



Litigation Advice for the Land Use Practitioner

Hope for the Best, Prepare for the Worst
Environmental and Land Use Law Section

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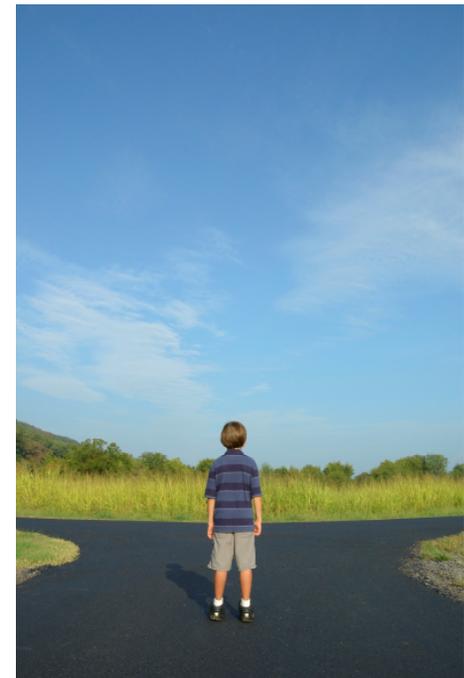


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What am I seeking?

- Comprehensive plan adoption and amendment
- Zoning ordinance adoption and amendment
- Rezoning
- Variance
- Conditional Use/Special Exception
- Site Plan Approval
- Architectural or Appearance board approval



Consider

- Rules of your Jurisdiction!
- Meeting with Staff/Local Government Attorney
- Actively monitor your application once its filed



Who am I before?

- Elected Board vs. Appointed Board
- Special Master
- Hearing Officers
- Administrative Law Judge
- Circuit Court Judge



What type of Proceeding?

- Quasi-judicial– Implement Policy
 - Involves the application of policy to a specific development application.
- Quasi-legislative – Set Policy
 - Involves formulating policy rather than applying specific rules to a certain situation.

“Now that I’m here, where am I?”

- Janis Joplin



Quasi-Judicial vs. Quasi-Legislative

- Quasi-judicial
 - Site specific zonings
 - Conditional use permits
 - Variances
 - Site plan approval
- Quasi-legislative
 - Comprehensive plan amendments
 - Zoning ordinance adoption and amendment
 - Adoption of land development regulations
 - Decisions on developer agreements



Quasi-Judicial vs. Quasi-Legislative

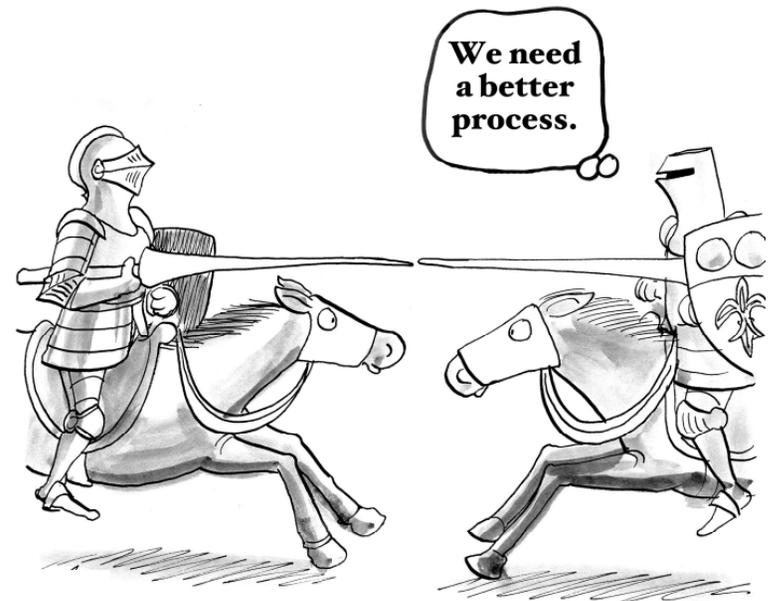
Board of County Commissioners of Brevard County v. Snyder, 627 So. 2d. 469 (Fla. 1993)

- Rezoning to quasi-judicial
- Appeal by Certiorari
- Strict Scrutiny Review



Quasi-Judicial vs. Quasi-Legislative

- Major Differences between proceedings
 - Standard of Review
 - Rules governing ex parte communications
 - Due process
 - Right to cross examination
 - Procedure for appeal



Appeals

- Several avenues to appeal land use decisions
- Need to keep possibility of appeal in mind throughout all proceedings

APPEAL



- Time for Appeal
 - Administrative process is not complete until the order is “rendered” in writing and filed with the clerk.



Standard of Review

- Quasi Legislative
 - Fairly Debatable Standard
 - Highly deferential to decision maker
 - Decision upheld so long as there is reasonable basis to support action
 - Avenue of appeal is declaratory judgment in circuit court.



Standard of Review

- Quasi-judicial

Avenue of appeal is writ of certiorari

1. Was procedural due process afforded;
2. Were the essential requirements of law observed;
and
3. Were the administrative findings supported by competent and substantial evidence?



Was procedural due process afforded?

- Due process requirements met if:
 1. The parties are provided **notice** of the hearing
 2. Opportunity to be **heard**
 3. Allowed to present **evidence**
 4. Parties allowed to **cross examine** witnesses
 5. Informed of **all** facts upon which the governing body acts

“Out here, Due Process is a bullet.”

- John Wayne



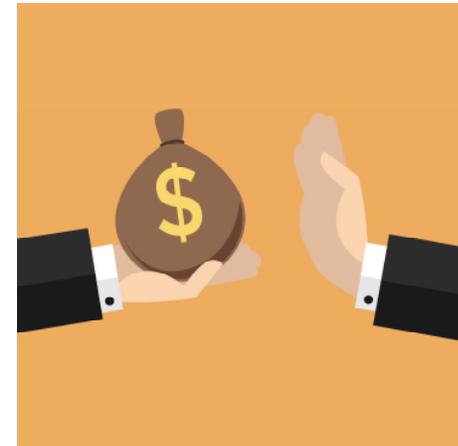
Was procedural due process afforded?

- Notice
 - Are there statutory notice requirements?
 - Ordinance Adoption
 - Comprehensive Plan Adoption
 - What are my jurisdiction's notice requirements?



Was procedural due process afforded?

- Ex Parte Communications
 - Jennings v Dade County, 589 So. 2d 1337 (Fla. 3d DCA 1991), rev. den. 598 So. 2d 75 (Fla. 1992)
 - Section 286.0115, Florida Statutes
 - May adopt an ordinance requiring disclosure of ex parte communication before Board takes final action
 - May adopt enact Quasi-judicial procedure form statute in an ordinance
 - None of the above - alternate procedure ordinance



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

- Potter Stewart



Were the essential requirements of law observed?



“Go get ‘em, son, and if you should run into any obstacles in your quest ... don’t worry, we’ll use litigation.”

- Substantive Burden
 - Dependent on the type of proceeding
 - Helps determine what is irrelevant to the proceeding



Competent and Substantial Evidence

- Important to maintain a good record!
- Why?
 - Competent and Substantial Evidence
 - “ Evidence a reasonable mind would accept as adequate to support a conclusion”
 - Degroot v. Sheffield*, 95 So. 2d 912, 916 (Fla. 1957)
- Burden is on YOU!
 - Entitlement needs to be evident from the record

“A good record transports you to another place.”

- Ty Segall



Achieving a Good Record

- Transcript
 - Get a court reporter
- Application and Backup
 - Ensure the record reflects exactly what you client is proposing in their application
 - Offer the Application and backup into the Record.
- Understand who has custody of the record

REMEMBER

Think carefully about what you want the board to consider and what you want the appellate court to see.



Achieving a Good Record

- Expert vs. Lay Testimony
 - Lay witness may only offer testimony about matters not requiring expert testimony
 - Generalized statements of opposition are not allowed
 - Need established facts
- Argument vs. Testimony
 - You are not evidence



Achieving a Good Record

- Evidentiary Issues and Objections
- Cross Examination
 - Should be used sparingly
- Parties vs. Public



“Perhaps you would like to rephrase your last answer.”

Achieving a Good Record

- Know the local rules!
- Know the Room!
- Prepare and Rehearse!



“No matter what type of equipment you have, you still have to have a certain talent to be able to make a good record.”

- Dr. Dre



Other Helpful Hints

- Staff Recommendations
 - Approval
 - Beware of Third Party opposition
 - Denial
 - Understand perceived defects
 - Are they curable?
 - Stipulate to points you agree on with Staff
 - Identify the local government attorney advising staff/ board members
 - Understand local government attorney's position



Other Legal Limitations on Land Use and Zoning Regulations

- Constitutional Limitations
 - Substantive Due Process
 - Equal protection
 - Takings
 - First Amendment



Other Legal Limitations on Land Use and Zoning Regulations

- Bert J. Harris Act - Section 70.001, Florida Statutes
 - Used for regulations **that inordinately burden existing uses** or **vested rights** to a specific use of real property
- 42 U.S.C § 1983
 - Remedy for the violation of rights granted under the federal constitution or statutes if the violation occurs under the color of state law.





**THANK YOU,
QUESTIONS?**



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