MIXED USE)

<table>
<thead>
<tr>
<th>EUCLID V. AMBLER REALTY (USCT 1926)</th>
<th>Zoning (not allowing multi-family in single-family neighborhoods) is legal based on police power</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>90 YEARS LATER</strong></td>
<td>Form-based codes which are urban design documents requiring the developer’s project to look at very certain ways are also legal</td>
</tr>
</tbody>
</table>

**Broad scope of police power in land use law**
PLANNING AND ZONING ARE BOTH LEGAL IN FLORIDA

<table>
<thead>
<tr>
<th>COMP PLAN</th>
<th>Must be adopted by all Florida local government based on state law (F.S.163)</th>
</tr>
</thead>
<tbody>
<tr>
<td>ZONING</td>
<td>Must be consistent with the adapted comprehensive plan</td>
</tr>
</tbody>
</table>
| Zoning Standards | • As-of-right  
• Conditional Use/Special Exception  
• Not Permitted                  |
LOCALLY UNWANTED LAND USES (LULUs)

- Ex: Adult entertainment, tattoo parlors, land fills, utility plants, medical marijuana dispensaries, bill boards, cell towers, “other peoples” religious worship centers.

- Fundamental rights (freedom of speech, freedom of religion)

- **May** be allowed to restrict to certain zoning categories

- **May** be allowed to make it a conditional use/special exception

- **May** be allowed to limit the number/location
GROWTH MANAGEMENT

Metro Urban Growth Boundary and Hypothetical Green Belt

- Cities within the Green Belt
- City Limits 1996
- City Limits 2005
- City Limits 2010
- Portland Metro UGB
- UGB’s in Green Belt
- Hypothetical Green Belt
- county2007

Miles

N
GROWTH MANAGEMENT PROGRAMS

- Urban Growth Boundaries - draw a line in the sand (OK)
- Ramapo - tie development to infrastructure (OK)
- Petaluma - limit # of annual permits (OK)
- Boca Raton - Population cap (NOT OK)
- Concurrency (F.S.163) (OK)

It is within local government’s police power to manage/limit growth.
ENVIROMENTAL PROTECTION MAY NOT BE A TAKING

- Just v. Marinette County – Public Trust doctrine
- Graham V. Estuary Property
REDEVELOPMENT IN FLORIDA

5th AMENDMENT

“No person shall be... deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation”

- Kelo Decision
- Anti-Kelo Amendment in Florida
- Public-Private Partnership (P-3s)
THE GOAL OF A PLANNER IS TO MOVE FROM NIMBY TO YIMBY
ADDITIONAL PROPERTY RIGHTS FOR DEVELOPERS

Vested Rights

Estoppel

Development Agreement
ADDIONAL PROPERTY RIGHTS PROTECTION FOR FLORIDA DEVELOPERS
(IN ADDITION TO TAKING CLAIMS)

- Bert Harris Act

- If a government law has “inordinately burdened” an existing use of real property, the property owner is entitled to compensation

- What does “inordinately burdened” mean?
1. Can the local government stop/condition the developer’s project if the neighbors object at the public hearing?

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   (d) Requires too much land to be dedicated.
SINCE IT DEPENDS

SETTLE

(UNLESS, OF COURSE, YOUR GOAL IS TO KILL THE PROJECT THROUGH DELAYS OR OTHERWISE)
FOLLOW YOUR CODE AS WRITTEN, NOT AS YOU WISH IT WAS WRITTEN (WORDS MATTER)

Shall vs. May
And vs Or
299’ mail notice ≠ 300’ mail notice
Conceptual earthwork plan ≠ approved storm water management plan

If you do not follow your code as written, you are giving the other side and/or third parties a valid claim to litigate against you
IT IS OKAY TO “GO BEYOND” THE LAW AND BE ETHICAL
AICP PLANNERS ARE REQUIRED TO FOLLOW CODE OF ETHICS
CLOSING THOUGHTS

Continuing to make great plans to protect the public interest

Do Good

Understand land use regulations/private property rights by spotting legal issues

Be Fair

Speak with your local government attorney for guidance to balance planning and land use regulations

Be Smart
OTHER SESSIONS DURING THIS CONFERENCE WILL COVER THESE IMPORTANT LEGAL TOPICS IN DETAIL.

MEDICAL MARIJUANA

SIGN RESTRICTIONS
WE FINISHED!!!!
THANK YOU!

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