



# 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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**LLW**

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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



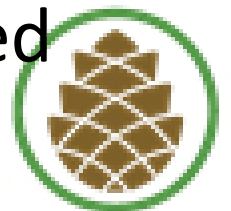
# Appeals

- 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.





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