

**The Florida Bar Continuing Legal Education Committee and the
City, County, and Local Government Law Section present**



City, County, and Local Government Certification Review Course 2023

COURSE CLASSIFICATION: ADVANCED LEVEL

March 15, 2023

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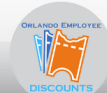
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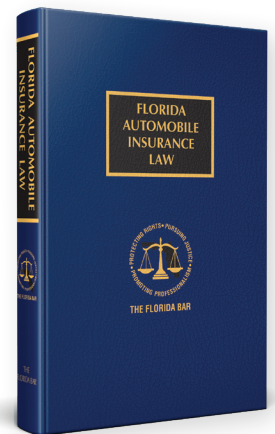
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Experienced practitioners guide the reader through the intricacies of this ever-changing area. Topics include the procedure for handling the typical automobile insurance case from both the plaintiff's and defendant's perspective, as well as the process for determining the order and priority of coverage in cases involving multiple tortfeasors and insurance policies. Sample forms, worksheets, and checklists are provided to aid the practitioner. In addition to updated case law, statutes, court rules, and other legal authority, the new edition includes:

- Updating and discussions of statute references
- Highlighting or discussion of recent and current case opinions
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 - Peer-to-Peer Car Sharing Programs
 - Low Speed Autonomous Vehicles
 - Federal Courts' Interpretation of Florida Insurance Bad Faith Law

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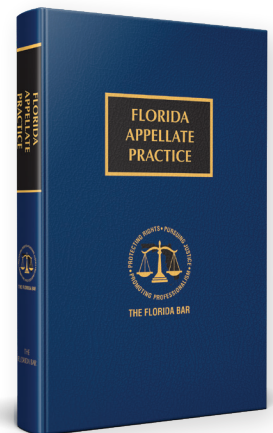
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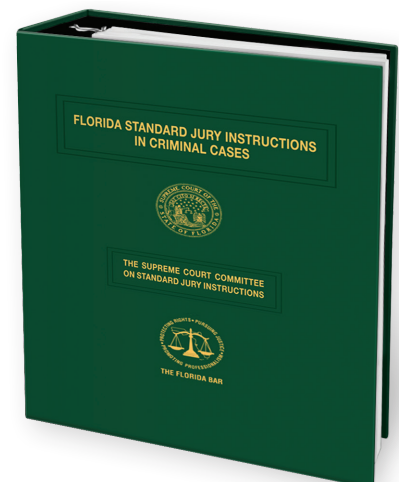
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- 10.6 - Discharging A Firearm [In Public] [On Residential Property] § 790.15, Fla. Stat.
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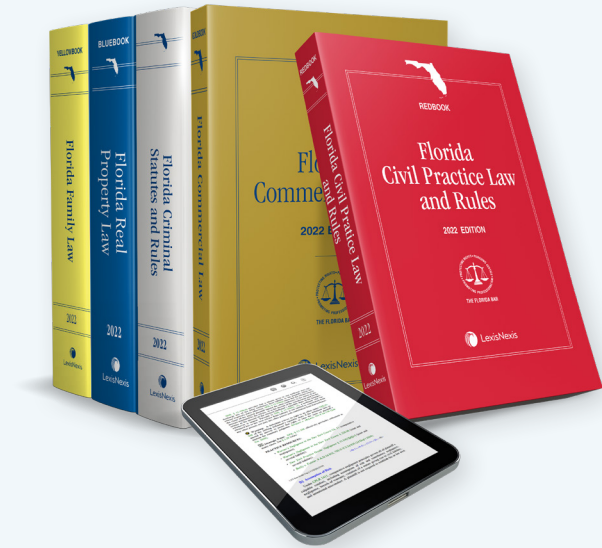
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Common Questions About CLER

1. What is CLER?

CLER, or Continuing Legal Education Requirement, was adopted by the Supreme Court of Florida in 1988 and requires all members of The Florida Bar to continue their legal education.

2. What is the requirement?

Over a 3 year period, each member must complete 33 hours, 5 of which are in the area of ethics, professionalism, substance abuse, or mental illness awareness, and 3 hours in technology.

3. Where may I find information on CLER?

Rule 6-10 of the Rules Regulating The Florida Bar sets out the requirement. All the rules may be found at www.floridabar.org/rules.

4. Who administers the CLER program?

Day-to-day administration is the responsibility of the Legal Specialization and Education Department of The Florida Bar. The program is directly supervised by the Board of Legal Specialization and Education (BLSE) and all policy decisions must ultimately be approved by the Board of Governors.

5. How often and by when do I need to report compliance?

Members are required to report CLE hours earned every three years. Each member is assigned a three year reporting cycle. You may find your reporting date by logging in to your member portal at member.floridabar.org.

6. Will I receive notice advising me that my reporting period is upcoming?

Four months prior to the end of your reporting cycle, you will receive a CLER Reporting Affidavit, if you still lack hours.

7. What happens if I am late or do not complete the required hours?

You run the risk of being deemed a delinquent member which prohibits you from engaging in the practice of Florida law.

8. Will I receive any other information about my reporting cycle?

Yes, you will receive reminders prior to the end of your reporting cycle, if you have not yet completed your hours.

9. Are there any exemptions from CLER?

Rule 6-10.3(c) lists all valid exemptions. They are:

- 1) Active military service
- 2) Undue hardship (upon approval by the BLSE)
- 3) Nonresident membership (see rule for details)
- 4) Full-time federal judiciary
- 5) Justices of the Supreme Court of Florida and judges of district, circuit and county courts
- 6) Inactive members of The Florida Bar

10. Other than attending approved CLE courses, how may I earn credit hours?

Credit may be earned by:

- 1) Lecturing at an approved CLE program
- 2) Serving as a workshop leader or panel member
- 3) Writing and publishing in a professional publication or journal
- 4) Teaching (graduate law or law school courses)
- 5) University attendance (graduate law or law school courses)

11. How do I submit various activities for credit evaluation?

Applications for credit may be found on our website, www.floridabar.org.

12. How are attendance hours posted on my CLER record?

You must post your credits online by logging in to your member portal at member.floridabar.org.

13. How long does it take for hours to be posted to my CLER record?

When you post your CLE credit online, your record will be automatically updated and you will be able to see your current CLE hours and reporting period.

14. How may I find information on programs sponsored by The Florida Bar?

You may wish to visit our website, www.floridabar.org/cle, or refer to The Florida Bar News. You may also call CLE Registrations at 850/561-5831.

15. If I accumulate more than 30 hours, may I use the excess for my next reporting cycle?

Excess hours may not be carried forward. The standing policies of the BLSE, as approved by the Supreme Court of Florida specifically state in 6.03(b):

- ... CLER credit may not be counted for more than one reporting period
- and may not be carried forward to subsequent reporting periods.

16. Will out-of-state CLE hours count toward CLER?

Courses approved by other state bars are generally acceptable for use toward satisfying CLER.

17. If I have questions, whom do I call?

You may call the Legal Specialization and Education Department of The Florida Bar at 850/561-5842.

**While online checking your CLER, don't forget to check your
Basic Skills Course Requirement status.**

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PREFACE

The course materials in this booklet were prepared for use by the registrants attending our Continuing Legal Education course during the lectures and later in their offices.

The Florida Bar is indebted to the members of the Steering Committee, the lecturers and authors for their donations of time and talent, but does not have an official view of their work products.

CLER CREDIT

(Maximum 12.5 hours)

General 12.5 hours Ethics..... 1.5 hours

CERTIFICATION CREDIT

(Maximum 12.5 hours)

City, County, & Local Government Law..... 12.5 hours

Seminar credit may be applied to satisfy both CLER and Board Certification requirements in the amounts specified above, not to exceed the maximum credit. Refer to Chapter 6, Rules Regulating The Florida Bar, see the CLE link at www.floridabar.org for more information about the CLER and Certification Requirements.

Prior to your CLER reporting date you will be sent a Reporting Affidavit (must be returned by your CLER reporting date). You are encouraged to maintain records of your CLE hours.

CLE CREDIT IS NOT AWARDED FOR THE PURCHASE OF THE COURSE BOOK ONLY.

CLE COMMITTEE MISSION STATEMENT

The mission of the Continuing Legal Education Committee is to assist the members of The Florida Bar in their continuing legal education and to facilitate the production and delivery of quality CLE programs and publications for the benefit of Bar members in coordination with the Sections, Committees and Staff of The Florida Bar and others who participate in the CLE process.

COURSE CLASSIFICATION

The Steering Committee for this course has determined its content to be ADVANCED.

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LECTURE PROGRAM

Wednesday, March 15, 2023

- 8:15 a.m. - 8:30 a.m. **Welcome & Introduction of Speakers**
Isabelle Lopez, Program Chair
- 8:30 a.m. - 9:45 a.m. **Home Rule & Allocation of Taxing Powers**
Greg Stewart, Nabors, Giblin & Nickerson, Tallahassee
- 9:45 a.m. - 10:30 a.m. **Eminent Domain**
Elizabeth Alt, Marion County Attorney's Office, Ocala
- 10:30 a.m. - 10:40 a.m. **Break**
- 10:40 a.m. - 11:10 a.m. **Florida Bar Ethics**
Sheila Tuma, The Florida Bar, Tampa
- 11:10 a.m. - 12:10 p.m. **Sunshine Law & Public Records**
Patricia Gleason, Attorney General's Office, Tallahassee

Thursday, March 16, 2023

- 8:15 a.m. - 8:30 a.m. **Welcome & Introduction of Speakers**
Isabelle Lopez, Program Chair
- 8:30 a.m. - 10:00 a.m. **Public Sector Liability**
Erin Jackson, Johnson Jackson, Tampa
- 10:00 a.m. - 10:45 a.m. **Sovereign Immunity**
Peter J. Sweeney, Block & Scarpa, Vero Beach
- 10:45 a.m. - 10:55 a.m. **Break**
- 10:55 a.m. - 12:05 p.m. **Procurements**
Frederick Springer, Bryant Miller Olive

Friday, March 17, 2023

- 8:15 a.m. - 8:30 a.m. **Welcome & Introduction of Speakers**
Isabelle Lopez, Program Chair
- 8:30 a.m. - 10:00 a.m. **Public Finance**
Kareem Spratling, Bryant Miller Olive, Tampa
Rhonda Bond-Collins, Bryant Miller Olive, Tampa

Friday, March 17, 2023 Lecture Program (Cont.)

10:00 a.m. - 10:45 a.m.	Ethics Under Part III, Ch. 112, F.S., Conflicts of Interest, Financial Disclosures <i>Steven Zuilkowski, Florida Commission on Ethics, Tallahassee</i>
10:45 a.m. - 10:55 a.m.	Break
10:55 a.m. - 12:05 p.m.	Land Use, Zoning, Practice & Procedure Before Local Government Legislative & Quasi-Judicial Boards <i>Mark Barnebey, Blalock Walters, Bradenton</i>

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Home Rule & Allocation of Taxing Powers

By

**Grey Stewart, Nabors, Giblin &
Nickerson, Tallahassee**

Home Rule and Exercise of Taxing Power

March 2023

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City, County and Local Government Certification Review Course

In memory of Robert L. “Bob” Nabors, a mentor, friend, and the father of local government home rule.

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HOME RULE AND EXERCISE OF TAXING POWER

These materials focus on the Florida constitutional and statutory powers of Florida counties and municipalities and the authority of special districts within their current statutory classification scheme. Any home rule analysis also requires a general discussion of the taxing preemption to the State embodied in the 1968 constitutional revision. The home rule analysis is completed with an outline of the legal requirements for a valid fee or special assessment imposed by ordinance.

I. COUNTY AND MUNICIPAL HOME RULE CONCEPTS

A. County Home Rule

1. Summary

Prior to the 1968 Constitutional revision that ushered in home rule for Florida's local governments, Florida counties could exercise only those powers specifically granted by the Florida Legislature or reasonably implied from a specific legislative grant. This dependency on specific legislation for the exercise of local government power led to a proliferation of special acts and an escalation in the enactment of population acts. As the state grew in population and complexity during the 1950s and 1960s, it became apparent that such legislative vehicles failed to provide the local government framework for a modern Florida. Such inadequate local government constitutional framework coupled with a near century-old patchwork of unrelated Florida Constitution provisions led to a citizen demand for a complete revision of the Florida Constitution.

The 1968 constitutional revision unleashed county home rule by constitutionally creating two forms of counties, authorizing county home rule and constitutionally restricting the future use of population acts. The Legislature subsequently reduced to ordinance pre-1968 revision population acts and local laws relating only to the unincorporated areas of a county were able to be amended or repealed by subsequent county ordinance.

Section 125.01, Florida Statutes broadly granted to all counties the expansive home rule power contemplated in the Florida Constitution.

Except for matters that cannot be constitutionally changed, the home rule power possessed by charter and non-charter counties is essentially the same. The fundamental differences are that the home rule power of a charter county cannot be diminished by a special act unless the electors approve and that, by judicial interpretation, a charter county is vested with municipal powers in the unincorporated areas. Additionally, the home rule power of a charter county can be restricted by a charter limitation that is not inconsistent with general law.

2. County Power Before the 1968 Florida Constitution

No provisions relating to the general power of counties comparable to Article VIII, sections 1(f) and 1(g), Florida Constitution (1968), existed in the 1885 Florida Constitution. Article VIII, section 1, Florida Constitution (1885), merely provided that "[t]he State shall be divided into political divisions to be called counties." Additionally, Article IX, section 1, Florida Constitution (1885), provided, "The Legislature shall provide for a uniform and equal rate of taxation. . . ."

This brief mention of counties in Article VIII, section 1, Florida Constitution (1885), and the posture of implementing general legislation placed counties, before the 1968 Florida Constitution, in an area of limited power. All county power had to be found in an express grant from the Legislature and no implied power could be inferred that would result in the exercise of any power not expressly conferred by the State. See Amos v. Mathews, 126 So. 308 (Fla. 1930); and Molwin Inv. Co. v. Turner, 167 So. 33 (Fla. 1936). The primary source of county power was a special act.¹ This rule of limited county power is illustrated in the following excerpt from a case considering a county's authority to grant an exclusive franchise:

It is also well settled that a county or municipality has no power to grant an exclusive franchise to a public service corporation to use the streets, unless 'the power not only to grant a franchise but also to grant an exclusive franchise has been delegated to it by the Legislature either expressly or by necessary implication.' [citations omitted]

Cohen v. Sunhaven Homes, Inc., 98 So.2d 501, 503 (Fla. 1957).

3. County Power of Local Self-Government Under the 1968 Constitutional Revision

Except for the constitutional reservation to the Legislature of the power to preempt county authority by general law, the home rule power of counties, whether charter or non-charter, is expansive. Upon approval of its charter by a vote of the electors, a charter county derives the home rule power embodied in its charter directly from the Florida Constitution. See State v. Broward County, 468 So. 2d 965, 969 (Fla. 1985). In contrast, a non-charter county has "such power of self-government as is provided by general or special law."

Compare the two constitutional authorizations:

(f) NON-CHARTER GOVERNMENT. Counties not operating under county charters shall have such power of self-government as is provided by general or special law. The board of county commissioners of a county not operating under a charter may enact, in a manner prescribed by general law, county ordinances not inconsistent with general or special law, but an ordinance in conflict with a municipal ordinance shall not be effective within the municipality to the extent of such conflict.

Art. VIII, § 1(f), Fla. Const.

¹Examples of the time demand on the Legislature to focus on issues of local authority are: (1) the number of local bills introduced in the 1965 Legislative Session was 2,107 and (2) the number of population acts enacted had grown to 2,100 by 1970 with over 1,300 having been enacted since the effective date of the 1960 census. Sparkman, The History and Status of Local Government Powers in Florida, 25 U. Fla. L. Rev. 271, 286 (1973).

(g) CHARTER GOVERNMENT. Counties operating under county charters shall have all powers of local self-government not inconsistent with general law, or with special law approved by vote of the electors. The governing body of a county operating under a charter may enact county ordinances not inconsistent with general law. The charter shall provide which shall prevail in the event of conflict between county and municipal ordinances.

Art. VIII, § 1(g), Fla. Const. Thus, the constitutional contemplation of home rule power for non-charter counties required authorization by general law or special act.

Section 125.01, Florida Statutes, by design and intent, is a general law grant of expansive home rule authority to all Florida counties. While subsection (1) of section 125.01, Florida Statutes, enumerates certain specific powers, subsection (3) clarifies that such enumeration is not intended to be exclusive or restrictive, rather the legislative purpose is to be liberally construed to grant to all counties the broad exercise of home rule powers authorized in the State Constitution. A broad construction of section 125.01 has been approved by the Florida Supreme Court on numerous occasions. See, e.g., State v. Orange County, 281 So. 2d 310 (Fla. 1973); Speer v. Olson, 367 So. 2d 207 (Fla. 1978); and Taylor v. Lee County, 498 So. 2d 424 (Fla. 1986).

Except for the potential preemption of municipal authority in its county charter, the scope of home rule power in a charter and a non-charter county is essentially the same. That this constitutional consequence was clearly contemplated is supported by the following from the Commentary to Florida Statutes Annotated, Article VIII, section 1(g), Florida Constitution:

Counties operating under a charter are presumptively considered to have the broad power of self-government (with the exception of precedence over municipal ordinances which must be provided in the charter) unless provided otherwise by general law or by the special law adopting the charter. Thus, charter counties and non-charter counties apparently start from different poles in their relationships with legislative enactments. Both could, conceivably, be the same depending on the legislation adopted.

T. D'Alemberte, Commentary, Art. VIII, § 1(g), 26A Fla. Stat. Ann. 271 (West 1970).

In fact, a charter county may have less home rule power if its charter has restrictions not inconsistent with general law or special law approved by the voters. For example, in State v. Sarasota County, 549 So. 2d 659 (Fla. 1989), a charter provision required elector approval of bonds not required in non-charter counties.

Under the constitutional design as legislatively implemented, neither a charter nor non-charter county needs specific authority to enact ordinances or to deliver services. All counties have the home rule authority to enact ordinances for any public purpose. The search is for a preemption by the Legislature or, in the case of charter counties, a charter limitation that is not inconsistent with

general law. Absent such preemption, all counties have the home rule power to legislate by ordinance for any county purpose.

4. Constitutional and Statutory Distinctions Between Charter and Non-Charter Counties

In addition to receiving a direct constitutional grant of the power of local self-government upon charter approval, a charter county has more expansive home rule authority than a non-charter county in several fundamental ways.²

a. Special Acts Require Elector Approval

First, the Legislature cannot, by special act, diminish the power of local self-government constitutionally granted to a charter county unless the special act is approved by the electors. See Art. VIII, § 1(g), Fla. Const.

b. Municipal Preemption

Second, the county charter may grant to the county the power to regulate an activity countywide and provide that such regulation prevails over a conflicting municipal ordinance. Such municipal preemption can be implemented by a charter amendment approved by the electors in a single countywide vote. Provided, however, any attempt to transfer municipal services to the county by charter amendment requires dual approval by both the municipal and county electors as a consequence of judicial construction of the transfer of power limitations contained in Article VIII, section 4, Florida Constitution. See Broward County v. City of Ft. Lauderdale, 480 So. 2d 631 (Fla. 1985).³

c. Municipal Taxing Powers of Charter Counties

Third, as discussed in more detail subsequently, a charter county is vested with the authority to levy any tax within its jurisdiction that is authorized by general law for a municipality unless the tax authorization precludes county imposition. See McLeod v. Orange County, 645 So. 2d 411 (Fla.

²Until the adoption of Amendment 10 to the Florida Constitution in 2018, a county charter could also change the method by which a county office is chosen or abolish any county office where all duties of the office as provided by general law are transferred to another office. Amendment 10 amended Article VIII, Section 1 and prohibits charter counties from abolishing the office of the sheriff, tax collector, property appraiser, supervisor of elections, or clerk of court, and prohibits charter counties from transferring the duties of those offices or eliminating election of those office.

³Under the cases applying Article VIII, section 4, an interlocal agreement may provide for a transfer of services between local governments when the ultimate responsibility for supervising or controlling those services is not transferred. See City of Palm Beach Gardens v. Barnes, 390 So. 2d 1188 (Fla. 1980).

1994) (extending the municipal taxing power of charter counties to the public service tax authorized under section 166.231, Florida Statutes).

One of the essential distinctions between a charter county and a non-charter county is the constitutional vesting of municipal taxing powers in charter counties by the 1968 constitutional revision.⁴ This constitutional vesting of municipal powers provides a charter county with the authority to levy any form of tax within the unincorporated areas that municipalities are provided by general law.⁵ The genesis of a charter county's municipal taxing power is judicial in nature, not statutory.

The initial case explaining the municipal taxing power of a charter county is State v. Dade County, 127 So. 2d 881 (Fla. 1961), which constructed the constitutional home rule charter of Dade County as authorized under the 1885 Florida Constitution. In State v. Dade County, the Florida Supreme Court held that general laws granting municipalities the authority to issue revenue bonds applied to Dade County because its charter also authorized the county to exercise all powers and privileges granted to municipalities. Id. at 882.

Faced with clear precedents and a constitution provision concerning the municipal powers of Dade County under its constitutional charter, the Florida Supreme Court decided the case of State ex rel. Volusia County v. Dickinson, 269 So. 2d 9 (Fla. 1972).⁶ The fundamental distinction was that

⁴Other distinctions between charter counties and those not operating under a charter, in addition to their sources of power, are that ordinance of non-charter counties cannot be inconsistent with special law as well as general law and are not effective within a municipality in the event of a conflict. In contrast, the power of self-government of a charter county is limited by an inconsistent special act only if the special act has been approved by vote of the electors. Additionally, the charter provides which ordinance prevails in the event of a conflict with a municipal ordinance.

⁵An exception to this constitutional principle would arise if the general law authorizing a tax for a municipality expressly provided that the tax was not available to charter counties since the power of self-government of a charter county cannot be inconsistent with general law.

⁶See State ex rel. Dade County v. Brautigam, 224 So. 2d 688 (Fla. 1969). The Supreme Court approved Dade County's imposition of an excise tax on cigarette sales in the unincorporated areas pursuant to a cigarette tax option granted to municipalities in section 210.03, Florida Statutes (1968). Any doubt as to the municipal taxing authority of Dade County was eliminated by the adoption of Article VIII, section 6(f), Florida Constitution, in the 1968 constitutional revision. Consistently, in Bearden v. Metropolitan Dade County, 258 So. 2d 344 (Fla. 3d DCA 1972), cert. denied, 263 So. 2d 234 (Fla. 1972), the Court approved the levy by Dade County of the public service tax pursuant to section 167.431, Florida Statutes (1971). The Court, in Bearden v. Metropolitan Dade County, upheld Dade County's levy of the public service tax by recognizing that, pursuant to its charter, Dade County had the same power to levy and collect taxes as the municipalities. 258 So. 2d at 346.

Volusia County adopted its charter under the authority of Article VIII, section 1(g), Florida Constitution, and did not share the unique Dade County constitutional authority.⁷

In Volusia County v. Dickinson, Volusia County levied, by ordinance, a cigarette sales tax in the unincorporated areas under the statutory taxing authority granted to a municipality by section 210.03, Florida Statutes (1971).⁸ The Court noted that the issue in Volusia County v. Dickinson was "quite analogous in principle" to the one considered by the Court in the Dade County v. Brautigam case. See 269 So. 2d at 11. In upholding the authority of Volusia County to impose a tax option granted to a municipality by general law, the Court held as follows:

When Section 1(g), Article VIII and Section 9(a), Article VII are read together, it will be noted that charter counties and municipalities are placed in the same category for all practical purposes. That upon a county becoming a charter county it automatically becomes a metropolitan entity for self-government purposes. This is so because Section 1(g) of Article VIII provides a charter county "shall have all powers of local self-government not inconsistent with general law. . . . The governing body of a county operating under a charter may enact county ordinances not inconsistent with general law." This all inclusive language unquestionably vests in a charter county the authority to levy any tax not inconsistent with general or special law as is permitted municipalities.

Read together, Sections 9(a), Article VII and 1(g), Article VIII, clearly connote the principle that unless precluded by general or special law, a charter county may without more under authority of existing general law impose by ordinance any tax in the area of its tax jurisdiction a municipality may impose.

269 So. 2d at 10-11 (emphasis in original).⁹

In McLeod v. Orange County, 645 So. 2d 411 (Fla. 1994), the Florida Supreme Court extended the municipal taxing power of charter counties to the public service tax authorized under

⁷Prior to the decision in Volusia County v. Dickinson, the Dade County distinction was thought to be significant because of the unique provisions of Article VIII, section 6(f), Florida Constitution, which expressly conferred on Dade County all powers provided to municipalities by general law.

⁸The municipal tax on the sale of cigarettes was subsequently repealed as a local option and imposed statewide. Ch. 72-360, Laws of Fla.

⁹See also State v. Broward County, 468 So. 2d 965 (Fla. 1985), rev'd on other grounds, 515 So. 2d 1273 (Fla. 1987) (favorably discussed the municipal taxing power of a charter county under Article VIII, section 1, Florida Constitution).

section 166.231, Florida Statutes. The Supreme Court adopted the "logic employed" in Volusia County v. Dickinson:

The crux of the Volusia holding is that "unless precluded by general or special law, a charter county may without more under authority of existing general law impose by ordinance any tax in the area of its tax jurisdiction a municipality may impose." 269 So. 2d at 11. This conclusion was dictated by our reading of articles VII and VIII of the Florida Constitution.

* * *

Read together, the articles give charter counties the authority to levy any tax that a municipality may impose, if it is within the county's taxing jurisdiction.

645 So. 2d at 413 (footnote omitted).

On a collateral issue, the Florida Supreme Court held that no geographic limitation existed on the expenditure of the public service tax proceeds which were levied solely in the unincorporated areas. The Court stated, "However, even if all of the projects are located within municipalities and confer no benefit to the unincorporated areas, this Court cannot create a constitutional prohibition when none exists." 645 So. 2d at 414. The intervenor had argued that the public service tax was illegal unless the use of the tax proceeds provided a real and substantial benefit to the unincorporated area attempting to draw an analogy to the dual taxation prohibition in Article VIII, section 1(h), Florida Constitution.¹⁰

5. Transition Provisions

Article VIII, section 6(d), Florida Constitution (1968), provides that "[l]ocal laws relating only to unincorporated areas of a county" in existence on the effective date of the constitutional revision can be amended or repealed by county ordinance.

Caution should be exercised in reviewing a prior special act to ensure that it relates "only to the unincorporated areas." See Spaulding v. St. Johns County, 384 So. 2d 1276 (Fla. 1980), where the Court held that the county was without power to amend a special act placing a restriction on its purchasing power since the operation of the act was not limited to the unincorporated area. See also Davis v. Gronemeyer, 251 So. 2d 1 (Fla. 1971), holding that a special act creating a civil service system for the county did not relate only to the unincorporated area and thus could not be repealed by ordinance under the transition provisions of Article VIII, section 6(d), Florida Constitution.

¹⁰The court also emphasized the county power construction of the constitutional concept by holding that the implemented ordinance was correctly adopted pursuant to the ordinance enactment provisions for counties in section 125.66(1), Florida Statutes, rather than the ordinance enactment provisions in section 166.041, relating to municipalities.

B. Municipal Home Rule

1. Summary

As with counties, prior to the 1968 Constitutional revision that ushered in home rule for Florida's local governments, Florida municipalities could exercise only those powers specifically granted by the Florida Legislature or reasonably implied from a specific legislative grant. This led to the same proliferation of special acts and an escalation in the enactment of population acts.

The 1968 constitutional revision unleashed municipal home rule by authorizing municipal home rule which was legislatively implemented in the Municipal Home Rule Powers Act embodied in Section 166.021, Florida Statutes. As with a non-charter county, the exercise of home rule power by a municipality cannot be inconsistent with either a general law or a special act.

Except for certain limitations provided in section 166.021(4), which require elector approval, section 166.021 provides that any other limitations on municipal power in a charter enacted or adopted prior to July 1, 1973, is nullified and repealed and any special acts existing on July 1, 1973, can be modified or repealed by ordinance.

The threshold question in a determination of a valid exercise of municipal home rule power is whether the action undertaken serves a municipal purpose.

2. Municipal Power Prior to the 1968 Florida Constitution

As with counties, under the 1885 Florida Constitution, all municipal powers were dependent on a specific delegation of authority by the Legislature in a general law or special act.

The Legislature shall have power to establish, and to abolish, municipalities to provide for their government, to prescribe their jurisdiction and powers, and to alter or amend the same at any time.

Art. VIII, §8, Fla. Const. (1885).

This requirement of an express legislative grant was a reflection of the prevailing nineteenth century local government theory known as "Dillon's Rule."¹¹ Under this approach to municipal power, "[t]he authority of local governments in all matters, including those purely local, was limited to that expressly granted by the legislature, or that which could be necessarily implied from an express grant." Sparkman, The History and Status of Local Government Powers in Florida, 25 U. of Fla. L.R. 271, 282 (1973); see also Malone v. City of Quincy, 62 So. 922 (Fla. 1913). To find a

¹¹The term "Dillon's Rule" is named after a treatise on municipal corporations by J. Dillon. See Malone v. City of Quincy, 62 So. 922 (Fla. 1913) (a typical application of Dillon's Rule by the Florida Supreme Court).

municipal power to legislate, the search was for an express delegation of authority from the Legislature in a general law or special act. The quantum and source of power was essentially the same for both municipal and county governments.

3. Municipal Power of Local Self-Government Under the 1968 Constitutional Revision

The 1968 revision to the Florida Constitution abolished Dillon's Rule and fostered a Florida revolution in municipal home rule power. Article VIII, section 2(b), Florida Constitution, provides as follows:

(b) POWERS. Municipalities shall have governmental, corporate and proprietary powers to enable them to conduct municipal government, perform municipal functions and render municipal services, and may exercise any power for municipal purposes except as otherwise provided by law. . . .

Art. VIII, §2(b), Fla. Const. (emphasis added). The constitutional revision signaled a dramatic reversal of the source of municipal legislative power from Tallahassee to the city hall.

Section 166.021, Florida Statutes, the Municipal Home Rule Powers Act, completed the constitutional design of the novel municipal home rule concept. As recognized by the Florida Supreme Court, section 166.021 was:

a broad grant of power to municipalities in recognition and implementation of the provisions of Art. VIII, §2(b), Fla. Const. It should be so construed as to effectuate that purpose where possible. It provides, in new F.S. §166.021(1), that municipalities shall have the governmental, corporate and proprietary powers to enable them to conduct municipal government, perform municipal functions and render municipal services; it further enables them to exercise any power for municipal services, except when expressly prohibited by law.^[12]

City of Miami Beach v. Forte Towers, Inc., 305 So. 2d 764, 766 (Fla. 1974) (Dekle, J., concurring) (footnote omitted).¹³

¹²Under section 166.021(3), Florida Statutes, this broad grant of home rule power to legislate by ordinance on any subject matter upon which the state Legislature may act is denied to: (1) subjects of annexation, merger, and exercise of extraterritorial power of municipalities which require general or special law pursuant to Article VIII, section 2(c), Florida Constitution, (2) any subject expressly prohibited by the Florida Constitution, (3) any subject expressly preempted to state or county government by the Florida Constitution or by general law, and (4) any subject preempted to a county pursuant to a county charter.

¹³In Forte Towers, the Court apparently agreed that the Municipal Home Rule Powers Act

To affirm and emphasize the broad constitutional deferral of municipal legislative power, section 166.021(4), Florida Statutes, further provides:

The provisions of this section shall be so construed as to secure for municipalities the broad exercise of home rule powers granted by the constitution. It is the further intent of the Legislature to extend to municipalities the exercise of powers for municipal governmental, corporate, or proprietary purposes not expressly prohibited by the constitution, general or special law, or county charter and to remove any limitations, judicially imposed or otherwise, on the exercise of home rule powers other than those so expressly prohibited.^[14]

Id. (emphasis added). As Justice Dekle recognized, the empowering provision allowing municipalities to legislate by ordinance is

the provision of new F.S. §166.021(1) which expressly empowers municipalities to "exercise any power for municipal purposes, except when expressly prohibited by law." . . . [T]he intent of this chapter was largely to eliminate the "local bill evil" by implementing the provisions of Art. VIII, §2, Fla. Const.

Forte Towers, Inc., 305 So. 2d at 766. This liberal construction of municipal home rule has been consistently followed by the Florida Supreme Court:

Article VIII, Section 2, Florida Constitution, expressly grants to every municipality in this state authority to conduct municipal government, perform municipal functions, and render municipal services. The only limitation on that power is that it must be exercised for a valid "municipal purpose." It would follow that municipalities are not dependent upon the Legislature for further authorization. Legislative statutes are relevant only to determine limitations of authority.

empowered a municipality to enact a rent control ordinance, though it split on whether the ordinance was properly imposed.

¹⁴Section 166.021, Florida Statutes, was enacted by Chapter 73-129, Laws of Florida, in response to the narrow municipal home rule interpretation in City of Miami Beach v. Fleetwood Hotel, Inc., 261 So. 2d 801 (Fla. 1972). The Court in Forte Towers, Inc. stated that it had to consider whether Chapter 73-129 necessitated a change in the Fleetwood Hotel decision and stated, "I believe that it does, and that municipalities now are empowered to enact such ordinances by virtue of new Ch. 73-129." 305 So. 2d at 766, Dekle, J., concurring.

State v. City of Sunrise, 354 So. 2d 1206, 1209 (Fla. 1978). A comparison of municipal power under the 1885 and 1968 Florida Constitution was made by the Supreme Court in Lake Worth Utilities v. City of Lake Worth, 468 So. 2d 215 (Fla. 1985). The Court stated:

Thus, [under the 1885 Florida Constitution] the municipalities were inherently powerless, absent a specific grant of power from the legislature. The noblest municipal ordinance, enacted to serve the most compelling municipal purpose, was void, absent authorization found in some general or special law.

The clear purpose of the 1968 revision embodied in article VIII, section 2 was to give the municipalities inherent power to meet municipal needs.

Id. at 217.

To determine the home rule power of a municipality to legislate by ordinance, the search today is not for specific legislative authorization. The search is for a general or special law that is inconsistent with the subject matter of the proposed ordinance. Absent an inconsistent law, a municipality has the complete power to legislate by ordinance for any municipal purpose.

C. Recap of County and Municipal Home Rule Power

The following is a summary of the constitutional and statutory home rule power of counties and municipalities, the power of the Legislature to restrict or diminish such home rule power and the expanded home rule power possessed by charter counties.

- Counties and municipalities are not dependent upon the Legislature for authorization to act in pursuit of county or municipal purposes. Legislative statutes are relevant only to determine limitations of authority.
- The constitutional home rule powers of all counties and municipalities cannot be inconsistent with general law.
- The power of local self-government of charter counties is derived directly from the Florida Constitution and can be diminished by special act only if the special act is approved by a vote of the electors.
- The power of local self-government provided by general law for municipalities and non-charter counties can be preempted by special act.
- A county charter can contain limitations on county power not inconsistent with general law that apply only to that charter county.

- The ordinance of a non-charter county that is in conflict with a municipal ordinance shall not be effective within the municipality to the extent of such conflict.
- A county charter can provide which shall prevail in the event of a conflict between a county and a municipal ordinance. A county charter provision providing for countywide regulatory authority that preempts inconsistent municipal action requires elector approval only in a single countywide vote. As discussed more fully below, a county charter that attempts to transfer municipal services to a county requires dual approval by electors countywide and within each municipality under judicial construction of the transfer of power provisions of Article VIII, section 4, Florida Constitution.
- A charter county is vested with the authority to levy any tax within its jurisdiction that the Legislature authorizes for a municipality unless a contrary legislative intent is provided in the tax authorization.

D. Transfer of Powers

1. Summary

Article VIII, section 4, Florida Constitution, provides a direct constitutional grant for a transfer of a function or power among a county, municipality, or special district subject to elector approval.

The power of a charter county to preempt an inconsistent municipal ordinance in its charter has been judicially balanced with the constitutional transfer of power provisions to require dual approval of both county and municipal electors of a charter amendment transferring a municipal service to the county.

Notwithstanding the elector approval requirements in Article VIII, section 4, the Legislature retains the constitutional power to effectuate a transfer in any manner otherwise provided by law.

2. General Provisions

Article VIII, section 4, Florida Constitution, sets forth the authority for local governments to transfer powers under specified circumstances, as follows:

By law or by resolution of the governing bodies of each of the governments affected, any function or power of a county, municipality or special district may be transferred to or contracted to be performed by another county, municipality or special district, after approval by vote of the electors of the transferor and approval by vote of the electors of the transferee, or as otherwise provided by law.

This section authorizes counties, municipalities, and special districts to transfer specific powers or functions of one entity to another such entity, so long as the transfer is approved by the electors of

both entities or provided by general or special law.

Although it authorizes the transfer of powers, Article VIII, section 4, Florida Constitution, mandates specific procedural requirements. First, this section specifies two avenues under which a transfer can be initiated: by a resolution of each governing body or by general or special act of the Legislature. Second, the transfer may only occur after approval by vote of the electors of the transferor and approval by vote of the electors of the transferee (a dual referenda), or as otherwise provided by law.

The Florida Supreme Court has established a rule on when the dual referenda requirements are triggered:

We hold that section 1(g) permits *regulatory* preemption by counties, while section 4 requires dual referenda to transfer functions or powers relating to *services*. A charter county may preempt a municipal regulatory power in such areas as handgun sales when county-wide uniformity will best further the ends of government. § 125.86(7), Fla. Stat. (1983). Dual referenda are necessary when the preemption goes beyond regulation and intrudes upon a municipality's provision of services.

Broward County v. City of Ft. Lauderdale, 480 So. 2d 631, 635 (Fla. 1985) (emphasis in original).

This rule, in the reasoning of the Court, draws a line between what was perceived as the overlapping power of Article VIII, section 4, Florida Constitution, and the constitutional authority in Article VIII, section 1(g) for a county charter to provide which shall prevail in the event of a conflict between a county and a municipal ordinance.

The situation where actual control is not transferred is distinguishable. In the case of Miami Dolphins, Ltd. v. Metropolitan Dade County, 394 So. 2d 981 (Fla. 1981), opponents to a tourist development tax plan challenged a provision that would allocate funds raised by Dade County to renovate the city-owned Orange Bowl stadium. The Court found that because the plan did not require the city to transfer any jurisdiction over the stadium to Dade County, but rather only offered a grant of funds to be used for a particular purpose, it was not an unconstitutional transfer of powers. Similarly, in City of Palm Beach Gardens v. Barnes, 390 So. 2d 1188 (Fla. 1980), the issue was the implementation of a contract between the city and the sheriff of Palm Beach County for the performance of law enforcement services for the city at a stated price. Opponents to the contract argued that pursuant to Article VIII, section 4, Florida Constitution, a separate vote of both the city and the county electors was required. Finding that section 4 was inapplicable, the Court stated, "In our opinion, the framers of section 4 had no intention of applying its provisions to a sheriff as a county official, and his contracting for services with a municipality is clearly different from a municipality transferring or contracting away the authority to supervise and control its police powers to the county government." Id. at 1189. Provision of services may be transferred without section 4 implications if the ultimate responsibility for supervising or controlling those services is not transferred.

Thus, case law provides two inquiries in determining whether a transfer of powers implicates Article VIII, section 4, Florida Constitution, and its requisite dual referenda: (1) whether the transfer from one unit of government to another involves the provision of services or the preemption of regulatory authority, and (2) whether the transfer from one unit of government to another involves total relinquishment of power and control over the service at issue. When the transfer involves the complete relinquishment of control over services, the local government unit must comply with the requisite procedures of Article VIII, section 4, Florida Constitution.

Notwithstanding the above analysis, the rule of construction forged in Broward County v. City of Ft. Lauderdale is trumped by a transfer of powers "otherwise provided by law." Thus, in addition to the referenda process initiated by resolution of the governing bodies, Article VIII, section 4, Florida Constitution, provides that local government powers and functions may be transferred between units of local government "as otherwise provided by law." Legislative efforts to transfer powers between units of local government will preempt local government ordinances in non-charter counties and municipalities by general or special law, and in charter counties by general law or special act adopted by a referendum of the electors of the county. See Art. VIII, §§ 1 and 2, Fla. Const.

3. Intergovernmental Service Delivery Options

Chapter 163, Part I, Florida Statutes, provides for intergovernmental cooperation and the exercise of joint powers by a city and a county through the execution of an interlocal agreement. Section 163.01(5), Florida Statutes, enumerates the terms and conditions of the interlocal agreement and specifically provides that such an agreement may provide for the creation of a separate legal entity. Section 163.01(7)(a), Florida Statutes, also specifically provides that the interlocal agreement may create "a separate legal or administrative entity to administer" the agreement. However, section 163.01(7)(c), Florida Statutes, limits the power of any separate legal or administrative entity by providing that such entity shall not possess the power to levy any tax or to issue any type of bond in its own name. Section 163.01(7)(g)1., Florida Statutes, specifically authorizes the issuance of bonds for financing public facilities, including, but not limited to, water, wastewater, alternative water supply facilities and water reuse facilities.

Often the regional nature of county government is ignored or overlooked. The issue under the constitutional authority of a municipality to adopt an inconsistent ordinance and "opt-out" of a countywide program where municipal action is not preempted, is not whether the municipality has consented to the county ordinance. As discussed more fully below, the issue is whether the municipality has the authority to object to the subject matter of the ordinance and, if so, whether it legislatively opted-out by the adoption of an inconsistent municipal ordinance. If the municipality takes no inconsistent legislative action, a countywide program which serves a county purpose is implemented. An interlocal agreement is a viable option to eliminate doubt and secure municipal consent for such countywide programs.

E. County Preemption of Municipal Power

1. Summary

A county ordinance adopted by a non-charter county in conflict with a municipal ordinance shall not be effective within the municipality to the extent of such conflict under the provisions of Article VIII, section 1(f), Florida Constitution.

As to charter counties, Article VIII, section 1(g), Florida Constitution, provides that the charter will provide which ordinance prevails in a conflict between county and municipal ordinances.

Thus, as to a charter county, the charter is constitutionally an instrument for a county to preempt municipal authority.¹⁵ Such municipal authority preemption by a county charter can be diminished by a special act only with elector approval. Recall, Article VIII, section 1(g), provides that charter counties have such power of local self-government not inconsistent with general law "or with special law approved by vote of the electors."

Additionally, section 166.021, Florida Statutes, the Municipal Home Rule Powers Act, provides in subsections (3)(c) and (a) that municipal power does not exist for (1) any subject expressly preempted to the state or county government by the Constitution or by general law or (2) any subject preempted to a county pursuant to a county charter.

2. Municipal Purpose Exception

The constitutional principle that a county ordinance is not effective within a municipality that enacted an inconsistent ordinance is also limited by the requirement that all municipal ordinances must serve a municipal purpose.

For example, in City of Ormond Beach v. County of Volusia, 535 So. 2d 302 (Fla. 5th DCA 1988), the county transportation impact fee ordinance stated that its purpose was to regulate county land use and land development and to implement the comprehensive plan by imposing an impact fee for county road expansion attributable to new growth and development. Volusia County imposed such transportation impact fee countywide and several municipalities enacted ordinances to opt out of the application of the county impact fee ordinance within their boundaries. The court held that the municipal ordinances were invalid because, although municipalities have broad powers under the Florida Constitution to act for municipal purposes, these ordinances had no reasonable relationship to the morals, health, welfare, and safety of the people. The court further stated that preventing or hindering a county in its task of building and maintaining county roads was not in the best interest of a municipality.¹⁶

¹⁵If the area of municipal preemption is a transfer of services as opposed to a regulatory preemption, the dual referendum requirement of Article VIII, section 4, Florida Constitution, is implicated. Broward County v. City of Ft. Lauderdale, 480 So. 2d 631 (Fla. 1985).

¹⁶The court applied the Ormond Beach reasoning in Seminole County v. City of Casselberry, 541 So. 2d 666 (Fla. 5th DCA 1989), which was factually similar, yet Seminole County was then a non-charter county and Volusia County was a charter county. (Seminole County is currently a

The Ormond Beach court stated:

Most cases dealing with whether a city's ordinances or other municipal activities are for a "municipal purpose" concern some positive action undertaken by the city, considered to be needed for the health, morals, safety, protection or welfare of the city. . . . If an ordinance has no reasonable relationship to the morals, health, welfare and safety of the people of a municipality, it is beyond the authorized exercise of the police power of the municipality.

In this case, the cities' ordinances have no apparent police power or municipal governmental function. . . . They simply recite their sole purpose or intent is to opt the respective city out of the county's ordinance, relying upon the primacy of city ordinances in the case of "conflict."

However, there is no real conflict in this case. The cities in essence are attempting to veto an otherwise legitimate effort on the part of the county to raise funds to pay for the county road system, which traverses the municipalities as well as the unincorporated areas. Preventing or hindering the county from its task of maintaining, building and planning the arterial or collective streets throughout the county does not appear to be in any city's best interest or welfare.

535 So. 2d at 304-05 (citations, footnote omitted).

The general rule of both Ormond Beach and Seminole County is that both charter and non-charter counties have the power to impose impact fees countywide to fund capital facilities provided on a countywide uniform basis. In other words, the constitutional principle that county ordinances are not effective within municipalities with conflicting ordinances is also constitutionally limited by the requirement that all municipal ordinances serve a municipal purpose. Absent a municipal purpose, a municipality cannot, by adopting an inconsistent ordinance, preempt the county from providing or funding a countywide program or facility.

charter county.) The Florida Constitution provides that a county's charter will state which ordinance shall prevail when a county ordinance and a municipal ordinance are in conflict. Art. VIII, §1(g), Fla. Const. (1968). The Volusia County charter, however, provided that a county ordinance in conflict with a municipal ordinance is not effective within the municipalities to the extent of the conflict except in specific areas not relevant to the decision. The 1968 Florida Constitution states that when a non-charter county ordinance conflicts with a municipal ordinance then the county ordinance shall not be in effect within that municipality to the extent of the conflict. Art. VIII, § 1(f), Fla. Const. The court held that the same rule of law applied in Seminole County that had applied in Ormond Beach.

Assume that a county establishes a countywide emergency medical services program and imposes an impact fee to fund the growth portion of the needed capital facilities and equipment. Can a single municipality "opt-out" of such countywide program and interfere with the county funding plan? The Polk County Emergency Medical Services Impact Fee was upheld by the trial court over an inconsistent municipal ordinance which attempted to remove municipal areas paying the countywide impact fee when the municipality itself did not provide emergency medical services. The trial court opinion was not appealed.

F. Judicial Deference to Local Government Legislative Acts

1. Separation of Powers

Article II, section 3, Florida Constitution, provides for separation of powers between the three branches of government:

The powers of the state government shall be divided into legislative, executive, and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein.

Through the judicial extension of this separation of powers doctrine, legislative enactments of counties and cities in the exercise of their home rule powers are entitled to the same judicial deference as actions of the Legislature. See Chapman v. Town of Redington Beach, 282 So. 3d 979, 981 (Fla. 2d DCA 2019) (court decree compelling the Town to enforce its zoning ordinances would violate the doctrine of separation of powers).

2. Status of County and City Ordinances as Legislative Acts

The status of county and city ordinances as legislative acts that are entitled to judicial deference is well established in judicial precedent. For example, in the context of the setting of utility rates, the Court in Mohme v. City of Cocoa, 328 So. 2d 422, 424-25 (Fla. 1976), recognized the exercise of legislative power by a municipality as follows:

In Florida, it is a well recognized principle of law that rate-setting for municipal utilities is a legislative function to be performed by legislative bodies like local municipal governments and the commissions to which these bodies delegate such authority. Our courts will intervene to strike down unreasonable or discriminatory public utility service rates prescribed by the Legislature, a municipality, or municipal commission; however, courts will not themselves fix prospective rates. [citations omitted]

The Court in Mohme v. City of Cocoa also stated that the burden of proof on the invalidity of the utility rates rested on the utility customer's challenging the rates as invalid and held that a municipality "should not be required to come forward to prove the efficacy of its rates unless and until a

dissatisfied customer has made a prima facie showing based on competent evidence of invalidity.” 328 So. 2d at 426.

Likewise, in the City of Riviera Beach v. Martinique 2 Owners Association, 596 So. 2d 1164, 1165 (Fla. 4th DCA 1992), the Court recognized the legislative nature of utility rate-making as follows:

The term ‘just and equitable’ as used in section 180.13(2) is a brake primarily on the legislative rate-making, not on later judicial review. That is to say, the cities are given broad authority to establish their own rates for municipal utilities’ charges. The amount or form those rates take in a representative democracy is something that is left to a civically vigilant electorate. Judicial deference to the legislative will requires a rule of review of utility rates such that it is only when the rate is so excessive as to be entirely unjustifiable—i.e., when the rate is arbitrary, unreasonable or invidiously discriminatory—that a court should enjoin enforcement. We cannot say that Riviera Beach’s rates fit within that rule.

Similarly, in the context of determining the validity of a special assessment, the concept of judicial deference was embodied in the adoption of the following “appropriate standard of review:”

To eliminate any confusion regarding what standard is to be applied, we hold that the standard is the same for both prongs; that is, the legislative determination as to the existence of special benefits and as to the apportionment of the costs of those benefits should be upheld unless the determination is arbitrary.

Sarasota County v. Sarasota Church of Christ, Inc., 667 So. 2d 180, 184 (Fla. 1995).

II. SPECIAL DISTRICT POWER AND CLASSIFICATION

A. Summary

Special districts are limited purpose local governments created to serve a specific purpose or provide an identified service or facilities. A special district has the same limited power that was possessed by counties and municipalities prior to the implementation of constitutional and statutory home rule in the 1968 constitutional revision.

The express power of a special district is found in its charter whether created by special act, general law, county or municipal ordinance, or interlocal agreement.

B. Special District Power

Special districts are a limited form of local government created to perform a specialized function. Special districts have no home rule power. This specialized form of local government has

only the powers expressly provided, or which can be reasonably implied, from the authority provided legislatively in its charter. See State ex rel. City of Gainesville v. St. Johns River Water Management District, 408 So. 2d 1067 (Fla. 1st DCA 1982).¹⁷

The Florida Supreme Court, in explaining the specialized nature of special districts in Gallant v. Stephens, 358 So. 2d 536 (Fla. 1978), recognized a special district as a distinct form of local government:

Wholly independent of this county taxing power is the authority provided for "special districts" to meet the need for special purpose services in any geographical area which may (but need not) be within one county. . . .

Id. at 540. The definition of special districts in section 189.012(6), Florida Statutes, supports the Supreme Court's explanation in Gallant of a special district and provides:

"Special district" means a unit of local government created for a special purpose, which has jurisdiction to operate within a limited geographic boundary and is created by general law, special act, local ordinance, or by rule of the Governor and Cabinet. The term does not include a school district, a community college district, a special improvement district created pursuant to s. 285.17, a municipal service taxing or benefit unit as specified in s. 125.01, or a board which provides electrical service and which is a political subdivision of a municipality or is part of a municipality.

Id.

C. Statutory Classifications

Special districts are defined by statute as independent or dependent. Such statutory classification controls the available formation options and dictates the application of statutory millage limitations.

Section 189.012(2), Florida Statutes, defines a special district as "dependent" if it meets one of the following criteria:

- Its governing body is identical to that of a single county or municipality,

¹⁷The only constitutional references to a special district are the potential authorization of ad valorem taxing power and the millage limitations of Article VII, section 9, Florida Constitution, and the scheduling provisions of prior authorized special district tax millage in Article XII, section 2, Florida Constitution.

- All members of the governing body are appointed by a single county or municipality,
- The members of the governing body can be removed during their unexpired term by a single county or municipality, or
- Its budget requires approval of or can be vetoed by a single county or municipality.

An "independent" special district is defined in section 189.012(3), Florida Statutes, as a special district that is not defined as "dependent" under the criteria of section 189.012(2), Florida Statutes, or any district that includes more than one county unless the district lies wholly within the boundaries of a single municipality (i.e., Town of Longboat Key).

One of the principal differences between an independent and dependent district is the treatment of special district millage. Any millage authorized and levied by a dependent district is aggregated with the general-purpose local government's millage for purposes of the 10-mill cap on ad valorem property taxes. See Board of County Commissioners, Hernando County v. Florida Department of Community Affairs, 626 So. 2d 1330 (Fla. 1993). Additionally, as provided in Chapter 189, Florida Statutes, the general-purpose local government to which a dependent district is dependent is ultimately responsible for oversight of the dependent district. See, e.g. §189.068, Fla. Stat. (oversight authority in general-purpose government), §189.076, Fla. Stat. (general-purpose local government responsible for all indebtedness of dissolved district).

D. Creation of Special Districts

1. Statutory Limitations

Section 189.031, Florida Statutes, adopted under the provisions of Article III, section 11(a)(21), Florida Constitution, prohibits the creation of independent special districts by special acts or general laws of local application unless they conform to the stated statutory criteria and minimum requirements provided in section 189.031(3), Florida Statutes.

Section 189.02(1), Florida Statutes, provides that the charter for the creation of a dependent special district shall be adopted only by "ordinance of a county or municipal governing body having jurisdiction over the area affected." Section 189.02(4), Florida Statutes, contains minimum criteria for the charter of a dependent special district created by ordinance. Section 189.02(5), Florida Statutes, reserves authority for the Legislature to create a dependent district by special act "at the request of or with the consent of the local government upon which the special district will be dependent."

2. Creation by Special Act

Except for the criteria and requirements of section 189.031, Florida Statutes, a special act creating a special district can be uniquely drafted to provide the authority and organizational structure desired. A special district created by special act can also authorize the levy of ad valorem taxes within a stated millage cap subject to elector approval. However, a special act cannot authorize a special district to impose or levy any other tax. See Art. VII, §1(a), Fla. Const.

A major disadvantage of a special act special district is that any charter change requires a supplemental special act adopted by the Legislature.

3. Creation by General Law

The prohibited special law provisions of Article III, section 11, Florida Constitution, limit a general law classification of special districts in section 11(b) as follows:

In the enactment of general laws on other subjects, political subdivisions or other governmental entities may be classified only on a basis reasonably related to the subject of the law.

Accordingly, a general law may authorize the creation of a special district to perform a specialized function. If applicable less than statewide, the special district classification in the general law must be reasonably related to the subject of the law or the nature of the special district. Because the enabling act is a general law, selected tax revenues could be included as local tax options of the special district. See Art. VII, §1(a), Fla. Const.

4. Creation by Local Ordinance

The charters of dependent special districts must be adopted by county or municipal ordinance under the provisions of section 189.02, Florida Statutes. If the boundaries of a dependent special district created by a county includes municipal areas, approval of the affected municipality is required. See § 189.02(2), Fla. Stat.

This express statutory authority for the creation of dependent districts, combined with the broad power of self-government constitutionally and legislatively provided to all counties, provides the home rule power of a county to create a dependent special district as a separate unit of local government by ordinance. See Forsythe v. Longboat Key Beach Erosion Control District, 604 So. 2d 452 (Fla. 1992), (acknowledges the validity of the creation of a dependent special district by ordinance, but the dependent district created by ordinance was disapproved since, under the special district statutory classification scheme before the Court, a district located in more than one municipality was by definition an independent special district and could be created only by special act.)

The major advantage of a home rule special district is the retention of local control in drafting the initial charter and any amendments.

5. Creation under Section 125.01(5), Florida Statutes

Section 125.01(5)(a), Florida Statutes, authorizes a county to create by ordinance a special district to include both incorporated and unincorporated areas subject to the approval by the affected municipality. Once created, such special district has the power to provide municipal services and facilities “from funds derived from service charges, special assessments, or taxes within such unit only.”

A special district created by ordinance pursuant to Section 125.01(5) is classified as “independent” or “dependent” under Chapter 189, Florida Statutes, depending on the governing board and budget adoption provisions provided in the authorizing ordinance. Section 189.031(4)(b), Florida Statutes, expressly recognizes that a county may create an independent special district “as otherwise authorized by general law.”

Section 125.01(5)(b), Florida Statutes, requires that the governing body of the special district be composed of county commissioners and further provides that the governing board may include elected officials of the affected municipality. The basis of apportionment must be established in the ordinance.

E. Uniform Special District Accountability Act

Chapter 189, Florida Statutes, establishes a legislative framework of minimum standards for special district creation and dissolution, elections, finances, oversight and accountability, and mandatory coordination with the counties and cities in which they are located. This chapter also outlines certain mandatory reporting requirements to the state designed to promote transparency by reporting to the public and counties and cities of the status and activities of special districts.

There are other special district reporting requirements within various generally applicable and purpose specific (i.e. chapter 191 covers special fire districts) general laws, including, but not limited to the following sections 11.45 (7), 218.32, 218.38, 218.39, 218.503, 189.014, 189.015, 189.016. and 189.08, Florida Statutes.

III. PREEMPTION OF LOCAL GOVERNMENT POWER

A. Summary

A constitutional provision, general law, or special act can diminish or limit the home rule power of a county or a municipality. As to a charter county, the special act is constitutionally required to be approved by the electors.

The exercise of county or municipal home rule cannot conflict with a constitutional provision, general law, or special act. Additionally, the exercise of county and municipal home rule power is preempted if it is inconsistent with a pervasive regulatory scheme or is contrary to the assignment of responsibility among governmental units by the legislature.

A more stringent county or municipal ordinance is not in conflict with a state regulatory scheme if by its language and scope the state regulation does not preempt local action or advance a contrary regulation that the Legislature intended to be uniform.

B. Preemption of Legislative Special Acts

The design of the 1968 constitutional revision incorporates a legislative mechanism to prohibit special legislation that is inconsistent or in conflict with general law. Article III, section 11(a)(21), Florida Constitution (1968), provides:

SECTION 11. Prohibited special laws.--

(a) There shall be no special law or general law of local application pertaining to:

* * *

(21) any subject when prohibited by general law passed by a three-fifths vote of the membership of each house. Such law may be amended or repealed by like vote.

When the Florida Legislature exercises this power to prohibit special acts, it does so in clear and certain terms, citing the constitutional provision as its basis. See, e.g., §1011.77, Fla. Stat. (prohibiting special acts pertaining to taxation for school purposes and the Florida Education Finance Program); see also Art. III, §11, n. 1, Fla. Const. (detailing each of the 10 statutes passed by a supermajority of the Legislature under its Art. III, §11(a)(21) power).¹⁸

The concept of state preemption of local government power is not limited to circumstances in which an express and direct state legislative statement or declaration of preemption has been made. As will be discussed more thoroughly below, local government power can also be preempted by legislative decisions of the state if the local government action: (1) conflicts with state law, (2) is inconsistent with a pervasive regulatory scheme legislated by the state, or (3) attempts to exercise control over an area in which the state has assigned contrary discretion and responsibility.

C. Preemption by Constitutional Provision

It may go without saying, but the home rule authority of a county or municipality can be preempted by a constitutional provision.

¹⁸Historically, the Florida House of Representatives and the Florida Senate have differed on the interpretation of this constitutional provision. The House position is that a special act passed by a "like vote" of three-fifths repeals a general law prohibition. The Senate position is that the general law prohibition must be repealed by a three-fifths vote before considering the inconsistent special act.

1. Charter Term Limits Illustration

An example of this type of preemption is found in the judicial saga over local charter provisions imposing term limits. In the consolidated case of Cook v. City of Jacksonville and Deblacker v. Eight is Enough in Pinellas, 823 So. 2d 86 (Fla. 2002) (hereinafter referred to as "Cook Consolidated"), the Florida Supreme Court reviewed two District Court of Appeal opinions upholding charter provisions imposing term limits on county officers, other than county commissioners. As discussed subsequently, the Court receded from the Cook Consolidated opinion.

In Cook v. City of Jacksonville, 765 So. 2d 289 (Fla. 1st DCA 2000), the electors approved a charter amendment placing a term limit on the clerk of court. The First District Court reasoned that, where the Constitution establishes no qualifications for a public office, the Legislature may impose additional qualifications. Under such reasoning, the First District Court distinguished the prior opinion in Thomas v. Cobb, 58 So. 2d 173 (Fla. 1952), which held that a statute which imposed additional qualifications unconstitutional where the Constitution provided specific qualifications.

In Deblaker v. Eight is Enough in Pinellas, 775 So. 2d 317 (Fla. 2d DCA 2000), the Second District Court upheld term limit provisions primarily on the basis that no statute or constitutional provision prohibited the charter county from imposing term limits and thus the broad home rule authority granted to charter counties under Article VIII, section 1(g), Florida Constitution, included the power to impose term limits by charter amendment.

The Court in Cook Consolidated reversed both decisions and held that a charter term limit provision is a disqualification from election to office and thus unconstitutional since Article VI, section 4(a), Florida Constitution "provides the exclusive roster of those disqualifications which may be permissibly imposed." 823 So. 2d at 90. The Court also held that the enumeration of offices subject to term limits in Article VI, section 4(b), Florida Constitution, provided those positions authorized by the Constitution upon which a term limit may be permissibly imposed.

However, in Telli v. Broward County, 94 So. 3d 504 (Fla. 2012), the Court receded from its decision in Cook Consolidated and held that the term limit on county commissioners in the Broward County charter did not violate the Florida Constitution. The Fourth District Court of Appeal, in Snipes v. Telli, 67 So. 3d 415 (Fla. 4th DCA 2011), had upheld the term limits on county commissioners and drew a distinction between the officers at issue in the Cook Consolidated case.

First, the Florida Supreme Court in Telli v. Broward County recognized:

Not allowing Broward County in this case to decide whether its county commissioners should be subject to term limits brings into focus the broad implication of the Court's prior ruling in Cook, and the limitation it has on the exercise of Florida counties' home rule power as authorized by the Florida Constitution.

94 So. 3d at 507.

The Court quoted extensively the dissent by Justice Anstead in Cook Consolidated as

follows:

This broad language was obviously intended to allow charter counties wide latitude in acting regulations governing the selection and duties of county officers. . . . The term limit provisions in the charters in these cases are not inconsistent with any provision of general law relating to elected county officers. Given this grant of broad authority and consistency with general law, I can find no legal justification for concluding that charter counties should not be allowed to ask their citizens to vote on eligibility requirements of local elected officials, including term limits, since they could abolish the offices completely or decide to select the officers in any manner of their choosing.

94 So. 3d at 512.

The Court then receded from its opinion in Cook Consolidated and held:

The implied prohibition in Cook against term limits for county officers and county commissioners from the lack of inclusion in article VI, section 4, of the Florida Constitution, overly restricts the authority of counties pursuant to their home rule powers under the Florida Constitution. The opinions of the First and Second Districts should have been affirmed, as Justice Anstead stated in his dissenting opinion.

94 So. 3d at 512.

The basis for the Court receding from the stare decisis of Cook Consolidated was stated as follows:

In this case, the prior opinion in Cook undermines the ability of counties to govern themselves as that broad authority has been granted to them by home rule power through the Florida Constitution.

94 So. 3d at 513.

The Court further stated the following justification:

Receding from the Cook decision will promote stability in the law by allowing the counties to govern themselves, including term limits of their officials, in accordance with their home rule authority.

94 So. 3d at 513.

2. Reservation of State Power

In Lowe v. Broward County, 766 So. 2d 1199 (Fla. 4th DCA 2000), review denied, 789 So. 2d 346 (Fla. 2001), the Court recognized a constitutional principle of reservation of state power in certain matters inherently of a purely statewide concern "separate from the doctrine of preemption." This conclusion was based on the following quote from City of Miami Beach v. Fleetwood Hotel, Inc., 269 So. 2d 801 (Fla. 1972):

"Matters that because of their nature are inherently reserved for the State alone and among which have been the master and servant and landlord and tenant relationships, matters of descent, the administration of estates . . . and many other matters of general and statewide significance, are not proper subjects for local treatment. . ."

766 So. 2d at 1204.

Additionally, the court established a test for determining the constitutional line between permissible and overreaching county legislation under this constitutional principle as follows:

Given the constitutional and statutory breadth accorded to a charter county's self-governing powers, the better test is to invalidate a local ordinance only where its subject is "in a substantial degree a matter of state concern."

766 So. 2d at 1205.

Ultimately, the Court held that the ordinance formally establishing a domestic partnership registry is not a matter inherently reserved to the State and thus did not apply its articulated constitutional principle.

D. Local Government Action in Conflict with State Law

The Legislature can preempt county and municipal home rule authority by adopting an express general law prohibition. For examples see the following provisions of the Florida Statutes: section 125.0109, providing that operation of a residence as a family day care home shall constitute a valid residential use for purposes of any local zoning regulation; section 125.01045, prohibiting a county from imposing a fee or seeking reimbursement for costs provided by a first responder; section 125.0107, prohibiting a county from adopting any ordinance relating to possession or sale of ammunition; section 403.7031, prohibiting any county or municipality from adopting by ordinance a definition inconsistent with the definitions contained in section 403.703 relating to environmental control; section 215.425, placing limitations on the payment of bonuses and severance pay; section 163.045, prohibiting local government from requiring notices, applications, approvals, permits, fees, or mitigation for the pruning, trimming, or removal of tress on residential property; and section 163.3209, prohibiting permits or other approvals or code provisions related to "vegetation maintenance and tree pruning or trimming" within the right-of-way of established electric or distribution lines.

Recently, the Florida Legislature passed Section 57.112, Florida Statutes, which provides for prevailing party attorney fees in certain actions to challenge a local ordinance expressly preempted by state law. This section provides in pertinent part: “if a civil action is filed against a local government to challenge the adoption or enforcement of a local ordinance on the grounds that it is expressly preempted by the State Constitution or by state law, the court shall assess and award reasonable fees and costs and damages to the prevailing party.” §57.112(2), Fla. Stat.¹⁹

The doctrine that local government action is preempted if it is in conflict with state law is most clearly stated in Rinzler v. Carson, 262 So. 2d 661 (Fla. 1972). In Rinzler, the Supreme Court considered a City of Jacksonville ordinance that prohibited the possession of any machine gun, submachine gun, or similar firearm within the municipal boundaries of the city. The ordinance was more restrictive than allowed under state law. The Supreme Court, in determining that the ordinance was invalid, stated:

Municipal ordinances are inferior in stature and subordinate to the laws of the state. Accordingly, an ordinance must not conflict with any controlling provision of a state statute, and if any doubt exists as to the extent of a power attempted to be exercised which may affect the operation of a state statute, the doubt is to be resolved against the ordinance and in favor of the statute. A municipality cannot forbid what the legislature has expressly licensed, authorized or required, nor may it authorize what the legislature has expressly forbidden.

Id. at 668.

In the case of City of Miami Beach v. Rocio, 404 So. 2d 1066 (Fla. 3d DCA 1981), rev. denied, 408 So. 2d 1092 (Fla. 1981), the Court balanced this conflict doctrine with the provisions of the Municipal Home Rule Powers Act contained in section 166.021, Florida Statutes. The municipal ordinance at issue delayed conversion of apartments into condominiums by extending leases and creating a 90-day moratorium on their conversion. The Court held that the subject matter of the municipal ordinance was not “expressly preempted to the state” within the “expressly preempted” language of section 166.021(3)(c), Florida Statutes. However, the Court recognized that express preemption is not required, and that municipal authority can be otherwise restricted by general law. The Court, relying extensively on Rinzler v. Carson, held that the ordinance was invalid under the conflict doctrine with the following statement, “Municipal ordinances are inferior to state law and must fail when conflict arises.” See 404 So. 2d at 1069.

The city had argued in City of Miami Beach v. Rocio that the conflict doctrine articulated in Rinzler v. Carson had been superseded by the passage of the Municipal Home Rule Powers Act. The Court rejected this argument and noted:

¹⁹ As of this drafting, House Bill 403 and its Senate companion Senate Bill 280 are pending in the 2022 Florida Legislative Session. If passed, these bills would change the legal standards and processes used by courts to determine the validity of local ordinances and impose new substantive requirements on local governments for adopting and enforcing ordinances.

Although the legislature has extended municipal powers in the Municipal Home Rule Powers Act, the issue of conflict with state law has not been addressed. . . . The principle that a municipal ordinance is inferior to state law remains undisturbed. Although legislation may be concurrent, enacted by both state and local governments in areas not preempted by the state, concurrent legislation enacted by municipalities may not conflict with state law. If conflict arises, state law prevails.

Rocio, 404 So. 2d at 1070.

The subject of express preemption was most recently addressed in Orange County v. Singh, 268 So. 3d 668 (Fla. 2019). In this case an Orange County charter amendment providing for the nonpartisan election of the sheriff, tax collector, property appraiser, supervisor of elections, and the clerk of court was challenged. This amendment also allowed for the election of these officers at the time of the primary election, rather than the general election in certain circumstances. Three constitutional officers – the sheriff, property appraiser, and tax collector – challenged this amendment as being in conflict with the Florida Election Code, Chapters 97-105, Florida Statutes, and in violation of the express preemption set forth in Section 97.0115, Florida Statutes, which states “All matters set forth in chapters 95-105 are preempted to the state, except as otherwise provided by state or federal law.”

The Fifth District Court of Appeal had held that the nonpartisan election amendment was invalid under the doctrine of express preemption due to the operation of Section 97.0115, Florida Statutes, and the Florida Supreme Court originally disagreed, stating that “Whether the county constitutional officers must stand for election in partisan or nonpartisan elections is not a matter set forth in the Florida Election Code and is, therefore, not preempted.” Orange County v. Singh, 44 Fla. L. Weekly S102 (Fla. Jan. 4, 2019). However, a new majority of the Florida Supreme Court just months later recalled the mandate issued in January and in April 2019 issued a new opinion, finding that the express preemption to the state of all matters set forth in the Florida Election Code found in Section 97.0115, Florida Statutes, preempted charter counties from requiring nonpartisan elections for local elected officers. See Singh, 268 So. 3d at 674.

E. Local Government Action Inconsistent With a Pervasive Regulatory Scheme

Not only is local government action prohibited when it is in conflict with the provision of a specific state statute, local government action is also preempted when it is deemed to be inconsistent with a pervasive regulatory scheme of the state. In Tribune Co. v. Cannella, 458 So. 2d 1075 (Fla. 1984), the Florida Supreme Court addressed the effect of a local government action within the area of public records disclosure. The area of public records had been the subject of comprehensive regulation by the state. At issue was not an ordinance but rather a municipal policy that delayed the public release of personnel files for seven days. The Supreme Court struck the municipal policy, holding that the state public records law did not allow a delay in the disclosure of nonexempt public records for any reason. The basis of the Supreme Court's decision was the comprehensive nature of the public records law and it stated the following language with approval:

Under [the preemption] doctrine a subject is preempted by a senior legislative body from the action by a junior legislative body if the senior legislative body's scheme of regulation of the subject is pervasive and if further regulation of the subject by the junior legislative body would present a danger of conflict with that pervasive regulatory scheme. . . .

Id. at 1077.

The general rule that an ordinance cannot be in conflict with a pervasive regulatory scheme of the state is softened by the principle that a municipal or county ordinance providing more stringent regulation is not in conflict if the state regulatory scheme by its language and scope does not preempt local action or advance a policy that the Legislature intended to be uniform.

In Jordan Chapel Freewill Baptist Church v. Dade County, 334 So. 2d 661 (Fla. 1976), the Court was determining whether an ordinance providing additional regulation of bingo was in conflict with the state statute. The Court stated the general rule that legislative provisions are inconsistent if, to comply with one provision, a violation of the other is required. The Court further held as follows:

Courts are therefore concerned with whether compliance with a County ordinance requires a violation of a state statute or renders compliance with a state statute impossible.

334 So. 2d at 664.

Similarly, in F.Y.I. Adventures v. City of Ocala, 698 So. 2d 583 (Fla. 5th DCA 1997), the Court upheld an ordinance providing additional regulations to those enacted by the state on the conduct of bingo games. The Court held that, under its review of the statute, it perceived no intent by the Legislature to preempt appeal of bingo regulation or that the Legislature intended that bingo regulation be uniform across the state. As a consequence, the Court in FYI Adventures v. City of Ocala held as follows:

The question is, does compliance with the ordinance violate the state law, or make compliance with state law impossible? It is not a conflict if the ordinance is more stringent than the statute.

698 So. 2d at 584.

In Phantom of Clearwater v. Pinellas County, 894 So. 2d 1011, 1016 (Fla. 2d DCA 2005), the Court was faced with a state law regulating the sale of fireworks that had a section that stated:

This chapter shall be applied uniformly throughout the state.

In upholding the ordinance, the Court reasoned that implied preemption is actually a decision by the courts to create preemption in the absence of an explicit legislative directive and that such judicial decisions are made reluctantly since they preclude an elected local governing body from exercising its local powers. The Court concluded as follows:

[I]f the legislature can easily create express preemption by including clear language in a statute, there is little justification for the courts to insert such words into a statute. In the absence of express preemption, normally a determination based upon any direct conflict between the statute and a local law, . . . is adequate to solve a power struggle between existing statutes and newly created ordinances.

894 So. 2d at 1019.

Therefore, the courts imply preemption only when the legislative scheme is so pervasive that it evidences an intent to preempt the particular area under a uniform legislative scheme.

The Court in City of Kissimmee v. Florida Retail Federation, 915 So. 2d 205 (Fla. 5th DCA 2005), recognized that in resolving conflict between the state and local regulation, the Court should exercise judicial deference. Recognizing the principle that a local ordinance cannot conflict with a state statute, the Court held that conflict does not exist simply because the ordinance is more stringent than the state law or regulates an area not covered by the state law. The Court held as follows:

Where there is no direct conflict between the two, appellate courts should indulge every reasonable presumption in favor of an ordinance's constitutionality.

915 So. 2d at 209.

In Thomas v. State, 614 So. 2d 468 (Fla. 1993), the Court held a penalty in a municipal ordinance invalid since it has exceeded the penalty imposed by the state. However, the Court recognized the concurrent regulatory jurisdiction of both the municipality and the state as follows:

Although municipalities and the state may legislate concurrently in areas that are not expressly preempted by the state, a municipality's concurrent legislation must not conflict with state law.

614 So. 2d at 470.

F. Local Government Action Contrary to State Assignment of Discretion and Responsibility

The final area of local government preemption exists when the proposed governmental action is contrary to or in conflict with the assignment of governmental responsibility by the Legislature.

For example, in Department of Transportation v. Lopez-Torres, 526 So. 2d 674 (Fla. 1988), the Florida Supreme Court recognized the preemption of local government action because the Legislature had assigned specific responsibility to a governmental entity. The Supreme Court found that such preemption existed without reliance on the conflict doctrine developed in Rinzler v. Carson and City of Miami Beach v. Rocio and without reliance on the pervasive regulatory scheme doctrine asserted in Tribune Company v. Cannella. Furthermore, in Department of Transportation v. Lopez-Torres, a municipality attempted to exercise control of the replacement of a bridge on the state highway system by directing its new location through the local comprehensive plan. The Florida Department of Transportation sought to construct a replacement bridge at an alternative location which was 100 feet north of the existing bridge. The Town of Ocean Ridge and certain of its residents filed suit maintaining that the town's comprehensive plan prevented construction of a bridge at the location selected by the Department.

At issue was the relationship between the specific assignments of responsibility contained within the Florida Transportation Code and the efforts of the municipality to legislate within those areas.²⁰ The stated purpose of the Florida Transportation Code as contained in section 334.035, Florida Statutes, is as follows:

The purpose of the Florida Transportation Code is to establish the responsibilities of the state, the counties, and the municipalities in the planning and development of the transportation systems serving the people of the state and to assure the development of an integrated, balanced statewide transportation system.

Under the provisions of the Florida Transportation Code, the state and each local government is granted the authority over specific roads within its jurisdiction. The roads within the state's responsibility are defined by section 334.01(25), Florida Statutes. Those that are the responsibility of counties and each municipality are defined by sections 334.03(8) and 334.03(3), Florida Statutes, respectively. No express preemption language is contained within the Florida Transportation Code. The Florida Supreme Court in Department of Transportation v. Lopez-Torres found that authority over state roads was preempted to the Florida Department of Transportation and that municipalities had no authority to interfere in the exercise of that authority, even when it conflicted with legitimate municipal goals. The Supreme Court stated:

By virtue of its preemptive authority, the DOT may route a state road bridge through or into a municipality by way of a corridor that conflicts with the municipality's comprehensive growth plan.

Id. at 676. Thus, the Court concluded that "the legislature preempted municipalities from exercising any control over the establishment of state roads and bridges[.]" Id. at 674.

IV. CONSTITUTIONAL PREEMPTION OF FORMS OF TAXATION TO THE STATE

²⁰Chapters 334 through 339, Florida Statutes, along with certain other chapters, as designated by section 334.01, Florida Statutes, constitute the Florida Transportation Code.

A. Summary

Article VII, section 1(a), Florida Constitution, is not a source of taxing power but rather a limitation or allocation of power among the state and local governments.

The state is constitutionally prohibited from levying an ad valorem tax on real or tangible personal property.

All forms of taxation other than the ad valorem tax on real or tangible personal property are preempted to the state except as provided by general law.

B. Historical Context

To place the taxing power of local government in proper perspective, one must focus on the difference in the taxation provisions of the 1885 and the 1968 Florida Constitutions.

Article IX, section 3, Florida Constitution (1885), provided, "No tax shall be levied except in pursuance of law," and Article IX, section 5, Florida Constitution, provided:

Section 5. The Legislature shall authorize the several counties and incorporated cities or towns in the State to assess and impose taxes for county and municipal purposes, and for no other purposes, and all property shall be taxed upon the principles established for State taxation.

In contrast, Article VII, section 1(a), Florida Constitution (1968), provides:

No tax shall be levied except in pursuance of law. No state ad valorem taxes shall be levied upon real estate or tangible personal property. All other forms of taxation shall be preempted to the state except as provided by general law.

Article VII, section 9(a), Florida Constitution (1968), provides:

Counties, school districts, and municipalities shall, and special districts may, be authorized by law to levy ad valorem taxes and may be authorized by general law to levy other taxes, for their respective purposes. . . .

Under the 1885 Florida Constitution, if a special act did not change the method of assessment or collection, a county or a municipality could be authorized by special act to levy a tax.²¹ In

²¹Article III, section 20, Florida Constitution (1885), like Article III, section 11(a)(2), Florida Constitution (1968), prohibits special acts relating to the assessment and collection of taxes. See

contrast, under the 1968 Florida Constitution, all taxes, other than ad valorem taxes, are preempted to the State. The 1968 Florida Constitution expressly authorized counties to levy ad valorem taxes but preserved state-wide legislative discretion as to the levy of all other taxes by constitutionally requiring a general law authorization.

Article VII of the 1968 Florida Constitution is not a source of local government taxing power. Other than the mandatory authorization to levy ad valorem taxes within the stated millage limits, Article VII grants no taxing power to local governments. Rather, it is a limitation on the power to tax, whether imposed by ordinance or special act. All taxes other than ad valorem taxes are preempted to the state except as authorized by general law.

For example, before the Court in City of Tampa v. Birdsong Motors, Inc., 261 So. 2d 1 (Fla. 1972), was the validity of a license tax imposed by the city pursuant to a special act charter provision enacted prior to the tax preemption to the state embodied in the 1968 constitutional revision. The license tax was calculated as a percentage of the gross sales of persons, firms, or corporations engaged in business, professions, or occupations.

The Court in Tampa v. Birdsong Motors, Inc. first recognized the change in the constitutional tax provisions in the 1968 constitutional revision in Article VII, section 1(a):

Prior to adoption of the Florida Constitution of 1968, the authority of a city to impose taxes could be enacted by special or local act... . Under the Constitution of Florida adopted in 1968, this authorization for a city to tax must hereafter 'be authorized by general law,' except in the case of ad valorem taxes.

261 So. 2d at 3

The Court then held the tax was not valid:

Any tax not authorized by general law must necessarily fall by virtue of the preemption clause of Fla. Const. Art. VII, § 1 (1968).

261 So. 2d at 4.

C. Definition of Ad Valorem Tax

The definition of an ad valorem tax in the constitutional context of Article VII, section 1(a), Florida Constitution, was before the Court in Rutledge v. Chandler, 445 So. 2d 1007 (Fla. 1984). There, a “floor tax” was levied on all Florida retailers on alcoholic beverages in their retail inventory on a date certain.

also Alachua County v. Adams, 702 So. 2d 1253 (Fla. 1997) (holding that the use of the infrastructure surtax cannot be changed by special act).

The floor tax was constitutionally challenged on the grounds that the state was imposing an ad valorem tax in violation of Article VII, section 1(a). In rejecting such a challenge, the Court provided the following delineation of the difference between an ad valorem tax and an excise tax, quoting from its prior decision in City of DeLand v. Florida Public Service Co., 161 So. 735, 738 (Fla. 1935):

All taxes, other than polls, are either direct or indirect property taxes. A direct tax is one that is imposed directly upon property, according to its value. It is generally spoken of as a property tax or an ad valorem tax. An indirect tax is a tax upon some right or privilege, or corporate franchise, and is most often called an excise or occupational tax.

An excise and a property tax, when the two approach each other, ordinarily may be distinguished by the respective methods adopted for laying them and fixing their amounts. If a tax is imposed directly by the Legislature without assessment, and its sum is measured by the amount of business done, income previously received, or by the extent to which a taxable privilege may have been enjoyed or exercised by the taxpayer, irrespective of the nature or value of such taxpayer's assets or his investments in business, it is to be regarded as an excise tax. But, if the tax is computed upon the valuation of the property, and assessed by assessors, either where it is situated or at the owner's domicile, although privileges may be included in the valuation, it is considered a property tax.

The Court in Rutledge v. Chandler then held that the floor tax was not a property tax because it was not levied on an assessed value but was imposed directly by the Legislature, without assessment, and therefore was based upon the exercise of a privilege—the possession of alcoholic beverages for retail sale. The Court further held that the exercise of the privilege was measured by the amount of alcoholic beverages in inventory on the date established rather than a property tax based upon an assessed value. See also Gaulden v. Kirk, 47 So. 2d 567, 572 (Fla. 1950) (“The real test as to whether the tax provided in the instant law is a property tax involves not merely a consideration of the purpose of the act but rather a consideration of the subject of taxation or the thing actually taxed.”)

The constitutional prohibition on a state levy of ad valorem taxes in section 1(a) of Article VII has also been resorted to in challenging a funding mandate by the Legislature on local governments as an indirect levy of ad valorem taxes by the state.

In Board of Public Instruction of Brevard County v. State Treasurer, 231 So. 2d 1 (Fla. 1970), the constitutionality of a general requirement that local school districts provide financial support to junior colleges was challenged on the basis that junior colleges had been removed from the jurisdiction of local school boards. The school board argued that the operation of junior colleges constituted a state activity rather than a local activity and thus the requirement of ad valorem taxes to support junior colleges was an unconstitutional funding of a state function in violation of section 1(a) of Article VII.

The Court held that nothing in the Florida Constitution prohibited the Legislature from enacting laws requiring local funds be used to support such educational institutions to the extent they serve a

local purpose. The Court in Board of Public Instruction of Brevard County v. State Treasurer then held that the junior college served a local function and that ad valorem taxes levied by school districts to support such institutions were local taxes levied for local purposes:

While the legislature may not circumvent the prohibition of state ad valorem taxation by any scheme or device which requires local ad valorem taxes and then channels the proceeds into essentially state functions which are not also local functions, no such situation is here presented.

231 So. 2d at 4.

In St. Johns River Water Management District v. Deseret Ranches of Florida, Inc., 421 So. 2d 1067 (Fla. 1982), the Court held that the water management district was not levying state ad valorem taxes in violation of Article VII, section 1(a), because the fact that water resource conservation planning and development are state functions does not make them exclusively so. The Court further held that simply because a water management district serves a state function does not prevent it from levying ad valorem taxes where the policy purpose is similarly vital to the local area within the district. The Court additionally recognized that Article VII, section 9(b), Florida Constitution, specifically authorizes the levy of ad valorem taxes for water management purposes. See also Sandegren v. State ex rel. Sarasota County Public Hospital Board, 397 So. 2d 657 (Fla. 1981).

V. AD VALOREM TAXATION PRINCIPLES

A. Summary

Article VII, section 9, Florida Constitution, implements the local ad valorem taxation of real and tangible personal property contemplated in Article VII, section 1 and places constitutional millage limits on the constitutional ad valorem taxing capacity of local governments.

The municipal service taxing unit is the authorization by law for a county furnishing municipal services to levy additional ad valorem taxes within the constitutional limits fixed for municipal purposes in implementation of the last sentence of section 9(b) of Article VII.

The Legislature has set statutory ad valorem millage limitations more severe than those constitutionally mandated. An argument exists that such statutory millage limitations are in violation of a direct constitutional grant of the ad valorem taxing power to counties and municipalities.

This section is limited to discussing the authorization and limitations on the use of ad valorem taxes to provide local governmental services and does not include constitutional limitations and statutory provisions relating to the pledge of ad valorem taxes for the payment of debt or constitutional and statutory provisions relating to assessment principles and practices.

B. Constitutional and Statutory Provisions

Section (9)(a) of Article VII, Florida Constitution (1968), implements the local ad valorem taxation of real estate and tangible personal property contemplated in Article VII, section 1 as follows:

Counties, school districts, and municipalities shall, and special districts may, be authorized by law to levy ad valorem taxes and may be authorized by general law to levy other taxes, for their respective purposes, except ad valorem taxes on intangible personal property and taxes prohibited by this constitution.

Article VII, section 9(b), Florida Constitution, then places certain constitutional millage ceilings on local government ad valorem levies:

Ad valorem taxes, exclusive of taxes levied for the payment of bonds and taxes levied for periods not longer than two years when authorized by vote of the electors who are the owners of freeholds therein not wholly exempt from taxation, shall not be levied in excess of the following millages upon the assessed value of real estate and tangible personal property: for all county purposes, ten mills; for all municipal purposes, ten mills; for all school purposes, ten mills; . . . and for all other special districts a millage authorized by law approved by vote of the electors who are owners of freeholds therein not wholly exempt from taxation. A county furnishing municipal services may, to the extent authorized by law, levy additional taxes within the limits fixed for municipal purposes.

These constitutional millage limitations can be summarized as follows:

- Ten mills for municipal purposes.
- Ten mills for county purposes.
- To the extent authorized by law, a county furnishing municipal services may levy additional taxes within the limits fixed for municipal purposes.
- Special districts may levy a millage: (1) authorized by law, and (2) approved by voters.
- The ten mills for county purposes and municipal purposes may be exceeded if approved by electors: (1) for two years for general governmental purposes, and (2) for payment of bonds.

Article XII, section 2, Florida Constitution, provides:

SECTION 2. Property taxes; millages.--Tax millages authorized in counties, municipalities and special districts, on the date this revision becomes effective, may be continued until reduced by law.

Article XII, section 15, Florida Constitution, provides:

SECTION 15. Special district taxes.--Ad valorem taxing power vested by law in special districts existing when this revision becomes effective shall not be abrogated by Section 9(b) of Article VII herein, but such powers, except to the extent necessary to pay outstanding debts, may be restricted or withdrawn by law.

The initial case construing the ad valorem tax millage ceilings in the 1968 constitution revision was State ex rel. Dade County v. Dickinson, 230 So. 2d 130 (Fla. 1969). At issue was whether the county, since it possessed the charter power to provide services both countywide and for municipal functions, had the constitutional power to levy 20 mills of ad valorem taxes for both county and municipal purposes regardless of any millage levy by the municipalities within the county. The county argued that the plain meaning of the last sentence of section 9(b) of Article VII provided to it the power to levy in the aggregate 20 mills for county and municipal purposes in addition to any millage levied by the municipalities within the county since it was a county providing municipal services. The Court summarized the argument as follows:

Reduced to its simplest terms and excluding the referendum approach, this would mean that a Dade County citizen living in a municipality is subject to a maximum of ten mills levy by the County for county services, ten mills maximum levy by the municipality for its services, and an additional ten mills maximum for municipal services provided by the County under home-rule—a total of thirty mills for county and municipal purposes (to which one can add a ten-mill maximum for school purposes for a total of forty mills; school millage, of course, is not at issue here).

230 So. 2d at 135.

The Court held that it could not reconcile the county's position with what it perceived as the express will of the people reflected in Article VII, section 9(b) as follows:

It is our view that both the legislature and the people intended to limit ad valorem taxation for county and municipal purposes *in all areas of the State* to a twenty-mill maximum beyond which millages could be raised but only if approved by referendum of the tax-paying property-holders directly affected. Regardless of any question as to the wisdom of this approach in face of expanding needs for public services, the people have spoken both through the legislature and through their direct approval of Article VII, § 9(b) and their voice ought to be heard and heeded.

230 So. 2d at 135-36 (emphasis in original).

C. Function of the Municipal Service Taxing and Benefit Unit Concept

Section 125.01(1)(q), Florida Statutes, includes as an enumerated county power, the power to

[e]stablish, and subsequently merge or abolish those created hereunder, municipal service taxing or benefit units for any part or all of the unincorporated area of the county, within which may be provided fire protection, law enforcement, beach erosion control, recreation service and facilities, water, streets, side-walks, street lighting, garbage and trash collection and disposal, waste and sewage collection and disposal, drainage, transportation, indigent health care services, mental health care services, and other essential facilities and municipal services from funds derived from service charges, special assessments, or taxes within such unit only. Subject to the consent by ordinance of the governing body of the affected municipality given either annually or for a term of years, the boundaries of a municipal service taxing or benefit unit may include all or part of the boundaries of a municipality in addition to all or part of the unincorporated areas. If ad valorem taxes are levied to provide essential facilities and municipal services within the unit, the millage levied on any parcel of property for municipal purposes by all municipal service taxing units and the municipality may not exceed 10 mills. This paragraph authorizes all counties to levy additional taxes, within the limits fixed for municipal purposes, within such municipal service taxing units under the authority of the second sentence of s. 9(b), Art. VII of the State Constitution.

Id. (emphasis added).

Section 125.01(1)(r), Florida Statutes, further enumerates the power to

[l]evy and collect taxes, both for county purposes and for the providing of municipal services within any municipal service taxing unit, and special assessments; borrow and expend money; and issue bonds, revenue certificates, and other obligations of indebtedness, which power shall be exercised in such manner, and subject to such limitations, as may be provided by general law. There shall be no referendum required for the levy by a county of ad valorem taxes, both for county purposes and for the providing of municipal services within any municipal service taxing unit.

Id. (emphasis added).

A municipal service taxing unit is not constitutionally nor functionally a special district.²² It is purely a mechanism by which a county can fund a particular service from a levy of ad valorem taxes, not countywide, but within all or a portion of the unincorporated areas. It is a tax equity tool available to a board of county commissioners within its legislative discretion to place the burden of ad valorem taxes upon a geographic area less than countywide to fund a particular service. In terms of function and accountability, it is no different than any other revenue source appropriated and budgeted by a county. In the county budget, the municipal service taxing unit is used to segregate the ad valorem taxes levied within the taxing unit to ensure that funds derived from such levy are used to provide the contemplated services.

The distinction between a municipal service taxing unit and municipal service benefit unit is that "benefit unit" is the correct terminology when the mechanism used to fund the county service is a service charge or a special assessment rather than a tax. Again, both units are similar in that a municipal service benefit unit is a mechanism available to a board of county commissioners to identify a precise geographic area in the unincorporated area in which to impose such service charges and special assessments and is not a special district in function or in status. The municipal service benefit unit is used within the county budget to account for such special assessments and service charges to ensure that such funds are used to provide the county services for which they were imposed.

D. The Benefit Requirement for Use of Ad Valorem Taxes

1. General Rule

The general rule is that the questions of benefits and of unlawful burdens do not arise when the tax is uniform, for a public purpose, and within the power of the Florida Legislature to prescribe. See Hunter v. Owens, 86 So. 839 (Fla. 1920); Jenkins v. Entzminger, 135 So. 785 (Fla. 1931); Dressel v. Dade County, 219 So. 2d 716 (Fla. 3d DCA 1969), cert. denied, 226 So. 2d 402 (Fla. 1969); and Tucker v. Underdown, 356 So. 2d 251 (Fla. 1978).

2. Constitutional Dual Taxation Provision

Article VIII, section 1(h), Florida Constitution, provides:

(h) TAXES; LIMITATION. Property situate within municipalities shall not be subject to taxation for services rendered by the county exclusively for the benefit of the property or residents in unincorporated areas.

The Florida Supreme Court interpreted this "dual taxation" provision to prohibit the taxation of city-located property by a county where no "real and substantial" benefit accrues to municipal residents and property from the county service. Conversely, this provision permits such taxation

²²For a constitutional comparison, see the statement of legislative intent provided in section 125.01(5)(c), Florida Statutes, relating to millage levy by a special district created by ordinance.

where the service provides a real and substantial benefit to municipal property and residents. City of St. Petersburg v. Briley, Wild & Associates, Inc., 239 So. 2d 817 (Fla. 1970).

The benefit required to be received by municipal areas or residents, is not a "direct benefit" occurring within municipal areas, but may consist entirely of "indirect benefits." See Town of Palm Beach v. Palm Beach County, 460 So. 2d 879 (Fla. 1984). The dual taxation provision limits only the taxing of property within municipalities for services exclusively for the benefit of unincorporated areas; there is no comparable constitutional provision that limits the taxing of property within the unincorporated area for the benefit of the municipal area. See McLeod v. Orange County, 645 So. 2d 411 (Fla. 1994).

3. Statutory Dual Taxation Provision

The dual taxation provisions of Article VIII, section 1(h), Florida Constitution, only limit the power of counties to expend ad valorem taxes, not other county revenues. See Manatee County v. Town of Longboat Key, 365 So. 2d 143 (Fla. 1978). In response to the holding in Manatee County v. Town of Longboat Key, the Legislature adopted section 125.01(7), Florida Statutes, to include by statute all non-ad valorem county revenues in the "real and substantial" benefit expenditure limitation as follows:

No county revenues, except those derived specifically from or on behalf of a municipal service taxing unit, special district, unincorporated area, service area, or program area, shall be used to fund any service or project provided by the county when no real and substantial benefit accrues to the property or residents within a municipality or municipalities.

Under this statutory provision, county revenues derived from or on behalf of the unincorporated areas are excluded. For example, section 218.64(1), Florida Statutes, provides:

The proportion of the local government half-cent sales tax received by a county government based on two-thirds of the incorporated area population shall be deemed countywide revenues and shall be expended only for countywide tax relief or countywide programs. The remaining county government portion shall be deemed county revenues derived on behalf of the unincorporated area but may be expended on a countywide basis.

Other examples of unincorporated revenues are fees and charges imposed in the unincorporated area only and taxes such as the public service tax imposed only in the unincorporated area. See McLeod v. Orange County, 645 So. 2d 411 (Fla. 1994).

E. Statutory Ad Valorem Revenue Limitations

Notwithstanding the direction in Article VII, section 9(a), Florida Constitution, that, "Counties, school districts, and municipalities shall . . . be authorized by law to levy ad valorem taxes" within stated millage limitations, the Legislature adopted statutory maximum millage rates in section 200.065(5), Florida Statutes. Such millage limitations apply to the aggregate ad valorem revenues of local government, including dependent special districts and municipal service taxing units. This aggregation provision allows a local government to adjust district or MSTU millage to accommodate the revenue needs of the local government general fund.

Generally, the maximum millage rate that may be levied shall be the rolled-back rate calculated pursuant to section 200.065(1), Florida Statutes, adjusted by the change in per capita Florida personal income. Such maximum millage rate may be exceeded by extraordinary vote or by referendum of the voters. Specific reference should be made to the statutory provisions in section 200.065(5), Florida Statutes, for the circumstances under which the maximum millage rate can be exceeded and for unique provisions relating to the calculation of taxable value within each jurisdiction.

VI. HOME RULE NON-TAX REVENUE SOURCES

A. Summary

Not all local government revenue sources are taxes requiring general law authorization under Article VII, section 1, Florida Constitution. The judicial inquiry, when a county or municipal revenue source is imposed by ordinance, is whether the charge meets the legal sufficiency test for a valid fee or assessment. If not, the charge is a tax and general law authorization is required under the tax preemption provisions of Article VII, section 1. If not a tax under Florida case law, the imposition of the fee or assessment by ordinance is within the constitutional and statutory home rule power of municipalities and counties.²³

Whether a fee, assessment or charge authorized by a local government ordinance and not a general law is constitutionally permissible depends on the Florida case law requirements established for its validity. The difficulty in this analysis results from the various requirements that exist for the different types of constitutionally valid fees and charges.

In the constitutional analysis of the validity of a home rule charge, judicial reliance is often placed on the type of governmental power being exercised. For example, special assessments, like taxes, are imposed under sovereign powers, as an enforced contribution from the property owner. In contrast, regulatory fees are imposed pursuant to the police power as regulation of an activity or property. In further contrast, user fees, franchise fees or rental fees are imposed pursuant to the exercise of the proprietary right of government.

²³See *City of Boca Raton v. State*, 595 So. 2d 25 (Fla. 1992) (held that Chapter 170, Florida Statutes, was supplemental authority to the power of self-government of a municipality to levy special assessments authorized in section 166.021, Florida Statutes).

Although home rule charges are imposed through the exercise of differing governmental powers, judicial analysis has created limitations to ensure that they are not taxes. For example, restrictions on the amount of the charge are ingrained in Florida case law to ensure that special assessments do not exceed the special benefit provided to assessed property, that regulatory fees do not exceed the cost of regulation, and that fees imposed under the proprietary right of government are not unreasonable. Use restrictions are also imposed on special assessments and regulatory fees to ensure that the proceeds are used for the purpose for which they were imposed. No use restrictions apply to fees imposed under the proprietary capacity of government as long as the amount of the fee is reasonable.

B. Home Rule Fees or Service Charges

1. General

Generally, fees fall into two categories: (1) regulatory fees imposed under the police power in the exercise of a sovereign function of the local government; and (2) fees imposed in the assertion of the proprietary power of local government. Each category of fee has its own special rules developed by Florida case law that distinguishes a valid fee from a tax.

Each fee imposed under the home rule power of a local government must be analyzed in the context of judicial rules applicable to its validity. The threshold analysis requires a consideration of whether the fee is imposed under the police power or as a function of a proprietary activity. The following more specific analysis focuses on the Florida case law rules for specific fees.

2. Regulatory Fees Generally

Regulatory fees are imposed under the police or sovereign power of local government and are subject to use restrictions. The use restrictions applicable to a regulatory fee require fee proceeds to be applied to provide the cost of the regulatory activity. Examples of regulatory fees imposed under the sovereign power are building permit fees, inspection fees, impact fees, and stormwater fees.

Such regulatory fees cannot exceed the cost of the regulatory activity and are generally required to be applied solely to pay the cost of the regulatory activity for which they are imposed. As an example, as explained subsequently, the fee imposed on development to regulate its impact on the need for future capital facilities must meet the "dual rational nexus test." In other words, the impact fee cannot exceed the cost of the capital facilities required as a consequence of the development regulation and must be used and expended for such regulatory purpose. Similarly, building permit fees cannot exceed the cost of the governmental activity established to regulate the building permit issuance and ensuing inspection activity.

In Tamiami Trails Tours, Inc. v. City of Orlando, 120 So. 2d 170 (Fla. 1960), the owners or operators of trucks challenged the validity of a permit charge imposed by ordinance for utilization by trucks of designated freight and loading zones on city streets. At issue was whether the ordinance was a valid exercise of the police power of the municipality in its regulation of traffic on its streets or whether the exaction or fee was a tax. The challengers of the ordinance were not objecting to the city's

regulation of traffic under its police power by the establishment of freight zones but merely the imposition of a fee for the use of such zones.

The Court concluded as follows:

It is, of course, well settled that the power to regulate includes the power to license *as a means of regulating*, and that a reasonable license fee may be charged in an amount sufficient to bear ‘the expense of issuing the license and the cost of necessary inspection or police surveillance connected with the business or calling licensed, and all the incidental expenses that are likely to be imposed upon the public in consequence of the business licensed.’ But it is only in those cases where regulation is the primary purpose of a licensing ordinance or statute that the exaction of a fee therefor can be especially referred to the police power. And where a license is required and a fee exacted solely for revenue purposes and the payment of such fee gives the right to carry on the business without any further conditions, it is a tax. [citations omitted]

120 So. 2d at 172 (emphasis in original).

The Court held that the license permit was an invalid regulatory fee and therefore a tax in conflict with general law provisions in existence at the time of the decision.

3. Proprietary User Fees Generally

User fees are imposed by local government in the exercise of a proprietary activity and can generate a profit available for general governmental expenditures as long as the profit generated is reasonable. User fees generally benefit the party paying the fee in a manner not shared by the general public and are paid by choice in the sense that the feepayer has the option of not using the governmental service provided.

For example, a local government utility fee imposed pursuant to an exercise of a proprietary function can generate a profit as long as the amount of profit is reasonable. Other examples of fees imposed by local government in its proprietary capacity are admission fees, franchise fees, and traditional user fees such as recreation registration fees or entrance fees. Such fees are governed by the principle that the feepayer receives a benefit or that the fee imposed is reasonable in relation to the privilege or service provided.

The landmark decision on the construction of a valid user fee is State v. City of Port Orange, 650 So. 2d 1 (Fla. 1994). At issue in State v. City of Port Orange case was the validity of a “transportation utility fee” imposed by municipal ordinance on the owners and occupants of developed properties within the municipality for the use of municipal roads. No fees were imposed on undeveloped property and unpaid fees became a lien upon the property until paid.

The proceeds of the transportation utility fee were to be applied to pay for capital projects relating to improvements to the local road system maintained by the municipality. The fees were

imposed monthly on a classification of developed properties based upon a mixture of actual traffic counts and the use of a national trip generation manual.

The Court held that the funding of capital projects on the municipal road system was the exercise of a sovereign function contemplated within the definition of a tax. The Court distinguished a tax from a user fee with the following two-part test:

Such fees share common traits that distinguish them from taxes: they are charged in exchange for a particular governmental service which benefits the party paying the fee in a manner not shared by other members of society, and they are paid by choice, in that the party paying the fee has the option of not utilizing the governmental service and thereby avoiding the charge. [citations omitted]

650 So. 2d at 3.

In construing the transportation utility fee as a tax, the Court concluded that the end result of the fee was the conversion of municipal roads into a toll road system where only owners of developed property would be required to pay.

It is important to an understanding of the decision in State v. City of Port Orange to recognize the distinction the Court made between the transportation utility fee before it and a user fee. The Court characterized the transportation utility fee as a revenue raising charge in the nature of a tax imposed pursuant to the exercise of a sovereign power:

Funding for the maintenance and improvement of a municipal road system even when limited to capital projects as the circuit court did here, is revenue for the exercise of a sovereign function contemplated within the definition of a tax.

Id. at 3 (emphasis supplied).

In contrast, the Court recognized that user fees were imposed pursuant to the proprietary power of local government:

User fees are charges based upon the proprietary right of the governing body permitting the use of the instrumentality involved.

Id. at 3 (emphasis supplied).

Thus, the transportation utility fee before the Court was found not to meet the tests for a valid user fee imposed in the exercise of the proprietary power of the municipality.

Another example of a user fee is the franchise fee. A franchise fee is a user fee generally imposed upon a utility for the grant of a franchise and as fair rent for the use of public property. A

franchise fee is reasonable since it is assumed to be bargained for the property right that is relinquished by the local government. Similarly, a local government utility can generate a profit if the amount of the profit is reasonable. As an illustration, the First District Court of Appeal in Jacksonville Port Authority v. Alamo Rent-a-Car, 600 So. 2d 1159 (Fla. 1st DCA 1992), recognized that the fee charged Alamo for its use of airport facilities was not imposed by the Jacksonville Port Authority (the "JPA") "to regulate its airport system under the auspices of the general police power, but rather to do so as a function of its proprietary status." Id. at 1164. The Court's rationale was that

[t]he fee [in this case] is not a general revenue source in support of a sovereign government, instead, it is governed by entirely different principles based upon Alamo's receipt of a special benefit from the JPA--the generation of its customers.

Id. at 1164.

4. Impact Fees

Impact fees are a common type of local government regulatory fee that deserve individual discussion. Impact fees are charges imposed against new development to provide for the cost of capital facilities made necessary by that growth. The purpose of the charge is to impose upon the newcomers, rather than the general public, the cost of new facilities necessitated by their arrival. For example, in City of Dunedin v. Contractors and Builders Assoc. of Pinellas County, 312 So. 2d 763 (Fla. 2d DCA 1975), the court stated, "Where a city's water and sewer facilities would be adequate to serve its present inhabitants were it not for drastic growth, it seems unfair to make the existing inhabitants pay for new systems when they have already been paying for the old ones." Id. at 766. See also Hollywood, Inc. v. Broward County, 431 So. 2d 606 (Fla. 4th DCA 1983), rev. denied, 440 So. 2d 352 (Fla. 1983).

Impact fees are unique products of local government's home rule powers and are imposed in conjunction with their power to regulate land use and their statutory responsibility to adopt and enforce comprehensive planning. The development of impact fees has occurred in Florida by home rule ordinance rather than direct statutory authorization or mandate. The characteristics and limitations of impact fees in Florida are largely found in Florida case law, not statute.

Section 163.31801, Florida Statutes, designated as the "Florida Impact Fee Act" places certain limitations on the imposition and enforcement of impact fees. This Act recognizes the important role of impact fees in providing essential infrastructure and provides certain minimum requirements for an impact fee including:

(4) At a minimum, each local government that adopts and collects an impact fee by ordinance and each special district that adopts, collects, and administers an impact fee by resolution must:

(a) Ensure that the calculation of the impact fee is based on the most recent and localized data.

(b) Provide for accounting and reporting of impact fee collections and expenditures and account for the revenues and expenditures of such impact fee in a separate accounting fund.

(c) Limit administrative charges for the collection of impact fees to actual costs.

(d) Provide notice at least 90 days before the effective date of an ordinance or resolution imposing a new or increased impact fee. A local government is not required to wait 90 days to decrease, suspend, or eliminate an impact fee. Unless the result is to reduce the total mitigation costs or impact fees imposed on an applicant, new or increased impact fees may not apply to current or pending permit applications submitted before the effective date of a new or increased impact fee.

(e) Ensure that collection of the impact fee may not be required to occur earlier than the date of issuance of the building permit for the property that is subject to the fee.

(f) Ensure that the impact fee is proportional and reasonably connected to, or has a rational nexus with, the need for additional capital facilities and the increased impact generated by the new residential or commercial construction.

(g) Ensure that the impact fee is proportional and reasonably connected to, or has a rational nexus with, the expenditures of the funds collected and the benefits accruing to the new residential or nonresidential construction.

(h) Specifically earmark funds collected under the impact fee for use in acquiring, constructing, or improving capital facilities to benefit new users.

(i) Ensure that revenues generated by the impact fee are not used, in whole or in part, to pay existing debt or for previously approved projects unless the expenditure is reasonably connected to, or has a rational nexus with, the increased impact generated by the new residential or nonresidential construction.

§ 163.31801(4), Fla. Stat.

The content of current Subsection (9) was added during the 2009 Legislation Session changing the burden of proof and the judicial review standard to be applied in a challenge to the validity of impact fees. This subsection provides:

In any action challenging an impact fee, the government has the burden of proving by a preponderance of the evidence that the imposition or amount of the fee meets the requirements of state legal precedent or this section. The court may not use a deferential standard.

In 2019 the Florida Legislature again revised section 163.31801, Florida Statutes. These revisions (a) prevented a local government from requiring the payment of impact fees prior to the date of issuance of a building permit for the property subject to the impact fee (b) mandated that impact fee credits entitle the credit holder to the “full benefit of the intensity or density prepaid by the credit balance as of the date it was first established;” (c) as it relates to school impact fees, local governments are required to provide dollar-for-dollar credits against school impact fees for any

exaction related to public education facilities (similar to already existing requirements applicable to transportation impact fees); (d) prohibit local governments from using impact fee revenues to pay existing debt service unless the expenditures have a rational nexus with the increased impact generated by new development; and (e) water and sewer connection fees were exempted from the requirements of Section 163.31801, Florida Statutes.

In 2020, Section 163.31801, Florida Statutes, was amended again to (a) prohibit the application of new or increased impact fees to any pending permit application, unless the result would decrease the amount due; (b) provide that impact fee credits are assignable and transferable at any time after their establishment from one property to another that is within the same impact fee zone or district or in an adjoining zone or district provided that property receives the same benefits from the improvement or contribution that generated the credits.

Most recently in 2021, the Florida Legislature again amended the statute through the enactment of Chapter 2021-63, Laws of Florida, which capped impact fee increases to no more than 12.5 percent in any given year and no more than 50 percent over four years and which provided procedures that local governments must follow in order to exceed those caps. See § 163.31801(6), Fla. Stat. In addition, the amendment provided definitions of “infrastructure” and “public facilities,” limiting the uses of impact fees; expanded the dollar-for-dollar impact fee credit requirement to encompass all impact fees, not just school-related fees; mandated collection of impact fees in their own accounting fund; and updated requirements for an affidavit of compliance with the statute to be submitted with an annual financial report or audit report. The amendment also made clear that the statute applies to local governments, school districts, and special districts levying impact fees.

As developed under Florida case law, impact fees must meet the "dual rational nexus" test. First, impact fees are valid when a reasonable connection, or rational nexus, exists between the anticipated need for additional capital facilities and the growth in population. Second, impact fees are valid when a reasonable connection, or rational nexus, exists between the expenditure of the impact fee proceeds and the benefits accruing to the growth from those proceeds. Hollywood, Inc. v. Broward County, 431 So. 2d 606, 611-12 (Fla. 4th DCA 1983). See also St. Johns County v. N.E. Fla. Builders Assoc., 583 So. 2d 635, 637 (Fla. 1991).

Applying this two-prong test, the Florida courts have upheld impact fees imposed by local governments for a variety of capital projects. See Baywood Construction, Inc. v. City of Cape Coral, 507 So. 2d 768 (Fla. 2d DCA 1987), rev. denied, 513 So. 2d 1060 (Fla. 1987) (water and sewer capital expansion fee); City of Dunedin v. Contractors and Builders Assoc. of Pinellas County, 358 So. 2d 846 (Fla. 2d DCA 1978) (water and sewer impact fee); St. Johns Co. v. N.E. Florida Builders Assoc., Inc., 583 So. 2d 635 (Fla. 1991) (countywide school facilities impact fee); Ormond Beach v. County of Volusia, 535 So. 2d 302 (Fla. 5th DCA 1988) (county road impact fee); Hollywood, Inc. v. Broward Co., 431 So. 2d 606 (Fla. 4th DCA 1983) (park expansion impact fee); Home Builders and Contractors Assoc. of Palm Beach Co., Inc. v. Palm Beach Co., 446 So. 2d 140 (Fla. 4th DCA 1983), rev. denied, 451 So. 2d 848 (Fla. 1984) (county road impact fees).

Under the first prong of the dual rational nexus test, needs are sufficiently attributable to new development when the need for additional capital facilities is rationally related to the growth

generated by new development. Hollywood, Inc. v. Broward County, 431 So. 2d 606, 611 (Fla. 4th DCA 1983). For example, in Hollywood, Inc., Broward County adopted an ordinance which required developers to dedicate land or pay a fee as a condition of plat approval. The county intended to use the fee or land in expanding the county's park system to accommodate the residents of the new development. The court upheld the ordinance against developer attack. Broward County showed that the county's park program had a standard of three acres of developed parkland per one thousand residents. The county met this standard for current residents through various methods but new growth required the county to acquire and develop new land to maintain its standard of three acres per one thousand residents. The court stated:

Thus, Broward County demonstrated a reasonable connection between the need for additional park facilities and the growth in population that will be generated by the subdivision and, in addition, that the fees were an equitable pro rata share of the cost of reasonable capital expansion required because of new development.

Hollywood, Inc., 431 So. 2d at 612.

Additionally, under the second prong of the dual rational nexus test, valid impact fees must exhibit a reasonable connection or rational nexus between the expenditure of the fees collected and the benefits accruing to the new development. See Hollywood, Inc. v. Broward County, 431 So. 2d 606, 611 (Fla. 4th DCA 1983). However, the benefits accruing from impact fee expenditures need not be exclusively or overwhelmingly for the fee payers only. The court in Home Builders and Contractors Assoc. of Palm Beach County, Inc. v. Palm Beach County, 446 So. 2d 140 (Fla. 4th DCA 1983), noted that exclusivity is not the proper test for valid impact fees because, "It is difficult to envision any capital improvement for parks, sewers, drainage, roads, or whatever, which would not in some measure benefit members of the community who do not reside in or utilize the new development." Id. at 143.

The second prong of the dual rational nexus test is met when ordinances or resolutions specifically earmark the fees collected to benefit the new residents by the construction of capital facilities. Hollywood, Inc. at 612; see also City of Dunedin v. Contractors and Builders Association of Pinellas County, 312 So. 2d 763, 766 (Fla. 2d DCA 1975). Furthermore, under the second prong of the dual rational nexus test, local governments may not expend impact fee proceeds for operation and maintenance expenses; the fees must be expended for capital projects needed or consumed by new development. Finally, the second prong of the dual rational nexus test requires local governments to expend the impact fee proceeds within a reasonable time of their collection. See Home Builders and Contractors Assoc. of Palm Beach County, Inc. v. Board of County Commissioners of Palm Beach County, 446 So. 2d 140, 142 (Fla. 4th DCA 1983) (ordinance requiring expenditure or refund of impact fees within six years was upheld).

Impact fees are sufficiently "earmarked" when the ordinances or resolutions relating to their imposition, collection and administration expressly limit the use of the fee revenue to meeting the costs of the reasonably required improvements or is limited to the consumption of existing capacity by the new development. See Contractors and Builders Assoc. of Pinellas County v. City of

Dunedin, 329 So. 2d 314 (Fla. 1976). In Dunedin, the Florida Supreme Court invalidated the impact fee ordinance which the city adopted to fund expansion of its water and sewer utility system. The Supreme Court articulated its grounds for invalidation with the following:

The failure to include necessary restrictions on the use of the [impact fee] fund is bound to result in confusion, at best. City personnel may come and go before the fund is exhausted, yet there is nothing in writing to guide their use of these moneys, although certain uses, even within the water and sewer systems, would undercut the legal basis for the fund's existence. . . . [T]he ordinance is defective for failure to spell out necessary restrictions to be collected.

329 So. 2d at 321. However, the Supreme Court went on to say:

Nothing we decide, . . . , prevents Dunedin from adopting another sewer connection charge ordinance, incorporating appropriate restrictions on use of the revenues it produces. Dunedin is at liberty, moreover, to adopt an ordinance restricting the use of moneys already collected.

Id. at 322 (emphasis added). Based on this language, the City of Dunedin adopted two ordinances which expressly restricted the impact fee revenue for the water and sewer system expansion and which established trust funds for that purpose. For example, one of the two subsequent ordinances which the City of Dunedin adopted provided that "the use of any funds previously collected . . . is restricted to extension or construction of new additions to the treatment and systems so as to meet the increased demand which additional connections to the system create." City of Dunedin v. Contractors and Builders Assoc. of Pinellas County, 358 So. 2d 846, 847 (Fla. 2d DCA 1978).

5. Franchise Fees

Franchise fees are another type of proprietary user fee that merits additional discussion. A franchise fee is a charge imposed upon a utility for the grant of a franchise and for the privilege of using the local government's rights-of-way to conduct the utility business. A franchise fee is fair rent for the use of such rights-of-way and consideration for the local government agreeing not to provide competing utility services during the franchise term. See City of Plant City v. Mayo, 337 So. 2d 966 (Fla. 1976); Santa Rosa County v. Gulf Power Co., 635 So. 2d 96 (Fla. 1st DCA 1994), rev. denied, 645 So. 2d 452 (Fla. 1994); and City of Hialeah Gardens v. Dade County, 348 So. 2d 1174 (Fla. 3d DCA 1977).

By definition, a franchise ordinance grants a special privilege that is not available to the general public. The Florida Supreme Court explained in Leonard v. Baylen Street Wharf Co., 52 So. 718 (Fla. 1910), that "[a] franchise is a special privilege conferred upon individuals or corporations by governmental authority to do something that cannot be done of common right." Id. at 718. However, "[f]ranchises [are] not . . . the absolute property of any one, but their use may be granted or permitted by proper governmental authority, subject to supervision and regulation, and upon such

terms as may be lawfully imposed." Id. Franchises are used for "the good of the public, usually for the purpose of rendering an adequate service without unjust discrimination, and for a reasonable compensation." Id. Finally, "[p]rivate rights in franchises are confined to a proper use of them for the general welfare, subject to lawful governmental regulation." Id.

In addition to compensation for the relinquishment of property rights, when counties and municipalities have the authority to own, operate, and maintain utilities themselves any permission granted to another entity to perform those services is additional justification for the fee.

The home rule authority of a county or municipality to enter into a franchise agreement with a utility and to impose a fee that is bargained for in exchange for the government property rights relinquished is settled. An evolving issue is the extent of the power of a county or municipality to unilaterally impose a fee for a privileged use of its right-of-way whether such charge is characterized as a rental fee, a regulatory fee or both.

Customarily, a franchise fee is calculated as a percentage of the gross revenues received by a utility from a defined geographic area. A franchise fee imposed by a municipality is based upon the gross revenues received by the utility from the municipal areas and a franchise fee imposed by a county is generally based upon the gross revenues received by the utility from the unincorporated areas (whether a franchise fee imposed by a county could be based on gross receipts received by the utility countywide has not been addressed.)

In Alachua County v. State, because the electric utilities would not consent to a franchise agreement, Alachua County unilaterally imposed a fee for the privileged use of its rights-of-way. The fee imposed was three percent (3%) of the gross revenues generated by the electric utilities and the utilities were allowed to separately state the fee on the electric bill. The record in the validation proceedings did not, in the words of the Court, establish any "nexus between its alleged 'reasonable rental charge' . . . and the rental value of the rights-of-way." Id. at 1067-68. As a consequence, the Court held that the unilaterally imposed privilege fee was a tax not authorized by general law.

The Alachua County case was distinguished by the Court in Florida Power Corp. v. City of Winter Park, 887 So. 2d 1237 (Fla. 2004). There, the electric utility refused to renegotiate a franchise agreement which had previously provided for the payment of a franchise fee of six percent (6%) of the gross revenues received from the sale of electricity within the City of Winter Park. The Court likened the electric utility to a holdover tenant in the public rights-of-way and held that the electric utility would be subject to the six percent fee until the parties reached a new agreement or the City exercised its rights to acquire granted under the franchise agreement. The Court distinguished its prior holding in Alachua County as follows:

Moreover, we reiterate that Alachua validates fees that are reasonably related to the government's cost of regulation or the rental value of the occupied land, as well as those that are the result of a bargained-for exchange. [cit. omitted] In the instant case, the trial court specifically found that the City had "offer[ed] sufficient evidence that the six percent fee was reasonably related" to the costs of regulation,

and had "also presented strong evidence that the six percent fee is a fair 'market rate' for such use, occupation, or rental."

887 So. 2d at 1241.

In summary, a bargained for reasonable fee in a franchise agreement is not a tax. The fact that the franchise agreement has expired does not render the charge a tax and it remains a valid fee until a new agreement is reached or any contractually granted acquisition rights are exercised. Additionally, a unilaterally imposed fee reasonably related to the cost of regulation and constituting a reasonable rental charge for the use of public property is a valid fee.

6. Utility Fees

Fees and charges imposed by a county or a municipality to fund the operating costs and capital requirements of a utility are user fees imposed in the exercise of a proprietary activity. Such utility enterprises can generate a profit available for general governmental purposes if the profit is reasonable.

A local government has the right to classify utility customers under reasonable classifications based upon factors bearing upon the provision of the utility service. In Pinellas Apartment Association, Inc. v. City of St. Petersburg, 294 So. 2d 676 (Fla. 2d DCA 1974), a class action challenged the municipality's rate structure for the provision of garbage collection and disposal service. The challenge centered on a differential utility charge for bulk containers as contrasted to collection from individual garbage cans. There was evidence that the users of bulk containers were charged slightly more than the cost incurred by the municipality for the collection costs for that classification whereas the rates charged to a person utilizing garbage cans were somewhat less than the cost of collection.

In quoting 12 McQuillin, Municipal Corporations (3d Ed. 1970, at section 35.37b), the Court stated the following standards to be applied in evaluating utility rates:

A municipality has the right to classify consumers under reasonable classifications based upon such factors as the cost of service, the purpose for which the service or the product is received, the quantity or the amount received, the different character of the service furnished, the time of its use or any other matter which presents a substantial difference as a ground of distinction. Accordingly, a lack of uniformity in the rate charged is not necessarily unlawful discrimination. The establishment of classifications and the charging of different rates for the several classes is not unreasonable and does not violate the requirements of equality and uniformity. Discrimination to be unlawful must draw an unfair line or strike an unfair balance between those in like circumstances having equal rights and privileges. Discrimination with respect to rates charged does not vitiate unless it is arbitrary and without a reasonable fact basis or justification.

294 So. 2d at 677-78.

The Court upheld the utility rate structure under the following reasoning:

Needless to say, in establishing the charges the City Council could not be expected to make an exact forecast of the cost of providing a particular type of garbage collection. The setting of utility rates is often a complicated process and mathematical exactitude cannot be required. There does not have to be an exact correlation between the rates charged for various aspects of the service provided by the city. There is nothing inherently wrong with the city making a modest return on its utility operation or certain portions thereof, providing the rate is not unreasonable in light of the service provided. [citation omitted]

294 So. 2d at 678.

In City of Pompano Beach v. Oltman, 389 So. 2d 283 (Fla. 4th DCA 1980), review denied, 399 So. 2d 1144 (Fla. 1981), the Court upheld the imposition of differential utility rates to customers outside the corporate limits of the municipality from those charged within municipal boundaries. The utility users located outside the municipality had challenged the rates as unreasonable on the basis that the rate of return earned by the municipality on customers outside its boundaries was unreasonable.

First, the court recognized that the setting of municipal rates was a legislative function entitled to judicial deference.

Utility rate making by municipalities is a legislative function reviewable by the courts as are all legislative actions, but the authority of the courts in such matters is limited to making a judicial determination as to the validity of such rate ordinances. Courts may not engage in rate making, since this is an unlawful incursion in the legislative arena. [citation omitted]

389 So. 2d at 286.

The Court in City of Pompano Beach v. Oltman then acknowledged the concept that the operation of a utility by a municipality is an exercise of its proprietary powers and that the municipality can earn a reasonable profit:

While its utility rates must be reasonable and non-discriminatory a municipality is entitled to make a reasonable profit from its utility operations and to use the proceeds thus derived for other valid municipal purposes. [citations omitted]

389 So. 2d at 286.

Last, the Court emphasized the concept of judicial deference to legislative actions by a municipality as follows:

Like other actions taken by legislative bodies, a utility rate ordinance is presumed valid, and the burden rests on those who attack such rates to clearly

demonstrate that such rates are arbitrary, unreasonable, or discriminatory. The city has no duty to explain or justify its actions in setting rates until such burden has shifted to it by the establishment of a prima facie case of invalidity based on competent evidence. [citations omitted]

389 So. 2d at 286.

In Rosalind Holding Co. v. Orlando Utilities Commission, 402 So. 2d 1209 (Fla. 5th DCA 1981), review denied, 412 So. 2d 469 (Fla. 1982), the Court was faced with a challenge that the utility rates charged were unreasonable and confiscatory. The Court first recognized the right of a municipal utility to earn a profit from a utility operating in its proprietary capacity:

Absent a controlling statute, a municipal utility, like any other utility, is entitled to earn a reasonable rate of return on its capital and its rates may be set so that it earns a rate of return on its equity comparable to other similar businesses. [footnotes omitted]

402 So. 2d at 1212.

In comparing the profit earned by the municipal utility, the Court stated the following:

Municipal utilities in Florida are entitled to earn a profit on their utilities operations, and some municipalities in Florida take a higher percentage of the utility's profit into general revenues than Orlando does, even including the franchise-equivalent payment. [footnote omitted]

402 So. 2d at 1213.

In Pinellas County v. State, 776 So. 2d 262 (Fla. 2001), the Court held that a utility availability or "readiness to serve" charge (the "Utility Availability Charge") imposed by the county and calculated to pay portions of the capital cost of reclaimed water distribution lines and service stubs was a valid fee imposed against property with access to such reclaimed water service regardless of actual connection.

The Utility Availability Charge was pledged as partial security for the payment of revenue bonds issued to construct reclaimed water distribution lines and service stubs. Reclaimed water service, although highly treated, was not potable and was required to be delivered through specific collection transmission lines. The transmission lines to carry the reclaimed water from the treatment facilities to the general service areas were not included in the Utility Availability Charge calculation but were apportioned to all system users. Only the cost of the reclaimed water distribution lines and the pumping stations at identified properties were included.

Not all property within the county utility service area had reclaimed water service available. The monthly Utility Availability Charge was charged only to property that had reclaimed water service available through the construction of the reclaimed collection system. Property that elected to use the reclaimed water would be subject to a connection charge and a monthly fee based upon usage.

The Court held that the Utility Availability Charge was a valid fee and not an impermissible tax. Under the tests for user fee validity established in State v. City of Port Orange, 650 So. 2d 1 (Fla. 1994), as discussed above, the Court reasoned that the property paying the Utility Available Charge had access to reclaimed water services and thus received a benefit from the cost of the capital construction of the reclaimed water collection system which was not shared by persons not required to pay the charge. The Court recognized that some customers carrying the burden of the Utility Available Charge may elect not to connect and use the reclaimed water service but held that such individual decision not to connect did not undermine the validity of the fee. In upholding the validity of charge, the Court recognized a long line of cases where local ordinances imposing mandatory fees were upheld regardless of whether individual customers actually used or desired the service.

Consistent with the reasoning in Pinellas County v. State, other utility rate structures that impose a charge on unoccupied units or property have been upheld. For example, in Town of Redington Shores v. Redington Towers, Inc., 354 So. 2d 942 (Fla. 2d DCA 1978), sewer service charges were imposed on unoccupied and unused units in a condominium building which was connected to the sewer system. The Court held that it was not an unconstitutional deprivation of property rights since the sewer charges were reasonably related to the value received from the service availability. Similarly, in City of Riviera Beach v. Martinique 2 Owners Association, Inc., 596 So. 2d 1164 (Fla. 4th DCA 1992), only 17 units of a 200-unit condominium complex were sold and occupied. From the time of the issuance of the certificate of occupancy, the city had charged for waste removal services at a per-residential rate rather than the cheaper container rate. The Court held that whether the charge was based on how many containers are necessary or on the basis of how many residential units are in a building was a legislative judgment for the city to make:

We know of no legal reasons why a city could not charge large residential buildings on the basis of each living unit, if that is its legislative decision, rather than by the number of outdoor, refuse containers necessary to service the building. Nor does this record betray why the city should not be able to charge the greater of the two, if it has provided by ordinance as here that that is what it will charge.

596 So. 2d at 1165.

C. Special Assessments

1. General

A special assessment is a charge imposed against property because that property derives some special benefit from the expenditure of the monies. Increasingly, counties and municipalities have utilized special assessments as a home rule revenue source to fund certain services and to construct and maintain capital facilities.

As established by case law, two requirements exist for the imposition of a valid special assessment: (1) the property assessed must derive a special benefit from the improvement or service

provided; and (2) the assessment must be fairly and reasonably apportioned among the properties that receive the special benefit. See City of Boca Raton v. State, 595 So. 2d 25 (Fla. 1992).

2. Special Benefit

The test to be applied in evaluating whether a special benefit is conferred on property by the provision of a service is

whether there is a "logical relationship" between the services provided and the benefit to real property. Whisnant v. Stringfellow, 50 So. 2d 885 (Fla. 1951).

Lake County v. Water Oak Management Corp., 695 So. 2d 667, 669 (Fla. 1997). This logical relationship to property test defines the line between those services that can be funded by special assessments and those failing to satisfy the special benefit test.

The benefit required for a valid special assessment consists of more than simply an increase in market value and includes both potential increases in value and the added use and enjoyment of the property. See Meyer v. City of Oakland Park, 219 So. 2d 417 (Fla. 1969). In Meyer, the Florida Supreme Court upheld a sewer assessment on both improved and unimproved property, stating that the benefit need not be direct nor immediate but must be substantial, certain and capable of being realized within a reasonable time. Furthermore, the benefit need not be determined in relation to the existing use of the property. See City of Hallandale v. Meekins, 237 So. 2d 318 (Fla. 4th DCA 1970), aff'd, 245 So. 2d 253 (Fla. 1971).

Although the benefit derived need not be direct and immediate, the benefit must be special and peculiar to the property assessed and not a general benefit to the entire community. Thus, services which are provided by a government may be essential to the public welfare but fail to provide the special benefit necessary for the imposition of a valid assessment. For example, the Court in Crowder v. Phillips, 1 So. 2d 629 (Fla. 1941), held that a special assessment for the establishment and maintenance of a hospital did not provide a special or peculiar benefit to the real property assessed. The Court reasoned that the hospital provided benefits to the entire community because of its availability to any person but that no logical relationship existed between the construction and maintenance of the hospital and the assessed property. Additionally, in Whisnant v. Stringfellow, 50 So. 2d 885 (Fla. 1951), an assessment for the county health unit was also held to be invalid in that it benefited everyone in the county, regardless of their status as property owners.

Significantly, in Sarasota County v. Sarasota Church of Christ, 667 So. 2d 180 (Fla. 1995), the Florida Supreme Court recognized and declared that assessed properties may be specially benefited by a special assessment program for services even when the assessment is imposed throughout an entire community. In this case, the Supreme Court found that stormwater management services confer a special benefit to property and additionally clarified that courts will presume that local government legislative findings on special benefit are correct, unless a challenger can prove that they are "palpably arbitrary or grossly unequal and confiscatory." 667 So. 2d at 184 (quoting South Trail Fire Control District, Sarasota County v. State, 273 So. 2d 380, 383 (Fla.

1973)). See also Harris v. Wilson, 693 So. 2d 945 (Fla. 1997) (upholding solid waste special assessment imposed throughout unincorporated area of Clay County and confirming the holdings in the Sarasota Church of Christ case).

Following this case law, the Florida Supreme Court ratified these prior decisions in Lake County v. Water Oak Management, 695 So. 2d 667 (Fla. 1997). The Lake County Court concluded that the county's fire rescue special assessment program provided a special benefit to property and, in so doing, articulated the appropriate test for special benefit. The Court rejected the assertion that for a valid special benefit to exist, a special assessment program must provide a "unique" benefit to the assessed properties, and instead found that a special benefit will exist so long as there is a "logical relationship" between the services provided and the benefit to real property." 695 So. 2d at 669; see also North Lauderdale v. SMM Properties, 825 So. 2d 243 (Fla. 2002) (incorporating restrictions on fire rescue services).

Governmental functions such as public hospitals, public health units, emergency medical services, certain recreation facilities, general law enforcement activities, and the general provision of government fail to bear a logical relationship to property and thus are required to be funded by taxes. Examples of services and facilities that possess a logical relationship to property and thus can be funded wholly or partially by special assessments are: fire protection, fire and first responder services, street improvements, parking facilities, downtown redevelopment, solid waste collection and disposal, stormwater management, beach nourishment, and water and wastewater utility improvements. Once an identified service or capital facility satisfies the special benefit test, the assessed amount is required to be fairly apportioned among the benefited property in a manner consistent with the logical relationship embodied in the special benefit requirement.

Generally, a special assessment, whether imposed for capital projects or services, is collected on the annual ad valorem tax bill pursuant to the provisions of section 197.3632, Florida Statutes (the "Uniform Collection Method"). Under such Uniform Collection Method, the special assessment is characterized as a "non-ad valorem assessment." See §197.3632(1)(d), Fla. Stat.

3. Fair and Reasonable Apportionment

An improvement or service which specially benefits the assessed properties must also be "fairly and reasonably apportioned among the benefited properties." City of Boca Raton v. State, 595 So. 2d 25 (Fla. 1992); Parrish v. Hillsborough County, 123 So. 830 (Fla. 1929). For example, in South Trail Fire Control District, Sarasota County v. State, 273 So. 2d 380 (Fla. 1973), the Florida Supreme Court upheld the apportionment scheme which assessed business and commercial property on an area basis while other property was assessed on a flat rate basis. The Court held that the manner of the assessment's apportionment is immaterial and may vary provided that the amount of the assessment for each property does not exceed the proportional benefits it receives as compared to other properties.

However, improper apportionment will defeat a special assessment when a special benefit is otherwise available. In City of Ft. Lauderdale v. Carter, 71 So. 2d 260 (Fla. 1954), a special assessment for garbage, waste and trash collection was apportioned based upon the value of the

property. The Florida Supreme Court held this assessment to be invalid in that apportioning on the basis of value did not bear any reasonable relationship to the services provided. See also St. Lucie County-Fort Pierce Fire Prevention and Control District v. Higgs, 141 So. 2d 744 (Fla. 1962) (Court struck fire assessments imposed against property based on the ratio of the assessed value of each property to the total value of all property in the district).

In comparison, the Florida Supreme Court in City of Naples v. Moon, 269 So. 2d 355 (Fla. 1972), found that the levying of a special assessment for improved parking facilities was valid because the city established specific guidelines to measure the benefits accruing to the assessed property. The guidelines were value of the property benefited, relative floor space of each improved property, its kind, susceptibility to improvement, and the maximum annual benefits to be conferred thereon. City of Naples, 269 So. 2d at 358. Other methods of apportionment which have been upheld are sewer improvements on a square foot basis (Meyer v. City of Oakland Park, *supra*) and street improvements on a lineal front foot basis (Bodner v. City of Coral Gables, 245 So. 2d 250 (Fla. 1971)).

Finally, in determining the reasonableness of the apportionment, courts generally give deference to the legislative determination of a local government. In Rosche v. City of Hollywood, 55 So. 2d 909 (Fla. 1952), the Florida Supreme Court stated:

The apportionment of assessments is a legislative function and if reasonable men may differ as to whether land assessed was benefited by the local improvement the determination as to such benefits of the city officials must be sustained.

Id. at 913; see also Key Colony No. 1 Condominium Assoc., Inc. v. Village of Key Biscayne, 651 So. 2d 779 (Fla. 3d DCA 1995).

The concept of judicial deference to legislative findings was strengthened and expanded by the Florida Supreme Court in its decisions in Sarasota County v. Sarasota Church of Christ and Harris v. Wilson.

4. Summary

Many assessed services and improvements have been upheld as providing the requisite special benefit. Such services and improvements include:

- **Garbage Disposal:** Harris v. Wilson, 693 So. 2d 945 (Fla. 1997) and Charlotte County v. Fiske, 350 So. 2d 578 (Fla. 2d DCA 1977);
- **Sewer Improvements:** City of Hallandale v. Meekins, 237 So. 2d 318 (Fla. 4th DCA 1970) and Meyer v. City of Oakland Park, 219 So. 2d 417 (Fla. 1969);

- **Fire Protection:** South Trail Fire Control Dist., Sarasota County v. State, 273 So. 2d 380 (Fla. 1973) and Fire Dist. No. 1 of Polk County v. Jenkins, 221 So. 2d 740 (Fla. 1969);
- **Fire and First Response Rescue Services:** Sarasota County v. Sarasota Church of Christ, 641 So. 2d 900 (Fla. 2d DCA 1994), rev'd on other grounds, 667 So. 2d 180 (Fla. 1995); Lake County v. Water Oak Management Corp., 695 So. 2d 667 (Fla. 1997); and Morris v. City of Cape Coral, 163 So. 3d 1174 (Fla. 2015). The scope of fire rescue services held to provide a logical relationship to the use and enjoyment of property was restricted in City of North Lauderdale v. SMM Properties, 825 So. 2d 243 (Fla. 2002). The Court held that the "emergency medical services" portion of the combined fire and rescue services program failed to provide any special benefit to property;
- **Street Improvements:** Atlantic Coast Line R. Co. v. City of Gainesville, 91 So. 118 (Fla. 1922) and Bodner v. City of Coral Gables, 245 So. 2d 250 (Fla. 1971);
- **Parking Facilities:** City of Naples v. Moon, 269 So. 2d 355 (Fla. 1972);
- **Downtown Redevelopment:** City of Boca Raton v. State, 595 So. 2d 25 (Fla. 1992);
- **Stormwater Management Services:** Sarasota County v. Sarasota Church of Christ, 667 So. 2d 180 (Fla. 1995);
- **Water and Sewer Line Extensions:** Murphy v. City of Port St. Lucie, 666 So. 2d 879 (Fla. 1995);
- **Neighborhood Amenities:** City of Winter Springs v. State, 776 So. 2d 255 (Fla. 2001); and
- **Beach Nourishment/Restoration:** Donovan v. Okaloosa County, 82 So.3d 801 (Fla. 2012).

A few services and facilities have been deemed to not provide the requisite special benefit. These include a county hospital, Crowder v. Phillips, 1 So. 2d 629 (Fla. 1941), a county health unit, Whisnant v. Stringfellow, 50 So. 2d 885 (Fla. 1951), and emergency medical services, City of North Lauderdale v. SMM Properties, 825 So. 2d 343 (Fla. 2002).

D. Home Rule Tax Increment

The Florida Supreme Court in Strand v. Escambia County, 992 So. 2d 150 (Fla. 2008), upheld a tax increment financing that was implemented by county ordinance to finance infrastructure improvements within a tax increment district. The project financed was a four-lane road-widening project designed to encourage economic development and to relieve traffic congestion. This opinion affirms the constitutional analysis first provided by the Court in State v. Miami Beach Redevelopment

Agency, 392 So. 2d 875 (Fla. 1980) and represents a landmark decision in support of the use of a tax-exempt financing authorized by law or home rule ordinance.

In Miami Beach Redevelopment Agency, the Florida Supreme Court held that funds placed in the statutory community redevelopment trust fund created under the general law scheme in Chapter 163, Part II, Florida Statutes, lost their character as ad valorem taxes for purposes of constitutional elector approval requirements in Article VII, section 12, Florida Constitution. The Court's reasoning was that bonds secured by available trust fund revenues were not payable from ad valorem taxes since no bondholder had the power to compel the levy of ad valorem taxes or interfere with the budgetary discretion of a local governing board in the levy of ad valorem taxes. Under the reasoning of the Court, the statutory duty to make an annual contribution to the community redevelopment trust fund did not make the bonds payable from ad valorem taxes in the constitutional sense of that term. Thus, voter approval is not required for the pledge of trust fund revenues generated from an annual deposit in a trust fund of a defined tax increment.

The principles articulated in the State v. Miami Beach Redevelopment Agency decision were subsequently followed in precedent establishing the constitutional limits of when elector approval is required in the appropriation of ad valorem taxes. A pledge of ad valorem taxes in violation of Article VII, section 12, Florida Constitution, occurs when a bondholder or outside party can compel the exercise of the taxing authority or interfere with the budgetary discretion of the governing board or, where the ad valorem taxing power is indirectly pledged under a financing structure in a manner which will invariably lead to an increase in ad valorem taxation. See State v. Brevard County, 539 So. 2d 461 (Fla. 1989). For example, in County of Volusia v. State, 417 So. 2d 968 (Fla. 1982), the pledge of all non-ad valorem taxes coupled with a promise to maintain all programs generating the various revenues was held to have more than an incidental affect on the exercise of the taxing power.

Of equal significance is the fact that the Court in Strand v. Escambia County upheld a tax increment financing that was implemented by county ordinance to finance infrastructure improvements within a tax increment district consisting of a four-lane road widening project required to improve economic development within the area and to relieve traffic congestion. The creation of a tax increment trust fund by ordinance is not restricted to the general law formula contained in section 163.387(2)(a), Florida Statutes, for redevelopment projects. As an example, the ordinance could provide that the increment is measured only by a percentage of the prior year taxable value generated by new construction. As a further example, the ordinance can provide that the annual tax increment is calculated on an increase in the countywide taxable value or the increase in taxable value within a designated geographic area described in the ordinance.

As a consequence of a recent legislative change in the definition of "rolled-back" rate, the creation of a home rule tax increment does not diminish the ad valorem tax capacity otherwise available to a local government.

Amendments to section 200.001, Florida Statutes, added a new definition of "dedicated increment value" to be included in the rolled-back rate calculation provided in section 200.065, Florida Statutes. This new term "dedicated increment value" is defined in section 200.001(8)(h) as "the proportion of the cumulative increase in taxable value within a defined geographic area used to

determine a tax increment amount to be paid to a redevelopment trust fund pursuant to s. 163.387(2)(a) or to be paid or applied pursuant to an ordinance, resolution, or agreement to fund a project or to finance essential infrastructure." Id. (emphasis added).

The portion of the cumulative increase in taxable value represented by a dedicated increment value is excluded from the calculation of the rolled-back rate which rate sets the base maximum ad valorem millage rates mandated in section 200.065, Florida Statutes.²⁴ Thus, the agreement to pay or apply a portion of the cumulative increase in taxable value within a defined geographic area by local government ordinance, agreement, or resolution does not reduce available ad valorem funds under the statutory ad valorem millage limitations set for local governments.

Acknowledgement: For additional information, please see Primer of Home Rule & Local Government Revenue Sources by Nabors Giblin & Nickerson, P.A. and the Florida Home Rule Green Book, Second Edition, by Robert L. Nabors. Excerpts from both books are included herein with permission.

²⁴Generally, section 200.065(5), Florida Statutes, sets as the maximum millage rate for counties and municipalities that can be levied by a majority vote at the rolled-back rate established pursuant to section 200.065(1), Florida Statutes, as adjusted for growth in per capita Florida personal income. Such maximum millage rate can be exceeded by extraordinary vote or by referendum approved by the electors. The increase in the rolled-back rate by the portion of the cumulative increase in taxable value represented by a dedicated increment yields additional funds within the maximum millage rate imposed by a majority vote.

Home Rule and Exercise of Taxing Power

March 15, 2023
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COUNTY HOME RULE Pre-1968

- Prior to 1968 constitutional revision: County power subject to “Dillon’s Rule”
- Express grant from Legislature
- No implied power not within scope of express grant
- Primary scope of power: special act

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COUNTY HOME RULE Post-1968

- 1968 Constitution abolished Dillon’s Rule and unleashed county home rule
- Charter Counties: Art. VIII, § 1(g), Fla. Const.
- Non-charter Counties: Art. VIII, § 1(f), Fla. Const.

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CHARTER COUNTIES

- Direct constitutional grant of home rule upon elector approval of charter
- "... all powers of local self-government not inconsistent with general law, or with special law approved by the electors."
- "The charter shall provide which shall prevail in the event of conflict between county and municipal ordinances."

Art. VIII, § 1(g), Fla. Const.

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NON-CHARTER COUNTIES

- "...shall have such power of self-government as is provided by general or special law."
- "... an ordinance in conflict with a municipal ordinance shall not be effective within the municipality to the extent of such conflict."

Art. VIII, § 1(f), Fla. Const.

- Section 125.01, Florida Statutes:
implemented home rule for all counties.

Broadly construed by courts

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DIFFERENCE BETWEEN CHARTER AND NON-CHARTER COUNTIES

- Source of home rule power
- Charter counties are insulated from special acts not approved by the electors
- Charter counties are treated differently by Legislature: section 100.361, Florida Statutes – municipal recall
- Charters can preempt municipal authority
- Charter counties are vested with municipal taxing power in unincorporated areas

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SUMMARY: COUNTY HOME RULE POWER

- Amount of home rule power possessed by charter and non-charter counties is essentially the same
- Charter county may have less home rule power
 - State v. Sarasota County, 549 So. 2d 659 (Fla. 1989)
- Counties are not dependent upon the Legislature for authorization to act in pursuit of county purposes. Legislative statutes are relevant only to determine limitations of authority.

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Municipal Home Rule Pre-1968

- Dillion's Rule
- Express Grant
- No implied power not within an express grant
- Proliferation of special acts and population acts

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Municipal Home Rule Post- 1968

- 1968 Constitution abolished Dillion's Rule and unleashed municipal home rule
- Article VIII, §2

"Municipalities shall have governmental, corporate and proprietary powers to enable them to conduct municipal government, perform municipal functions, and render municipal services, and may exercise any power for municipal purposes except as otherwise provided by law...."

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Municipal Home Rule Powers Act

- Home Rule legislatively implemented in Municipal Home Rule Powers Act, section 166.021, F.S.
- Must serve municipal purpose
- Must not be inconsistent with general law or special act or municipal charter
- Limitations on exercise of extraterritorial power, creation of cities, terms of elected officers and other matters listed in (3) and (4).

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COUNTY PREEMPTION OF MUNICIPAL POWER

- Non-charter county ordinance in conflict with a municipal ordinance is not effective within the city to the extent of the conflict
- Municipal purpose exception to the validity of a municipal "opt-out" ordinance
- Charter county charter provides which ordinance prevails in the event of conflict
- Dual referenda may be required for the resulting transfer of powers: Art. VIII, § 4, Fla. Const.

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Transfer of Powers

"By law or by resolution of the governing bodies of each of the governments affected, any function or power of a county, municipality or special district may be transferred to or contracted to be performed by another county, municipality or special district, after approval by vote of the electors of the transferor and approval by vote of the electors of the transferee, or as otherwise provided by law."

Article VIII, §4, Fla. Const.

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Balancing Transfer of Powers and Charter County Preemption

Art. VIII, §1(g) v. Art. VIII, §4

- Power of a charter county to preempt an inconsistent municipal ordinance has been judicially balanced with the constitutional transfer of power provisions to require dual approval of both county and municipal electors of a charter amendment transferring a municipal service to the county
- Power of a charter county to preempt a municipal ordinance in regulatory matters does not require referendum
- Interlocal service agreements where actual control or supervision is not transferred are permissible
- Legislature retains authority to provide for assignments of authority as "otherwise provided by law."

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Transfer of Powers Inquiry

- (1) Whether the transfer from one unit of government to another involves the provision of services or the preemption of regulatory authority, and
- (2) Whether the transfer from one unit of government to another involves total relinquishment of power and control over the service at issue.

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Home Rule Summary

- Counties and municipalities are not dependent upon the Legislature for authorization to act in pursuit of county or municipal purposes. Legislative statutes are relevant only to determine limitations of authority.
- Home rule powers of all counties and municipalities cannot be inconsistent with general law
- Home rule power of charter counties is derived directly from the Florida Constitution and can be diminished by special act only if the special act is approved by a vote of the electors
- Home rule power for municipalities and non-charter counties can be preempted by special act
- County charter can contain limitations on county power not inconsistent with general law that apply only to that charter county

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Home Rule Summary (cont.)

- Non-charter county ordinance that is in conflict with a municipal ordinance shall not be effective within the municipality to the extent of such conflict
- County charter can provide which shall prevail in event of a conflict between a county and municipal ordinance
- Charter County enjoys same taxing authority of a city unless contrary legislative intent
- Regulatory preemption by a county does not implicate the dual referenda requirement of the Transfer of Powers provision
- Transfer of Powers provision requires dual referenda to transfer functions or powers related to services.

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Special Districts

- Limited purpose governments
- Express grant of power
- No implied authority not within the scope of the express grant
- Authority embodied in district charter

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Dependent Districts

- Section 189.012(2), F.S.
- "Dependent" if it meets one of the following criteria:
 - Its governing body is identical to that of a single county or municipality
 - All members of the governing body are appointed by a single county or municipality
 - The members of the governing body can be removed during their unexpired term by a single county or municipality, or
 - Its budget requires approval of or can be vetoed by a single county or municipality

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Dependent District Creation

- County or city ordinance
§189.02(1), F.S.
- Special act with consent
§189.02(5), F.S.
- Ordinance adopted under section
125.01(5), Florida Statutes
- Minimum criteria for charter
§189.02(4), F.S.

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Independent Districts

- Section 189.012(3), F.S.
- Special district that is not defined as
"dependent" under the criteria of section
189.012(2), Florida Statutes, or any district
that includes more than one county unless
the district lies wholly within the
boundaries of a single municipality

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Independent District Creation

- Special Act
ad valorem millage with referendum approval
- General Law
other tax revenues optional
- Ordinance adopted under section
125.01(5), Florida Statutes
- Interlocal adopted per 163.01, Florida
Statutes
- Minimum requirements for charter
§189.031(3), F.S.

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PREEMPTION OF HOME RULE POWERS BY LEGISLATURE

Constitutional provision, general law, or properly approved special act can limit the home rule authority of a county or city.

- (1) Local government acts in conflict with state law
- (2) Local government acts inconsistent with a pervasive regulatory scheme
- (3) Local government acts contrary to state assignment of discretion and responsibility

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Waves of Preemption

Vacation Rentals

Tree Trimming

BUSINESS DAMAGES??

vegetable gardens

FIREARMS

Minimum Wage

Styrofoam

Subsistence

PLASTIC BAGS

smoking

Workplace Standards

NOISE!!

**SUPER
PREEMPTION**

ATTORNEYS' FEES

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Constitutional Preemption

(1) Conflict with Constitutional Provision;
and

(2) Reservation of State Power

- matters inherently of a purely statewide concern are not proper subjects for local treatment
- "substantial degree a matter of state concern"
- employment law, landlord/tenant, estates etc.

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Preemption by Direct Conflict

- Legislature can preempt county and municipal home rule authority by adopting an express general law prohibition
- Local governments can impose more stringent requirements than state law, but cannot forbid what the Legislature has authorized or authorize what the Legislature has forbidden

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Section 57.112, Florida Statutes

- Authorizes prevailing party attorney's fees in certain actions alleging express preemption of a local ordinance by state law.
- No fees allowed if:
 - local government is provided notice of the preemption; and
 - acts within 30 days to withdraw or repeal the preempted ordinance.

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Pervasive Regulatory Scheme

- Implied preemption due to area of comprehensive regulation by the state
- Implied preemption when state intended to occupy the field rendering legislation by a "junior legislative body" in danger of conflict
- More stringent local ordinance allowed if the state law does not preempt local action or advance a policy that the Legislature intended to be uniform
- Legislative provisions are inconsistent if to comply with one provision, a violation of the other is required

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Contrary to State Assignment of Responsibility

- Implied preemption when action is contrary to or in conflict with assignment of authority by the Legislature
- Stay in your lane preemption

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CONSTITUTIONAL PREEMPTION OF TAXATION TO STATE

- Prior to 1968 constitutional revision, taxes could be authorized by special act
- Article VII, section 1(a): constitutional preemption of all taxes (except ad valorem taxes) to state
 - “No tax shall be levied except in pursuance of law.”
 - “No state ad valorem taxes shall be levied upon real estate or tangible personal property.”
 - “All other forms of taxation shall be preempted to the state except as provided by general law.”

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Ad Valorem Taxes

“A direct tax is one that is imposed directly upon property, according to its value. It is generally spoken of as a property tax or an ad valorem tax. An indirect tax is a tax upon some right or privilege, or corporate franchise, and is most often called an excise or occupational tax.”

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Constitutional Millage Limitations

“Counties, school districts, and municipalities shall, and special districts may, be authorized by law to levy ad valorem taxes and may be authorized by general law to levy other taxes, for their respective purposes, except ad valorem taxes on intangible personal property and taxes prohibited by this constitution.”

Art. VII, §9(a), Fla. Const.

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Constitutional Millage Limitations

- Ten mills for municipal purposes.
- Ten mills for county purposes.
- To the extent authorized by law, a county furnishing municipal services may levy additional taxes within the limits fixed for municipal purposes.
- Special districts may levy a millage: (1) authorized by law, and (2) approved by voters.
- The ten mills for county purposes and municipal purposes may be exceeded if approved by electors: (1) for two years for general governmental purposes, and (2) for payment of bonds.

Art. VII, §9(b), Fla. Const.

- See also Section 200.071, Fla. Stat.

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Statutory Revenue Limitations

- Section 200.065(5), F.S.
- Apply to aggregate millage, including dependent special districts and MSTUs
- Limited to Rolled-Back Rate, adjusted by change in per capita Florida personal income, unless approved by super majority vote (up to 110%) or unanimous vote/referendum (excess of 110%)

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Ad Valorem Benefit Requirement

- Questions of benefits and of unlawful burdens do not arise when the tax is uniform, for a public purpose, and within the power of the Florida Legislature to prescribe
- Dual Tax

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Constitutional Dual Taxation

- "Property situate within municipalities shall not be subject to taxation for services rendered by the county exclusively for the benefit of the property or residents in unincorporated areas."

Art. VIII, §1(h), Fla. Const.

- Prohibits the taxation of city-located property by a county where no "real and substantial" benefit accrues to municipal residents and property from the county service
- "direct benefit" not required
- Only applies to ad valorem taxes

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Statutory Dual Taxation

- "No county revenues, except those derived specifically from or on behalf of a municipal service taxing unit, special district, unincorporated area, service area, or program area, shall be used to fund any service or project provided by the county when no real and substantial benefit accrues to the property or residents within a municipality or municipalities."

§125.01(7), Fla. Stat.

- Applies to non-ad valorem revenues
- Revenues derived from or on behalf of the unincorporated area are excluded

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THE MSTU CONCEPT

- Not a special district
- A levy by a county within the limits fixed for municipal purposes
- No referendum required
- Can include municipal areas with the municipality's consent by ordinance
- Ad valorem tax less than countywide without violating Art. VII, §2, Fla. Const. §125.01(q) and (r), F.S.

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MSTUs

Creation:	Ordinance
Deadlines:	January 1 or July 1 per Section 200.066, Florida Statutes
Consent:	Municipal consent by ordinance if includes incorporated areas
Millage:	Levied through annual budget process

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What is a Home Rule Revenue Source?

Any Charge Imposed Under Local Government Authority

- Except a tax (must be authorized by general law)
- That is not inconsistent with general or special law

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Home Rule Revenue Sources

- Fees
 - User fees
 - Regulatory Fees
 - Impact fees
- Special Assessments
 - Capital
 - Service

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AUTHORITY TO IMPOSE FEES

- Florida Legislature
 - General laws
 - Special acts
- Florida Constitution
 - Home rule

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TWO CATEGORIES OF FEES

Local governments generally impose fees in one of two ways:

- 1) Regulatory Fees imposed pursuant to police powers (i.e., building permit fees, inspection fees, impact fees)
- 2) Proprietary Fees imposed in the exercise of a proprietary power (i.e., utility fees, franchise fees, traditional user fees)

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REGULATORY FEES

- Offset Cost of Processing, Review or Monitoring
- Limited To Cost of Service

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IMPACT FEES

Impact fees are charges imposed against new development to fund capital facilities made necessary by that growth.

The purpose of the charge is to impose upon newcomers, rather than the general public, the cost of new facilities made necessary by their arrival.

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IMPACT FEES

Dual Rational Nexus Test

A reasonable connection between the need for additional capital facilities and the growth.

AND

A reasonable connection between the expenditure of fee proceeds and the benefits accruing to the growth.

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MOST FREQUENTLY IMPOSED IMPACT FEES

- Roads
- Parks Construction or Expansion
- Fire and EMS Facilities
- Water & Sewer Facility Expansion
- School Facilities
- Libraries
- Law Enforcement
- Public Buildings

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SECTION 163.31801, FLORIDA STATUTES

- Adopted by Legislature During 2006 Session
- First State Codification of Legislative Requirements for Impact Fee
- Sets Forth Minimum Requirements

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REQUIREMENTS UNDER SECTION 163.31801, FLORIDA STATUTES

- Fee Must Be Based Upon the Most Recent Localized Data
- Provides Accounting of Collection and Expenditure of Impact Fees
- Administrative Charge For Collection Limited to Actual Cost
- Requires Notice No Less Than 90 Days Before Effective Date
- Requires credits to be transferable under certain circumstances

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REQUIREMENTS UNDER SECTION 163.31801, FLORIDA STATUTES

- Fee cannot be collected prior to Building Permit
- Impact Fee Credit Holders entitled to “full benefit of intensity or density” as of date credit is established
- Exactions must be credited against impact fees
- “Infrastructure” and “Public Facilities”
- Impact Fees cannot be used to pay debt except under certain circumstances
- Water and sewer fees are exempt

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Phasing

Pursuant to plan for imposition, collection, and use.

- Increase up to 25% = two, equal annual increments
- Increase up to 50% = four equal installments
- May not exceed 50% of current rate
- May not increase more than once every 4 years.

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Extraordinary Circumstances

Local government may increase impact fees beyond the phase-in limitations if:

1. Demonstrated-need study within past 12 months that demonstrates extraordinary circumstances
2. No less than two dedicated workshops
3. Approved by no less than 2/3 vote of the governing body

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Proprietary/User Fees

- Utility fees, franchise fees etc.
- Reasonable in Amount
- Reasonable Profit – (Proprietary/Enterprise Activities Only)
- May Fund Capital, O&M or Sometimes Both
- Just and Equitable
- Charged in Exchange For a Governmental Service or Facility
- Are Paid by Choice (Voluntary)

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SPECIAL ASSESSMENTS

Special assessments are charges assessed against the property of some particular locality because that property derives some special benefit from the expenditure of the money.

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CASE LAW REQUIREMENTS

Special Benefit to Property

and

Fair and Reasonable Apportionment

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EXAMPLES OF
SPECIAL BENEFIT

- Fire Protection
- Street Improvements
- Parking Facilities
- Downtown Redevelopment
- Solid Waste
- Sewer Improvements
- Water and Sewer Lines
- Stormwater
- Beach Renourishment

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FAIR AND REASONABLE
APPORTIONMENT

- Logically and factually driven method must be developed to spread the costs among the benefited properties.
- Does method of apportionment make sense in terms of what is being provided?
- Legislative determination receives judicial deference.

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THE END

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Eminent Domain

By

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2023 CITY, COUNTY AND LOCAL GOVERNMENT LAW CERTIFICATION REVIEW

“Florida Eminent Domain Practice and Procedure”

A collaboration by Regina Ross, Esq. and Elizabeth Alt, Esq.

OUTLINE

I. POWER OF EMINENT DOMAIN

A. Definitions and Source of Eminent Domain Power.

B. Constitutional Limitations on Eminent Domain Power.

1. United States Constitution. Fifth Amendment Fourteenth Amendment
2. Florida Constitution.
 - a) Due process - Art. I, § 9, Fla. Const.
 - b) “Public purpose” & “full compensation” - Art. X, § 6, Fla. Const.

C. Authority to Exercise Eminent Domain Power.

1. Chapters 73 and 74, F.S., prescribe the procedures by which the power of eminent domain must be instituted.
 - a) Chapter 73, F.S. - “slow take” statute.
 - b) Chapter 74, F.S. - “quick take” statute.

D. Conflicting Powers of Condemnors.

1. Federally owned lands.
2. State property.
3. Neither superior – 3 doctrines.
 - a) Prior public use.
 - b) Compatible use.
 - c) Superior power,

E. Prerequisites to Exercising Eminent Domain Power (Public Purpose and Necessity)

1. Public Purpose.
2. Public Necessity.

II. THE PUBLIC PURPOSE DOCTRINE¹

A. Statutory Application.

1. Article X, § 6, of the Florida Constitution - Only for a public purpose.
2. Section 73.021(1), F.S. – The Condemnor must state the authority & use.
3. Section 73.013, F.S. - Prohibits conveyance of property taken to a private entity except as provided for by statute.
4. Section 73.014, F.S. - It is not a valid public purpose to take private property to abate or eliminate a public nuisance or to prevent or eliminate slum or blight condition.

B. Defined and Characterized.

1. Characteristics of a public use:
 - a) The acquired property must be available to the public in common.
 - b) The public interest in the project must dominate the private gain.
 - c) The manner of enjoyment or use of the property acquired must be in the control of the public.

C. Prior Public Use Doctrine.

1. Property already devoted to a public use may not be taken for another public use without express legislative authority.
2. Exceptions:
 - a) Proposed use is of superior rank in respect of public necessity&

¹ The terms “public use” and “public purpose” are used interchangeably.

- b) Taking will not materially impair or interfere with or is not inconsistent with the use already existing, and is not detrimental to the public.

III. NECESSITY FOR THE TAKING

A. Definition of Necessity.

- 1. Must be grounded in genuine necessity for health, safety and welfare.
- 2. Reasonable and not an absolute.

B. Judicial Inquiry.

- 1. Judge = Public purpose & necessity.
- 2. Jury = Compensation.

C. Necessity as a Limitation on Eminent Domain Power.

- 1. Quantity.
- 2. Interest.

D. Discretion of Condemning Authority.

- 1. Wide discretion.
- 2. In determining necessity, must consider SCALE.
 - a) Safety considerations;
 - b) Cost;
 - c) Availability of an alternate route;
 - d) Long-range planning; &
 - e) Environmental factors.
- 3. Challenge: DIBS. The Condemnor is:
 - a) abusing its Discretion;
 - b) acting Illegally or in a procedurally incorrect manner; or
 - c) acting in Bad faith.

E. Public Purpose Distinguished from Public Necessity.

- 1. Public purpose: Quality & nature of the project.
- 2. Public necessity: Quantity & location of the property.

IV. INITIATING CONDEMNATION LAWSUIT BY CONDEMNOR

A. Presuit Project Activities.

- 1. Project Planning.
- 2. Project Financing.
- 3. Federal Project Financing.
- 4. Public-Private Projects and Financing.
- 5. Project Development and Environment (PD&E).
- 6. Project Design.
- 7. Relocation of Utilities.
- 8. Project Permitting.
- 9. Pre-Eminent Domain Right-of-Way Acquisition Activities.
- 10. Advance Acquisition.
- 11. Post-Right-Of-Way and Litigation Activities.

B. Presuit Requirements.

- 1. Good Faith Negotiation.
- 2. Notice to Fee and Business Owners.
- 3. Written Offer to Fee Owner.
- 4. Providing Requested Information to Owner.
- 5. Business Damages Procedure.
- 6. Mediation and Settlement.
- 7. Costs and Attorneys' Fees.

V. TAKING

- A. Slow Take.**
- B. Quick Take.**
- C. Determining Property Rights Needed.**
- D. The Petition.**
- E. Order of Taking Hearing.**
- F. Entry of Order.**

VI. COMPENSATION

- A. In General.**
- B. What Constitutes a Compensable Taking?**
- C. Special Damages.**
 - 1. Severance Damages § 73.071(3)(b), F.S.
 - 2. Typical examples of severance damages include:
 - a) Reduction in size or alteration in shape of the remainder;
 - b) Damage resulting from the use to which the Condemnor intends to put the acquired property; &
 - c) Change in grade between the part taken and the remainder. Multiple Tracts.
 - 3. Noise.
- D. Business Damages.**
 - 1. Governed by s. 73.071(3)(b), F.S.
 - 2. Applicable circumstances.
 - 3. Business Owner good-faith offer - § 73.015(2)(c), F.S.
 - 4. Attorney's Fees.

*** Disclaimer ***

- 1. Nothing in this outline or the presentation that accompanies this outline is to be considered a sample question on any exam. All information in whatever form is offered to you by the author solely to demonstrate principles in Eminent Domain.
 - 2. This outline and the presentation that accompanies this outline were prepared without guidance from any Certification Committee or Certification Program.
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2023 CITY, COUNTY AND LOCAL GOVERNMENT LAW CERTIFICATION REVIEW
“Florida Eminent Domain Practice and Procedure”²

I. POWER OF EMINENT DOMAIN

A. Definitions and Source of Eminent Domain Power

1. Eminent domain is the fundamental power of the sovereign to take private property for a public use without the owner’s consent.
2. The terms “eminent domain” and “condemnation” refer to intentional, voluntary takings by the government through the condemnation process.
3. The power of eminent domain is an inherent attribute of sovereignty that is not derived from the constitution, *Daniels v. State Road Dept.*, 170 So. 2d 846 (Fla. 1964), and is absolute, except as limited by the constitution, *Demeter Land Co. v. Florida Public Service Co.*, 99 Fla. 954, 128 So. 402 (1930).
4. The power of eminent domain arises from the practical necessity to take properties for the public good, and every property owner holds title to property subject to the superior right of the government to retake that property. *Demeter Land Co.*
5. The power of eminent domain is exercised against the land and is an *in rem* proceeding, not *in personam*. *Miccosukee Tribe of Indians of Florida v. Dept. of Environmental Protection ex rel. Board of Trustees of Internal Improvement Trust Fund*, 78 So. 3d 31 (Fla. 2d DCA 2012).

B. Constitutional Limitations on Eminent Domain Power

1. United States Constitution. Fifth Amendment to the United States Constitution prohibits the federal government from taking private property for public use without “just” compensation, and the Fourteenth Amendment prohibits state governments from condemning private property without due process of law. The Fourteenth Amendment, in effect, applies the requirements of the Fifth Amendment to state and local government. *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963).
2. Florida Constitution. The due process provision of the Florida Constitution mandates that “[n]o person shall be deprived of life, liberty or property without due process of law.” Art. I, § 9, Fla. Const. Florida’s constitutional eminent domain provisions state that no private property shall be taken except for a “public purpose” and with “full compensation.” Art. X, § 6, Fla. Const.
3. The Florida Constitution guarantees “full” rather than “just” compensation to guarantee that the owner receives full, fair, and complete compensation and is “made whole.” See *Jacksonville Expressway Authority v. Henry G. Du Pree Co.*, 108 So. 2d 289, 292 (Fla. 1959), quoting *Dade County v. Brigham*, 47 So. 2d 602, 604 (Fla. 1950).

C. Authority to Exercise Eminent Domain Power

1. Authority to exercise the power of eminent domain and the constitutional limitations on that power are vested in the legislature. The legislature, in turn, delegates the authority to agencies of government.
2. When the legislature delegates the power to exercise eminent domain, its use is subject to the limitations and conditions set forth in the delegation of authority. Specific authorization to exercise the power of eminent domain, together with particular limitations on that power, are contained in numerous sections of the Florida Statutes.
3. Chapters 73 and 74, F.S., prescribe the procedures by which the power of eminent domain must be instituted.
 - a) Chapter 73, F.S., is referred to as the “slow take” statute.

² These materials were, for the most part, extracted from Florida Bar, Lexis Nexis, *Florida Eminent Domain Practice and Procedure* (New York, NY: Lexis Nexis, 2019).

- b) Chapter 74, F.S., is referred to as the “quick take” statute.
 - i. A condemnor may initiate a “quick take” only if Chapter 74, F.S. or another applicable statutory provision expressly authorizes this procedure. *See Pichowski v. Florida Gas Transmission Co.*, 857 So. 2d 219 (Fla. 2d DCA 2003) (private gas pipeline company did not have quick take authority when not expressly provided by statute).
 - ii. Section 74.011, F.S., lists the specific entities that are authorized to take possession and title of an owner’s property in advance of entry of final judgment.

D. Conflicting Powers of Condemnors

1. The state of Florida may not exercise the power of eminent domain over federally owned lands without the consent of the federal government. *United States v. Carmack*, 329 U.S. 230, 67 S.Ct. 252, 91 L.Ed. 209 (1946).
2. A county is not permitted to appropriate state property without state consent. *See* § 127.01(1)(a), F.S.
3. When one condemning authority seeks property held by another condemning authority and neither possesses a superior power of condemnation, the authority to condemn is subject to the application of three doctrines: the prior public use doctrine, the compatible use doctrine, and the doctrine of superior power of condemnation.
 - a) The prior public use doctrine states that property devoted to public use cannot be taken and appropriated to another public use unless the authority for the taking either has been given expressly by the legislature or is necessarily implied. *See, e.g., Florida East Coast Railway Co. v. City of Miami*, 321 So. 2d 545 (Fla. 1975); *Housing Authority of City of Fort Lauderdale v. State Dept. of Transportation*, 385 So. 2d 690 (Fla. 4th DCA 1980).
 - b) If a taking will neither materially impair nor alter an existing public use and the proposed use is not detrimental to the public, Florida courts may permit one condemning authority to appropriate the property of another authority under the compatible use doctrine.
 - c) The doctrine of superior power of condemnation, either expressly granted or necessarily implied, suspends the prior public use doctrine and permits one condemning authority to appropriate the property of another condemning authority. *See, e.g., Florida East Coast Railway Co. v. City of Miami*, 372 So. 2d 152 (Fla. 3d DCA 1979).

E. Prerequisites to Exercising Eminent Domain Power (Public Purpose and Necessity)

1. Public Purpose. The Florida Constitution expressly prohibits use of the power of eminent domain “except for a public purpose.” Art. X, § 6, Fla. Const.
2. In determining whether a particular use of eminent domain is for a public purpose, the courts traditionally have held that “[t]he public interest must dominate the private gain.” *See Demeter Land Co. v. Florida Public Service Co.*, 99 Fla. 954, 128 So. 402, 406 (1930), relying on *Boyd v. C. L. Ritter Lumber Co.*, 89 S.E. 273, 279 (Va. 1916).
3. The public purpose test was set forth by the Florida Supreme Court in *Baycol, Inc. v. Downtown Development Authority of City of Fort Lauderdale*, 315 So. 2d 451, 455 (Fla. 1975):

[E]minent domain cannot be employed to take private property for a predominantly Private Use; it is, rather, the means provided by the constitution for an assertion of the public interest and is predicated upon the proposition that the private property sought is for a necessary public use. It is this public nature of the need and necessity involved that constitutes the justification for the taking of private property, and without which proper purpose the private property of our citizens cannot be confiscated, for the private ownership and possession of property was one of the great rights preserved in our constitution and for which our forefathers fought and died; it must be jealously preserved within the reasonable limits prescribed by law.

Decisions have, however, consistently allowed an incidental private use where the purpose of the taking was clearly and predominantly a public purpose.

4. Public Necessity. Public necessity is essential to the valid exercise of the power of eminent domain. *See* § 73.021(1), F.S.; *Canal Authority v. Miller*, 243 So. 2d 131 (Fla. 1970).
5. The necessity must be reasonable, not absolute.

II. THE PUBLIC PURPOSE DOCTRINE³

A. Statutory Application.

1. Article X, § 6, of the Florida Constitution restricts the exercise of the power of eminent domain to the condemnation of private property only for a public purpose.
2. The constitutional limitation that private property be taken only for public use is given procedural application in § 73.021(1), F.S., which requires that the Condemnor state the authority under and the use for which the property is to be acquired.
3. Section 73.013, F.S. was created to prohibit the conveyance of property taken by eminent domain to a private entity except as provided for by statute, and § 73.014, F.S. was created to state that it is not a valid public purpose to take private property to abate or eliminate a public nuisance or to prevent or eliminate slum or blight condition.

B. Defined and Characterized.

1. Characteristics of a public use:
 - a) The acquired property must be available to the public in common. It is not necessary that the entire community directly participate in the benefits to be derived from the property taken. However, the use and benefit must be available to the public in common, not to particular individuals or estate. For example, a schoolhouse site for a district of a dozen families is as undeniably for public use as is the ground for a statehouse. It is immaterial how few people actually use the property. *Wilton v. St. Johns County*, 98 Fla. 26, 123 So. 527 (1929).
 - b) The public interest in the project must dominate the private gain. The requirement that public interest in the project must dominate private gain does not preclude some lesser private use of the property. It is well settled that an incidental private benefit is permissible when the purpose of the taking is clearly and predominantly a public purpose. *Ervin v. Cotney*, 104 So. 2d 346 (Fla. 1958).
 - c) The manner of enjoyment or use of the property acquired must be in the control of the public. The degree of control retained by the public over the condemned property is significant. The Florida Supreme Court has considered two cases involving whether a lease of substantial project property to private enterprise constituted an improper release of the public's control of the project. In distinguishing *Panama City v. State*, 93 So. 2d 608 (Fla. 1957) from *City of West Palm Beach v. State*, 113 So. 2d 374 (Fla. 1959), the Court found it important that Panama City had retained control of the project and leased the various units to private interests, thereby maintaining a public use, whereas the city of West Palm Beach had not.
2. In 2006, the Florida Legislature created § 73.013, F.S., prohibiting the transfer of property acquired by eminent domain to a private entity. This legislation also provided for other statutory modifications to give effect to the general intent to prohibit use of the economic redevelopment rationale to justify a taking in Florida. To further reinforce the action of the legislature, on November 7, 2006, voters passed a constitutional amendment creating

³ The terms “public use” and “public purpose” are used interchangeably.

subsection (c) of Article X, § 6, of the Florida Constitution prohibiting the transfer of private property taken by eminent domain to a natural person or private entity.

3. The requirement for taking a parcel of land to carry out a public purpose is ultimately a judicial question on which the landowner has the right to be heard. *Daniels v. State Road Dept.*, 170 So. 2d 846 (Fla. 1964); *Spafford v. Brevard County*, 92 Fla. 617, 110 So. 451 (1926).
4. The condemning authority, not the landowner, has the burden of proof and must come forward with evidence of a public purpose for the taking and a reasonable necessity that the property is being taken for the contemplated public use. Once the Condemnor has established the nature of the public use and the necessity for the taking, the burden shifts to the landowner. The owner then must either concede the public nature of the use and the necessity of the property for the project or show bad faith or abuse of discretion as an affirmative defense. *Canal Authority v. Miller*, 243 So. 2d 131 (Fla. 1970).

C. Prior Public Use Doctrine

The prior public use doctrine states that property already devoted to a public use may not be taken for another public use without express legislative authority. *City of Dania v. Central & Southern Florida Flood Control District*, 134 So. 2d 848 (Fla. 2d DCA 1961). In *Georgia Southern & Florida Railway Co. v. State Road Dept.*, 176 So. 2d 111, 112 (Fla. 1st DCA 1965), the court expressed the doctrine as follows:

The general rule is that property devoted to a public use cannot be taken and appropriated to another and different public use unless the legislative intent to so take has been manifested in express terms or by necessary implication. There are two well established exceptions to the rule. One exists when the proposed use is of superior rank in respect of public necessity, and the other arises when the taking will not materially impair or interfere with or is not inconsistent with the use already existing, and is not detrimental to the public.

III. NECESSITY FOR THE TAKING

A. Definition of Necessity

1. The Supreme Court in *Lieberman v. Marshall*, 236 So. 2d 120, 126 (1970), held that “the state’s interest which may be protected must in every case be more than mere public desire, public demand, or public benefit, and must be grounded in genuine necessity for health, safety and welfare.” In *Peavy-Wilson Lumber Co. v. Brevard County*, 159 Fla. 311, 31 So. 2d 483 (1947), the Supreme Court noted a “vast difference [between] public benefit and public necessity.” In describing public necessity, the Court stated: “The best authority limits this rule to the securing of something that is basically essential, such as public buildings to carry on governmental functions, public roads, schools, drainage projects, parks and playgrounds in congested area.” *Id.* at 318.
2. It is established that necessity “should be construed to mean a reasonable and not an absolute necessity.” *Canal Authority v. Miller*, 243 So. 2d 131, 134 (Fla. 1970); *Broward County v. Steele*, 537 So. 2d 650 (Fla. 4th DCA 1989). *See also City of Jacksonville v. Griffin*, 346 So. 2d 988 (Fla. 1977).

B. Judicial Inquiry

The necessity for the exercise of the sovereign power of eminent domain is not a jury question, but is decided by a court of competent jurisdiction. *Canal Authority v. Miller*, 243 So. 2d 131 (Fla. 1970). *See also Security Management Corp. v. State, Dept. of Transportation*, 718 So. 2d 339 (Fla. 4th DCA 1998).

C. Necessity as a Limitation on Eminent Domain Power

1. Generally, the acquiring authority is not permitted to take a greater quantity of property than necessary to serve the particular public use for which the property is being acquired. For example, see *Knappen v. Division of Administration*, State Dept. of Transportation, 352 So. 2d 885 (Fla. 2d DCA 1977), FDOT was not free to acquire more land than was necessary for its roadway in order to design a roadway project wide enough to attract federal fund.
2. The condemning authority also may not take a greater than necessary interest or estate in the property. In *Canal Authority v. Miller*, 243 So. 2d 131 (Fla. 1970), the court found adequate evidence of reasonable necessity for an easement, but not for a fee simple title.

D. Discretion of Condemning Authority

1. A governmental body has wide discretion to select the amount, location, and interest of property to be condemned. See *School Board of Broward County v. Viele*, 459 So. 2d 354 (Fla. 4th DCA 1984). However, Florida courts require a condemnor to consider the following factors in establishing necessity:
 - a) Safety considerations
 - b) Cost;
 - c) Availability of an alternate route;
 - d) Long-range planning; &
 - e) Environmental factors.
2. There are three grounds for challenging the Condemnor's discretion (any one, if proved, is sufficient to prevail):
 - a) The Condemnor is acting illegally without statutory authority or in a procedurally incorrect manner.
 - b) The Condemnor is acting in bad faith.
 - c) The Condemnor is abusing its discretion.

E. Public Purpose Distinguished from Public Necessity

The questions of whether a particular project has a public purpose and whether there is a public necessity for the project frequently go hand in hand. However, unlike public purpose, which concerns the quality and nature of the project, public necessity focuses on a determination of what property and how much of that property is needed for the project. *Dade County v. Paxson*, 270 So. 2d 455 (Fla. 3d DCA 1972). Frequently, the question of necessity also involves the timing of a project. *City of Miami v. Cox*, 313 So. 2d 443 (Fla. 3d DCA 1975).

IV. INITIATING CONDEMNATION LAWSUIT BY CONDEMNOR

A. Presuit Project Activities

1. Before filing the eminent domain lawsuit, condemning authorities conduct numerous project preparation activities that may be required by professional engineering standards and specifications, and state or federal law or procedure, and that may have a significant impact on both the success of the taking and the monetary compensation ultimately awarded to property and business owners.
2. These activities extend from early project planning, through location survey and project development.
3. These activities include preliminary engineering and environmental analyses, preliminary and final design, permitting, title examination, right-of-way mapping, appraisal, offers to purchase, negotiations for acquisition, and residential and business relocation.
4. Although these activities may differ for transportation and other types of public improvement projects, timing and general project development stages have many similarities. For example, utility projects or public building construction projects frequently must undergo complex and

time-consuming architectural, engineering, environmental, and permitting phases before eminent domain can be initiated.

5. Activities:

a) Project Planning

Many condemning authorities have specific statutory requirements for planning public projects. The Florida Transportation Code, Chapters 334–339, 341, 348, and 349, F.S. and §§ 332.003–332.007, 351.35, 351.36, 351.37, and 861.011, F.S., serve to establish the responsibilities of the state, counties, and municipalities in the planning and development of transportation systems.

b) Project Financing

Understanding project financing is important for because many steps in the presuit project development process can be affected by the source of funding. For example, if federal funds are used on a public project, many project development requirements, such as environmental assessments, must comply with federal law and procedure, and all property acquisition and displaced relocation activities must strictly conform to the requirements of the Uniform Relocation Assistance and Real Property Acquisition Policies Act, 42 U.S.C. §§ 4601 et seq., and implementing federal regulations, 49 C.F.R. Part 24.

c) Federal Project Financing

Use of federal funds imposes numerous project development and environmental assessment requirements. Understanding applicable federal requirements is important because they can affect both the timing and substance of appraisals, offers to property owners, negotiations, relocation entitlements, and possession and clearance of the project for construction.

d) Public-Private Projects and Financing

It is becoming increasingly common for condemning authorities to embark on public projects using a combination of public and private financing. These innovative approaches to project delivery can include numerous variations and combinations of federal, state, local government, and private sector funding. These agreements may include responsibility for completing the project development and environmental assessment (PD&E), conducting design, acquiring right-of-way, doing construction, or simply providing funds for any of these activities. It is important to be aware of any project agreements and the statutory authority underlying the public-private projects.

e) Project Development and Environment (PD&E)

Under federal or state law, condemning authorities may be required to complete a comprehensive study that evaluates social, economic, and environmental effects associated with the proposed improvement project to support decisions on the type, location and conceptual design to meet the project’s proposed purpose and need. In sum, this PD&E process can be extremely complex and includes gathering information, taking public comments, conducting environmental assessments, and performing preliminary engineering studies to formulate a recommended conceptual design.

f) Project Design

Information from the PD&E report and environmental documentation, field surveys, geotechnical explorations, field reviews, preliminary engineering plans, and traffic data must be considered in determining the optimum design of the facility. The final design process incorporates specifications, cost estimates, and other information into construction plans and contract documents necessary for construction. The condemning authority

should be especially alert during the design phase to architectural or engineering issues under consideration that can result in damages and increased right-of-way costs. For instance, issues such as location of right-of-way or project boundary limits, pond and water retention locations, drainage, elevation, access limitations, driveway connections, and median locations can significantly affect the amount of severance or business damages resulting to parcels on the project.

g) Relocation of Utilities

Utility relocation frequently imposes lengthy project development, environmental, design, and regulatory approvals or permitting requirements, and sufficient time must be provided in the project schedules to accommodate those processes as well as time for possible acquisition of additional right-of-way for the relocation.

h) Project Permitting

Securing environmental permits for a project may be required during the project development and design process when adverse environmental impacts such as water quality or quantity result from project construction or operation. Regulatory agencies at both the federal and the state levels have established criteria for permits that are specific to their agencies. Permits may be required from agencies such as the U.S. Environmental Protection Agency, U.S. Army Corps of Engineers, U.S. Coast Guard, Florida Department of Environmental Protection, and Florida Water Management Districts when there is any alteration of land or wetlands, impact on surface water, or necessary storm water treatment. The permitting process should begin as early as possible in the PD&E stage of the project and be closely monitored through the permitting application process and design until final permit approval, because the time for this process can vary significantly among environmental resource agencies. Whether the condemning authority has secured necessary permits for the project may be raised as a defense to the order of taking. *See Seadade Industries, Inc. v. Florida Power & Light Co.*, 245 So. 2d 209 (Fla. 1971).

i) Pre-Eminent Domain Right-of-Way Acquisition Activities

At this stage, the condemning authority should conduct a field review of the project and should address the status of completion of right-of-way maps, plans, required project resolutions, acquisition notices to the property owners and business owners, the condemning authority's schedule for offers for acquisition, available time for negotiation, intended plans and schedule for relocation of both residential and business displacements, and planned dates for initiation of eminent domain and initiation of construction.

j) Advance Acquisition

Increasingly, governmental entities are seeking opportunities to purchase property needed for future public projects when the property is available and on the market for sale. Purchase of these properties has many advantages to an agency, including savings on future condemnation costs and reduction of future project schedules.

k) Post-Right-Of-Way and Litigation Activities

The condemning authority must ensure that any commitments made during the right-of-way acquisition or litigation negotiation and settlement process that may have an impact on construction are met. Agreements relating to specific driveway locations, median or curb cuts, drainage modifications, or other construction matters must be incorporated into construction plans and contract documents in order to accomplish the changes made in litigation.

B. Presuit Requirements

Good Faith Negotiation

1. Before an eminent domain proceeding is filed under F.S. Chapter 73 or Chapter 74, “the condemning authority must attempt to negotiate in good faith with the fee owner of the parcel to be acquired, must provide the fee owner with a written offer and, if requested, a copy of the appraisal upon which the offer is based, and must attempt to reach an agreement regarding the amount of compensation to be paid for the parcel.” § 73.015(1), F.S. *See Simmons v. Dept. of Environmental Protection*, 849 So. 2d 415 (Fla. 2d DCA 2003) (department’s duty under F.S. 73.015 did not extend beyond duty to send written offer). This requirement does not extend to business owners or their lessees.

Notice to Fee and Business Owners

2. Section 73.015, F.S., provides the notification and presuit negotiation requirements that all condemning authorities must follow before filing any eminent domain action under Chapter 73 or Chapter 74, F.S. The condemning authority must make a good-faith effort to notify fee as well as business owners and their lessees that:
 - a) all or a portion of the property to be taken is necessary for a project;
 - b) the nature of the project and the parcel designation of the property to be acquired;
 - c) within 15 business days after receipt of a request by the fee or business owner, the condemning authority will provide a copy of the appraisal report on which the offer is based;
 - d) the fee or business owner’s rights under §§ 73.091–73.092 and 73.071, F.S. (or copies of the provisions); and
 - e) the fee owner’s rights and responsibilities under §§ 73.015(1)(b)–(1)(c) and 73.015(4), F.S., and the business owner’s rights and responsibilities under §§ 73.015(2)(b)–(2)(c) and 73.015(4), F.S.
3. The condemning authority’s notice must be sent by certified mail, return receipt requested, to the fee owner’s last known address listed on the county’s ad valorem tax roll, or it may be personally delivered to the fee owner. § 73.015(1)(c), F.S.
4. The Condemnor’s notice must be sent to business owners by certified mail, return receipt requested, to the address of the registered agent for the business located on the property to be acquired. If no agent is listed, the notice must be sent by certified mail or personal delivery to the address of the business. § 73.015(2)(b), F.S.
5. Notice to one owner of multiple ownership properties or businesses constitutes notice to all owners of these properties or businesses. Notice is not required to a property owner who acquires title to the property or a business owner who acquires an interest in the business after the original notice has been given. The return of the notice as undeliverable by the postal authorities constitutes compliance with the mailing requirement. § 73.015(1)(c), (2)(b), F.S.

Written Offer to Fee Owner

6. The condemning authority must provide a written offer of compensation for the value of the property being taken, including, when less than the entire property is being taken, any damages to the remainder caused by the taking. § 73.015(1)(b), F.S.
7. The written offer must be sent by certified mail, return receipt requested, to the fee owner’s last known address on the county ad valorem tax roll. Alternatively, the written offer may be personally delivered to the fee owner of the property. The condemning authority is not required

to give a written offer to a person who acquires title to the property after the required notice has been given. § 73.015(1)(c), F.S.

8. Section 73.015(1)(c) F.S., provides that the return of the notice as undeliverable by the postal authorities constitutes compliance with this requirement, but the statute does not mention return of the written offer. A first written offer does not need to separate the offer between a fee owner and any other interests in the property to be a valid presuit offer. *See Orlando/Orange County Expressway Authority v. Tuscan Ridge, LLC*, 84 So. 3d 410 (Fla. 5th DCA 2012).
9. The fee owner must be given at least 30 days to respond to the offer after either receipt of the required notice or the date the notice is returned as undeliverable by the postal authorities. NOTE: A written offer may be sent concurrent with the required notice, but that is not specifically required by the law. However, because the law clearly provides a 30-day opportunity for the owner to respond to the offer, the condemning authority should not initiate eminent domain proceedings for at least 30 days after the receipt of the notice or receipt of the written offer by the fee owner, whichever is later.

Providing Requested Information to Owner

10. Within 15 days after receipt of a request by the fee owner, § 73.015(1)(a)3, F.S., or the business owner, § 73.015(2)(a)3, F.S., the condemning authority must provide: (1) a copy of the appraisal report on which the offer to the fee owner is based; (2) copies, if prepared, of the right-of-way maps or other documents that show the proposed taking; and (3) copies, if prepared, of the construction plans.
11. The construction plans that must be provided are those that show project improvements to be made on the property taken and adjacent to the remaining property. The construction plans requested may include plan detail, profiles, cross-sections, drainage and pavement marking sheets, and driveway connection detail. F.S. 73.015(1)(a)3, (2)(a)3.
12. If the fee or business owner requests any additional plan sheets other than those showing project improvements to be constructed on the property taken or adjacent to the remaining property, the condemning authority must provide those plans, to the extent prepared, within 15 days of the request.

Business Damages Procedure

13. Within 180 days after receipt of the notice required by § 73.015(2)(a), F.S. or the date the notice is returned as undeliverable, or at a later date agreed to by the condemning authority and the business owner, the business owner who qualifies for business damages under § 73.071(3)(b), F.S. and who intends to claim business damages must submit a good-faith written offer to the condemning authority by certified mail to settle any claims for business damages. § 73.015(2)(c), F.S.
14. The business damage offer must include an explanation of the nature, extent, and amount of the damage and must be prepared by the owner, a certified public accountant, or a business damage expert familiar with the owner's business. The business owner must also provide to the condemning authority copies of the business records that substantiate the offer. § 73.015(2)(c)1, F.S.
15. In many cases, the 180-day period may expire before initiation of the eminent domain lawsuit or during the pleading process. Therefore, the court may grant the business owner up to an additional 180 days to submit a business damage offer on a demonstration of a good-faith

justification by the business owner for failure to timely submit the required offer. § 73.015(2)(c), F.S.

16. Within 120 days of the offer by the business owner and receipt of the business records, the condemning authority must accept or reject the business owner's offer or make a counteroffer. If the condemning authority fails to respond to the business damage offer, the condemning authority will be considered to have made a counteroffer of zero for purposes of determining the benefit for calculation of attorneys' fees under § 73.092(1). *See* § 73.015(2)(d), F.S.

Mediation and Settlement

17. The parties may elect to submit both the compensation and business damage claims to nonbinding mediation under § 73.015(3), F.S.
18. If presuit mediation or another mutually acceptable presuit dispute resolution procedure results in a settlement, the settlement must be in writing and must incorporate by reference the maps, plans, or other documents relating to the taking on which the settlement is based.
19. Both parties have the same legal rights under the settlement that would have been available if the matter had been resolved through eminent domain proceedings in circuit court with the maps, plans, or other documents having been made a part of the record.
20. Any written or oral statements used in presuit mediation or negotiations between the parties are inadmissible in any condemnation proceeding, except in a proceeding to determine reasonable attorneys' fees and costs. *See* § 73.015(5), F.S.

Costs and Attorneys' Fees

21. If a settlement is reached instead of condemnation of a road right-of-way between the public condemning authority and a property or business owner, costs are recovered in the same manner as provided in F.S. 73.091. F.S. *See* § 73.015(4), F.S.
22. Presuit costs must be paid when the business or property owner submits to the condemning authority all appraisal reports, business damage reports, or other work product for which recovery is sought on transfer of title of the real property by closing, on payment of any amounts due for business damages, or on final judgment. § 73.015(4)(c), F.S.
23. If the parties are not able to agree on the amount of presuit costs to be paid by the condemning authority, the property or business owner may file a complaint in the circuit court in which the property is located to recover those costs. § 73.015(4)(d), F.S.
24. For settlement of compensation claims instead of condemnation, attorneys' fees to be paid by public condemning authorities for the land, severance damages, and improvements for road right-of-way are calculated in the same manner as provided in § 73.092(1), F.S., unless the parties agree otherwise. *See* § 73.015(4)(a), F.S.

V. ORDER OF TAKING

A. Slow Take

1. Under Chapter 73, F.S., the "slow take" statute, the condemning authority may file a petition to condemn whatever property interests it needs to carry out its public project (for "public use or purpose"). § 73.021, F.S.

2. Under § 73.021, F.S., the condemning authority is not required to have an appraisal of the property to file its condemnation action, and under F.S. 73.111, no deposit of funds is required until after final judgment. *See City of Miami Beach v. Cummings*, 233 So. 2d 842 (Fla. 3d DCA 1970).
3. However, under § 73.015(1)(a), F.S., as part of presuit negotiations, an appraisal would have to be made available to the owner, on request, before filing suit.
4. Under a slow take, at the time the final judgment is rendered, the condemning authority can decide to pay the amount awarded into the registry of the court and acquire possession and title or other rights in the property, or the condemning authority can decide that the award is excessive and refuse to deposit the funds, making the judgment null and void. § 73.111, F.S.
5. Under Chapter 73, F.S., the Condemnor may unilaterally dismiss the case at any time before the entry of a final judgment, and be obligated only for the payment of attorneys' fees and costs.

B. Quick Take

1. An alternative to an F.S. Chapter 73 slow take, the condemning authority may switch to an F.S. Chapter 74 "quick take" at any time before final judgment, § 74.011, F.S. or initially file its petition as a quick take under Chapter 74, F.S.
2. The quick take statute allows the condemning authority to take possession and title to property upon deposit of a good-faith estimate of value before a valuation trial and entry of a final judgment, § 74.031, F.S., while at the same time, providing the property owners all of their rights as guaranteed by the constitution.
3. A quick take may be beneficial both to Condemnors and Condemnees. Condemnors often have construction deadlines, funding requirements, and public pressures that mandate swift completion of the project; however, after the good-faith estimate of value is deposited, the petitioner cannot dismiss the petition regardless of the amount awarded by the jury, and the petitioner will be liable for paying interest on any compensation amount awarded over the initial deposit.
4. Property owners, on the other hand, often want the quick take to settle their rights to use, lease, or convey their property. The quick take can, however, work to the disadvantage of the petitioner, because the valuation date is fixed by the deposit of funds and the Condemnor is committed to carrying out the taking regardless of the ultimate valuation. § 74.071, F.S.
5. Under the quick take statute, once a deposit is made, the rights of both parties vest: the Condemnor's right is to the land condemned and the owner's right is to full compensation. § 74.061, F.S. *See also Manhattan Properties Ltd. v. Division of Administration, State, Dept. of Transportation*, 541 So. 2d 655 (Fla. 2d DCA 1989); *O'Sullivan v. City of Deerfield Beach*, 232 So. 2d 33 (Fla. 4th DCA 1970).
6. Once title passes under a quick take, the Condemnor cannot dismiss the case without the property owner's consent.
7. Example: In *City of Miami v. Florida East Coast Railway Co.*, 428 So. 2d 674 (Fla. 3d DCA 1983), the Condemnor obtained title to property before trial. A verdict of \$23.3 million not

only exceeded the Condemnor's deposit of \$14.5 million, but also exceeded the amount that the Condemnor budgeted for the entire acquisition. Nevertheless, because title had passed, the Condemnor was obligated to pay the verdict, interest, cost of expert witnesses, and attorneys' fees.

C. Determining Property Rights Needed

1. The Condemnor must identify the property rights to be acquired, and is permitted to take only those property rights that are, in its sound discretion, necessary for the project. *Wilton v. St. Johns County*, 98 Fla. 26, 123 So. 527 (1929).
2. Broad discretion is vested in the condemning authority to determine how much property is necessary to condemn for a public purpose. *City of Hollywood Community Redevelopment Agency v. 1843, LLC*, 980 So. 2d 1138 (Fla. 4th DCA 2008). However, a condemnor cannot take more property than necessary to serve the use for which it is being acquired.
3. A petition seeking to take private property may be denied if the Condemnor cannot show that it needed to condemn all of the property sought to be taken in the petition. *See Viverette v. State, Dept. of Transportation*, 227 So. 3d 1274, 1276 (Fla. 1st DCA 2017).

D. The Petition

1. Section 73.021, F.S. provides that a condemning authority may file its eminent domain petition in the circuit court of the county where the property is located.
2. The Condemnor must file a petition that satisfies the requirements of § 73.021, F.S. It must set forth the following:
 - a) the authority under which and the public use or purpose for which the property is to be acquired, and that the property is necessary for that public use or purpose;
 - b) a description identifying the property sought to be acquired (the petitioners may join in the same action all properties involved in a planned project whether in the same or different ownership, or whether or not the property is sought for the same use);
 - c) the estate or interest in the property that the petitioner intends to acquire;
 - d) the names; places of residence; legal disabilities, if any; and interests in the property of all owners, lessees, mortgagees, judgment creditors, and lienholders, so far as ascertainable by diligent search, and all unknown persons having an interest in the property when the petitioner has been unable to ascertain the identity of such persons by diligent search and inquiry;
 - e) whether any mobile home is located on the property sought to be acquired and, if removal of the mobile home will be required, the name of the owner of such mobile home (such requirement, however, does not apply to any governmental authority exercising its power of eminent domain when reasonable relocation or removal expenses must be paid to mobile home owners under other provisions of law or agency rule applicable to such exercise of power);
 - f) a statement that the petitioner has surveyed and located its line or area of construction, and intends in good faith to construct the project on or over the described property; and
 - g) a demand for relief that the property be condemned and taken for the uses and purposes set forth in the petition, and that the interest sought be vested in the petitioner. The lawsuit should also be accompanied by a notice of lis pendens alerting the public that the property is impacted by the proceedings.

3. The petition must include appropriate resolutions authorizing the condemnation action. If the resolutions are defective, the condemnation action will be subject to a motion to dismiss, typically without prejudice. *See Viverette v. State, Dept. of Transportation*, 227 So. 3d 1274 (Fla. 1st DCA 2017); *Gil Eriksen Properties, LLC v. Pompano Beach Community Redevelopment Agency*, 997 So. 2d 522 (Fla. 4th DCA 2009), citing *Salfi v. Division of Administration, State, Dept. of Transportation*, 312 So. 2d 781 (Fla. 4th DCA 1975); *Florida Power & Light Co. v. Canal Authority of State of Florida*, 423 So. 2d 421 (Fla. 5th DCA 1982). A valid resolution contains a description of the property, a statement of the title or easement to be acquired, and an explanation of the public purpose for the taking. § 73.021(1)–(3), F.S.; *Walker v. Florida Gas Transmission Co.*, 491 So. 2d 1286 (Fla. 1st DCA 1986). If the resolution requires conditions precedent to the filing of a condemnation case, those conditions must be satisfied or the taking will be denied. *District Board of Trustees of Daytona Beach Community College v. Allen*, 428 So. 2d 704 (Fla. 5th DCA 1983).
4. Finally, the petition under F.S. Chapter 74 must include a declaration of taking, signed by the petitioner or its legal agent, which recites the petitioner’s good-faith estimate of value of the property sought. § F.S. 74.031. A form for the declaration is set forth at § 5.48. The Condemnor need not include an estimate of business damages as part of its estimate of value. *Division of Administration, State Dept. of Transportation v. Pink Pussy Cat, Inc.*, 314 So. 2d 192 (Fla. 1st DCA 1975).
5. Because of the presuit negotiation requirements in § 73.015, F.S. the petition should also include a general allegation that the Condemnor has complied with all conditions precedent to the filing of the action. *See Fla.R.Civ.P. 1.120(c)*.
6. The Condemnor must serve the petition on all parties shown to have an interest in the property. §§ 73.031(1) and 74.041(1), F.S. Notice of a proposed taking and the opportunity to file appropriate defenses by those having an interest in the property are essential constitutional guarantees. *Spafford v. Brevard County*, 92 Fla. 617, 110 So. 451 (1926). In a quick take proceeding, notice must also be given of the date on which the court will be asked to confirm the proposed taking. § 74.041(1), F.S.
7. A slow take does not require setting a date for an order of taking hearing since the Condemnor is not required to make a good faith deposit. Instead, either the petitioner or the defendant, at any time before the valuation trial, and unless the defendant concedes petitioner’s right to condemn the property, should file a motion pursuant to § 73.061(1), F.S. for the trial judge to determine the petitioner’s right to take the property. *Dade County v. General Waterworks Corp.*, 267 So. 2d 633 (Fla. 1972); *City of Miami v. Florida East Coast Railway Co.*, 286 So. 2d 247 (Fla. 3d DCA 1973). The only issues to be determined by the court are public purpose and necessity. This is because there is no good faith estimate of value required to be deposited into the registry of the court, and title does not pass until after final judgment on compensation.
8. Sections 74.041 and 74.051, F.S. require a party claiming an interest in the property to request a hearing on the petition for order of taking. If no request is made, the court will enter an order of taking on the date specified in the summons to show cause. Section 74.051(1), F.S. reads in part: “Any defendant failing to file a request for hearing shall waive any right to object to the order of taking.” The mere filing of an answer to the petition challenging the proposed taking is not sufficient under the statute. A defendant must request a hearing or lose the right to contest the propriety of the proposed taking. If a property owner wants to contest the taking, it is important to specifically request an order of taking hearing. If a hearing is requested, the trial

court must provide an opportunity to be heard. *Kirchhoff v. South Florida Water Management District*, 805 So. 2d 848 (Fla. 2d DCA 2001).

9. A hearing on the declaration of taking cannot be held earlier than one day following the date set by the summons to show cause. § 74.041(3), F.S. Section 74.041(1), F.S. requires that a declaration of taking be filed not less than 20 days before the date specified for the hearing on the order of taking. If a hearing is requested on the order of taking, the hearing may not be set before an answer is due. *A Flair for Hair, Inc. v. State, Dept. of Transportation*, 562 So. 2d 851 (Fla. 3d DCA 1990); *Rudy's Sirloin Steakburgers, Inc. v. State, Dept. of Transportation*, 562 So. 2d 850 (Fla. 3d DCA 1990). Note that a condemning authority may amend its declaration of taking only by following proper procedure and filing appropriate pleadings.

D. Order of Taking Hearing

1. The Condemnor's burden of proof is to establish public purpose and reasonable necessity for the taking.
2. A Condemnee is ordinarily concerned with the following matters:
 - a) A defense to the taking based on lack of a public purpose or necessity.
 - b) A challenge to the Condemnor's good-faith estimate of value.
 - c) Discovery of engineering or appraisal testimony. Whether a remainder will be serviced by an access road or whether drainage to or from the remainder will be impaired are bona fide inquiries that should be raised. A Condemnee may be entitled to claim additional damages after the conclusion of a case if it is proved that the damages arose by virtue of a change in the plans that were introduced into evidence by the Condemnor. The owner should consider requiring that the Condemnor's present plans and specifications be entered into evidence. Unless plans and specifications are made a part of the record, proof of the right to pursue additional damages after the case has closed may be difficult to sustain.
 - d) Failure of the Condemnor to obtain permits from regulatory agencies.
 - e) The date that the owner must surrender possession to the Condemnor. This issue may be extremely important, especially when a business is involved and inventory has to be moved or liquidated, or when a homeowner is displaced and must find suitable replacement quarters. If an owner is seeking an extension of time before having to vacate, testimony should be presented on the particular time requirements.

E. Entry of Order

1. At the hearing on the taking the trial court has a limited standard of review of the condemning authority's determination, in its sound discretion, of what and how much property to acquire.
2. Once the condemning authority presents evidence showing a reasonable necessity, the landowner must either concede necessity or, as an affirmative defense, be prepared to show bad faith or gross abuse of discretion. *City of Jacksonville v. Griffin*, 346 So. 2d 988 (Fla. 1977). The trial court is not authorized to substitute its judgment for that of the condemning authority acting within the scope of its lawful authority. *Canal Authority v. Miller*, 243 So. 2d 131 (Fla. 1970).

3. Under F.S. Chapter 74, if, having heard all the testimony, the trial court grants the Condemnor's petition to take private property, the court will enter an order of taking that will:
 - a) transfer title of the property to the Condemnor on the deposit of the good-faith estimate in the court registry;
 - b) specify the amount of money to be deposited for each parcel;
 - c) fix the time and terms under which the owner must surrender possession of the property; and
 - d) make any other provision necessary for the protection of the rights of the parties.
4. Under § 73.061(1), F.S. the court will simply enter an order finding that the petitioner does or does not have a legal right to take the property that is the subject of the condemnation petition.
5. The parties may also stipulate to the entry of an order of taking or to the condemning authority's right to take. Stipulated orders of taking or right to take are often beneficial to both parties. The Condemnor eliminates the risk that the order of taking may be denied and obtains clear title to the property necessary for the construction of the project. This is especially beneficial in road-widening projects when construction schedule delays could lead to substantial penalties or loss of funding. From the Condemnee's perspective, a stipulated order of taking may provide, among other things, for a bottom line deposit or extended possession of the property. In addition, both parties can save expenses by stipulating to an order of taking. *See Gil Eriksen Properties, LLC v. Pompano Beach Community Redevelopment Agency*, 997 So. 2d 522 (Fla. 4th DCA 2009), for a discussion of an attempt to vacate an agreed order of taking after its entry.
6. If the parties can also agree on compensation issues, a stipulated order of taking and final judgment may be entered. All interests and claims intended to be settled in a stipulated order of taking/final judgment should be specifically included. *Sunshine Properties, L.L.C. v. State Dept. of Transportation*, 900 So. 2d 714 (Fla. 4th DCA 2005).
7. After the order of taking has been entered, the case is ready to be set for jury trial.
8. The order of taking becomes effective only if the Condemnor deposits the required sum in the court registry within 20 days after entry of the order. § 74.051(4), F.S. If this deposit is not timely made, the order becomes void *ab initio*. *Id.* The deposit must be not less than the amount of the petitioner's estimate of value when the petitioner is the state or any other public body. Otherwise, the deposit must be double the amount of the petitioner's estimate of value. § 74.051(2), F.S. A utility company, for example, is required to make a double deposit. On the date the deposit is made, title to the property legally vests in the Condemnor, and it is that date on which compensation to the owner is determined. § 74.061, F.S.
9. Once void, the order cannot be reinstated. *McMurrer v. Marion County*, 936 So. 2d 19 (Fla. 5th DCA 2006). In *McMurrer*, the Condemnor made the deposit on the 25th day after entry of the order of taking. The defendant's counsel filed a motion to vacate the order. The Condemnor responded with a motion to "reinstate" the order of taking. At the hearing on the motions, the Condemnor argued "excusable neglect." The trial court reinstated the order of taking. The district court reversed on the grounds that condemnation statutes are strictly construed against the Condemnor and rendered the order void and a nullity by the failure to make a timely deposit.
10. Once the deposit is received in the registry of the court, an owner may move to withdraw it. § 74.071, F.S.

VI. COMPENSATION

A. In General

1. The Florida Constitution guarantees that “[n]o private property shall be taken except for a public purpose and with full compensation therefor paid to each owner.” Art. X, § 6(a), Fla. Const.
2. Full compensation must be determined as if the condemnation were never to occur and the owners voluntarily sold the property. *Broward County v. Patel*, 641 So. 2d 40 (Fla. 1994); *Florida Dept. of Revenue v. Orange County*, 620 So. 2d 991 (Fla. 1993).
3. The courts have determined that, in addition to fair market value, items such as moving costs, severance damages, and reimbursement of appraisers’ fees are elements in determining full compensation. *Jacksonville Expressway Authority v. Henry G. Du Pree Co.*, 108 So. 2d 289 (Fla. 1959), limited on other grounds 171 So. 2d 873, 189 So. 2d 481.
4. The standard for determining the value of property in eminent domain is “the fair actual market value at the time of the lawful appropriation.” *Sunday v. Louisville & N. R. Co.*, 62 Fla. 395, 57 So. 351 (1912).
5. When less than all of the property is taken, an owner is entitled to compensation for damages to the remainder. “[T]he issue in eminent domain proceedings is to determine what is full compensation for both the property taken and for damages to the remaining property.” *Florida Power & Light Co. v. Jennings*, 518 So. 2d 895, 898 (Fla. 1987).
6. “These ‘damages to the remainder’ are called ‘severance damages’ and are measured by the reduction in value of the remaining property.” *Kendry v. Division of Administration, State, Dept. of Transportation*, 366 So. 2d 391, 393 (Fla. 1978), quoting *City of Tampa v. Texas Co.*, 107 So. 2d 216, 219–220 (Fla. 2d DCA 1958).
7. In addition to the value of the property taken and damages to the remainder, full compensation includes moving costs to remove items from the property taken, interest, attorneys’ fees, and costs of expert witnesses. *Jacksonville Expressway Authority; Dade County v. Brigham*, 47 So. 2d 602 (Fla. 1950).
8. As part of full compensation, an owner is entitled to interest, at the statutory rate, from the date of taking until payment is made. *Florida Dept. of Transportation v. Mallards Cove, LLP*, 159 So. 3d 927 (Fla. 2d DCA 2015), rev. den. 177 So. 3d 1268, cert. den. 136 S.Ct. 1824; *West v. Sunbelt Enterprises*, 530 So. 2d 433 (Fla. 1st DCA 1988). See also *Dept. of Agriculture & Consumer Services v. Bogorff*, 35 So. 3d 84 (Fla. 4th DCA 2010).
9. If the case involves an order of taking, the owner is entitled to interest, at the statutory rate, on the difference between the amount of the good-faith deposit and the amount of the verdict, for the period between the date of surrender of possession to the date of payment of the final judgment. § 74.061, F.S.

B. What Constitutes a Compensable Taking?

1. A taking is an appropriation and conversion of private property to a public use or purpose.

2. “Taking” has been defined as “entering upon private property and devoting it to public use or otherwise informally appropriating it, in such a way as substantially to oust the owner.” *Alizieri v. Manatee County*, 396 So. 2d 240, 241 (Fla. 2d DCA 1981).
3. Examples:
 - a) The effectiveness of a water mill was reduced 50% because the State Road Department obstructed the channel by which the water left the mill. The obstruction was located about 500 feet away from the mill, but caused the water level to rise and a trespass to occur. The court held that the damage constituted a taking in *State Road Dept. of Florida v. Tharp*, 146 Fla. 745, 1 So. 2d 868 (1941).
 - b) The construction of a new airport runway caused jet aircraft to invade the airspace above the plaintiffs’ residences. This invasion was held to establish a continuing trespass tantamount to a taking in *City of Jacksonville v. Schumann*, 167 So. 2d 95 (Fla. 1st DCA 1964). See *City of Jacksonville v. Schumann*, 199 So. 2d 727 (Fla. 1st DCA 1967). See also *Bakus v. Broward County*, 634 So. 2d 641 (Fla. 4th DCA 1994); *Fields v. Sarasota-Manatee Airport Authority*, 512 So. 2d 961 (Fla. 2d DCA 1987).
 - c) An easement providing access to the owner’s land was taken by condemnation. No part of the land on which the owner’s business was located was taken. This was held to be a taking that entitled the owner to compensation for loss of the easement, to severance damages for the remaining lands, and to statutory business damages for harm to the business in *Glessner v. Duval County*, 203 So. 2d 330 (Fla. 1st DCA 1967).
 - d) Placing railroad tracks in a street was held to be a taking when the abutting property owner held the underlying fee to the street. *Jarrett Lumber Corp. v. Christopher*, 65 Fla. 379, 61 So. 831 (1913). Placing railroad tracks in a public street was held not to be a taking in *Florida Southern Ry. Co. v. Brown*, 23 Fla. 104, 1 So. 512 (1887).
 - e) The permanent flooding of property by a public authority was found to be a taking in *Kendry v. State Road Dept.*, 213 So. 2d 23 (Fla. 4th DCA 1968). Likewise, a water management district’s operations that caused an owner’s lands to be continually flooded constituted a taking in *South Florida Water Management District v. Steadman Stahl, P.A. Pension Fund*, 558 So. 2d 1087 (Fla. 4th DCA 1990).
 - f) When a county reconfigured a drainage system to divert water from one landowner’s property across another landowner’s property, it was held that the permanent diversion of water constituted a taking. *Drake v. Walton County*, 6 So. 3d 717 (Fla. 1st DCA 2009).
 - g) A taking occurred when raw sewage was dumped on oyster beds in *Gibson v. City of Tampa*, 135 Fla. 637, 185 So. 319 (1938).
 - h) Dumping of fill for a road embankment was held to be a taking in *State Road Dept. of Florida v. Darby*, 109 So. 2d 591 (Fla. 1st DCA 1959).
 - i) Changing the grade or width of a street within the existing right-of-way was held not to be a taking in *Jacksonville Expressway Authority v. Milford*, 115 So. 2d 778 (Fla. 1st DCA 1959). However, when a changed grade caused great amounts of water to flow onto an owner’s property during rainstorms, rendering a portion of the property useless for

residential purposes, a taking was declared in *Thompson v. Nassau County*, 343 So. 2d 965 (Fla. 1st DCA 1977).

4. Note: Condemning authorities or their contractors may be liable in tort for damage to private property even though there has been no taking in the constitutional sense. Cases denying compensation because there has been no taking have nothing to do with damages from negligence.

C. Special Damages

1. Severance Damages § 73.071(3)(b), F.S. provides that “[w]here less than the entire property is sought to be appropriated, any damages to the remainder caused by the taking” shall be included in the compensation awarded.
2. To be compensable, the damage to the remainder must be caused by the taking. *Division of Administration, State Dept. of Transportation v. Capital Plaza, Inc.*, 397 So. 2d 682 (Fla. 1981); *Dept. of Transportation v. Butler Carpet Co.*, 231 So. 3d 499 (Fla. 2d DCA 2018); *Jacksonville Expressway Authority v. Milford*, 115 So. 2d 778 (Fla. 1st DCA 1959).
3. The measure of severance damages is the reduction in value of the remaining property. *Mulkey v. Division of Administration, State of Florida, Dept. of Transportation*, 448 So. 2d 1062 (Fla. 2d DCA 1984). Cost to cure can be considered for its impact on the remaining property. *Broward County v. Patel*, 641 So. 2d 40, 43 (Fla. 1994).
4. Typical examples of severance damages include:
 - a) Reduction in size or alteration in shape of the remainder,
 - b) Damage resulting from the use to which the Condemnor intends to put the acquired property, and
 - c) Change in grade between the part taken and the remainder. *See Partyka v. Florida Dept. of Transportation*, 606 So. 2d 495 (Fla. 4th DCA 1992).
5. The most frequent example of severance damage is a substantial diminution in access as a result of the taking. Ease and facility of access are valuable property rights, and the owner must be compensated for any substantial impairment of access caused by the taking. *State Dept. of Transportation v. Stubbs*, 285 So. 2d 1 (Fla. 1973); *Division of Administration, State of Florida Dept. of Transportation v. Ness Trailer Park, Inc.*, 489 So. 2d 1172 (Fla. 4th DCA 1986); *State Dept. of Transportation v. ABS, Inc.*, 336 So. 2d 1278 (Fla. 2d DCA 1976).
6. Multiple Tracts. When two or more tracts are involved, the court must decide whether they may be treated as a single unit or a parent tract for purposes of determining severance damages. The court will consider three factors: unity of use, unity of ownership, and physical contiguity. These three factors are not inflexible and the importance of each factor varies with the facts of each case.
7. Noise. Noise may constitute a taking or may give rise to severance damages. If noise substantially deprives the owner of all beneficial use of the remaining land, a taking occurs and the owner may recover damages even without a physical invasion or trespass. *Frenchman, Inc.; Northcutt v. State Road Dept.*, 209 So. 2d 710 (Fla. 3d DCA 1968); *City of Jacksonville v. Schumann*, 167 So. 2d 95 (Fla. 1st DCA 1964). If part of the property is taken and highway noise either renders the remainder practically useless or substantially ousts the owner, noise clearly is an element of severance damages. *Dean v. State Road Dept.*, 165 So. 2d 257 (Fla. 3d

DCA 1964) (noisy highway destroyed church's viability as place of worship). Temporary loss of business because of noise, vibration, and related nuisances during construction are not recoverable as business or severance damages. *Howard Johnson Co. v. Division of Administration, State of Florida Dept. of Transportation*, 450 So. 2d 328 (Fla. 4th DCA 1984).

D. Business Damages

1. Business damage is governed by § 73.071(3)(b), F.S. A business owner is entitled to compensation for damage to or destruction of a business established for five years or more resulting from the denial of use of the land taken by a public body for a right-of-way. For property taken between January 1, 2000, and December 31, 2004, the requirement was four years. Ch. 2002-20, § 57, Laws of Fla.
2. A claim for business damage applies only in the following circumstances:
 - a) The action is brought by the Department of Transportation or a county, municipality, board, district, or other public body. For example, power companies that are not public bodies are not liable for business damages. *Sasnett v. Tampa Electric Co.*, 513 So. 2d 157 (Fla. 2d DCA 1987).
 - b) The property is being taken for a right-of-way. § 73.071(3)(b), F.S. "Right-of-way" includes roads, drainage facilities, canals, levees, and water control facilities. It is an all-inclusive definition. *Joynt v. Orange County*, 701 So. 2d 1249 (Fla. 5th DCA 1997).
 - c) Less than the entire property is being taken. § 73.071(3)(b), F.S.
 - d) The taking of a portion of the property damages or destroys an established business having a physical existence and continuous operation for more than four years (or five years after January 1, 2005) at the location where the partial taking is alleged to cause business damages. § 73.071(3)(b), F.S.
 - e) The business is owned by the party whose property is being taken. § 73.071(3)(b), F.S.
 - f) The business is located on adjoining lands also owned or held by the defendant. § 73.071(3)(b), F.S. "Adjoining" means next to or in contact with or abutting on.
 - g) In order to recover business damages, the business owner must have an interest in the real property taken.
 - h) The damage or destruction is attributable to the loss of the use of the portion of the property taken. § 73.071(3)(b), F.S.
3. Under § 73.015, F.S., within 180 days of receiving notice of pending action from a condemning authority, the owner must submit (by certified mail, return receipt requested) business records and a good-faith written offer to settle any business damage claim. § 73.015(2)(c), F.S.
4. An owner's entitlement to business damages and related attorneys' fees may be affected by the owner's compliance with the presuit negotiation statute. *Id.* Absent a good-faith justification for the failure to submit a business damage offer within 180 days, the court must strike the owner's claim for business damages. *Id.* Additionally, § 73.015(3), F.S. provides for voluntary nonbinding mediation between business owners and condemning authorities during presuit

negotiation. Procedures for this presuit voluntary nonbinding mediation are set forth in Fla.R.Civ.P. 1.720.

5. Section 73.071(3)(b), F.S. requires the defendant claiming the right to recover these special damages to set forth in the answer the nature and extent of the special damages. Failure to meet the statutory requirements may result in disallowance of the claim. *State Road Dept. v. Peter*, 165 So. 2d 771 (Fla. 2d DCA 1964). Failure to comply with F.S. 73.015(2)(c) by not submitting a business damage claim during presuit negotiation may result in the claim being stricken.
6. The Condemnor has no burden to put forward any evidence of business damage. The owner must plead and prove any damages. When both parties submit evidence on business damages, the jury's verdict must be within the range of the experts' testimony. If the Condemnor offers no testimony on the issue, any verdict supported by a defensible view of the evidence will be sustained, even if less than the owner's proof. *Behm v. Division of Administration, State Dept. of Transportation*, 336
7. Business damages are neither defined specifically nor limited by § 73.071, F.S., and may include lost profits, loss of goodwill, costs related to moving and selling equipment, and damages caused by business "down time." *System Components Corp. v. Florida Dept. of Transportation*, 14 So. 3d 967 (Fla. 2009).
8. The concept of avoidable consequences - a party cannot recover damages inflicted that could have been reasonably avoided. *System Components Corp. v. Florida Department of Transportation*, 14 So. 3d 967 (Fla. 2009). In other words, a less expensive remedy is properly considered.
9. The business owner does not have to move. If he does, resulting business damages must be measured by the probable financial impact reasonably suffered as a result of the taking. *System Components Corp. v. Florida Department of Transportation*, 14 So. 3d 967, 980 (Fla. 2009).
10. Business damage must be distinguished from damage to the remainder, or severance damages. As noted in *LeSuer v. State Road Dept.*, 231 So. 2d 265 (Fla. 1st DCA 1970), the cost of relocating improvements on remaining property constitutes an item of severance damages. On the other hand, statutory business damages are more in the nature of actual or prospective reduced or lost profits caused by the taking of a part of the property. *LeSuer*. See also *Meyers v. City of Daytona Beach*, 158 Fla. 859, 30 So. 2d 354 (1947).
11. A comprehensive discussion of business damages is contained in *System Components Corp. v. Florida Dept. of Transportation*, 14 So. 3d 967 (Fla. 2009), in which the court provided an overview of the business damage statute, discussed the statutory prerequisites for qualifying to recover business damages, and discussed the character of the damages that may be recovered.

CASES

PAGES THAT FOLLOW SUMMARIZE RECENT CASES BY DATE:

- (1) EMINENT DOMAIN;**
 - (A) Recent Cases.**

 - (2) TAKING,
INVERSE CONDEMNATION &
RELATED CLAIMS;**
 - (A) Recent Cases.**
 - (B) Sunshine Law &/or Public Records.**

 - (3) BERT J. HARRIS ACT**
 - (A) Recent Cases.**
 - (B) Sunshine Law &/or Public Records.**
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*** Disclaimer ***

- 1. Nothing in this outline or the presentation that accompanies this outline is to be considered a sample question on any exam. All information in whatever form is offered to you by the author solely to demonstrate principles in Eminent Domain.

- 2. This outline and the presentation that accompanies this outline were prepared without guidance from any Certification Committee or Certification Program.

1. EMINENT DOMAIN

A. RECENT CASES

1(A). EMINENT DOMAIN - RECENT CASES

Valuation Disagreement - 2021.

Disappointed Owner asserted that the valuation method utilized by FDOT in its expert's valuation was invalid & that good faith was not used. The question was not properly before the Court but it found that "inaccurate" is not "invalid" or "bad faith."

Tidewater Pres. Master Assoc., Inc. v. Dep't of Transp., 331 So. 3d 288 (Fla. 2d DCA 2021).

Eminent Domain - Personal Property - 2021.

The only recognized constitutionally cognizable taking-claim regarding personal property involved actual appropriation of property for the govt.'s own use.

Petitioners asserted a constitutional-takings claim regarding personal property in response to enactment of § 790.222, F.S., the Marjory Stoneman Douglas High School Public Safety Act, which in part bans certain weapons. The only recognized constitutionally cognizable taking-claim regarding personal property involves actual appropriation of property for the govt.'s own use. The exercise of police power by the destruction of property which is itself a public nuisance or the prohibition of its use in a particular way, whereby its value becomes depreciated, is very different from taking property for public use or depriving a person of his property without due process.

Hunt v. State, 310 So. 3d 1123 (Fla. 1st DCA 2021).

See Horne v. Dep't of Agric., 576 U.S. 350, 361, 135 S.Ct. 2419, 192 L.Ed.2d 388 (2015).

Eminent Domain – Resolution, Legal Descriptions, Necessity, Estimate - 2020.

The 5th DCA reversed a taking, finding:

1. County did not violate eminent domain statute by combining multiple properties within one resolution.
 2. County's petition for eminent domain was defective because the legal descriptions provided two potential easement boundaries, rendering them unclear.
 3. There is no "bright line test" to determine reasonable necessity.
 4. County failed to establish that ensuring public use of the beachfront property was a reasonable necessity.
 5. County failed to present a good faith estimate of value for each easement.
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Altman v. Brevard County, 300 So. 3d 347 (5th DCA 2020).

Eminent Domain - Damages, View/Traffic - 2020.

Loss of visibility and loss of traffic are not compensable.

Billboard owner asserted a taking due to a highway flyover blocking view of the billboard. The Trial Court denied relief as an unobstructed view of billboard on private property was not a compensable property interest. The 1st DCA affirmed finding that **Florida law does not recognize visibility as a stand-alone property right and, in inverse condemnation actions, any decrease or loss of visibility suffered as a result of construction of a public highway is not compensable.**

Billboard owner also alleged that although FDOT did not physically take the property encumbered by its billboard easement, the flyover caused loss due to the property losing accessibility. The Court held that a **diversion of traffic is not compensable.**

TLC Properties, Inc. v. Dep't of Transp., 292 So. 3d 10 (Fla. 1st DCA 2020).

Eminent Domain – Attorneys’ Fees - 2020.

Motion for attorneys’ fees filed after a stipulated condemnation judgment was improperly stricken where motion was legally sufficient to allege a claim for attorneys' fees.

The 4th DCA reversed a trial court decision striking the property owner’s motion or attorneys’ fees. The Court found that a motion to strike only tests the legal sufficiency of a claim and should not be granted where the pleading presents a bona fide issue of fact that may be supported by evidence. The Court concluded that the motion was legally sufficient to allege a claim for attorneys' fees.

The DOT did not assert legal insufficiency at the hearing, but argued that the result obtained was not due to the efforts of the property owner’s counsel. The Court found this issue should not have been decided in a non-evidentiary hearing on a FCRP 1.140 motion to strike.

Berlin v. State of Florida Dep't of Transp., 287 So. 3d 631 (Fla. 4th DCA 2020).

Eminent Domain - Damages, Layperson Testimony - 2020.

Owner of property is generally competent to testify as a lay witness regarding its value.

Damages were properly awarded to a property owner relying on layperson testimony as to damages when gas company brought condemnation action to acquire easements on private property. The property owner testified that he had planned to subdivide the parcel but the permanent easement rendered certain lots unmarketable. The property owner’s testimony was not speculative as it was based on personal knowledge from selling similar lots for rural residential development.

The 11th DCA dismissed a portion of the gas company’s appeal asserting the property owner was not entitled to attorney’s fees. The Court found it lacked jurisdiction to review the award as the issue was not a final decision subject to appellate review.

***Sabal Trail Transmission, LLC v. 3.921 Acres of Land in Lake County Florida*, 947 F.3d 1362 (11th Cir. 2020).**

See Ocean Concrete, Inc., below.

2. TAKING, INVERSE CONDEMNATION & RELATED CLAIMS

A. RECENT CASES

2(A). TAKING, INVERSE CONDEMNATION & RELATED CLAIMS - RECENT CASES

Tara-Manatee, Inc. owns 1,100+ acres. Tara DRI (Development of Regional Impact) created in 1980. In 2008, owner of Tara-Manatee created Lake Lincoln, LLC (“LL”) & conveyed to LL a 10-acre corner parcel plus 12 acres located elsewhere. Tara-Manatee dissolved after it sold a majority of its properties to 3rd parties. In 2009, LL applied to County to divide 10-acre parcel and rezone it to permit an adult assisted living facility and to shift existing commercial and residential entitlements. In 2010 County denied the request, instead deciding that allowable uses are wetlands and open spaces. In 2019, County approved the request, but the LL parcel was undevelopable for about 9 years in between. LL asserts regulatory taking.

Trial Court ruled in favor of LL on inverse condemnation. On appeal:

Dept. of Transportation, Division of Administration v. Jirik (Jirik II), 498 So. 2d 1253 (Fla. 1986), analysis – first determine what the parcel is as a matter of law.

A. Physical contiguity:

Trial court found that 10-acre parcel is inside the DRI area, and that the common owner of both entities made it an internal transfer. Appellate court disagreed because LL did not own any land physically contiguous with the 10-acre parcel.

B. Unity of ownership:

Although LL is successor to original developer, in the relevant timeframe LL didn’t own the vast majority of the Tara DRI area.

C. Unity of use:

Appellate Court found Trial Court should have looked at:

1. Intent of the owner;
2. Appearance of land;
3. Dependence between parcels;
4. Highest & best use;
5. Zoning;
6. Actual use of land;
7. Adaptability of the property; &
8. Possibility of combined use of parcels soon.

Appellate Court found LL’s intent was that the 10-acre parcel be an independent commercial parcel, consistent with future land use classification and neighboring uses. Highest and best use was as commercial with some remainder as mitigation. No realistic possibility of combined use with other parcels in near future. Thus, the parcel at issue for regulatory taking is just the corner, and not the entire development.

Reversed and remanded as to inverse condemnation.

Lake Lincoln, LLC v. Manatee County, ___ So. 3d ___, 2023 WL 175208 (Fla. 2d DCA Jan. 13, 2023).

Inverse Condemnation – Taxi Medallions - 2022.

Taxi medallion owners filed inverse condemnation claim when County changed its Ordinance to render the medallions valueless.

The claims were dismissed. In inverse condemnation hearings, the Plaintiff must first demonstrate that he possesses a property interest that is constitutionally protected. Only if the Plaintiff actually possesses such interest will the Court consider whether the deprivation or reduction of that interest constitutes a “taking.”

Permits and licenses to operate taxicabs are privileges, not rights. Privileges and licenses do not rise to the level of constitutionally protected property interests for purposes of the Takings Clause.

***Gulf Coast Transportation v. Hillsborough County*, ___ So. 3d ___, 2022 WL 5265431 (Fla. 2d DCA October 7, 2022).**

Due Process, Equal Protection, Taking, Injunctive Relief – 2022.

Boat slip renters subject to code violation & eviction processes brought the following claims:

Procedural Due Process: Elements:
(1) Deprivation of a constitutionally protected liberty or property right;
(2) State action; &
(3) Constitutionally inadequate process.

When State law provides an adequate means to remedy the alleged procedural deprivation, there is no due-process violation regardless of whether the Plaintiff availed himself of that remedy or not.

The claim does not turn on whether the Plaintiff presented the claim to the State courts. But, a violation occurs only when the State refuses to provide a process adequate to remedy the procedural deprivation.

Substantive Due Process: The Substantive component of due process protects rights that are fundamental, i.e., created by the Constitution. Property interests are not created by the Constitution.

As a general rule, actionable conduct must shock the conscience.

Non-legislative deprivations of state-created rights, including land rights, through code violation & eviction processes cannot support a substantive due process claim even if the government acted arbitrarily.

Equal Protection Requires the government to treat similarly situated people alike.

Elements:
Can bring as a class of one if:
(1) Intentional,
(2) Treatment that is different from treatment of similarly situated people,
(3) With no rational basis.

Cannot rely on broad generalities when arguing a comparator.

Takings

5th Amendment as applied to the States by the 14th Amendment prohibits the government from seizing private property for public use without providing just compensation.

Until 2019, Plaintiff in Federal court would have to show either that the State law provided him no process for obtaining just compensation (such as an action for inverse condemnation) or that the State law appears to provide such process but due to State court interpretation, the process is inadequate. (Taking not ripe until the State refuses to provide compensation for a taking through available processes.) See **Williamson County Regional Planning Commission v. Hamilton Bank**, 473 U.S. 172, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985).

In 2019, the Supreme Court overruled **Williamson** holding that a property owner has a claim for a violation of the Takings Clause as soon as a government takes his property for public use without paying for it. In other words, the right to compensation arises at the time of taking, regardless of post-taking remedies that may be available property owner. **Knick v. Twp. Of Scott, Penn.**, 588 U.S. ___, 139 S.Ct. 2162, 204 L.Ed. 558 (2019). Succinctly, the Plaintiff need not pursue post-taking remedies in State court before filing suit in Federal Court under §1983.

Injunctive Relief

No claim since an injunction would not prevent imminent harm to the Plaintiff.

Kessler v. City of Key West, ____ So.3d ____, 2022 WL 590892 (Fla. 11th DCA, February 28, 2022).

Taking – Breach – 2022.

State university student paid tuition & fees, then campus closed for COVID. When denied a refund, the student claimed the taking of a property interest in (1) the monies paid & (2) use of campus. Court rejected. While a contract can create a property right, this was not a taking. Proper argument was a breach.

Rivadeneira v. Univ. of S. Fla., ___ So. 3d ___, 2022 WL 445661 (M.D. Fla. Feb. 14, 2022).

Taking – Abatement – 2022.

1st Appeal Immediately Below.

Second Amended Complaint filed by Owner of gas station damaged in Hurricane Irma brought the following allegations when Hillsborough County demolished the fallen canopy.

Physical or Categorical Taking Plaintiff must plausibly allege that the government took private property for “public use.”

When government acts pursuant to its police powers in an emergency situation to destroy property to avert a dangerous situation, there is no taking for “public use.”

Property is held under the implied obligation of the owner that its use will not be injurious to others.

The Takings clause of the Florida constitution is identical to the US. Constitution.

Here Plaintiff asserts that the application of a regulation went too far & constituted a per se physical taking.

To prove physical taking, Plaintiff must prove that the govt. took the property for some part of the property permanently for “public use.”

The categorical rule enjoys limited application to extraordinary cases only.

Here it is a close call. Court prefers to resolve on the merits, so claim survived dismissal.

Due Process, Per Se

Elements:

- (1) Deprivation of a constitutionally protected liberty or property right;
- (2) State action; &
- (3) Constitutionally inadequate process.

Factual questions remain whether the ordinance unconstitutionally failed to afford procedural due process. Claim survived for a determination on the merits.

Due Process, As Applied

To show the County exceeded its policing authority, the Plaintiff will have to show that the demolition of the canopy was more than an isolated incident or random act. Plaintiff must prove that there was a pervasive or widespread violation of due process rights during public emergencies.

Claim survived for a resolution on the merits.

Munzel v. Hillsborough County, ___ So. 3d ___, 2022 WL 2440427 (M.D. Fla. Jul. 5, 2022).
See *Munzel* 1st appeal immediately below.

Taking – Abatement – 2022.

2nd Appeal Immediately Above.

Owner of gas station damaged in Hurricane Irma filed suit when Hillsborough County demolished the fallen canopy.

Physical or Categorical Taking Having abandoned his claim of regulatory taking, Plaintiff is no longer required to establish loss of all economically viable use of his property.

When government takes property for public purpose, it has a categorical duty to compensate the former owner whether the interest taken constitutes an entire or part of a parcel.

Fallen canopy posed an imminent danger. The government owes no compensation for requiring the owner to abate a nuisance on his property because he never had a right to engage in the nuisance in the first place.

Due Process, Per Se

Widespread abatements by the County in the years following Plaintiff's injury are irrelevant.

Notice and hearing prior to demolition are not required when abatement is in response to an emergency situation.

Due Process, As Applied

Claim not raised in the original complaint was found time-barred under the four-year statute of limitations.

In this case, Plaintiff's complaint included allegation that County did not follow the procedures for abatement. This could be read to contemplate "as applied" procedural due process. This Count was not dismissed on the statute of limitations.

Due Process vs. Employee

Plaintiff alleged Code Officer violated clearly established law by initiating the abatement process without notice in a non-emergency situation.

To provide clearly established law binding on the Code Officer, Plaintiff would have to show that his actions would be obvious to a reasonable government actor that his actions violated Federal law.

Officer acted within the scope of his authority and was entitled to qualified immunity. Officer's motion to dismiss with prejudice was granted with leave to amend.

***Munzel v. Hillsborough County*, ___ So. 3d ___, 2022 WL 671578 (M.D. Fla. Mar. 7, 2022).**
See *Munzel* 2nd appeal immediately above.

Inverse Condemnation – COVID – Regulatory Taking - 2022.

Bar operators sued Governor, Department of Business and Professional Regulations and Orange County asserting that temporary COVID closures and restrictions equated to inverse condemnation. The 5th DCA affirmed the trial court's dismissal.

Under Florida law, private property cannot be taken by the government unless it is for public use and the Owner is fully compensated. Art. X, § 6, Fla. Const. Inverse condemnation is a cause of action to recover the value of property that has been *de facto* taken by an agency having eminent domain powers & where no formal exercise of that power was undertaken.

There are 2 categories (1) Physical/Permanent/Can Be a Partial Taking, &

(2) Regulatory/Deprives all Econ Bene Use.

- A. Physical: *** Physical/Permanent/Can Be Partial***
1. Physical taking occurs when:
 - (a) Government uses its eminent domain powers to formally condemn property, and
 - (b) Per se - Government commits physical taking by taking possession without acquiring title (i.e., plants its flag on private property.)
 2. Physical taking rule: Can be just a corner but the Government pays for what it takes.
- B. Regulatory: ***Deprives All Econ Bene Use + Penn Central***
1. Regulatory taking occurs when:
Government imposes regulations that restrict an owner's ability to use his own property.
 2. Test: Penn Central: Ask yourself "What is the Regular P-R-I-C-e" for the taking?
 - (a) pertains to **Regulatory** taking.
 - (a) **Penn Central**.
 - (b) interference with **Reasonable** investment-backed expectations;
 - (c) economic **Impact** of the regulation,
 - (d) **Character** of the government's action.

Appellants originally argued a per se taking occurred because owners were not allowed to regulate their own businesses. Appellants relied on a California case where wineries were required to permit union organizers access to the winery property for a certain period of time each week. There, the Court found a physical taking as it removed one of an owner's most "treasured rights," i.e. to exclude persons from one's property.

Appellants in the instant case argue the opposite. They argue that they were unable to permit customers entry to the property. Thus, the Court found, the instant case distinguishable from the California case. The proper argument would be that a regulatory taking occurred.

Reviewing other out-of-state cases, where regulatory takings were found when an owner was deprived of ALL productive use of his property. Here, the executive order lasted for 17 days and then permitted incremental openings.

Appellants also argue that after applying Penn Central, their claim should have remained viable. In its consideration of this Appellant argument, the Court relief on *Scott v. Galaxy Fireworks*, 111 So. 3d 898 (Fla. 2d DCA 2012) wherein an executive order banned sales of fireworks during a specific period of weeks.

Applying Penn:

- (a) **Reasonable investment-backed expectations.**
Fireworks is a highly regulated industry and a seller should expect further regulations from time to time.
- (b) **economic Impact.**
Sellers had alternatives, ex. could have sold out-of-state. Looking at other regulatory takings out- of-state, the owner was deprived of ALL productive use of his property.
- (c) **Character of government action.**
The temporary ban was an exercise of police powers for safety purposes.

Applying Penn to the instant case:

- (a) **Reasonable investment-backed expectations.**
Sales of alcohol is highly regulated.

(b) economic Impact.

Appellants and many others were impacted by the COVID orders. The executive order lasted for 17 days and then permitted incremental openings.

(c) Character of government action.

An exercise of police powers for safety purposes.

Trial Court's dismissal was affirmed.

Orlando Bar Group, LLC v. DeSantis, 339 So. 3d 487 (Fla. 5th DCA 2022).

Taking – Liquor License - 2022.

Owner of beachfront restaurant, which had brought the restaurant in a sale that included a State liquor license and grandfathered a nonconforming use permit from town to serve alcohol on the entire property, including the beachfront portion, brought action in state court against town seeking relief from the Town's refusal to restore its liquor license for the beach portion of the restaurant on the ground Owner had abandoned its nonconforming use by not selling alcohol while renovating the restaurant.

1. Liquor license is a privilege, not a property interest.
2. ***Penn Central*** not met. Town's regulations did not deprive all economic benefit.
3. prohibit any Town's revocation of nonconforming use permit was not a regulatory taking.
4. Town's revocation of nonconforming use permit did not implicate a fundamental right protected by substantive due process under the Florida Constitution.
5. Issue preclusion applied to State court judgment declaring that town wrongfully failed to follow Town code procedure prior to revoking non-conforming use.
6. District Court would not exercise its discretion to enter declaratory relief on four issues on which owner had already been granted declaratory relief in earlier State court suit against Town.

***Persaud Properties FL Investments, LLC v. Town of Fort Myers Beach, Florida*, 593 F. Supp. 3d 1129 (M.D. Fla. 2022).**

Inverse Condemnation - Prescriptive Rights - 2020.

Property owner could not prevail on an inverse condemnation action where power company had acquired a prescriptive easement to the property.

In the 1950s, the power company erected a series of power poles and transmission lines on a ROW belonging to the Florida DOT. Subsequently the power company inadvertently placed several poles on private property outside of the ROW. Fifty years later, a purchaser filed an inverse condemnation action.

The 1st DCA found that no prior property owners knew that the poles were located on their property and, thus, could not consent to the placement. Although the power poles served the property, their presence was still adverse. The power company was entitled to a prescriptive easement.

Okefenoke Rural Elec. Membership Corp. v. Dayspring Health, LLC, 300 So. 3d 371 (Fla. 1st DCA 2020).

Inverse Condemnation - Value, Irreparable Harm - 2020.

Trial Court Order requiring FDAC to present evidence at trial as to the value of citrus trees it forced owner to destroy did not cause irreparable harm.

The 5th DCA found that FDAC would have had the burden of going forward at trial regarding valuation to be placed on destroyed trees if it had brought eminent domain proceeding prior to taking trees, and FDAC, if dissatisfied with jury's verdict, would still have right to plenary appeal to seek relief from any reversible error committed.

Florida Dep't of Agric. & Consumer Services v. Mahon, 293 So. 3d 1091 (Fla. 5th DCA 2020).

Inverse Condemnation - Access - 2020.

Property owner was entitled to maintain his action for inverse condemnation where City blocked ingress/egress to his property.

A loss of a portion or even all of one's access is not a taking so long as other suitable access remains. **The loss of the most convenient access is often not compensable.** Here, the impairment of access was more than a mere aggravation and inconvenience of having to travel a less convenient route because (1) municipal services were disrupted as a direct result of the City's action and (2) the City's destruction of the owner's access to the eastbound road involves more than just an exercise of police power to regulate the flow of traffic or to control the operation of traffic because the barriers only impede the owner's property. The City's acts were inverse condemnation.

Clark v. City of Pembroke Pines, 292 So. 3d 773 (Fla. 4th DCA 2020).

Inverse Condemnation - § 73.111 Inapplicable - 2020.

Section 73.111, Florida Statutes, requiring the proceeds be deposited within the court registry within 20 days does not apply to a property owner's inverse condemnation action.

The 3rd DCA held that Section 73.111, F.S., only governs eminent domain proceedings where the condemning authority initiates proceedings. Section 73.111, F.S., allows the condemning authority to walk away from a valuation it deems too costly or unaffordable, which only makes sense in an eminent domain context.

Galleon Bay Corp. v. Bd. of County Commissioners of Monroe County, 105 So. 3d 555 (Fla. 3d DCA 2020).

2. TAKING, INVERSE CONDEMNATION & RELATED CLAIMS

B. SUNSHINE LAW &/OR PUBLIC RECORDS

2(B). TAKING, INVERSE CONDEMNATION & RELATED CLAIMS – SUNSHINE LAW &/OR PUBLIC RECORDS

Court Ordered Mediation – 2019.

Note* Section 44.102(3), F.S. provides: "All written communications in a mediation proceeding, other than an executed settlement agreement, shall be exempt from the requirements of chapter 119.

The statutory exemptions of mediation communications provided by Sec. 44.102(3), F.S., applied to the transcript of the concluded attorney-client session in Court ordered mediation.

Everglades Law Center, Inc. v. South Florida Water Management District, 290 So. 3d 123 (Fla. 4th DCA 2019).

Transcript is Public Despite Litigation – 2014.

A transcript of a closed meeting to discuss settlement of a lawsuit became a public record upon the entry of a final judgment in that case even though the same parties were also litigating an inverse condemnation lawsuit.

Chmielewski v. City of St. Pete Beach, 161 So. 3d 521 (Fla. 2d DCA 2014).

Inverse Condemnation – Closed Meeting Transcript – Derivative Claims – 2013.

Note* Section 286.011(8) provides an exemption to the Sunshine Law. Under certain circumstances, any board or commission of any agency or authority of any county, municipal corporation, or political subdivision, and the chief administrative or executive officer of the governmental entity, may meet in private with the entity's attorney to discuss ***pending litigation to which the entity is presently a party*** before a court or administrative agency,

Section 286.011(8)(e), F.S., provides that transcripts of closed meetings "shall be made part of the public record upon conclusion of the litigation."

The exemption provided under Section 286.011(8), F.S., does not extend to "derivative claims" made in separate, subsequent litigation.

AGO 13-13.

3. BERT J. HARRIS ACT

A. RECENT CASES

3(A). BERT J. HARRIS ACT - RECENT CASES

Bert J. Harris Act – Summary Judgment – 2022.

1st Appeal Below.

Second appeal reversed Trial County’s entry of Summary Judgment in Town’s favor on inverse condemnation & Bert Harris claim.

1. Total Taking: City offered to permit the development of 3 out of 40 parcels. Trial Court was required but failed to determine whether this equated to a total taking.
2. Ripeness. Claim ripe due to City writing that administrative avenues were closed.
3. 1-year. Plaintiff owned property when ordinances enacted in 2003 & 2004. Claim was not presented until 2016. Trial Court failed to address.

Appellate Court remanded the issue for further consideration

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***Jamieson v. Town of Fort Myers Beach*, ___ So. 3d ___, 2022 WL 17982952 (Fla. 2d DCA Dec. 29, 2022).**

See Jamieson 1st appeal below.

Bert J. Harris Act - Summary Judgment - 2022.

Proving an inordinate burden is akin to a causation requirement that each landowner must prove to prevail. If Landowner could not have developed the property due to other reasons, then the County did not cause an “inordinate burden.”

—
Landowner sought to develop Property when the County’s Comprehensive Plan permitted one residence per acre. During development review, Landowner was advised by Water Management district that several environmental issues needed to be addressed. Landowner abandoned the application process.

Subsequently County changed its Comprehensive Plan & changed the “existing use” to reduce the density.

Landowner again sought to develop the Property. The density in his new proposal violated the now existing Comprehensive Plan. When advised of the density issue, Landowner abandoned the application process and filed suit.

To prevail, owner must prove that “a specific action of a governmental entity has inordinately burdened an existing use of real property or a vested right to a specific use of real property”. §70.001(2), Fla. Stat.

The trial court: (1) Granted the Landowner’s Motion for Summary Judgment finding that the County’s action had inordinately burdened the property.

And

(2) Denied the County’s Motion for Summary Judgment making no similar finding.

County appealed both rulings.

Only the Order stating a finding was appealable. Generally, a party may not seek interlocutory review by appeal of a nonfinal order, including an order denying a motion for summary judgment. However, an exception exists for a specific nonfinal order determining that a governmental entity has taken action that has inordinately burdened real property within the meaning of § 70.001(6)(a), Fla. Stat., Fla. R. App. P. 9.130(a)(3)(C)(vii). Because the Order denying the County’s Motion contained no such determination, it was not appealable.

Turning to the trial court’s grant of the Landowner’s Motion for Summary Judgment, the Appellate Court reversed its finding of no inordinate burden.

“Inordinate burden” occurs when Government’s action has directly restricted or limited the use such that the property owner is permanently unable to attain the *reasonable*, investment-backed expectation for the existing use of the real property

On appeal, County showed that Landowner never addressed the outstanding environmental issues. In light of the regulatory history, it cannot be assumed that the District would have permitted the development and, therefore, Landowner’s investment-backed expectation to develop the property as he intended was not *reasonable*. Therefore, the Appellate Court found that when viewed in a light most favorable to the County, there is a genuine dispute of a material fact as to whether other regulatory barriers, apart from the new density requirements, prevented the Property from being developed as intended. Therefore, Landowner’s investment-backed expectation to develop the property as he intended was not *reasonable*.

The Court dismissed the appeal of the trial court’s denial of the County’s Motion for Summary Judgment. The Court reversed the trial court’s granting of the Landowner’s Motion for Summary Judgment and remanded for further proceedings.

“Existing Use,” § 70.001(3)(b), Fla. Stat.

1. An actual, present use or activity on the real property, including periods of inactivity which are normally associated with, or are incidental to, the nature or type of use; or
2. Activity or such reasonably foreseeable, nonspeculative land uses which are suitable for the subject real property and compatible with adjacent land uses and which have created an existing fair market value in the property greater than the fair market value of the actual, present use or activity on the real property.

“Inordinate Burden,” § 70.001(3)(b), Fla. Stat.

1. Government’s action has directly restricted or limited the use such that the property owner is permanent unable to attain the reasonable, investment-backed expectation for the existing use of the real property or a vested right to a specific use of the property with respect to the property as a whole or the owner is left with existing or vested uses that are unreasonable such that the property owner bears permanently a disproportionate share of the burden imposed for the good of the public, which in fairness should be borne by the public at large.
2. Does not include temporary impacts; impacts occasioned by governmental abatement of a public nuisance or impacts caused by an action of a governmental entity taken to grant relief to a property owner.

***Brevard County v. Waters Mark Dev. Enters., LC*, 350 So. 3d 395 (Fla. 5th DCA 2022).**

Bert J. Harris Act – Commercial Mural Ordinance - 2022.

Plaintiff owned property within the City’s Mural Ordinance Geographic Area, a defined area where commercial murals could be displayed. The Plaintiff had hosted permittees for several years and derived significant income, and spent money to maintain the mural structure.

The City amended the Ordinance revising the geographical boundaries of the area, excluding Plaintiff’s property.

The Plaintiff filed a Harris action asserting the City’s action inordinately burdened his property.

The trial court granted the City’s Motion for Summary Judgment finding that the Ordinance specified that the issuing of a mural permit does not create a vested right or compensable interest for the advertiser permittee. As such, the trial court held that the Plaintiff did not have a vested right and did not suffer an inordinate burden.

The Third DCA disagreed finding the fact that an advertiser permittee did not have a vested right under the Ordinance does not affect the analysis of whether the Ordinance inordinately burdened the underlying property owner. The Court held that although the trial court found the Plaintiff had an existing use, the trial court failed to examine and objectively analyze whether the Plaintiff had a reasonable, investment-backed expectation that it could continue to host murals on its property.

—
***Karenza Apartments, LLP v. City of Miami*, 347 So. 3d 431 (Fla. 3d DCA 2022).**

Bert J. Harris Act - Challenge of Settlement Agreement - 2022.

The United States government sought a writ of certiorari to quash a resolution of the City of Homestead that was the result of a settlement agreement between the City and property owner involving a Bert J. Harris Act claim.

The City and Owner sought a writ of prohibition to preclude the circuit court from exercising jurisdiction over the petition for writ of certiorari.

The 3d DCA found the settlement agreement was a quasi-legislative act (not quasi-judicial) because it was entered pursuant to the Bert J. Harris statute. The associated resolution would also be a quasi-legislative act. Accordingly, the proper method of attack was a suit in circuit court for declaratory or injunctive relief wherein the U.S. would have to assert that the action taken by City was arbitrary, capricious, confiscatory or violative of constitutional guarantees.

—
***City of Homestead v. United States of America*, 346 So. 3d 1205 (Fla. 3d DCA 2022).**

Bert J. Harris Act – Single Claim by Multiple Property Owners - 2022.

Owners of 4 contiguous properties together planned to develop a 4-story hotel. City enacted height ordinance preventing project as planned. Owners jointly asserted a Bert Harris claim. Action was dismissed by Trial Court. Appellate Court affirmed.

For purposes of Bert Harris:

- A. 4 contiguous parcels owned by separate companies could not be treated as a combined undifferentiated parcel.
- B. Claimants without title to all of the property at issue could not make a joint claim for relief that did not differentiate their respective claims relating to their individual property ownership.
- C. Owners' appraisal given in support relied on values before the ordinance was enacted.
- D. Defects in the appraisal could not be cured due to lapse of the 1-year limitations period.

DHBH Atl., LLC v. City of Delray Beach, 334 So. 3d 332 (Fla. 4th DCA 2022).

Bert J. Harris Act - Pre-Suit Appraisal - 2021

The appraisal is merely a pre-suit requirement to put govt. on notice of the claim and allow it to evaluate the claim. It in no way limits the evidence that would ultimately be presented to the jury.

The 1st DCA found that the Trial Court erred in finding a property owner's appraisals submitted to County with its claim were invalid as business damages. The appraisals showed the value of the land at its best and highest use and demonstrated a loss in value, not a loss in income.

County asserted the appraisals were not valid. The 1st DCA found that the trial court erroneously deemed the appraisals were of business damages and invalid under the Harris Act. Business damages may not be recoverable under the Harris Act.

Blue Water Holdings SRC, Inc. v. Santa Rosa County, 332 So. 3d 1035 (Fla. 1st DCA 2021).

Bert J. Harris Act - Pre-Suit Bona Fide Settlement Offer - 2021

City's response to claim offering no change in its position is a bona fide settlement offer under the Harris Act.

City prevailed against a property owner's Bert J. Harris Act claim. Property owner asserted that City was not entitled to attorney's fees because City had failed to provide a bona fide offer to settle the case. The facts showed that City's written statement in response to the property owner's claim under the Act was to propose no changes to City's prior action. Such an offer is permitted by statute and constituted a bona fide settlement offer.

City of Holmes Beach v. Coral Escapes of Holmes Beach, LLC, 327 So. 3d 361 (Fla. 2d DCA 2021).

Bert J. Harris Act - “Property Owner” – 2021

Decided Under Pre-2021 Law

Having sold the property that was the subject of a Harris lawsuit, the Plaintiff was no longer the “property owner” entitled to relief under the 2016 Harris Act.

Prior to Oct. 1, 2021, the Harris Act, Section 70.001, Florida Statutes, required a claimant to retain title ownership of the subject property through all stages of the litigation. The statute as then written defined the property owner as one who *holds* title, not one who *held* title.

During the pendency of the action and **effective Oct. 1, 2021, the Act was amended to expand the definition of a property owner entitled to relief under Harris claim to include one who relinquishes title to the subject real property before the claim reaches final resolution.** The Court found this amendment to be substantive and not applicable retroactively.

Dean Wish LLC v. Lee County, Florida, 326 So. 3d 840 (Fla. 2d DCA 2021).

Bert J. Harris Act - Existing Use - 2021.

No existing use is found when a property owner’s use was inconsistent with City’s Comprehensive Plan.

No private development shall be permitted except in conformity with comprehensive plans. Section. 163.3161(6), Florida Statutes.

Mojito Splash, LLC v. City of Holmes Beach, 326 So. 3d 137 (Fla. 2d DCA 2021).

Bert J. Harris Act - Failure to Rezone - 2021.

City’s failure to rezone commercial properties in midtown area to allow residential development following City’s amendment of Comprehensive Plan to give area a “planned mobility” future land use designation did not inordinately burden an existing use or vested right of property owners. Properties were not zoned for residential development and Comprehensive Plan amendment merely expressed an expectation that, in some unspecified time in the future, residential development might be permitted.

Boca Center at Military, LLC v. City of Boca Raton, 312 So. 3d 920 (4th DCA 2021).

Bert J. Harris Act - Ripe - 2020.

2nd Appeal Above.

Property owner’s claim was not barred because it existed prior to his ownership. The owner acquired the full property rights when he bought the property, including the right to challenge the existing wetlands designation.

Property owner showed multiple unsuccessful efforts to work with the City to use the wetland portion of the property. Therefore, the claim was ripe despite there being no meaningful development application because the permissible uses of the property were known to a reasonable degree of certainty.

While a property owner must give a land-use authority an opportunity to exercise its discretion, **once it becomes clear that the permissible uses of the property are known to a reasonable degree of certainty, a takings claim is likely to have ripened.**

***Jamieson v. Town of Fort Myers Beach*, 292 So. 3d 880 (Fla. 2d DCA 2020).**
See *Jamieson* 2nd appeal above.

Bert J. Harris Act - Use, Experts, Value - 2020.

Zoning regulations prevented a property owner from constructing a concrete batch plant. The 4th DCA held that the Trial Court was within its discretion in excluding County's proffered experts that the property owner's intended use was not the property's highest and best use. Act requires valuation focused on the property owner's investment-backed expectation, rather than a potentially higher value use.

Any error resulting from exclusion of appraiser's testimony after rezoning was harmless error. The County's appraiser valued the property, as inordinately burdened by zoning regulations, with lower value than that to which the property owner's expert testified.

Trial Court was within its discretion to allow the property owner to testify as to property's value.

***Indian River County v. Ocean Concrete, Inc.*, 308 So. 3d 1010 (Fla. 4th DCA 2020).**
See *Sabal Trail Transmission* above.

3. BERT J. HARRIS ACT

B. SUNSHINE LAW &/OR PUBLIC RECORDS

3(B). BERT J. HARRIS ACT - SUNSHINE LAW &/OR PUBLIC RECORDS.

Bert J. Harris Act – Pre-Suit – Shade Meetings - 2009.

Note* Section 286.011(8) provides that under certain circumstances, any board or commission of any agency or authority of any county, municipal corporation, or political subdivision, and the chief administrative or executive officer of the governmental entity, may meet in private with the entity's attorney to discuss *pending litigation to which the entity is presently a party* before a court or administrative agency,

Section 286.011(8)(e), F.S., provides that transcripts of closed meetings "shall be made part of the public record upon conclusion of the litigation."

Town Council having received the mandatory pre-suit notice under the Bert J. Harris Act could NOT conduct closed meeting to discuss settlement because the Town was not a party to a PENDING LITIGATION.

AGO 09-25.

See also: ***AGO 06-03*** (exemption not applicable to pre-litigation mediation proceedings); ***AGO 13-17*** (exemption may not be used to conduct a closed meeting during a mandatory arbitration proceeding, when there is no pending legal proceeding in a court or before an administrative agency); ***Inf. Op. to Barrett, February 17, 2016*** (board not entitled to use exemption to discuss pending investigation and subpoena where there is no on-going judicial or administrative proceeding);

See also:

AGO 09-14 (FL Governmental Conflict Resolution Act requires mediation before filing suit. If suit improperly filed prior to mediation, suit is suspended while mediation occurs. In either instance, there is no pending legal proceeding.)

Vs.

AGO 94-64 (Litigation that is ongoing but temporarily suspended pursuant to a stipulation for settlement has not been concluded for purposes of s. 286.011(8), and a transcript of meetings held between the city and its attorney to discuss such litigation may be kept confidential until conclusion of the litigation.)

//

Eminent Domain

2023 City, County and Local Government Law Certification Review Course

1

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1

* Disclaimer *

2

- Nothing in this presentation or its accompanying outline may be considered a sample question on any exam. Everything provided to you by the author is offered solely to demonstrate certain principles in Eminent Domain.
- This presentation & its accompanying outline were created without guidance from any Certification Committee or Certification Program.

2

Sources of Eminent Domain Power

3

- Power is **not provided** for but is instead **limited by** the federal and state constitutions.
- U.S. Constitution** (5th and 14th Amendments)
 - 5th Amendment requires public use and **just compensation**
 - 14th Amendment applies the requirements of the 5th Amendment to state and local governments.
- Florida Constitution** (Art. 10, §6, Fla. Const.)
 - "No private property shall be taken except for a public purpose and with **full compensation**...."
 - Imposes limitations on the power of the Legislature.

3



Full Compensation v. Just Compensation

4



'F'la = 'F'ull Compensation

- Land
- Improvements
- MH Relocation Benefits
- Cost to cure
- Severance damages

- **Business damages**
- **Attorneys' fees & costs**
- **Experts' fees & costs**
- **Interest**



'US' = 'U'lt Compensation

- Land
- Improvements
- Uniform Relocation Assist., **42 USC Ch. 61.**
- Cost to cure
- Severance Damages

4

Authority to Exercise Eminent Domain (Examples)

5

- **s. 127.01, F.S.** Counties (in addition to constitutional HR). No power outside borders for parks/rec.
- **ss. 153.03(5), (8), F.S.** County water and sewer facilities.
- **s. 163.01(7)(f), F.S.** Legal entity created by interlocal agreement & wholly owned by municipalities and counties.
- **s. 163.370(1), F.S.** County or municipality acquiring property within a CRA but not to eliminate slum or blight.
- **ss. 166.401 & 166.411, F.S.** Municipalities.
- **s. 190.011(7)(a), F.S.** Community development districts.
- **s. 388.181, F.S.** Mosquito control districts.
- **s. 1013.24, F.S.** School boards.



5

Property Interests Subject to Condemnation

6

- Mineral and surface rights
- Easements
- Future interests
- Restrictive covenants
- Covenants running with the land
- Trade fixtures
- Utilities
- Trees and crops
- Appurtenant rights
- Leaseholds
- Contract for deed
- Mortgages
- Personal property
- Contract rights
- Billboards

6

Various Interests & Takings

7

- Not Property Interests.
 - Liquor License. **Persaud Properties FL Investments, LLC v. Town of Fort Myers Beach, Florida**, 593 F. Supp. 3d 1129 (M.D. Fla. 2022).
 - Taxi Medallion. **Gulf Coast Transportation v. Hillsborough County**, 2022 WL 5265431 (Fla. 2d DCA October 7, 2022).
 - Right to access campus during COVID. **Rivadeneira v. Univ. of S. Fla.**, 2022 WL 445661 (M.D. Fla. Feb. 14, 2022).
- Regulatory Taking.
 - Must Deprive of ALL Economic Benefit.
 - Right to permit customers entry into bar closed temporarily by Governor during COVID is not total deprivation. **Orlando Bar Group, LLC v. DeSantis**, 339 So. 3d 487 (Fla. 5th DCA 2022). See also **Persaud**.
 - Physical Taking.
 - Doesn't Apply to Nuisance.
 - Abatement of dangerous gas station canopy damages by Hurricane. A physical taking can be done in an emergency to redress danger posed. **Munzel v. Hillsborough County**, 2022 WL 2440427 (M.D. Fla. Jul. 5, 2022).

7

Phases of the Eminent Domain Process

8

Phase I:	Pre-Suit Checklist.
Phase II:	File suit.
Phase III:	Order of taking hearing is held.
Phase IV.	Jury renders a FJ & determines full comp.

8

Phase I, Pre-Suit Checklist

9



☒

1. **Project Planning.**
Determine what property is needed & appraise its value; Arrange financing; Complete environmental & development design; Relocate utilities, Permits; ROW Activities.

☐

2. **Select Procedure (Ch. 73, Ch. 74)**

☐

3. **Public Purpose & Necessity (s. 73.021, F.S.)**

☐

4. **Pre-Suit Notice & Negotiations (s. 73.015, F.S.)**

9

Phase I, Pre-Suit Checklist

10

☒ 1. Project Planning.


☐ 2. **Select Procedure (Ch. 73, Ch. 74)**

☐ 3. Public Purpose & Necessity (s. 73.021, F.S.)

☐ 4. Pre-Suit Notice & Negotiations (s. 73.015, F.S.)

10



Procedures to Exercise Eminent Domain

11

• Chapters 73 and 74, F.S. provide the procedures by which the power of eminent domain must be instituted.

Ch. 73, F.S. = "slow take" statute.

Ch. 74, F.S. = "quick take" statute.





11

Slow Take v. Quick Take: Key Difference

12

Timing of Title



• **Slow take:**

Final Judgment

- Title to the land vests upon payment of the final judgment.

• **Quick take:**

Order of Taking.

- Title to the land vests upon deposit of good faith estimate funds in the registry of the Court.

12



Slow Take: 2 Advantages

13

1. Title does not vest until Condemnor deposits the amount set forth in the final judgment into the court registry within **20 days** after the rendition of the judgment, or the proceedings will be null and void. (s. **73.111**, F.S.)

If an unfavorable verdict is received, Condemnor has the option of not making the deposit (but would still be liable for reasonable attorneys' fees and costs).

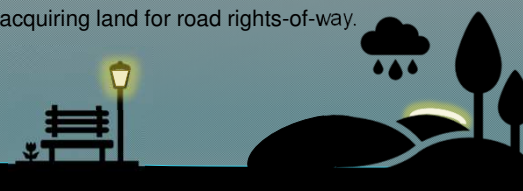
2. May initiate a quick take by filing a declaration of taking with the petition at any time prior to final judgment. (s. **74.031**, F.S.)

13

Slow Take: Disadvantage

14

- Ch. 73, F.S., is s-l-o-w & therefore may be difficult to execute for projects where tight schedules must be maintained.
- Example: acquiring land for road rights-of-way.

14

Quick Take: Advantage 1 of 2

15

- Condemnor takes possession & title in advance of final judgment.
- Once Condemnor's deposit of the good faith estimate is timely made:
 - (a) Title vests in Condemnor;
 - (b) Right to compensation vests in the property owner; &
 - (c) Property is considered condemned. (s. **74.061**, F.S.)



15



Quick Take: Advantage 2 of 2

16

- Date of valuation for the property is established as of the date that the deposit is made in court. [s. **74.051(1)**, F.S.]
- In an inflationary real estate market, this can be an advantage to Condemnor even though the project may not be constructed until sometime in the future.



16



Quick Take: 2 Disadvantages

17

1. The disadvantage of a quick take is that Condemnor loses the option of altering its course of action after an unfavorable jury verdict and judgment.

Remember: In a slow take, Condemnor may initiate a quick take by filing a declaration of taking with the petition at any time prior to final judgment. (s. **74.031**, F.S.)
2. Bodies: DOT, County, Muni, Flood Control District, Public Utility Corporation, et. al. (s. **74.011**, F.S.)

17

Phase I, Pre-Suit Checklist

18

- ☒ 1. Project Planning.
- ☒ 2. Select Procedure (Ch. 73, Ch. 74)
-  ☐ 3. **Public Purpose & Necessity (s. 73.021, F.S.)**
- ☐ 4. Pre-Suit Notice & Negotiations (s. 73.015, F.S.)

18

Prerequisites to Exercise of Eminent Domain Power

19

Public Purpose & Necessity (s. 73.021, F.S.)

- Public **purpose** concerns the **quality** and **nature** of the project—the public interest must dominate the private gain.
- Public **necessity** focuses on a determination of **what property** and **how much** of that property is needed for the project—the necessity must be reasonable, not absolute.

19

Public Purpose: Characteristics

20

- The property acquired is **available to the public** in common.
- The manner of enjoyment or use of the property acquired must be in the **control of the public**.
- Although **public interest** in the project must **dominate the private gain**, incidental gain to private parties is permissible.
- Examples: roads, parks, bridges, utilities, sewers & drainage, may create incidental private gain.

20



Necessity: Establish (SCALE Factors)

21

- To establish reasonable necessity, Condemnor must **Weigh** the following:

- **S**afety considerations
- **C**ost
- **A**vailability of an alternate route
- **L**ong-range planning
- **E**nvironmental issues



a Necessity to Weigh is a **SCALE**

21

Kelo v. City of New London, CT, 545 U.S. 469, 125 S. Ct. 24, 162 L.Ed. 439 (2005)
22



- Govt. took areas of “distressed municipality” from private owners to give to private owner.
- Public purpose of rejuvenation = public use under 5th Amendment.
- “ . . . nothing . . . precludes any State from placing further restrictions on its exercise of the takings power.” Kelo at 489.

22

Florida’s Reaction to Kelo
23

Fla. Const. art. X, sec. 6(c)
s. 73.014, F.S.

Private property taken by E.D. on or after Jan. 2, 2007, may not be conveyed to a natural person or private entity except as provided by general law passed by 3/5 vote of the membership of each house of the Legislature. (2006)

Notwithstanding any law, E.D. may not be exercised to take private property for the purpose of:

- abating or eliminating a public nuisance, or
- preventing or eliminating slum or blight. (2006)

23

Phase I, Pre-Suit Checklist
24

- ☒ 1. Project Planning.
- ☒ 2. Select Procedure (Ch. 73, Ch. 74)
- ☒ 3. Public Purpose & Necessity (s. 73.021, F.S.)
-  ☐ 4. Pre-Suit Notice & Negotiations (s. 73.015, F.S.)

24

Pre-suit Notice: Fee Owner
(s. 73.015, F.S.)

25

- Condemnor must notify the fee owner(s) of the following:
 - That all or a portion of his/her property is necessary for a project.
 - The nature of the project and the parcel designation.
 - That the appraisal, right of way maps, and other documents will be provided within **15 days** of a request by fee owner(s).
 - Statutory rights under ss. **73.091** and **73.092**, F.S. (or provide a copy of the provisions).

25

Pre-suit Negotiation: Fee Owner
(s. 73.015, F.S.)

26

- Condemnor must provide a **written** offer to the fee owner(s).
- Condemnor must attempt to negotiate in **good faith** with fee owner(s) for full compensation (mediation & settlement).
- Establishes the starting point for calculating **attorneys' fees**.



26

Pre-suit Notice: Business Owner
(s. 73.015, F.S.)

27

- Condemnor must notify business owners, including lessees, who operate a business on the property to be acquired of the following:
 - That all or a portion of the property is necessary for a project;
 - The nature of the project and the parcel designation;
 - That the appraisal, right of way maps, and other documents will be provided within 15 days of a request;
 - Business owner's statutory rights under ss. **73.091**, **73.092**, and **73.071** F.S.; &
 - **If qualified, business owner must submit a good faith written offer to settle the business damage claim within 180 days of the notice.**

27

Phase I, Pre-Suit Checklist

28

☒ Project Planning.
☒ Select Procedure (Ch. 73, Ch. 74)
☒ Public Purpose & Necessity (s. 73.021, F.S.)
☒ Pre-Suit Notice & Negotiations (s. 73.015, F.S.)

28

Phases of Eminent Domain Process

29

☒ Phase I: Pre-Suit Checklist.
 Phase II: File suit.
☐ Phase III: Order of taking hearing is held.
☐ Phase IV: Jury renders a FJ & determines full comp.

29



The Eminent Domain Petition
(s. 73.021, F.S.)

30

When Complaining of E.D., Demand Good Mobile *[think food truck]* PANINIS.

1. **Good** Faith Negotiation.
2. **Mobile** Home (yes or no).
3. **Public** purpose.
4. **Authority**.
5. **Necessity**.
6. **Interest**.
7. **Name**, place of residence, legal disabilities (if any), & interest held.
8. **I.D.** Property.
9. **Survey** (if available) & intend in GF to build project on property.
10. **Demand**.



30

Phases of Eminent Domain Process

31

☒ Phase I:

Pre-Suit Checklist.

☒ Phase II:

File suit.

 Phase III:

Order of taking hearing is held.

☐ Phase IV:

Jury renders FJ & determines full comp.

31



Phase III, Order of Taking Hearing

32

• CONDEMNOR:

Initial Burden.

- Public purpose and
- Reasonable necessity for the taking.
- If Quick Take, good faith estimate.

• OWNER:

Burden shifts.

- "DIBS", i.e., abuse of Discretion, Illegality or Bad faith.

• JUDGE:

If Quick Take, orders Condemnor deposit an amount into the Court Registry as a good faith deposit. At that time, title will vest.

• CLERK:

Sets for 12-person jury trial to determine compensation.

32

Phases of Eminent Domain Process

33

☒ Phase I:

Pre-Suit Checklist.

☒ Phase II:

File suit.

☒ Phase III:

Order of taking hearing is held.

 Phase IV:

Jury renders FJ & determines full comp.

33



FJ: Slow Take (Ch. 73, F.S.)

34

After a jury determination:

1. Final judgment sets forth the full compensation.
2. Condemnor is required to deposit the judgment amount within **20 days** after rendition of the judgment.
3. If the deposit is not timely made, the proceedings are deemed **null and void** (unless good cause is shown for additional time to make the deposit).
4. Once the deposit is confirmed, Condemnor receives title to the property.

34



FJ: Quick Take (Ch. 74, F.S.)

35

After a jury determination:

1. Final judgment sets forth the full compensation.
2. If the judgment exceeds Condemnor's earlier deposit of good faith estimate, Condemnor must **pay the balance**.
3. Condemnor is required to pay the owner **interest** on the amount that the judgment exceeds the estimated value provided in the declaration of taking. (s. **74.061**, F.S.)

35



Compensation



36

- Section **73.071**, F.S. addresses compensation and related issues.
- Section **73.071(3)**, F.S. describes the 3 categories of compensation:
 1. Value of the property taken;
 2. Reasonable removal or relocation expenses for a mobile home owner; &
 3. Damages caused by a partial taking, i.e., severance damages and business damages.

36

Severance Damages
s. 73.071(3)(b), F.S.

37

- When less than all of the property is taken, an owner is entitled to compensation for the part taken and for damages to the remainder caused by the taking.
- The underlying rationale is that full compensation requires the owner to be put in a financial position that is as good as if the property had not been taken.
- Severance damages are calculated as the difference between the FMV of the remainder property before and after the taking. Cost to cure can be considered for its impact on the FMV of remaining property. **Broward County v. Patel, 641 So. 2d 40, 43 (Fla. 1994).**
- An owner has no duty to mitigate damages to the remaining property from a taking. "A duty to mitigate . . . damages is something of a misnomer in this context, because neither party has an obligation to cure or mitigate anything. **Id.**"

37

Severance Damages
s. 73.071(3)(b), F.S.

38

Examples of severance damages include:

- Change in grade between the part taken and the remainder;
- Reduction in size or alteration in shape of the remainder; or
- Damage resulting from the use to which Condemnor intends to put the property taken.



38



Business Damages
F.S. 73.071(3)(b).

39

- Business damages are neither defined nor limited by the statute & may include:
 - Lost profits;
 - Loss of goodwill,
 - Costs related to moving and selling equipment; &
 - "Down time."
- The business owner does not have to mitigate or relocate.
- But if it does, the resulting business damages must be measured by the probable financial impact reasonably suffered as a result of the taking. **System Components Corp. v. DOT, 14 So. 3d 967, 984 (Fla. 2009).**

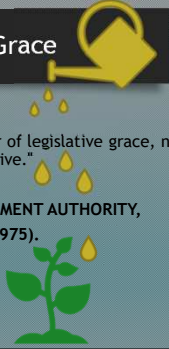
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Business Damages - Legislative Grace

40

"The right to business damages is a matter of legislative grace, not constitutional imperative."

JAMESSON v. DOWNTOWN DEVELOPMENT AUTHORITY,
322 So. 2d 510 (Fla. 1975).



40

A claim for business damage applies only when:

41

- Less than the entire property is being taken.
- Condemnor is a State or local public body.
- The property is being taken for right-of-way.
- The partial taking damages or destroys an established business having a physical existence and continuous operation for more than 5 years.
- The business owner must have an interest in the property being taken.
- The business is located on adjoining property also owned or held by the property owner.
- The damage or destruction is caused by loss of use of the portion of the property taken.

41

Business Damage by
Public Tenant at 5 COPPA [cabana] ROW

42

- Public Condemnor (not a utility co.). **Sasnett v. Tampa Elec.**, 513 So. 2d 157 (Fla. 2d DCA 1987).
- Tenant or Owner. B.O. interest in taken & remainder as Tenant or Owner.
"A tenant's business damages constitute the amount totaling the tenant's leasehold interest in the property." **Seminole County v. Sanford Court Investors, Ltd.**, 743 So. 2d 1165, 1169 (Fla. 5th DCA 1999), see also **M.J. Stavola v. DOT**, 742 So. 2d 391, 393 (1999).
- 5 years.
- Continuous Operation.
- Physical existence on remainder.
- Partial taking.
- Adjacent.

s. 73.071(3)(b), F.S.
business damages



• ROW. All inclusive, **Joynt v. Orange County**, 701 So. 2d 1249 (Fla. 5th DCA 1997).

42

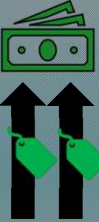
Severance Damages & Business Damages

43

Both severance damages and business damages are simultaneously available but must be distinguished.

- **Severance damages** = reduced value of the remaining **land**.
- **Business damages** = additional sum awarded for damages to the **business** conducted on the remainder.

Could make a good essay.



43

Phases of Eminent Domain Process

44

- ☒ Phase I: Pre-Suit Checklist.
- ☒ Phase II: File suit.
- ☒ Phase III: Order of taking hearing is held.
- ☒ Phase IV: Jury renders FJ & determines full comp.



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* Disclaimer *

45

1. Nothing in this presentation or its accompanying outline may be considered a sample question on any exam. Everything provided to you by the author is offered solely to demonstrate certain principles in Eminent Domain.
2. This presentation & its accompanying outline were created without any guidance from a Certification Committee or Certification Program.

45



Exercises in Damages, s. 73.071(3), F.S.

46

1. **FMV** of the property taken.
2. Reasonable **removal** or **relocation** expenses for a **mobile home** owner.
3. Damages caused by a **partial** taking, i.e.,
 - (a) **Severance** damages and
 - (b) **Business** damages.



- Assume Business Owner meets parameters of s. 73.071(3)(b), F.S.
- No mobile homes involved, s. 73.071(3)(c) is inapplicable.

46

Business Damage by Public Tenant at 5 COPPA [cabana] ROW

47

- **Public** Condemnor (not a utility company).
- **Tenant** or Owner. B.O. interest in taken & remainder as Tenant or Owner.
- 5 years.
- Continuous **Operation**.
- Physical existence on remainder.
- Partial taking.
- Adjacent.
- **ROW** (all inclusive)

business damages
s. 73.071(3)(b), F.S.



47

NORTH ROAD

SOUTH ROAD

BUSINESS

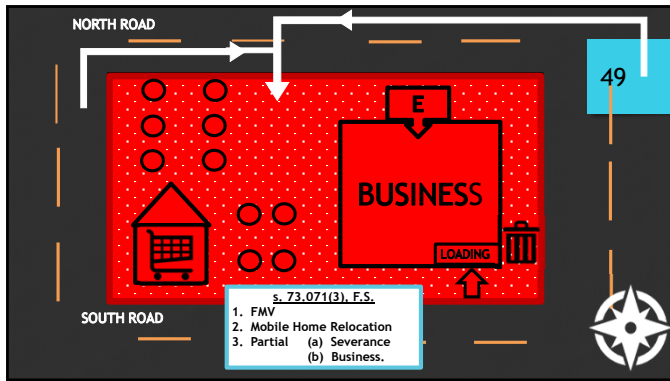
LOADING

- s. 73.071(3), F.S.
1. FMV
 2. Mobile Home Relocation
 3. Partial
 - (a) Severance
 - (b) Business.

48



48



49

Damages for Whole Taking
49

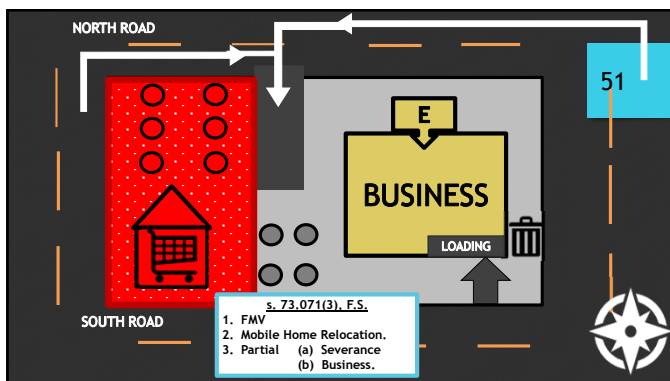
- FMV – \$TBD.
- Mobile- \$0.
- Partial - Severance – \$0.
- Business – \$0.

Public Tenant at 5 COPPA [cabana] ROW

- Public
- Tenant or owner.
- 5 years.
- Continuous Operation.

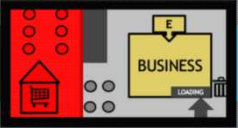
- Physical existence on remainder.
- Partial taking.
- Adjacent.
- ROW.

50



51

Damages for Partial Taking



52

(1) FMV –

property taken.

(2) Mobile -

\$0.

(3) Partial -

(a) Severance –

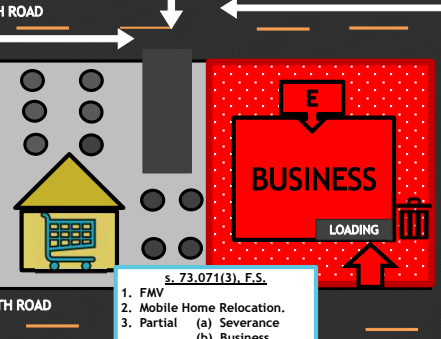
loss of value to remainder land.

(b) Business –

business impact on remainder.

52

NORTH ROAD



53

SOUTH ROAD

§ 73.071(3), F.S.

1. FMV

2. Mobile Home Relocation.

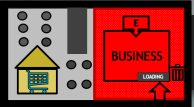
3. Partial

(a) Severance

(b) Business.

53

Business Dmgs: Shed



54

(1) FMV –

property taken.

(2) Mobile -

\$0.

(3) Partial -

(a) Severance –

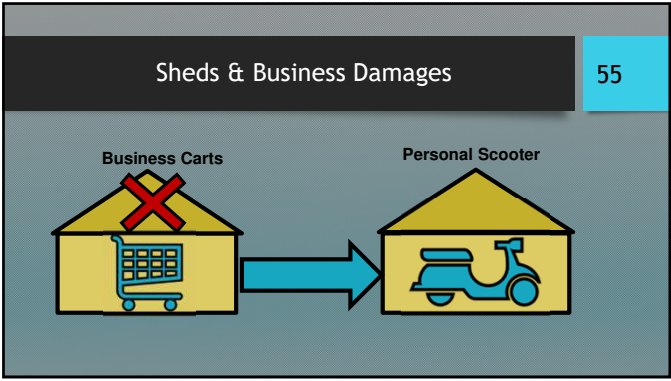
loss of value to remainder land.

(b) Business –

business impact on remainder.



54



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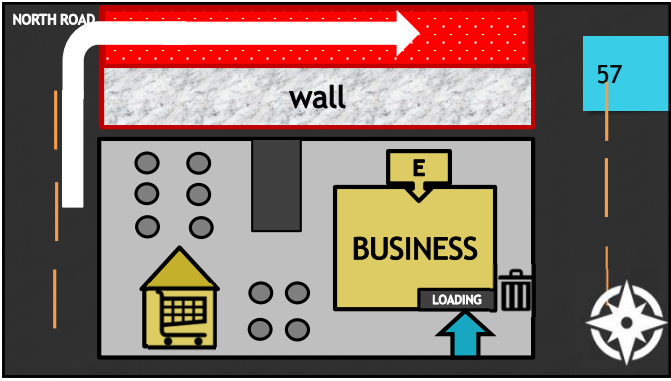
56

(1) FMV – property taken.
(2) Mobile - \$0.
(3) Partial -

(a) Severance – land has lost value.
(b) Business – unlikely for shed.

Palm Beach County v. Awadallah, 538 So. 2d 142 (Fla. 4th DCA 1989).
The Fourth DCA determined that the storage units had no connection to the business on the parent tract because they were **not an essential part of the business' day-to-day operation**. Without a connection to the business on the parent tract, the **storage buildings on the remainder could not stand alone as a means of claiming business damages**.

56



57

Access

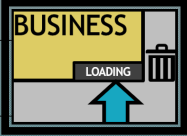
58

Ease and facility of access are valuable property rights, and the owner must be compensated for any **substantial impairment** of access caused by the taking.

- **Dept. of Transportation v. Stubbs**, 285 So. 2d 1 (Fla. 1973).

Loss of **most convenient** access is **not compensable**.

- **Palm Beach County v. Tessler**, 528 So. 2d 846 (Fla. 1989).



Owner:

While access still exists, when considered in light of the ugly remaining access, the right of access was substantially diminished.

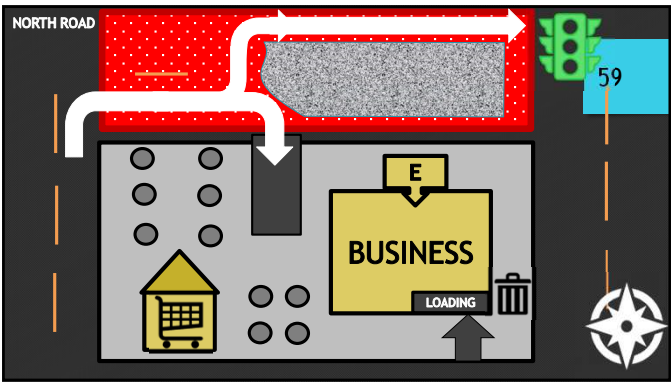
Condemnor:

Ugly or not, the remaining access is reasonable.

58

NORTH ROAD

59



59

Traffic



60

The Supreme Court of Florida found that the construction of a traffic island in an existing right of way did not take any portion of Plaintiff's land. Without this required taking of land, Plaintiff could not seek business damages for any loss of access.

- **Weaver Oil v. City of Tallahassee**, 647 So. 2d 819 (Fla. 1994).

No taking occurs where governmental action reduces the flow of traffic on abutting road. Landowner has no property right in traffic.

- **City of Tallahassee v. Boyd**, 616 So. 2d 1000 (1st DCA 1993).

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Questions?

61

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Florida Bar Ethics

By

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ETHICS

Sheila Tuma, Florida Bar

I. ETHICS RULES

A. Rule 4-1.1 Competence

B. Rule 4-1.4 Communication

C. Rule 4-1.6 Confidentiality

D. Rule 4-1.7 Conflict of Interest: Current Client

E. Rule 4-1.9 Conflict of Interest: Former Client

F. Rule 4-1.11 Special Conflicts of Interest for Former or
Current Government Officers and Employees

II. ETHICS OPINIONS

A. List of Ethics Opinions for Government Attorneys and
Public Officials

B. Ethics Opinion 09-1

C. Ethics Opinion 10-2

D. Ethics Opinion 77-30 (reconsidered September 29, 2006)

E. Ethics Opinion 12-2

F. Ethics Opinion 12-3

4 RULES OF PROFESSIONAL CONDUCT
4-1 CLIENT-LAWYER RELATIONSHIP

RULE 4-1.1 COMPETENCE

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.

Comment

Legal knowledge and skill

In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter, and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question. In many instances the required proficiency is that of a general practitioner. Expertise in a particular field of law may be required in some circumstances.

A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. A newly admitted lawyer can be as competent as a practitioner with long experience. Some important legal skills, such as the analysis of precedent, the evaluation of evidence and legal drafting, are required in all legal problems. Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge. A lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation can also be provided through the association of a lawyer of established competence in the field in question.

In an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required where referral to or consultation or association with another lawyer would be impractical. Even in an emergency, however, assistance should be limited to that reasonably necessary in the circumstances, for ill-considered action under emergency conditions can jeopardize the client's interest.

A lawyer may accept representation where the requisite level of competence can be achieved by reasonable preparation. This applies as well to a lawyer who is appointed as counsel for an unrepresented person. See also rule 4-6.2.

Thoroughness and preparation

Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more extensive treatment than matters of lesser complexity and consequence. The lawyer should consult with the client about the degree of thoroughness and the level of preparation required as well as the estimated costs involved under the circumstances.

Maintaining competence

To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, engage in continuing study and education, and comply with all continuing legal education requirements to which the lawyer is subject.

RULE 4-1.4 COMMUNICATION

(a) Informing Client of Status of Representation. A lawyer shall:

- (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in terminology, is required by these rules;
- (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;
- (3) keep the client reasonably informed about the status of the matter;
- (4) promptly comply with reasonable requests for information; and
- (5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows or reasonably should know that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) Duty to Explain Matters to Client. A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Comment

Reasonable communication between the lawyer and the client is necessary for the client to effectively participate in the representation.

Communicating with client

If these rules require that a particular decision about the representation be made by the client, subdivision (a)(1) requires that the lawyer promptly consult with and secure the client's consent prior to taking action unless prior discussions with the client have resolved what action the client wants the lawyer to take. For example, a lawyer who receives from opposing counsel an offer of settlement in a civil controversy or a proffered plea bargain in a criminal case must promptly inform the client of its substance unless the client has previously indicated that the proposal will be acceptable or unacceptable or has authorized the lawyer to accept or to reject the offer. See rule 4-1.2(a).

Subdivision (a)(2) requires the lawyer to reasonably consult with the client about the means to be used to accomplish the client's objectives. In some situations- depending on both the importance of the action under consideration and the feasibility of consulting with the client -this duty will require consultation prior to taking action. In other circumstances, such as during a trial when an immediate decision must be made, the exigency of the situation may require the lawyer to act without prior consultation. In such cases the lawyer must nonetheless act reasonably to inform the client of actions the lawyer has taken on the client's behalf. Additionally, subdivision (a)(3) requires that the lawyer keep the client reasonably informed about the status of the matter, such as significant developments affecting the timing or the substance of the representation. RRTFB-June 1, 2014

A lawyer's regular communication with clients will minimize the occasions on which a client will need to request information concerning the representation. When a client makes a reasonable request for information, however, subdivision (a)(4) requires prompt compliance with the request, or if a prompt response is not feasible, that the lawyer, or a member of the lawyer's staff, acknowledge receipt of the request and advise the client when a response may be expected.

Explaining matters

The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so.

Adequacy of communication depends in part on the kind of advice or assistance that is involved. For example, when there is time to explain a proposal made in a negotiation, the lawyer should review all important provisions with the client before proceeding to an agreement. In litigation a lawyer should explain the general strategy and prospects of success and ordinarily should consult the client on tactics that are likely to result in significant expense or to injure or coerce others.

On the other hand, a lawyer ordinarily will not be expected to describe trial or negotiation strategy in detail. The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests and the client's overall requirements as to the character of representation. In certain circumstances, such as when a lawyer asks a client to consent to a representation affected by a conflict of interest, the client must give informed consent, as defined in terminology.

Ordinarily, the information to be provided is that appropriate for a client who is a comprehending and responsible adult. However, fully informing the client according to this standard may be impracticable, for example, where the client is a child or suffers from mental disability. See rule 4-1.14. When the client is an organization or group, it is often impossible or inappropriate to inform every one of its members about its legal affairs; ordinarily, the lawyer should address communications to the appropriate officials of the organization. See rule 4-1.13. Where many routine matters are involved, a system of limited or occasional reporting may be arranged with the client.

Withholding information

In some circumstances, a lawyer may be justified in delaying transmission of information when the client would be likely to react imprudently to an immediate communication. Thus, a lawyer might withhold a psychiatric diagnosis of a client when the examining psychiatrist indicates that disclosure would harm the client. A lawyer may not withhold information to serve the lawyer's own interest or convenience or the interests or convenience of another person. Rules or court orders governing litigation may provide that information supplied to a lawyer may not be disclosed to the client. Rule 4-3.4(c) directs compliance with such rules or orders.

Amended July 23, 1992, effective Jan. 1, 1993 (605 So.2d 252); March 23, 2006, effective May 22, 2006 (SC04-2246), (933 So.2d 417).

RULE 4-1.6 CONFIDENTIALITY OF INFORMATION

(a) Consent Required to Reveal Information. A lawyer must not reveal information relating to representation of a client except as stated in subdivisions (b), (c), and (d), unless the client gives informed consent.

(b) When Lawyer Must Reveal Information. A lawyer must reveal such information to the extent the lawyer reasonably believes necessary:

- (1) to prevent a client from committing a crime; or
- (2) to prevent a death or substantial bodily harm to another.

(c) When Lawyer May Reveal Information. A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

- (1) to serve the client's interest unless it is information the client specifically requires not to be disclosed;
- (2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and client;
- (3) to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved;
- (4) to respond to allegations in any proceeding concerning the lawyer's representation of the client; or
- (5) to comply with the Rules Regulating the Florida Bar.

(d) Exhaustion of Appellate Remedies. When required by a tribunal to reveal such information, a lawyer may first exhaust all appellate remedies.

(e) Limitation on Amount of Disclosure. When disclosure is mandated or permitted, the lawyer must disclose no more information than is required to meet the requirements or accomplish the purposes of this rule.

Comment

The lawyer is part of a judicial system charged with upholding the law. One of the lawyer's functions is to advise clients so that they avoid any violation of the law in the proper exercise of their rights.

This rule governs the disclosure by a lawyer of information relating to the representation of a client during the lawyer's representation of the client. See rule 4-1.18 for the lawyer's duties with respect to information provided to the lawyer by a prospective client, rule 4-1.9(c) for the lawyer's duty not to reveal information relating to the lawyer's prior representation of a former

client, and rules 4-1.8(b) and 4-1.9(b) for the lawyer's duties with respect to the use of such information to the disadvantage of clients and former clients.

A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation. See terminology for the definition of informed consent. This contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.

The principle of confidentiality is given effect in 2 related bodies of law, the attorney-client privilege (which includes the work product doctrine) in the law of evidence and the rule of confidentiality established in professional ethics. The attorney-client privilege applies in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule applies not merely to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules Regulating the Florida Bar or by law. However, none of the foregoing limits the requirement of disclosure in subdivision (b). This disclosure is required to prevent a lawyer from becoming an unwitting accomplice in the fraudulent acts of a client. See also Scope.

The requirement of maintaining confidentiality of information relating to representation applies to government lawyers who may disagree with the policy goals that their representation is designed to advance.

Authorized disclosure

A lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation, except to the extent that the client's instructions or special circumstances limit that authority. In litigation, for example, a lawyer may disclose information by admitting a fact that cannot properly be disputed or in negotiation by making a disclosure that facilitates a satisfactory conclusion.

Lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers.

Disclosure adverse to client

The confidentiality rule is subject to limited exceptions. In becoming privy to information about a client, a lawyer may foresee that the client intends serious harm to another person. However, to the extent a lawyer is required or permitted to disclose a client's purposes, the client

will be inhibited from revealing facts that would enable the lawyer to counsel against a wrongful course of action. While the public may be protected if full and open communication by the client is encouraged, several situations must be distinguished.

First, the lawyer may not counsel or assist a client in conduct that is criminal or fraudulent. See rule 4-1.2(d). Similarly, a lawyer has a duty under rule 4-3.3(a)(4) not to use false evidence. This duty is essentially a special instance of the duty prescribed in rule 4-1.2(d) to avoid assisting a client in criminal or fraudulent conduct.

Second, the lawyer may have been innocently involved in past conduct by the client that was criminal or fraudulent. In such a situation the lawyer has not violated rule 4-1.2(d), because to "counsel or assist" criminal or fraudulent conduct requires knowing that the conduct is of that character.

Third, the lawyer may learn that a client intends prospective conduct that is criminal. As stated in subdivision (b)(1), the lawyer must reveal information in order to prevent such consequences. It is admittedly difficult for a lawyer to "know" when the criminal intent will actually be carried out, for the client may have a change of mind.

Subdivision (b)(2) contemplates past acts on the part of a client that may result in present or future consequences that may be avoided by disclosure of otherwise confidential communications. Rule 4-1.6(b)(2) would now require the lawyer to disclose information reasonably necessary to prevent the future death or substantial bodily harm to another, even though the act of the client has been completed.

The lawyer's exercise of discretion requires consideration of such factors as the nature of the lawyer's relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction, and factors that may extenuate the conduct in question. Where practical the lawyer should seek to persuade the client to take suitable action. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to the purpose.

Withdrawal

If the lawyer's services will be used by the client in materially furthering a course of criminal or fraudulent conduct, the lawyer must withdraw, as stated in rule 4-1.16(a)(1).

After withdrawal the lawyer is required to refrain from making disclosure of the client's confidences, except as otherwise provided in rule 4-1.6. Neither this rule nor rule 4-1.8(b) nor rule 4-1.16(d) prevents the lawyer from giving notice of the fact of withdrawal, and the lawyer may also withdraw or disaffirm any opinion, document, affirmation, or the like.

Where the client is an organization, the lawyer may be in doubt whether contemplated conduct will actually be carried out by the organization. Where necessary to guide conduct in connection with the rule, the lawyer may make inquiry within the organization as indicated in rule 4-1.13(b).

Dispute concerning lawyer's conduct

A lawyer's confidentiality obligations do not preclude a lawyer from securing confidential legal advice about the lawyer's personal responsibility to comply with these rules. In most situations, disclosing information to secure such advice will be impliedly authorized for the lawyer to carry out the representation. Even when the disclosure is not impliedly authorized, subdivision (b)(5) permits such disclosure because of the importance of a lawyer's compliance with the Rules of Professional Conduct.

Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim involving the conduct or representation of a former client. The lawyer's right to respond arises when an assertion of such complicity has been made. Subdivision (c) does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion. The right to defend, of course, applies where a proceeding has been commenced. Where practicable and not prejudicial to the lawyer's ability to establish the defense, the lawyer should advise the client of the third party's assertion and request that the client respond appropriately. In any event, disclosure should be no greater than the lawyer reasonably believes is necessary to vindicate innocence, the disclosure should be made in a manner that limits access to the information to the tribunal or other persons having a need to know it, and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

If the lawyer is charged with wrongdoing in which the client's conduct is implicated, the rule of confidentiality should not prevent the lawyer from defending against the charge. Such a charge can arise in a civil, criminal, or professional disciplinary proceeding and can be based on a wrong allegedly committed by the lawyer against the client or on a wrong alleged by a third person; for example, a person claiming to have been defrauded by the lawyer and client acting together. A lawyer entitled to a fee is permitted by subdivision (c) to prove the services rendered in an action to collect it. This aspect of the rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary. As stated above, the lawyer must make every effort practicable to avoid unnecessary disclosure of information relating to a representation, to limit disclosure to those having the need to know it, and to obtain protective orders or make other arrangements minimizing the risk of disclosure.

Disclosures otherwise required or authorized

The attorney-client privilege is differently defined in various jurisdictions. If a lawyer is called as a witness to give testimony concerning a client, absent waiver by the client, rule 4-1.6(a) requires the lawyer to invoke the privilege when it is applicable. The lawyer must comply with the final orders of a court or other tribunal of competent jurisdiction requiring the lawyer to give information about the client.

The Rules of Professional Conduct in various circumstances permit or require a lawyer to disclose information relating to the representation. See rules 4-2.3, 4-3.3, and 4-4.1. In addition

to these provisions, a lawyer may be obligated or permitted by other provisions of law to give information about a client. Whether another provision of law supersedes rule 4-1.6 is a matter of interpretation beyond the scope of these rules, but a presumption should exist against such supersession.

Former client

The duty of confidentiality continues after the client-lawyer relationship has terminated. See rule 4-1.9 for the prohibition against using such information to the disadvantage of the former client. Amended July 23, 1992, effective Jan. 1, 1993 (605 So.2d 252); Oct. 20, 1994 (644 So.2d 282); March 23, 2006, effective May 22, 2006 (SC04-2246), (933 So.2d 417); amended July 7, 2011, effective October 1, 2011 (SC10-1968); amended May 29, 2014, effective June 1, 2014 (SC12-2234).

RULE 4-1.7 CONFLICT OF INTEREST; CURRENT CLIENTS

(a) **Representing Adverse Interests.** Except as provided in subdivision (b), a lawyer must not represent a client if:

- (1) the representation of 1 client will be directly adverse to another client; or
- (2) there is a substantial risk that the representation of **1** 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.

(b) **Informed Consent.** Notwithstanding the existence of a conflict of interest under subdivision (a), a lawyer may represent a client if:

- (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
- (2) the representation is not prohibited by law;
- (3) the representation does not involve the assertion of a position adverse to another client when the lawyer represents both clients in the same proceeding before a tribunal; and
- (4) each affected client gives informed consent, confirmed in writing or clearly stated on the record at a hearing.

(c) **Explanation to Clients.** When representation of multiple clients in a single matter is undertaken, the consultation must include an explanation of the implications of the common representation and the advantages and risks involved.

(d) **Lawyers Related by Blood, Adoption, or Marriage.** A lawyer related by blood, adoption, or marriage to another lawyer as parent, child, sibling, or spouse must not represent a client in a representation directly adverse to a person who the lawyer knows is represented by the

other lawyer except with the client's informed consent, confirmed in writing or clearly stated on the record at a hearing.

(e) **Representation of insureds.** Upon undertaking the representation of an insured client at the expense of the insurer, a lawyer has a duty to ascertain whether the lawyer will be representing both the insurer and the insured as clients, or only the insured, and to inform both the insured and the insurer regarding the scope of the representation. All other Rules Regulating The Florida Bar related to conflicts of interest apply to the representation as they would in any other situation.

Comment

Loyalty to a client

Loyalty and independent judgment are essential elements in the lawyer's relationship to a client. Conflicts of interest can arise from the lawyer's responsibilities to another client, a former client or a third person, or from the lawyer's own interests. For specific rules regarding certain conflicts of interest, see rule 4-1.8. For former client conflicts of interest, see rule 4-1.9. For conflicts of interest involving prospective clients, see rule 4-1.18. For definitions of "informed consent" and "confirmed in writing," see terminology.

An impermissible conflict of interest may exist before representation is undertaken, in which event the representation should be declined. If such a conflict arises after representation has been undertaken, the lawyer should withdraw from the representation. See rule 4-1.16. Where more than one client is involved and the lawyer withdraws because a conflict arises after representation, whether the lawyer may continue to represent any of the clients is determined by rule 4-1.9. As to whether a client-lawyer relationship exists or, having once been established, is continuing, see comment to rule 4-1.3 and scope.

As a general proposition, loyalty to a client prohibits undertaking representation directly adverse to that client's or another client's interests without the affected client's consent. Subdivision (a)(1) expresses that general rule. Thus, a lawyer ordinarily may not act as advocate against a person the lawyer represents in some other matter, even if it is wholly unrelated. On the other hand, simultaneous representation in unrelated matters of clients whose interests are only generally adverse, such as competing economic enterprises, does not require consent of the respective clients. Subdivision (a)(1) applies only when the representation of one client would be directly adverse to the other and where the lawyer's responsibilities of loyalty and confidentiality of the other client might be compromised.

Loyalty to a client is also impaired when a lawyer cannot consider, recommend, or carry out an appropriate course of action for the client because of the lawyer's other responsibilities or interests. The conflict in effect forecloses alternatives that would otherwise be available to the client. Subdivision (a)(2) addresses such situations. A possible conflict does not itself preclude the representation. The critical questions are the likelihood that a conflict will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client. Consideration should be given to whether the client wishes to accommodate the other interest involved.

Consultation and consent

A client may consent to representation notwithstanding a conflict. However, as indicated in subdivision (a)(1) with respect to representation directly adverse to a client and subdivision (a)(2) with respect to material limitations on representation of a client, when a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent. When more than 1 client is involved, the question of conflict must be resolved as to each client. Moreover, there may be circumstances where it is impossible to make the disclosure necessary to obtain consent. For example, when the lawyer represents different clients in related matters and 1 of the clients refuses to consent to the disclosure necessary to permit the other client to make an informed decision, the lawyer cannot properly ask the latter to consent.

Lawyer's interests

The lawyer's own interests should not be permitted to have adverse effect on representation of a client. For example, a lawyer's need for income should not lead the lawyer to undertake matters that cannot be handled competently and at a reasonable fee. See rules 4-1.1 and 4-1.5. If the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice. A lawyer may not allow related business interests to affect representation, for example, by referring clients to an enterprise in which the lawyer has an undisclosed interest.

Conflicts in litigation

Subdivision (a)(1) prohibits representation of opposing parties in litigation. Simultaneous representation of parties whose interests in litigation may conflict, such as co-plaintiffs or co-defendants, is governed by subdivisions (a), (b), and (c). An impermissible conflict may exist by reason of substantial discrepancy in the parties' testimony, incompatibility in positions in relation to an opposing party, or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question. Such conflicts can arise in criminal cases as well as civil. The potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than 1 co-defendant. On the other hand, common representation of persons having similar interests is proper if the risk of adverse effect is minimal and the requirements of subdivisions (b) and (c) are met.

Ordinarily, a lawyer may not act as advocate against a client the lawyer represents in some other matter, even if the other matter is wholly unrelated. However, there are circumstances in which a lawyer may act as advocate against a client. For example, a lawyer representing an enterprise with diverse operations may accept employment as an advocate against the enterprise in an unrelated matter if doing so will not adversely affect the lawyer's relationship with the enterprise or conduct of the suit and if both clients consent upon consultation. By the same token, government lawyers in some circumstances may represent government employees in proceedings in which a government agency is the opposing party. The propriety of concurrent representation can depend on the nature of the litigation. For example, a suit charging fraud

entails conflict to a degree not involved in a suit for a declaratory judgment concerning statutory interpretation.

A lawyer may represent parties having antagonistic positions on a legal question that has arisen in different cases, unless representation of either client would be adversely affected. Thus, it is ordinarily not improper to assert such positions in cases pending in different trial courts, **but** it may be improper to do so in cases pending at the same time in an appellate court.

Interest of person paying for a lawyer's service

A lawyer may be paid from a source other than the client, if the client is informed of that fact and consents and the arrangement does not compromise the lawyer's duty of loyalty to the client. See rule 4-1.8(±). For example, when an insurer and its insured have conflicting interests in a matter arising from a liability insurance agreement and the insurer is required to provide special counsel for the insured; the arrangement should assure the special counsel's professional independence. So also, when a corporation and its directors or employees are involved in a controversy in which they have conflicting interests, the corporation may provide funds for separate legal representation of the directors or employees, if the clients consent after consultation and the arrangement ensures the lawyer's professional independence.

Other conflict situations

Conflicts of interest in contexts other than litigation sometimes may be difficult to assess. Relevant factors in determining whether there is potential for adverse effect include the duration and intimacy of the lawyer's relationship with the client or clients involved, the functions being performed by the lawyer, the likelihood that actual conflict will arise, and the likely prejudice to the client from the conflict if it does arise. The question is often one of proximity and degree.

For example, a lawyer may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic to each other, but common representation is permissible where the clients are generally aligned in interest even though there is some difference of interest among them.

Conflict questions may also arise in estate planning and estate administration. A lawyer may be called upon to prepare wills for several family members, such as husband and wife, and, depending upon the circumstances, a conflict of interest may arise. In estate administration the identity of the client may be unclear under the law of some jurisdictions. In Florida, the personal representative is the client rather than the estate or the beneficiaries. The lawyer should make clear the relationship to the parties involved.

A lawyer for a corporation or other organization who is also a member of its board of directors should determine whether the responsibilities of the 2 roles may conflict. The lawyer may be called on to advise the corporation in matters involving actions of the directors. Consideration should be given to the frequency with which such situations may arise, the potential intensity of the conflict, the effect of the lawyer's resignation from the board, and the possibility of the corporation's obtaining legal advice from another lawyer in such situations. If there is material risk that the dual role will compromise the lawyer's independence of professional judgment, the lawyer should not serve as a director.

Conflict charged by an opposing party

Resolving questions of conflict of interest is primarily the responsibility of the lawyer undertaking the representation. In litigation, a court may raise the question when there is reason to infer that the lawyer has neglected the responsibility. In a criminal case, inquiry by the court is generally required when a lawyer represents multiple defendants. Where the conflict is such as clearly to call in question the fair or efficient administration of justice, opposing counsel may properly raise the question. Such an objection should be viewed with caution, however, for it can be misused as a technique of harassment. See scope.

Family relationships between lawyers

Rule 4-1.7(d) applies to related lawyers who are in different firms. Related lawyers in the same firm are also governed by rules 4-1.9 and 4-1.10. The disqualification stated in rule 4-1.7(d) is personal and is not imputed to members of firms with whom the lawyers are associated. The purpose of Rule 4-1.7(d) is to prohibit representation of adverse interests, unless informed consent is given by the client, by a lawyer related to another lawyer by blood, adoption, or marriage as a parent, child, sibling, or spouse so as to include those with biological or adopted children and within relations by marriage those who would be considered in-laws and stepchildren and stepparents.

Representation of insureds

The unique tripartite relationship of insured, insurer, and lawyer can lead to ambiguity as to whom a lawyer represents. In a particular case, the lawyer may represent only the insured, with the insurer having the status of a non-client third party payer of the lawyer's fees. Alternatively, the lawyer may represent both as dual clients, in the absence of a disqualifying conflict of interest, upon compliance with applicable rules. Establishing clarity as to the role of the lawyer at the inception of the representation avoids misunderstanding that may ethically compromise the lawyer. This is a general duty of every lawyer undertaking representation of a client, which is made specific in this context due to the desire to minimize confusion and inconsistent expectations that may arise.

Consent confirmed in writing or stated on the record at a hearing

Subdivision (b) requires the lawyer to obtain the informed consent of the client, confirmed in writing or clearly stated on the record at a hearing. With regard to being confirmed in writing, such writing may consist of a document executed by the client or one that the lawyer promptly records and transmits to the client following an oral consent. See terminology. If it is not feasible to obtain or transmit the writing at the time the client gives informed consent, then the lawyer must obtain or transmit it within a reasonable time afterwards. See terminology. The requirement of a writing does not supplant the need in most cases for the lawyer to talk with the client, to explain the risks and advantages, if any, of representation burdened with a conflict of interest, as well as reasonably available alternatives, and to afford the client a reasonable opportunity to consider the risks and alternatives and to raise questions and concerns. Rather, the writing is required in order to impress upon clients the seriousness of the decision the client

is being asked to make and to avoid disputes or ambiguities that might later occur in the absence of a writing.

RULE 4-1.9 CONFLICT OF INTEREST; FORMER CLIENT

A lawyer who has formerly represented a client in a matter must not afterwards:

- (a) represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent;
- (b) use information relating to the representation to the disadvantage of the former client except as these rules would permit or require with respect to a client or when the information has become generally known; or
- (c) reveal information relating to the representation except as these rules would permit or require with respect to a client.

Comment

After termination of a client-lawyer relationship, a lawyer may not represent another client except in conformity with this rule. The principles in rule 4-1.7 determine whether the interests

of the present and former client are adverse. Thus, a lawyer could not properly seek to rescind on behalf of a new client a contract drafted on behalf of the former client. So also a lawyer who has prosecuted an accused person could not properly represent the accused in a subsequent civil action against the government concerning the same transaction.

The scope of a "matter" for purposes of rule 4-1.9(a) may depend on the facts of a particular situation or transaction. The lawyer's involvement in a matter can also be a question of degree. When a lawyer has been directly involved in a specific transaction, subsequent representation of other clients with materially adverse interests clearly is prohibited. On the other hand, a lawyer who recurrently handled a type of problem for a former client is not precluded from later representing another client in a wholly distinct problem of that type even though the subsequent representation involves a position adverse to the prior client. Similar considerations can apply to the reassignment of military lawyers between defense and prosecution functions within the same military jurisdiction. The underlying question is whether the lawyer was so involved in the matter that the subsequent representation can be justly regarded as a changing of sides in the matter in question.

Matters are "substantially related" for purposes of this rule if they involve the same transaction or legal dispute, or if the current matter would involve the lawyer attacking work that the lawyer performed for the former client. For example, a lawyer who has previously represented a client in securing environmental permits to build a shopping center would be precluded from representing neighbors seeking to oppose rezoning of the property on the basis of environmental considerations; however, the lawyer would not be precluded, on the grounds of substantial relationship, from defending a tenant of the completed shopping center in resisting eviction for nonpayment of rent.

Lawyers owe confidentiality obligations to former clients, and thus information acquired by the lawyer in the course of representing a client may not subsequently be used by the lawyer to the disadvantage of the client without the former client's consent. However, the fact that a lawyer has once served a client does not preclude the lawyer from using generally known information about that client when later representing another client. Information that has been widely disseminated by the media to the public, or that typically would be obtained by any reasonably prudent lawyer who had never represented the former client, should be considered generally known and ordinarily will not be disqualifying. The essential question is whether, but for having represented the former client, the lawyer would know or discover the information.

Information acquired in a prior representation may have been rendered obsolete by the passage of time. In the case of an organizational client, general knowledge of the client's policies and practices ordinarily will not preclude a subsequent representation; on the other hand, knowledge of specific facts gained in a prior representation that are relevant to the matter in question ordinarily will preclude such a representation. A former client is not required to reveal the confidential information learned by the lawyer in order to establish a substantial risk that the lawyer has confidential information to use in the subsequent matter. A conclusion about the possession of such information may be based on the nature of the services the lawyer provided the former client and information that would in ordinary practice be learned by a lawyer providing such services.

The provisions of this rule are for the protection of clients and can be waived if the former client gives informed consent. See terminology.

With regard to an opposing party's raising a question of conflict of interest, see comment to rule 4-1.7. With regard to disqualification of a firm with which a lawyer is associated, see rule 4-1.10.

Amended July 23, 1992, effective Jan. 1, 1993 (605 So.2d 252); April 25, 2002 (820 So.2d 210); March 23, 2006, effective May 22, 2006 (SC04-2246), (933 So.2d 417); November 19, 2009, effective February 1, 2010 (SC08-1890) (34 Fla.L.Weekly S628a); amended May 29, 2014, effective June 1, 2014 (SC12-2234).

RULE 4-1.10 IMPUTATION OF CONFLICTS OF INTEREST; GENERAL RULE

(a) Imputed Disqualification of All Lawyers in Firm. While lawyers are associated in a firm, none of them may knowingly represent a client when any 1 of them practicing alone would be prohibited from doing so by rule 4-1.7 or 4-1.9 except as provided elsewhere in this rule, or unless the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.

(b) Former Clients of Newly Associated Lawyer. When a lawyer becomes associated with a firm, the firm may not knowingly represent a person in the same or a substantially related matter in which that lawyer, or a firm with which the lawyer was associated, had previously represented a client whose interests are materially adverse to that person and about whom the lawyer had acquired information protected by rules 4-1.6 and 4-1.9(b) and (c) that is material to the matter.

(c) Representing Interests Adverse to Clients of Formerly Associated Lawyer. When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formally associated lawyer unless:

(1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and

(2) any lawyer remaining in the firm has information protected by rules 4-1.6 and 4-1.9(b) and (c) that is material to the matter.

(d) Waiver of Conflict. A disqualification prescribed by this rule may be waived by the affected client under the conditions stated in rule 4-1.7.

(e) Government Lawyers. The disqualification of lawyers associated in a firm with former or current government lawyers is governed by rule 4-1.11.

Comment

Definition of "firm"

With respect to the law department of an organization, there is ordinarily no question that the members of the department constitute a firm within the meaning of the Rules of Professional Conduct. However, there can be uncertainty as to the identity of the client. For example, it may not be clear whether the law department of a corporation represents a subsidiary or an affiliated corporation, as well as the corporation by which the members of the department are directly employed. A similar question can arise concerning an unincorporated association and its local affiliates.

Similar questions can also arise with respect to lawyers in legal aid. Lawyers employed in the same unit of a legal service organization constitute a firm, but not necessarily those employed in separate units. As in the case of independent practitioners, whether the lawyers should be treated as associated with each other can depend on the particular rule that is involved and on the specific facts of the situation.

Where a lawyer has joined a private firm after having represented the government, the situation is governed by rule 4-1.10(a) and (b); where a lawyer represents the government after having served private clients, the situation is governed by rule 4-1.10(c)(1). The individual lawyer involved is bound by the rules generally, including rules 4-1.6, 4-1.7, and 4-1.9.

Different provisions are thus made for movement of a lawyer from 1 private firm to another and for movement of a lawyer between a private firm and the government. The government is entitled to protection of its client confidences and, therefore, to the protections provided in rules 4-1.6, 4-1.9, and 4-1.11. However, if the more extensive disqualification in rule 4-1.10 were applied to former government lawyers, the potential effect on the government would be unduly burdensome. The government deals with all private citizens and organizations and thus has a much wider circle of adverse legal interests than does any private law firm. In these circumstances, the government's recruitment of lawyers would be seriously impaired if rule 4-1.10 were applied to the government. On balance, therefore, the government is better served in the long run by the protections stated in rule 4-1.11.

Principles of imputed disqualification

The rule of imputed disqualification stated in subdivision (a) gives effect to the principle of loyalty to the client as it applies to lawyers who practice in a law firm. Such situations can be considered from the premise that a firm of lawyers is essentially 1 lawyer for purposes of the rules governing loyalty to the client or from the premise that each lawyer is vicariously bound by the obligation of loyalty owed by each lawyer with whom the lawyer is associated. Subdivision (a) operates only among the lawyers currently associated in a firm. When a lawyer moves from 1 firm to another the situation is governed by subdivisions (b) and (c).

The rule in subdivision (a) does not prohibit representation where neither questions of client loyalty nor protection of confidential information are presented. Where 1 lawyer in a firm could not effectively represent a given client because of strong political beliefs, for example, but that lawyer will do no work on the case and the personal beliefs of the lawyer will not materially

limit the representation by others in the firm, the firm should not be disqualified. On the other hand, if an opposing party in a case were owned by a lawyer in the law firm, and others in the firm would be materially limited in pursuing the matter because of loyalty to that lawyer, the personal disqualification of the lawyer would be imputed to all others in the firm.

The rule in subdivision (a) also does not prohibit representation by others in the law firm where the person prohibited from involvement in a matter is a nonlawyer, such as a paralegal or legal secretary. Such persons, however, ordinarily must be screened from any personal participation in the matter to avoid communication to others in the firm of confidential information that both the non-lawyers and the firm have a legal duty to protect. See terminology and rule 4-5.3.

Lawyers moving between firms

When lawyers have been associated in a firm but then end their association, however, the problem is more complicated. The fiction that the law firm is the same as a single lawyer is no longer wholly realistic. There are several competing considerations. First, the client previously represented must be reasonably assured that the principle of loyalty to the client is not compromised. Second, the rule of disqualification should not be so broadly cast as to preclude other persons from having reasonable choice of legal counsel. Third, the rule of disqualification should not unreasonably hamper lawyers from forming new associations and taking on new clients after having left a previous association. In this connection, it should be recognized that today many lawyers practice in firms, that many to some degree limit their practice to one field or another, and that many move from one association to another several times in their careers. If the concept of imputed disqualification were defined with unqualified rigor, the result would be radical curtailment of the opportunity of lawyers to move from one practice setting to another and of the opportunity of clients to change counsel.

Reconciliation of these competing principles in the past has been attempted under two rubrics. One approach has been to seek per se rules of disqualification. For example, it has been held that a partner in a law firm is conclusively presumed to have access to all confidences concerning all clients of the firm. Under this analysis, if a lawyer has been a partner in one law firm and then becomes a partner in another law firm, there is a presumption that all confidences known by a partner in the first firm are known to all partners in the second firm. This presumption might properly be applied in some circumstances, especially where the client has been extensively represented, but may be unrealistic where the client was represented only for limited purposes. Furthermore, such a rigid rule exaggerates the difference between a partner and an associate in modern law firms.

The other rubric formerly used for dealing with vicarious disqualification is the appearance of impropriety and was proscribed in former Canon 9 of the Code of Professional Responsibility. This rubric has a two-fold problem. First, the appearance of impropriety can be taken to include any new client-lawyer relationship that might make a former client feel anxious. If that meaning were adopted, disqualification would become little more than a question of subjective judgment by the former client. Second, since "impropriety" is undefined, the term "appearance of impropriety" is question-begging. It therefore has to be recognized that the problem of imputed

disqualification cannot be properly resolved either by simple analogy to a lawyer practicing alone or by the very general concept of appearance of impropriety.

A rule based on a functional analysis is more appropriate for determining the question of vicarious disqualification. Two functions are involved: preserving confidentiality and avoiding positions adverse to a client.

Confidentiality

Preserving confidentiality is a question of access to information. Access to information, in turn, is essentially a question of fact in particular circumstances, aided by inferences, deductions, or working presumptions that reasonably may be made about the way in which lawyers work together. A lawyer may have general access to files of all clients of a law firm and may regularly participate in discussions of their affairs; it should be inferred that such a lawyer in fact is privy to all information about all the firm's clients. In contrast, another lawyer may have access to the files of only a limited number of clients and participate in discussion of the affairs of no other clients; in the absence of information to the contrary, it should be inferred that such a lawyer in fact is privy to information about the clients actually served but not information about other clients.

Application of subdivisions (b) and (c) depends on a situation's particular facts. In any such inquiry, the burden of proof should rest upon the firm whose disqualification is sought.

Subdivisions (b) and (c) operate to disqualify the firm only when the lawyer involved has actual knowledge of relevant information protected by rules 4-1.6 and 4-1.9(b) and (c). Thus, if a lawyer while with 1 firm acquired no knowledge or information relating to a particular client of the firm and that lawyer later joined another firm, neither the lawyer individually nor the second firm is disqualified from representing another client in the same or a related matter even though the interests of the 2 clients conflict.

Independent of the question of disqualification of a firm, a lawyer changing professional association has a continuing duty to preserve confidentiality of information about a client formerly represented. See rules 4-1.6 and 4-1.9.

Adverse positions

The second aspect of loyalty to client is the lawyer's obligation to decline subsequent representations involving positions adverse to a former client arising in substantially related matters. This obligation requires abstention from adverse representation by the individual lawyer involved, but does not properly entail abstention of other lawyers through imputed disqualification. Hence, this aspect of the problem is governed by rule 4-1.9(a). Thus, if a lawyer left 1 firm for another, the new affiliation would not preclude the firms involved from continuing to represent clients with adverse interests in the same or related matters so long as the conditions of rule 4-1.10(b) and (c) concerning confidentiality have been met.

Rule 4-1.10(d) removes imputation with the informed consent of the affected client or former client under the conditions stated in rule 4-1.7. The conditions stated in rule 4-1.7 require the lawyer to determine that the representation is not prohibited by rule 4-1.7(b) and that each

affected client or former client has given informed consent to the representation, confirmed in writing or clearly stated on the record. In some cases, the risk may be so severe that the conflict may not be cured by client consent. For a definition of informed consent, see terminology.

Where a lawyer is prohibited from engaging in certain transactions under rule 4-1.8, subdivision (k) of that rule, and not this rule, determines whether that prohibition also applies to other lawyers associated in a firm with the personally prohibited lawyer.

Amended July 23, 1992, effective Jan. 1, 1993 (605 So.2d 252); March 23, 2006, effective May 22, 2006 (SC04-2246), (933 So.2d 417); amended July 7, 2011, effective October 1, 2011 (SCI0-1968) amended May 29, 2014, effective June 1, 2014 (SC12-2234).

RULE 4-1.11 SPECIAL CONFLICTS OF INTEREST FOR FORMER AND CURRENT GOVERNMENT OFFICERS AND EMPLOYEES

(a) Representation of Private Client by Former Public Officer or Employee. A lawyer who has formerly served as a public officer or employee of the government:

(1) is subject to rule 4-1.9(b) and (c); and

(2) shall not otherwise represent a client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency gives its informed consent, confirmed in writing, to the representation.

(b) Representation by Another Member of the Firm. When a lawyer is disqualified from representation under subdivision (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:

(1) the disqualified lawyer is timely screened from any participation in the matter and is directly apportioned no part of the fee therefrom; and

(2) written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this rule.

(c) Use of Confidential Government Information. A lawyer having information that the lawyer knows is confidential government information about a person acquired when the lawyer was a public officer or employee may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. As used in this rule, the term "confidential government information" means information that has been obtained under governmental authority and which, at the time this rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose and which is not otherwise available to the public. A firm with which that lawyer is associated may undertake or continue representation in the matter only if the disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom.

(d) Limits on Participation of Public Officer or Employee. A lawyer currently serving as a public officer or employee:

(1) is subject to rules 4-1.7 and 4-1.9; and

(2) shall not:

(A) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless the appropriate government agency gives its informed consent; or

(B) negotiate for private employment with any person who is involved as a party or as attorney for a party in a matter in which the lawyer is participating personally and substantially.

(e) **Matter Defined.** As used in this rule, the term "matter" includes:

(1) any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest, or other particular matter involving a specific party or parties; and

(2) any other matter covered by the conflict of interest rules of the appropriate government agency.

Comment

A lawyer who has served or is currently serving as a public officer or employee is personally subject to the rules of professional conduct, including the prohibition against concurrent conflicts of interest stated in rule 4-1.7. In addition, such a lawyer may be subject to statutes and government regulations regarding conflict of interest. Such statutes and regulations may circumscribe the extent to which the government agency may give consent under this rule. See terminology for definition of informed consent.

Subdivisions (a)(1), (a)(2), and (d)(1) restate the obligations of an individual lawyer who has served or is currently serving as an officer or employee of the government toward a former government or private client. Rule 4-1.10 is not applicable to the conflicts of interest addressed by this rule. Rather, subdivision (b) sets forth a special imputation rule for former government lawyers that provides for screening and notice. Because of the special problems raised by imputation within a government agency, subdivision (d) does not impute the conflicts of a lawyer currently serving as an officer or employee of the government to other associated government officers or employees, although ordinarily it will be prudent to screen such lawyers.

Subdivisions (a)(2) and (d)(2) apply regardless of whether a lawyer is adverse to a former client and are thus designed not only to protect the former client, but also to prevent a lawyer from exploiting public office for the advantage of another client. For example, a lawyer who has pursued a claim on behalf of the government may not pursue the same claim on behalf of a later private client after the lawyer has left government service, except when authorized to do so by the government agency under subdivision (a). Similarly, a lawyer who has pursued a claim on behalf of a private client may not pursue the claim on behalf of the government, except when authorized to do so by subdivision (d). As with subdivisions (a)(1) and (d)(1), rule 4-1.10 is not applicable to the conflicts of interest addressed by these subdivisions.

This rule represents a balancing of interests. On the one hand, where the successive clients are a government agency and another client, public or private, the risk exists that power or discretion vested in that agency might be used for the special benefit of the other client. A lawyer should not be in a position where benefit to the other client might affect performance of the lawyer's professional functions on behalf of the government. Also, unfair advantage could accrue to the other client by reason of access to confidential government information about the client's adversary obtainable only through the lawyer's government service. On the other hand, the rules governing lawyers presently or formerly employed by a government agency should not be so restrictive as to inhibit transfer of employment to and from the government. The government has a legitimate need to attract qualified lawyers as well as to maintain high ethical standards. Thus, a former government lawyer is disqualified only from particular matters in which the lawyer participated personally and substantially. The provisions for screening and waiver in subdivision (b) are necessary to prevent the disqualification rule from imposing too severe a deterrent against entering public service. The limitation of disqualification in subdivisions (a)(2) and (d)(2) to matters involving a specific party or parties, rather than extending disqualification to all substantive issues on which the lawyer worked, serves a similar function.

When a lawyer has been employed by 1 government agency and then moves to a second government agency, it may be appropriate to treat that second agency as another client for purposes of this rule, as when a lawyer is employed by a city and subsequently is employed by a federal agency. However, because the conflict of interest is governed by subdivision (d), the latter agency is not required to screen the lawyer as subdivision (b) requires a law firm to do. The question of whether 2 government agencies should be regarded as the same or different clients for conflict of interest purposes is beyond the scope of these rules. See rule 4-1.13 comment, government agency.

Subdivisions (b) and (c) contemplate a screening arrangement. See terminology (requirements for screening procedures). These subdivisions do not prohibit a lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly relating the attorney's compensation to the fee in the matter in which the lawyer is disqualified.

Notice, including a description of the screened lawyer's prior representation and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent.

Subdivision (c) operates only when the lawyer in question has knowledge of the information, which means actual knowledge; it does not operate with respect to information that merely could be imputed to the lawyer.

Subdivisions (a) and (d) do not prohibit a lawyer from jointly representing a private party and a government agency when doing so is permitted by rule 4-1.7 and is not otherwise prohibited by law.

For purposes of subdivision (e) of this rule, a "matter" may continue in another form. In determining whether 2 particular matters are the same, the lawyer should consider the extent to which the matters involve the same basic facts, the same or related parties, and the time elapsed.

Amended July 23, 1992, effective Jan. 1, 1993 (605 So.2d 252);, March 23,2006, effective May 22, 2006 (SC04-2246), (933 So.2d 417); amended July 7, 2011, effective October 1, 2011 (SC!0-1968).

RULE 4-1.12 FORMER JUDGE OR ARBITRATOR, MEDIATOR OR OTHER THIRD-PARTY NEUTRAL

(a) Representation of Private Client by Former Judge, Law Clerk, or Other Third-Party Neutral. Except as stated in subdivision (d), a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge or other adjudicative officer or law clerk to such a person or as an arbitrator, mediator, or other third-party neutral, unless all parties to the proceeding give informed consent, confirmed in writing.

(b) Negotiation of Employment by Judge, Law Clerk, or Other Third-Party Neutral. A lawyer shall not negotiate for employment with any person who is involved as a party or as attorney for a party in a matter in which the lawyer is participating personally and substantially as a judge or other adjudicative officer or as an arbitrator, mediator, or other third-party neutral. A lawyer serving as a law clerk to a judge or other adjudicative officer may negotiate for employment with a party or attorney involved in a matter in which the clerk is participating personally and substantially, but only after the lawyer has notified the judge or other adjudicative officer.

(c) Imputed Disqualification of Law Firm. If a lawyer is disqualified by subdivision (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in the matter unless:

(1) the disqualified lawyer is timely screened from any participation in the matter and is directly apportioned no part of the fee therefrom; and

(2) written notice is promptly given to the parties and any appropriate tribunal to enable it to ascertain compliance with the provisions of this rule.

(d) Exemption for Arbitrator as Partisan. An arbitrator selected as a partisan of a party in a multimember arbitration panel is not prohibited from subsequently representing that party.

Comment

This rule generally parallels rule 4-1.11. The term "personally and substantially" signifies that a judge who was a member of a multimember court, and thereafter left judicial office to practice law, is not prohibited from representing a client in a matter pending in the court, but in which the former judge did not participate. So also the fact that a former judge exercised administrative responsibility in a court does not prevent the former judge from acting as a lawyer in a matter where the judge had previously exercised remote or incidental administrative

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PROFESSIONAL ETHICS OF THE FLORIDA BAR

OPINION 09-1 December 10, 2010

A lawyer may not communicate with officers, directors, or managers of State Agency, or State Agency employees who are directly involved in the matter, and other State Agency employees whose acts or omissions in connection with the matter can be imputed to State Agency about the subject matter of a specific controversy or matter on which a lawyer knows or has reason to know that a governmental lawyer is providing representation unless the agency's lawyer first consents to the communication. A lawyer may communicate with other agency employees who do not fall within the above categories, and may communicate with employees who are considered represented by State Agency's lawyer on subjects unrelated to those matters in which the agency lawyer is known to be providing representation. The lawyer may be required to identify himself or herself as a lawyer who is representing a party in making those contacts. Lawyers communicating with agency personnel are cautioned not to either purposefully or inadvertently circumvent the constraints imposed by Rule 4-4.2 and Rule 4-4.3 in their communications with government employees and officials. If a lawyer does not know or is in doubt as to whether State Agency is represented on a particular matter or whether particular State Agency's employees or officials are represented for purposes of the rule, the lawyer should ask State Agency's lawyer if the person is represented in the matter before making the communication.

[Note: This opinion was approved as revised by the Board of Governors at its December 10, 2010 meeting.]

RPC: 4-4.2, 4-4.3

Opinions: 78-4, 87-2

A member of The Florida Bar has requested an advisory ethics opinion. The operative facts as presented in the Inquiring Lawyer's letter are as follows.

Inquirer's firm represents financial institutions in applying for charter approvals and other necessary approvals with State Agency and federal regulatory agencies, and also in regulatory issues that may arise with such agencies. Occasionally, Inquirer's firm may represent clients in administrative or judicial proceedings in which State Agency is the opposing party.

Inquirer's firm currently is representing four clients in administrative or judicial proceedings involving State Agency which handles state regulatory matters involving the licensing, examination, and supervision of financial institutions. Legal counsel for State Agency has advised Inquirer's firm that all communications to any employee of State Agency from any lawyer in the firm pertaining to any of the firm's clients must go through the legal department of State Agency, even when such client matters are not connected in any way to the four litigation cases. The Inquirer asks whether Inquirer's firm is prohibited by Rule 4-4.2 from directly communicating with all employees of State Agency, when such communications do not pertain to any adversarial proceeding between the firm's clients and State Agency.

Rule 4-4.2 of the Rules of Professional Conduct of The Florida Bar is the governing ethical standard:

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer.

Notwithstanding the foregoing, an attorney may, without such prior consent, communicate with another's client in order to meet the requirements of any court rule, statute or contract requiring notice or service of process directly on an adverse party, in which event the communication shall be strictly restricted to that required by the court rule, statute or contract, and a copy shall be provided to the adverse party's attorney.

The Comment to the rule states, in relevant part:

This rule contributes to the proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer in a matter ...and the uncounseled disclosure of information relating to the representation.

This rule does not prohibit communication with a represented person, or an employee or agent of such a person, concerning matters outside the representation. For example, the existence of a controversy between a government agency and a private party, or between 2 organizations, does not prohibit a lawyer for either from communicating with nonlawyer representatives of the other regarding a separate matter. Parties to a matter may communicate directly with each other, and a lawyer is not prohibited from advising a client concerning a communication that the client is legally entitled to make, provided the client is not used to indirectly

violate the Rules of Professional Conduct. Also, a lawyer having independent justification for communicating with the other party is permitted to do so. Permitted communications include, for example, the right of a party to a controversy with a government agency to speak with government officials about the matter.

In the case of a represented organization, this rule prohibits communications with a constituent of the organization who supervises, directs, or regularly consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter, or whose act or omission in connection with that matter may be imputed to the organization for purposes of civil or criminal liability ...

The prohibition on communications with a represented person only applies in circumstances where the lawyer knows that the person is in fact represented in the matter to be discussed. This means that the lawyer has actual knowledge of the fact of the representation; but such actual knowledge may be inferred from the circumstances. Thus, the lawyer cannot evade the requirement of obtaining the consent of counsel by closing eyes to the obvious

Several issues must be considered in responding to the requested advisory opinion. The first is whether all persons within an organization are deemed to be represented by the organization's counsel for the purposes of this rule. As indicated in the comments to Rule 4-4.2 quoted above, a lawyer would be ethically precluded from communicating with employees of governmental entities or agencies who are considered represented by the government's lawyer for purposes of this rule with regard to matters on which the agency is known to be represented by a lawyer unless the entity's lawyer consents to the communication.

Florida Ethics Opinion 78-4 addresses this sometimes difficult question of who within an organizational structure is considered to be a "party" within the meaning of the rule. (Opinion 78-4 was decided under the old Code of Professional Responsibility, which prohibited *ex parte* contacts with a "party" represented by counsel. While the current rule refers to a "person" represented by counsel, the rationale of the opinion nevertheless remains applicable here.) Attempting to balance one party's need to conduct pre-suit investigation by interviewing certain members of the opponent corporation against the organization's interest in preventing the unadvised disclosure of particular information, the Committee declined to adopt a rule that would prohibit all contacts with organizational employees no matter how removed from the conduct in question. Instead, the

Committee found ex parte communications improper only with regard to employees who are "officers, directors or managing agents" but not other employees "unless they have been directly involved in the incident or matter giving rise to the investigation or litigation." In Florida Ethics Opinion 87-2, the Committee extended the rationale of Opinion 78-4 to government entities and noted that the Comment to Rule 4-4.2, in addition to precluding direct contact with an agency's management, also would preclude unauthorized communications with persons whose acts or omissions in connection with the matter could be imputed to the organization.

Thus, regarding a matter in which State Agency is represented, Inquirer and the firm must obtain the consent of State Agency's lawyer before communicating with State Agency's officers, directors or managers, or employees who are directly involved in the matter, or with public officials or employees whose acts or omissions in connection with the matter can be imputed to State Agency.

The second issue that must be addressed is when the prohibition arises. Rule 4-4.2 is not limited to matters in litigation and may extend to matters on which litigation has not yet commenced, as well as to specific transactional or non-litigation matters on which the agency's lawyer is providing representation. Pursuant to the language of the Comment, however, direct communications with represented persons, including protected employees, on matters other than specific matters for which the agency lawyer is providing representation are permissible. See Florida Ethics Opinion 94-4. Moreover, the Comments limit the scope of the Rule to those circumstances where "the lawyer knows that the person [agency] is in fact represented in the matter to be discussed." Thus, an agency lawyer need not enter a formal appearance in order to "in fact" represent his or her agency on a particular matter, nor must the agency lawyer give other lawyers formal notice of such representation. However, as suggested by the Comment, there must be actual knowledge by the non-agency lawyer of representation by the agency lawyer on the matter being discussed in order for Rule 4-4.2 to apply; but such actual knowledge may be inferred from the circumstances. As a consequence, Inquirer and the firm are not precluded from communicating with employees or any other employee of State Agency regarding subjects unrelated to those specific matters on which the representation of the State Agency's lawyer is known to Inquirer and the firm. In this instance, however, the Inquirer or members of the firm may be required to identify himself or herself as a lawyer representing a client to comply with Rule 4-4.3 Dealing with Unrepresented Persons.

The final question that must be resolved is whether, because State Agency has a

general counsel, the general counsel is effectively representing the agency on all matters, merely by virtue of being in the continuous employ of the agency, thus preventing all communications with the State Agency's public officials and employees on all subjects. The Comments described above suggest that this is not the intent of the Rule. In addition, the Comments to the Rule expressly recognize that lawyers with an "independent justification" may communicate with a represented party.

Florida Ethics Opinion 78-4 also addresses this issue+. The Professional Ethics Committee addressed two questions:

(1) When is a party sufficiently "represented by a lawyer" to require application of DR 7-104(A)(1) so as to prohibit communication with the party and, in specific, must litigation have commenced for the DR to apply? (2) Where a potential suit or pending suit involves a corporation, who in the corporate structure is considered to be a "party" within the meaning of the (Rule)?

The Committee's unanimous answer to the first question is that representation of a party commences whenever an attorney-client relationship has been established with regard to the matter in question, regardless of whether or not litigation has commenced. In the opinion of the majority of the Committee, in the case of even an individual or corporation that has general counsel representing the individual or corporation in all legal matters, the DR would require communication on the matter to be with the party's attorney.

Florida Ethics Opinion 87-2 extended the rationale of Opinion 78-4 to government agencies, as discussed above, and made no exception for contacts with personnel of government agencies.

In view of the Comments' clarification that there must be knowledge that the other party is represented in a particular matter and that the bar on communications does not apply to matters outside the representation, Rule 4-4.2 should not be read to bar all communications with government officials and employees merely because the government entity retains a general counsel or other continuously employed lawyers. Conversely, the rule cannot be read to allow lawyers representing a client to approach represented public officials and employees to make inquiry about a matter, the status of a matter, or obtain statements about a matter without affording such officials and employees an opportunity to discuss with government counsel the advisability of entertaining the communication. If the lawyer representing a client knows that the public official or employee is represented in the matter, the

lawyer must obtain the prior consent of the government lawyer. If the lawyer representing a client does not know that the public official or employee is represented in a matter, the lawyer should inquire whether the person is represented in the matter. In all instances, to comply with other provisions of the Rules, the lawyer must identify himself or herself to the public official or employee as a lawyer who is representing a client. Rule 4-4.3 and Florida Ethics Opinion 78-4.

In conclusion, Rule 4-4.2, as clarified by its Comments, prohibits communications with officers, directors, or managers of State Agency, or State Agency employees who are directly involved in the matter, and other State Agency employees whose acts or omissions in connection with the matter can be imputed to State Agency about the subject matter of a specific controversy or matter on which a lawyer knows or has reason to know that a governmental lawyer is providing representation unless the agency's lawyer first consents to the communication. The Rule does not prohibit a lawyer from communicating with other agency employees who do not fall within the above categories, nor does it prohibit a lawyer from communicating with employees who are considered represented by State Agency's lawyer for purposes of this rule on subjects unrelated to those matters in which the agency lawyer is actually known to be providing representation. The lawyer may be required to identify himself or herself as a lawyer who is representing a party. Rule 4-4.3 and Florida Ethics Opinion 78-4.

Lawyers communicating with agency personnel must be cautioned not to either purposefully or inadvertently circumvent the constraints imposed by Rule 4-4.2 and Rule 4-4.3 in their communications with government employees and officials. The right to communicate directly with agency personnel about matters unrelated to those on which the agency lawyers are providing specific legal representation must not be used as a vehicle for engaging in communications that are barred by the rule. If the Inquirer does not know or is in doubt as to whether State Agency is represented on a particular matter or whether particular State Agency's employees or officials are represented for purposes of the rule, Inquirer should ask State Agency's lawyer if the person is represented in the matter before making the communication. In all instances, the Inquirer may be required to identify himself or herself as a lawyer who is representing a client.

[Revised: 08-24-2011]

PROFESSIONAL ETHICS OF THE FLORIDA BAR

OPINION 10-2

September 24,2010

A lawyer who chooses to use Devices that contain Storage Media such as printers, copiers, scanners, and facsimile machines must take reasonable steps to ensure that client confidentiality is maintained and that the Device is sanitized before disposition, including: (1) identification of the potential threat to confidentiality along with the development and implementation of policies to address the potential threat to confidentiality; (2) inventory of the Devices that contain Hard Drives or other Storage Media; (3) supervision of nonlawyers to obtain adequate assurances that confidentiality will be maintained; and (4) responsibility for sanitization of the Device by requiring meaningful assurances from the vendor at the intake of the Device and confirmation or certification of the sanitization at the disposition of the Device.

RPC: 4-1.1, 4-1.6(a), 4-5.3(b)

The Professional Ethics Committee has been asked by the Florida Bar Board of Governors to write an opinion addressing the ethical obligations of lawyers regarding information stored on hard drives. An increasing number of devices such as computers, printers, copiers, scanners, cellular phones, personal digital assistants ("PDA's"), flash drives, memory sticks, facsimile machines and other electronic or digital devices (collectively, "Devices") now contain hard drives or other data storage media¹ (collectively "Hard Drives" or "Storage Media") that can store information? Because many lawyers use these Devices to assist in the practice of law and in doing so intentionally and unintentionally store their clients' information on these Devices, it is important for lawyers to recognize that the ability of the Devices to store information may present potential ethical problems for lawyers.

For example, when a lawyer copies a document using a photocopier that contains a hard drive, the document is converted into a file that is stored on the copier's hard drive. This document usually remains on the hard drive until it is overwritten or deleted. The lawyer may choose to later sell the photocopier or return it to a leasing company. Disposal of the device without first removing the information can result in the inadvertent disclosure of confidential information.

Duty of Confidentiality

Lawyers have an ethical obligation to protect information relating to the representation of a client. Rule 4-1.6(a) of the Rules Regulating the Florida Bar addresses the duty of confidentiality and states:

(a) **Consent Required to Reveal Information.** A lawyer shall not reveal information relating to representation of a client except as stated in subdivisions (b), (c), and (d), unless the client gives informed consent.

The comment to the rule further states:

The confidentiality rule applies not merely to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or by law.

A lawyer must ensure confidentiality by taking reasonable steps to protect all confidential information under the lawyer's control. Those reasonable steps include identifying areas where confidential information could be potentially exposed. Rule 4-1.1 addresses a lawyer's duty of competence:

Competence A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.

The comment to the rule further elaborates:

To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law *and its practice*, engage in continuing study and education, and comply with all continuing legal education requirements to which the lawyer is subject.

(emphasis added).

If a lawyer chooses to use these Devices that contain Storage Media, the lawyer has a duty to keep abreast of changes in technology to the extent that the lawyer can identify potential threats to maintaining confidentiality. The lawyer must learn such details as whether the Device has the ability to store confidential information, whether the information can be accessed by unauthorized parties, and who can potentially have access to the information. The lawyer must also be aware of

different environments in which confidential information is exposed such as public copy centers, hotel business centers, and home offices. The lawyer should obtain enough information to know when to seek protection and what Devices must be sanitized, or cleared of all confidential information, before disposal or other disposition. Therefore, the duty of competence extends from the receipt, i.e., when the lawyer obtains control of the Device, through the Device's life cycle, and until disposition of the Device, including after it leaves the control of the lawyer. Further, while legal matters are beyond the scope of an ethics opinion, a lawyer should be aware that depending on the nature of the information, misuse of these Devices could result in inadvertent violation of state and federal statutes governing the disclosure of sensitive personal information such as medical records, social security numbers, criminal arrest records, etc.

Duty to Supervise

The lawyer must regulate not only the lawyer's own conduct but must take reasonable steps to ensure that all nonlawyers over whom the lawyer has supervisory responsibility adhere to the duty of confidentiality as well. Rule 4-5.3(b) states:

(b) Supervisory Responsibility. With respect to a nonlawyer employed or retained by or associated with a lawyer or an authorized business entity as defined elsewhere in these Rules Regulating The Florida Bar:

- (1) a partner, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;
- (2) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and
- (3) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(A) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(B) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

A lawyer's supervisory responsibility extends not only to the lawyer's own employees but over entities outside the lawyer's firm with whom the lawyer contracts to assist in the care and maintenance of the Devices in the lawyer's control. If a nonlawyer will have access to confidential information, the lawyer must obtain adequate assurances from the nonlawyer that confidentiality of the information will be maintained.

Sanitization

A lawyer has a duty to obtain adequate assurances that the Device has been stripped of all confidential information before disposition of the Device. If a vendor or other service provider is involved in the sanitization of the Device, such as at the termination of a lease agreement or upon sale of the Device, it is not sufficient to merely obtain an agreement that the vendor will sanitize the Device upon sale or turn back of the Device. The lawyer has an affirmative obligation to ascertain that the sanitization has been accomplished, whether by some type of meaningful confirmation, by having the sanitization occur at the lawyer's office, or by other similar means.

Further, a lawyer should use care when using Devices in public places such as at copy centers, hotel business centers, and outside offices where the lawyer and those under the lawyer's supervision have little or no control. In such situations, the lawyer should inquire and determine whether use of such Devices would preserve confidentiality under these rules.

In conclusion, when a lawyer chooses to use Devices that contain Storage Media, the lawyer must take reasonable steps to ensure that client confidentiality is maintained and that the Device is sanitized before disposition. These reasonable steps include: (1) identification of the potential threat to confidentiality along with the development and implementation of policies to address the potential threat to confidentiality; (2) inventory of the Devices that contain Hard Drives or other Storage Media; (3) supervision of nonlawyers to obtain adequate assurances that confidentiality will be maintained; and (4) responsibility for sanitization of the Device by requiring meaningful assurances from the vendor at the intake of the Device and confirmation or certification of the sanitization at the disposition of the Device.

¹.As used in this opinion, Storage Media is any media that stores digital

representations of documents.

· See Brian Smithson, *The IEEE 2600 Series: An Introduction to New Security Standards for Hardcopy Devices*, **ISSA Journal**, Nov. 2009, at 28; Holly Herman, *Experts Warn Copiers Can Be Fertile Ground for ID Thieves*, **Reading Eagle** (**Jun.** 2, 2010, 12:28:54 P.M.), <http://readingeagle.com/article.aspx?id=222523>; Mark Huffman, *Digital Copiers Could Be an Identity Theft Threat*, ConsumerAffairs.com (May 19, 2010), http://www.consumeraffairs.com/news04/20_10/05/digital_copiers.html; Armen Keteyian, *Digital Photocopiers Loaded with Secrets*, CBSNews.com (April 15, 2010), http://www.cbsnews.com/stories/20_10/04/19/eveningnews/main6412439.shtml; Gregg Keizer, *Photocopiers: The Newest ID Theft Threat*, **Computerworld** (March 14, 2007), http://www.computerworld.com/s/article/90_13104/Photocopiers_The_newest_ID_theft_threat.

[Revised: 09-24-2014]

PROFESSIONAL ETHICS OF THE FLORIDA BAR

OPINION 77-30 (Reconsideration)

September 29, 2006

Whether a conflict of interest involving representation of an individual county commissioner before the Florida Commission on Ethics by a county attorney may be waived depends on the individual circumstances of the matter. In cases where the conflict may be waived, both the individual commissioner and the county must give informed consent, confirmed in writing, and consent on behalf of the county must be given by someone other than the individual commissioner to be represented.

RPC: 4-1.7, 4-1.13(e)

Opinion: 77-30

Florida Statutes: §§ 111.065 and 111.07

The Florida Bar Board of Governors has revised Florida Ethics Opinion 77-30 to clarify its views on conflicts involving a county attorney's representation of a county commissioner charged with ethics violations before the Florida Commission on Ethics. In the 1978 opinion, the Professional Ethics Committee gave its opinion on the following circumstances:

A county commissioner is charged before the ethics commission with misuse of public office in directing county employees to work on private property during normal working hours with county road equipment. The subject commissioner asks the county attorney to represent him as legal counsel. The county attorney is on contract with the county and engages in the private practice of law in addition to his work for the county.

The Committee found that the "situation represents an inherent conflict and the appearance of impropriety."

The Committee's opinion was based on the disciplinary rules and ethical canons. Since the opinion was written, the Rules Regulating The Florida Bar were adopted. Rule 4-1.7 states as follows:

(a) **Representing Adverse Interests.** Except as provided in subdivision (b), a lawyer shall not represent a client if:

(1) the representation of 1 client will be directly adverse to another client; or

(2) there is a substantial risk that the representation of 1 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.

(b) Notwithstanding the existence of a conflict of interest under subdivision (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a position adverse to another client when the lawyer represents both clients in the same proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing or clearly stated on the record at a hearing.

The Board has heard from both the Florida Commission on Ethics, which has indicated that individual commissioners are frequently represented by a local government lawyer despite the opinion's existence, and from the City, County and Local Government Law Section, which believes that the opinion is overbroad.

The Board agrees with the City, County and Local Government Law Section that the opinion may be overbroad, particularly the following statement:

A county attorney represents the county commission, not the individual members serving on it. He places his responsibility as county attorney in jeopardy when he accepts an engagement to represent a particular commissioner before the Florida Ethics Commission.

A county attorney may be required to represent individual commissioners by ordinance or charter or by contract with the county. Florida statutes also require particular governmental entities to provide representation to individual constituents in certain circumstances. See, e.g., Florida Statutes §§ 111.065 and 111.07. It is a legal and factual question, outside the scope of an ethics opinion, whether a county attorney is required to represent individual commissioners.

The Board is of the opinion that there are some conflicts involving the representation of individual county commissioners that may be waived by both the individual commissioner and the county. For example, if a frivolous ethics complaint is filed against an individual commissioner and the county attorney can readily determine that the allegations are unfounded, the county attorney may represent the individual commissioner if both the individual commissioner and the county give informed consent, confirmed in writing, to the dual representation. Someone other than the individual commissioner to be represented must give informed consent on behalf of the county. Rule 4-1.13(e), Rules of Professional Conduct.

Whether a county attorney may represent an individual commissioner in a particular ethics complaint will depend on the circumstances of the individual situation, and such an analysis must occur on a case by case basis.

[Revised: 09-13-2011]

PROFESSIONAL ETHICS OF THE FLORIDA BAR
OPINION 12-2
(June 22, 2012)

A lawyer may provide their log-in credentials to theE-Portal to trusted nonlawyer employees for the employees to file court documents that have been reviewed and approved by the lawyer, who remains responsible for the filing. The lawyer must properly supervise the nonlawyer, should monitor the nonlawyer's use of the E-Portal, and should immediately change the lawyer's password if the nonlawyer employee leaves the lawyer's employ or shows untrustworthiness in use of theE-Portal.

[This opinion was affirmed by the Board of Governors at its December 7, 2012 meeting.]

RPC: 4-5.3, 4-5.5

Opinion: 87-11

Case: *In re Amendments to the Florida Rules of Civil Procedure et al.*, **102 So.3d 451, (Fla. 2012)**

Rules of Judicial

Administration: 2.060(d), 2.420, 2.425, 2.515

The Professional Ethics Committee has been asked by The Florida Bar Board of Governors to issue a formal opinion on whether lawyers may permit supervised nonlawyers to use the lawyer's access credentials (log-in name and password) for filing documents with a court using theE-Portal.

The Supreme Court of Florida adopted amendments on June 21, 2012, to Florida rules of court requiring mandatory electronic filing of all documents filed in Florida courts.¹ Implementation of this order is by a schedule adopted by the Court in an administrative order. The implementation of mandatory filing will be phased in over time. ¹Filing will occur via theE-Portal, which is a single website to serve all Florida courts. ¹The Florida Court's E-Filing Authority oversees theE-Portal and "was created pursuant to legislative directive to provide oversight to the development, implementation and operation of a statewide portal designed to process the filing of court documents."²

Currently, theE-Portal permits only lawyers to obtain a user name and password

for filing. Clerk's offices have received communications from lawyers and others asking if a lawyer may provide the lawyer's log-in name and password to nonlawyers who are supervised by the lawyer so that the nonlawyer may file documents electronically on the lawyer's behalf.

TheE-Portal Authority Board met on June 15, 2011, and unanimously adopted a motion to allow a non-lawyer to use a lawyer's credentials to electronically file documents via theE-Portal under the direction or supervision of the lawyer. § On September 28, 2011, theE-Filing Authority Board voted to retract the policy that was adopted on June 15, 2011 and voted not to take a position on the issue. ¹

The Florida Courts Technology Commission, which is responsible for developing standards fore-filing, adopted at its September 26-27, 2011 meeting, a requirement to add the following certification to theE-Portal:

I certify that the filing transmitted through the portal, including all attachments contains no confidential or sensitive information, or that any such confidential or sensitive information has been properly protected by complying with the provisions of Rules 2.420 and 2.425, Florida Rules of Judicial Administration. ii

The certification was modified by the Florida Courts Technology Commission at its May 8-9, 2012 meeting as follows:

The attorney filing, or directing and authorizing this filing (including all attachments), certifies that it contains no confidential or sensitive information, or that any such confidential or sensitive information has been properly protected by complying with the revisions of Rules 2.420 and 2.425, Florida Rules of Judicial Administration.-

The certification, which as of the date of this opinion had not yet been implemented, may be in the form of a check box required to be checked before submitting a filing through the e-portal or an affirmative statement regarding compliance with the referenced rules.

Rule 4-5.3 addresses a lawyer's responsibility for the conduct of nonlawyer employees, and provides in subdivision (c) that "[a]lthough paralegals or legal assistants may perform the duties delegated to them by the lawyer without the presence or active involvement of the lawyer, the lawyer shall review and be responsible for the work product of the paralegals or legal assistants." The comment further explains a lawyer's ability to delegate, in stating that "[i]f an activity requires the independent judgment and participation of the lawyer, it

cannot be properly delegated to a nonlawyer employee."

This Committee has previously opined that a lawyer may not permit a nonlawyer employee to sign the lawyer's name together with the nonlawyer's initials to discovery and notices of hearing in Florida Ethics Opinion 87-11. That opinion was based, in part, on the then existing Rule of Judicial Administration 2.060(d) which requires that all pleadings be signed by at least one lawyer of record in the matter who is licensed in Florida or who has obtained permission to appear in the matter in which the pleading is filed. Current Rule of Judicial Administration 2.515 is substantially the same. This Committee was of the opinion that permitting a nonlawyer to sign pleadings would be assisting in the unlicensed practice of law, in violation of Rule 4-5.5, Rules of Professional Conduct.

The Committee is of the opinion that a properly supervised nonlawyer may use the credentials of a lawyer to file documents via theE-Portal at that lawyer's direction. Such a task is akin to a nonlawyer transporting a properly prepared and signed pleading to the clerk's office and physically filing it, which is a ministerial task that may be properly delegated. The Committee cautions that the lawyer will remain responsible for the nonlawyer's conduct and must properly supervise the nonlawyer. A prudent lawyer will monitor the nonlawyer's activity and should immediately change the lawyer's password if a nonlawyer with access to the lawyer's credentials leaves the lawyer's employ or demonstrates unreliability in using theE-Portal. The Committee's opinion would remain unchanged if the certification in its current form is added to theE-Portal as a check box upon filing documents so long as the lawyer specifically reviews the documents to be filed, ensures that the documents are in compliance with the confidentiality provisions of Florida Rules of Judicial Administration 2.420 and 2.425, and instructs the nonlawyer employee to make the certification upon filing the documents. This opinion is limited to filing documents via theE-Portal and specifically does not address the issue of electronic signing of pleadings.

¹. *In re Amendments to the Florida Rules of Civil Procedure, the Florida Rules of Judicial Administration, the Florida Rules of Criminal Procedure, the Florida Probate Rules, the Florida Small Claims Rules, the Florida Rules of Juvenile Procedure, the Florida Rules of Appellate Procedure, and the Florida Family Law Rules of Procedure- Electronic Filing*. ___ So.3d ___, 37 Fla. L. Weekly S638 (Fla. 2012).

2. *Id.*

³. http://www.flclerks.com/e-Filing_Authority/Resources/EFA_Documents/SC11-399/11-399_091912_OrderReqResponse.pdf

⁴. *In re Amendments, supra.*

⁵. *E-Filing Authority Board website:*
http://www.flclerks.com/eFiling_authority.html

⁶. *E-Filing Authority Board June 15, 2011 minutes, available at:*
http://www.flclerks.com/e-Filing_Authority/Resources/Minutes/2011-2012_Minutes/Minutes-June_2011.pdf

⁷. *E-Filing Authority Board September 28, 2011 minutes, available at:*
http://www.flclerks.com/e-Filing_Authority/Resources/Minutes/2011-2012_Minutes/Sept_2011_BOD_draft_minutes.pdf

s. Florida Courts Technology Commission September 26-27, 2011 minutes, available at: http://www.flcourts.org/gen_public/technology/FCTC-September2011Minutes.pdf

⁹. *Florida Courts Technology Commission May 8-9, 2012 minutes, available at:*
http://www.flcourts.org/gen_public/technology/FCTC-May2012MeetingMinutes.pdf

[Revised: 03-27-2013]

PROFESSIONAL ETHICS OF THE FLORIDA BAR

Opinion 12-3 (January 25, 2013)

Lawyers may use cloud computing if they take reasonable precautions to ensure that confidentiality of client information is maintained, that the service provider maintains adequate security, and that the lawyer has adequate access to the information stored remotely. The lawyer should research the service provider to be used.

Note: This opinion was affirmed by the Board of Governors with slight modification on July 26, 2013.

RPC: 4-1.6

Opinions: 10-2, 07-2, Alabama 2010-02, Arizona 09-04, Iowa 11-01, Nevada 33, New York State 842, Pennsylvania 2011-200

The Professional Ethics Committee has been directed by The Florida Bar Board of Governors to issue an opinion regarding lawyers' use of cloud computing. "Cloud computing" is defined as "Internet-based computing in which large groups of remote servers are networked so as to allow sharing of data-processing tasks, centralized data storage, and online access to computer services or resources."¹ It is also defined as "A model of computer use in which services stored on the internet are provided to users on a temporary basis." Because cloud computing involves the use of a third party as a provider of services and involves the storage and use of data at a remote location that is also used by others outside an individual law firm, the use of cloud computing raises ethics concerns of confidentiality, competence, and proper supervision of nonlawyers.

In other words, cloud computing involves use of an outside service provider which provides computing software and data storage from a remote location that the lawyer accesses over the Internet via a web browser, such as Internet Explorer, or via an "app" on smart phones and tablets. The lawyer's files are stored at the service provider's remote server(s). The lawyer can thus access the lawyer's files from any computer or smart device and can share files with others. Software is purchased, maintained, and updated by the service provider. Many lawyers and others are computing "in the cloud" because of convenience and potential cost savings.

The main concern regarding cloud computing relates to confidentiality. Lawyers have an obligation to maintain as confidential all information that relates to a

client's representation, regardless of the source. Rule 4-1.6, Rules Regulating The Florida Bar. A lawyer may not voluntarily disclose any information relating to a client's representation without either application of an exception to the confidentiality rule or the client's informed consent. *Id.* A lawyer has the obligation to ensure that confidentiality of information is maintained by nonlawyers under the lawyer's supervision, including nonlawyers that are third parties used by the lawyer in the provision of legal services. *See*, Florida Ethics Opinion 07-2 and 10-2.

Additionally, this Committee has previously opined that lawyers have an obligation to remain current not only in developments in the law, but also developments in technology that affect the practice of law. Florida Ethics Opinion 10-2. Lawyers who use cloud computing therefore have an ethical obligation to understand the technology they are using and how it potentially impacts confidentiality of information relating to client matters, so that the lawyers may take appropriate steps to comply with their ethical obligations.

Other states that have addressed the issue of cloud computing have generally determined that there are ethics concerns regarding confidentiality of information, but that a lawyer may compute via the cloud if the lawyer takes reasonable steps. *See, e.g.*, Alabama Ethics Opinion 2010-02 (Lawyer may outsource storage of client files through cloud computing if they take reasonable steps to make sure data is protected); Arizona Ethics Opinion 09-04 (2009) (Lawyer may use online file storage and retrieval system that enables clients to access their files over the Internet, as long as the firm takes reasonable precautions to protect confidentiality of the information); Iowa Ethics Opinion 11-01 (2011) (Appropriate due diligence a lawyer should perform before storing files electronically with a third party using SaaS (cloud computing), includes determining that the lawyer will have adequate access to the stored information, the lawyer will be able to restrict access of others to the stored information, whether data is encrypted and password protected, and what will happen to the information in the event the lawyer defaults on an agreement with the third party provider or terminates the relationship with the third party provider); Nevada Formal Ethics Opinion 33 (2006) (Attorney may store client files electronically on a remote server controlled by a third party as long as the firm takes precautions to safeguard confidential information such as obtaining the third party's agreement to maintain confidentiality); New York State Bar Ethics Opinion 842 (2010) (Lawyer may use an online computer data storage system to store client files provided the attorney takes reasonable care to maintain confidentiality, and the lawyer must stay informed of both technological advances that could affect confidentiality and changes in the law that could affect privilege);

and Pennsylvania Ethics Opinion 2011-200 ("An attorney may ethically allow client confidential material to be stored in 'the cloud' provided the attorney takes reasonable care to assure that (1) all such materials remain confidential, and (2) reasonable safeguards are employed to ensure that the data is protected from breaches, data loss and other risks").

This Committee agrees with the opinions issued by the states that have addressed the issue. Cloud computing is permissible as long as the lawyer adequately addresses the potential risks associated with it. As indicated by other states that have addressed the issue, lawyers must perform due diligence in researching the outside service provider(s) to ensure that adequate safeguards exist to protect information stored by the service provider(s). New York State Bar Ethics Opinion 842 suggests the following steps involve the appropriate due diligence:

- Ensuring that the online data storage provider has an enforceable obligation to preserve confidentiality and security, and that the provider will notify the lawyer if served with process requiring the production of client information;
- Investigating the online data storage provider's security measures, policies, recoverability methods, and other procedures to determine if they are adequate under the circumstances;
- Employing available technology to guard against reasonably foreseeable attempts to infiltrate the data that is stored.

Of particular practical assistance is Iowa Ethics Opinion 11-01. As suggested by the Iowa opinion, lawyers must be able to access the lawyer's own information without limit, others should not be able to access the information, but lawyers must be able to provide limited access to third parties to specific information, yet must be able to restrict their access to only that information. Iowa Ethics Opinion 11-01 also recommends considering the reputation of the service provider to be used, its location, its user agreement and whether it chooses the law or forum in which any dispute will be decided, whether it limits the service provider's liability, whether the service provider retains the information in the event the lawyer terminates the relationship with the service provider, what access the lawyer has to the data on termination of the relationship with the service provider, and whether the agreement creates "any proprietary or user rights" over the data the lawyer stores with the service provider. It also suggests that the lawyer determine whether the information is password protected, whether the information is encrypted, and whether the lawyer will have the ability to further encrypt the information if

additional security measures are required because of the special nature of a particular matter or piece of information. It further suggests that the lawyer consider whether the information stored via cloud computing is also stored elsewhere by the lawyer in the event the lawyer cannot access the information via "the cloud."

This Committee agrees with the advice given by both Iowa and New York State. Additionally, this Committee believes that the lawyer should consider whether the lawyer should use the outside service provider or use additional security in specific matters in which the lawyer has proprietary client information or has other particularly sensitive information.

In summary, lawyers may use cloud computing if they take reasonable precautions to ensure that confidentiality of client information is maintained, that the service provider maintains adequate security, and that the lawyer has adequate access to the information stored remotely. The lawyer should research the service provider to be used.

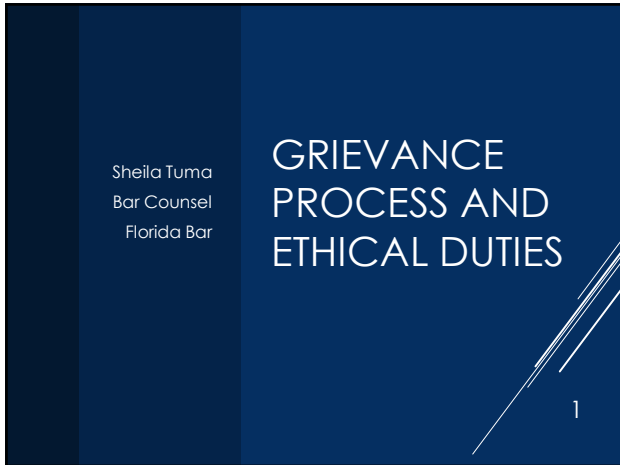
¹ Collins English Dictionary - Complete & Unabridged 10th Edition.

HarperCollins Publishers. 10 Sep. 2012. <Dictionary.com

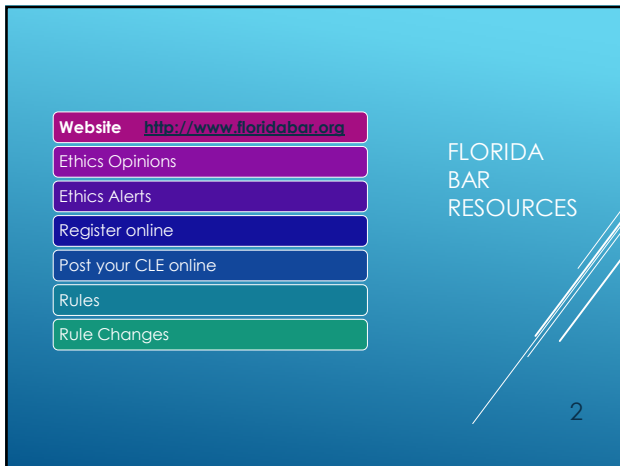
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² Id.

[Revised: 07-30-2013]



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5

5

► **Competent representation requires:**

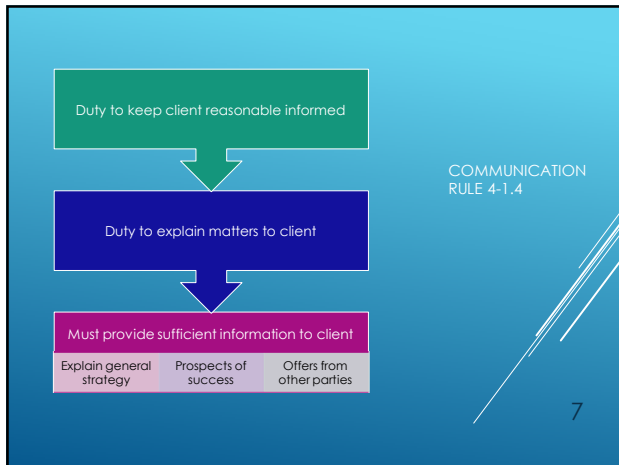
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- Preparation

Missing a statute of limitations my subject a lawyer to disciplinary sanctions. *The Florida Bar v. Kinney*, 606 So. 2d 367 (Fla. 1992).

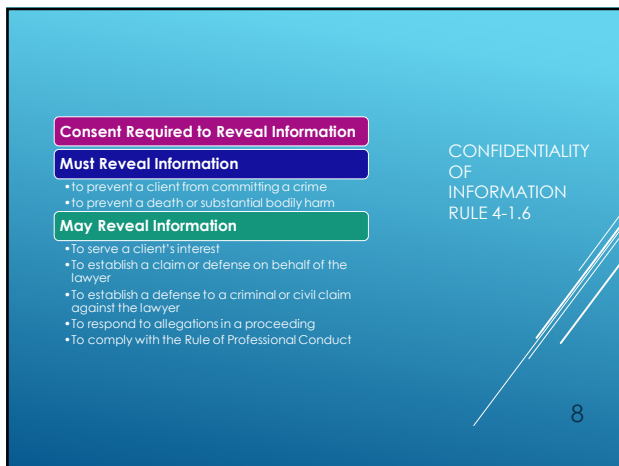
**COMPETENCE
RULE 4-1.1**

6

6



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8



9

- ▶ Lawyer Who Formerly Represented Client Shall Not
 - ▶ Represent another in the same or substantially related matter (look at facts of that particular situation)
 - ▶ Use information relating to representation to the disadvantage of former client
 - ▶ Reveal information relating to representation except where rule permit or require
 - ▶ The Florida Bar vs. Mullin-attorney received an admonishment.

CONFLICT OF INTEREST- FORMER CLIENT RULE 4-1.9

10

10

SPECIAL CONFLICTS OF INTEREST FOR FORMER OR CURRENT GOVERNMENT OFFICERS RULE 4-1.11

- ▶ Representation of Private Client by Former Public Officer or Employee
 - ▶ Subject to Rule 4-1.9(b)
 - ▶ Need informed consent in writing from appropriate government agency

11

11

- ▶ Limits on Participation of Public Officer or Employee
 - ▶ Subject to rules 4-1.7 and 4-1.9
 - ▶ Shall not
 - ▶ Participate in a matter in which the lawyer participated while in private practice unless consent
 - ▶ Negotiate for private employment with any party or their attorney in a matter in which the lawyer is participating.

RULE 4-1.11 ... CONTINUED

12

12

Lawyer Represents Organization Acting Through It's Duly Authorized Constituents.

Violations by Officers or Employees of Organization

Lawyer must proceed in best interest of organization

- Take measures that minimize disruption
- Consider the seriousness of the violation

ORGANIZATION AS CLIENT RULE 4-1.13

13

13

Representing Directors, Officers, Employees, etc.

May Also Represent Them

Subject to Rule 4-1.7	Organizations consent to dual representation	Consent must be by appropriate official of organization or by shareholders.

RULE 4-1.13 ... CONTINUED

14

14

Opinion 09-1

- Discusses the individuals a lawyer can and can not speak do when a governmental lawyer represents the agency

Opinion 10-2

- Discusses the steps a lawyer must take to maintain client confidentiality on such things as printers, copiers, scanners etc.

Opinion 77-30

- Discusses whether conflict can be waived for a county attorney to represent an individual county commissioner
- Opinion 12-2**
- Discusses whether a lawyer can provide their log in credentials to the S-Portal to a trusted nonlawyer employee to file court documents.
- Opinion 12-3**
- Discusses whether a lawyer can use cloud computing if they take reasonable precautions to ensure confidentiality

ETHICS OPINIONS

15

15

Must remember you are a lawyer all the time.

4-8.2 Impugning Qualifications and Integrity of judges

It is only a privilege to practice law

4-8.4 Disparaging opposing counsel, jurors, litigants, witnesses and court personnel.

VIOLETING OTHER BAR RULES AT SOCIAL NETWORKING SITES

16

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Confirm important conversations in writing

Supervise your staff

Conduct conflict checks

Stay Current with The Florida Bar

- Pay dues
- Do CLE
- Update record bar address

Have a tickler system to prevent missing important dates

AVOIDING OR LIMITING BAR COMPLAINTS

17

17

ETHICS HOTLINE

800-235-8619

18

18

Sunshine Law & Public Records

By

**Patricia Gleason, Attorney General's
Office, Tallahassee**

Open Government Update: March 15
2023



Patricia R. Gleason
Florida Attorney
General's Office

1

Web-based resources at Myfloridalegal.com

1. Training PowerPoints and two hour open government audio presentation ("Training" at open government site)
2. Copies of circuit court and county court opinions cited in Sunshine Manual ("Cases" at open government site)
3. Formal and Informal Attorney General Opinions (AG Opinions site)
4. PDF version of Sunshine Manual and Public Records Guide for Law Enforcement Agencies (open government site)

2



I. Public Records Law Overview and Update

3

A. Scope of Public Records Act

1. **Florida's Public Records Act, Ch. 119, F.S.,** provides a right of access to the records of state and local governments as well as to records of private entities acting on their behalf.

4

A. Scope of Public Records Act

2. In the absence of statutory exemption, this right of access applies to
 - a) All "documents, papers, letters, maps, books, tapes, photographs, films, sound recordings, data processing software or other material, regardless of the physical form, characteristics, or means of transmission"
 - b) made or received pursuant to law or ordinance or in connection with the transaction of official business
 - c) by any agency [includes a private entity "acting on behalf" of a public agency]
 - d) which are used to perpetuate, communicate, or formalize knowledge.

5

Scope of Public Records Act

Example: *NCAA v. Associated Press*, 18 So. 3d 1201 (Fla. 1st DCA 2009), review denied, 37 So. 3d 848 (Fla. 2010)

"Records created and maintained by the NCAA are not generally subject to disclosure. However, the documents at issue in this case were examined by lawyers for a public agency, Florida State University, and used in the course of the agency's business.

Because the documents were received in connection with the transaction of official business by an agency, they are public records. The NCAA has failed to show that an exception applies under state or federal law, and thus, the records must be disclosed."

6

Public Records Case Update

- **1. Florida Police Benevolent Association, Inc. v. City of Tallahassee**, 314 So. 3d 796 (Fla. 1st DCA 2021), review granted, No. 21-651 (Fla. December 21, 2021)
- **Conclusion:** The identity of officers who were threatened with deadly force by crime suspects and who then responded by killing the suspects is confidential under Marsy's Law. The court rejected the trial judge's conclusion that Marsy's Law did not shield the identity of law enforcement officers acting in the course of their official duties. The appellate court noted that Marsy's Law would not halt an internal affairs investigation nor impede any grand jury investigation. Also, if the State Attorney determines that the officer was not a victim and instead charges the officer for his conduct, the Marsy's Law protections would not apply.

7

Public Records Case Update

- **2. City of St. Petersburg v. Dorchester Holdings, LLC**, 331 So. 3d 799 (Fla. 2d DCA 2021)
- **Background:** After Dorchester Holdings filed a breach of contract lawsuit against the city stemming from whether the city had failed to comply with an agreement to remove illegally dumped muck found on a development site, the company made a public records request (reprinted in the opinion) for numerous records relating to the property. When the city told Dorchester in accordance with its public records policy, that Dorchester must prepay for costs involved in reviewing for exempt material in over 146,000 emails, the company filed a lawsuit alleging that the charges were excessive especially because it asserted that the emails did not contain exempt material. The trial judge ruled that the estimate was unreasonable, and the parties should work together to reduce the costs.

8

Public Records Case Update

- **Dorchester Holdings, cont'd**
- **Conclusion:** The trial judge erred in finding that the city's cost estimate was unreasonable and violated Dorchester's rights under the Public Records Act. The trial judge also incorrectly determined that prepayment of the estimated service charge was unauthorized; prepayment is authorized because the custodian must review the records for exempt material such as attorney work product prior to production. If, on remand, the court finds the estimate to be unreasonable, the court must enter findings and conclusions to support that conclusion.

9

Public Records Case Update

- 3. *Miami Dade College v. Nader + Museu I, LLLP*, 47 F.L.W. D1814 (Fla. 3d DCA August 31, 2022)
- Background: Nader made a public records request for numerous records. MDC asked for search terms to narrow the search scope but did not offer its own search terms or provide an invoice or estimate, believing that the parties could work this out. Instead, Nader filed a public records lawsuit and ultimately received the records as part of discovery production. The trial court granted Nader's request for a writ of mandamus. MDC then asked for over \$200,000 in fees for the production pursuant to s. 119.07(4), F.S. The trial court denied the motion because MDC failed to comply with its own policy which called for the requester to agree in advance to the fees. On appeal, MDC argued that its failure to provide an invoice or estimate could be excused because the trial court order effectively allowed Nader to obtain records for free, and also because it relied on an interlocutory order issued prior to completion of production that MDC would be entitled to fees in an amount to be determined after the litigation.

10

Public Records Case Update

- *Miami Dade, continued*
- Conclusion: The trial court order was affirmed because "MDC failed to provide Nader with an estimate or invoice of the anticipated cost of producing the public records prior to production, violating both its own policies and procedures and the language of s. 119.07(4), F.S.," which requires that the custodian shall furnish a copy of the record "upon payment of the fee prescribed by law." The court also said that "a trial court cannot order a public agency to produce public records and provide that it will determine the reasonable costs incurred by the agency for preparation of the records after the fact."

11

Public Records Case Update

- 4. *City of Sunny Isles Beach v. Gatto*, 338 So.3d 1045 (Fla. 3d DCA 2022)
- Background: A city commissioner was observed texting during a virtual city commission meeting. Gatto made a public records request for the text messages and subsequently filed suit against the city and the commissioner when the commissioner refused to provide them. The trial judge viewed the messages in camera and determined that they were public records. The commissioner and city did not appeal the judge's ruling that the text messages between the commissioner and a city resident which addressed city business and contained unflattering remarks about another commissioner were public records. However, the judge's finding that the texts between the commissioner and her husband were public records was appealed.

12

Public Records Case Update

- *City of Sunny Isles Beach*, continued.
- **Conclusion:** The “Husband” texts were not public records because a “private communication” by a municipal official falls outside of the definition of a public record. The court rejected Gatto’s argument that the texts were public records because they were made at a city commission meeting, “touched on City matters” and “bear some similarity in subject matter” to the texts between the commissioner and city resident, which were determined to be public records. By contrast, the “Husband” texts were “uniformly personal and private and were not made in connection with any business transacted by the City.” The commissioner was not acting in an official capacity when she was texting with her husband. Nor did her husband “step out of his role as husband” and “adopt the role of a citizen seeking to enter a City process or to transact City business.”

13

Public Records Case Update

- 5. *Human Rights Defense Center v. Armor Correctional Health Services, Inc.*, 336 So. 3d 769 (Fla. 3d DCA 2021)
- **Conclusion:** After observing that “the right to access public records is of a constitutional magnitude, disclosure of public records is not a discretionary act,” and citing the statutory duty of records custodians to permit inspection and copying of public records, the court reversed an order dismissing a public records lawsuit, noting that “resolution of such disputed issues as notice and compliance must be litigated in an evidentiary setting.”

14

Public Records Case Update

- 6. *City of Miami v. Blanco*, 336 So. 3d 1268 (Fla. 3d DCA 2022)
- **Conclusion:** Trial court departed from essential requirements of law by failing to conduct an in camera review before granting Blanco’s motion to compel and/or subpoena (filed after the city denied his public records request for video camera recordings taken at the police station following Blanco’s DUI arrest). Without an in camera inspection, the trial judge could not determine whether the video recordings fell within the security plan exemptions in ss. 119.071(3)(a) and 281.301, F.S., and whether they were material in any manner.

15

Public Records Case Update

- 7. *Florida Department of Health v. Smith*, 47 F.L.W. D2095 (Fla. 1st DCA October 12, 2022)
- Conclusion: The petition filed by the Department and Surgeon General seeking certiorari review of an order denying their motion for a protective order as to the deposition of a corporate representative in a public records lawsuit is dismissed because “the petition does not demonstrate that the order would result in irreparable harm to the petitioners....”

16

Public Records Case Update

- 8. *O’Boyle v. Town of Gulf Stream*, 341 So.3d 335 (Fla. 4th DCA 2022)
- Conclusion: “We hold that [s. 119.12, F.S.] does not provide for (1) an award of attorney’s fees for litigating the amount of fees or (2) an award of fees attributable to the non-testifying associates of an attorney fee expert.” (Emphasis supplied by the court).

17

Public Records Case Update

- 9. *O’Boyle v. Town of Gulf Stream*, 341 So.3d 343 (Fla. 4th DCA 2022)
- Conclusion: A lawyer could recover fees for his assistance of a pro se litigant (in this case, the attorney’s father) in a public records case before entering a notice of appearance, because the complaint requested attorney’s fees and disclosed that it was prepared with the assistance of counsel. The court found that this disclosure notified the town that the lawyer was assisting his father in an authorized “limited-representation capacity” which does not obligate the lawyer to sign the pleading.

18

Public Records Case Update

- **10. *Florida Center for Government Accountability, Inc. v. Executive Office of the Governor*, No. 22-CA-1785 (Fla. 2d Cir. Ct. October 27, 2022), appeal filed, November 1, 2022 (Fla. 1st DCA)**
- **Background:** On October 10, 2022, FCGA filed a complaint to enforce the Public Records Act, relating to requests sent on September 20 and 21 for various records including text messages, a text log, and a phone log for a set period of time relating to the transfer of migrants to Martha's Vineyard on Sept. 14, 2022. The hearing was set for October 25.

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Public Records Case Update

- **10. *FCGA continued***
- **Conclusions:** The EOG's "partial production and response to the record requests were unreasonable." The EOG "has not made any production of a text or phone log of [a specified individual] as requested" nor has it shown why it has not produced all responsive records.
- **FCGA was entitled to file this action within 30 days of making the records request because "it would otherwise not availed itself of the protection of s. 119.07(1)(h), F.S., which requires an agency to preserve all records responsive to a records request, even if it contends that certain records are not a public record if an action is filed within a 30-day window of the request being made."**

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Sunshine Law Overview and Update

21

Scope of Sunshine Law—Section 286.011, F.S.

The Sunshine Law applies to any gathering of two or more members of an elected or appointed public collegial board when they meet to discuss any matter which will foreseeably come before that board for action. Advisory committees can be included even though their powers are limited to making recommendations. Staff committees can be subject to the Sunshine Law if they have been delegated some “decision-making” authority (such as the authority to screen and rank proposals) as opposed to mere fact-finding or information-gathering.

22

Scope of Sunshine Law—Section 286.011, F.S.

Example: *Sarasota Citizens for Responsible Government v. City of Sarasota*, 48 So. 3d 775 (Fla. 2010)

“All governmental entities in Florida are subject to the requirements of the Sunshine Law unless specifically exempted.” However, a county administrator’s discussions with staff and consultants while negotiating a memorandum of understanding with a baseball team did not violate the Sunshine Law because the administrator’s “so-called negotiations team only served an informational role . . .”

23

Requirements of the Sunshine Law

- 1) Meetings must be open to the public
- 2) Reasonable public notice of such meetings must be given; and
- 3) Minutes of the meetings must be promptly prepared and open to public inspection.

24

Sunshine Law Case Update

- ***1. Florida Citizens Alliance, Inc. v. School Board of Collier County, 328 So. 3d 22 (Fla. 2d DCA 2021)***
- **Background:** Pursuant to school board policy, the superintendent created textbook committees to review and recommend textbooks for use in the district schools. In accordance with the policy, the committees submitted their reports to the superintendent for transmittal to the board. The school board held two meetings to consider the reports and ultimately approved all books except one.

25

Sunshine Law Case Update

- ***Florida Citizens Alliance , continued***
- **Conclusions:**
- **1.** The trial court erroneously concluded that the committees were not subject to the Sunshine Law. While staff is not typically subject to the Sunshine Law, committees delegated decision making authority, as opposed to fact finding, must comply. In this case the textbook committees' evaluation and ranking "helped to crystalize the decision" to be made by the school board, quoting from *Silver Express Co. v. District Board of Trustees, 691 So. 2d 1099 (Fla. 3d DCA 1997)* (committee formed by college purchasing director to rank proposals for the director, subject to Sunshine Law).

26

Sunshine Law Case Update

- ***Florida Citizens Alliance, continued***
- **2.** The school board violated the Sunshine Law by failing to give reasonable notice for the textbook committee meetings. While notices of school board meetings were posted on the public notice page of the district website and in an electronic newsletter, the meeting information for the textbook committees was difficult to locate. "We agree with the Plaintiffs that burying a notice inside a committee application and calendar on the instructional materials page of the District's website is an unreasonable way to give public notice of a meeting."

27

Sunshine Law Case Update

- *Citizens Alliance, continued*
- 3. The two public school board meetings did not cure the Sunshine Law violations by the textbook committees because the school board did not discuss the substance of the textbooks, and the discussion lasted less than 30 minutes for all 36 recommended titles. When the board rescinded its approval of one title at the second meeting, the school board policy did not permit the board to chose a textbook from other alternatives. Instead, the matter went back to the textbook committee to review and consider an alternative. Therefore, the board did not hold the full and open hearing needed to cure the violations.

28

Sunshine Law Case Update

- 2. *Collier County Public Schools v. Mason Classical Academy, Inc.*, 342 So. 3d 753 (Fla. 2d DCA 2022)
- Discussions between two district employees and school district attorney which occurred as part of a fact-finding investigation conducted by the attorney into complaints against the charter school were not meetings subject to the Sunshine Law “because neither employee was a school board member or part of a decision-making committee.”

29

Sunshine Law Case Update

- *Collier County Public Schools, continued*
- Section 90.502(6), F.S., provides that a meeting that is not subject to the Sunshine Law shall not be construed to waive the attorney-client privilege. However, in this case the interviews between the attorney and the employees were conducted as part of a fact-finding investigation; the record did not establish that either employee consulted with the attorney for the purpose of obtaining legal advice or services. Therefore, these conversations were not protected by the attorney-client privilege.

30

Sunshine Law Case Update

- **3. *Florida Environmental Regulation Specialists Inc. v. Florida Department of Environmental Protection*, 342 So. 3d 710 (Fla. 1st DCA 2022)**
- **Conclusion:** “Meetings among agency staff to assess and make recommendations regarding contract management do not implicate” open meetings requirements. “The undisputed evidence showed that there was no delegation of policy making authority to any group of staff members at the department and the decision to terminate the contract was made by the agency official tasked with doing so.”

31

Public Comment

Although not a part of the Sunshine Law, s. 286.0114, F.S., requires, subject to limited exceptions, that public boards provide an opportunity for public comment prior to taking official action on a proposition. Boards are authorized to adopt rules or policies that provide time limits for speakers; procedures for allowing a representative of a group to speak, as opposed to all members of a large group; and procedures or forms for an individual to use to inform the board of a desire to be heard, to indicate his/her position and a representative; and designate a specified period of time for public comment.

32

Public Comment Case Update

- ***Larson v. Palm Beach County*, Case No. 2016-CA-001706 (Fla. 15th Cir. Ct. November 26, 2019), *per curiam* affirmed, 311 So. 3d 853 (Fla. 4th DCA 2021).**
- **Conclusion:** County procedure stipulating that the public has 3 minutes to speak on the entire consent agenda (as opposed to 3 minutes for each item on the regular agenda) does not violate s. 286.0114, F.S. The court found no evidence that the board or its employees intentionally utilized evasive devices, i.e. committed fraud to deliberately dilute the public's right to be heard “by flooding the consent agenda with controversial non-ministerial propositions.”

33

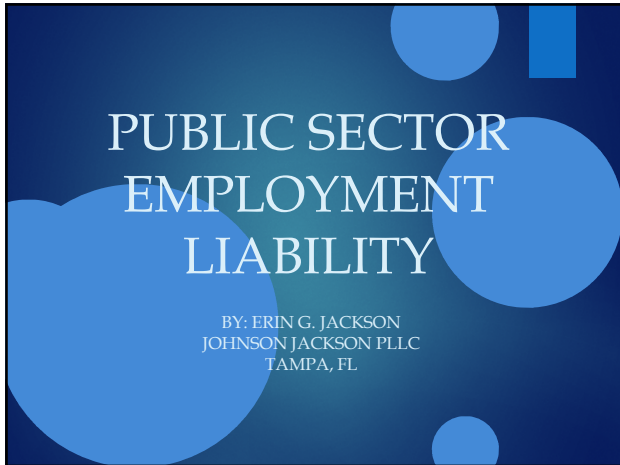
Contact information

- Pat.Gleason@myfloridalegal.com
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- 850-245-0179 (direct)

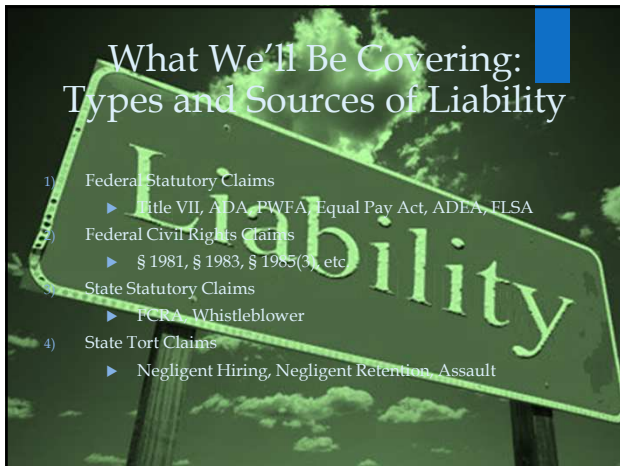
Public Sector Liability

By

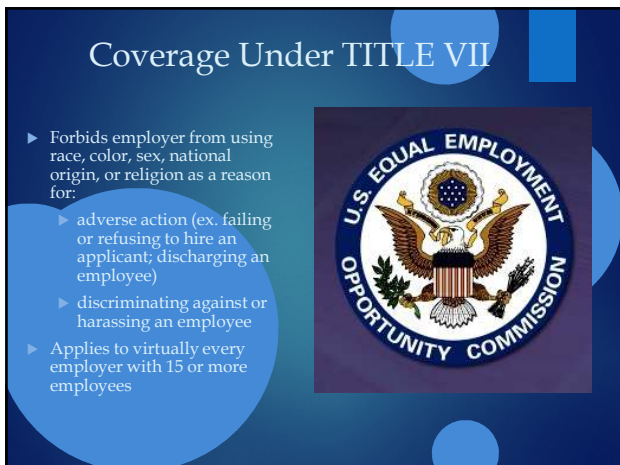
**Erin Jackson, Johnson Jackson,
Tampa**



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Coverage Under TITLE VII

- ▶ Race: ALL races are protected
- ▶ Sex: Gender and sexual orientation
- ▶ Pregnancy: Prohibits discrimination based on pregnancy and abortions
- ▶ Nat'l Origin: Any ancestry or origin
- ▶ Religion: More extensive protection; requires accommodation



4

Prohibited Activities Under TITLE VII

- ▶ Discrimination
 - ▶ Describes any "adverse employment action" that is motivated by protected characteristic.
- ▶ Harassment
 - ▶ A type of discrimination.
 - ▶ Not limited to sexual harassment. Can be based on any protected characteristic.



5

Protected Characteristics Title VII

- ▶ RACE
 - ▶ Title VII prohibits discrimination on the basis of race against all persons.
 - ▶ Title VII does not define "race."
- ▶ Associational discrimination is also prohibited.
 - ▶ Ex: Discrimination based on Plaintiff having biracial child or interracial marriage.
- ▶ No BFOQ defense to race discrimination claim.



6

Protected Characteristics Title VII

► NATIONAL ORIGIN

- National origin includes membership in a national group, common ancestry, heritage or background, ethnic characteristics, or the geographical place of birth
- Need not be recognized "nation"
 - Based upon unique historical, political and/or social circumstances of a given region.
 - Ex: Cajuns, Serbs



7

Protected Characteristics Title VII

► NATIONAL ORIGIN

- Employer rules requiring employees to speak only English at all times are *presumptively unlawful*.
- Permissible if policy is *job related* and consistent with *business necessity*.
- Factors considered:
 - 1. Whether the restrictive policy effectively serves business needs;
 - 2. Whether the restrictive language is narrowly tailored; and
 - 3. Whether the employer provided adequate notice of language restrictive policies.



8

Protected Characteristics Title VII

► SEX

- Generally, protected class of "sex" involves condition of being male or female.
- Price Waterhouse: Title VII discrimination includes discrimination based on sexual stereotypes.



9

Bostock v. Clayton County, 140 S. Ct. 1731 (2020)

- ▶ The Court consolidated for decision three cases involving Title VII and questions as to whether it covers discrimination based on sexual orientation or transgender status. In all three cases, an employer fired a long-time employee shortly after the employee revealed he or she is homosexual or transgender.
- ▶ For the last 50+ years, virtually all courts have said that Title VII does not cover those characteristics.
- ▶ Recently, a couple of circuit courts held that such discrimination violated Title VII's prohibition on discrimination "because of sex."

10

Bostock v. Clayton County, 140 S. Ct. 1731 (2020)

- ▶ Writing for a 6-3 majority, Justice Gorsuch agreed.
- ▶ "[I]t is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex."
- ▶ "[S]ex plays an unmistakable and impermissible role in [a] discharge decision" because "homosexuality and transgender status are inextricably bound up with sex."

11

Bostock v. Clayton County, 140 S. Ct. 1731 (2020)

- ▶ Majority hypothetical:
 - ▶ Suppose an employer had two employees who both were attracted to men, and suppose further that one of those employees was a male and one was a female.
 - ▶ If the employer were to fire the male but permit the female to stay employed, then the employer would have discriminated against the male for traits or actions that it tolerated in the female.
 - ▶ By intentionally singling out the male employee based in part on his sex, the employer would have violated Title VII.

12

Bostock v. Clayton County, 140 S. Ct. 1731 (2020)

- ▶ Because the text of the statute was unambiguous, the majority held that the logical command of those terms had to be given effect, even if the legislators who passed the law might not have realized what its consequences would be
- ▶ "Those who adopted the Civil Rights Act might not have anticipated that their work would lead to this particular result....But the limits of the drafters' imagination supply no reason to ignore the law's demands. When the express terms of a statute give us one answer and extratextual considerations suggest another, it's no contest. Only the written word is the law, and all persons are entitled to its benefit."

13

Prohibited Activities Under TITLE VII

- ▶ DISCRIMINATION
 - ▶ Can be established under 3 theories:
 1. Disparate Treatment
 2. Disparate Impact
 3. Pattern & Practice Discrimination
 - ▶ Disparate treatment and Pattern & Practice discrimination require proof of discriminatory intent; disparate impact does not.



14

Prohibited Activities Under TITLE VII

- ▶ DISCRIMINATION
 - ▶ One way to prove intentional discrimination is burden-shifting framework of McDonnell Douglas, which requires an employee to show that:
 1. She belongs to a protected class;
 2. She was subjected to an adverse employment action;
 3. She was qualified to perform the job in question; and
 4. The Employer treated "similarly situated" employees outside her class more favorably?
 - ▶ But, when are employees "similarly situated"?

15

Prohibited Activities Under TITLE VII

▶ DISCRIMINATION

- ▶ Employees must be similarly situated “in all material respects.”
- ▶ This standard is generally met when the “comparator”:
 1. Engaged in the same basic conduct (or misconduct);
 2. Was subject to the same employment policy;
 3. Was under the jurisdiction of the same supervisor; and
 4. Shared the plaintiff’s employment or disciplinary history.



16

Prohibited Activities Under TITLE VII

▶ HARASSMENT

- 1) Conduct that is unwelcome;
-- not solicited or invited
- 2) Based on a protected characteristic;
-- any protected characteristic
- 3) Severe and pervasive enough to alter the conditions of employment;
-- reasonable person standard
- 4) Employer is legally responsible
-- different analysis depending on harasser’s status

17

Allen v. Ambu-Stat, LLC, 799 Fed. Appx. 703 (11th Cir. 2020)

- ▶ The “sufficiently pervasive” standard for hostile work environment claims remains high in the Eleventh Circuit.
- ▶ Employee brought sexual harassment and retaliation claims.
 - ▶ Employee claims she was subjected to sexually suggestive comments from her employer and that the employer had his son slap the employee on her buttocks.
 - ▶ Employee complained about the inappropriate comments but did so in response to the employer’s wife accusing her of having an affair.
- ▶ The Eleventh Circuit determined that the employer’s conduct did not constitute as sexual harassment because it was not “sufficiently pervasive” and the employee did not “oppose” the conduct for the retaliation claim.

18

Allen v. Ambu-Stat, LLC, 799 Fed. Appx. 703 (11th Cir. 2020)

- ▶ Why was the employer's conduct not "sufficiently pervasive?"
 - ▶ The Eleventh Circuit found persuasive that the conduct, while "boorish" and inappropriate, was sporadic and appears to have occurred in a joking context of "friends outside of work."
- ▶ Why did the employee's complaints not constitute "opposition" for retaliation purposes?
 - ▶ merely discussing an event is not enough, the employee must have actively opposed the conduct;
 - ▶ the complaints made by the employee were to "apologize and mend fences" and not to oppose; and
 - ▶ merely mentioning the words "sexual harassment" does not invoke statutory protection. The Eleventh Circuit focused on why the complaints were made and whose behavior the comments focused on.

19

Prohibited Activities Under TITLE VII



Harassment – Employer Responsibility

SUPERVISOR vs. CO-WORKER

- ▶ CO-WORKER = KNEW OR SHOULD HAVE KNOWN
- ▶ SUPERVISOR = AUTOMATICALLY LIABLE

**UNLESS... no tangible
employment action and...**

20

Prohibited Activities Under TITLE VII



Affirmative Defense to Harassment

1. Employer used reasonable care to prevent the harassment (policies) **AND**
2. Employee unreasonably failed to take advantage of any preventative or corrective opportunities

21

Harassment

- ▶ The EEOC Harassment Guidance – Jan. 10, 2017
- ▶ 5 Core Principles to prevent and address harassment:
 - ▶ Committed and engaged leadership;
 - ▶ Consistent and demonstrated accountability;
 - ▶ Strong and comprehensive harassment policies;
 - ▶ Trusted and accessible complaint procedures; and
 - ▶ Regular, interactive training tailored to the audience and the organization

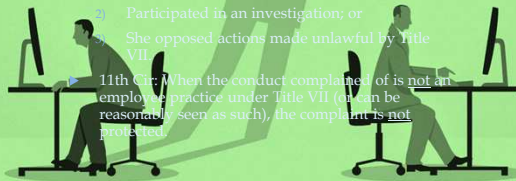


22

Prohibited Activities Under TITLE VII

▶ RETALIATION

- ▶ An employer cannot take action against an employee because:
 - 1) She has filed a charge under Title VII;
 - 2) Participated in an investigation; or
 - 3) She opposed actions made unlawful by Title VII.



11th Cir. When the conduct complained of is not an employer's practice under Title VII (or can be reasonably seen as such), the complaint is not protected.

23

Monaghan v. Worldpay US, Inc. 955 F.3d 855 (11th Cir. 2020)

- ▶ In Monaghan, the Eleventh Circuit reset its Title VII retaliation claim standard.
- ▶ The Eleventh Circuit decided that the correct standard is that articulated by the Supreme Court in Burlington Northern – that retaliation is material if it “well might have dissuade[d] a reasonable worker from making or supporting a charge of discrimination.”
 - ▶ It rejected the district court’s application of the standard found in Cowski v. Peake, which is that retaliation only occurs if the employer’s actions were “sufficiently severe or pervasive to alter the terms and conditions of employment.”

24

Prohibited Activities Under TITLE VII

- Pregnancy Discrimination Act (part of Title VII)
- Protects the right of pregnant employees to be treated the same as non-pregnant employees.
- No duty under the PDA to accommodate pregnant women if they do not already accommodate other disabled employees. (But see Pregnant Workers Fairness Act).
- Employer's refusal to accommodate could constitute unlawful discrimination if such accommodations are routinely granted to non-pregnant employees.
- Young v. United Parcel Services Inc. (S. Ct. 2015)

25

Pregnancy Discrimination

Hicks, 870 F.3d 1253 (11th Cir. 2017)

- Female police officer sued the city under the PDA and FMLA, claiming she was constructively discharged after returning to work following the birth of her child.
- Otc, Hicks worked as an investigator on the narcotics task force when she became pregnant.
- Her supervisor, Lt. Richardson, who was also female, told Hicks more than once that she would only be allowed 6 weeks of FMLA rather than 12 weeks. Hicks took 12 weeks.
- Before her FMLA, Hicks was given an evaluation of "exceeds expectations." On her first day back after FMLA, she was written up.
- Hicks overheard Lt. Richardson saying "that b****" and claiming she would find a way to write her up. Another officer overheard Richardson say "that stupid c*** thinks she gets 12 weeks."

26

Pregnancy Discrimination

- 8 days after she returned to work from FMLA, Hicks was involuntarily transferred from narcotics to patrol. She lost her vehicle, weekends off, and was to receive a pay cut. She also would be required to wear ballistic vests all day.
- Hicks' doctor wrote a letter saying that the ballistic vest was restrictive and could lead to breast infections that lead to an inability to breastfeed. Hicks requested a desk job.
- The Chief did not consider breastfeeding a condition that warranted alternative duty. He gave her 2 options: 1) don't wear a vest or 2) wear a larger "specially fitted" vest, which left gaping holes.
- Hicks resigned.

27

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graph LR; A[Pregnancy Discrimination] --> B["The PDA amended Title VII to add that discrimination 'on the basis of sex,' includes discrimination 'on the basis of pregnancy, childbirth, or related medical conditions.'  
42 U.S.C. § 2000e(k).  
Is breastfeeding a 'related medical condition?'"]; B --> C["The Eleventh Circuit says YES. Lactation and breastfeeding are 'related medical conditions' and therefore covered under the PDA."];
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Pregnancy Discrimination

The PDA amended Title VII to add that discrimination "on the basis of sex," includes discrimination "on the basis of pregnancy, childbirth, or related medical conditions."
42 U.S.C. § 2000e(k).
Is breastfeeding a "related medical condition?"

The Eleventh Circuit says YES. Lactation and breastfeeding are "related medical conditions" and therefore covered under the PDA.

28

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graph TD; A[Employers do not have to provide special accommodations to breastfeeding workers; however, taking adverse action based on a woman's breastfeeding is prohibited by the FDA.] --> B[Hicks showed that other EEs with temporary injuries were given "alternative duty," and she merely requested the same alternative duty.]; B --> C[Citing Young, the court found that Hicks proved discrimination by being treated differently than others similarly situated.];
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Pregnancy

Employers do not have to provide special accommodations to breastfeeding workers; however, taking adverse action based on a woman's breastfeeding is prohibited by the FDA.

Hicks showed that other EEs with temporary injuries were given "alternative duty," and she merely requested the same alternative duty.

Citing Young, the court found that Hicks proved discrimination by being treated differently than others similarly situated.

29

Durham v. Rural/Metro Corp., 955 F.3d 1279 (11th Cir. 2020)

- ▶ Pregnant employee requested light-duty assignments. Employer refused and told her that she could not remain on the job absent medical release. She was offered unpaid leave.
 - ▶ Employer previously gave light-duty assignments to four non-pregnant employees who suffered injuries on the job.
- ▶ Employee sued on basis of pregnancy discrimination.
- ▶ Employer argued that employee could not state a prima facie case because she could not show adequate comparators (non-pregnant employees whose off-the-job injuries resulted in lifting restrictions).
- ▶ The Eleventh Circuit held that the employee only need to provide a general showing that the employer accommodates others “similar in their inability to work.” It did not matter if they suffered their injury on or off the job.

- 30

Prohibited Activities Under TITLE VII

- ▶ RELIGION
 - ▶ Religion is defined as "all aspects of religious observance and practice, as well as belief." Religion includes any sincerely held religious belief, whether or not "mainstream."
 - ▶ Unlike other protected classifications under Title VII, religion carries with it a duty to accommodate.
 - ▶ Unless undue hardship; any act that requires an employer to bear greater than a *de minimis* cost in accommodating an employee's beliefs.

31

TITLE VII Remedies

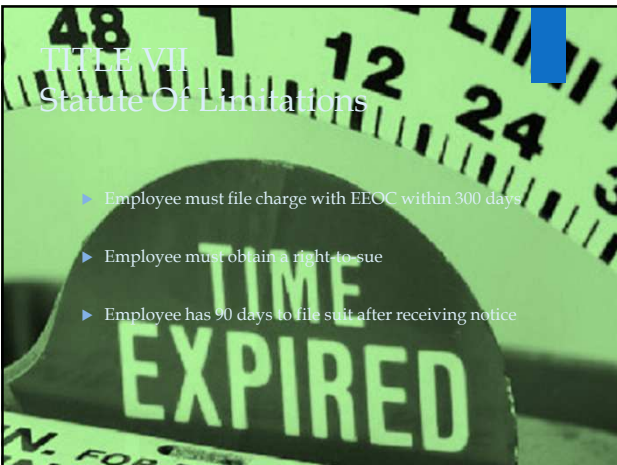
- ▶ Back pay
- ▶ Front pay
- ▶ Restored benefits
- ▶ Reinstatement
- ▶ Attorney's fees and costs
- ▶ Equitable relief
- ▶ Punitive damages (NOT for Public ERs)
- ▶ Jury Trial



32

TITLE VII Statute Of Limitations

- ▶ Employee must file charge with EEOC within 300 days
- ▶ Employee must obtain a right-to-sue
- ▶ Employee has 90 days to file suit after receiving notice



33

Pregnant Workers Fairness Act

- Takes effect June 27, 2023
- Requires reasonable accommodation to qualified pregnant or postpartum employees with a “known limitation” unless doing so would impose undue hardship on the employer
- Requires interactive process



34

Pregnant Workers Fairness Act

- ▶ “Known limitation”
 - ▶ Physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions that the employee (or their representative) has communicated to the employer
- ▶ Known limitation does not necessarily mean “disability”
- ▶ Much broader
 - ▶ Morning sickness
 - ▶ Lifting restrictions
 - ▶ Postpartum depression

35

Pregnant Workers Fairness Act

- ▶ Specifically, employers cannot:
 - ▶ Require a specific accommodation not determined through the interactive process
 - ▶ Deny employment opportunities based on the need to make a reasonable accommodation
 - ▶ Require leave, whether paid or unpaid, if another accommodation can be met
 - ▶ Take adverse action against a qualified employee because of the request for accommodation
 - ▶ Retaliate against an employee for protected activity under the Act
 - ▶ Coerce, intimidate, threaten or interfere with rights afforded under the Act.

36

PUMP for Nursing Mothers Act

- ▶ Providing Urgent Maternal Protections for Nursing Mothers Act
- ▶ Amends the Fair Labor Standards Act
- ▶ Took effect December 29, 2022
- ▶ Extends rights to breastfeeding employees for the 1st year after the baby's birth
- ▶ Applies to exempt and nonexempt employees
- ▶ Requires:
 - ▶ Reasonable break time
 - ▶ A place, other than bathroom, to express breast milk



37

Lilly Ledbetter Fair Pay Act of 2009

- ▶ Signed by President Obama in January 2009.
- ▶ Holds that actionable discrimination may occur each time an employee is affected by a discriminatory compensation decision
 - ▶ i.e., each time wages, benefits or compensation is paid.
 - ▶ 300 days from the date of the paycheck to file a charge.

38

Coverage under the Equal Pay Act

- ▶ Requires only that workers doing "equal work" be paid "equal wages."
- ▶ Applies ONLY to GENDER
- ▶ No employer shall discriminate:
 - ▶ On the basis of sex;
 - ▶ Within an establishment;
 - ▶ For work performed under similar working conditions; and
 - ▶ That requires equal skill, effort and responsibility.



39

Equal Pay Act Exceptions

- ▶ Unequal pay is allowed when the unequal pay has been set pursuant to:
 - ▶ A seniority system;
 - ▶ A merit system;
 - ▶ A system which measures earning by quantity or quality;
 - ▶ Any other differential based on a factor other than sex.

40

Equal Pay Act Who Can be Held Liable?

- ▶ Any employer that permits an employee to work, OR
- ▶ Any person acting directly or indirectly in the interest of such an employer.



THUS, managers may be held individually liable.

41

Equal Pay Act Remedies

- ▶ Difference in compensation
- ▶ Liquidated damages
 - ▶ Allows victim to recover an additional amount equal to the amount of the loss
- ▶ Attorneys' fees and costs



42

Equal Pay Act Statute of Limitations

▶ Actions must be commenced within 2 years after cause of action accrued, or

▶ For willful violations, victims have 3 years to file suit.



43

Coverage under the ADEA

- ▶ Only applies to AGE
- ▶ Protected class = 40 years old or older
- ▶ Job actions prohibited are the exact same as Title VII, including harassment



44

Coverage under the ADEA

- ▶ Unlike Title VII, the ADEA does **NOT**
 1. Permit a person to establish discrimination by showing that age was a motivating factor. The ADEA requires the person to show her age was the "but-for" cause of an adverse decision.
 2. Apply to job applicants attempting to bring a claim of disparate impact.
- ▶ Even though the 11th and 7th Circuits have held the foregoing, not all courts agree.
- ▶ See e.g., Northern District of California & Southern District of Texas



45

ADEA Exceptions

- ▶ BFOQ, reasonably necessary to the normal operation of the particular business;
- ▶ Differentiation is based on a reasonable factor other than age;
- ▶ The terms of a bona fide seniority system apply; or
- ▶ A disparate impact arises from application of equal terms of a bona fide employee benefit plan to employees of different ages.

46

ADEA Who can Be Held Liable?

- ▶ State or local gov't
- ▶ Individual managers generally NOT liable

Remedies

- ▶ Same as Title VII, EXCEPT if the employer's violation is willful, liquidated damages may be awarded in the amount of lost compensation



47

ADEA Statute of Limitations

Different than Title VII—

- ▶ Must file a charge within 300 days with EEOC;
- ▶ BUT, unlike Title VII, no need to wait for receipt of a right-to-sue letter. May file suit 60 days after a charge has been filed.



48

Coverage under the ADA

- ▶ Prohibits employers, with 15 or more employees, from discriminating against qualified individuals with disabilities or perceived disabilities.
 - ▶ NOTE: Title II of the ADA (public services) covers all employers regardless of size.
- ▶ Same actions as prohibited by Title VII
 - ▶ hiring, firing, failure to promote, harassment...



49

Coverage under the ADA

- ▶ An individual with a disability:
 - ▶ has an impairment that substantially limits a **major life activity**;
 - ▶ has a record of such an impairment; OR
 - ▶ is regarded as having such an impairment.
- ▶ "Qualified" individual means:
 - ▶ A person who, with or without reasonable accommodation, can perform the essential functions of the job in question.

50

Accommodations ADA

- ▶ The burden of identifying an accommodation rests with the **employee**.
- ▶ The employee also carries the ultimate burden of persuasion that the accommodation is reasonable.
- ▶ The **employer** has burden to show that an accommodation would cause "undue hardship."



51

Accommodations ADA

Reasonable Accommodation may include:

- ▶ “making existing facilities used by employees readily accessible to and usable by individuals with disabilities;” and
- ▶ “job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.”

52

Accommodations ADA

Courts have held reasonable accommodation does not necessarily include:

- ▶ Job reassignment without competition.
 - ▶ *“The ADA only requires an employer to allow a disabled person to compete equally with the rest of the world for a vacant position.”*
- ▶ Telecommuting – Regular attendance generally qualifies as an essential job function.
- ▶ Extensive leave where substantial leave has already been granted.



53

Accommodations ADA

- ▶ On August 8, 2017, the EEOC and UPS settled an 8-year-long lawsuit for \$1.7 million.
- ▶ Allegation: UPS violated the ADA by maintaining an inflexible maximum leave policy that automatically terminated employees when they reached 12 months of leave.
- ▶ In addition to monetary and injunctive relief, the settlement also required UPS to implement a new ADA policy.
- ▶ August 8, 2017 EEOC Press Release:
“Having a multiple-month leave policy alone does not guarantee compliance with the ADA. Such a policy must also include the flexibility to work with employees with disabilities who may simply require a reasonable accommodation to return to work. UPS has now made changes which will allow more people to keep their jobs.”

54

ADA

WHO CAN BE HELD LIABLE?

- ▶ All employers with 15 or more employees
 - ▶ Title II--Discrimination in the administration of public services--all employers may be held liable

REMEDIES

- ▶ Same as Title VII

STATUTE OF LIMITATIONS

- ▶ Same as Title VII



55

56

FLSA

- ▶ Sets minimum wage and overtime for employees
- ▶ Creates categories of employees exempt from overtime



57

THE BASICS

Pay employees for all hours worked.

Classify employees correctly, as either exempt or non-exempt.

58

FLSA2019-11:
Section 7(k) of the FLSA

▶ Section 7(k) of the FLSA provides a partial overtime exemption on a "work period" basis.

▶ No public agency will be deemed to have violated the FLSA (overtime requirement) if an employee who performs fire protection and law enforcement activities remain in certain time limits

▶ If fire – no overtime owed if less than 212 hours in 28-day work period (or no more than approximately 7.57 hours per day in any work period for 7-27 days)

▶ If LEO – no overtime owed if less than 171 hours in 28-day work period (or no more than approximately 6.11 hours per day in any work period for 7-27 days)

▶ If the employee is engaged in both fire protection and law enforcement, then the maximum hour standard is which activity the employee spends majority of his work time

59

FLSA Exemptions

SALARY BASED (WHITE COLLAR)	NON-SALARY BASED
1. Executive 2. Administrative 3. Professional	1. Outside Sales 2. Commissioned Sales 3. Motor Carrier Exemption 4. Miscellaneous

60

EXECUTIVE EXEMPTION

The employee must:

- (1) be compensated on a salary basis at a rate not less than \$684 per week, exclusive of board, lodging, or other facilities;
- (2) work primarily in management of the enterprise in which they are employed or of a recognized department or subdivision thereof;
- (3) customarily and regularly direct the work of two or more other employees; and
- (4) have the authority to hire or fire other employees or their suggestions and recommendations as to the change of status of other employees are given particular weight.

61

ADMINISTRATIVE EXEMPTION

The employee must:

- (1) be compensated on a salary or fee basis at a rate of not less than \$684 per week, exclusive of board, lodging, or other facilities;
- (2) work primarily in the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; and
- (3) exercise discretion and independent judgment with respect to matters of significance.

62

PROFESSIONAL EXEMPTION

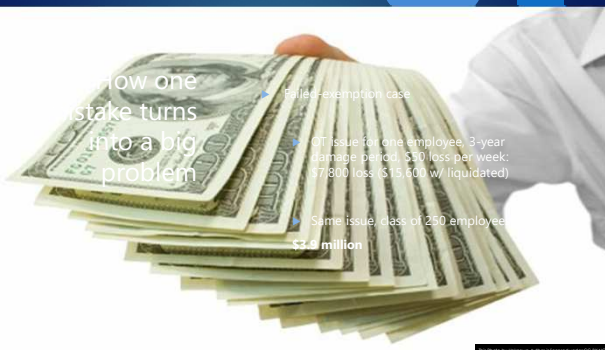
The employee must:

- (1) be compensated on a salary or fee basis at a rate of not less than \$684 per week, exclusive of board, lodging, or other facilities; and
- (2) their primary duty is the **performance of work**
 - (I) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction; or
 - (II) requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.

63

How one mistake turns into a big problem

- Failed exemption case
- OT issue for one employee, 3-year damage period, \$30 loss per week: \$7,800 loss (\$15,600 w/ liquidated)
- Same issue, class of 250 employees: \$3.9 million



64

FLSA Exemptions

- Effective January 1, 2020 –
- Qualifying salary level for exemption is currently not less than \$684 per week / \$35,568 per year.
- Highly compensated employee exemption threshold is raised to \$107,432.



65

FLSA Working Time

- 1. Waiting Time
- 2. Pre and Post Activities
- 3. On-call Time
- 4. Lunch Breaks
- 5. Sleeping Time
- 6. Travel Time
- 7. Meetings and Training



66

FLSA Who Can be Sued?



- ▶ “Employer” includes any person who acts in the interest of an employer to any employees of the employer.
- ▶ THUS, like the Equal Pay Act, individual managers can be held liable.

67

FLSA

- ▶ Remedies:
 - ▶ Unpaid wages
 - ▶ Unpaid overtime
 - ▶ Liquidated damages
 - ▶ Attorney’s fees and costs
- ▶ Statute of Limitations:
 - Like the Equal Pay Act; 2 years;
 - Extended to 3 for willful



68

Coverage Under the FMLA

- ▶ Entitles eligible employees for up to 12 work weeks of leave during any 12-month period for:
 - ▶ Birth of a son or daughter
 - ▶ Placement of a child with the employee for adoption or foster care;
 - ▶ Employee’s serious health condition; or
 - ▶ Care of the employee’s spouse, son, daughter, or parent, if the spouse, son, daughter, or parent has a serious health condition.



Family and Medical Leave Act

69

FMLA

Who Can Be Sued?

- ▶ “Employer” includes any person who acts in the interest of an employer to any of the employees of such employer. (Same as FLSA).
- ▶ According to the 11th Cir., public official sued in his or her individual capacity is not an “employer” under the FMLA, thus there is no subject matter jurisdiction over the claim.

70

FMLA

- ▶ Remedies
 - (1) Lost wages, salary, benefits or other compensation
 - (2) Prejudgment interest
 - (3) Liquidated damages equal to the sum of (1) and (2); and
 - (4) Fees and costs

Statute of Limitations → Like the EPA and FLSA; 2 years; Extended to 3 for willful



71

National Defense Authorization Act

- ▶ Went into effect January 28, 2008, amends the FMLA to provide 2 new leave entitlements.
 - ▶ Eligible ees of covered employers to care for covered servicemembers (26 WORKWEEKS)
 - ▶ Any qualifying exigency arising out of the fact that a covered family member is on active duty or has been notified of an impending call to active duty.
 - ▶ Short notice deployment; military events; childcare and school activities; financial and legal arrangements; counseling; rest and recuperation; post-deployment activities; and agreed upon activities

72

Florida Statutes

Florida Civil Rights Act

- ▶ Coverage under the FCRA
 - ▶ Same as Title VII, ADA and ADEA
 - ▶ Race, sex, national origin, religion, disability and age (except not limited to 40 or older)
- EXCEPT also includes prohibition of discrimination based on marital status
- Applies to ERs covered by Title VII, including local and state governments



73

THIS IS FCRA

Florida

- ▶ Title VII and the FCRA
- ▶ Federal courts look to federal case law interpreting Title VII when analyzing FCRA claims.
- ▶ Thus, any interpretive changes regarding Title VII may subsequently be applied to the FCRA.
- ▶ EXs:
 - ▶ Sex discrimination includes discrimination against a transgender person for gender nonconformity under both Title VII and FCRA.
 - ▶ Title VII retaliation claim must be proved according to traditional principles of but-for causation since 2013 Supreme Court decision.



74

THIS IS FCRA

Florida

- ▶ Remedies
 - ▶ Compensatory
 - ▶ NO PUNITIVE FOR STATE AND LOCAL GOV'T
 - ▶ Attorney's fees and costs
 - ▶ Jury trial
- ▶ Statute of Limitations
 - ▶ 90 days to file charge of discrimination with FCHR; unlike Title VII which gives 180 days.
 - ▶ EE then has one year to file suit after the FCHR makes a final determination
 - ▶ If FCHR fails to make a determination within 180 days employee can file suit. No early right to sue either.



75

Law CS/HB 255

- ▶ On June 30, 2020, Governor Ron DeSantis signed into law CS/HB 255, which amends the limitations period for filing a lawsuit alleging a violation of the FCRA.
- ▶ Prior to the law, if FCHR fails to issue a determination within 180 days, the charging party may proceed as if the FCHR issued a reasonable cause determination and file a lawsuit. The SOL to file is 4 years.
- ▶ The amendment harmonizes the limitations periods, providing that the 1-year SOL that applies where FCHR issues a timely cause determination applies where it fails to do so. The FCHR is required to "promptly notify" the charging party of its failure to issue a determination. The 1-year period begins on the date that notice was sent.

76

Federal Civil Rights Claims

- ▶ Enacted in wake of Civil War and known as Civil Rights Acts of 1866 and 1871
- ▶ Codified at 42 U.S.C. §§ 1981-85



77

Coverage Under § 1981

- ▶ Guarantees the "same equal rights under the law" to all persons "as is enjoyed by white citizens."
- ▶ Amended in 1991, adding new sections:
 - ▶ Define the right to "make and enforce contracts," and
 - ▶ Protection against violation of rights by "governmental discrimination and impairment under color of state law."



78

Coverage Under § 1981

- ▶ Contract language used in employment cases – both private and public employers.
- ▶ § 1981 applies ONLY to RACE as understood at the time of its enactment in 1866.
- ▶ Action against state actor must be brought via § 1983 – action cannot proceed if based solely on § 1981.
- ▶ Unlike Title VII, § 1981 claims require plaintiffs to establish "but-for" causation. *Comcast Corp. v. National Association of African-American Owned Media*, 140 S.Ct. 1009 (2010).

79

Coverage Under § 1983

- ▶ Constitution is not self-executing. Thus...
- ▶ When individuals seek to enforce Constitutional rights against a local gov't, the individual generally must bring suit under § 1983.
- ▶ Procedural due process, equal protection, free speech, unreasonable search and seizure, etc.

80

Coverage Under § 1983

§ 1983 allows an action for damages against any person who, under color of law, subjects any person to a deprivation of any rights, privileges or immunities secured by the Constitution or the law of the United States.



81

Coverage Under § 1983

Policy
A policy described government, private "Statement of Inter important organiza

- ▶ To state a claim, Plaintiff must show:
 - 1 He was deprived of a right, privilege or immunity secured by the Constitution or Federal law,
 - 2 The deprivation took place under color of law, and
 - 3 The act was in furtherance of a "custom or policy"

82

Coverage Under § 1983

▶ "Custom or Policy"

- ▶ Counties and municipalities may only be held liable if the act taken constitutes a custom or policy of the county/municipality. The local gov't must be clearly at fault. Its actions must have been the CAUSE of the harm. There is no respondeat superior.
- ▶ Single instance of deprivation does not mean you're safe.
- ▶ When action is taken by a gov't official in whom final policymaking authority has been vested, action constitutes official policy and gov't potentially can be held liable.

83

Coverage Under § 1985

- ▶ Prohibits various conspiracies to interfere with civil rights, including conspiracies to discriminate against someone based on race and sex. The law has been extended to protect against conspiracies based on any protected characteristic.
- ▶ "Conspiracy" means 2 individuals act together..
- ▶ May be brought against anyone – not just state actors

84

Coverage Under § 1985

Elements of claim under § 1985(3):

- 1) a conspiracy;
- 2) for the purpose of depriving equal protection; and
- 3) an act in furtherance of the conspiracy;
- 4) whereby a person is either injured in his person or property or deprived of a right.



85

Who Can Be Sued?

- ▶ § 1981
 - ▶ any individual who violates the statute;
 - ▶ counties and municipalities; but,
 - ▶ **generally not** state gov't, unless waived 11th Amendment Immunity
- ▶ § 1983
 - ▶ counties and municipalities if violation was due to custom or policy
 - ▶ **not** private persons unless engaging in "state action" because of color of law requirement
- ▶ § 1985
 - ▶ private persons/business and governmental entities

86

Defenses

- ▶ Absolute Immunity
 - ▶ Available to state and local legislators and judges when sued for damages and, in some instances, for injunctions
 - ▶ Prosecutors when sued for damages
- ▶ Qualified Immunity
 - ▶ Available to gov't officials in certain circumstances when sued in their individual capacities under sections 1981 and 1983.
 - ▶ In other words, not available in state tort lawsuit.



87

Defenses Qualified Immunity

- ▶ When are gov't officials entitled to Qualified Immunity?
- ▶ When they act with discretionary authority within the scope of their job duties; AND
- ▶ Their conduct does not violate a clearly established right of which a **reasonable person** would have known.

88

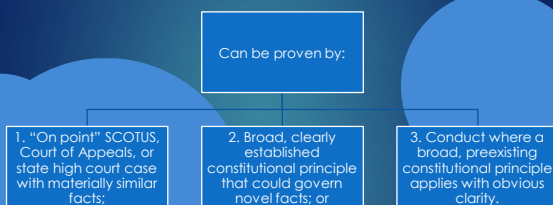
Defenses Qualified Immunity

- ▶ Objective Reasonableness Standard
 - ▶ Government agent gets benefit of the doubt UNLESS actions are so obviously illegal in light of then-existing law that only an official who was plainly incompetent or who knowingly violated the law would have committed them.
- ▶ 11th Cir. has held that QI is the rule rather than the exception. It provides immunity from SUIT not just from liability. Usually, immediately appealable.



89

Clearly Established Rights



90

Remedies

§ 1981

- Injunctive relief, reinstatement, back pay
- Punitive damages against a public official and compensatory damages against both the official and the municipality

§ 1983

- Injunctive relief, reinstatement, back pay
- Punitive damages against a public official and compensatory against municipality and official
- Attorneys' fees and costs

91

Statute of Limitations



- ▶ § 1983 (presumably § 1985)
 - ▶ Governed by same SOL as personal injury suits
 - ▶ In Florida, the 4-year SOL for tort actions governs
- ▶ § 1981
 - ▶ 4-year SOL applies

92

Section 1981 vs. Title VII

Differences	Title VII	Section 1981
Actionable Discrimination	Race, color, religion, sex, & national origin	Race, certain national origins, & religions
Number of Employees	Applies only to employers of 15 or more persons	No such restriction
Individual Liability	No	Yes

93

Excessive Use of Force

▶ Graham Factors

- ▶ Severity of the crime at issue;
- ▶ Whether the suspect poses an immediate threat to the safety of the officers or others;
- ▶ Whether the suspect was actively resisting arrest or attempting to evade arrest by flight;
- ▶ The relationship between the need and amount of force used; and
- ▶ The extent of the injury inflicted.



94

Public Employee Labor Relations Act

- ▶ Protects rights of public employees to take concerted action in furtherance of mutual aims and protects the right to form, join and assist employee organizations.
- ▶ PERC oversees disputes concerning the representation of public employees by labor unions and allegations of unfair labor practices.



95

Florida Whistleblower Act

▶ Coverage

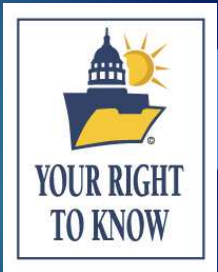
- ▶ EEs who disclose or threaten to disclose to a governmental agency a violation or suspected violation of misfeasance, malfeasance, waste, or neglect of duties. (Fla. Stat. § 112.3187)
- ▶ The complaint must be in writing. Does not protect those who disclose information known to be false.



96

Florida Constitutional Law

- ▶ Provides additional rights beyond that provided in the U.S. Constitution
 - ▶ Right to privacy;
 - ▶ Right to access to public meetings and records; and
 - ▶ The right of access to the courts.



97

State Tort Claims

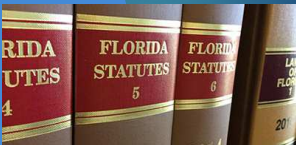
- ▶ DEFAMATION
- ▶ NEGLIGENCE RETENTION
- ▶ NEGLIGENCE HIRING
- ▶ BATTERY



98

State Tort Claims Sovereign Immunity

- ▶ § 768.28 F.S. -- § 768.28, F.S. waives sovereign immunity in state tort actions.
- ▶ Strict compliance with the notice requirement in section 768.28, Florida Statute is required to maintain a claim against the State, its Agencies or Subdivisions.



99

Conclusion

- ▶ Employment related liability of Florida local gov't can be divided into four major categories:
 - ▶ Federal Civil Rights Claims
 - ▶ Federal Statutory Claims
 - ▶ State Statutory Claims
 - ▶ State Tort Claims

100



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101

Sovereign Immunity

By

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Sovereign Immunity

I. Sovereign Immunity – The History

- a. Ancient Principle – Based on English law.
 - i. The Sovereign could not be sued without his consent.
- b. The Florida Constitution – In 1968, the Florida Constitution was revised. Among the many by-products of this revision, certain articles were moved around.ⁱ
 - i. Article X, section 13 – “Provision may be made by general law for bringing suit against the state as to all liabilities now existing or hereafter originating.”
 - 1. In and of itself, this does not waive sovereign immunity. Rather, it allowed the Legislature to create a general law governing how suit would be brought against the state.
- c. Florida Statute
 - i. Section 768.28 – The Legislature (in 1973) enacted section 768.28. Pursuant to Article X, section 13 of the Florida Constitution, this statute waived sovereign immunity:
 - 1. “The state, for itself and for its agencies or subdivisions, hereby waives sovereign immunity for liability for torts, but only to the extent specified in this act. Actions at law against the state or any of its agencies or subdivisions to recover damages in tort for money damages against the state or its agencies or subdivisions for injury or loss of property, personal injury, or death caused by the negligent or wrongful act or omission of any employee of the agency or subdivision while acting within the scope of the employee’s office or employment under circumstances in which the state or such agency or subdivision, if a private person, would be liable to the claimant, in accordance with the general laws of this state, may be prosecuted subject to the limitations specified in this act.”

II. The Basics – Who, What, When, Where and What else?

- i. Who does it apply to?
 - 1. The State of Florida (all three branches: Executive, Legislative and Judicial)
 - 2. Agencies of the State of Florida, including more than 35 agencies (such as):
 - a. Department of Education
 - b. Department of Health
 - c. Department of Law Enforcement
 - d. Department of Fish and Wildlife Conservation
 - e. Department of Emergency Management
 - 3. Political Subdivisions of the State (Counties)

4. Municipal Corporations
5. Constitutional Officers (Governor, Attorney General, Sheriffs, Property Appraisers, etc.)
6. Independent establishments of the State (Independent Special Districts, State University Boards of Trustees, etc.)
7. Public Agencies within Public Private Partnerships
8. Corporations acting as instrumentalities or agencies of the State (such as Enterprise Florida)

ii. What does it apply to?

1. It applies to torts

- a. What is a tort? A tort is “[a] civil wrong, other than breach of contract, for which a remedy may be obtained, usually in the form of damages; a breach of a duty that the law imposes on persons who stand in a particular relation to one another. Tortious conduct is typically one of four types: (1) a culpable or intentional act resulting in harm; (2) an act involving culpable and unlawful conduct causing unintentional harm; (3) a culpable act of inadvertence involving an unreasonable risk of harm; and (4) a nonculpable act resulting in accidental harm for which, because of the hazards involved, the law imposes strict or absolute liability despite the absence of fault.” Black’s Law Dictionary, 10th Edition (2014).

2. Torts include both negligent and intentional acts.

- a. However, intentional acts have a further qualifier to be actionable as a claim. It must be shown that they are committed (1) within the course and scope of agent's employment and (2) the agent was acting without bad faith, without malicious purpose, and not in a manner exhibiting willful disregard of human rights, safety, or property. City of Fort Lauderdale v. Todaro, 632 So. 2d 655 (Fla. 4th DCA 1994).

i. Note of caution – The Catch-22 with the “Intentional Act” affirmative defense.

1. Example – Law enforcement sued for battery. If you plead that the officer was so outside the course and scope of his job, you may get the agency removed, but you may have hung your employee out in the wind.
2. Recent case with excellent detailed analysis of this issue – Davis v. Baez, 208 So. 3d 747 (Fla. 3d DCA 2016).

3. Waived for Contract claims -
 - a. Based on the genesis of caselaw, sovereign immunity has also been waived for contract claims. Pan-Am Tobacco Corp. v. Dep't of Corrections, 471 So. 2d 4 (Fla 1984).
 - i. Must be an express written contract. See City of Ft. Lauderdale v. Israel, 178 So. 3d 444 (Fla. 4th DCA 2015).
 4. It does not apply to Federal claims.
- iii. When does it apply?
1. Since it was waived in 1973. But it's an interesting question when it comes to new causes of action: if the action is new, it would depend if it was classified as a tort.
 - a. Also, just keep in mind, the Legislature could change the statute, allowing it to apply to new causes of action, possibly even retroactively.
- iv. Where does it apply?
1. Applies throughout the entirety of the State of Florida;
 - a. However, be careful about the multiple federal properties throughout Florida, which may be adjacent to susceptible property.
 - i. Example – Miami Marlins pitcher Jose Fernandez hit a jetty; who has ownership of the jetty?
 - ii. Multi-agency Task force for law enforcement.
- v. What does it actually do?
1. The doctrine means that unless the entity has waived sovereign immunity, the entity cannot be sued. The court does not have jurisdiction to entertain the claim. Pollack v. Fla. Dep't of Highway Patrol, 882 So. 2d 928 (Fla. 2004).
 2. Claims are limited to \$200,000 per claimant/\$300,000 per incident. See §768.28(5).
 - a. This changed in 2011 and became effective October 1, 2011 and applies to claims arising after that. Id.
 3. Attorneys' Fees – Limited to 25% of the recovery. See §768.28(8).

III. Examples of Claims –

- a. The most common claims are the same that you see between private party litigants, including:
 - i. Automobile Negligence
 - ii. Slip and Fall/Trip and Fall (also known as premises liability claims)
 - iii. Negligent Hiring
 - iv. Negligent Retention

IV. The Process –

- a. The Incident – You may find out immediately, you may not find out for years.
 - i. Example – If a person trips on a sidewalk and is injured, you may never find out until you receive a notice of claim.
 - ii. Public Record – If you do find out, how do you go about investigating and is it public record?
 - 1. Be very careful here. Make sure that trained professionals are handling the investigation because it would be very easy to create a public record that would be discoverable.
- b. Notice of Claim – Florida Statute §768.28(6)
 - i. Who gets the notice?
 - 1. The entity (municipality, county, school board, etc.) and
 - 2. The Department of Financial Services (unless the entity is a municipality, county or the Florida Space Agency). See §768.28(6)(a).
 - a. Must be presented in writing. Id.
 - ii. Timeframe
 - 1. Must be submitted to the entity within three (3) years of the incident. Id.
 - a. **UNLESS** it is for a wrongful death claim, it must be submitted within two (2) years of the incident. See §768.28(6)(a)(2). OR
 - b. **UNLESS** it is a claim for contribution, it must be submitted with six (6) months after the judgment. Id.
 - iii. Contents
 - 1. Must include:
 - a. Name of Claimant;
 - b. Date of Birth of Claimant;
 - c. Place of Birth of Claimant;
 - d. Social Security or Federal Identification Number of Claimant (as appropriate);
 - e. Whether more than \$200 is owed to the state or any subdivision?
 - i. If not, must state nothing is owed;
 - ii. If so, must state the case style, tribunal, the nature and amount of all adjudicated penalties, fines, fees, victim restitution fund, and other judgments in excess of \$200, whether imposed by a civil, criminal, or administrative tribunal. Id. at (6)(c).
 - 2. What is not required to be included? A detailed description of what happened.
 - iv. Evaluation and Stay of the lawsuit

1. Pursuant to §768.28(6)(d), the Agency has six (6) months to investigate and make a final disposition of the claim, UNLESS:
 - a. The claim is for medical malpractice or wrongful death, which allows for only ninety (90) days for final disposition.
 2. **Practice point:** unless there is an overwhelming and compelling reason, it does not make sense from a legal perspective to deny the claim early. However, there may be political or other pressure or reasons to do so.
- c. Suit Filed
- i. Applicable Statute of Limitations – the statute of limitations is four (4) years for all tort claims. §95.11(3), Florida Statutes, in conjunction with §768.28(14). However, mind the exception:
 1. Wrongful death claims. §95.11(4)(d) states that wrongful death claims are limited to two (2) years, which was codified in 768.28(14) in 2011 (effective date is July 1, 2011).
 - ii. Initial Service – must be made on the “head of the agency concerned and also, except as to a defendant municipality, county or the Florida Space Agency, upon the Department of Financial Services....”
 1. Time for response – Thirty (30) days. See §768.28(7). This is ten more than the normal response time you see in a standard civil summons.
- d. Evaluation and defense of the claim
- i. Is there a duty of care? The waiver of sovereign immunity did not create any new duties of care. Triannon Park Condo. Ass’n, Inc. v. City of Hialeah, 468 So. 2d 912 (Fla. 1985). This is the evaluation of Planning versus Operational.
 1. Agencies are not liable for planning activities. See Commercial Carrier Corp. v. Indian River County, 371 So. 2d 1010 (Fla. 1979) and subsequent progeny.
 2. Agencies are liable for operational activities. Id.
 - a. This is typically handled by a motion to dismiss, with the key question of law being: is the complained of activity a “planning activity” (and therefore no duty) or an “operational activity”. For a more recent case, see Piedra v. City of North Bay Village, 193 So. 3d 48 (Fla. 3d DCA 2016).
 3. If there is a duty of care, then move to the next level question.
 - ii. Is there a waiver of sovereign immunity for the claim? Id.
 1. Preliminary inquiry where one or more tort defendants raise sovereign immunity as defense is whether conduct complained of is tortious. White v. City of Waldo,

659 So. 2d 707 (Fla. 1st DCA 1995), *cause dismissed*, 666 So. 2d 901, *rehearing denied & review denied*, 667 So. 2d 774

- a. If there is not, then there is no viable claim and the case should be dismissed;
- b. If there is, then move forward to trial.

e. Trial - Adverse Jury Verdict

- i. If the verdict is for more than \$200,000 (individual claimant) or \$300,000 (for all claimants/plaintiffs for one incident), options for collecting the additional award are limited:
 1. Pursue insurance funds, if the entity has excess coverage. However, there is no guaranteed way to force the payment of insurance proceeds if the carrier will not pay. For more, see the discussion of Plancher v. UCF Athletic Association, Inc. below.
 2. Pursue a claims bill. See §768.28(5).
- ii. Generally, anything above the threshold would have to move to a claims bill.
 1. Example – UCF case. “In 2008, Ereck Plancher, a University of Central Florida (UCF) football player, collapsed and tragically died during football practice conditioning drills. After his death, Ereck's parents (the Planchers) filed a negligence action against UCF and UCF Athletics Association, Inc. (“UCFAA”), the statutorily authorized direct-support organization responsible for administering UCF's athletics department.” Plancher v. UCF Athletic Ass’n, Inc., 175 So. 3d 724, 725 (Fla. 2015) (footnote and internal citations omitted).
 - a. Ultimately, a verdict was rendered for \$10 million against UCFAA alone. [On the first day of trial, UCF was dismissed as a defendant].
 - b. After moving through the Fifth DCA, the Florida Supreme Court upheld the award, but found UCFAA was covered by the rubric of sovereign immunity as provided by §768.28. Therefore, UCFAA was only responsible to pay \$200,000.
 - c. Further, the Court specifically held that UCFAA (and by implication, its insurance carrier) was also only responsible for payment up to \$200,000 and directed that any further payment must come from the Legislature. Id. at 729, and footnote 4 to the opinion. See also Stuyvesant Insurance Company v. Bournazian, 342 So. 2d 471, 472 n. 3 (Fla. 1976).

V. Recent Updates –

a. Cases

- i. Gualtieri v. Bogle, 343 So.3d 1267 (Fla. 2d DCA 2022) – Plaintiff is a motorcyclist pulled off his motorcycle during a traffic stop and was subsequently injured when his motorcycle fell on him. He sued both the Sheriff deputy and the Sheriff alleging battery and negligent training. The Second DCA found that (and thus reiterated) that there is no viable claim against the deputy individually because there was no allegation of bad faith, malicious intent or willful and wanton disregard. It also remanded for dismissal the negligent training claim because the Court found that the decision on how to train officers is discretionary and therefore immune from liability under sovereign immunity. However, the Court allowed the battery claim against the Sheriff to move forward as a question of fact of whether the actions were in the course and scope of the deputy’s work.
- ii. McKinley v. Gualtieri, 338 So.3d 429 (Fla. 2d DCA 2022) – Bystander Plaintiff bitten by sheriff K-9 at an auto show. The Second DCA outlines the application of duty for police dogs and handlers to under common-law as the basis for waiver of sovereign immunity and further expands the analysis of operational versus planning when a K-9 officer is working, with this case being operational and therefore not barred by sovereign immunity.
- iii. Broward County v. Manarite ex rel. G.M., 333 So.3d 1130 (Fla. 4th DCA 2022) – A child was injured near a construction site and several entities were sued, including Broward County. The County argued in a motion to dismiss that it was protected by sovereign immunity because the acts at issue were “planning-level” decisions. The trial court denied the motion, but the Fourth DCA reversed and agreed that the complaint failed to alleged more than discretionary planning-level decisions and therefore must be dismissed as pled. Also one of the first opinions that reflected the new rule from FHP v. Jackson allowing a broader range of appeals of non-final orders litigating sovereign immunity as a defense.
- iv. City of Sweetwater v. Pichardo, 332 So.3d 20 (Fla. 3d DCA 2021) – Police officer claim based on Mayor telling him he was promoted to Lieutenant, but he was not actually promoted but was only in an “acting lieutenant” position. Subsequently, the officer was faced with termination, but resigned. When the officer found out later that he was not promoted, he sued for negligent misrepresentation and said he would not have resigned if he had known his “true position” because he would have the benefit of collective bargaining protections when faced with termination. The Third DCA reversed the trial court and remanded for granting summary judgment in favor of the City because there is

no common law or statutory duty for a municipality to provide accurate information, meaning there cannot be liability. This reinforces the two-step analysis for claims: first is there a duty and if there is a duty, is it barred by sovereign immunity.

- v. Lazzari v. Guzman, 314 So.3d 374 (Fla. 3d DCA 2020) – Plaintiff sues doctor, who is an employee of Jackson Memorial Hospital, as well as Jackson Memorial Hospital and the University of Miami. The Hospital is affiliated with the University of Miami medical school by written agreement and therefore the University claims entitlement to sovereign immunity because the Hospital (and the doctor as employee) are agents of the University at the time of the claim. The Third District agreed and affirmed summary judgment in favor of the University.
- vi. Medina v. Pollack, 300 So.3d 173 (Fla. 4th DCA 2020) – School security guard at Parkland high school is sued for failing to (1) call for Code Red, (2) advise the shooter was a threat, (3) exercise reasonable care of the protection of teachers and students and (4) follow policies and procedures to mitigate/reduce risk of harm or injuries, all directly related to the mass shooting at the school. The security guard moved for summary judgment based on sovereign immunity and claimed that his action/inaction did not rise to the level of willful and wanton disregard of safety, but the trial court denied the motion and the security guard appealed. The Fourth DCA agreed that there were factual issues as to whether the action/inaction constituted willful and wanton disregard of safety and returned the case for further proceedings and/or trial.
- vii. Department of Financial Services. v. Barnett, 303 So.3d 508 (Fla. 2020) – Answered the rephrased certified question of whether a mass casualty event (such as school shooting) is “arising out of the same incident or occurrence” thus limiting all claimants to the \$200,000/\$300,000 statutory cap on damages. This specific case involved the murder of four children by their stepfather, and DCF’s alleged negligence in failure to properly monitor the situation. The Supreme Court said yes, the statutory cap applies to all injuries sustained in the same incident or occurrence and came to the conclusion based on strict statutory interpretation of §768.28(5).
- viii. Fla. Highway Patrol v. Jackson, 288 So.3d 1179 (Fla. 2020) – The Florida Supreme Court answered the certified question in the negative and said the appellate rules do not allow appeal of nonfinal orders denying sovereign immunity when the finding was not explicitly made by the trial court. The Court then the same day changed Florida Rule of Appellate Procedure Rule 9.130 to remedy the underlying problem (see 289 So. 3d 866) (Fla. 2020)). Overall, the case and opinion updating the rule present an excellent

discussion and analysis of the current law for appeals of trial court orders denying pre-trial sovereign immunity claims.

- ix. Ross v. City of Jacksonville, 274 So.3d 1180 (Fla. 1st DCA 2019) – Affirmed summary judgment in favor of the City of Jacksonville. A sheriff’s vehicle was involved in a traffic pursuit and struck another vehicle, causing personal injuries. The City moved for summary judgment based on (1) the officer’s actions were not so reckless as to constitute disregard for human life, rights, safety, or property, as well as (2) he was acting in accordance with the written police vehicle pursuit policy. Finally, the officer (3) had reason to believe the fleeing vehicle committed a forcible felony and for all of these reasons, the City was entitled to sovereign immunity.
- x. Fla. Fish & Wildlife Conservation Comm’n v. Daws, 256 So.3d 907 (Fla. 1st DCA 2018) – Sovereign Immunity not waived for nuisance claims because FWC owes no duty to prevent trespass on private land and issuing deer dog hunting license was discretionary decision.
- xi. Sanchez v. Miami-Dade County, 245 So.3d 933 (Fla. 3d DCA 2018) – County’s decision to allocate off-duty police officers in certain locations was a discretionary decision protected by sovereign immunity.
- xii. Sun ‘N Lake of Sebring Improvement District v. Ayala, 247 So.3d 572 (Fla. 2d DCA 2018) – Sovereign Immunity is not waived for a claim for Florida Deceptive and Unfair Trade Practices Act (“FDUTPA”).
- xiii. Paylan v. Dirks, 228 So.3d 679 (Fla. 2d DCA 2017) – Sovereign immunity waived for a claim against assistant state attorney for a tortious interference with a business relationship claim.
- xiv. Rogers v. Jones, 227 So.3d 759 (Fla. 1st DCA 2017) – emphasized that any claim under 768.28 is governed by a four-year statute of limitations, in particular 768.28(14). Note – the exceptions for claims of contribution, wrongful death and claims for medical malpractice.
- xv. Grossman Roth, P.A. v. Mellen, 221 So.3d 683 (Fla. 4th DCA 2017) – Reversal and remand holding that claims bill limiting attorneys’ fee was an unconstitutional impairment of contract between the claimant and the law firm, based on the recent holding of Searcy, Denney, Scarola, Barnhart & Shipley, etc. v. State, 209 So. 3d 1181 (Fla. 2017).
- xvi. Miami-Dade County v. Pozos, 242 So.3d 1152 (Fla. 3d DCA 2017) – Split opinion that held an agency can only appeal a non-final order denying summary judgment for

sovereign immunity if the trial court specifically finds, as a matter of law, that the agency is not entitled to sovereign immunity.

- xvii. Wilson v. City of Tampa, 209 So.3d 646 (Fla. 2d DCA 2017) – notice requirements of 768.28(6)(a) are minimal and two-fold: must be in writing and assert a claim for compensation.
- xviii. State of Florida, Department of Elder Affairs v. Caldwell, 199 So.3d 1107 (Fla. 1st DCA 2016) – no waiver of sovereign immunity for claim statutory claim of retaliatory discharge.
- xix. G4S Secure Solutions (USA), Inc. v. Morrow, 210 So.3d 92 (Fla. 2d DCA 2016) – private prisoner transport company considered agent of Pinellas County Sheriff’s Office and therefore entitled to sovereign immunity.
- xx. City of Delray Beach v. DeSisto, 197 So.3d 1206 (Fla. 4th DCA 2016) – claims based on Florida Civil Rights Act are subject to sovereign immunity cap in §768.28(5).
- xxi. Manfre v. Shinkle, 184 So.3d 641 (Fla. 5th DCA 2016) – motorist hit dead horse in road and sued the local sheriff. The court found no duty owed to the motorist by the sheriff for the deceased equine in the road. Seriously, it is important for its excellent analysis of the “duty” issue in the examination of liability against agencies.

ⁱ The Florida Constitution of 1885 had the exact same language at Article III, Section 22.

Sovereign Immunity

1

The History

Ancient Principle – Based on English law.

- The Sovereign could not be sued without his consent.
- The Florida Constitution – In 1968, the Florida Constitution was revised. Among the many by-products of this revision, certain articles were moved around.
 - Article X, section 13 – “Provision may be made by general law for bringing suit against the state as to all liabilities now existing or hereafter originating.”
 - In and of itself, this does not waive sovereign immunity. Rather, it allowed the Legislature to create a general law governing how suit would be brought against the state.
- The Florida Constitution of 1885 had the exact same language at Article III, Section 22.

2

The Statute – Section 768.28

- Section 768.28 – The Legislature (in 1973) enacted section 768.28. Pursuant to Article X, section 13 of the Florida Constitution, this statute waived sovereign immunity:

3

"The state, for itself and for its agencies or subdivisions, hereby waives sovereign immunity for liability for torts, but only to the extent specified in this act. Actions at law against the state or any of its agencies or subdivisions to recover damages in tort for money damages against the state or its agencies or subdivisions for injury or loss of property, personal injury, or death caused by the negligent or wrongful act or omission of any employee of the agency or subdivision while acting within the scope of the employee's office or employment under circumstances in which the state or such agency or subdivision, if a private person, would be liable to the claimant, in accordance with the general laws of this state, may be prosecuted subject to the limitations specified in this act."

4

The Basics – Who, What, When, Where and What else?

Who does it apply to?

- The State of Florida (all three branches: Executive, Legislative and Judicial)
- Agencies of the State of Florida, including more than 35 agencies (such as):
 - Department of Education
 - Department of Health
 - Department of Law Enforcement
 - Department of Fish and Wildlife Conservation
 - Department of Emergency Management
- Political Subdivisions of the State (Counties)
- Municipal Corporations
- Constitutional Officers (Governor, Attorney General, Sheriffs, Property Appraisers, etc.)
- Independent establishments of the State (Independent Special Districts, State University Boards of Trustees, etc.)
- Public Agencies within Public Private Partnerships
- Corporations acting as instrumentalities or agencies of the State (such as Enterprise Florida)

5

What does it apply to?

- It applies to torts
 - What is a tort?
 - A tort is "[a] civil wrong, other than breach of contract, for which a remedy may be obtained, usually in the form of damages; a breach of a duty that the law imposes on persons who stand in a particular relation to one another. Tortious conduct is typically one of four types: (1) a culpable or intentional act resulting in harm; (2) an act involving culpable and unlawful conduct causing unintentional harm; (3) a culpable act of inadvertence involving an unreasonable risk of harm; and (4) a nonculpable act resulting in accidental harm for which, because of the hazards involved, the law imposes strict or absolute liability despite the absence of fault." Black's Law Dictionary, 10th Edition (2014).

6

What does it apply to (continued)

- Torts include both negligent and intentional acts.
 - However, intentional acts have a further qualifier to be actionable as a claim. It must be shown that they are committed (1) within the course and scope of agent's employment and (2) the agent was acting without bad faith, without malicious purpose, and not in a manner exhibiting willful disregard of human rights, safety, or property. City of Fort Lauderdale v. Todaro, 632 So. 2d 655 (Fla. 4th DCA 1994).

7

What does it apply to (continued)

- Note of caution – The Catch-22 with the “Intentional Act” affirmative defense.
 - Example – Law enforcement sued for battery. If you plead that the officer was so outside the course and scope of his job, you may get the agency removed, but you may have hung your employee out in the wind.
- Recent case with excellent detailed analysis of this issue – Davis v. Baez, 208 So. 3d 747 (Fla. 3d DCA 2016).

8

What does it apply to (continued)

- Waived for Contract claims -
 - Based on the genesis of caselaw, sovereign immunity has also been waived for contract claims. Pan-Am Tobacco Corp. v. Department of Corrections, 471 So. 2d 4 (Fla. 1984).
 - Must be an express written contract. See City of Ft. Lauderdale v. Israel, 178 So. 3d 444 (Fla. 4th DCA 2015).
- It does not apply to Federal claims.

9

When does it apply?

- Since it was waived in 1973. But it's an interesting question when it comes to new causes of action: if the action is new, it would depend if it was classified as a tort.
- Also, just keep in mind, the Legislature could change the statute, allowing it to apply to new causes of action, possibly even retroactively.

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Where does it apply?

- Applies throughout the entirety of the State of Florida;
 - However, be careful about the multiple federal properties throughout Florida, which may be adjacent to susceptible property.
 - Example – Miami Marlins pitcher Jose Fernandez hit a jetty; who has ownership of the jetty?
- Multi-agency Task force for law enforcement.

11

What else?

- The doctrine means that unless the entity has waived sovereign immunity, the entity cannot be sued. The court does not have jurisdiction to entertain the claim. Pollock v. Florida Department of Highway Patrol, 882 So. 2d 928 (Fla. 2004).
- Claims are limited to \$200,000 per claimant/\$300,000 per incident. See §768.28(5).
 - This changed in 2011 and became effective October 1, 2011 and applies to claims arising after that. Id.
- Attorney's Fees – Limited to 25% of the recovery. See §768.28(8).

12

Examples of Claims

- The most common claims are the same that you see between private party litigants, including:
 - Automobile Negligence
 - Slip and Fall/Trip and Fall (also known as premises liability claims)
 - Negligent Hiring
 - Negligent Retention

13

The Process

- Start with the incident - You may find out immediately, you may not find out for years.
 - Example – If a person trips on a sidewalk and is injured, you may never find out until you receive a notice of claim.
 - Public Record – If you do find out, how do you go about investigating and is it public record?
- Be very careful here. Make sure that trained professionals are handling the investigation because it would be very easy to create a public record that would be discoverable.

14

The Process (continued)

- The Notice of Claim – Florida Statute §768.28(6)
 - Who gets the notice?
 - The entity (municipality, county, school board, etc.) and
 - The Department of Financial Services (unless the entity is a municipality, county or the Florida Space Agency). See §768.28(6)(a).
 - Must be presented in writing. Id.
 - Timeframe
 - Must be submitted to the entity within three (3) years of the incident. Id.
 - **UNLESS** it is for a wrongful death claim, it must be submitted within two (2) years of the incident. See §768.28(6)(a)(2). Or it is for contribution pursuant to §768.31, which must be presented within six (6) months after the judgment.

15

The Process (continued)

- Contents
 - Must include:
 - Name of Claimant;
 - Date of Birth of Claimant;
 - Place of Birth of Claimant;
 - Social Security or Federal Identification Number of Claimant (as appropriate);
 - Whether more than \$200 is owed to the state or any subdivision?
 - If not, must state nothing is owed;
 - If so, must state the case style, tribunal, the nature and amount of all adjudicated penalties, fines, fees, victim restitution fund, and other judgments in excess of \$200, whether imposed by a civil, criminal, or administrative tribunal. Id. at (6)(c).
- What is not required to be included? A detailed description of what happened.

16

The Process (continued)

- Evaluation and stay of lawsuit
 - Pursuant to §768.28(6)(d), the Agency has six (6) months to investigate and make a final disposition of the claim, UNLESS:
 - The claim is for medical malpractice or wrongful death, which allows for only ninety (90) days for final disposition.
 - **Practice point:** unless there is an overwhelming and compelling reason, it does not make sense from a legal perspective to deny the claim early. However, there may be political or other pressure or reasons to do so.

17

The Process (continued)

- The lawsuit has been filed
 - What is the applicable Statute of Limitations – the statute of limitations is four (4) years for all tort claims. §95.11(3), Florida Statutes, in conjunction with §768.28(14). However, mind the exception:
 - **NOTE:** Wrongful death claims. §95.11(4)(d) states that wrongful death claims are limited to two (2) years, which was codified in §768.28(14) in 2011 (effective date is July 1, 2011).
- Initial Service – must be made on the “head of the agency concerned and also, except as to a defendant municipality, county or the Florida Space Agency, upon the Department of Financial Services....”
 - Time for response – Thirty (30) days. See §768.28(7). This is ten more than the normal response time you see in a standard civil summons.

18

The Process (continued)

- Evaluation and defense of the claim
 - Is there a duty of care? The waiver of sovereign immunity did not create any new duties of care. Triannon Park Condo. Ass'n Inc. v. City of Hialeah, 468 So. 2d 912, 917 (Fla. 1985). This is the evaluation of Planning versus Operational.
 - Agencies are not liable for planning activities. See Commercial Carrier Corp. v. Indian River County, 371 So. 2d 1010 (Fla. 1979) and subsequent progeny.
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 - If there is a duty of care, then move to the next level question.

19

The Process (continued)

- The next inquiry: is there a waiver of sovereign immunity for the claim? Id.
 - Preliminary inquiry where one or more tort defendants raise sovereign immunity as defense is whether conduct complained of is tortious. White v. City of Waldo, 659 So. 2d 707 (Fla. 1st DCA 1995), *cause dismissed*, 666 So. 2d 901, *rehearing denied & review denied*, 667 So. 2d 774;
 - If there is no tortious conduct, then there is no viable claim and the case should be dismissed;
 - If there is, then move forward to trial.

20

The Process (continued)

- Trial – You lose and receive an adverse jury verdict
 - If the verdict is for more than \$200,000 (individual claimant) or \$300,000 (for all claimants/plaintiffs for one incident), options for collecting the additional award are limited:
 - Pursue insurance funds, if the entity has excess coverage. However, there is no guaranteed way to force the payment of insurance proceeds if the carrier will not pay. For more, see the discussion of Plancher v. UCF Athletic Association, Inc. below.
 - Pursue a claims bill. See §768.28(5).
 - Generally, anything above the threshold would have to move to a claims bill.

21

A real life example – Plancher v. UCF

- “In 2008, Ereck Plancher, a University of Central Florida (UCF) football player, collapsed and tragically died during football practice conditioning drills. After his death, Ereck's parents (the Planchers) filed a negligence action against UCF and UCF Athletics Association, Inc. (“UCFAA”), the statutorily authorized direct-support organization responsible for administering UCF's athletics department.” Plancher v. UCF Athletic Association, Inc., 175 So. 3d 724, 725 (Fla. 2015) (footnote and internal citations omitted).

22

Plancher v. UCF (continued)

- Ultimately, a verdict was rendered for \$10 million against UCFAA alone. [On the first day of trial, UCF was dismissed as a defendant].
- After moving through the Fifth DCA, the Florida Supreme Court upheld the award, but found UCFAA was covered by the rubric of sovereign immunity as provided by §768.28. Therefore, UCFAA was only responsible to pay \$200,000.
- Further, the Court specifically held that UCFAA (and by implication, its insurance carrier) was also only responsible for payment up to \$200,000 and directed that any further payment must come from the Legislature. *Id.* at 729, and footnote 4 to the opinion. See also Stuyvesant Insurance Company v. Bournazian, 342 So. 2d 471, 472 n. 3 (Fla. 1976).

23

Top Sovereign Immunity Cases every local government attorney must know

- Commercial Carrier Corp. v. Indian River County, 371 So. 2d 1010 (Fla. 1979).
- Triannon Park Condo. Ass'n Inc. v. City of Hialeah, 468 So. 2d 912, 917 (Fla. 1985).
- Pan-Am Tobacco Corp. v. Department of Corrections, 471 So. 2d 4 (Fla. 1984).
- Everton v. Willard, 468 So. 2d 936 (Fla. 1985).
- Kaisner v. Kolb, 543 So. 2d 732 (Fla. 1989).
- Wallace v. Dean, 3 So. 3d 1035 (Fla. 2009).

24

Recent updates from cases

- Gualtieri v. Bogle, 343 So.3d 1267 (Fla. 2d DCA 2022) – Plaintiff is a motorcyclist pulled off his motorcycle during a traffic stop and was subsequently injured when his motorcycle fell on him. He sued both the Sheriff deputy and the Sheriff alleging battery and negligent training. The Second DCA found that (and thus reiterated) that there is no viable claim against the deputy individually because there was no allegation of bad faith, malicious intent or willful and wanton disregard. It also remanded for dismissal the negligent training claim because the Court found that the decision on how to train officers is discretionary and therefore immune from liability under sovereign immunity. However, the Court allowed the battery claim against the Sheriff to move forward as a question of fact of whether the actions were in the course and scope of the deputy's work.
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25

Recent updates from cases

- Broward County v. Manarite ex rel. G.M., 333 So.3d 1130 (Fla. 4th DCA 2022) – A child was injured near a construction site and several entities were sued, including Broward County. The County argued in a motion to dismiss that it was protected by sovereign immunity because the acts at issue were "planning-level" decisions. The trial court denied the motion, but the Fourth DCA reversed and agreed that the complaint failed to alleged more than discretionary planning-level decisions and therefore must be dismissed as pled. Also one of the first opinions that reflected the new rule from FHP v. Jackson allowing a broader range of appeals of non-final orders litigating sovereign immunity as a defense.
- City of Sweetwater v. Pichardo, 332 So.3d 20 (Fla. 3d DCA 2021) – Police officer claim based on Mayor telling him he was promoted to Lieutenant, but he was not actually promoted but was only in an "acting lieutenant" position. Subsequently, the officer was faced with termination, but resigned. When the officer found out later that he was not promoted, he sued for negligent misrepresentation and said he would not have resigned if he had known his "true position" because he would have the benefit of collective bargaining protections when faced with termination. The Third DCA reversed the trial court and remanded for granting summary judgment in favor of the City because there is no common law or statutory duty for a municipality to provide accurate information, meaning there cannot be liability. This reinforces the two-step analysis for claims: first is there a duty and if there is a duty, is it barred by sovereign immunity.

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Recent updates from cases

- Lazzari v. Guzman, 314 So.3d 374 (Fla. 3d DCA 2020) – Plaintiff sues doctor, who is an employee of Jackson Memorial Hospital, as well as Jackson Memorial Hospital and the University of Miami. The Hospital is affiliated with the University of Miami medical school by written agreement and therefore the University claims entitlement to sovereign immunity because the Hospital (and the doctor as employee) are agents of the University at the time of the claim. The Third District agreed and affirmed summary judgment in favor of the University.
- Medina v. Pollack, 300 So.3d 173 (Fla. 4th DCA 2020) – School security guard at Parkland high school is sued for failing to (1) call for Code Red, (2) advise the shooter was a threat, (3) exercise reasonable care of the protection of teachers and students and (4) follow policies and procedures to mitigate/reduce risk of harm or injuries, all directly related to the mass shooting at the school. The security guard moved for summary judgment based on sovereign immunity and claimed that his action/inaction did not rise to the level of willful and wanton disregard of safety, but the trial court denied the motion and the security guard appealed. The Fourth DCA agreed that there were factual issues as to whether the action/inaction constituted willful and wanton disregard of safety and returned the case for further proceedings, and/or trial.
- Department of Financial Services v. Barnett, 303 So.3d 508 (Fla. 2020) – Answered the rephrased certified question of whether a mass casualty event (such as school shooting) is "arising out of the same incident or occurrence" thus limiting all claimants to the \$200,000/\$300,000 statutory cap on damages. This specific case involved the murder of four children by their stepfather, and DCF's alleged negligence in failure to properly monitor the situation. The Supreme Court said yes, the statutory cap applies to all injuries sustained in the same incident or occurrence and came to the conclusion based on strict statutory interpretation of § 768.28(5).

27

Recent updates from cases

- Fla. Highway Patrol v. Jackson, 288 So.3d 1179 (Fla. 2020) – The Florida Supreme Court answered the certified question in the negative and said the appellate rules do not allow appeal of nonfinal orders denying sovereign immunity when the finding was not explicitly made by the trial court. The Court then the same day changed Florida Rule of Appellate Procedure Rule 9.130 to remedy the underlying problem [see 289 So. 3d 866] (Fla. 2020)). Overall, the case and opinion updating the rule present an excellent discussion and analysis of the current law for appeals of trial court orders denying pre-trial sovereign immunity claims.
- Ross v. City of Jacksonville, 274 So.3d 1180 (Fla. 1st DCA 2019) – Affirmed summary judgment in favor of the City of Jacksonville. A sheriff's vehicle was involved in a traffic pursuit and struck another vehicle, causing personal injuries. The City moved for summary judgment based on (1) the officer's actions were not so reckless as to constitute disregard for human life, rights, safety, or property, as well as (2) he was acting in accordance with the written police vehicle pursuit policy. Finally, the officer (3) had reason to believe the fleeing vehicle committed a forcible felony and for all of these reasons, the City was entitled to sovereign immunity.
- Fla. Fish & Wildlife Conservation Comm'n v. Daws, 256 So.3d 907 (Fla. 1st DCA 2018) – Sovereign immunity not waived for nuisance claims because FWC owes no duty to prevent trespass on private land and issuing deer dog hunting license was discretionary decision.
- Sanchez v. Miami-Dade County, 245 So.3d 933 (Fla. 3d DCA 2018) – County's decision to allocate off-duty police officers in certain locations was a discretionary decision protected by sovereign immunity.

28

Recent updates from cases

- Sun 'N Lake of Sebring Improvement District v. Ayala, 247 So.3d 572 (Fla. 2d DCA 2018) – Sovereign Immunity is not waived for a claim for Florida Deceptive and Unfair Trade Practices Act ("FDUTPA").
- Paylan v. Dirks, 228 So.3d 679 (Fla. 2d DCA 2017) – Sovereign immunity waived for a claim against assistant state attorney for a tortious interference with a business relationship claim.
- Rogers v. Jones, 227 So.3d 759 (Fla. 1st DCA 2017) – emphasized that any claim under §768.28 is governed by a four-year statute of limitations, in particular §768.28(14). Note – the exceptions for claims of contribution, wrongful death and claims for medical malpractice.

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Recent updates from cases (continued)

- Grossman Roth, P.A. v. Mellen, 221 So. 3d 683 (Fla. 4th DCA 2017) – Reversal and remand holding that claims bill limiting attorneys' fee was an unconstitutional impairment of contract between the claimant and the law firm, based on the recent holding of Searcy, Denney, Scarola, Barnhart & Shipley, etc. v. State, 209 So.3d 1181 (Fla. 2017).
- Miami-Dade County v. Pozos, 242 So.3d 1152 (Fla. 3d DCA 2017) – Split opinion that held an agency can only appeal a non-final order denying summary judgment for sovereign immunity if the trial court specifically finds, as a matter of law, that the agency is not entitled to sovereign immunity.
- Wilson v. City of Tampa, 209 So.3d 646 (Fla. 2d DCA 2017) – notice requirements of §768.28(6)(a) are minimal and two-fold: must be in writing and assert a claim for compensation.

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Recent updates from cases (continued)

- State of Florida, Department of Elder Affairs v. Caldwell, 199 So.3d 1107 (Fla. 1st DCA 2016) – no waiver of sovereign immunity for claim statutory claim of retaliatory discharge.
- G4S Secure Solutions (USA), Inc. v. Morrow, 210 So.3d 92 (Fla. 2d DCA 2016) – private prisoner transport company considered agent of Pinellas County Sheriff's Office and therefore entitled to sovereign immunity.
- City of Delray Beach v. DeSisto, 197 So.3d 1206 (Fla. 4th DCA 2016) – claims based on Florida Civil Rights Act are subject to sovereign immunity cap in §768.28(5).
- Manfre v. Shinkle, 184 So.3d 641 (Fla. 5th DCA 2016) – motorist hit dead horse in road and sued the local sheriff. The court found no duty owed to the motorist by the sheriff for the deceased equine in the road. Seriously, it is important for its excellent analysis of the "duty" issue in the examination of liability against agencies.

Procurements

By

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Summary Contents

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I. GOVERNING LAW

A. Common Law

1. There is no common law requirement for governmental entities to competitively bid or award to the lowest qualified and responsive bidder.
2. Absent a specific law or rule requiring competitive bidding for purchase/services, any reasonable method may be used.
 - a. Public policy, however, favors competitive procurement whenever possible, even in the absence of controlling statutes and/or laws. 1966 Op. Att'y Gen. Fla. 066-9 (Feb. 7, 1966); see also § 287.001, Fla. Stat. (2022) (relating to state agency procurements).
 - b. Purposes of public bid statutes/laws:
Affords the public protection by preventing favoritism toward contractors by public officials. City of Daytona Beach v. News Journal Corp., 156 So. 887 (Fla. 1934).

Seeks to ensure fair competition by providing equal terms/criteria for award of contracts. City of Opa-Locka v. Trs. of Plumbing Indus. Promotion Fund, 193 So. 2d 29 (Fla. 3d DCA 1966).

B. Constitutional Limitations

1. Article V, section 21, Florida Constitution – **recent, effective 2018** (“In interpreting a state statute or rule, a state court or an officer hearing an administrative action pursuant to general law may not defer to an administrative agency’s interpretation of such statute or rule, and must instead interpret such statute or rule de novo.”)
2. Article VII, section 1, Florida Constitution, impliedly limits the imposition of taxes and expenditure of tax revenues to public purposes. See Brown v. Winton, 197 So. 543 (Fla. 1940).
3. Article VII, section 9, Florida Constitution, provides that counties, school districts, and municipalities shall, and special districts may, be authorized by law to levy ad valorem taxes and may be authorized by general law to levy other taxes but such levies are limited to use for their respective purposes. For example, entertainment or hospitality purposes are not county purposes, absent statutory authority. 1958 Op. Att’y Gen. Fla. 085-305 (Nov. 10, 1958).
4. Article VII, section 10, Florida Constitution, provides that no county, school district, municipality, special district, or agency of any of them shall become a joint owner with, or stock holder of, or give, lend, or use its taxing power or credit to aid any corporation, association, partnership or person.
 - a. This has been construed to restrict indemnification by a city commission. 1984 Op. Att’y Gen. Fla. 084-103, (December 19, 1984), but see Am. Home Assurance Co. v. Nat’l R.R. Passenger Corp., 908 So. 2d 459, 476 (Fla. 2005) (municipal agency has inherent authority to “enter into an indemnification agreement as part of a contract with a private party and may not invoke sovereign immunity to defeat its obligations under the contract”).
 - b. A municipality may not lawfully expend public funds to repair privately maintained streets. 1979 Op. Att’y Gen. Fla. 079-14 (Feb. 16, 1979).
 - c. Although advanced payments are generally preferred with respect to provided services, a city could, pursuant to its home rule powers, bill in arrears for greens fees payments. 1990 Op. Att’y Gen. Fla. 090-41 (May 15, 1990).
 - d. "Joint owner" for constitutional purposes does not necessarily equate with statutory or common law definitions of “partnership” or “joint venture,” and a public agency is not necessarily pledging its credit when a private party obtains arguably below-market or otherwise financially favorable terms in a transaction. Jackson

Shaw Co. v. Jacksonville Aviation Auth., 8 So. 3d 1076 (Fla. 2008).

5. Article VII, section 12, Florida Constitution, restricts the creation of indebtedness. See Betz v. Jacksonville Transp. Auth., 277 So. 2d 769 (Fla. 1973) (contract directly, indirectly, or contingently binding city to pay fees from ad valorem or other municipal revenues would be invalid in the absence of the requisite referendum vote).
6. Article X, section 13, Florida Constitution, provides in relevant part that “provision shall be made by general law for bringing suit against the state as to all liabilities now existing or hereafter originating.”
 - a. Power to waive the state’s sovereign immunity rests with the state legislature.
 - b. Section 768.28, Florida Statutes, creates a limited waiver of sovereign immunity in tort.
 - c. Citizens Prop. Ins. Corp. v. San Perdido Ass’n, Inc., 104 So. 3d 344 (Fla. 2012) (holding that a district court is unable to use a writ of prohibition to review a non-final order denying a party’s claim of immunity from suit where a limited waiver of sovereign immunity applies)
7. Article X, section 13, Florida Constitution, and the enactment of section 768.28, Florida Statutes, constitute the only manner in which the state’s **tort** immunity has been waived. With regard to **contract** claims, however, the Supreme Court of Florida has found an implied waiver of sovereign immunity despite the nonexistence of an express legislative waiver. See Pan-Am Tobacco Corp. v. Dep’t of Corrections, 471 So. 2d 4 (Fla. 1984) (“we recede from a line of cases holding that the state may not be sued in contract without express consent to the suit.... [O]ur holding here is applicable only to suits on express, written contracts into which the state agency has statutory authority to enter”); see, e.g., City of Miami v. Cruz, 342 So. 3d 741 (Fla. 3d DCA 2022) (“Florida law recognizes a limited waiver of sovereign immunity where the municipality breaches an express written contract.”). It has taken time for this holding to sink in. See, e.g. 2000 Op. Att’y Gen. Fla. 2000-22 (Apr. 4, 2000) (“A county may not agree to indemnify another party to a contract or alter the state’s waiver of sovereign immunity such that the county’s liability may be extended beyond the limits established in section 768.28, Florida Statutes.”). It is very important to distinguish between tort liability and contract liability; if a government has the power to enter into a contract, it has the power to agree to an indemnification clause, it cannot invoke sovereign immunity to avoid its contractual obligations, and the limits of liability in section 768.28(5) do not apply. Dep’t of Transp. v. Schwefringhaus, 188 So. 3d 840 (Fla. 2016). An example of a county policy on indemnification is attached in Appendix E.

C. Statutory Law
1. Federal

- a. When drafting bid documents, it is imperative to know the source of funds being used to assure compliance with applicable federal laws. Federal funds often come with significant strings attached. See, e.g., Fla. Admin. Code Rule 62-503.800, which provides for the audit requirements for the federally-funded State Revolving Fund Loan Program. Common areas where federal grant monies are received are transportation, planning, sewer, community development, aviation, beach renourishment, and emergency management. Since early 2000's, several FEMA compliance audits have raised these issues. See Appendix A for common federal statutory issues.
- b. Significant money is spent in the form of grants, where the receiving party is called a "recipient" rather than a "contractor." Historically, grants were often distributed through an application process rather than competitive award, and took the form of "best effort" engagements. More recently, award has become more competitive, and grants may include detailed performance and results measures.
- c. In December 2013, the federal Office of Management and Budget (OMB) promulgated new uniform guidance ("Super Circular"), which is codified at 2 CFR Part 200, including procurement requirements in Subpart D. Federal agencies were required to follow it for all awards after December 2014, and it was phased in over time for non-federal entities. The Super Circular incorporates into one place many previous OMB Circulars, including:
 - i. A-21, Education Institutions
 - ii. A-50, Audit Follow-up
 - iii. A-87, for State & Local Governments
 - iv. A-89, Catalog of Federal Domestic Assistance
 - v. A-102, Administrative Requirements for State and Local Governments
 - vi. A-110, Institutions of Higher Education, Hospitals and Other Non-Profit Organizations
 - vii. A-122, Non-Profit Organizations;
 - viii. A-133, Single Audit Guidance

When expending federal grant and loan funds, local governments are required to follow their "own documented procurement procedures which reflect applicable state, local, and tribal laws and regulations, provided that the procurements conform to applicable Federal law and the standards identified in this part." 2 C.F.R. §200.318(a). In other words, local governments must comply with the "most restrictive" procurement requirements of both federal

and state law as well as their own local policies. Effective June 20, 2018, OMB increased the uniform guidance bid thresholds: micro-purchase threshold increased from \$3,500 to \$10,000; simplified acquisition threshold increased from \$150,000 to \$250,000. **Effective November 12, 2020**, OMB amended the Super Circular to support implementation of the President’s Management Agenda, Results-Oriented Accountability for Grants Cross-Agency Priority Goal (Grants CAP Goal).

- d. In response to the Covid-19 pandemic, the federal government took extraordinary steps to shore up the national economy. These steps included the \$2 trillion stimulus bill called the Coronavirus Aid, Relief, and Economic Security (CARES) enacted in March 2020, the \$1.9 trillion stimulus bill called the American Rescue Plan enacted in March 2021, and the \$1.2 trillion Infrastructure Investment and Jobs Act enacted in November 2021 – which together **total more than \$5 trillion!** These funds were released faster than guidance and constraints on how they might be spent. The federal government is now catching up with such guidance, some of which is summarized in Appendix A.

2. State

- a. State statutes that require a competitive procurement process by local governments include:

§ 101.293, Fla. Stat. (2022), Voting Machines and Equipment Purchases.

§ 125.012, Fla. Stat. (2022), Transportation and Port Facilities, Concession Franchises – Counties defined in §125.011(1), Fla. Stat. (2022).

§ 125.031, Fla. Stat. (2022), Lease or lease-purchases of property for public purpose – county.

§ 125.3401, Fla. Stat. (2022), Purchase, sale, or privatization of water, sewer, or wastewater reuse utility – county.

§ 125.35, Fla. Stat. (2022), Property sale or lease – county, Matheson v. Miami-Dade Cty., 258 So. 3d 516 (Fla. 3d DCA 2018).

§ 125.355, Fla. Stat. (2022), Purchases of real property – county.

§ 130.01-07, Fla. Stat. (2022), Bonds – county.

§ 153.10, Fla. Stat. (2022), et seq., Water and sewer system construction contracts – county.

§ 155.12, Fla. Stat. (2022), Supply purchased for hospitals – Trustees.

§ 157.03-157.07, Fla. Stat. (2022), Drainage projects – county.

§ 166.045, Fla. Stat. (2022), Purchases of real property – Cities that want public record exemption; otherwise bound by charter or ordinance.

§ 180.24, Fla. Stat. (2022), Contracts for Construction – Cities; requires bids on municipal public works projects for construction contracts in excess of \$25,000 and on materials or equipment purchases in excess of \$10,000.

§ 189.053, Fla. Stat. (2022), Purchases from purchasing agreements of special districts, municipalities, or counties – permits procurement by special districts of commodities and contractual services from purchasing agreements of other local governments.

§ 190.033, Fla. Stat. (2022), Community Development Districts – bids required for purchases in excess of \$195,000.

§ 217.15-19, Fla. Stat. (2022), Federal surplus property procurement – city and county, school board, city and county officers.

§ 218.385, Fla. Stat. (2022), Sale of local government bonds.

§ 218.391, Fla. Stat. (2022), Auditor selection procedures.

§ 218.415, Fla. Stat. (2022), Bid requirements for local government investments.

§ 255.103, Fla. Stat. (2022), Authorizes public entities to procure construction management services under the same process outlined in section 287.055, Florida Statutes.

§ 255.20, Fla. Stat. (2022), Local bids and contracts for public construction works – Counties, cities and special districts; projects exceeding \$300,000 or \$75,000 for electrical work.

§ 255.065, Fla. Stat. (2022), Public-Private Partnerships.

§ 286.043, Fla. Stat. (2022), Airport automobile rental concession – city, county, and other units of local government.

§ 287.055, Fla. Stat. (2022), Consultants Competitive Negotiation Act or “CCNA” – regulates contracting with architects, professional engineers, landscape architects, registered land surveyors and design-builders.

§§ 336.41; 336.44, Fla. Stat. (2022), Competitive bidding on county roadwork.

§ 489.145, Fla. Stat. (2022), Guaranteed Energy, Water, and Wastewater Performance Savings Contracting Act – state, city, or political subdivision

§ 705.103, Fla. Stat. (2022), Sale of abandoned property procedure – city or county.

§ 1013.45, Fla. Stat. (2022), Educational facilities – contains requirements relating to bidding by local school boards.

- b. Other state statutes that relate to local government competitive procurement include:

§ 50.011, Fla. Stat. (2022), et seq., Language of legal and official advertisements.

§ 50.061, Fla. Stat. (2022), Chargeable amounts legal and official advertisements by size of counties.

§ 119.011, Fla. Stat. (2022), definition of “agency” under public records law includes private corporations acting on behalf of public agencies; see also News & Sun Sentinel v. Schwab, Twitty & Hanser Arch. Group, Inc., 596 So. 2d 1029 (Fla. 1992).

§ 218.70 - .79, Fla. Stat. (2022), Local Government Prompt Payment Act. See Constr. Consulting, Inc. v. Trustees of Broward College, 347 So. 3d 14 (Fla. 4th DCA 2022) (statute does not

prohibit waiver of an interest claim as part of a settlement or an accord and satisfaction).

§ 218.80, Fla. Stat. (2022), Public Bid Disclosure Act – requires disclosure on bid documents if fees or permitting are required by the governmental entity; subset act of previously referenced act.

§ 252.38(3), Fla. Stat. (2022), Emergency management powers of political subdivisions.

§ 255.05, Fla. Stat. (2022), Bond of contractor constructing public buildings – county, city or other public authority.

§ 255.0518, Fla. Stat. (2022), Public bids; bid opening.

§ 255.0705 - .078, Fla. Stat. (2022), Florida Prompt Payment Act. See Constr. Consulting, Inc. v. Trustees of Broward College, 347 So. 3d 14 (Fla. 4th DCA 2022) (statute does not prohibit waiver of an interest claim as part of a settlement or an accord and satisfaction).

§ 255.0991, Fla. Stat. (2022), Prohibited local government preferences on projects funded 50% or more by state-appropriated funds.

§ 255.0992, Fla. Stat. (2022), Prohibited governmental actions on public works projects.

§§ 283.32; 336.044, Fla. Stat. (2022), Statutes dealing with recycled products.

§ 286.011, Fla. Stat. (2022), Sunshine Law – applicable to bid evaluation committees, Leach-Wells v. City of Bradenton, 734 So. 2d 1168 (Fla. 2d DCA 1999); Op. Att’y Gen. Fla. 2013-30 (December 30, 2013).

§ 286.0113, Fla. Stat. (2022), Sunshine Law – temporary exemption for contract negotiation processes, Carlson v. Dep’t of Revenue, 227 So. 3d 1261 (Fla. 1st DCA 2017).

§ 287.084, Fla. Stat. (2022), Preference to Florida businesses for purchases of personal property when low bidder’s home state has local preference.

§ 287.087, Fla. Stat. (2022), Preference to businesses with Drug Free Workplace Programs.

§ 287.092, Fla. Stat. (2022), A foreign manufacturer with over 200 employees in Florida shall have preference with any other foreign company when the price and other factors are the same.

§ 287.093, Fla. Stat. (2022), Authorizes set asides of up to 10% or more of the total funds allocated for procurement of personal property and services for the purpose of entering into contracts with Minority Business Enterprises.

§ 287.133, Fla. Stat. (2022), Public Entity Crimes, prohibits vendors/contractors placed on the state's convicted vendor list from submitting bids/proposals and/or contracting with public entities.

§ 287.134, Fla. Stat. (2022), Companies subject to disqualification from public contracting and purchasing for discrimination are kept on a list by the Florida Department of Management Services.

§ 287.135, Fla. Stat. (2022), Prohibition against contracting with scrutinized companies (dealings with Cuba, Iran, Sudan or Syria, or boycotting Israel). But see Odebrecht Constr., Inc. v. Fla. Dep't of Transp., 715 F. 3d 1268 (11th Cir. 2013) (enjoining enforcement of statute as in conflict with federal law and President's authority regarding federal policy toward Cuba).

§ 288.075, Fla. Stat. (2022), Confidentiality of records; provides a public records exception for certain items in conjunction with economic development agencies.

§ 295.187, Fla. Stat. (2022), Florida Veteran Business Enterprise Opportunity Act.

§ 403.70605, Fla. Stat. (2022), Solid Waste collection Services in Competition with Private Companies

Chapter 489, Fla. Stat. (2022), Contracting – Construction, Electrical and Alarm Systems, and Septic Tanks.

§ 627.351, Fla. Stat. (2022), Insurance Risk Apportionment Plans

§§ 627.727; 627.7275, Fla. Stat. (2022), Motor Vehicle Insurance and liability.

c. State statutes that relate to expenditures of public funds include:

§ 28.235, Fla. Stat. (2022), authorizes advanced payments by Clerk of Circuit Court pursuant to Chief Financial Officer's rules or procedures.

§ 129.07, Fla. Stat. (2022), prohibits county commissioners from expending or contracting for more than the amount budgeted in the fund and provides for personal liability for excess indebtedness.

§ 129.08, Fla. Stat. (2022), prohibits county commissioners from incurring indebtedness or paying a claim not authorized by law. Mayes Printing Co. vs. Flowers, 154 So. 2d 859 (Fla. 1st DCA 1963).

§ 166.241, Fla. Stat. (2022), establishes budget requirements for municipalities.

d. State statutes that relate to state executive agency procurement:

§ 287.057, Fla. Stat. (2022), Procurement of commodities or contractual services.

§ 287.0582, Fla. Stat. (2022), requires non-appropriation clause in state executive branch agency contracts ("The State of Florida's performance and obligation to pay under this contract is contingent upon an annual appropriation by the Legislature.").

3. Statute of Frauds

a. The Statute of Frauds operates as a defense to the enforcement of a contract. Specified agreements must be in writing or evidenced by some type of memorandum to be enforceable. See § 672.201, Fla. Stat. (2022) (Florida's version of the UCC); §§ 725.01-725.08, Fla. Stat. (2022) (unenforceable contracts).

b. The following are required to be evidenced by a writing: promises by executors or administrators to pay estates' debts out of their own funds; promises to answer for debt/default of another (surety); promises made in consideration of marriage; promises creating an interest in land (however, interests for one year or less are generally not subject to Statute of Frauds); promises that cannot be performed within one year (year runs from date of agreement and

- not date of performance); agreements for the sale of goods for \$500 or more-except for specially manufactured goods, written confirmation of an oral agreement, admissions in a pleading or court that contract existed, or partial payment or delivery was made and accepted; health care guarantees; debt barred by statute of limitations; newspaper subscriptions; home solicitation sales; home improvement contracts; and credit agreements.
- c. The Statute of Frauds is satisfied if the writing contains the following: identity of parties sought to be charged, identification of contract's subject matter, terms and conditions of agreement, recital of consideration, and signature of party to be charged.
 - d. The Statute of Frauds is particularly relevant in relation to change orders and/or amendments in contracts. It is important to document any of these changes in writing in order to avoid litigation or disputes.
4. Local
- a. There is no requirement that counties adopt a home rule ordinance prescribing a general procedure for county purchases, they are free to deal with each contract or purchase on an individual basis with or without competitive bidding as may best serve the public interest. 1971 Op. Att'y Gen. Fla. 071-366 (November 9, 1971); see also Volume Servs. Div. v. Canteen Corp., 369 So. 2d 391 (Fla. 2d DCA 1979). Numerous municipalities and counties have enacted laws and adopted policies related to the procurement process. Florida has a strong public policy, which requires that even in the absence of controlling statutes, expenditures of public funds must be made on competitive bids whenever possible. 1966 Op. Att'y Gen. Fla. 066-9 (February 7, 1966). Ackman v. Dade Cty., 308 So. 2d 622 (Fla. 3d DCA 1975) (no petition for mandamus would lie where there was no clear legal right to the performance of an administrative act, adherence to competitive bidding procedure).
 - b. Standard of review for compliance
Article V, section 21, Florida Constitution – **effective 2018** (“In interpreting a state statute or rule, a state court or an officer hearing an administrative action pursuant to general law may not defer to an administrative agency’s interpretation of such statute or rule, and must instead interpret such statute or rule de novo.”)
Dep’t of Transp. v. Groves-Watkins Constr., 530 So. 2d 912 (Fla. 1988) (agency’s decision based upon an exercise of discretion cannot be overturned absent a finding of illegality, fraud, oppression or misconduct).
Liberty Cty. v. Baxter’s Asphalt & Concrete, Inc., 421 So. 2d 505, 507 (Fla. 1982) (unlike other jurisdictions that “curtail the

discretion of local authorities by demanding absolute compliance with public bidding guidelines,” under controlling Florida law “a public body has wide discretion in soliciting and accepting bids for public improvements and its decision, when based on an honest exercise of this discretion, will not be overturned by a court even if it may appear erroneous and even if reasonable persons may disagree.”).

Biscayne Marine Partners LLC v. City of Miami, 273 So. 3d 97 (Fla. 3d DCA 2019) (recognizing judicial deference due to public body’s contracting decisions absent illegality, fraud, oppression or misconduct).

Accela, Inc. v. Sarasota Cty., 993 So. 2d 1035 (Fla. 2nd DCA 2008) (court required to determine whether the county acted arbitrarily or capriciously).

Emerald Correctional Mgmt. v. Bay Cty., 955 So. 2d 647 (Fla. 1st DCA 2007) (Wide discretion afforded counties in accepting or rejecting proposals is subject to review pursuant to arbitrary and capricious standard).

Santa Rosa Island Auth. v. Pensacola Beach Pier, Inc., 834 So. 2d 261 (Fla. 1st DCA 2002) (government may rescind negotiations and readvertise proposals and court cannot force reinstitution of negotiations with a firm ranked highest following RFP unless illegality, fraud, oppression or misconduct found).

Miami-Dade Cty. v. Church & Tower, Inc., 715 So. 2d 1084 (Fla. 3d DCA 1998) (strong judicial deference is accorded to an entity’s decision with respect to competitively bid contract, and a judgment call of the entity based on its honest discretion should not be disturbed by the court).

Miami Marinas Ass’n, Inc. v. City of Miami, 408 So. 2d 615 (Fla. 3d DCA 1981) (charter required competitive bidding process and prevented award of waterfront property management contract through competitive negotiation instead).

Marriott Corp. v. Dade Cty., 383 So. 2d 662 (Fla. 3d DCA 1980) (charter authorized expression of the policy of its authorities by resolution, which required “sealed competitive bids have been received, therefore, in the manner provided by law, and the award of such franchise shall be to that bidder whose bid, when accepted, will result in the greatest financial benefit to the port authority.” The court held that an award made solely because the contractor was a local man who would use local contractors and local labor and would patronize local supply houses was an error, based upon resolutions, charter and public policy arguments).

Volume Servs. Div. v. Canteen Corp., 369 So. 2d 391 (Fla. 2d DCA 1979) (where special act creating Tampa Sports Authority

required bids, and specifications set forth five criteria for consideration, there was no obligation to award a contract to a particular bidder—the lowest, lowest and best, or the lowest responsible bidder—in the absence of a directive to that effect in the controlling legislation).

City of Opa-Locka v. Trs. of Plumbing Ind. Pro. F., 193 So. 2d 29 (Fla. 3d DCA 1966) (city could not waive county code provision requiring a bidder to hold an appropriate certificate of competency qualifying him to perform the work proposed by the bid).

Berbusse v. N. Broward Hospital Dist., 117 So. 2d 550 (Fla. 2d DCA 1960) (standard of review for compliance with hospital district special act is that discretion will not be interfered with by the court unless exercised arbitrarily or capriciously, or unless based upon a misconception of law, or upon ignorance through lack of inquiry, or in violation of law, or was the result of improper influence).

c. Sample Local Procurement Provisions

Appendix B - Miami-Dade County Protest Procedures

Appendix C - Pinellas County Purchasing Ordinance

Appendix D - Pinellas County CCNA Policies/Procedures

Appendix E - Pinellas County Indemnification Resolution

II. COMPETITIVE PROCUREMENT METHODS

A. The ABA Model Procurement Code includes two basic competitive procurement methods: Competitive Sealed Bidding and Competitive Sealed Proposals (sections 3-202 and 3-203). Florida roughly follows these and, at the state level, adds a third: Invitation to Negotiate.

B. Competitive Bids

1. Used when it is possible to define specifically the scope of work or to establish precise specifications.
2. Process is usually begun by a notice called an Invitation to Bid (“ITB”).
3. Fundamental award criterion is low price.

C. Competitive Proposals

1. Used when ITB is not practicable, but it is possible to define specifically the purposes and uses of the goods or services being sought and to identify necessary deliverables. Emerald Correctional Mgmt. v. Bay Cty., 955 So. 2d 647 (Fla. 1st DCA 2007).
2. Process is usually begun by a notice called Request for Proposals (“RFP”).
3. In addition to considering price, evaluate ability, experience, and proposed solution. Factors and relative weights must be disclosed in the RFP.

Factors are typically scored numerically, with highest score deemed “most advantageous” to the buyer, which is the basis of award.

4. Model Code provides for “discussions” following proposal submittal and revisions before final contract award. Historically, many jurisdictions have conducted negotiations under the RFP process.
5. While negotiations may be allowed under RFP, there are limits. It is improper for proposer to take exception to required terms in proposal, on ground that they will be worked out during negotiations, and it is improper to allow changes to material terms of proposal like price. Bright House Networks v. AT&T Corp., 205 So. 3d 837 (Fla. 5th DCA 2016).
6. Improper to use RFP as an initial ranking tool to determine a preferred provider and then negotiate a contractor with that provider, without limitation and without regard for the original proposal and RFP parameters. Dep’t of Lottery v. Gtech Corp., 816 So. 2d 648 (Fla. 1st DCA 2001).

D. Invitation to Negotiate

1. Used when ITB and RFP not practicable, and purpose is to determine the best method for achieving a specific goal or solving a particular problem.
2. Process is usually begun by a notice called Invitation to Negotiate (“ITN”).
3. Enables far-reaching negotiations with multiple vendors to achieve “best value,” which is the basis of award. AT&T Corp. v. Dep’t of Mgmt. Servs., 201 So. 3d 852 (Fla. 1st DCA 2016).

E. Other Methods.

1. Local governmental entities are governed by their own procedures, which may or may not mirror State requirements or the ABA Model Code.
2. Often, two questions must be answered – “what are we buying?” and “where is the money coming from?” – to determine applicable competitive procurement requirements. See section I.C.2 above for the variety of State statutes that may govern particular procurements.
3. If particular statutes apply, local governments have limited ability to develop “hybrid” approaches. For example, since statutes govern award of construction contracts and award of construction management contracts, the Southwest Florida Water Management District was limited to following those methods and could not combine them. Op. Att’y Gen. Fla. 11-21 (2011). See also Op. Att’y Gen. Fla. 12-34 (2012), where the Attorney General further elaborated on the ability for a non-home ruled entity to use hybrid procurement methods.
4. Governing law often includes numerous exceptions to competitive procurement requirements (for example, emergencies, sole source, cooperative purchasing (“piggybacks”), etc.)

- a. Accela, Inc. v. Sarasota Cty., 993 So. 2d 1035 (Fla. 2nd DCA 2008) (upholding challenge to “piggyback” contract); see National Chem. Labs, Inc. v. Broward Cty. School Bd., No. 21-1530 (DOAH Sep. 8, 2021) (applying Accela and rejecting challenge to piggyback transaction).
 - b. Blu-Med Response Sys. v. Fla. Dep’t of Health, 993 So. 2d 150 (Fla. 1st DCA 2008) (gubernatorial declaration of emergency excused the agency from compliance with the emergency procurement rules of chapter 287, Florida Statutes).
 - c. Op. Att’y Gen. Fla. 12-24 (2012) (Sebring Airport Authority is an “eligible user” under section 287.056(1), Florida Statutes, and may purchase from State contracts rather than competitively procuring its own).
 5. Newest method is “unsolicited proposal,” authorized by the Public Private Partnership legislation, chapter 2013-223, Laws of Florida, now codified at section 255.065, Florida Statutes. Rather than wait for a government to issue a competitive solicitation, a company can submit a proposal on its own initiative. If the government is interested in pursuing the idea, it must then follow a process to advertise the fact that it received the unsolicited proposal and invite others to respond, and then the government may negotiate a contract.
- F. Consultants’ Competitive Negotiation Act (“CCNA”), § 287.055, Fla. Stat. (2022)
1. While Chapter 287 generally applies to State executive branch agencies, the CCNA is contained within it and includes its own definitions, including a much broader definition of every “agency” that must comply with the statute.
 2. The CCNA applies to most public entities seeking the “professional services” of an architect, professional engineer, landscape architect, registered surveyor or mapper. It roughly follows ABA Model Code section 5-205.
 - a. Other statutory sections adopt by reference CCNA procedures for buying certain services beyond those defined in the CCNA. See, e.g., § 255.103, Fla. Stat. (2022) (construction management services).
 - b. While the definition of “agency” is broad, not every public entity that buys professional services is governed by the CCNA. See Dealer Tag Agency, Inc. v. First Hillsborough Cty. Auto Tag Agency, Inc., 14 So. 3d 1238 (Fla. 2d DCA 2009) (CCNA does not apply to tax collector because tax collector, a constitutional entity, is not an agency as defined under the CCNA).
 - c. Op. Att’y Gen. Fla. 09-49 (2009) (North Broward Hospital District may not contract with an equipment vendor under a sole source

contract, such that the vendor contracts with a licensed general contractor to provide design/build construction services to erect a storage facility to house the equipment, without complying with CCNA for those services covered by the act)

3. The CCNA applies only if professional services are needed for a “project” as defined: a fixed capital outlay study or planning activity.
4. The CCNA applies only if services are related to (i) a project construction cost of which is estimated to exceed \$325,000 or (ii) a planning or study activity where fee exceeds \$35,000.
5. Selection process:
 - a. Requires uniform and consistent public announcements for all public projects.
 - b. “Competitive selection” entails evaluation of all statements of qualification and ranking in order of preference of a minimum of three firms. Criteria is governed by statute but may be added to by the governmental entity, except MAY NOT consider compensation during initial review and ranking.
 - c. After ranking, “competitive negotiation” entails negotiating business terms deemed fair, competitive and reasonable – but must negotiate serially, i.e., one firm at a time, starting with top ranked firm, and prohibited from negotiating with next absent impasse.
6. Minority Business Enterprise (MBE)
 - a. Requires public entities to consider whether a firm is a certified Minority Business Enterprise as part of the evaluation process.
 - b. MBE certification is governed by section 287.0943, Florida Statutes.
7. “Continuing Contract”
 - a. Section 287.055(2)(g), Florida Statutes, defines a “continuing contract” and section 287.055(4)(d) indicates they are not prohibited.
 - b. These function like a “master agreement” – once procured under the CCNA, may be used for a number of different projects that might otherwise individually require competitive selection.
 - c. The maximum amount of construction costs under a continuing contract cannot exceed \$4 million. For study activity, the maximum fee for studies is \$500,000 for each individual study under the contract. The 2020 amendment of §287.055(2)(g) increased these cap amounts (previously \$2 million and \$200,000).

III. BID PROTESTS

A. State Claims

1. Protest bond

a. Section 287.042(2)(c), Florida Statutes, requires that any person protesting under section 120.57(3)(b), Florida Statutes (the Administrative Procedures Act), shall post at the time of filing the formal written protest a bond in an amount equal to 1% of the estimated contract amount. Some local governments similarly require a protest bond under their governing law. See Zayo Group, LLC v. School Bd. of Polk Cty., No. 21-1708 (DOAH Sep. 17, 2021) (1% calculation based on initial contract term, not all possible renewals).

i. The bond is designed to cover the payment of all costs and charges adjudged against the protestor in the administrative hearing and any subsequent appellate court proceedings. If the agency prevails, it shall recover all costs and charges, excluding attorney's fees from the bond and remainder shall be returned to the protestor.

ii. Depending on the estimated contract amount, 1% of it as the bond requirement could be quite high. Since the purpose of the bond is to secure costs and charges (excluding attorney fees), having a bond amount much larger than necessary may violate constitutional arguments such as access to courts and due process. Cf. Hadi v. Liberty Behavioral Health Corp., 927 So. 2d 34 (Fla. 1st DCA 2006) (reversing order allowing protestor to post \$5,000 bond instead of \$5,000,000 bond, but leaving open question whether this challenge could be viable in case that does not interfere with ongoing administrative proceeding).

b. Jurisdictional Requirement

i. The failure to post a protest bond at the time of filing a formal written protest under section 287.042(2)(c), Florida Statutes, is not jurisdictional. ABI Walton Ins. Co. v. Dep't. of Mgmt. Serv., 641 So. 2d 967 (Fla. 1st DCA 1994); Gen. Elec. v. Dep't of Transp., 869 So. 2d 1273 (Fla. 1st DCA 2004).

ii. Chapter 2006-82, Laws of Florida, amended section 120.57(3)(a), Florida Statutes, to provide that in the notice of a decision concerning a contract award, the notice shall include the following state: "failure to post the bond or other security required by law within the time allowed for filing a bond shall constitute a waiver of proceedings under chapter 120, Florida Statutes."

- iii. The 2006 Legislature did not expressly indicate that its intent was to overrule ABI Walton and General Electric, and many secondary sources still cite to ABI Walton and General Electric for the proposition that the protest bond requirement is not jurisdictional. See, e.g., 43 Fla. Jur. 2d Public Works & Contracts § 37 (2017) (“notice and opportunity to cure are required before the bid protest is dismissed solely due to a deficient bond,” citing General Electric); Fla. Constr. Law & Prac. § 7.78 (2010-11) (“[a]gencies must give protestors notice and an opportunity to cure a defective protest bond,” citing General Electric); 8 Fla. Prac., Constr. Law Manual § 5:21 (2010-11) (“[i]n the event of any deficiency in a bid protest bond, the awarding agency must give the protestor written notice of the deficiency in the bond and an opportunity to cure before dismissing the protest,” citing ABI Walton and General Electric).
 - iv. In practice, the protest bond is sometimes viewed as jurisdictional, and failure to file one timely is deemed fatal to a protest. See, e.g., United Health Care of Fla., Inc. v. Dep’t of Mgmt. Servs., Order Relinquishing Jurisdiction, Case No. 11-3998BID (DOAH Sep. 9, 2011) (adopted by Final Order of Dismissal, DMS Case No. 11-22427 (Sep. 12, 2011), aff’d per curiam, UnitedHealthCare of Florida, Inc. v. Dep’t of Mgmt. Servs., Case No. 1D11-4868 (Fla. 1st DCA Dec. 7, 2011)).
- 2. Procedural matters
 - a. Type of review

MRO Software, Inc. v. Miami-Dade Cty., 895 So. 2d 1086 (Fla. 3d DCA 2004) (contract award is an executive function, rather than a quasi-judicial act subject to certiorari review).

Orlando-Orange Cty. Expressway Auth. v. Hubbard Constr. Co., 682 So. 2d 566 (Fla. 5th DCA 1996) (authority was an “agency” as defined in the Administrative Procedures Act, chapter 120, Florida Statutes).
 - b. Notice procedures

Douglas N. Higgins, Inc. v. Florida Keys Aqueduct Auth., 403 So. 2d 1042 (Fla. 3d DCA 1981) (second lowest bidder on project entitled to hearing within 21 days as provided by administrative code provision governing point of entry into proceedings; actual notice in excess of 21 days could not cure failure to notify in accordance with rule).

Helicopter Applicators, Inc. v. South Fla. Water Mgmt. Dist., 892 So. 2d 1114 (Fla. 4th DCA 2004) (bid protest may be dismissed when filed months after the bid opening).

b.

Standing

National Chem. Labs, Inc. v. Broward Cty. School Bd., No. 21-1530 (DOAH Sep. 8, 2021) (challenge to “piggyback” transaction)
AHF MCO of Fla., Inc. v. Agency for Health Care Admin., 308 So. 3d 1136 (Fla. 1st DCA 2020) (bidder deemed non-responsive due to violation of “cone of silence” lacked standing to protest because it would have no chance of obtaining award in a re-bid proceeding).

Agency for Health Care Admin. v. Best Care Assurance, LLC, 302 So. 3d 1012 (Fla. 1st DCA 2020) (where economic injuries are alleged as basis for standing in administrative bid protest proceeding, inquiry is whether proceeding contemplates consideration of such interests).

Asphalt Paving Sys., Inc. v. Anderson Columbia, 264 So. 3d 1110 (Fla. 1st DCA 2019) (competitor had standing to challenge contract amendment on basis that work added to contract should have been competitively bid).

Madison Highlands, LLC v. Fla. Housing Finance Corp., 220 So. 3d 467 (Fla. 5th DCA 2017) (“An applicant who submits the fifth lowest bid does not have a substantial interest, unless the applicant can establish that the four higher-ranked applications must all be rejected or re-evaluated, resulting in the protesting filer being ranked highest.”).

Accela, Inc. v. Sarasota Cty., 901 So. 2d 237 (Fla. 2d DCA 2005) (plaintiffs had standing to complain because they were potential competitors with a right to seek a determination of whether competitive bidding was required).

Brasfield & Gorrie General Contractor, Inc. v. Ajax Constr. Co., 627 So. 2d 1200 (Fla. 1st DCA 1993) (contractor’s failure to submit bid for construction of city parking facility precluded standing).

Intercontinental Props., Inc., v. Dep’t of Health & Rehab. Servs., 606 So. 2d 380 (Fla. 3d DCA 1992) (protesting bidder must be prepared to show that bid of intended awardee is deficient and that its own bid does not suffer from the same deficiency).

Mid-American Waste Sys. of Fla., Inc. v. City of Jacksonville, 596 So. 2d 1187 (Fla. 1st DCA 1992) (bidder had standing to protest award in violation of ordinance of waste-hauling contract to sister corporation of one convicted of price fixing).

City of Lynn Haven v. Bay Cty. Council of Registered Architects, 528 So. 2d 1244 (Fla. 1st DCA 1988) (non-profit organization of

registered architects had standing to challenge alleged circumvention of Consultants Competitive Negotiation Act).

Godheim v. City of Tampa, 426 So. 2d 1084 (Fla. 2d DCA 1983) (taxpayer failed to show special injury or assert constitutional challenge and thus did not have standing to enjoin city from entering into a contract for the design, construction and operation of a solid waste landfill).

Preston Carroll Co. v. Florida Keys Aqueduct Auth., 400 So. 2d 524 (Fla. 2d DCA 1981) (where another contractor was second lowest bid, unsuccessful bidder failed to establish substantial interest and lacked standing).

PayIt, LLC v. Dep't of Fin. Servs., No. 20-0742 (DOAH Aug. 6, 2020 (standing in bid protest under chapter 120, Fla. Stat.)).

d. Bid splitting to avoid competitive procurement requirements

Mayes Printing Co. v. Flowers, 154 So. 2d 859 (Fla. 1st DCA 1963) (where three sections of a single counter were separately bid in excess of statutory requirement for competitive purchase pursuant to section 125.08, Florida Statutes, an illegal warrant resulted).

Armco Drainage & Metal Products, Inc. v. Cty. of Pinellas, 137 So. 2d 234 (Fla. 2d DCA 1962) (county was not estopped to deny claim of bidder where three separate orders for metal resulted in purchase in excess of statutory amount requiring competition).

e. Late bids

Hewitt Contracting Co. v. Melbourne Regional Airport Auth., 528 So. 2d 122 (Fla. 5th DCA 1988) (airport authority had discretion to accept bid for construction work that was ten minutes late).

Air Support Servs. Int'l, Inc. v. Metropolitan Dade Cty., 614 So. 2d 583 (Fla. 3d DCA 1993) (when no time is specified, bid is due at the close of business on the date specified).

f. Waiving informalities – material vs. non-material deviations (Responsiveness)

Biscayne Marine Partners LLC v. City of Miami, 273 So. 3d 97 Fla. 3d DCA 2019) (rejecting argument that hearing officer and circuit court were required to undertake independent review of bid responsiveness, recognizing judicial deference due to public body's contracting decisions).

Overstreet Paving Co. v. Dep't of Transp., 608 So. 2d 851 (Fla. 2d DCA 1992) (bid should not have been declared nonresponsive for missing Disadvantaged Business Enterprise form).

Cent. Fla. Equip. Rentals of Dade Cty., Inc. v. Lowell Dunn Co., 586 So. 2d 1171 (Fla. 3d DCA 1991) (no preliminary injunction would lie to prohibit county from awarding bid to next low bidder where lowest bidder had a material irregularity based on its failure

to designate single manufacturer and installer of landfill liner and no bidders submitted quality control manuals, which the low bidder claimed was also a material irregularity of the next low bidder).

Tropabest Foods, Inc. v. Dep't of Gen. Servs., 493 So. 2d 50 (Fla. 1st DCA 1986) (irregularity as to beverage mix that did not affect price did not constitute grounds for awarding to another bidder).

Robinson Elec. Co., Inc. v. Dade Cty., 417 So. 2d 1032 (Fla. 3d DCA 1982) (security in the form of a check rather than a bid bond did not constitute a material variation from the county's invitation for bids and thus could be waived).

Glatstein v. City of Miami, 399 So. 2d 1005 (Fla. 3d DCA 1981) (material variance between detailed plans upon which competitive bidding was proposed, and the plans submitted and later adopted by city rendered contract void).

Harry Pepper & Assocs., Inc. v. City of Cape Coral, 352 So. 2d 1190 (Fla. 2d DCA 1978). (city did not have authority to accept bid for water treatment plant which was facially nonconforming in regard to the brand of pumps to be installed, but was amended to conform to specifications prior to award).

City of Miami Beach v. Klinger, 179 So. 2d 864 (Fla. 3d DCA 1965) (where city pursuant to its charter published an invitation for sealed bids for the dockage concession of for hire charter fishing boats only for a five-year period and where additional supplemental offer was contained in alternative bid based upon the city granting an additional five-year term by way of an option, the result was the invalidation of the entire agreement absent rebidding).

Jani-King Gulf Coast Region v. Escambia Cty. Sch. Bd., No. 16-2762, (DOAH Aug. 26, 2016) (requirement of audited financial statements was material and omission from bid could not be waived).

Motorola Solutions, Inc. v. Bay Cty., No. 16-2766 (DOAH July 25, 2016) (scoresheet errors and errors involving the number of scorers were de minimis).

Morse Commc'ns, Inc. v. Brevard Business Tel. Sys., Inc., No. 08-5079 (DOAH Feb. 10, 2009) (when invitation to bid required bidders submit a letter from the manufacturing stating that they were authorized service providers, bidder's submission of contact information of a manufacturer employee who could provide the requested information, instead of providing a letter, was a minor informality which could be waived).

- g. Bid mistake
Dep't of Transp. v. Ronlee, Inc., 518 So. 2d 1326 (Fla. 3d DCA 1988) (bid may not be reformed to correct error, even if subcontractor made a \$50,000 error and correcting error still leaves bidder low; however, bidder may be permitted to withdraw bid).
Hotel China & Glassware Co. v. Bd. of Public Instruction of Alachua Cty., 130 So. 2d 78 (Fla. 1st DCA 1961) (generally, equity will relieve a unilateral mistake if the public body is informed promptly upon discovery when the mistake is material, goes to substance, was not occasioned by the lack of due care or diligence, or is the result of neglect).
Lassiter Constr. Co. v. Sch. Bd. for Palm Beach Cty., 395 So. 2d 567 (Fla. 4th DCA 1981) (no upward adjustment to compensation made where error in transposing figure for concrete work from bid worksheet to final bid summary sheet was negligently made by the president himself; error was less than 4% of intended bid, and he would still receive some profit).
State Bd. of Control v. Clutter Constr. Corp., 139 So. 2d 153 (Fla. 1st DCA 1962) (contractor permitted to withdraw bid where complying in the face of honest mistake of \$100,000.00 would work severe hardship upon the bidder, error was not the result of gross negligence or willful inattention, and the error was discovered and communicated before acceptance).
- h. Rejecting all bids
Dep't of Transp. v. Grove-Watkins Constructors, 530 So. 2d 912 (Fla. 1988) (absent fraud, collusion or evidence of means of avoiding competition, no statutory right exists in any bidder to have its bid accepted).
Couch Constr. Co. v. Dep't of Transp., 361 So. 2d 172 (Fla. 1st DCA 1978) (public body should reserve the right to reject all bids, so long as rejection is rational and not arbitrary, when guidelines or specifications are silent on rejection).
Milander v. City of Hialeah, 456 So. 2d 588 (Fla. 3d DCA 1984) (city was free to reject all bids and not sell its property to anyone after request for submission of bids on real property).
Social Sentinel, Inc. v. Dep't of Educ., No. 19-0754 (DOAH Apr. 17, 2019) (discussing “arbitrary or illegal” constraint on rejecting all bids under chapter 120, Fla. Stat.).
- i. Basis of Award
Valle-Axelberd and Assocs., Inc., v. Metropolitan Dade Cty., 440 So. 2d 606 (Fla. 3d DCA 1983) (where county reserved right to consider factors other than price, county commission exercised its discretion to award to party other than low bidder).

Wester v. Belote, 138 So. 721 (Fla. 1931) (Leading Florida procurement law case relating to the issue of right to reject or right to award bids).

Culpepper v. Moore, 40 So. 2d 366 (Fla. 1949) (no mandatory obligation is imposed upon school board to consider the lowest dollar and cents bid as being “the lowest responsible bid” to the exclusion of all other pertinent factors).

Liberty Cty. v. Baxter’s Asphalt & Concrete, Inc., 421 So. 2d 505 (Fla. 1982) (county could award to low bidder on road resurfacing contract, notwithstanding that bidder had submitted bid on only one of two alternate asphalt types for which bids were requested).

Suburban Inv. Co. v. Hyde, 55 So. 76 (Fla. 1911) (where low bidder refused to submit samples of material on time, county commission had discretion to award to another bidder).

j. Time and Effectiveness of Award

City of Cocoa v. The Villas of Cocoa Village, LLC, 343 So. 3d 122 (Fla. 5th DCA 2022) (trial court erred by concluding city’s RFP constituted a binding contract that precluded city from terminating negotiations after almost three years and canceling RFP).

City of Miami Beach v. Dickerman Overseas Contracting Co., U.S.A., 659 So. 2d 1106 (Fla. 3d DCA 1995) (though city notified bidder of award, under solicitation terms no contract arose until bidder executed contract).

H. Gore Enters., Inc. v. City of West Palm Beach, 617 So. 2d 1160 (Fla. 4th DCA 1993) (following announcement of bid award, city retained discretion to reject all bids and re-solicit up until time written contract executed).

Schloesser v. Dill, 383 So. 2d 1129 (Fla. 3d DCA 1980) (public contracts are deemed “awarded” and binding when the procuring authority announces its intent to accept the offer, even if the parties intend later to execute a formal contract).

City of Homestead v. Raney Constr., Inc., 357 So. 2d 749 (Fla. 3d DCA 1978) (after city council awarded and parties signed contract, it was valid and binding despite new city council resolution rescinding it for technical improprieties).

Berry v. Okaloosa Cty., 334 So. 2d 349 (Fla. 1st DCA 1976) (where board of county commissioners’ motion to award bid to plaintiff was rescinded by subsequent formal action, no binding contract resulted, because no formal notification of the acceptance of the bid had occurred, and the mere fact of a representative being present at the public meeting was not adequate notice).

Dedmond v. Escambia Cty., 244 So. 2d 758 (Fla. 1st DCA 1971) (Escambia County had no authority to cancel award once notice

had been given that offer was accepted despite fact that lease had not been executed).

Housing Auth. of Ft. Pierce v. Foster, 237 So. 2d 569 (Fla. 4th DCA 1970) (jury question presented whether acceptance of bid was intended to have binding effect until formal contract had been executed).

3. Substantive matters

a. Specificity of technical requirements

Westinghouse Elec. v. Jacksonville Transp. Auth., 491 So. 2d 1238 (Fla. 1st DCA 1986) (requirement that spiral transitions be included in design for people mover system was not exclusionary where testimony indicated they limit lateral jerk of the vehicles making the ride more comfortable for passengers when negotiating curves, and in light of the fact that the flexibility of the price proposal process encouraged interaction and development of the specifications).

Robinson's, Inc. v. Short, 146 So. 2d 108 (Fla. 1st DCA 1962) (specifications were too vague where tax collector specification required forms be "securely fastened" where the tax collector knew he would only accept stapling and not gum, glue or crimping. Court held that the specifications must detail to all bidders the standards anticipated, the test the products must meet, and all factors upon which the product will be judged and the award made).

PRIDE v. Dep't of Highway Safety & Motor Vehicles, Case No. 13-0494BID (DOAH Apr. 10, 2013) (agency intentions ill-defined, and agency failed to succinctly define various terms, contrary to competitive bidding), *dismissed as moot*, Case No. 13-343 (HSMV May 22, 2013).

b. Requirements contracts

Tavormina v. Dade Cty., 475 So. 2d 1304 (Fla. 3d DCA 1985), (no exclusive contract where Tavormina agreed to provide all the county's landfill "overburden" on an "as needed" basis where agreement contemplated multiple awards to other contractors from whom the county could use the best bid and where fill was received from other sources on a gratuitous basis), *aff'd on appeal following remand*, 508 So. 2d 1293 (Fla. 3d DCA 1987).

Dade Cty. v. OK Auto Parts of Miami, 360 So. 2d 441 (Fla. 3d DCA 1978) (guarantee provision of eleven cars per day in a towing contract when read in conjunction with other provisions in the contract indicating that the contractor intended to pay only for what he actually towed in was not absolute, despite the legal requirement that in construing the ambiguous provision most strongly against the drafter, the court was compelled to resolve the

question of whether there was *any* viable guarantee against the county. The court looked to both the document itself and the circumstances surrounding the parties at the time of the contract in order to ascertain the intent of the parties).

Boyd v. Bonded Garages, 160 So. 2d 724 (Fla. 3d DCA 1964) (upon termination of valet parking contract, and award of non-exclusive contract to new bidder, the county retained the authority to prevent previous contractor from conducting business with the county).

Wester v. Belote, 138 So. 721 (Fla. 1931) (where bids were received for 50,000 cubic yards for oyster shell at price per cubic yard f.o.b. lighters, absent fraud, it was permitted to delete language “from time to time as needed”).

c. Exceeding statutory requirements

Reliance Ins. Co. v. Dade Cty., 230 So. 2d 21 (Fla. 3d DCA 1970) (where statute required bonds, “of streets, alleys and other such rights of ways shown on such plats” and bid required bond for, “plats, street signs, sidewalks, drainage structures, necessary fill, bridge and guardrails,” company was required to pay and indemnify the county, and the county could recover on a statutory bond when the requirements of the bond exceeded the requirements of statute).

d. Professional services

Parker v. Panama City, 151 So. 2d 469 (Fla. 1st DCA 1963) (revaluation of tangible and real property tax roll in entirety required exercise of special skills and training, therefore charter provision requiring competitive bidding on contracts in excess of \$1,000 was not applicable).

City of Pensacola v. Kirby, 47 So. 2d 533 (Fla. 1950) (maintenance of parking meters was not involving peculiar skill and ability so as to be excluded from charter provision requiring competitive bidding).

e. Patent Licenses

Kapsch TrafficCom IVHS, Inc. v. Dep’t of Transp., 249 So. 3d 693 (Fla. 1st DCA 2018) (patent license agreement not one for commodities or contractual services, thus not subject to competitive bidding requirements)

B. Relief

1. Miami-Dade Cty. Sch. Bd. v. J. Ruiz Sch. Bus Serv., Inc., et al., 874 So. 2d 59 (Fla. 3d DCA 2004) (even when it is undisputed that school board’s failure to award contract is clearly erroneous, contrary to competition, arbitrary and capricious, damages for lost profits and income are not available).

2. City of Cape Coral v. Water Servs. of Am., Inc., 567 So. 2d 510 (Fla. 2d DCA 1990) (where unsuccessful bidder relied on representations that its bid would not be rejected for lack of license, bidder was entitled to bid preparation costs, prejudgment interest and attorneys' fees but not entitled to lost profits.)
3. Royal Am. Development, Inc. v. City of Jacksonville, 508 So. 2d 528 (Fla. 1st DCA 1987) (after housing authority invited construction proposals, submissions were reviewed, and selections or proposals were recommended, city declined to adopt necessary ordinances, and preconstruction expenditures were awarded on theory of promissory estoppel).
4. Wood-Hopkins Contracting Co. v. Roger J. Au & Son, Inc., 354 So. 2d 446 (Fla. 1st DCA 1978) (damages, not injunctive relief, are available after award is made).

C. Federal Claims

1. See generally, Kevin F. Foley and David E. Cannella, Disappointed Bidders on Public Projects and Civil Rights Claims Under 42 U.S.C. §1983, Fla. B.J., Mar. 1993, 18. This article compares the results in Pataula Elec. Membership Corp. v. Whitworth, 951 F.2d 1238 (11th Cir. 1992) and United of Omaha Life Ins. Co. v. Solomon, 960 F.2d 31 (6th Cir. 1992). The cases turn on whether state law recognizes a low bidder's property interest in a contract and whether it requires that the lowest responsible bidder be awarded the public contract. The article also suggests that a claimant should consider asserting a violation of its procedural due process rights if the agency does not have an adequate procedural mechanism to challenge the agency action.
2. NASA v. Nelson, 562 U.S. 134 (2011) (holding that Constitution does not prohibit government from conducting standard employment background checks on employees of federal contractors; challenged background checks are reasonable, further the Government's interests in managing its internal operations, and are protected against public disclosure under the Federal Privacy Act of 1974).

IV. LOCAL PREFERENCE

A. Generally

1. Local preference policies/ordinances have been enacted with the goal of providing employment opportunities for local contractors and to ensure continuous work for local businesses in an effort to provide local economic benefits/incentives.

B. Application

1. Local preferences are generally granted to a contractor/vendor in a specified geographic area or location, as defined in an ordinance or policy. Such preference policies automatically grant a fixed percentage to a “local” contractor/vendor that submits a bid or proposal. The application of such preference type schemes often have a number of requirements, which include minimum dollar threshold amounts at which such preferences are granted, reciprocity to other cities/counties utilizing similar preferences and waiver provisions for certain agreements such as CCNA and professional service type agreements. The percentage of preference tends to be around 5%.
2. Tie bids – The most common application of local preferences seems to be with tie bids. In such cases where two bidders/proposers submit bids/proposals tied in price, but otherwise meeting all required conditions, awards are automatically made to the “local” bidder/proposer.

C. Advantages and Disadvantages

1. Local preference ordinances or policies have been enacted or adopted with the policy goals of: (1) employing local residents and businesses; (2) reducing local unemployment (i.e., job creation); (3) generating tax revenue in the locality; (4) rewarding local residents and businesses who contribute to the locality through the payment of taxes; and (5) providing continuous, stable work for local residents and businesses. See Steven R. Schooley & Michael W. Andrew, Jr., The Devil in Devolution: State & Local Preference Programs, Construction Lawyer, Oct. 16, 1996, at 18, 18-19.
2. However, local preference ordinances or policies may come with a number of disadvantages, including: (1) increasing the costs of goods and services caused by a less competitive market; (2) restraining the efficiency and growth of local businesses; (3) failing to address multi-jurisdictional businesses; (4) adding costs for administering/enforcing local preference ordinances and policies; and (5) causing retaliatory local preferences in other jurisdictions. Id. Other disadvantages include increased likelihood of bid protests, creation of barriers to regional and statewide cooperative purchases and making purchases lacking in equity, impartiality and open competition.

D. Types of Local Preferences

1. Pure local preference ordinances or policies automatically award a fixed percentage in favor of a local bidder. Id. at 19. The application of such preference often have a number of requirements, which include minimum dollar threshold amounts at which such local preferences are granted, reciprocity to other localities utilizing similar preferences and waiver provisions for certain agreements. The percentage tends to be around 5%.

2. Tie-bid local preference ordinances or policies automatically award the contract to the local business if it is tied in price, but otherwise meets all required conditions with another bidder. Id. This is the most common application of local preference ordinances or policies.
3. Employment-oriented local preference ordinances or policies prefer bidders that guarantee employment of a fixed percentage of local citizens and businesses. Id.
4. Reciprocal local preference ordinances or policies apply the foreign-locality's local preference standards in favor of local bidders competing against the foreign bidder. Id.

E. Local Preference Challenges

1. Local preference ordinance and policies have been challenged on federal and state constitutional grounds, including: (1) privileges and immunities; (2) equal protection; (3) due process; and (4) interstate commerce. Id. at 22-23.
 - a. Privileges and Immunities Challenges: Denver v. Bossie, 266 P. 214 (Colo. 1928) (statute providing local preference for in-state products did not subvert or abridge the rights of citizens of other states); Allen v. Labsap, 87 S.W. 926 (Mo. 1905) (no violation of the privileges and immunities clause where the city adopted an ordinance requiring all stone used in public works projects be dressed within the jurisdiction). But see United Bldg. & Constr. Trades v. City of Camden, 465 U.S. 208 (1984) (allowing non-resident construction workers to challenge local preference statute on privilege and immunities grounds).
 - b. Equal Protection Challenges: Am. Yearbook Co. v. Askew, 339 F. Supp. 719 (M.D. Fla. 1972) (statute requiring all public printing be done in the state did not violate the equal protection clause because state was exercising proprietary or business power to contract); Equitable Shipyards, Inc. v. State, 611 P.2d 396 (Wash. 1980) (local preference statute favoring domestic shipbuilders did not violate the equal protection clause because a reasonable basis existed for the preference); Assoc. Gen. Contractors of Cal., Inc. v. City & Cty. of San Francisco, 813 F.2d 922 (9th Cir. 1987) (relieving competitive disadvantage suffered by local businesses due to higher taxes and administrative costs paid to reside in locality and promoting relocation of business to the area are legitimate state interests); APAC-Miss., Inc. v. Deep S. Constr. Co., 704 S.W.2d 620 (Ark. 1986) (granting local preference to businesses regularly contributing to local economy and providing safeguards and procedures for where public funds are expended are legitimate state interests); Smith Setzer & Sons Inc. v. S.C. Procurement Review Panel, 20 F.3d 1311 (4th Cir. 1994)

- (providing state benefits to residents supplying them is a legitimate state interest); Galesburg Constr. Co., Inc. of Wyo. V. Bd. of Tr. of Mem'l Hosp. of Converse Cty., 641 P.2d 745 (Wyo. 1982) (encouraging local economy is a legitimate state interest).
- c. Due Process Challenges: Ex parte Gemmill, 119 P. 298 (Id. 1911) (statute requiring all county printing be done within the county where practicable did not violate the due process clause because the statute did not confine the purchases to residents or citizens of the state); Collins v. Senatobia Bank Book & Stationery Co., 76 So. 258 (Miss. 1917) (statute prohibiting counties from purchasing blank books, stationary and printing services from non-state businesses did not violate the due process clause because no person is entitled as part of his liberty to contract with or perform labor for the state). But see Kendrick v. City Council of Augusta, Ga., 516 F. Supp. 1134 (S.D. Ga. 1981) (wrongfully rejected bidder is entitled to substantive and procedural due process protections when subjected to arbitrary government action denying a contract).
 - d. Commerce Clause Challenges: Am. Yearbook Co. v. Askew, 339 F. Supp. 719 (M.D. Fla. 1972) (statute requiring all public printing be done in the state did not violate the commerce clause because it had a limited and indirect effect on interstate commerce). See also Smith Setzer & Sons Inc. v. S.C. Procurement Review Panel, 20 F.3d 1311 (4th Cir. 1994), Big Country Foods, Inc. v. Bd. of Educ., 952 F.2d 1173 (9th Cir. 1992), Trojan Tech., Inc. v. Penn., 916 F.2d 903 (3d Cir. 1990) (local preference statutes did not violate commerce clause because local government was acting as direct market participant); but see W.C.M. Window Co., Inc. v. Bernardi, 730 F.2d 486 (7th Cir. 1984) (state demanding implementation of local preferences is unconstitutional regulation under the commercial clause if the funding and administration of the project is locally controlled).
2. For the most part, legal challenges on federal and state constitutional grounds have been unsuccessful. See Gavin L. Phillips, Validity, Construction, and Effect of State and Local Laws Requiring Governmental Units to Give "Purchase Preference" to Goods Manufactured or Services Performed in State, 84 A.L.R. 4th 419 (1991).
 3. Regulations in other states
 - a. A court in Arizona ruled the City of Tucson's local preference unconstitutional under both the Arizona and US Constitutions. Specifically, the court found the local preference ordinance to violate the Gift Clause and the Equal Privileges and Immunities clause of the Arizona Constitution, and the Equal Protection and Privileges and Immunities Clauses of the U.S. Constitution.

Hirshman v. City of Tuscon, Ariz. Superior Ct., Pima Cty., Case No. C-20140690 (November 20, 2014).

4. Federal Prohibition on Geographic Preferences

- a. The Environmental Protection Agency (the "EPA") has promulgated procurement regulations requiring that grantees of EPA grant funds use procurement procedures that provide full and open competition. 40 C.F.R. § 31.36(c)(1).
- b. The use of state or local geographical preferences in evaluating bids or proposals is prohibited, except where federal law requires or encourages them. 40 C.F.R. § 31.36(c)(2). However, geographic location may be used as selection criteria when contracting for architectural and engineering services, so long as there remain a sufficient number of qualified firms to compete for the project. Id.
- c. Other federal agencies and programs have also strictly prohibited the use of local preferences in procurement, such as: the Federal Aviation Administration, Urban Development Action Grant and Community Development Block Grant. However, federal programs such as Farm to School encourages the purchase of unprocessed locally grown and locally raised agricultural products.
- d. Procurement by state and local governments is not covered by the North American Free Trade Agreement ("NAFTA"). However, the State has agreed to procure in accordance with the Government Procurement Agreement negotiated under the auspices of the World Trade Organization (WTO). As a practical matter, if any foreign company believes a solicitation runs afoul of the WTO or trade agreements, its recourse would be to complain to its home government. Then, that sovereign's recourse would be to bring a complaint against the U.S. before the WTO. Worst case, the WTO would agree and fine the U.S. The dispute would always remain between the two sovereigns. There would be no recourse against the local government or the State.

F. Local Preference in Florida

1. Legal Authority

- a. When a county is purchasing personal property through competitive solicitation, section 287.084, Florida Statutes, allows the county to award a reciprocal local preference to the lowest responsible and responsive vendor whose principal place of business within Florida, in an amount equal to the preference granted by the foreign state or political subdivision in which the lowest responsible and responsive vendor has its principal place of business.
- b. In Adolphus v. Baskin, 116 So. 225 (Fla. 1928), the City of Clearwater awarded a contract to construct a public building to the

second lowest bidder because "he is a local man, will use local contractors and local labor, and will patronize local supply houses." Id. at 604. The Florida Supreme Court found that although there was nothing in the City Charter requiring the City Commission to award contracts to the lowest responsible bidder, the City Commission was required to exercise its municipal power in a reasonable manner, and that it was unreasonable to award to the second lowest bidder based on the bidder's local ties because it would "unnecessarily deplete the public fund." Id. at 605.

- c. In Marriott Corp. v. Metropolitan Dade Cty., 383 So. 2d 662 (Fla. 3d DCA 1980), the Board of County Commissioners awarded a contract to a vendor on the grounds that it was a local firm, even though the bid of a non-local firm returned a higher percentage of revenues to the County. Id. at 663. The Third District Court of Appeals found that the County adopted by resolution the use of competitive bidding and was required to follow those resolutions. Id. at 665-67. The Third District Court of Appeals held that the Board abused its discretion in awarding the contract to the local firm because: (1) nothing in the record confirmed the firm was in fact local and the lowest bidder was not given an opportunity to demonstrate it could qualify as a local firm, id. at 668; and (2) the non-local firm was "the best bidder within the standards set by the Board when it elected to solicit competitive bids." Id.
- d. In City of Port Orange v. Leechase Corp., 430 So. 2d 534 (Fla. 5th DCA 1983), the City of Port Orange adopted an ordinance granting a pure 3% local preference to firms located in the City and Volusia County. Id. at 535. Based solely on this ordinance, the City awarded a contract to a local bidder, rather than the lower non-local bidder. Id. The Fifth District Court of Appeals upheld the ordinance on the grounds that the determination of whether or not to award a local preference is purely a legislative decision and the judicial branch should not overturn such a decision. Id. The Court distinguishes Adolphus and Marriott because both cases lacked a specific local preference ordinance and, therefore, the courts were reviewing the exercise of power by the executive branch of government as opposed to the legislative branch of government. Id. at 535-36.
- e. In Attorney General Opinion 2002-03, the School Board of Alachua County asked whether it may give preference to local firms. The Attorney General opined that the School Board has flexibility in evaluating potential vendors and "knowledge of local conditions" falls within an evaluation of the firms "capabilities" and "experience." Id. However, the Attorney General cautioned that giving undue weight to the local preference could be contrary

to the process of competitive bidding, which could cause the School Board's actions to be arbitrary and capricious. Id.

- f. In Attorney General Opinion 2001-65, the Lake County School Board asked if it could adopt a policy giving a local preference in awarding purchasing and professional services contracts. The Attorney General opined that the School Board may adopt such local preference policy as long as such policy does not conflict with statutes or rules on competitive bidding. Id.
- g. In Attorney General Opinion 2012-34, the Attorney General opined that a special district has no authority to enact a policy granting a local preference to businesses located within the district absent a statutory authorization for such preference.
- h. § 255.0991, Fla. Stat. (2022), prohibits local government preferences on projects funded by state-appropriated funds: a state college, county, municipality, school district, or other political subdivision of the state may not use a local ordinance or regulation that provides a preference based upon: (i) the contractor's maintaining an office or place of business within a particular local jurisdiction; (ii) the contractor's hiring employees or subcontractors from within a particular local jurisdiction; or (iii) the contractor's prior payment of local taxes, assessments, or duties within a particular local jurisdiction.

2. Examples

- a. Brevard County, Florida (Resolution No. 2010-122)
 - i. Pure local preference that awards a fixed percentage based on the "category" of local vendor and amount of contract.
 - ii. Establishes four categories of local vendors, the highest category being a vendor with a permanent place of business located in the county, which has paid local taxes for at least one year. Also requires half of the staff working under the bid to be county residents.
- b. Manatee County, Florida (Section 2-26-6)
 - i. Tie bid local preference awarding the contract to the local vendor when the local vendor and non-local vendor have both submitted the lowest responsive bid.
 - ii. Defines a local vendor as a business that has maintained for the six months prior to the solicitation a physical place of business with at least one full-time employee in Manatee County and the neighboring counties of Desoto, Hardee, Hillsborough, Pinellas and Sarasota.
- c. Orange County, Florida (Section 17-310(g)(4))
 - i. Reciprocal local preference allowing the county to award to the next lowest responsive and responsible bidder having a principal place of business within the county the same

- preference awarded to local vendors in the county of the lowest responsive and responsible bidder.
- d. St. Lucie County, Florida (Section 2-184)
 - i. For Bids, "second chance" local preference allowing the local vendor with the second lowest contract price to match the lowest price submitted by a non-local vendor if the local vendor's original price was within 5% of the non-local vendor's price.
 - ii. For RFPs, pure local preference awarding a fixed percentage to the local vendor.
 - iii. Also provides a reciprocal local preference allowing the county to enter into interlocal agreements with other local governments to extend local preferences of the county to their local vendors.
 - iv. Defines a local vendor as any business having a fixed office location within St. Lucie, Indian river, Martin or Okeechobee County for at least one year prior to the solicitation; holds any business license required by the county; and is the principal offeror and not a subcontractor or a joint venturer.

V. SUNSHINE LAW

- A. The open meetings law, Section 286.011, Florida Statutes, generally applies to purchasing matters.
 - 1. Sarasota Citizens for Responsible Gov't v. City of Sarasota, 48 So. 2d 755, 758 (Fla. 2010) (affirming trial court's validation of City and County bonds to finance spring training facilities to bring Oriels to Sarasota on basis that discussions did not violate Sunshine Law: (i) "negotiations team" not a board or commission subject to the Sunshine Law because it performed only information gathering and fact-finding roles and was not delegated any decision-making authority; (ii) private informational briefings for individual County Board of Commissioners members in preparation for public hearing did not violate Sunshine Law; and (iii) any possible Sunshine Law violations resulting from email communications between Board members were cured by the Board's subsequent, independent, and final action taken at duly noticed public hearing).
 - 2. Leach-Wells v. City of Bradenton, 734 So. 2d 1168 (Fla. 2d DCA 1999) (Sunshine Law applies to bid evaluation meetings).
 - 3. Silver Express Co. v. Miami-Dade College, 691 So. 2d 1099 (Fla. 3d DCA 1997) (Sunshine Law applies to proposal evaluation meetings).
 - 4. Port Everglades Auth. v. Int'l Longshoremen's Ass'n, 652 So. 2d 1169, 1170 (Fla. 4th DCA 1995) (violation of Sunshine Law occurred when

selection and negotiation committee excluded bidders from competitor's presentation to committee).

5. Godheim v. City of Tampa, 426 So. 2d 1084 (Fla. 2d DCA 1983) (Sunshine Law did not apply to negotiation meetings conducted by city staff members with two competing vendors for award of contract for design, construction and operation of solid waste facility, where ultimate decisions concerning the procedures to be followed and the award of the contract were made by the city council in open meetings).
6. News-Press Publishing Co., Inc. v. Carlson, 410 So. 2d 546 (Fla. 2d DCA 1982) (where responsibility delegated to staff on budget committee, it had to comply with Sunshine Law).
6. Op. Att'y Gen. Fla. 2013-30 (Dec. 30, 2013) (opening of bids as required under section 255.0518, Florida Statutes, falls under the Sunshine Laws, section 286.011, Florida Statutes, and minutes of the bid opening must be taken and promptly recorded).

B. Section 286.0113(2), Florida Statutes, first enacted in 2006 and currently effective until 2025, provides an exemption from the open meeting requirement for negotiated procurements. This statutory exemption must be taken into account when applying the authorities cited immediately above in subsection V.A.

1. The following meetings are temporarily exempt from open meeting requirements during competitive solicitation:
 - a. negotiation with a vendor
 - b. vendor makes an oral presentation
 - c. vendor answers questions
 - d. government negotiation team discusses negotiation strategies
2. With regard to 1.d., the exemption is limited "to portions of meetings—the portions 'at which negotiation strategies are discussed.' Other portions—those in which negotiation strategies are *not* discussed—are not exempt." Carlson v. Dep't of Revenue, 227 So. 3d 1261, 1267 (Fla. 1st DCA 2017).
3. These meetings are recorded and such recordings and any records presented at these meetings are public records that may be obtained at the earlier of (a) the posting of the notice of intended ward or (b) 30 days after opening of bids, proposals, or final replies. Absent bad faith, merely inadvertent technological inability to recover meetings' recordings does not constitute a statutory violation. Carlson, 227 So. 3d at 1270.
4. If buyer rejects all bids and concurrently provides notice of its intent to reissue a competitive bid, the recording and any records presented at the meetings remain exempt until later award of reissued competitive bid or until the agency withdraws the reissued competitive bid; however, the recording and any records presented at the meetings are not exempt for longer than 12 months.

- C. A similar temporary exemption exists from public records law: Sealed bids, proposals, or replies received pursuant to a competitive solicitation are exempt until the buyer provides notice of an intended decision or until 30 days after opening the bids, proposals, or final replies, whichever is earlier. § 119.071(1)(b), Fla. Stat. (2022).
- D. Public records in public hands – the public records law otherwise generally applies to procurement related materials, absent an express exemption or basis of confidentiality. See Sepro Corp. v. Dep’t of Env’tl. Prot., 839 So. 2d 781 (Fla. 1st DCA 2003).
1. Financial statements of prospective bidder on public works projects are exempt from public records law. § 119.071(1)(c), Fla. Stat. (2022).
 2. Data processing software under licensing agreement that prohibits its disclosure where the software is trade secret, as defined by § 812.081, Fla. Stat. (2022) and is exempt pursuant to §119.071(1)(f), Fla. Stat. (2022).
 3. Appraisals, reports relating to value, offers and counteroffers for purchase of real property are exempt under conditions set forth in § 125.355, Fla. Stat. (2022) for counties, and § 166.045, Fla. Stat. (2022) for cities.
 4. Competitive proposal information qualifying as “trade secret” under § 812.081 is exempt from public record under § 815.045, Fla. Stat. (2022). Managed Care of N. Am., Inc. v. Fla. Healthy Kids Corp., 268 So. 3d 856 (Fla. 1st DCA 2019).
- E. Public Records in Private Hands
1. Article I, section 24, Florida Constitution provides that the public has the right to review the records of any public body "or persons acting on their behalf..."
 2. §119.011(2), Fla. Stat. (2022), defines "agency" to include private entities, person, partnership or corporation "acting on behalf of any public entity."
 3. § 119.0701, Fla. Stat. (2022) requires public agency contracts for services performed on behalf of the agency by a private entity to contain contract provisions clarifying the public record responsibilities of the private contractor.
 4. The Attorney General in AG Opinion 2014-06 opined that it is the nature and scope of the services provided by a private contractor that determine whether they are "acting on behalf" of an agency and subject to the requirements of section 119.0701, Florida Statutes.
 5. The Supreme Court of Florida adopted the "totality of factors" approach in News & Sun-Sentinel Co. v. Schwab, Twitty & Hansen Architectural Group, Inc., 596 So. 2d 1029 (Fla. 1992) as follows:
 - the level of public funding;
 - commingling of funds;
 - whether the activity was conducted on publicly-owned property;

- whether services contracted for are an integral part of the public agency's chosen decision-making process;
 - whether the private entity is performing a governmental function or a function which the public agency otherwise would perform;
 - the extent of the public agency's involvement with, regulation of, or control over the private entity;
 - whether the private entity was created by the public agency;
 - whether the public agency has a substantial financial interest in the private entity;
 - for whose benefit the private entity is functioning.
6. NCAA v. Associated Press, 18 So. 3d 1201 (Fla. 1st DCA 2009) (it was unnecessary to determine whether the NCAA became a public "agency" under the Schwab test because documents at issue became public records when the NCAA provided them to agents of University and the University used them in connection with its business)
 7. § 119.011(12), Fla. Stat. (2022) defines "public records" as "all documents...made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency."
 8. Shevin v. Byron, Harless, Schaeffer, Reid & Assocs., Inc., 379 So. 2d 633 (Fla. 1980) (letters, memoranda, resumes and travel vouchers of a private consultant conducting a search for director of the Jacksonville Electric Authority are public records).
 9. B&S Utilities, Inc. v. Baskerville-Donovan, Inc., 988 So. 2d 17 (Fla. 1st DCA 2008), discussed which documents of a private contractor doing public work are public records in further detail: "to the extent the private entity creates the documents while performing the public function"; "generated in performing engineering services for the City"; "records generated by BDI's performance of its contracts with the City...".

VI. CONTRACT PERFORMANCE

- A. Public project payment and performance bonds – Under Florida's Construction Lien Law, the term "owner" is defined to *exclude* "any political subdivision, agency, or department of the state, a municipality, or other governmental entity." § 713.01(23), Fla. Stat. (2022). Thus, there are no lien rights against public projects. Like most states, Florida has a "Little Miller Act" (based on 40 U.S.C. § 3131), to protect the interests of those involved with public projects. The Little Miller Act is codified at section 255.05, Florida Statutes. **This statute is the subject of the one procurement-related sample question on the certification exam.** Before taking the exam, it is worth taking the time at least to read section 255.05. Basically, the statute requires two bond conditions: (1) the prime contractor must perform in a time and manner designated by the contract ("performance bond"); and (2) the prime contractor must make all payments due to those satisfying the definition of "claimant" under the Construction Lien Law

("payment bond"). Local governments have discretion to exempt from this requirement any contract that is for \$200,000 or less.

- B. Change orders and amendments - Process by which parties to a contract agree to change such terms as contract price, contract time or scope of work in a specified time period.
1. Must amendments comply with competitive bidding requirements? Compare Asphalt Paving Sys., Inc. v. Anderson Columbia, 264 So. 3d 1110 (Fla. 1st DCA 2019) (petition alleging that state agency change order failed to meet statutory requirement for public bidding exemption established party's standing and entitled it to hearing under Chapter 120, Florida Statutes) and Op. Att'y Gen. Fla. 2003-29 (Jun. 25, 2003) (city may not modify a utility O&M contract to include repairs and capital improvements in excess of no-bid maximums prescribed by city's charter and by state law without seeking bids for additional work) with Grove Key Marina, Inc. v. Sakolsky, 383 So. 2d 695 (Fla. 3d DCA 1980) (where 1973 lease had been executed as the result of competitive bidding process, but there was no competition relating to later amendments, in the absence of requirement of expenditure the amendments were not void).
 2. Contract provisions generally provide that such changes be in writing. Florida law requires written change orders on public projects where the express terms of the governmental entity's contract contains such a provision. Courts must balance the doctrine of sovereign immunity against holding public entities more accountable for cost increases to contractors.
 - a. Cty. of Brevard v. Miorelli Eng'g, Inc., 703 So. 2d 1049 (Fla. 1997) (contractor not entitled to recovery for changes without a written change order).
 - b. Ajax Paving Indus., Inc. v. Charlotte Cty., 752 So. 2d 143 (Fla. 2d DCA 2000) (distinguished claim in Miorelli as one for damages not covered in the original contract, whereas Ajax claimed damages for work and materials clearly addressed in the original contract between the parties).
 - c. Acquisition Corp. of Am. v. Am. Cast Iron Pipe Co., 543 So. 2d 878 (Fla. 4th DCA 1989) (enforceability of written change orders).
 3. An implied contract may arise out of an express contract where the contractor is required to perform "extras"; an implied theory is barred only if the express contract concerns the same subject matter as the implied contract. F.H. Paschen, S.N. v. B&B Site Dev., Inc., 311 So. 3d 39 (Fla. 3d DCA 2021).
 4. If the contractor seeks only to recover damages owed for work performed within the scope of the contract, and not to modify the scope of work, then the contractor is not required to follow mandatory dispute resolution procedures regarding extra work. Miami-Dade Cty. Expressway Auth. v. Elec. Consultants Corp., 300 So. 3d 291 (Fla. 3d DCA 2020).

C. Contract Renewal

1. Xerox State & Local Solutions, Inc. v. Dep't of Revenue, 187 So. 3d 386 (Fla. 1st DCA 2016), rejected argument that failure to price renewal term in ITN procurement rendered offer non-responsive, but concluded that it did prohibit agency from later renewing contract.
2. Dep't of Highway Safety & Motor Vehicles v. National Safety Comm'n, Inc., 75 So. 3d 298 (Fla. 1st DCA 2011), discussed a renewal provision essentially identical to section 287.058(1)(f), Florida Statutes, and found mutual agreement of the parties is required for renewal; a unilateral right to renew for does not exist for either the private party or the government).
3. Dep't of Corrections v. C&W Food Serv., Inc., 765 So. 2d 728 (Fla. 1st DCA 2000) (despite renewal clause for two additional one-year periods, renewal is not a unilateral right).

D. Termination

1. Fla. Env'tl. Reg. Specialists, Inc. v. Fla. Dep't Env'tl. Prot., 342 So. 3d 710 (Fla. 1st DCA 2022) (contract "did not require any magic language" to effect termination, and decision to terminate did not implicate open meeting law).
2. Northwood Assocs. v. Ertel, 265 So. 3d 665 (Fla. 1st DCA 2019) (legislative proviso language prohibiting use of funds to pay for certain leases not an unconstitutional impairment of contract).
3. Handi-Van, Inc. v. Broward Cty., 116 So. 3d 530 (Fla. 4th DCA 2013), provides a detailed discussion of government's right to terminate for convenience, while upholding termination based on state law contract analysis and showing little sympathy toward federal law exception against "bad faith" termination.
4. Rollins Servs. v. Metropolitan Dade Cty., 281 So. 2d 520 (Fla. 3d DCA 1973) (where contract provided that "the authority may at its option and discretion terminate the contract at any time without any default on the part of the contractor by giving written notice to the contractor and a surety at least ten (10) days prior to the effective date of the termination set forth in notice," such unilateral termination provision can be enforced because specifically reserved in the contract).

E. Damages

1. Broward Cty. v. CH2M Hill, Inc., 302 So. 3d 895 (Fla. 4th DCA 2020) (in multi-party dispute involving professional malpractice claims against licensed engineer and breach of contract claims against contractor, trial court may allocate damages on comparative fault basis pursuant to section 768.81, Fla. Stat., rather than hold breaching parties jointly and severally liable).

2. Dep't of Env't'l Protection v. ContractPoint Florida Parks, LLC, 986 So. 2d 1260 (Fla. 2008) (section 11.066, Florida Statutes, does not require a specific legislative appropriation before a governmental entity can be required to pay a valid judgment entered for breach of contract with a private entity).
3. Martin Cty. v. Polivka Paving, Inc., 44 So. 2d 126 (Fla. 4th DCA 2010) (to recover delay damages, contractor must prove that the government delay caused indefinite stand by, so that the contractor was suspended and unable to take on additional work).
4. Triple R Paving, Inc. v. Broward Cty., 774 So. 2d 50 (Fla. 4th DCA 2000) ("no damage for delay" clause not enforceable when the delay results from fraud or bad faith).
5. C.A. Davis, Inc. v. City of Miami, 400 So. 2d 536 (Fla. 3d DCA 1981) (upholding "no damage for delay" clause).

VII. ETHICAL CONSIDERATIONS

- A. Generally, section 112.313, Florida Statutes, provides standards of conduct for public officers, employees of agencies and local government attorneys. It prohibits solicitation of and acceptance of gifts, doing business with one's agency, unauthorized compensation, misuse of public position and conflicting contractual relationships.
***Including a provision restricting lobbying activity in all bids or RFP's and codifying such a provision in an ordinance may serve to discourage some of the abuses specified above. (See Appendix C, Pinellas County Purchasing Ordinance – Sec. 2-189.)
- B. In addition to section 112.313, Florida Statutes, other provisions of chapter 112, Florida Statutes, specifically apply to purchasing agents. Section 112.3145, Florida Statutes, addresses the disclosure of financial interests and clients represented before agencies. Section 112.3185, Florida Statutes, addresses contractual services. Finally, section 112.3148, Florida Statutes, addresses reporting and prohibited receipt of gifts by procurement employees.
- C. Criminal penalties for self-dealing are found in chapter 839, Florida Statutes – Offenses by Public Officers and Employees.
- D. In addition to personal conflict issues, buyers should be aware of and avoid or mitigate potential organizational conflicts of interest. In some circumstances, a government contractor's performance on a past or current contract may give it an unfair (or intolerable) advantage over others in future competitive procurement situations. See § 287.057(19), Fla. Stat. (2022); see, e.g., Sutron Corp. v. Lake Cty. Water Auth., 870 So. 2d 930 (Fla. 5th DCA 2004) (applying policy of former version of statute to non-state agency); Boston Culinary Group, Inc., v. Univ. of

Cent. Fla., No. 17-4509 (DOAH Nov. 21, 2017) (bidder representative's involvement in drafting solicitation documents grounds for disqualifying bidder from competition).

VIII. EMERGING PROCUREMENT ISSUES

- A. Covid-19 effects on contractual obligations – Rockwell at Amelia Passage, LLC v. Williams, 343 So. 3d 627 (Fla. 1st DCA 2022) (affirming summary judgment finding that force majeure clause not triggered by pandemic for purposes of extending time to close on sale); Trustees of Miami-Dade College v. Verdini, 339 So. 3d 413 (Fla. 3d DCA 2022) (affirming dismissal on sovereign immunity grounds of complaint by students deprived of on-campus services); Gibson v. Lynn Univ., Inc., Case No. 20-CIV-81173-RAR (S.D. Fla. Nov. 29, 2020) (denying motion to dismiss complaint by students deprived of live on-campus education)
- B. Personal liability for opposing public project – Hurchalla v. Lake Point Phase I, LLC, 278 So. 3d 58 (Fla. 4th DCA 2019) (affirming judgment against former county commissioner for \$4.4 million in damages for tortious interference with interlocal agreement for stormwater project)
- C. Recent Legislation (2022)
 - 1. Ch. 2022-216 – Evidence of vendor financial stability; adding new subsection 287.057(27) (HB 1057).
- D. Pending Legislation (2023)
 - 1. SB 212 – Emergency Response Mapping Data; Requiring the Department of Education to procure a vendor to produce emergency response mapping data for public school buildings; requiring the vendor to provide the data to certain entities; specifying requirements for the data, etc. (see also HB 301)
 - 2. SB 284 – Energy; Revising the selection criteria for purchasing or leasing vehicles for state agencies, state universities, community colleges, and local governments under a state purchasing plan; deleting a provision requiring the use and procurement of ethanol and biodiesel blended fuels; requiring the Department of Management Services, before a specified date, to make recommendations to state agencies, state universities, community colleges, and local governments relating to the procurement and integration of electric and natural gas fuel vehicles, etc.
 - 3. SB 304 – U.S.-produced Iron and Steel in Public Works Projects; Requiring governmental entities to include a requirement in certain contracts that certain iron or steel products be produced in the United States; authorizing the use of foreign steel and iron materials in certain

- circumstances; requiring the Department of Management Services and the Department of Transportation to adopt rules for specified purposes, etc.
4. SB 346 – Public Construction; Providing that applications for approval of a development permit or development order which are under review by a municipality are deemed approved after a specified timeframe; requiring a certain list to include a dollar valuation using reasonable market rates of the estimated cost to complete items on the list; revising the timeframe within which proceedings must commence to resolve disputes between vendors and local governmental entities; revising the conditions that require a public entity to pay or release amounts subject to certain disputes or claims, etc. (see also HB 383)
 5. HB 309 – Tourist Development Tax: Authorizes certain fiscally constrained counties to use designated percentage of tourist development tax revenues received to reimburse for expenses incurred for certain purposes; provides specifications for use of those tax revenues.
 6. HB 331 – Liens and Bonds: Revises liens & bonds laws, including provisions relating to when notices must be served; notarizing forms; alternative forms of security; direct contracts; computation of time; extent of certain liens; requirements for notice of commencement, notice of termination, & notice of contest of lien; transferring lien to security; service of documents; immunity to issuing authority; & release of liens; authorizes attorney fees in certain actions.
 7. HB 563 – Applications on Government Devices: Prohibits specified employees from being issued device that contains certain application [viz., *TikTok/ByteDance*]; prohibits specified employees from downloading certain application; authorizes Governor & law enforcement entities to use certain application; authorizes DMS to adopt rules.

IX. PRACTICAL POINTERS

A. Solicitation Terms and Conditions

1. Advertisements/instructions to bidders in Bid/RFP documents should reserve the right to reject all bids.
2. Selection Criteria should be clearly articulated in all documents.
3. Minimum/mandatory criteria should be strictly observed during the evaluation process.
4. Bid documents should prominently state that bidders may not rely on verbal information furnished by public employees. All requests for information should be in writing and addressed to the specific individual/address designated on all relevant bid documents. Answers should be furnished to all known bidders.
5. If bid bonds or bid deposits are required, this requirement should be noted in all relevant documents.

B. Drafting Checklist - RFP's/Bids

1. Can I reject all bids?
2. Can I award in part?
3. Are selection criteria clear and easy to apply?
4. Have I created a property right for a low bidder?
5. Have I indicated all inquiries into meaning of specifications are to be made in writing to one person?
6. Have I provided that submission of a bid implies full understanding of and agreement with the terms of the RFP and that misunderstanding will not relieve the bidder from performance?
7. Have I reserved the right to waive informalities or immaterial variations?
8. Have I provided that offers are irrevocable at least for a certain time period?
9. Have I provided for clear bid award procedure?
10. Have I provided for acceptance of late bids?
11. Have I provided for mandatory or optional prebid conference?
12. Have I explained that no assurances are binding other than final action?
13. Are bid bond and bid deposit requirements clear?
14. Have I advertised appropriately?

C. Drafting Checklist - Contracts

1. Is there a public purpose to this contract?
2. Have I identified the appropriate parties?
3. Are these parties authorized to perform this function?
4. Are representations or warranties appropriate?
5. Are any procedural requirements a condition precedent to the parties' performance (resolutions of city council, corporate resolutions)?
6. Have I identified the capacity or status of the parties?
7. Can I obtain service of process after reviewing the contract (name, entity, location of entity creation, principal place of business or registered agent)?
8. Can I identify the date of execution of the contract?
9. Can I identify the date that the services are to begin?
10. Have I provided a term for the contract?
11. Is the execution of the parties correct?
12. Can I encumber funds under this contract?
13. Can I audit this contract?
14. Have I included a cancellation provision at the end of the fiscal year or a fiscal non-funding provision?
15. Can I make payments or know when I will be receiving payments?
16. Are advanced payments required?
17. Am I creating a debt (mortgage, security interest, or requirement for a special filing with the I.R.S.)?
18. Are there any restrictions on the funds being used to pay for this contract, which require special conditions?

19. Have I provided for indemnity to the county?
20. Have I avoided indemnity by the county?
21. Have I provided for termination for cause, termination for convenience or options for renewal in lieu of termination?
22. Have I provided for default and remedy for default?
23. Is there a priority of documents provision?
24. Does the law of Florida govern the contract?
25. Is Florida the venue for litigation of the contract?
26. Is the contract assignable without consent?
27. Have I provided for patent, trademark and copyright indemnification?
28. Has bid splitting occurred which could require competitive bidding?
29. Does the scope of the services defined in the contract duplicate an existing contract between the parties?
30. Have I required compliance with all applicable laws?
31. Have I included required language to private entities requiring them to comply with public records laws if the contract requires the private entity to perform services on behalf of an agency?

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OF APPENDICES

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Appendix B:	Miami-Dade County Protest Procedures
Appendix C:	Pinellas County Purchasing Ordinance
Appendix D:	Pinellas County CCNA Policies/Procedures
Appendix E:	Pinellas County Indemnification Resolution

Appendix A:

Federal Statutory Issues

Sample of Federal Statutory Issues

When drafting bid documents, it is imperative to know the source of funds being utilized to ensure compliance with applicable federal laws. Most federal grants also have significant audit requirements. Common areas where federal grant monies are received are transportation, planning, sewer, community development, aviation, beach renourishment and emergency management.

Federal Statutory Issues

The Archeological and Historic Preservation Act of 1974, PL 93-921 and the National Historic Preservation Act of 1966, PL 89-665, as amended, regarding identification and protection of historic properties.

The Clean Air Act, 42 USC 7506(c), which requires conformance with State Air Quality Implementation Plans.

The Coastal Barrier Resources Act, 16 USC 3501, et seq., regarding protection and conservation of the coastal barrier resources.

The Coastal Zone Management Act of 1972, PL 92-583, as amended, which requires assurance of project consistency with the approved State management program developed under this Act.

The Endangered Species Act, 16 USC 1531, et seq., which requires that projects avoid disrupting threatened or endangered species and their habitats.

Executive Order No. 11593, Protection and Enhancement of the Cultural Environment, regarding preservation, restoration, and maintenance of the historic or cultural environment.

Executive Order No. 11988, Floodplain Management, related to avoiding, to the extent possible, adverse impacts associated with floodplain occupancy, modification and development whenever there is a practicable alternative.

Executive Order No. 11990, Protection of Wetlands, related to avoiding, to the extent possible, adverse impacts associated with the destruction or modification of wetlands and avoiding support of construction and wetlands.

The Farmland Protection Policy Act, 7 USC 4201, et seq., regarding the protection of agricultural lands from an irreversible loss.

The Fish and Wildlife Coordination Act, PL 85-624, as amended, which requires that actions to control natural streams or other water bodies be undertaken to protect fish and wildlife resources and their habitats.

The Safe Water Drinking Act, Section 1424(e), PL 93-523, as amended, regarding protection of the underground sources of drinking water.

The Wild and Scenic Rivers Act, PL 90-542, as amended, relating to protecting components or potential components, of the national wild and scenic rivers system.

The Uniform Relocation Real Property Acquisition Policies Act of 1970, PL 91-646, which provides for fair and equitable treatment of persons displaced, or whose property is required as a result of federal or federally assisted programs.

The Demonstration Cities and Metropolitan Development Act of 1966, PL 89-754, as amended, which requires that projects be carried out in accord with area-wide planning activities.

Section 306 of the Clean Air Act, Section 508 of the Clean Water Act, and Executive Order No. 11738, which prohibit manufacturers, firms, or other enterprises on the EPA's list of Violating Facilities, from participating in the project.

The Federal Statutes relating to non-discrimination, including: the Civil Rights Act of 1964, PL 88-352, which prohibits discrimination on the basis of race, color, or national origin; the Age Discrimination Act, PL 94-135, which prohibits discrimination on the basis of age; Section 13 of the Federal Water Pollution Control Act, PL 92-500, which prohibits sex discrimination; the Rehabilitation Act of 1973, PL 93-112, which prohibits discrimination on the basis of handicaps.

Executive Order No. 11246, Equal Employment Opportunity, which provides for equal opportunity for all qualified persons and Executive Orders 11625 and 12138, Women's and Minority Business Enterprise, which requires that small minority and women's businesses and labor surplus areas be used when possible as sources of supplies, equipment, construction and services.

Executive Order No. 12549, Debarment and Suspension, which prohibits any award to a party which is debarred or suspended, or is otherwise excluded from or ineligible for, participation in Federal assistance programs.

The Davis Bacon Act, 40 USC 276, and related requirements of the Copeland Act, and Contract Work Hours and Safety Standards Act, which require compliance with labor standards for construction.

===== PRESIDENT JOE BIDEN =====

BUILDING A BETTER AMERICA

===== BUILD.GOV =====

A GUIDEBOOK TO THE BIPARTISAN INFRASTRUCTURE LAW FOR STATE, LOCAL, TRIBAL, AND TERRITORIAL GOVERNMENTS, AND OTHER PARTNERS



THE WHITE HOUSE
WASHINGTON

7.48



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A Note from the White House Infrastructure Implementation Coordinator

May 2022

Dear Friends:

With the signing of the Bipartisan Infrastructure Law in mid-November 2021, President Biden marked a new era of building a better America together. The Bipartisan Infrastructure Law is historic in its size – the largest ever investments in broadband, rail and transit, clean energy, and water, just to name a few – as well as the breadth of programs and sectors included in the law. The infrastructure law allocated funding to over 350 distinct programs across more than a dozen federal departments and agencies. From bringing high-speed internet to every American, to replacing lead service lines to bring clean water to people's homes, to repairing thousands of roads and bridges, to creating good-paying union jobs, close coordination with state, Tribal, territorial, and local leaders like you will be fundamental in the successful delivery of these programs.

This guidebook is another step in our effort to be as transparent as possible, so you know what to apply for, who to contact, and how to get ready to rebuild. After all, most of the building will actually be done by state, Tribal, and local government partners. Where they exist at this moment, we have also included planning activities you can be doing now to prepare for these programs coming across 2022 and 2023. The online version at Build.gov also hosts an application to quickly sort and filter programs by agency, issue or eligible recipient to better understand the available funding within the Bipartisan Infrastructure Law. We will continue to update this spreadsheet online. Our goal is for you—communities all across America—to take full advantage of the opportunity this new funding presents.

The President has been clear in his charge to me as we build a better America: make sure these programs get implemented without unnecessary bureaucracy and delay to rebuild America's infrastructure – while at the same time being good stewards of taxpayer dollars and working to achieve goals around creating good middle-class union jobs, supporting disadvantaged and underserved communities, advancing climate resilience and sustainability, and bringing back American manufacturing. It is our hope this resource is another step forward in our work together to build a better America.

Warm regards,

Mitch Landrieu
Senior Advisor and Infrastructure Implementation Coordinator
White House



Executive Summary

On November 15th, 2021, President Biden signed the [Bipartisan Infrastructure Law](#) – a once-in-a-generation investment in our nation’s infrastructure, competitiveness, and communities. This bill is a historic opportunity to rebuild America’s roads, bridges and rails; expand access to clean drinking water; ensure that every American has access to high-speed internet; to tackle the climate crisis and advance environmental justice, while investing in communities – both urban and rural – that have too often been left behind. This bipartisan effort will help ease inflationary pressures; strengthen supply chains by making long overdue improvements for our nation’s ports, airports, rail, and roads; drive the creation of good-paying union jobs with high labor standards that can be accessed by all workers, especially those from underserved communities; and grow the economy sustainably and equitably for decades to come.

Overview and Purpose of this Guidebook

To achieve the ambitious goals outlined by the President and this legislation, the Biden Harris Administration needs help. Building a better America is a shared endeavor no one can do alone, and investing Federal infrastructure dollars will require significant coordination between the Federal government, States, Tribal governments, community stakeholders, local governments, and other key partners.

This guidebook is a roadmap to the funding available under the law. It explains, in as much detail as currently available, how much funding is available at the program level. Our primary goal is to help our partners across the country know what to apply for, who to contact for help, and how to get ready to rebuild. We have also published an accompanying data file on [Build.gov](#) that allows users to quickly sort programs funded under the law by fields like agency, amount, eligible recipient, or program name.

The guidebook contains 13 chapters grouping Bipartisan Infrastructure Law programs by issue area. Each chapter contains a cover note explaining how to get ready to apply for and receive this subset of funding. These memos identify additional resources our partners can and should utilize to prepare while the Federal government gets ready to distribute Bipartisan Infrastructure Law funds from new and existing programs.

Each program description contains the Bipartisan Infrastructure Law statutory citation of that program. You can use this to find the specific language in Public Law 117-58, the authorizing document for the Bipartisan Infrastructure Law, that authorizes and/or appropriates funds for the program. If the BIL authorized and appropriated funds for the program, the “statutory location” listed corresponds to the section number that authorized the program. If the BIL only appropriated funds for the program (because the program was previously authorized), then the statutory location



listed corresponds to the section of Division J that describes the appropriation of funds for that program.

This is the second version of this product. In the coming weeks and months, we plan to publish updates to this content on [Build.gov](https://www.build.gov) to keep our partners up to date on the latest deadlines and details. The White House has also encouraged external stakeholders to use this information to develop local or regional-specific guides on available sources of funding, so every community in America can identify, understand, and access investment opportunities that they need and deserve under the law. This publication is not an attempt to capture every possible Federal infrastructure program, authorization, or expenditure—rather, it provides our partners with a deeper view into funding available under the law. If you have questions, please see the appendix for agency-level contact information and links to more information online.

Additional Resources & Actions

Earlier this year, the White House Infrastructure Implementation Coordinator sent a [letter to Governors](#) recommending a series of preparatory actions, including appointing infrastructure coordinators to manage the flow of funds to their States. He also [outlined steps cities](#) can take to prepare and has begun deeper intergovernmental engagements with Tribal leaders, county officials, civil rights and territorial leaders through outreach calls, listening sessions, and Tribal consultations.

The American Rescue Plan, signed into law in 2020, has already provided over \$350 billion in critical resources to every State, Tribal, county, city, and unit of local government to support their response to the COVID-19 public health emergency, including in making the investments needed to ensure a durable and equitable economic recovery. Recipients of Bipartisan Infrastructure Law funding should look to leverage those resources to help prepare for the transformative investments included under the law. For example, American Rescue Plan funding could be used to train the workers needed to build high quality infrastructure; hire back the public sector workers needed to help manage potential Federal investments; and get a jump start on water, sewer, and broadband projects that could complement investments from the infrastructure law. We encourage everyone to review the U.S. Department of Treasury's website [here](#), which explains how to request funding, eligible uses, and other important information about American Rescue Plan funding.

We recognize local capacity may be strained due to the pandemic, the need to account for heightened cybersecurity, climate and other known hazard risks, the effects of historic underinvestment, or just the challenges of day-to-day governance. A community's lack of capacity to apply for Federal funds can create significant inequities – and for many communities, this will be their first time applying for funds from a suite of Federal agencies. Many funding streams in the Bipartisan Infrastructure Law specifically set aside funds for disadvantaged communities.



Further, in keeping with efforts like the President's Justice40 Initiative, the Administration is committed to ensuring disadvantaged communities receive benefits from all available resources in relevant Bipartisan Infrastructure Law programs. The White House Infrastructure Implementation Team and the components across the Executive Office of the President and the Federal agencies will be engaging States, Tribal governments, territories, Federal agencies, philanthropies, civil rights leaders, advocates and others to leverage all available resources to quickly deliver the necessary technical assistance and capacity to underserved communities. We intend to use this guidebook as a critical tool to accelerate and amplify the impact of this work.

Disclaimer

This guidebook is designed to help users familiarize themselves with the Bipartisan Infrastructure Law. Nothing contained in this document constitutes guidance from the U.S. government on any law, program, policy, application process, or funding eligibility. Applicants for funding should consult official agency or program specific guidance for additional information

DEPARTMENT OF THE TREASURY

31 CFR Part 35

RIN 1505-AC77

Coronavirus State and Local Fiscal Recovery Funds

AGENCY: Department of the Treasury.

ACTION: Final rule.

SUMMARY: The Secretary of the Treasury (Treasury) is adopting as final the interim final rule published on May 17, 2021, with amendments. This rule implements the Coronavirus State Fiscal Recovery Fund and the Coronavirus Local Fiscal Recovery Fund established under the American Rescue Plan Act.

DATES: The provisions in this final rule are effective April 1, 2022.

FOR FURTHER INFORMATION CONTACT: Katharine Richards, Director, Coronavirus State and Local Fiscal Recovery Funds, Office of Recovery Programs, Department of the Treasury, (844) 529-9527.

SUPPLEMENTARY INFORMATION:

I. Introduction

Overview

Since the first case of coronavirus disease 2019 (COVID-19) was discovered in the United States in January 2020, the pandemic has caused severe, intertwined public health and economic crises. In March 2021, as these crises continued, the American Rescue Plan Act of 2021 (ARPA)¹ established the Coronavirus State and Local Fiscal Recovery Funds (SLFRF) to provide state, local, and Tribal governments² with the resources needed to respond to the pandemic and its economic effects and to build a stronger, more equitable economy during the recovery. The U.S. Department of the Treasury (Treasury) issued an interim final rule implementing the SLFRF program on May 10, 2021³ and has since disbursed over \$240 billion to state, local, and Tribal governments and received over 1,500 public comments on the interim final rule. Treasury is now issuing this final rule which responds to public comments, implements the ARPA statutory provisions on eligible and ineligible uses of SLFRF funds, and

makes several changes to the provisions of the interim final rule, summarized below in the section Executive Summary of Major Changes.

Since Treasury issued the interim final rule in May 2021, both the public health and economic situations facing the country have evolved. On the public health front, the United States has made tremendous progress in the fight against COVID-19, including a historic vaccination campaign that has reached over 80 percent of adults with at least one dose and is reaching millions of children as well.⁴ However, the disease continues to present an imminent threat to public health, especially among unvaccinated individuals. As the Delta variant spread across the country this summer and fall, the United States faced another severe wave of cases, deaths, and strain on the healthcare system, with the risk of hospitalization and mortality exponentially greater to unvaccinated Americans. COVID-19 has now infected over 50 million and killed over 800,000 Americans since January 2020; tens of thousands of Americans continue to be infected each day.⁵ Even as the nation recovers, new and emerging COVID-19 variants may continue to pose threats to both public health and the economy. Moving forward, state, local, and Tribal governments will continue to play a major role in responding through vaccination campaigns, testing, and other services.

The economic recovery similarly has made tremendous progress but faces continued risks from the disease and the disruptions it has caused. In the early months of the pandemic, the United States experienced the sharpest economic downturn on record, with unemployment spiking to 14.8 percent in April 2020.⁶ The economy has gradually added back jobs, with growth accelerating in the first half of 2021.⁷ However, as the Delta variant spread, the intensified health risks and renewed disruptions slowed growth, demonstrating the continued risks from the virus. By fall 2021, the economy had

exceeded its pre-pandemic size⁸ and unemployment had fallen below 5 percent,⁹ but despite this progress, too many Americans remain unemployed, out of the labor force, or unable to pay their bills, with this pain particularly acute among lower-income Americans and communities of color. Again, moving forward, state, local, and Tribal governments will remain on the frontlines of the economic response and rebuilding a stronger economy in the aftermath of the pandemic.

However, as state, local, and Tribal governments continue to face substantial needs to respond to public health and economic conditions, they have also experienced severe impacts from the pandemic and resulting recession. State, local, and Tribal governments cut over 1.5 million jobs in the early months of the pandemic amid sharp declines in revenue and remain over 950,000 jobs below their pre-pandemic levels.¹⁰ As the Great Recession demonstrated, austerity among state, local, and Tribal governments can hamper overall economic growth and severely curtail the ability of governments to serve their constituents.

Recognizing these imperatives, the SLFRF program provides vital resources for state, local, and Tribal governments to respond to the pandemic and its economic effects and to replace revenue lost due to the public health emergency, preventing cuts to government services. Specifically, the ARPA provides that SLFRF funds¹¹ may be used:

(a) To respond to the public health emergency or its negative economic impacts, including assistance to households, small businesses, and nonprofits, or aid to impacted industries such as tourism, travel, and hospitality;

(b) To respond to workers performing essential work during the COVID-19

⁸ U.S. Bureau of Economic Analysis, Real Gross Domestic Product [GDPC1], retrieved from FRED, Federal Reserve Bank of St. Louis, <https://fred.stlouisfed.org/series/GDPC1> (last visited December 7, 2021).

⁹ U.S. Bureau of Labor Statistics, *supra* note 6.

¹⁰ U.S. Bureau of Labor Statistics, All Employees, State Government [CES9092000001] and All Employees, Local Government [CES9093000001], retrieved from FRED, Federal Reserve Bank of St. Louis, <https://fred.stlouisfed.org/series/CES9092000001> and <https://fred.stlouisfed.org/series/CES9093000001> (last visited December 7, 2021).

¹¹ The ARPA adds section 602 of the Social Security Act, which creates the State Fiscal Recovery Fund, and section 603 of the Social Security Act, which creates the Local Fiscal Recovery Fund (together, SLFRF). Sections 602 and 603 contain substantially similar eligible uses; the primary difference between the two sections is that section 602 establishes a fund for states, territories, and Tribal governments and section 603 establishes a fund for metropolitan cities, nonentitlement units of local government, and counties.

¹ Public Law 117-2. <https://www.congress.gov/117/plaws/publ2/PLAW-117-publ2.pdf>.

² Throughout this Supplementary Information, Treasury uses “state, local, and Tribal governments” or “recipients” to refer generally to governments receiving SLFRF funds; this includes states, territories, Tribal governments, counties, metropolitan cities, and nonentitlement units of local government.

³ 86 FR 26786 (May 17, 2021).

⁴ Centers for Disease Control and Prevention, COVID Data Tracker: COVID-19 Vaccinations in the United States, <https://covid.cdc.gov/covid-data-tracker/#vaccinations> (last visited December 31, 2021).

⁵ Centers for Disease Control and Prevention, COVID Data Tracker, <http://www.covid.cdc.gov/covid-data-tracker/#data-tracker-home> (last visited December 7, 2021).

⁶ U.S. Bureau of Labor Statistics, Unemployment Rate [UNRATE], retrieved from FRED, Federal Reserve Bank of St. Louis; <https://fred.stlouisfed.org/series/UNRATE> (last visited December 7, 2021).

⁷ *Id.*

Assistance for State, Local, and Tribal Governments

State and Local Fiscal Recovery Funds

[Request Funding](#)

[Tribal Governments](#)

[Non-Entitlement Units](#)

[Recipient Compliance and
Reporting Responsibilities](#)

[SLFRF Self-Service Resources](#)

- [Final Rule](#) 
- [Overview of the Final Rule](#) 
- [Final Rule FAQs](#) 
- [Final Rule Press Release](#)
- [Interim Final Rule](#) 
- [Interim Final Rule FAQs](#) 
- [Interim Final Rule Quick Reference Guide](#) 
- [Tribal Government Information](#)
- [Non-Entitlement Unit Information](#)
- [Compliance and Reporting Guidance](#)

This content is from the eCFR and is authoritative but unofficial.

Title 2 - Grants and Agreements

Subtitle A - Office of Management and Budget Guidance for Grants and Agreements

Chapter II - Office of Management and Budget Guidance

Part 200 - Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards

Subpart D - Post Federal Award Requirements

Source: 85 FR 49543, Aug. 13, 2020, unless otherwise noted.

Authority: 31 U.S.C. 503

Source: 78 FR 78608, Dec. 26, 2013, unless otherwise noted.

Procurement Standards

- § 200.317** Procurements by states.
- § 200.318** General procurement standards.
- § 200.319** Competition.
- § 200.320** Methods of procurement to be followed.
- § 200.321** Contracting with small and minority businesses, women's business enterprises, and labor surplus area firms.
- § 200.322** Domestic preferences for procurements.
- § 200.323** Procurement of recovered materials.
- § 200.324** Contract cost and price.
- § 200.325** Federal awarding agency or pass-through entity review.
- § 200.326** Bonding requirements.
- § 200.327** Contract provisions.

PROCUREMENT STANDARDS

§ 200.317 Procurements by states.

When procuring property and services under a Federal award, a State must follow the same policies and procedures it uses for procurements from its non-Federal funds. The State will comply with §§ 200.321, 200.322, and 200.323 and ensure that every purchase order or other contract includes any clauses required by § 200.327. All other non-Federal entities, including subrecipients of a State, must follow the procurement standards in §§ 200.318 through 200.327.

§ 200.318 General procurement standards.

- (a) The non-Federal entity must have and use documented procurement procedures, consistent with State, local, and tribal laws and regulations and the standards of this section, for the acquisition of property or services required under a Federal award or subaward. The non-Federal entity's documented procurement procedures must conform to the procurement standards identified in §§ 200.317 through 200.327.

- (b) Non-Federal entities must maintain oversight to ensure that contractors perform in accordance with the terms, conditions, and specifications of their contracts or purchase orders.
- (c)
 - (1) The non-Federal entity must maintain written standards of conduct covering conflicts of interest and governing the actions of its employees engaged in the selection, award and administration of contracts. No employee, officer, or agent may participate in the selection, award, or administration of a contract supported by a Federal award if he or she has a real or apparent conflict of interest. Such a conflict of interest would arise when the employee, officer, or agent, any member of his or her immediate family, his or her partner, or an organization which employs or is about to employ any of the parties indicated herein, has a financial or other interest in or a tangible personal benefit from a firm considered for a contract. The officers, employees, and agents of the non-Federal entity may neither solicit nor accept gratuities, favors, or anything of monetary value from contractors or parties to subcontracts. However, non-Federal entities may set standards for situations in which the financial interest is not substantial or the gift is an unsolicited item of nominal value. The standards of conduct must provide for disciplinary actions to be applied for violations of such standards by officers, employees, or agents of the non-Federal entity.
 - (2) If the non-Federal entity has a parent, affiliate, or subsidiary organization that is not a State, local government, or Indian tribe, the non-Federal entity must also maintain written standards of conduct covering organizational conflicts of interest. Organizational conflicts of interest means that because of relationships with a parent company, affiliate, or subsidiary organization, the non-Federal entity is unable or appears to be unable to be impartial in conducting a procurement action involving a related organization.
- (d) The non-Federal entity's procedures must avoid acquisition of unnecessary or duplicative items. Consideration should be given to consolidating or breaking out procurements to obtain a more economical purchase. Where appropriate, an analysis will be made of lease versus purchase alternatives, and any other appropriate analysis to determine the most economical approach.
- (e) To foster greater economy and efficiency, and in accordance with efforts to promote cost-effective use of shared services across the Federal Government, the non-Federal entity is encouraged to enter into state and local intergovernmental agreements or inter-entity agreements where appropriate for procurement or use of common or shared goods and services. Competition requirements will be met with documented procurement actions using strategic sourcing, shared services, and other similar procurement arrangements.
- (f) The non-Federal entity is encouraged to use Federal excess and surplus property in lieu of purchasing new equipment and property whenever such use is feasible and reduces project costs.
- (g) The non-Federal entity is encouraged to use value engineering clauses in contracts for construction projects of sufficient size to offer reasonable opportunities for cost reductions. Value engineering is a systematic and creative analysis of each contract item or task to ensure that its essential function is provided at the overall lower cost.
- (h) The non-Federal entity must award contracts only to responsible contractors possessing the ability to perform successfully under the terms and conditions of a proposed procurement. Consideration will be given to such matters as contractor integrity, compliance with public policy, record of past performance, and financial and technical resources. See also § 200.214.

- (i) The non-Federal entity must maintain records sufficient to detail the history of procurement. These records will include, but are not necessarily limited to, the following: Rationale for the method of procurement, selection of contract type, contractor selection or rejection, and the basis for the contract price.
- (j)
 - (1) The non-Federal entity may use a time-and-materials type contract only after a determination that no other contract is suitable and if the contract includes a ceiling price that the contractor exceeds at its own risk. Time-and-materials type contract means a contract whose cost to a non-Federal entity is the sum of:
 - (i) The actual cost of materials; and
 - (ii) Direct labor hours charged at fixed hourly rates that reflect wages, general and administrative expenses, and profit.
 - (2) Since this formula generates an open-ended contract price, a time-and-materials contract provides no positive profit incentive to the contractor for cost control or labor efficiency. Therefore, each contract must set a ceiling price that the contractor exceeds at its own risk. Further, the non-Federal entity awarding such a contract must assert a high degree of oversight in order to obtain reasonable assurance that the contractor is using efficient methods and effective cost controls.
- (k) The non-Federal entity alone must be responsible, in accordance with good administrative practice and sound business judgment, for the settlement of all contractual and administrative issues arising out of procurements. These issues include, but are not limited to, source evaluation, protests, disputes, and claims. These standards do not relieve the non-Federal entity of any contractual responsibilities under its contracts. The Federal awarding agency will not substitute its judgment for that of the non-Federal entity unless the matter is primarily a Federal concern. Violations of law will be referred to the local, state, or Federal authority having proper jurisdiction.

[85 FR 49543, Aug. 13, 2020, as amended at 86 FR 10440, Feb. 22, 2021]

§ 200.319 Competition.

- (a) All procurement transactions for the acquisition of property or services required under a Federal award must be conducted in a manner providing full and open competition consistent with the standards of this section and § 200.320.
- (b) In order to ensure objective contractor performance and eliminate unfair competitive advantage, contractors that develop or draft specifications, requirements, statements of work, or invitations for bids or requests for proposals must be excluded from competing for such procurements. Some of the situations considered to be restrictive of competition include but are not limited to:
 - (1) Placing unreasonable requirements on firms in order for them to qualify to do business;
 - (2) Requiring unnecessary experience and excessive bonding;
 - (3) Noncompetitive pricing practices between firms or between affiliated companies;
 - (4) Noncompetitive contracts to consultants that are on retainer contracts;
 - (5) Organizational conflicts of interest;

- (6) Specifying only a “brand name” product instead of allowing “an equal” product to be offered and describing the performance or other relevant requirements of the procurement; and
- (7) Any arbitrary action in the procurement process.
- (c) The non-Federal entity must conduct procurements in a manner that prohibits the use of statutorily or administratively imposed state, local, or tribal geographical preferences in the evaluation of bids or proposals, except in those cases where applicable Federal statutes expressly mandate or encourage geographic preference. Nothing in this section preempts state licensing laws. When contracting for architectural and engineering (A/E) services, geographic location may be a selection criterion provided its application leaves an appropriate number of qualified firms, given the nature and size of the project, to compete for the contract.
- (d) The non-Federal entity must have written procedures for procurement transactions. These procedures must ensure that all solicitations:
 - (1) Incorporate a clear and accurate description of the technical requirements for the material, product, or service to be procured. Such description must not, in competitive procurements, contain features which unduly restrict competition. The description may include a statement of the qualitative nature of the material, product or service to be procured and, when necessary, must set forth those minimum essential characteristics and standards to which it must conform if it is to satisfy its intended use. Detailed product specifications should be avoided if at all possible. When it is impractical or uneconomical to make a clear and accurate description of the technical requirements, a “brand name or equivalent” description may be used as a means to define the performance or other salient requirements of procurement. The specific features of the named brand which must be met by offers must be clearly stated; and
 - (2) Identify all requirements which the offerors must fulfill and all other factors to be used in evaluating bids or proposals.
- (e) The non-Federal entity must ensure that all prequalified lists of persons, firms, or products which are used in acquiring goods and services are current and include enough qualified sources to ensure maximum open and free competition. Also, the non-Federal entity must not preclude potential bidders from qualifying during the solicitation period.
- (f) Noncompetitive procurements can only be awarded in accordance with § 200.320(c).

§ 200.320 Methods of procurement to be followed.

The non-Federal entity must have and use documented procurement procedures, consistent with the standards of this section and §§ 200.317, 200.318, and 200.319 for any of the following methods of procurement used for the acquisition of property or services required under a Federal award or sub-award.

- (a) **Informal procurement methods.** When the value of the procurement for property or services under a Federal award does not exceed the *simplified acquisition threshold (SAT)*, as defined in § 200.1, or a lower threshold established by a non-Federal entity, formal procurement methods are not required. The non-Federal entity may use informal procurement methods to expedite the completion of its transactions and minimize the associated administrative burden and cost. The informal methods used for procurement of property or services at or below the SAT include:
 - (1) **Micro-purchases** -

- (i) **Distribution.** The acquisition of supplies or services, the aggregate dollar amount of which does not exceed the micro-purchase threshold (See the definition of *micro-purchase* in § 200.1). To the maximum extent practicable, the non-Federal entity should distribute micro-purchases equitably among qualified suppliers.
- (ii) **Micro-purchase awards.** Micro-purchases may be awarded without soliciting competitive price or rate quotations if the non-Federal entity considers the price to be reasonable based on research, experience, purchase history or other information and documents it files accordingly. Purchase cards can be used for micro-purchases if procedures are documented and approved by the non-Federal entity.
- (iii) **Micro-purchase thresholds.** The non-Federal entity is responsible for determining and documenting an appropriate micro-purchase threshold based on internal controls, an evaluation of risk, and its documented procurement procedures. The micro-purchase threshold used by the non-Federal entity must be authorized or not prohibited under State, local, or tribal laws or regulations. Non-Federal entities may establish a threshold higher than the Federal threshold established in the Federal Acquisition Regulations (FAR) in accordance with paragraphs (a)(1)(iv) and (v) of this section.
- (iv) **Non-Federal entity increase to the micro-purchase threshold up to \$50,000.** Non-Federal entities may establish a threshold higher than the micro-purchase threshold identified in the FAR in accordance with the requirements of this section. The non-Federal entity may self-certify a threshold up to \$50,000 on an annual basis and must maintain documentation to be made available to the Federal awarding agency and auditors in accordance with § 200.334. The self-certification must include a justification, clear identification of the threshold, and supporting documentation of any of the following:
 - (A) A qualification as a low-risk auditee, in accordance with the criteria in § 200.520 for the most recent audit;
 - (B) An annual internal institutional risk assessment to identify, mitigate, and manage financial risks; or,
 - (C) For public institutions, a higher threshold consistent with State law.
- (v) **Non-Federal entity increase to the micro-purchase threshold over \$50,000.** Micro-purchase thresholds higher than \$50,000 must be approved by the cognizant agency for indirect costs. The non-federal entity must submit a request with the requirements included in paragraph (a)(1)(iv) of this section. The increased threshold is valid until there is a change in status in which the justification was approved.

(2) **Small purchases -**

- (i) **Small purchase procedures.** The acquisition of property or services, the aggregate dollar amount of which is higher than the micro-purchase threshold but does not exceed the simplified acquisition threshold. If small purchase procedures are used, price or rate quotations must be obtained from an adequate number of qualified sources as determined appropriate by the non-Federal entity.

(ii) ***Simplified acquisition thresholds.*** The non-Federal entity is responsible for determining an appropriate simplified acquisition threshold based on internal controls, an evaluation of risk and its documented procurement procedures which must not exceed the threshold established in the FAR. When applicable, a lower simplified acquisition threshold used by the non-Federal entity must be authorized or not prohibited under State, local, or tribal laws or regulations.

(b) ***Formal procurement methods.*** When the value of the procurement for property or services under a Federal financial assistance award exceeds the SAT, or a lower threshold established by a non-Federal entity, formal procurement methods are required. Formal procurement methods require following documented procedures. Formal procurement methods also require public advertising unless a non-competitive procurement can be used in accordance with § 200.319 or paragraph (c) of this section. The following formal methods of procurement are used for procurement of property or services above the simplified acquisition threshold or a value below the simplified acquisition threshold the non-Federal entity determines to be appropriate:

(1) ***Sealed bids.*** A procurement method in which bids are publicly solicited and a firm fixed-price contract (lump sum or unit price) is awarded to the responsible bidder whose bid, conforming with all the material terms and conditions of the invitation for bids, is the lowest in price. The sealed bids method is the preferred method for procuring construction, if the conditions.

(i) In order for sealed bidding to be feasible, the following conditions should be present:

- (A) A complete, adequate, and realistic specification or purchase description is available;
- (B) Two or more responsible bidders are willing and able to compete effectively for the business; and
- (C) The procurement lends itself to a firm fixed price contract and the selection of the successful bidder can be made principally on the basis of price.

(ii) If sealed bids are used, the following requirements apply:

- (A) Bids must be solicited from an adequate number of qualified sources, providing them sufficient response time prior to the date set for opening the bids, for local, and tribal governments, the invitation for bids must be publicly advertised;
- (B) The invitation for bids, which will include any specifications and pertinent attachments, must define the items or services in order for the bidder to properly respond;
- (C) All bids will be opened at the time and place prescribed in the invitation for bids, and for local and tribal governments, the bids must be opened publicly;
- (D) A firm fixed price contract award will be made in writing to the lowest responsive and responsible bidder. Where specified in bidding documents, factors such as discounts, transportation cost, and life cycle costs must be considered in determining which bid is lowest. Payment discounts will only be used to determine the low bid when prior experience indicates that such discounts are usually taken advantage of; and
- (E) Any or all bids may be rejected if there is a sound documented reason.

(2) ***Proposals.*** A procurement method in which either a fixed price or cost-reimbursement type contract is awarded. Proposals are generally used when conditions are not appropriate for the use of sealed bids. They are awarded in accordance with the following requirements:

- (i) Requests for proposals must be publicized and identify all evaluation factors and their relative importance. Proposals must be solicited from an adequate number of qualified offerors. Any response to publicized requests for proposals must be considered to the maximum extent practical;
 - (ii) The non-Federal entity must have a written method for conducting technical evaluations of the proposals received and making selections;
 - (iii) Contracts must be awarded to the responsible offeror whose proposal is most advantageous to the non-Federal entity, with price and other factors considered; and
 - (iv) The non-Federal entity may use competitive proposal procedures for qualifications-based procurement of architectural/engineering (A/E) professional services whereby offeror's qualifications are evaluated and the most qualified offeror is selected, subject to negotiation of fair and reasonable compensation. The method, where price is not used as a selection factor, can only be used in procurement of A/E professional services. It cannot be used to purchase other types of services though A/E firms that are a potential source to perform the proposed effort.
- (c) **Noncompetitive procurement.** There are specific circumstances in which noncompetitive procurement can be used. Noncompetitive procurement can only be awarded if one or more of the following circumstances apply:
- (1) The acquisition of property or services, the aggregate dollar amount of which does not exceed the micro-purchase threshold (see paragraph (a)(1) of this section);
 - (2) The item is available only from a single source;
 - (3) The public exigency or emergency for the requirement will not permit a delay resulting from publicizing a competitive solicitation;
 - (4) The Federal awarding agency or pass-through entity expressly authorizes a noncompetitive procurement in response to a written request from the non-Federal entity; or
 - (5) After solicitation of a number of sources, competition is determined inadequate.

§ 200.321 Contracting with small and minority businesses, women's business enterprises, and labor surplus area firms.

- (a) The non-Federal entity must take all necessary affirmative steps to assure that minority businesses, women's business enterprises, and labor surplus area firms are used when possible.
- (b) Affirmative steps must include:
 - (1) Placing qualified small and minority businesses and women's business enterprises on solicitation lists;
 - (2) Assuring that small and minority businesses, and women's business enterprises are solicited whenever they are potential sources;
 - (3) Dividing total requirements, when economically feasible, into smaller tasks or quantities to permit maximum participation by small and minority businesses, and women's business enterprises;
 - (4) Establishing delivery schedules, where the requirement permits, which encourage participation by small and minority businesses, and women's business enterprises;

- (5) Using the services and assistance, as appropriate, of such organizations as the Small Business Administration and the Minority Business Development Agency of the Department of Commerce; and
- (6) Requiring the prime contractor, if subcontracts are to be let, to take the affirmative steps listed in paragraphs (b)(1) through (5) of this section.

§ 200.322 Domestic preferences for procurements.

- (a) As appropriate and to the extent consistent with law, the non-Federal entity should, to the greatest extent practicable under a Federal award, provide a preference for the purchase, acquisition, or use of goods, products, or materials produced in the United States (including but not limited to iron, aluminum, steel, cement, and other manufactured products). The requirements of this section must be included in all subawards including all contracts and purchase orders for work or products under this award.
- (b) For purposes of this section:
 - (1) “Produced in the United States” means, for iron and steel products, that all manufacturing processes, from the initial melting stage through the application of coatings, occurred in the United States.
 - (2) “Manufactured products” means items and construction materials composed in whole or in part of non-ferrous metals such as aluminum; plastics and polymer-based products such as polyvinyl chloride pipe; aggregates such as concrete; glass, including optical fiber; and lumber.

§ 200.323 Procurement of recovered materials.

A non-Federal entity that is a state agency or agency of a political subdivision of a state and its contractors must comply with section 6002 of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act. The requirements of Section 6002 include procuring only items designated in guidelines of the Environmental Protection Agency (EPA) at 40 CFR part 247 that contain the highest percentage of recovered materials practicable, consistent with maintaining a satisfactory level of competition, where the purchase price of the item exceeds \$10,000 or the value of the quantity acquired during the preceding fiscal year exceeded \$10,000; procuring solid waste management services in a manner that maximizes energy and resource recovery; and establishing an affirmative procurement program for procurement of recovered materials identified in the EPA guidelines.

§ 200.324 Contract cost and price.

- (a) The non-Federal entity must perform a cost or price analysis in connection with every procurement action in excess of the Simplified Acquisition Threshold including contract modifications. The method and degree of analysis is dependent on the facts surrounding the particular procurement situation, but as a starting point, the non-Federal entity must make independent estimates before receiving bids or proposals.
- (b) The non-Federal entity must negotiate profit as a separate element of the price for each contract in which there is no price competition and in all cases where cost analysis is performed. To establish a fair and reasonable profit, consideration must be given to the complexity of the work to be performed, the risk borne by the contractor, the contractor's investment, the amount of subcontracting, the quality of its record of past performance, and industry profit rates in the surrounding geographical area for similar work.

- (c) Costs or prices based on estimated costs for contracts under the Federal award are allowable only to the extent that costs incurred or cost estimates included in negotiated prices would be allowable for the non-Federal entity under subpart E of this part. The non-Federal entity may reference its own cost principles that comply with the Federal cost principles.
- (d) The cost plus a percentage of cost and percentage of construction cost methods of contracting must not be used.

§ 200.325 Federal awarding agency or pass-through entity review.

- (a) The non-Federal entity must make available, upon request of the Federal awarding agency or pass-through entity, technical specifications on proposed procurements where the Federal awarding agency or pass-through entity believes such review is needed to ensure that the item or service specified is the one being proposed for acquisition. This review generally will take place prior to the time the specification is incorporated into a solicitation document. However, if the non-Federal entity desires to have the review accomplished after a solicitation has been developed, the Federal awarding agency or pass-through entity may still review the specifications, with such review usually limited to the technical aspects of the proposed purchase.
- (b) The non-Federal entity must make available upon request, for the Federal awarding agency or pass-through entity pre-procurement review, procurement documents, such as requests for proposals or invitations for bids, or independent cost estimates, when:
 - (1) The non-Federal entity's procurement procedures or operation fails to comply with the procurement standards in this part;
 - (2) The procurement is expected to exceed the Simplified Acquisition Threshold and is to be awarded without competition or only one bid or offer is received in response to a solicitation;
 - (3) The procurement, which is expected to exceed the Simplified Acquisition Threshold, specifies a "brand name" product;
 - (4) The proposed contract is more than the Simplified Acquisition Threshold and is to be awarded to other than the apparent low bidder under a sealed bid procurement; or
 - (5) A proposed contract modification changes the scope of a contract or increases the contract amount by more than the Simplified Acquisition Threshold.
- (c) The non-Federal entity is exempt from the pre-procurement review in paragraph (b) of this section if the Federal awarding agency or pass-through entity determines that its procurement systems comply with the standards of this part.
 - (1) The non-Federal entity may request that its procurement system be reviewed by the Federal awarding agency or pass-through entity to determine whether its system meets these standards in order for its system to be certified. Generally, these reviews must occur where there is continuous high-dollar funding, and third-party contracts are awarded on a regular basis;
 - (2) The non-Federal entity may self-certify its procurement system. Such self-certification must not limit the Federal awarding agency's right to survey the system. Under a self-certification procedure, the Federal awarding agency may rely on written assurances from the non-Federal entity that it is complying with these standards. The non-Federal entity must cite specific policies, procedures, regulations, or standards as being in compliance with these requirements and have its system available for review.

§ 200.326 Bonding requirements.

For construction or facility improvement contracts or subcontracts exceeding the Simplified Acquisition Threshold, the Federal awarding agency or pass-through entity may accept the bonding policy and requirements of the non-Federal entity provided that the Federal awarding agency or pass-through entity has made a determination that the Federal interest is adequately protected. If such a determination has not been made, the minimum requirements must be as follows:

- (a) A bid guarantee from each bidder equivalent to five percent of the bid price. The “bid guarantee” must consist of a firm commitment such as a bid bond, certified check, or other negotiable instrument accompanying a bid as assurance that the bidder will, upon acceptance of the bid, execute such contractual documents as may be required within the time specified.
- (b) A performance bond on the part of the contractor for 100 percent of the contract price. A “performance bond” is one executed in connection with a contract to secure fulfillment of all the contractor's requirements under such contract.
- (c) A payment bond on the part of the contractor for 100 percent of the contract price. A “payment bond” is one executed in connection with a contract to assure payment as required by law of all persons supplying labor and material in the execution of the work provided for in the contract.

§ 200.327 Contract provisions.

The non-Federal entity's contracts must contain the applicable provisions described in appendix II to this part.

This content is from the eCFR and is authoritative but unofficial.

Title 2 - Grants and Agreements

Subtitle A - Office of Management and Budget Guidance for Grants and Agreements

Chapter II - Office of Management and Budget Guidance

Part 200 - Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards

Source: 85 FR 49543, Aug. 13, 2020, unless otherwise noted.

Source: 85 FR 49539, Aug. 13, 2020, unless otherwise noted.

Authority: 31 U.S.C. 503

Source: 78 FR 78608, Dec. 26, 2013, unless otherwise noted.

Appendix II to Part 200 - Contract Provisions for Non-Federal Entity Contracts Under Federal Awards

In addition to other provisions required by the Federal agency or non-Federal entity, all contracts made by the non-Federal entity under the Federal award must contain provisions covering the following, as applicable.

- (A) Contracts for more than the simplified acquisition threshold, which is the inflation adjusted amount determined by the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) as authorized by 41 U.S.C. 1908, must address administrative, contractual, or legal remedies in instances where contractors violate or breach contract terms, and provide for such sanctions and penalties as appropriate.
- (B) All contracts in excess of \$10,000 must address termination for cause and for convenience by the non-Federal entity including the manner by which it will be effected and the basis for settlement.
- (C) Equal Employment Opportunity. Except as otherwise provided under 41 CFR Part 60, all contracts that meet the definition of "federally assisted construction contract" in 41 CFR Part 60-1.3 must include the equal opportunity clause provided under 41 CFR 60-1.4(b), in accordance with Executive Order 11246, "Equal Employment Opportunity" (30 FR 12319, 12935, 3 CFR Part, 1964-1965 Comp., p. 339), as amended by Executive Order 11375, "Amending Executive Order 11246 Relating to Equal Employment Opportunity," and implementing regulations at 41 CFR part 60, "Office of Federal Contract Compliance Programs, Equal Employment Opportunity, Department of Labor."
- (D) Davis-Bacon Act, as amended (40 U.S.C. 3141-3148). When required by Federal program legislation, all prime construction contracts in excess of \$2,000 awarded by non-Federal entities must include a provision for compliance with the Davis-Bacon Act (40 U.S.C. 3141-3144, and 3146-3148) as supplemented by Department of Labor regulations (29 CFR Part 5, "Labor Standards Provisions Applicable to Contracts Covering Federally Financed and Assisted Construction"). In accordance with the statute, contractors must be required to pay wages to laborers and mechanics at a rate not less than the prevailing wages specified in a wage determination made by the Secretary of Labor. In addition, contractors must be required to pay wages not less than once a week. The non-Federal entity must place a copy of the current prevailing wage determination issued by the Department of Labor in each solicitation. The decision to award a contract or subcontract must be conditioned upon the acceptance of the wage determination. The non-Federal entity must report all suspected or reported violations to the Federal awarding agency. The contracts must also include a provision for compliance with the Copeland "Anti-Kickback" Act (40 U.S.C. 3145), as supplemented by Department of Labor regulations (29 CFR Part

3, "Contractors and Subcontractors on Public Building or Public Work Financed in Whole or in Part by Loans or Grants from the United States"). The Act provides that each contractor or subrecipient must be prohibited from inducing, by any means, any person employed in the construction, completion, or repair of public work, to give up any part of the compensation to which he or she is otherwise entitled. The non-Federal entity must report all suspected or reported violations to the Federal awarding agency.

- (E) Contract Work Hours and Safety Standards Act (40 U.S.C. 3701-3708). Where applicable, all contracts awarded by the non-Federal entity in excess of \$100,000 that involve the employment of mechanics or laborers must include a provision for compliance with 40 U.S.C. 3702 and 3704, as supplemented by Department of Labor regulations (29 CFR Part 5). Under 40 U.S.C. 3702 of the Act, each contractor must be required to compute the wages of every mechanic and laborer on the basis of a standard work week of 40 hours. Work in excess of the standard work week is permissible provided that the worker is compensated at a rate of not less than one and a half times the basic rate of pay for all hours worked in excess of 40 hours in the work week. The requirements of 40 U.S.C. 3704 are applicable to construction work and provide that no laborer or mechanic must be required to work in surroundings or under working conditions which are unsanitary, hazardous or dangerous. These requirements do not apply to the purchases of supplies or materials or articles ordinarily available on the open market, or contracts for transportation or transmission of intelligence.
- (F) Rights to Inventions Made Under a Contract or Agreement. If the Federal award meets the definition of "funding agreement" under 37 CFR § 401.2 (a) and the recipient or subrecipient wishes to enter into a contract with a small business firm or nonprofit organization regarding the substitution of parties, assignment or performance of experimental, developmental, or research work under that "funding agreement," the recipient or subrecipient must comply with the requirements of 37 CFR Part 401, "Rights to Inventions Made by Nonprofit Organizations and Small Business Firms Under Government Grants, Contracts and Cooperative Agreements," and any implementing regulations issued by the awarding agency.
- (G) Clean Air Act (42 U.S.C. 7401-7671q.) and the Federal Water Pollution Control Act (33 U.S.C. 1251-1387), as amended - Contracts and subgrants of amounts in excess of \$150,000 must contain a provision that requires the non-Federal award to agree to comply with all applicable standards, orders or regulations issued pursuant to the Clean Air Act (42 U.S.C. 7401-7671q) and the Federal Water Pollution Control Act as amended (33 U.S.C. 1251-1387). Violations must be reported to the Federal awarding agency and the Regional Office of the Environmental Protection Agency (EPA).
- (H) Debarment and Suspension (Executive Orders 12549 and 12689) - A contract award (see 2 CFR 180.220) must not be made to parties listed on the governmentwide exclusions in the System for Award Management (SAM), in accordance with the OMB guidelines at 2 CFR 180 that implement Executive Orders 12549 (3 CFR part 1986 Comp., p. 189) and 12689 (3 CFR part 1989 Comp., p. 235), "Debarment and Suspension." SAM Exclusions contains the names of parties debarred, suspended, or otherwise excluded by agencies, as well as parties declared ineligible under statutory or regulatory authority other than Executive Order 12549.
- (I) Byrd Anti-Lobbying Amendment (31 U.S.C. 1352) - Contractors that apply or bid for an award exceeding \$100,000 must file the required certification. Each tier certifies to the tier above that it will not and has not used Federal appropriated funds to pay any person or organization for influencing or attempting to influence an officer or employee of any agency, a member of Congress, officer or employee of Congress, or an employee of a member of Congress in connection with obtaining any Federal contract, grant or any

other award covered by 31 U.S.C. 1352. Each tier must also disclose any lobbying with non-Federal funds that takes place in connection with obtaining any Federal award. Such disclosures are forwarded from tier to tier up to the non-Federal award.

(J) See § 200.323.

(K) See § 200.216.

(L) See § 200.322.

[78 FR 78608, Dec. 26, 2013, as amended at 79 FR 75888, Dec. 19, 2014; 85 FR 49577, Aug. 13, 2020]

Appendix B:
Protest Procedures (Miami-Dade County)

Implementing Order



Implementing Order No.: 3-21

Title: Bid Protest Procedures

Ordered: 10/03/2019

Effective: 10/13/2019

AUTHORITY:

Section 4.02 of the Miami-Dade County Home Rule Amendment and Charter and Section 2-8.4 of the Code of Miami-Dade County.

SUPERSEDES:

This Implementing Order supersedes previous Administrative Order No. 3-21, ordered December 1, 2009 and effective December 11, 2009.

POLICY:

It is the policy of Miami-Dade County (the "County") to provide a participant in any competitive process the opportunity to protest an award recommendation with respect to County contracts and purchases involving the expenditure of over \$25,000.

SCOPE:

This Implementing Order ("IO") establishes the requirements and procedures governing a bid protest brought by a participant in any competitive process utilized for selection of a person or other entity to construct any public improvement, to provide any supplies, materials or services (including professional or management services other than professional services whose acquisition procedure is governed by the Consultants' Competitive Negotiation Act, Section 287.055, Florida Statutes), or to lease any County property. This IO covers those professional services selections funded by the Federal Transit Administration.

Under this Implementing Order, a "formal" bid protest is a bid protest with respect to the recommended award of a County contract or purchase involving the expenditure of over \$250,000. An "informal" bid protest is a bid protest with respect to the recommended award of a County contract or purchase involving the expenditure of over \$25,000 up to and including \$250,000.

SECTION I

GENERAL PROVISIONS

A participant in any competitive process wishing to file a "formal" or "informal" bid protest within the scope of this Implementing Order shall file the protest in accordance with the procedures and requirements described herein.

No provision of this Implementing Order shall preclude the Director of the Internal Services Department or successor department, the Director of the issuing department, or the County Mayor from changing his or her recommendation. In cases of either “formal” or “informal” protests, if the award recommendation is changed in favor of the protester not later than five (5) work days following the filing of the bid protest, the filing fee shall be refunded to the protester.

BID PROTEST FEE

As a condition of initiating any bid protest within the scope of this Implementing Order, the protester shall present to the Clerk of the Board a nonrefundable filing fee (the “Filing Fee”), payable to the Clerk of the Board in accordance with the schedule provided below.

Contract Award Amount	Filing Fee*
\$25,001-\$250,000	\$ 500
\$250,001-\$500,000	\$1,000
\$500,001-\$5 million	\$3,000
Over \$5 million	\$5,000

*The Filing Fee for a certified Small Business Enterprise (“SBE”) firm shall be fifty percent (50%) of the listed Filing Fee above, for such contracts set-aside for bidding solely by SBEs. To be entitled to the reduced Filing Fee, the SBE must be certified with the Division of Small Business Development or successor division or department, at the time of filing of the bid protest.

Filing fees, or any other monies received as payment of protest costs, shall be deposited in a special account administered by the Clerk of the Board and shall be used by the Clerk solely for the purpose of defraying the cost of the hearing examiner and the Clerk’s costs of administering the bid protest program. If, at any given time, there are insufficient funds available in said special account to pay said costs the requesting department shall be responsible for reimbursement of any shortage to the Clerk of the Board. In the event that there is more than one requesting department, the department with the largest allocation shall bear the cost of any shortage. For formal bid protests, the requesting department, or the department with the largest allocation, shall bear the cost of the court reporter and any transcript of the bid protest hearing.

Notwithstanding the foregoing, filing fees shall not be required for projects when such filing fee requirement may jeopardize federal and/or state funding.

PROCEDURE

All bid protests shall be filed with the Clerk of the Board within the applicable time periods established in this Implementing Order. Protests must be submitted to the

Clerk of the Board during the operating hours of 8:00 AM through 4:30 PM, Mondays through Fridays.

All bid protests shall be submitted in writing to the Clerk of the Board and shall state with particularity the specific facts and grounds on which they are based, include all pertinent documents and evidence and be accompanied by the corresponding filing fee. This shall form the basis for review of the protest and no other facts, grounds, documentation or evidence not contained in the protester's submission to the Clerk of the Board at the time of filing the protest shall be permitted in the consideration of the protest, except for such additional evidence as is allowed during the course of the protest proceedings.

Failure to file the written protest within the required time limits established in this Implementing Order shall constitute a waiver of the right to protest the award recommendation.

Any question, issue, objection or disagreement concerning, generated by, or arising from the published requirements, terms, conditions or processes contained in the solicitation document shall be deemed waived by the protester and shall be rejected as a basis for a bid protest, unless it was brought by that bidder or proposer to the attention, in writing, of the procurement agent, buyer, contracting officer or other contact person of the County department that issued the solicitation document, at least two (2) work days (not less than 48 hours) prior to the hour of bid opening or proposal submission. This allows the issuing department the opportunity to consider, and to resolve or clarify in a timely fashion, through the issuance of an addendum, any such matter that is apparent on the face of the solicitation document, including but not limited to ambiguities or inconsistencies within the document.

The foregoing notwithstanding, a bid protest may not challenge the relative weight of the evaluation criteria or the formula specified for assigning points therefore contained in the bid, request for proposals ("RFP") or request for qualifications ("RFQ") specifications.

All references to "work days" herein exclude Saturdays, Sundays and legal holidays. If the last day of the filing period is a Saturday, Sunday or legal holiday, the period shall run through the end of the next work day. As used in this rule, "legal holiday" shall mean those days designated by Miami-Dade County as such. No time will be added to the above time limits for mail service.

Upon receipt of any properly filed bid protest under this Implementing Order, the Clerk of the Board shall promptly distribute a brief written notice of the protest to the following individuals: the Director of the issuing department, each member of the Board of County Commissioners (the "Commission"), the County Mayor, and the Director of the Internal Services Department or successor department.

The County's solicitation documents for contracts or purchases involving the expenditure of over \$25,000 shall contain provisions advising bidders and proposers of their rights and responsibilities established under Section 2-8.4 of the Code of Miami-Dade County and this Implementing Order concerning the presentation and administration of bid protests.

SECTION II

"FORMAL" BID PROTESTS: CONTRACTS AND PURCHASES INVOLVING THE EXPENDITURE OF OVER \$250,000

FILING OF PROTESTS

For the recommended award of a contract or purchase involving the expenditure of over \$250,000, an award recommendation letter shall be dated and transmitted by the issuing department to each competing bidder or proposer announcing the proposed award, and a copy thereof shall be deposited with the Clerk of the Board on the same day it is transmitted.

A written intent to protest a "Formal" bid under this section shall be filed by a protester with the Clerk of the Board and mailed to each bidder or proposer in the competitive process and to the County Attorney within three (3) work days of the filing of the award recommendation with the Clerk of the Board. This three (3) day period is determined by counting work days from the day after the award recommendation is filed with the Clerk of the Board. The written intent to protest shall state with particularity the specific facts and grounds on which the protest is based, and be accompanied by the corresponding filing fee.

Within three (3) days of the filing of the written intent to protest, the protester shall file the bid protest, including pertinent documents and supporting evidence with the Clerk of the Board and mail copies to each bidder or proposer in the competitive process and to the County Attorney. Further, if the protester makes a public record request within the three (3) day period in which to file an intent to protest, the protester may use the information obtained from this records request to support the bid protest when the protester has complied with bid protest procedure deadlines established herein and the protester has made a supplementary filing with the Clerk of the Board within forty-eight (48) hours of receiving the items requested by the public records request.

The intent to protest, bid protest, and any timely filed supplement shall form the basis for review of the protest and no other facts, grounds, documentation or evidence not contained in the protester's submission(s) to the Clerk of the Board shall be permitted in the consideration of the protest, except for such additional rebuttal evidence as is allowed during the course of the protest proceedings.

Protests filed in accordance herewith shall be referred to a hearing examiner. A hearing examiner shall be appointed by the Clerk of the Board no later than five (5)

work days following the filing of a bid protest. The hearing examiner shall conduct a hearing in connection with the bid protest, which shall be completed within ten (10) work days following his or her appointment. The hearing examiner may extend the deadline for completion of the hearing upon the written petition for good cause shown, but in no event shall the total, cumulative time extension exceed five (5) work days for completion of the hearing, regardless of the number of requests or requests from multiple parties. The hearing examiner shall within five (5) work days of the hearing, file written findings and recommendations with the Clerk of the Board and shall submit or mail a copy of same to all participants in the competitive process and to the County Attorney.

The hearing examiner shall consider the written protest and supporting documents and evidence appended thereto, the County Mayor's or issuing department Director's recommendation, and supporting documentation, and all evidence presented at the hearing. The hearing examiner may also require written summaries, proffers, affidavits and other documents the hearing examiner determines to be necessary to conclude the hearing, and shall issue the report and recommendation within the strict time limits set forth herein. No grounds will be considered from the protester that were not contained in the protester's written submission to the Clerk of the Board at the time of filing the bid protest. The hearing examiner shall be entitled to rely on evidence of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs, whether or not such evidence would be admissible in a trial in the courts of Florida.

The hearing examiner shall allow a maximum of two (2) hours for the protester's presentation of its protest and a maximum of two (2) hours for the County's response to each protest. In the event of multiple protests, the hearing examiner shall allocate the time as necessary to ensure that the hearing shall not exceed one day.

The Clerk of the Board is responsible for appointing a hearing examiner within the stipulated time, and advising the hearing examiner of his or her responsibilities established under Section 2-8.4 of the Code of Miami-Dade County and this Implementing Order. Upon making the appointment, the Clerk shall furnish the hearing examiner a copy of all submissions filed by the protester as well as a copy of the County Mayor's or issuing department Director's award recommendation memorandum and award recommendation letter. The Clerk is responsible for monitoring the timely advancement and completion of the bid protest process, and shall issue payment to the hearing examiner upon the hearing examiner's submission of his or her completed report and recommendation.

The Clerk of the Board, in coordination with the hearing examiner, is responsible for obtaining an adequate facility for the conduct and completion of the bid protest hearing within the stipulated time period.

The hearing examiner is responsible for performing in accordance with the provisions of Section 2-8.4 of the Code of Miami-Dade County and this Implementing Order, and

completing the bid protest hearing and preparing and submitting his or her report and recommendation within the stipulated time periods.

The hearing examiner shall be paid a fee of \$200.00 per hour and in no event to exceed \$2,500.00 per completed hearing.

In the event the hearing examiner fails to abide by the time limitations set forth in Section 2-8.4 of the Code of Miami-Dade County and this Implementing Order, that is, does not submit his or her completed report and recommendation to the Clerk of the Board within fifteen (15) work days of his or her appointment, or twenty (20) work days in the event five (5) additional work days are allowed by the hearing examiner for completion of the bid protest hearing, a reduction in the hearing examiner's fee shall be assessed by the Clerk of the Board at a rate of \$100 per work day late. In no event, however, shall the hearing examiner's fee be less than \$1,300.00 per completed hearing.

The Clerk of the Board shall render payment of the hearing examiner's fee within ten (10) work days of the Clerk's receipt of the completed report and recommendation, and an itemized hourly invoice, from the hearing examiner.

Prior to the Board of County Commissioners or any committee thereof hearing any protest relating to a competitive bid, request for proposal or request for qualifications, the County Mayor shall request the County Attorney to certify whether the bid or proposal in question is responsive. Upon receiving such request, the County Attorney shall, in consultation with the County Mayor if necessary, determine whether the bid or proposal is responsive. The Board of County Commissioners and any committee thereof shall be bound by the determination of the County Attorney with regard to the issue of responsiveness.

When a formal protest involves the expenditure of an amount that exceeds the County Mayor's delegated authority to award under Section 2-8.1(b) of the Code, as set forth in Section 2-8.4 of the Code of Miami-Dade County, the following shall apply: The hearing examiner's findings and recommendation shall be presented to the Commission by the County Mayor together with the recommendation of the County Mayor. Notice shall be mailed by the issuing department to all participants in the competitive process at least five (5) days in advance of such presentation. If the hearing examiner concurs in the County Mayor's recommendation, the Commission shall not allow presentations by any participants in the competitive process or their representatives at the time the matter is presented to the Commission. A two-thirds (2/3) vote of the Commission members present shall be required to take other than the recommended action. Provided, however, that a two-thirds (2/3) vote shall not be required to reject all bids. If the hearing examiner does not concur in the County Mayor's recommendation, the participants in the competitive process and their representatives may make presentations to the Commission and the Commission shall decide the matter by majority vote.

When a formal protest involves the expenditure of over two hundred fifty thousand dollars (\$250,000) up to the County Mayor's delegated authority to award under Section 2-8.1(b) of the Code, the following shall apply: If the hearing examiner concurs in the award recommendation of the Internal Services Department or successor department, or in the case that such department is not the department issuing the solicitation, the recommendation of the issuing department, the department shall be bound thereby and shall implement such recommendation within five (5) work days. If the hearing examiner does not concur in the award recommendation, the Director of the Internal Services Department or successor department or of the issuing department shall either accept the hearing examiner's recommendation and implement such recommendation within five (5) work days, or shall submit a written recommendation to the County Mayor within five (5) work days with supporting findings and reasons that the County Mayor should approve the department's recommendation despite the recommendation of the hearing examiner in which event the County Mayor shall, within five (5) work days, choose either the department's or the hearing examiner's recommendation, provide written findings therefore and instruct the department director to implement said recommendation accordingly.

SECTION III

"INFORMAL" BID PROTESTS: CONTRACTS AND PURCHASES INVOLVING THE EXPENDITURE OF OVER \$25,000 UP TO \$250,000

POSTING AWARD RECOMMENDATIONS

Award recommendations for contracts and purchases involving the expenditure of over \$25,000 up to \$250,000 shall be posted on the Internal Services Department or successor department website.

A written intent to protest an "Informal" bid under this section must be filed by a protester with the Clerk of the Board and mailed to each bidder or proposer in the competitive process and to the County Attorney within three (3) work days of the posting of the award recommendation. This three (3) day period is determined by counting work days from the day after the award recommendation is posted. The written intent to protest shall state with particularity the specific facts and grounds on which the protest is based and be accompanied by the appropriate filing fee.

Within three (3) days of the filing of the written intent to protest, the protester shall file the bid protest, including pertinent documents and supporting evidence with the Clerk of the Board and mail copies to each bidder or proposer in the competitive process and to the County Attorney. Further, if the protester makes a public record request within the three (3) day period in which to file an intent to protest, the protester may use the information obtained from this record request to support the protest when the protester has complied with bid protest procedure deadlines established herein and the protester has made a supplementary filing with the Clerk of the Board within forty-eight (48) hours of receiving the items requested by the public records request.

The Clerk of the Board shall immediately forward to the Director of the issuing department the letter of protest and any other material presented by the protester.

Contracts for which an informal protest is not received within the three (3) day period referenced above shall be awarded in accordance with the department's recommendation.

For bid protests of contracts or purchases involving the expenditure of over \$25,000 up to and including \$250,000, the department Director or designee shall, after reviewing the written recommendation for award and the written protest, and after consultation with the County Attorney, issue a report stating the department's recommendation and a summary of the factual and contractual grounds for such decision. The department Director's findings shall be forwarded to the County Mayor, or his/her designee, for the County Mayor's final determination and disposition of the protest.

When an informal protest is filed, the department shall provide an opportunity to settle the protest by mutual agreement. This should take place within five (5) work days of the filing of the protest. Failing resolution of the protest within said time period, the department Director or designee shall issue a report and recommendation to the County Mayor not later than twenty (20) work days from the filing of the protest.

SECTION IV

CONTRACTS AND PURCHASES INVOLVING EXPENDITURES OF \$25,000 OR LESS

- (a) Award recommendations for contracts and purchases involving the expenditure of \$25,000 or less are considered final and may not be protested.
- (b) Bid Award Recommendation of \$25,000.00 or less (Miami-Dade Transit Only)

Bidders may submit a written protest to the Director of Miami-Dade Transit, 701 NW 1st Court, Suite 1700, Miami, FL 33136, for any contract with a value of \$25,000.00 or less, with a copy to the Clerk of the Board, within five (5) business days of the recommendation for award. No filing fee is required. The protest letter sent to the Director must indicate that a copy has been sent to the Clerk of the Board. The decision by the Director of Miami-Dade Transit shall be final.

SECTION V

ARCHITECTURAL/ENGINEERING CONSULTANT SELECTIONS (MIAMI-DADE TRANSIT ONLY)

For all Architectural/Engineering Consultant Selections funded in whole or in part by the Federal Transit Administration ("FTA") or where it has been determined by the MDT Director that FTA requirements apply, any proposer may submit a written protest to the County Mayor, 111 N.W. 1st Street, 29th Floor, Miami, Florida 33128, with a copy to the Clerk of the Board, within ten (10) business days of the County Mayor's filing of an authorization to negotiate. The decision of the County Mayor shall be final and conclusive on these matters.

This Implementing Order is hereby submitted to the Board of County Commissioners of Miami-Dade County, Florida.

County Manager

Approved by the County Attorney as
to form and legal sufficiency

Appendix C:
Pinellas County Purchasing Ordinance

DIVISION 2. PURCHASING¹

Subdivision I. In General

Sec. 2-156. Definitions.

The following words, terms and phrases, when used in this division, shall have the meanings ascribed to them in this section, except where the context clearly indicates a different meaning:

Agencies means departments or offices created by special act or interlocal agreement, including but not limited to the Pinellas Planning Council, the Pinellas County Construction Licensing Board and Business Technology Services.

Board means the Board of County Commissioners of Pinellas County, Florida.

Business day means any calendar day from 7:00 a.m. to 5:00 p.m. EST, except a Saturday, Sunday or county observed holiday.

Constitutional officer means one or more of the following: clerk of circuit court and comptroller, property appraiser, sheriff, supervisor of elections, and tax collector.

County means Pinellas County, Florida, a political subdivision of the State of Florida.

County facilities shall mean any land, buildings or structures owned or controlled by the county.

Director means the Pinellas County Purchasing Director.

Evaluation criteria means the bases upon which the county will rely to determine acceptability of a response to a competitive solicitation, as stated in the solicitation document, or this division.

Noncompetitive purchase means a purchase that is not required to be made pursuant to a formal county-initiated competitive solicitation because a justification exists demonstrating that competitive selection is unnecessary, inappropriate or otherwise not in the best interest of the county under the circumstances. Such purchases may be made with no competition or with such competition as is practical and appropriate under the circumstances, as determined by the director.

Public notice means the required notification or advertisement of an invitation to bid, request for proposal, or other competitive solicitation provided for in this division, to be given to vendors for a reasonable period of time, as determined by the director, which shall, at a minimum, include: (i) direct notice to vendors by the Pinellas County Purchasing Department (Purchasing Department); (ii) posting notice or a link (which contains notice) on the purchasing department website; and (iii) notice in a newspaper of general circulation, when required by applicable law. The public notice shall describe the goods and/or services sought, and state the date, time and place of the bid, proposal, or other solicitation opening.

Purchase order means the county's document used to evidence the existence of a purchase or sales transaction with a vendor. Acceptance of a purchase order by a vendor shall constitute a contract, except in instances in which a purchase order is used only as an internal document.

¹State law reference(s)—Consultants' Competitive Negotiation Act, F.S. § 287.055; bids required for certain road work, F.S. §§ 336.41, 336.44.

Responsible with respect to bidder or proposer means a vendor who has submitted a bid or proposal, who has the capability, as determined by the county, in all respects to perform fully the contract requirements and who has the integrity and reliability which will give reasonable assurance of good-faith performance, which includes, but is not limited to those specified in section 2-161(a)(1)a.—j.

Responsive with respect to bidder or proposer means a vendor who has submitted a bid or proposal, which conforms in all material respects, as determined by the county, to the bid or proposal solicitation.

Sole source purchase means research has determined there is only one potential vendor for an item.

Vendor means an actual or potential supplier of goods and/or services.

(Ord. No. 94-51, § 1(a), 6-7-94; Ord. No. 06-19, § 1, 2-21-06; Ord. No. 08-49, § 1, 10-7-08; Ord. No. 18-34 , 10-23-18)

Cross reference(s)—Definitions generally, § 1-2.

Sec. 2-157. Purpose.

The purpose of this division is to provide for the fair and equitable treatment of all persons involved in public purchasing by the county, to maximize the purchasing value of public funds in procurement, and to provide safeguards for maintaining a procurement system of quality and integrity.

(Ord. No. 94-51, § 1(b), 6-7-94; Ord. No. 18-34 , 10-23-18)

Sec. 2-158. Applicability.

- (a) This division applies to the procurement of goods and/or services entered into by the county. This division shall apply to every expenditure of public funds by the county for public purchasing, irrespective of the source of the funds. Nothing in this division shall prevent the county from complying with all laws and the terms and conditions of any grant.
- (b) Any of the constitutional officers or agencies may utilize all or part of the county's purchasing process without the obligation of complying with the full procedures.

(Ord. No. 94-51, § 1(c), (d), 6-7-94; Ord. No. 18-34 , 10-23-18)

Sec. 2-159. Principal public purchasing official.

- (a) Except as otherwise provided in this division, the director, or the designated official within the purchasing department, when authorized by the director in writing, shall serve as the principal public purchasing official for the county, shall be responsible to the board and shall be responsible for the procurement of goods and services in accordance with this division. Additionally, the purchasing department shall serve as a servicing agency for the constitutional officers and agencies, as directed by the board.
- (b) In accordance with this division and any other applicable laws, the director, or the designated official within the purchasing department, when authorized by the director in writing, shall:
 - (1) Procure or supervise all goods and/or services needed by the county;
 - (2) Approve all purchase orders, regardless of amount, for all goods and/or services procured as authorized in this division;
 - (3) Provide assistance to agencies in the sale, trade, or disposal of surplus supplies and tangible personal property;

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- (4) With the exception of contract review policies approved by the board, have the authority and responsibility to establish and maintain written administrative procedures governing procurement of goods and/or services, in accordance with this division and purchasing policies adopted by resolution of the board ("purchasing manual"). Once developed, and as amended, the administrative procedures implementing this division and purchasing policies adopted by the board shall be approved by the county administrator.
- (c) The director may not delegate procurement authority to other county officials, except as authorized herein, or except as authorized pursuant to rules and regulations adopted by the board.
- (Ord. No. 94-51, § 2, 6-7-94; Ord. No. 06-19, § 2, 2-21-06; Ord. No. 07-42, § 1, 9-18-07; Ord. No. 08-49, § 1, 10-7-08; Ord. No. 18-34, 10-23-18)

Sec. 2-160. Waiver of provisions.

The board may waive any provision of this division by resolution.

(Ord. No. 94-51, § 9, 6-7-94; Ord. No. 18-34, 10-23-18)

Sec. 2-161. Bidder qualifications and prequalifications; suspension and debarment.

(a) *Qualifications.*

- (1) Responsible and responsive bidder who submits the lowest bid. In determining the responsible and responsive bidder who submits the lowest bid, in addition to price, due diligence will be conducted and the following factors, shall be considered, as a minimum:
- The ability, capacity and skill of the bidder to perform the contract;
 - Whether the bidder can perform the contract promptly, or within the time specified, without delay or interference;
 - The character, integrity, reputation, judgment, experience, and efficiency of the bidder;
 - The quality of performance of previous contracts;
 - The previous and existing compliance by the bidder with laws and ordinances relating to the contract;
 - The sufficiency of the financial resources and ability of the bidder to perform the contract;
 - The quality, availability and adaptability of the goods and/or services to the particular use required;
 - The ability of the bidder to provide future maintenance and service;
 - The number and scope of conditions attached to the bid;
 - The ability to meet insurance requirements.
- (2) *Prequalification of vendors for construction.* Vendors wishing to bid on the board's construction projects in excess of \$100,000.00 are required to be prequalified with the county administrator or his/her designee prior to bid opening, unless the solicitation includes a qualification process through multi-step bidding. Pursuant to F.S. § 255.20, a prequalified contractor considered eligible by the Florida Department of Transportation to bid to perform the type of work described under the contract is presumed to be qualified to perform the work described. The establishment, deletion and

modification of the prequalification categories for specific types of construction and the dollar amounts of the subcategories may be accomplished by the county administrator.

- a. Prequalification is recommended to the county administrator or his/her designee for final approval by a prequalification committee consisting of representatives from each of the following professional associations:

Tampa Bay Builders Association;

Pinellas Chapter of the Florida Engineering Society;

American Institute of Architects — Tampa Bay;

West Coast Chapter of the Florida Institute of C.P.A.s;

Suncoast Utility Contractors Association.
 - b. Prequalification is not a conclusive determination of responsibility, and a prequalified bidder may be rejected as a non-responsible bidder on the basis of subsequently discovered information.
- (b) *Suspension and debarment.* Maintaining the integrity of the public contracting and purchasing process is vital and a matter of great public interest. Selecting and contracting with highly qualified vendors that engage in ethical and responsible business practices protects the public and supports the integrity of the public contracting and procurement process. Because the opportunity to participate in competitive procurements or to supply goods and/or services to the county is a privilege, not a right, this privilege should be denied to vendors that engage or are involved in activities or actions, as described herein, that adversely impact the quality of goods and/or services provided to the county for the benefit of the public. In those instances, it is in the best interests of the public to disqualify vendors by suspension or debarment from consideration for award of contracts, or work on existing contracts, based upon documentation that the grounds for suspension or debarment exist, as provided herein.
- (1) *Suspension.* A vendor shall be suspended for a period of two years or until the conditions described herein have been rectified or resolved, whichever occurs first, as determined by the director based upon the following:
- a. The county has formally declared the vendor in breach of a contract that has resulted in the termination of the contract by the county for failure to comply with the conditions, specifications or terms of a contract with the county; or
 - b. The county has formally disqualified or declared a vendor's bid, quotation, or proposal non-responsive, based on the vendor's fraud or misrepresentation; or
 - c. The vendor is charged by a court of competent jurisdiction with the commission of a criminal offense as an incident to obtaining or attempting to obtain a public or private contract or subcontract or in the performance of such contract or subcontract; or is charged by a court of competent jurisdiction with the following: embezzlement, theft, forgery, bribery, fraud, falsification or destruction of records, receiving stolen property, or any other offense indicating a lack of business integrity or business honesty which currently, seriously and directly affects responsibility as a county government contractor; or
 - d. The vendor becomes insolvent, has proceedings in bankruptcy instituted against it, or has a receiver or trustee appointed over its property; or
 - e. The vendor has three or more violations of the code as defined in section 1-8 of the Code in any two-year period arising from or related to vendor's business activities, as determined in a court or administrative proceeding, including by plea; or

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- f. The vendor and the county are engaged in proceedings (i.e., court proceedings, arbitration, or administrative proceeding) arising from or related to the vendor's performance of a contract with the county, in which the vendor and the county have positions adverse to each other. To the extent that vendor is indemnifying and defending the county, the positions are not considered adverse; or
 - g. The vendor is suspended by another government entity.
- (2) *Debarment.* A vendor shall be permanently debarred by the director based on the following:
- a. The county obtains a judgment in an adversarial proceeding between the county and the vendor (i.e., court proceeding, arbitration, or administrative proceeding) arising from the vendor's performance of a contract with the county which remains unsatisfied for a period of 30 days from the expiration of any appeal period or final resolution of any appeal; or
 - b. Vendor conviction by or judgment obtained in a court of competent jurisdiction for commission of those offenses in connection with the vendor's business activities stated in subsection (b)(1)c. above; or
 - c. Vendor is debarred by another government entity.
- (3) *Public entity crime.* Notwithstanding any other provision herein, any vendor who has been convicted of a public entity crime, as defined by F.S. § 287.133, shall not be able to transact business with the county to the extent specified in the statute.
- (4) *Notification to suspend or debar.* The director shall issue written notification to suspend or debar the vendor based on documentation of the existence of one or more of the conditions described herein. The suspension or debarment shall take effect as of the date stated in the notification. The notification shall state the basis for the action taken and the period of the suspension, or that the vendor has been debarred. Prior to issuance of written notification, the director may schedule an informational meeting with the vendor to review the documentation supporting the suspension or debarment. The only issue that shall be considered at the informational meeting is whether the condition giving rise to the suspension or debarment has occurred.
- (5) *Effects of suspension and debarment.*
- a. Suspended or debarred vendors are not eligible for award of contracts or additional work on existing contracts during the period of suspension or during debarment; from having any bids, proposals, quotations or qualifications considered by the county or responding to other solicitations of the county; and from conducting business with the county as a subcontractor, representative, or joint venturer of other vendors.
 - b. Any business entity controlled by or affiliated with any suspended or debarred vendor may also be prohibited from contracting with the county if the relationship or affiliation is such that the person or business entity by reason of the relationship with the ineligible vendor could directly benefit from the contract. Such factors as ownership interest, one or more members of the board of officials in common, control of one entity by the other, interlocking or shared management or principals, and limited management and ownership among family members shall be considered in determining ineligibility under this section of this article.
- (6) *Reinstatement.* After suspension or debarment, a vendor is not eligible to contract or be awarded work with the county until reinstated by the director. To be considered for reinstatement, the vendor must supply information and reasonable documentation indicating that the conditions causing the suspension or debarment have been rectified or resolved. If the charges referenced in subsection (b)(1)c. are dismissed or the vendor is found not guilty, the suspension shall be lifted automatically upon written notification and proof of final court disposition provided by the vendor to the county. If

the conviction or judgment referenced in subsection (b)(2)b. is reversed through the appellate process, the debarment shall be removed immediately upon written notification and proof of final court disposition provided by the vendor to the county. As a condition of reinstatement, and with approval of the county administrator, the director may limit the nature and scope of contractual undertakings that must be satisfactorily completed before seeking additional contracts from the county. Nothing herein prevents the county from granting reinstatement prior to the end of the suspension period or debarment where, in the director's judgment, the county's interests have been addressed and the vendor to be reinstated is not likely to engage in similar conduct again.

(Ord. No. 94-51, § 4, 6-7-94; Ord. No. 02-19, § 1, 3-19-02; Ord. No. 04-6, § 1, 1-20-04; Ord. No. 10-09, § 1, 2-16-10; Ord. No. 14-11, § 1, 2-11-14; Ord. No. 18-34, 10-23-18)

Sec. 2-162. Protest procedure.

- (a) *Right to protest.* A vendor who is aggrieved by the contents of the bid or proposal package, or a vendor who is aggrieved in connection with the recommended award on a bid or proposal solicitation, may file a written protest to the director, as provided herein. This right to protest is strictly limited to those procurements of goods and/or services solicited through invitations to bid or requests for proposals, including solicitations pursuant to F.S. § 287.055, the "Consultants' Competitive Negotiation Act." No other actions or recommendations in connection with a solicitation can be protested, including: (i) requests for quotations, negotiations, qualifications or letters of interest; (ii) rejection of some, all or parts of bids or proposals; (iii) disqualification of bidders or proposers as non-responsive or non-responsible; or (iv) recommended awards less than the mandatory bid or proposal amount. Protests failing to comply with the provisions of this section shall not be reviewed.
- (b) *Posting.* The purchasing department shall post the recommended award on or through the departmental website.
- (c) *Requirements to protest.*
 - (1) If the protest relates to the content of the bid or proposal package, a formal written protest must be filed no later than 5:00 p.m. EST on the fifth full business day after issuance of the bid or proposal package.
 - (2) If the protest relates to the recommended award of a bid or proposal, a formal written protest must be filed no later than 5:00 p.m. EST on the fifth full business day after posting of the award recommendation.
 - (3) The formal written protest shall identify the protesting party and the solicitation involved; include a statement of the grounds on which the protest is based; refer to the statutes, laws, ordinances or other legal authorities which the protesting party deems applicable to such grounds; and specifically request the relief to which the protesting party deems itself entitled by application of such authorities to such grounds.
 - (4) A formal written protest is considered filed with the county when the purchasing department receives it. Accordingly, a protest is not timely filed unless it is received within the time specified above by the purchasing department. Failure to file a formal written protest within the time period specified shall constitute a waiver of the right to protest and result in relinquishment of all rights to protest by the bidder or proposer.
- (d) *Sole remedy.* These procedures shall be the sole remedy for challenging the content of the bid or proposal package or the recommended award.

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- (e) *Lobbying.* Protestors and anyone acting on their behalf, are prohibited from attempts to influence, persuade, or promote a bid or proposal protest through any other channels or means, and contacting any county official, employee, advisory board member, or representative to discuss any matter relating in any way to the solicitation being protested, other than the purchasing department's or county attorney's office to address situations such as clarification and/or pose questions related to the procurement process. The prohibitions provided for herein shall begin with the filing of the protest and end upon the final disposition of the protest; provided, however, at all times protestors shall be subject to the procurement lobbying prohibitions in section 2-189 of this Code. Failure to adhere to the prohibitions herein shall result in the rejection of the protest without further consideration.
- (f) *Time limits.* The time limits in which protests must be filed as specified herein may be altered by specific provisions in the bid or proposal.
- (g) *Authority to resolve.* The director shall resolve the protest in accordance with the documentation and applicable legal authorities and shall issue a written decision to the protestor no later than 5:00 p.m. EST on the tenth full business day after the filing thereof.
- (h) *Review of director's decision.*
- (1) The protesting party may request a review of the director's decision to the county administrator by delivering written request for review of the decision to the director by 5:00 p.m. EST on the fifth full business day after the date of the written decision. The written notice shall include any materials, statements, and arguments which the bidder or proposer deems relevant to the issues raised in the request to review the decision of the director.
 - (2) The county administrator shall issue a decision in writing stating the reason for the action with a copy furnished to the protesting party no later than 5:00 p.m. EST on the seventh full business day after receipt of the request for review. The decision shall be final and conclusive as to the county unless a party commences action in a court of competent jurisdiction.
- (i) *Stay of procurement during protests.* There shall be no stay of procurement during protests.
- (Ord. No. 94-51, § 5, 6-7-94; Ord. No. 04-87, § 1, 12-7-04; Ord. No. 14-11, § 2, 2-11-14; Ord. No. 18-34, 10-23-18)

Sec. 2-163. Bid and contract security.

- (a) *Bid security.*
- (1) *Requirement for bid security.* Bid security shall be required for all competitive sealed bidding for construction contracts when the price is estimated by the director to exceed \$100,000.00. Bid security shall be in a form satisfactory to the county attorney. Nothing herein shall prevent the requirement of such security on other contracts when the circumstances warrant.
 - (2) *Amount of bid security.* Bid security for all other competitive sealed bids and proposals shall be in an amount equal to at least five percent of the amount of the bid, unless the director determines that the nature of the industry is such that the bid security requirement would work a hardship on most potential bidders.
- (b) *Contract security.* When a construction contract is awarded in excess of \$100,000.00, security shall be provided in conformance with the minimum requirements of F.S. § 255.05.
- (1) A performance bond satisfactory to the county attorney, executed by a surety insurer authorized to do business in the state as a surety, in an amount equal to 100 percent of the price specified in the contract, conditioned that the contractor perform the contract in the time and manner prescribed in the contract; and

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- (2) A payment bond satisfactory to the county attorney, executed by a surety insurer authorized to do business in the state as a surety, in an amount equal to 100 percent of the price specified in the contract, conditioned that the contractor promptly make payments to all persons supplying labor, materials or services used directly or indirectly in the performance of the work provided for in the contract, and who are claimants as defined in F.S. § 255.05(1).
 - (3) In lieu of the bonds required herein, a contractor may file an alternative form of security, in accordance with F.S. § 255.05(7).
 - (c) *Authority to require additional security.* Nothing in this section shall be construed to limit the authority of the county to require additional security.

(Ord. No. 94-51, § 6, 6-7-94; Ord. No. 18-34 , 10-23-18)

Sec. 2-164. Intergovernmental relations.

- (a) *Cooperative purchasing authorized.* The purchasing department may either participate in, sponsor, conduct or administer a cooperative purchasing contract for the procurement of any goods, services or construction with one or more public procurement units. Such cooperative purchasing may include, but is not limited to, joint or multiparty contracts between public procurement units and open-ended state or federal public procurement unit contracts which are made available to local public procurement units.
- (b) *Approval authority for contracts of \$250,000.00 or less.* Approval of contracts for cooperative purchasing and acquisition or use of goods under this section which are \$100,000.00 or less in a fiscal or calendar year shall be granted to the director, and which are more than \$100,000.00 and do not exceed \$250,000.00 in a fiscal or calendar year shall be granted to the county administrator or his/her designee.
- (c) *Acquisition or use of goods by a public procurement unit.* The purchasing department may acquire from, or use any goods belonging to, another public procurement unit independent of the requirements of subdivision II of this division, pertaining to source selection and contract formation, unless prohibited by law.

(Ord. No. 94-51, § 7, 6-7-94; Ord. No. 02-19, § 1, 3-19-02; Ord. No. 06-19, § 3, 2-21-06; Ord. No. 18-34 , 10-23-18)

Sec. 2-165. Small business enterprises.

The board of county commissioners recognizes that the county's growth and prosperity depends on the full participation of all of its citizens and businesses, and is firmly committed to the principles of equal opportunity, supplier diversity, and equity.

In order to increase the impact of county purchases on the growth and prosperity of the Pinellas County community, the director is authorized to develop and implement programs to increase the access and participation of regional small businesses. A program established pursuant to this provision may depart from otherwise applicable provisions governing bidder eligibility and contract award, provided that such departures are related to the goals of maximizing small business participation, ensuring county expenditures are retained within a defined region, and promoting economic development in Pinellas County.

(Ord. No. 94-51, § 8, 6-7-94; Ord. No. 18-34 , 10-23-18; Ord. No. 19-12 , § 1, 5-7-19)

Editor's note(s)—Ord. No. 19-12 , § 1, adopted May 7, 2019, amended the catchline of § 2-165 from "Affirmative assistance to small and disadvantaged businesses" to read as herein set out.

Secs. 2-166—2-175. Reserved.

Subdivision II. Source Selection and Contract Formulation

Sec. 2-176. Competitive sealed bidding.

- (a) *Conditions for use.* Unless procured pursuant to another process authorized by law or this Code, all contracts of the county for the purchase of goods and/or services valued in excess of \$100,000.00 shall be awarded by competitive bidding.
- (b) *Invitation to bid.* An invitation to bid shall be issued and shall include specifications and conditions applicable to the procurement and shall indicate the deadline for bid submittal and the time of bid opening.
- (c) *Bidders list.* The director shall develop and implement procedures to promote competition among vendors by posting public notice of the bid and notifying vendors of the opportunity.
- (d) *Bid opening.* Bids shall be opened publicly in the presence of one or more witnesses at the time and place designated in the invitation to bid. The name of each bidder and other relevant information deemed appropriate to properly identify each bid shall be recorded.
- (e) *Bid receipt and bid evaluation.* Bids shall be received and evaluated in accordance with the requirements established in the bid documents.
- (f) *Award.* The county will enter into a contract with the responsible and responsive bidder who submits the lowest bid in accordance with section 2-188 of this Code.
- (g) *Tie bids.* If two or more bids received are for the same total amount or unit price, or in the case of proposals, the qualifications, quality and service are equal, the contract shall be awarded by drawing lots in public.

(Ord. No. 94-51, § 3(a), 6-7-94; Ord. No. 98-16, § 1, 1-27-98; Ord. No. 99-4, § 1, 1-5-99; Ord. No. 00-92, § 1, 11-7-00; Ord. No. 02-19, § 1, 3-19-02; Ord. No. 02-68, 8-20-02; Ord. No. 04-64, § 1, 9-21-04; Ord. No. 06-19, § 4, 2-21-06; Ord. No. 08-49, § 3, 10-7-08; Ord. No. 10-09, § 2, 2-16-10; Ord. No. 14-11, § 3, 2-11-14; Ord. No. 18-34, 10-23-18)

State law reference(s)—Bids required for certain road work, F.S. §§ 336.41, 336.45.

Sec. 2-177. Competitive sealed proposals.

- (a) *Request for proposals.* When the goods and/or services to be acquired dictate that the use of competitive sealed bidding is not practicable, reasonable or advantageous to the county, a contract may be entered into by use of the competitive sealed proposals method and public notice shall be given.
- (b) *Receipt of proposals.* No proposals shall be opened until the time designated in the public notice of the request for proposals.
- (c) *Evaluation factors.* The request for proposals shall state the evaluation criteria, including, but not limited to, price, vendor approach and methodology, capability and experience.
- (d) *Evaluation of proposals.* Proposals shall be evaluated and awarded as provided in the terms of the request for proposal.

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- (e) *Award.* The county will enter into a contract with the responsible and responsive proposer who submits the proposal which best meets the evaluation criteria. No other factors or criteria shall be used in the evaluation. The contract file shall contain the basis on which the award is made.

(Ord. No. 94-51, § 3(b), 6-7-94; Ord. No. 98-16, § 2, 1-27-98; Ord. No. 02-19, § 1, 3-19-02; Ord. No. 04-64, § 2, 9-21-04; Ord. No. 10-09, § 3, 2-16-10; Ord. No. 14-11, § 4, 2-11-14; Ord. No. 18-34, 10-23-18)

Sec. 2-178. Contracting for designated professional services.

- (a) *Consultants' Competitive Negotiation Act.* Contracts for architectural, professional engineering, landscape architectural and registered land surveying and mapping services shall be procured in accordance with F.S. § 287.055, referred to as the consultants Competitive Negotiation Act (CCNA). All contracts for CCNA services shall be procured under the supervision of the director and the purchasing department.
- (b) *Design-build and construction management services.* Design-build and construction management services, as defined in F.S. § 287.055 and § 255.103, respectively, shall be procured pursuant to the process defined in the CCNA, unless the county, through the director, elects to bid construction management and design-build contracts through an invitation to bid or request for proposal process, as provided in F.S. § 255.20(1), where price is considered in the award process.
- (c) *CCNA oversight.* The county administrator shall appoint a minimum of three members of his/her executive management team to provide oversight for the CCNA process. Such oversight will include, but not be limited to, composition of evaluation committees, evaluator pool members, the evaluation process, and any other matters deemed appropriate by the county administrator.
- (d) *Evaluator pool.* The director shall be responsible for developing and maintaining a pool of qualified evaluators to participate in CCNA evaluation committees, who may consist of representatives from county departments, professional organizations, and internal and external subject matter experts.
- (e) *Evaluation committee.* The CCNA evaluation committee shall consist of at least three but typically not more than seven members (unless deemed to be in the best interest of the county) selected based upon their expertise and/or association with the project. The evaluation committee must consist of at least one person from the requesting department (or the requesting division within a multi-divisional requesting department). The requesting department (or the requesting division within a multi-divisional requesting department) cannot have majority representation on the evaluation committee. The committee shall also include non-requesting department representatives, internal/external subject matter experts and local professional organization representatives (if deemed appropriate or necessary). Final composition and qualifications of evaluation committees shall be subject to the subsection titled "CCNA Oversight", above.
- (f) *Evaluation criteria.* Pursuant to the CCNA, the evaluation criteria for ranking shall include, but shall not be limited to, ability of the firm and its professional personnel; firm experience with projects of a similar size and type; firm's willingness and ability to meet the schedule and budget requirements; volume of work previously awarded by the county; effect of the firms recent/current and projected workload; minority business status; location; past performance; and when required, the public presentation.
- (g) *Ranking of firms.* The county, through the competitive proposal process, shall make a finding that the firm or individual to be employed is duly qualified to render the required services. The evaluation committee shall review submittals in response to the public solicitation and shall select, in order of preference, no fewer than three firms deemed to be the most highly qualified, if at least three firms respond to the solicitation. If less than three firms respond, and after conducting due diligence, it is decided by the director that every effort was made to comply with F.S. § 287.055 requirements, the county will interview the firms and proceed with the evaluation process. The evaluation committee may conduct public presentations with a minimum of three firms (if three firms submitted).

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- (h) *Public presentation.* The evaluation criteria for public presentation shall include, but shall not be limited to, the firm's understanding of the project, ability to provide required services within the schedule and budget, qualifications and approach to the project.
 - (i) *Contract negotiations.* Staff shall negotiate a contract with the number one ranked firm for professional services for compensation which is deemed to be fair and reasonable. Detailed discussions must be held by the firm and the county to establish the scope of the project and the exact services to be performed by the firm. Should the county and the firm fail to agree upon the terms of an acceptable contract, negotiations with the top firm shall be terminated and negotiations with the second ranked firm shall commence. If again unsuccessful, the process is repeated with the next ranked firm. This process is continued until the parties enter into a contract, the project is abandoned or the procurement process is otherwise terminated.

The firm awarded the contract must execute a truth-in-negotiation certificate stating that the wage rates and other unit costs are accurate, complete and current at the time of contracting. Any professional service contract in which the certificate is required shall contain a provision that the contract price shall be adjusted to exclude any significant sums where the county determines the contract price was increased due to inaccurate, incomplete or noncurrent wage rates and other factual unit costs. All such contract adjustments shall be made within one year following the end of the contract.

- (j) *Professional services not subject to CCNA.* Notwithstanding the foregoing provision of this section, the noncompetitive procurement of contracts for legal, medical, independent certified public accounting, expert witnesses, catering services (as defined by the State of Florida) or other professional services is hereby authorized by negotiation with organizations or persons on the basis of experience, skill, and financial capacity to perform and shall be approved as provided in section 2-188. Notwithstanding the foregoing, selection of an independent financial auditor to perform a "financial audit" as defined by F.S. § 11.45(1)(c) and other audit functions as may be requested shall be by the following described procedure, as permitted by the Pinellas County Home Rule Charter and F.S. § 218.391. A selection committee shall be established consisting of a designee of the board, the clerk of the circuit court and comptroller or his/her designee, the director of the office of management and budget or his/her designee, the supervisor of elections or his/her designee, the tax collector or his/her designee, the property appraiser or his/her designee, and the sheriff or his/her designee. The selection committee shall prepare or cause to be prepared a request for proposal for independent financial auditor services, and the auditor shall be selected by competitive sealed proposal pursuant to Pinellas County Code, section 2-177.

(Ord. No. 94-51, § 3(c), 6-7-94; Ord. No. 98-16, § 3, 1-27-98; Ord. No. 99-4, § 2, 1-5-99; Ord. No. 02-19, § 1, 3-19-02; Ord. No. 04-64, § 3, 9-21-04; Ord. No. 06-44, § 1, 6-6-06; Ord. No. 10-09, § 4, 2-16-10; Ord. No. 11-23, § 1, 7-26-11; Ord. No. 18-34, 10-23-18)

Sec. 2-179. Small purchases.

- (a) *Generally.* Any contract for \$100,000.00 in a fiscal or calendar year or less may be made in accordance with the small purchase procedures authorized in this section. A purchase shall not be artificially divided so as to constitute a small purchase under this section.
- (b) *Small purchases of \$5,000.00 or more.* Insofar as it is practical for small purchases of \$5,000.00 or more, no less than two quotations shall be solicited. Award shall be made on the basis of lowest and best quotation.
- (c) *Small purchases under \$5,000.00.* The director shall adopt operational procedures for making small purchases of less than \$5,000.00. Such procedures may provide for obtaining adequate and reasonable competition when deemed to be in the best interest of the county for the goods and/or services being purchased and shall require the maintenance of adequate written records to document the purchasing decision. Purchases below \$5,000.00 are not subject to competitive quotation.

(Ord. No. 94-51, § 3(d), 6-7-94; Ord. No. 99-4, §§ 3, 4, 1-5-99; Ord. No. 02-19, § 1, 3-19-02; Ord. No. 03-25, § 1, 5-6-03; Ord. No. 04-64, § 4, 9-21-04; Ord. No. 06-19, § 5, 2-21-06; Ord. No. 08-49, § 4, 10-7-08; Ord. No. 18-34, 10-23-18)

Sec. 2-180. Noncompetitive purchases.

In addition to any other provision of law providing for noncompetitive selection of vendors, noncompetitive purchases may be used as a procurement method when it is determined by the director that no condition exists, for example a conflict of interest, which would make the purchase inappropriate, and one of the following justifications exists:

- (1) The purchase constitutes a sole source purchase;
- (2) There is only one practicable and reasonable source for the purchase;
- (3) A noncompetitive purchase will result in verifiable financial savings to the county;
- (4) The purchase is intended as a trial program;
- (5) Utilizing a competitive process will be detrimental to timely securing the goods or services;
- (6) The purchase is of used goods, materials, or supplies;
- (7) The purchase is for goods and/or services for resale to the public at public marinas, as defined in section 90-3 of the Pinellas County Code;
- (8) The purchase pertains to a sponsorship, in which case it shall be conducted in accordance with the sponsorship policy established by the board; or
- (9) The purchase is related to statutorily authorized tourism promotion services and/or activities.

(Ord. No. 94-51, § 3(e), 6-7-94; Ord. No. 98-16, § 4, 1-27-98; Ord. No. 02-19, § 1, 3-19-02; Ord. No. 04-64, § 5, 9-21-04; Ord. No. 06-19, § 6, 2-21-06; Ord. No. 18-34, 10-23-18)

Editor's note(s)—Ord. No. 18-34, adopted Oct. 23, 2018, changed the title of Sec. 2-180 from "sole source/noncompetitive procurement" to "noncompetitive purchases" as set out herein.

Sec. 2-181. Emergency procurements.

- (a) *Generally.* Notwithstanding any other provisions of this division, emergency purchases of goods and/or services may be made in the event of a disruption of essential operations, or when there exists a threat to public health, welfare or safety, or when the protection or preservation of public property would not be possible through normal purchasing procedures; provided that such emergency purchases shall be made with such competition as is practicable under the circumstances. A written determination of the basis for the emergency and for the selection of the particular vendor shall be forwarded to the purchasing department for the contract file.
- (b) *Award.*
 - (1) Emergency purchases in excess of \$100,000.00 shall be authorized by the county administrator, as applicable. The county administrator shall place a receipt and file a report as to those emergency purchases in excess of \$100,000.00 and which do not exceed \$250,000.00 to the board at the end of each fiscal quarter, and in addition, a written explanation of the circumstances of an emergency purchase in excess of \$250,000.00 shall be filed by the county administrator and entered in the minutes of the board.

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- (2) Emergency purchases of a value less than or equal to \$100,000.00 shall be authorized by the director, as applicable.

(Ord. No. 94-51, § 3(f), 6-7-94; Ord. No. 98-16, § 5, 1-27-98; Ord. No. 02-19, § 1, 3-19-02; Ord. No. 04-64, § 6, 9-21-04; Ord. No. 06-19, § 7, 2-21-06; Ord. No. 18-34, 10-23-18)

Sec. 2-182. Other solicitations.

- (a) The source selection methods described above should be appropriate for most procurements; however, in some circumstances there may be a need for a modified or alternative selection process. Accordingly, the director may define such alternative solicitation processes in the purchasing manual, and choose such methods when appropriate and in the best interest of the county in the discretion of the director, as follows:
- (1) *Multi-step sealed bidding.* When it is considered impractical to initially prepare a purchase description to support an award based on price, a solicitation may be issued requesting the submission of unpriced offers, or information relating to the experience and capabilities of the prospective bidders, to be followed by bids limited to those bidders whose offers or experience and capabilities have been determined to be acceptable under the criteria set forth in the first solicitation.
- (2) When the needs of the county are not sufficiently defined to pursue a request for proposal as described herein, the director may choose to solicit by means of alternative methods, including but not limited to, a request for qualifications (RFQ), request for negotiations (RFN), request for information (RFI), or a solicitation for letters of interest (LOI), provided that the solicitation, to the extent possible under the circumstances, promotes the objectives stated in section 2-157 of this Code.

(Ord. No. 18-34, 10-23-18)

Editor's note(s)—Ord. No. 18-34, adopted Oct. 23, 2018, repealed the former § 2-182, and enacted a new § 2-182 as set out herein. The former § 2-182 pertained to used equipment/supplies procurement and derived from Ord. No. 94-51, § 3(g), adopted June 7, 1994; Ord. No. 98-16, § 6, adopted Jan. 27, 1998; Ord. No. 02-19, § 1, adopted March 19, 2002; Ord. No. 04-64, § 7, adopted Sept. 21, 2004; Ord. No. 06-19, § 8, adopted Feb. 21, 2006.

Sec. 2-183. Reserved.

Editor's note(s)—Ord. No. 10-09, § 5, adopted Feb. 16, 2010, deleted § 2-183, which pertained to procurement of construction management services and derived from Ord. No. 94-51, § 3(h), adopted June 7, 1994.

Sec. 2-184. Purchases of maintenance, repair and operating supplies and services.

- (a) Routine county operations require the on-going purchase of maintenance, repair, and operating supplies and services ("MRO"), and therefore when exclusively used for the procurement of MRO requirements, contracts may be procured and increased in accordance with this section. MRO purchases include preventative or scheduled maintenance supplies and/or services such as hardware, tools, chemicals, paints, paper products, office products and other consumables and associated services utilized for routine operation. MRO purchases specifically exclude capital improvement projects or consulting services.
- (b) Contracts for MRO requirements may be put in place to secure competitively procured pricing, and should establish the applicable pricing, unit costs, terms and conditions, and estimated quantities and total expenditures. Such contracts may be entered into in accordance with the authorities set out in section 2-188 herein, however when increases to MRO contracts are needed, the county administrator is authorized, when such increase would otherwise exceed existing delegated authority, to increase estimated and authorized

expenditures on any MRO contract in an amount not-to-exceed 50 percent of the initial award, which amount shall be cumulative over the term of the contract. Any increase beyond 50 percent of the initial award will require approval by the board, or re-solicitation of the contract. All increases to contracts in excess of \$100,000.00 will be placed in a report and filed with the board each fiscal quarter. The director may increase estimated and authorized expenditures on any MRO contract in an amount not-to-exceed \$100,000.00 cumulatively over the term of the contract. Increases in accordance with this section must be made in compliance with the provisions of F.S. ch. 129, relating to the county budget.

(Ord. No. 18-34 , 10-23-18)

Editor's note(s)—Ord. No. 18-34 , adopted Oct. 23, 2018, repealed the former § 2-182, and enacted a new § 2-182 as set out herein. The former § 2-182 pertained to used equipment/supplies procurement and derived from Ord. No. 00-92, § 2, adopted Nov. 7, 2000; Ord. No. 04-64, § 8, adopted Sept. 21, 2004; Ord. No. 06-19, § 9, adopted Feb. 21, 2006; Ord. No. 08-49, § 5, adopted Oct. 7, 2008.

Sec. 2-185. State bid or negotiated contracts and required purchases.

- (a) *State bid or negotiated contracts.* The county administrator is authorized to award contracts for purchases of goods and/or services in any amount within the budget of the using department under state bid or negotiated contracts and the director is authorized to award contracts for purchase of goods and/or services of \$100,000.00 or less under state bid or negotiated contracts.
- (b) *Purchases of goods required to be made from qualified nonprofit agencies for the blind or severely disabled.* Purchases of goods required to be made from qualified nonprofit agencies for the blind or severely disabled pursuant to state law may be authorized by the county administrator in any amount within the budget of the using department.
- (c) *Reports to the board.* For purchases in excess of \$250,000.00 made pursuant to this section, the county administrator shall place a receipt and file a report to the board at the end of each fiscal quarter.

(Ord. No. 00-92, § 3, 11-7-00; Ord. No. 06-19, § 10, 2-21-06; Ord. No. 18-34 , 10-23-18)

Sec. 2-186. Reserved.

Editor's note(s)—Ord. No. 18-34 , adopted Oct. 23, 2018, repealed § 2-186, which pertained to retail golf merchandise purchases for county-operated retail golf course shops and derived from Ord. No. 01-84, § 1, adopted Dec. 18, 2001.

Sec. 2-187. Right to audit.

This division establishes the authority to audit contract and pricing documents of vendors. The right to audit would apply to those contracts which the board determines to be of a nature to justify this provision. All vendors may be required to retain contract and pricing documents for audit purposes for a minimum time period specified in the invitation to bids, request for proposals, request for quotations, contract, or other agreement with the county, which time period shall be computed beginning after the completion or termination of the contract.

(Ord. No. 18-34 , 10-23-18)

Sec. 2-188. Approval authority.

- (a) *Approval authority generally.* The county administrator or his/her designee and the director or his/her designee, shall have authority to approve procurement related documents and instruments articulated in section 2-62 in accordance with the specified delegated financial authority limits under this division.
- (b) *Award of contracts.* Any board contract, which has a value of \$100,000.00 or less in a fiscal or calendar year may be awarded and subsequently extended by the director, or if the director is unavailable, his/her designee; a contract to be awarded which does not exceed \$250,000.00 in a fiscal or calendar year may be awarded and subsequently extended by the county administrator or his/her designee; a contract to be awarded which exceeds \$250,000.00 in a fiscal or calendar year may be awarded only by the board.
- (c) *Rejection of bids/proposals.* The county administrator may reject any or all bids/proposals or parts of bids/proposals, at any stage of the procurement process, when the public interest will be served. The director, within his/her delegated financial approval authority, may reject any or all bids/proposals or parts of bids/proposals, at any stage of the procurement process, when the public interest will be served.
- (d) *Contract extensions.* Awards made by the board will include authority for all subsequent contract extensions. The aforementioned contract extension shall be approved at the option of the county administrator if, after review of past performance under the contract, the county administrator determines in his/her sole discretion that contract extension is in the best interests of the county. The county administrator shall thereafter place a receipt and file a report that the contract has been extended on the consent agenda of the board at least quarterly.

(Ord. No. 02-19, § 1, 3-19-02; Ord. No. 02-68, 8-20-02; Ord. No. 04-64, § 11, 9-21-04; Ord. No. 06-19, § 12, 2-21-06; Ord. No. 08-49, § 7, 10-7-08; Ord. No. 18-34, 10-23-18)

Editor's note(s)—Ord. No. 04-64, § 10, adopted Sept. 21, 2004, repealed the former § 2-188, which pertained to vendor name changes and derived from Ord. No. 02-19, § 1, adopted Mar. 19, 2002. See § 2-187 for similar provisions. Additionally, Ord. No. 04-64, § 11, renumbered the former § 2-189 as § 2-188.

Sec. 2-189. Lobbying.

Lobbying shall be prohibited on all county competitive selection processes and purchasing contract awards pursuant to this division, including, but not limited to, requests for proposals, requests for quotations, requests for qualifications, bids or the award of purchasing contracts of any type. The purpose of this prohibition is to protect the integrity of the procurement process by shielding it from undue influences prior to the contract award, or the competitive selection process is otherwise concluded. However, nothing herein shall prohibit a prospective bidder/proposer/protestor from contacting the purchasing department or the county attorney's office to address situations such as clarification and/or pose questions related to the procurement process.

Lobbying of evaluation committee members, county government employees, elected/appointed officials, or advisory board members regarding requests for proposals, requests for quotations, requests for qualifications, bids, or purchasing contracts, by the bidder/proposer, any member of the bidder's/proposer's staff, any agent or representative of the bidder/proposer, or any person employed by any legal entity affiliated with or representing a bidder/proposer/protestor, is strictly prohibited from the date of the advertisement, or on a date otherwise established by the board, until either an award is final, or the competitive selection process is otherwise concluded. Any lobbying activities in violation of this section by or on behalf of a bidder/proposer shall result in the disqualification or rejection of the proposal, quotation, statement of qualification, bid or contract.

For purposes of this provision, "lobbying" shall mean influencing or attempting to influence action or non-action, and/or attempting to obtain the goodwill of persons specified herein relating to the selection, ranking, or contract award in connection with any request for proposal, request for quotation, request for qualification, bid or

purchasing contract through direct or indirect oral or written communication. The final award of a purchasing contract shall be the effective date of the purchasing contract.

Any evaluation committee member, county government employee, elected/appointed official, or advisory board member who has been lobbied shall immediately report the lobbying activity to the director.

(Ord. No. 02-35, 5-7-02; Ord. No. 04-64, § 12, 9-21-04; Ord. No. 04-87, § 1, 12-7-04; Ord. No. 10-09, § 6, 2-16-10; Ord. No. 11-23, § 2, 7-26-11; Ord. No. 14-11, § 5, 2-11-14; Ord. No. 18-34, 10-23-18)

Editor's note(s)—Ord. No. 04-64, § 12, adopted Sept. 21, 2004, renumbered the former § 2-190 as § 2-189.

Sec. 2-190. Reserved.

Editor's note(s)—Ord. No. 18-34, adopted Oct. 23, 2018, repealed § 2-190, which pertained to sponsorships and derived from Ord. No. 05-52, § 1, adopted July 26, 2005.

Sec. 2-191. Reserved.

Editor's note(s)—Ord. No. 18-34, adopted Oct. 23, 2018, repealed § 2-191, which pertained to marina sales and services and derived from Ord. No. 07-32, § 1, adopted July 24, 2007.

Sec. 2-192. Reserved.

Editor's note(s)—Ord. No. 18-34, adopted Oct. 23, 2018, repealed § 2-192, which pertained to catering services and derived from Ord. No. 07-32, § 2, adopted July 24, 2007.

Secs. 2-193—2-195. Reserved.

Appendix D:
Pinellas County CCNA Policies/Procedures

SECTION 10: CONTRACTING FOR PROFESSIONAL SERVICES CONSULTANT COMPETITIVE NEGOTIATION ACT (CCNA)

1. INTRODUCTION

The purpose of this procedure is to provide guidance for hiring professional firms for architectural, engineering, landscape architecture, land survey and mapping services, design build and construction management services as per Florida Statute (F.S.) 287.055. The CCNA process allows for professional firms to be hired based on the ability of the firm and quality of personnel, minority business enterprise consideration, firm experience with projects of similar size and scope, firm's willingness to meet the schedule and budget requirements, volume of work previously awarded by the County, effect of the firms current and projected workload, location and past performance.

In addition, the County has the right, as an option, to bid construction management services and, design build contracts through an invitation to bid or request for proposal process as provided in F.S 255.20 (1), where price is considered in the award process. The option to bid construction management services and design build contracts shall be the sole option of the County.

2. RELEASE OF CCNA REQUEST FOR PROPOSALS

The Purchasing Department shall develop a request for proposal (RFP) document based on the needs of the requisitioning department and release the document per procedure established in the Purchasing Procedures. The RFP document shall contain a general description of the project and shall indicate the method and the time within which interested professional firms can provide their written responses. In addition, the RFP document shall contain a draft agreement, period of term and any potential contract extensions.

3. QUALIFICATION OF CONSULTANTS

The basis of judging qualifications shall be at the time of committee evaluation. The Purchasing Department shall maintain a list of firms by discipline capable of providing services. The firms contained on the list are not deemed to be qualified until judged by an evaluation committee.

4. EVALUATION OF CONSULTANTS

The evaluation committee shall review statements of qualifications and performance data submitted in response to a released RFP and "Short List" the most qualified firms accordingly. The process utilized to evaluate CCNA RFP's shall be the same process utilized for all other County RFP processes. This process of evaluation involves individual review with consensus scoring determined at a public meeting. By utilizing this process, CCNA RFP's will be consistent in approach will all other County RFP processes.

The evaluation committee shall select at least three (3) firms deemed to be the most qualified, if at least three (3) firms respond to the RFP. If there are less than three (3) firms responding to the RFP and after searching it is decided every effort was made to meet the requirements of F.S. 287.055, the County shall proceed with the evaluation process.

The evaluation committee may request public/oral presentations and/or shall request some type of discussions with a minimum of three (3) firms (if three firms submitted to the RFP). The oral presentation shall include a firms' understanding of the project and strength of the individual proposed team members as demonstrated; ability to furnish the required service within time and budget; and approach to the project and methods used to plan, design and administer the project. Each evaluation committee member shall rate each firm and the committee will decide on a total average combined score to determine the top ranked firm. If public/oral presentations are not conducted the ratings applied during the "short list" phase will determine the rank order of firms for negotiation.

5. DEFINITION FOR SHORT LIST OR INITIAL RANKING CRITERIA (May be modified based on needs or situation)

- A. Ability of Firm and its Professional Personnel, Willingness and Ability to Meet Schedule and Budget Based on Current and Projected Workload.

1. Reviews the level of qualifications and experience of the firm and project team and appropriateness of the organization of the project team.
2. Reviews the professional resources available to properly provide services as requested in the RFP document.
3. Reviews the project team to ensure the team proposed contains all of the critical disciplines required.
4. Prime team proposed should have exceptional professional resources to properly provide services.
5. The project manager and proposed team should be uniquely qualified to provide the desired services.
6. Evaluates the workload commitments that will impact the firm's ability to complete services on schedule.
7. The submittal should demonstrate that the firm has adequate time available and personnel to complete services on schedule and additional backup staffing capability in the event of unforeseen circumstances.

B. Firm Experience with Project of Similar Size and Past Performance

1. Reviews the firms experience with projects of similar size, type and scope and the performance on those specific projects.
2. The prime firm must have adequate, recent (within the past five years) experience with projects of similar type as defined in the RFP document.
3. Experience pertaining to specific Pinellas County projects may also be considered. Pinellas County staff shall not however furnish references for such projects.
4. The scope of services provided should represent projects that are similar to those defined in the RFP document.
5. The overall performance of the firm relative to projects of similar size and scope should be evaluated.

C. Volume of Work Previously Awarded by the County

Pre-populated by the Purchasing Department, the purpose of this criterion is to effect an equitable distribution of contracts. For Continuing Contracts, this criterion is evaluated based on dollars spent with a firm during the two (2) previous completed fiscal years through current date. For Non-Continuing Contracts this criterion is evaluated based on value awarded to a firm during the two (2) previous completed fiscal years through current date. The date utilized for establishing award shall be the date the Board of County Commissioners or Count Administrator initially awards the contract. The points are worth 5 percent of the overall points available and are distributed as follows:

\$0 - \$200,000 – five (5%) percent of points available

\$200,001 - \$400,000 – four (4%) percent of points available

\$400,001 – 600,000 – three (3%) percent of points available

\$600,001- \$800,000 – two (2%) percent of points available

\$800,001 - \$1,000,000 – one (1%) percent of points available

Over \$1,000,000 – zero (0%) percent of points available

Based on a typical 1000 point evaluation scoring process, a firm deemed to be in the \$0-\$200,000 category threshold would be allotted 50 points etc.

D. Minority Business Status

Provides points pre-populated by the Purchasing Department for minority business status as designated by the State of Florida. If the firm is designated as a minority business by the State of Florida, five (5%) percent of the total evaluation points are awarded (25 points). If the firm does not have minority business status as per the State of Florida, zero (0%) percent of the points available are awarded.

E. Pinellas County Small Business Enterprise (SBE) Status

Provides points pre-populated by the Purchasing Department for SBE status as designated by Pinellas County. To qualify, a firm or its sub consultants must be located in one of four (4) counties (Pinellas / Hillsborough / Pasco / Manatee) and have annual sales of goods/services not exceeding the maximum three (3) year average of three (3) million dollars or gross revenues not exceeding eight (8) million dollars for construction and not exceed a maximum three (3) year average of fifty (50) employees.

If the prime firm is certified as a Pinellas County SBE, 100 points will be awarded. If the prime firm is not a certified Pinellas County SBE and utilizes one (1) certified Pinellas County SBE as sub-consultant, fifty (50) points will be awarded. If the prime firm utilizes more than one (1) certified Pinellas County SBE as sub-consultant, seventy-five (75) points will be awarded. Failure to utilize certified sub-consultants, as presented in your submittal and evaluated accordingly may affect future awards to your company. A prime firm or sub-consultant must be certified through Pinellas County Economic Development as an SBE prior to submission of your proposal document. If the prime firm nor any of its sub-consultants are not certified as a Pinellas County SBE, zero (0%) percent of the points available will be awarded.

F. Location

Evaluates the location of the project team relative to Pinellas County including the prime firm and project manager. If firm has an established office located in Pinellas, Manatee, Hillsborough or Pasco counties, 25 points are awarded. If not, no points will be awarded.

6. DEFINITION OF PUBLIC/ORAL PRESENTATION CRITERIA

A. Understanding of Project

Evaluate the firm's understanding of the overall project including the scope of work which may include but is not limited to, studies performed that affect the project, key design elements and affect on the community involved. Evaluation of the firm's qualifications and qualifications of the individuals proposed for the project including the project manager and staff of the firm to be assigned. Qualifications shall include but not be limited to experience with similar projects, management experience, firm experience, etc.

B. Ability to Provide Required Services Within the Schedule and Budget

Evaluation of the firm's overall approach including experience in scheduling projects, systems that will be used to keep track of the project schedule, cost control, quality assurance and quality control, issues and methods employed to avoid cost overruns and project delays.

C. Managerial Methods Used to Plan, Design and Administer the Project:

Evaluation of the overall approach of the project proposed by the firm and the appropriateness of the methods proposed to plan, design and administer the project in relation to the scope of work and County requirements.

7. EVALUATION COMMITTEES

The CCNA evaluation committee shall consist of at least three (3) but typically not more than seven (7) members (unless deemed to be in the best interest of the County) based upon their expertise and association with the project. The evaluation committee must consist of at least one person from the requesting department or division of a department; however, the requesting department or division within a department cannot have majority representation on the evaluation committee. As an example, an evaluation committee consisting of three (3) representatives shall only contain one representative from the requesting department or division.

A multi divisional department can have a majority on the committee as long as the evaluators are from different divisions with the department.

The committee may consist of subject matter experts and professionals from outside of County government as deemed necessary. All representatives selected to CCNA evaluation committees must be approved by the CCNA Oversight Committee.

All evaluation committee members must be free of conflicts of any sort, either direct or indirect and must complete the applicable Conflict of Interest form prior to participation in an evaluation process.

All evaluation meetings are public meetings. The meeting is proctored by a representative of the Purchasing Department. Purchasing Department representatives cannot participate as a voting member on an evaluation committee. The CCNA evaluation committee may be convened at any time to address pertinent issues pertaining to the procurement process; however, any discussion regarding the actual evaluation of proposals must be advertised as a public meeting before the meeting can be held. Advertisement consists of posting the meeting on the official County calendar at least seven (7) days prior to the meeting.

The Purchasing Department shall provide a written summary of the evaluation proceedings. The written summary, at a minimum, shall set forth the names of the evaluation committee member's present and official action taken by the committee.

8. EVALUATOR POOL

The Director of Purchasing shall have the responsibility for developing and maintaining a pool of qualified evaluators to participate in CCNA evaluation committees. The pool of evaluators shall be composed of assorted subject matter experts, both internal and external to County government and be capable and willing to evaluate CCNA proposals. The evaluator pool shall not contain members from the Purchasing Department, Office of County Attorney or Board of County Commissioners. Procurement processes for certain specialized services may require the ad hoc addition of evaluators to assist in the evaluation process.

9. RANKING OF FIRMS

Members of evaluation committees shall review each proposal submitted during a competitive CCNA process. The evaluation committee will convene at a prescribed public meeting and score proposals based on defined scoring criteria. The evaluation committee shall select in order of preference, at least three (3) firms, if at least three (3) firms responded to the public solicitation. If less than three (3) firms respond, and after the Purchasing Department provides ample due diligence to comply with F.S. 287.055 requirements, the County will evaluate all respondents and proceed with the evaluation process. As an option, the County may conduct public/oral presentations with a minimum of three (3) firms (if three firms submitted).

Upon completion of firm ranking and oral presentations (if applicable), the Purchasing Department will work with the Managing Department to move forward with the negotiation process.

10. NEGOTIATION

Staff (usually the department managing the project) will negotiate a contract with the most qualified firm (number one ranked firm) for professional services. The Purchasing Department will be responsible for facilitating this process. Detailed discussions must be held by the firm and the County to clearly establish the scope of the project and the exact services to be performed by the firm. Should the County and firm fail to reach agreement, negotiations with the first firm are terminated and negotiations with the second ranked firm shall commence. If again unsuccessful, the process is repeated with the next ranked firm. The process is continued until a mutually agreeable contract is concluded or the procurement process is abandoned. Termination of negotiations with the first firm and commencement of subsequent negotiations does not require approval.

11. TRUTH IN NEGOTIATIONS

The successful professional firm shall execute a truth in negotiation certificate stating that wage rates and other factual unit costs supporting compensation are accurate, complete and current at the time of contracting. Any professional service agreement in which such a certificate is required shall contain a

provision that the agreement price shall be adjusted to exclude any significant sums where the County determines the agreement price was increased due to inaccurate, incomplete or noncurrent wage rates and other factual unit costs. All adjustments to the agreement, if any, shall be made within one (1) year following the end of the agreement.

12. AWARD

The final negotiated contract will be presented for approval per County code. Based upon the final negotiated contract, a contract which is \$100,000.00 or less in a fiscal or calendar year may be awarded by the director of purchasing; a contract which is \$250,000.00 or less in a fiscal or calendar year may be awarded by the county administrator and all contracts exceeding \$250,000.00 in a fiscal or calendar year shall only be awarded by the Board.

13. CONTINUING CONTRACTS

Per FS 287.055, a continuing contract is a contract for professional services entered into with all of the procedures of F.S. 287.055 between the County and a firm whereby the firm provides professional services to the agency for projects in which the construction costs do not exceed Florida Statute threshold, for a study activity where the fee for such professional services does not exceed Florida Statute threshold or for work of a specified nature as outlined in the contract required by the agency, with no time limitation except that the contract must provide a termination clause. The consultants on continuous contracts are selected to perform professional services on same or similar terms.

For each specific task to be performed regarding a continuing contract, the requesting department shall prepare or have prepared with the assistance of a consultant the tasked-out scope of work. The scope of work shall include only those services to be performed and should include as applicable but not limited to; time for completion, amount of compensation, and construction cost estimate.

Tasked out scope of services are narratively described and supported by a detailed spreadsheet of tasks and subtasks with distribution of appropriate man hours by job title for each task and subtask at rates from the continuing consultant's contract fee schedule. Assignments will be rotated among firms as feasible by the facilitating department based upon the specific discipline required, experience and qualifications of the firm.

Continuing contracts are evaluated as per the evaluation of consultants for all other CCNA contracts. Oral presentations are not required for the evaluation of continuing contracts and the criteria utilized to evaluate the firms will be the same as utilized for determining the short list of other CCNA contracts.

14. CCNA OVERSIGHT

The County Administrator shall appoint a minimum of three (3) members of his/her executive management team (Assistant County Administrators) to provide oversight of the CCNA process. Such oversight will pertain to but not be limited to: composition of evaluation committees, evaluator pool members, the evaluation process and any other matters deemed appropriate by the County Administrator.

Prior to the scheduling of CCNA evaluation meetings, the Purchasing Department shall be responsible for obtaining oversight approval of the committee members for the purpose of ensuring the committee is comprised of equitable members and that no apparent conflict exists. The Purchasing Department shall be responsible for obtaining CCNA oversight pertaining to the evaluation process to BCC consideration. The purpose of this oversight is to review the evaluation process and ensure no obvious discrepancies or conflicts exist.

15. DESIGN-BUILD SERVICES

Design-build services shall be governed by F.S. 287.055. The County shall award design-build contracts by the use of a qualifications-based selection process pursuant to F.S. 287.055(3) --287.055(5), or by use of the competitive proposal selection process set out in this section. The procurement of competitive proposal design-build services shall be made in accordance with the following rules and procedures:

- A. Design criteria package: The design criteria package shall be prepared and sealed by a design criteria professional employed or retained by the County. If the County enters into a professional services

contract for the preparation of the design criteria package, the professional shall be selected and contracted with in accordance with the requirements of F.S. 287.055(4) and 287.055(5). The professional preparing the design criteria package shall not be eligible to render services under a design-build contract executed pursuant to the package prepared by such professional.

- B. Selection/negotiation committee: The County shall publicly advertise in a uniform and consistent manner on each occasion when design-build services are required except in cases of valid public emergencies. The advertisement shall include a general description of the project and shall indicate how, and the time within which, interested design-build firms may apply for consideration.

Any firm or individual desiring to provide design-build services for the County must first be determined legally qualified. Legal qualifications are:

1. Firms must be properly certified to engage in contracting through a certified or registered general contractor or a certified or registered building contractor as the qualifying agent.
2. Firms must be properly certified to practice or to offer to practice engineering, architecture, or landscape architecture.
3. The firm shall be duly qualified to perform its proposed services under any other applicable law.

16. SOLICITATION AND NEGOTIATION OF DESIGN-BUILD SERVICES

A. Solicitation.

Requests for proposals shall be sent to all interested firms requesting that their qualifications, proposed design be submitted at a time and place certain. The request for proposal shall contain at a minimum the design criteria package; evaluation criteria, technical and design aspects of the project; evaluating procedures and any other information pertinent to selection and award of the design-build contract. As an option, per Florida Statutes, the County may incorporate price into the evaluation process.

B. Evaluation.

The committee shall review all proposals and identify no less than three firms deemed qualified (if three firms propose, see Section 10.8) to perform the required services based on the evaluation criteria contained in the procurement document. The committee shall then rank and short-listed firms based on the evaluation criteria set forth on the request for proposal. The committee may require oral presentations of short-listed firms. The average combined scores received for the written proposal and oral presentation will determine the final ranking of firms. Price will also be considered in the evaluation process if used as an optional criterion.

C. Negotiation.

After ranking, staff shall negotiate a contract within the parameters of the design criteria package. Design-build contracts will be awarded under the provisions of County Code.

D. Additional Functions of Design Criteria Professional

The design-criteria professional shall be consulted in the evaluation process, the supervision or approval of the County of the detailed working drawings of the project and for the evaluation of the compliance of the project construction with its design criteria package.

17. CONSTRUCTION MANAGER AT RISK SERVICES

A. Solicitation

Requests for proposals shall be sent to all interested firms requesting that their Letter of Interest; qualifications, general approach to the project and other information as requested in the RFP. The request for proposal shall contain at a minimum a narrative description of the project scope of work, evaluation criteria, evaluating procedures and any other information pertinent to selection and award of the CM contract.

B. Evaluation

The committee shall review all proposals and identify no less than three firms deemed qualified (if three firms propose, see Section 10.8) to perform the required services based on firm qualifications, availability and past work of the firm. The committee shall rank the short-listed firms based on the evaluation criteria set forth on the request for proposal. The committee may, at their option require oral presentations of short-listed firms. The average combined scores received for the written proposal and oral presentation will determine the final ranking of firms. As an option, price may be utilized as a criterion for evaluation.

C. Negotiation

After final ranking (after oral presentations if required), staff shall negotiate a contract within the parameters of the narrated scope of work description set forth on the request for proposal. CM contracts will be awarded under the provisions of Section 2-178(l) and other applicable provisions of this article.

Appendix E:
Pinellas County Indemnification Resolution

RESOLUTION 06-70

**A RESOLUTION RELATING TO CONTRACTUAL
INDEMNIFICATION BY THE COUNTY.**

WHEREAS, Pinellas County frequently enters into contractual relationships;

WHEREAS, these contracts vary from purchase orders to multimillion dollar contracts, to interlocal agreements;

WHEREAS, the County generally requires other contracting parties to indemnify the County for the negligence both of the contractor and of the County;

WHEREAS, many parties refuse to indemnify the County for the actions or inactions of the County and often seek to require the County to indemnify them for the actions of the County, its contractors, or third parties;

WHEREAS, the nature of the party, and the subject matter of the contract are factors in the County's decision making regarding risk assumption and indemnification;

WHEREAS, the County usually has refused to indemnify other entities for several reasons: 1) The County is entitled to sovereign immunity under the Florida Constitution and §768.28, Fla. Stat., and an indemnification could be interpreted as a contractual waiver of that sovereign immunity; 2) The Florida Constitution prohibits a County from pledging its credit to another entity and the indemnification could be viewed as a pledge of the County's credit; 3) Article VII Section 10 of the Florida Constitution, and §§129.06 and 129.07, Fla. Stats. require that a County limit its expenditures to the budgeted amounts, and contracts requiring expenditures in violation of these statutes are not only void,

but subject the commissioners voting and contracting for such amounts, and their individual bonds, to liability for any excess indebtedness contracted for; 4) §§129.08 and 129.09, Fla. Stats. provide for criminal liability for commissioners knowingly voting for such expenditures, and the clerk of the circuit court signing any payment thereon;

WHEREAS, currently various individuals make determinations relative to these indemnification or risk assumption decisions based on the nature, size, necessity or desirability of the agreement at issue;

WHEREAS, in advising various departments and bodies regarding these indemnification or risk assumption matters, the County Attorney's Office has caused the phrase, "to the extent permitted by law" to be added to clauses wherein the County purports to indemnify another entity;

WHEREAS, the County Attorney's Office interpretation has been that due to all of the constraints listed above, "the extent permitted by law" is -- not at all, and that the indemnification of another entity is a void *ab initio* action with no effect;

WHEREAS, certain legal precedents have come out that could be construed to undermine the County Attorney's Office interpretation;

WHEREAS, American Home Assurance Company v. National Railroad Passenger Corporation, 908 So.2d 459 (Fla. 2005) (*holding that a municipality could contractually be held liable under an indemnification provision despite sovereign immunity defenses raised*), and Florida Department of Natural Resources v. Garcia, 753 So.2d 72 (Fla. 2000) (*holding that the City of*

Miami could indemnify the State of Florida despite a statutory provision that prohibits one governmental entity from indemnifying a second governmental entity for the second entity's negligence) are two cases that raise potential problems for the interpretation previously relied upon by the County Attorney's Office;

WHEREAS, the County Attorney's Office has been in contact with other County Attorney's Offices, reviewed the widely varying policies thereof, and has researched and discussed the matter internally;

WHEREAS, it is the opinion of the County Attorney's Office that the most conservative and safest course of action is to never indemnify another party;

WHEREAS, as a practical matter, it is sometimes necessary, to achieve policy goals that are in the best interests of the County, to take on the risk of such an indemnity provision; and

WHEREAS, the Board of County Commissioners hereby finds that there is a need for the County to implement a uniform policy and methodology for the review of matters relating to contractual risk assumption or indemnification of other entities by the County.

NOW THEREFORE BE IT RESOLVED by the Pinellas County Board of County Commissioners as follows:

I. The County Policy is that the County does not indemnify other parties. That Policy may only be waived based on certain factors such as:

- 1) the availability of the goods or services from other sources;
- 2) the County's need/desire for the goods or services;
- 3) the probability of a loss occurring.

II. County policy not to indemnify others should not be waived lightly and when done, shall conform to the following requirements:

- 1) The other entity must have refused, in writing, to remove all indemnification requirements requested of the County directly, and refused to allow a statement that each party be responsible for its own negligence to take the place of the indemnification provision.
- 2) No indemnification by the County for the acts of any entity other than the County, its Governing Body, or its employees shall be approved. Particularly, no contract shall be entered into that requires the indemnification for acts or omissions of third parties, or third party agents of the County.
- 3) County indemnification of a party shall specifically be limited to the lesser of the contract amount, or the limits of sovereign immunity under §768.28, Florida Statutes (\$100,000/\$200,000). Recovery shall be limited contractually to the actual damages incurred as a result of County's sole negligence. No recovery of attorney's fees and costs should be permitted.
- 4) County indemnification shall specifically be limited to traditional liabilities for which the County could be held liable under common law interpreting the limited waiver of sovereign immunity (i.e. no waiver of sovereign immunity for planning functions or otherwise). Language shall also be included that states that any claim must comply with the procedures found in §768.28, Fla. Stat. for such tort claims.
- 5) County indemnification requires specific individual review through the contract review process which must include, at a minimum, the Clerk of the Circuit Court, the County Attorney's Office, the County Risk Management Department, and the County Administrator's Office.

III. To the extent possible, and after consideration as outlined above, the following language is to be used for the County to indemnify another party (Contractor):

County hereby agrees to indemnify the Contractor for claims brought against the Contractor only to the extent that they are found to result from the sole negligence of the County, its governing body, or its employees. This indemnification shall not be construed to be an indemnification for the acts, or omissions of third parties, independent contractors or third party agents of the County. This indemnification shall not be construed as a waiver of the County's sovereign immunity, and shall be interpreted as limited to only such traditional liabilities for which the County could be liable under the common law interpreting the limited waiver of sovereign immunity. Any claims against the County must comply with the procedures found in §768.28, Florida Statutes. In order to comply with the requirements of §129.06, Florida Statutes, and Article VII,

section 10 of the Florida Constitution, the value of this indemnification is limited to the lesser of the amount payable by either party under the substantive provisions of this Agreement, or the limitations of §768.28, Florida Statutes. In addition, this indemnification shall be construed to limit recovery by the indemnified party against the County to only those damages caused by County's sole negligence, and specifically not include any attorney's fees or costs associated therewith.

IV. Notwithstanding any contractual authority delegation to the contrary, any indemnification provisions entered into by the County other than that listed in paragraph III. may only be entered into at the specific direction of the County Administrator or his designee, and only after review by the County Attorney's Office. Any indemnity provision entered into pursuant to this subsection IV shall be reported to the Board of County Commissioners in arrears no less than quarterly.

Commissioner Morroni offered the foregoing resolution and moved its adoption, which was seconded by Commissioner Seal, and upon roll call the vote was:

AYES: Duncan, Stewart, Harris, Seal, and Morroni.

NAYS: None.

ABSENT AND NOT VOTING: Welch and Latvala.

Bryant
Miller
Olive



CCLG Certification Review Procurements March 16, 2023

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Course Materials

- I. Governing Law
- II. Competitive Procurement Methods
- III. Bid Protests
- IV. Local Preference
- V. Sunshine Law
- VI. Contract Performance
- VII. Ethical Considerations
- VIII. Emerging Procurement Issues
- IX. Practical Pointers

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2

Law School Lesson

Who is
suing
who for
what?



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3

A Framework

Who...

...is acquiring...

...what...

...from whom...

...and with whose money?



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...and with whose money?

4

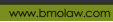
... With Whose Money?

The flowchart illustrates the flow of transportation funding from three levels of government to the transportation system. The funding sources are categorized as 'Own-source revenue'.

- Federal government:**
 - Receives \$98 billion in own-source revenue.
 - Provides \$1 billion to the Transportation system.
 - Provides \$46 billion to the State government.
- State government:**
 - Receives \$11 billion from the Federal government and \$80 billion in own-source revenue.
 - Provides \$103 billion to the Transportation system.
 - Provides \$23 billion to the Local government.
- Local government:**
 - Receives \$73 billion in own-source revenue and \$23 billion from the State government.
 - Provides \$107 billion to the Transportation system.

Transportation system: Receives a total of \$211 billion from the three government levels (\$1 billion from Federal, \$103 billion from State, and \$107 billion from Local).

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... With Whose Money?

Broadband Infrastructure Funding

Y-axis: Broadband Infrastructure Funding (\$M) from \$0 to \$35,000.

X-axis: Years from 2019E to 2027E.

Legend:

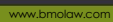
- Baseline Funding (CAF, USDA)
- Fib & Rngwrk (EAS)
- Competing Solutions Act (CSA)
- State Funds (MRA)
- BEAD (Infrastructure)
- RDOF Phase I
- T-1 Natl Broadband (CAN)
- Next Connect Program (NCP)
- Local Funds (LRF)
- T-1 Natl Broadband (AMP)
- RDOF Phase II
- Broadband Infrastructure (CAN)
- USDA ReConnect (USDA-Reconnect)
- Capital Projects Funds (CPMF)

Annotations:

- Lack of installation resources will push projects into the future (pointing to the 2023E peak).
- Labor Supply can grow at 15%/yr (pointing to the projected growth line starting in 2023E).

Jeffries Equity Research
- George Nottor

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... With Whose Money?

- \$2 trillion Coronavirus Aid, Relief, and Economic Security (CARES) (Mar. 2020)
- \$1.9 trillion American Rescue Plan (Mar. 2021)
- \$1.2 trillion Infrastructure Investment and Jobs Act (Nov. 2021)

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7

... What ...

Finance



Operate



Design



Maintain



Build



Own



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8

8

Question?

- You require highly-specialized equipment, available only from a sole provider. The equipment requires specialized installation and housing. The provider, along with its offer to sell the equipment, proposes to engage its trusted and experienced licensed contractor, to design and construct the facility to house the equipment. OK to purchase?

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Answer

- You require highly-specialized equipment, available only from a sole provider. The equipment requires specialized installation and housing. The provider, along with its offer to sell the equipment, proposes to engage its trusted and experienced licensed contractor, to design and construct the facility to house the equipment. OK to purchase?
- No. You "may not contract with an equipment vendor under a sole source contract ..., such that the vendor contracts with a licensed general contractor to provide design/build construction services to erect a storage facility for the equipment, without complying with [the CCNA], for those services covered by the act."

AGO 2009-49

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10

Question?

- Your wonderful developer has designed and built an attraction that city residents love to visit and use. The developer specializes in managing such facilities, so you included a property management contract in your competitively negotiated turn-key project solicitation. OK?

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Answer

- Your wonderful developer has designed and built an attraction that city residents love to visit and use. The developer specializes in managing such facilities, so you included a property management contract in your competitively negotiated turn-key project solicitation. OK?
- No. "Competitive bidding and competitive negotiation are different methods for selecting from offers.... An agency may engage in competitive negotiation to obtain certain professional services... [A] property management contract is not among the defined professional services."

Miami Marlins Ass'n v. City of Miami, 408 So. 2d 615 (Fla. 3d DCA 1981) Today?

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... Is Acquiring ...

"Acquisition" means the acquiring by contract with appropriated funds of supplies or services (including construction) by and for the use of the [govt] through purchase or lease, whether the supplies or services are already in existence or must be created, developed, demonstrated, and evaluated.

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... Is Acquiring ...

Acquisition begins at the point when [govt] needs are established and includes the description of requirements to satisfy [govt] needs, solicitation and selection of sources, award of contracts, contract financing, contract performance, contract administration, and those technical and management functions directly related to the process of fulfilling [govt] needs by contract

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Sample Question

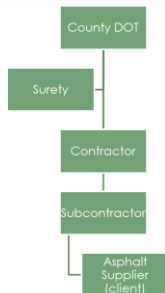
5. You represent an asphalt supplier to a subcontractor to a contractor for Pretty DOT in Pretty County, Florida. Pretty has paid the contractor, and supposedly, the contractor paid the subcontractor, in full and received a general release in favor of itself and the surety. However, the subcontractor did not pay your client. The contractor and subcontractor have filed for bankruptcy protection. Your client wants payment from the performance bond, even though your client failed to comply with all of the notice and time requirements contained in section 255.05(2) when perfecting these claims. You advise your client:
- Statutory notice and time limitation provisions may be enforceable, even where bond at issue does not contain reference to those provisions as required by statute.
 - The bond should be treated as a "common law bond," subjecting the bond to the more general statute of limitations because the bond did not contain the notice essential by statute.
 - The statute only applies to state buildings, and not roads constructed by counties.
 - To sue Pretty County, because they should have caught the mistake during their procurement process.

Answer: A

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Framework



A person entering into a formal contract with the state or any **county**, city, or political subdivision thereof, or other public authority or private entity, for the construction of a public building, for the prosecution and completion of a **public work**, or for repairs upon a public building or public work shall be required ...

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255.05 Bond

making payments to all persons defined in s. **713.01** who furnish labor, services, or materials for the prosecution of the work provided for in the contract.

- (18) "Lienor" means a person who is:
- (a) A contractor;
 - (b) A subcontractor;
 - (c) A sub-subcontractor;
 - (d) A laborer;
 - (e) A materialman who contracts with the owner, a contractor, a subcontractor, or a sub-subcontractor; or
 - (f) A professional lienor under s. 713.03;

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The Issue and Answer

American Home Assurance Company v. Plaza Materials Corp., 908 So. 2d 360 (Fla. 2005) (4-3)

"The payment bond provisions of all bonds required by subsection (1) shall be construed and deemed statutory payment bonds furnished pursuant to this section and such bonds shall not under any circumstances be converted into common law bonds." § 255.05(4), Fla. Stat. (added in 2005)

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"Black Letter" Statutes – 112

- Solicitation or acceptance of gifts (bribes) (§ 112.313(2); see also 838.014 to 838.22)
- Unauthorized compensation (gift for influence) (§ 112.313(4))
- Misuse of public position (§ 112.313(6))
- Disclosure or use of certain information (§ 112.313(8))
- Doing business with one's agency (§ 112.313(3))
- Conflicting employment or contractual relationship (§ 112.313(7))
- Voting conflicts (§ 112.3143(3)(a))

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"Black Letter" Statutes – Sunshine

- "Agency" means any ... business entity acting on behalf of any public agency. (119.011(2))
- § 119.0701 (Contracts; public records; request for contractor records; civil action)
- § 119.071(1)(b) (temporary exemption during procurement process – see also § 286.0013 (meeting exemption))
- **Note:** Similar exemptions in § 255.065(15) expired Oct. 2021

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"Black Letter" Statutes

- 125 and 189 – counties and special districts
- 180.24, 255.0525, and 255.20 – advertising
- 255.05 – bonds
- 255.065 – public private partnerships***
- 688 and 812.081 – trade secrets***

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"Black Letter" Statutes – 287.055

1) Short Title	6) Prohibition Against Contingent Fees
2) Definitions	7) Authority of DMS
3) Public Announcement and Qualification Procedures	8) State Assistance to Local Agencies
4) Competitive Selection	9) Applicability to Design-Build Contracts
5) Competitive Negotiation	10) Reuse of Existing Plans
	11) Construction of Law

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Recent Cases

- *Tallahassee Corp. Ctr. v. DMS*, No. 1D21-2007 (1st DCA Nov. 30, 2022) – "deferred" payment and non-appropriation
- *Constr. Consulting, Inc. v. Trustees of Broward College*, 347 So. 3d 14 (Fla. 4th DCA 2022) – prompt payment statutes do not prohibit waiver of an interest claim as part of a settlement or an accord and satisfaction
- *City of Cocoa v. Villas of Cocoa Village*, 343 So. 3d 122 (Fla. 5th DCA 2022) – terminating negotiations after almost three years and canceling RFP

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Recent Cases

- *City of Miami v. Cruz*, 342 So. 3d 741 (Fla. 3d DCA 2022) – contractual waiver of sovereign immunity
- *Fla. Env'tl. Reg. Specialists, Inc. v. Fla. Dep't Env'tl. Prot.*, 342 So. 3d 710 (Fla. 1st DCA 2022) – contract termination
- *Managed Care v. Fla. Healthy Kids*, 268 So. 3d 856 (1st DCA 2019) – trade secrets in proposal
- *Northwood Assocs. v. Ertel*, 265 So. 3d 665 (1st DCA 2019) – non-appropriation not impairment
- *Biscayne Marine Partners v. Miami*, 2019 WL 575327 (3d DCA 2019) – standard of certiorari review

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Recent AGOs

- Tourist development tax to fund contract (2021-02) (& 2020-02, 2019-13, 2019-02, 2017-01, 2016-18)
- Hybrid process to select construction manager (2017-02)
- Hybrid process to award construction contracts (2011-21)
- Alternate forms of security under 255.05 (2015-04)
- Continuing contracts under CCNA (2013-28)

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Recent Legislation

- Ch. 2022-216 – Evidence of vendor financial stability; adding new subsection 287.057(27)

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A Framework

Who...

...is acquiring...

...what...

...from whom...

...and with whose money?

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Thank You!

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Public Finance

By

**Kareem Spratling and Rhonda Bond-
Collins, Bryant Miller Olive, Tampa**

PUBLIC FINANCE

Rhonda D. Bond Collins
Kareem J. Spratling
Bryant Miller Olive P.A.

2023 CITY, COUNTY AND LOCAL GOVERNMENT LAW CERTIFICATION COURSE

This presentation addresses the basic constitutional and statutory provisions governing the issuance of debt obligations by cities, counties and local governments in the State of Florida and also covers certain SEC rules regarding disclosure requirements related to such debt obligations. This presentation is not intended to be an exhaustive reference source on public finance matters in Florida. Rather, it is intended to be a general review of public finance information relevant to attorneys representing cities, counties and local governments. The information included in the written materials has been derived from the written materials prepared for other Florida seminars, as well as the biennial Public Finance in Florida seminars including, in particular, "Overview of Local Government Borrowing Authority," by Randall W. Hanna. The outline has been updated over the years by Rhonda D. Bond-Collins, Grace E. Dunlap, Brooke A. Gonzalez and Kareem J. Spratling of Bryant Miller Olive, and previously by Alexandra M. MacLennan of Squire Patton Boggs.

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APPENDIX A - TOP 10 BOND CASE GROUPS

I. SUMMARY OF CLASSIFICATIONS OF MUNICIPAL BONDS

Municipal debt obligations may be classified in several different ways. Under the laws of most states and under Florida law, two significant classifications of public debt are used:

A. General Obligation Bonds

1. A general obligation bond is secured by the full faith and credit of an issuer with taxing power and is secured by a pledge of such taxing power. Article VII, Section 12 of the Florida Constitution provides that counties, municipalities, special districts and local governmental bodies with taxing powers may issue bonds or other indebtedness payable from ad valorem taxation and maturing more than twelve (12) months from issuance only to: (i) finance or refinance capital projects authorized by, and when approved by, a vote of the electors, or (ii) to refund outstanding bonds and interest and redemption premium thereon at a lower net average interest cost rate.

Therefore, local governments may issue bonds payable from ad valorem taxation and maturing within twelve (12) months without a referendum. Examples include tax anticipation notes, such as those often issued by school districts, and other short-term cash flow financing measures such as commercial bank loans and lines of credit. See also the discussion of obligations which are "subject to annual appropriation" such as equipment leases and certificates of participation discussed below.

2. Bonds subject to the referendum requirement may only be issued for "capital projects." Art. VII, § 12(a), Fla. Const. That means the general operating expenses of a government cannot be financed with general obligation bonds.

3. A general description of the provisions of Florida law relating to the holding of a referendum election may be found in Chapter 100 and Chapter 101, Florida Statutes. Additionally, bond referendum matters are discussed in more detail below.

4. Generally, a second referendum is not required for bonds issued to refund or refinance bonds which were subject to the referendum if the refunding or refinancing results in a lower net average interest rate.

B. Revenue Bonds

Revenue bonds are debt obligations as to which the full faith and credit of an issuer with taxing power is not pledged. Revenue bonds are payable from specific sources of revenue, and do not permit the bondholders to compel taxation or legislative appropriation of funds not pledged for payment of debt service. See *State v. Fla. Dev. Fin. Corp.*, 650 So. 2d 14, 17-18 (Fla. 1995). Pledged revenues may be derived from operation of the financed project, grants, fees and excise or other specified non-ad valorem taxes. Generally, no voter approval is required under state law prior to issuance of such bonds. Most bonds issued by local governments in Florida are revenue bonds. See *Volusia Cty. v. State* for a discussion of how bonds payable from non-ad valorem revenues may be considered an indirect pledge of ad valorem taxation and therefore

subject to the referendum requirement described above. 417 So. 2d 968 (Fla. 1982); *see also Webster v. N. Orange Mem'l Hosp. Tax Dist.*, 187 So. 2d 37 (Fla. 1966).

C. Types of Revenue Bonds

As described above, revenue bonds are generally classified in Florida as all bonds or other debt obligations other than general obligation bonds. These bonds may be categorized in several different classes:

1. Typical Revenue Bonds

Examples of typical revenue bonds include bonds payable from utility revenues, such as water and sewer revenues. However, other examples of revenue bonds include those payable from various sources of non-ad valorem revenues, such as excise taxes, gas taxes or state revenue sharing moneys. Examples of state shared revenues include Guaranteed Entitlement Revenues and the Local Government Half-Cent Sales Tax.

Local governments in Florida also commonly issue bonds secured by a covenant of the local government to budget and appropriate legally available non-ad valorem revenues for the payment of debt service. Such bonds are not secured by a specific lien upon or pledge of specific non-ad valorem revenues. Such covenant is subject to the requirement that the local government pay for all essential governmental services. This type of covenant is structured to address the concerns raised in *Volusia Cty. v. State* cited above. The question of what constitutes an essential governmental service is subject to judicial interpretation. *See Washington Shores Homeowners' Ass'n v. City of Orlando*, 602 So. 2d 1300 (Fla. 1992); *see also, State v. Tampa Sports Auth.*, 188 So. 2d 795 (Fla. 1966).

2. Certificates of Participation

In the late 1980's and early 1990's, local governments began searching for additional and innovative methods of financing local government projects. This was especially true for school districts where there are very limited sources of non-ad valorem revenues. Certificates of participation represent an undivided interest in lease payments from a governmental unit. The local government enters into a lease agreement with a not for profit corporation. In order to provide the costs of the project, the trustee sells interests in the lease agreement to outside investors. These outside investors hold a certificate representing the right to participate in the lease payments. The lease is subject to appropriation each year by the governmental unit. The lease term coincides with the fiscal year of the issuer, and if no appropriation is made, the lease terminates. Therefore, this lease may be payable from any revenues of the local government, including ad valorem taxes. *See State v. Sch. Bd. of Sarasota Cty.*, 561 So. 2d 549 (Fla. 1990); *see also, State v. Brevard Cty.*, 539 So. 2d 461 (Fla. 1989). Recent case law has confirmed this method of finance. In *Miccosukee Tribe of Indians of Fla. v. S. Fla. Water Mgmt. Dist.*, the Florida Supreme Court upheld the validity of certificates of participation to acquire land from U.S. Sugar Corporation for restoration of the Florida Everglades. 48 So. 3d 811 (Fla. 2010).

3. Equipment Leases

a. Typically used for computer, vehicle and other equipment financings.

b. Annual lease payments are subject to appropriation and no revenue stream is pledged. Very similar to Certificates of Participation discussed above, however, on a smaller scale without the public issuance and sale of participation certificates. However, some form documents from vendors include a covenant to budget and appropriate the lease payments each year, which would make that particular transaction more akin to general revenue bonds.

c. Remedies under an equipment lease should be limited to traditional lease remedies, such as return of property. Foreclosure cannot be a remedy (without a referendum) as discussed below due to the restrictions on a local government's ability to mortgage property or grant a security interest in property (other than a revenue stream).

4. Conduit Bonds

a. This broad category includes conduit bonds issued by local Industrial Development Authorities, Housing Finance Authorities, Health Facility Authorities and other governmental units on behalf of an underlying borrower. These bonds may also be issued directly by cities and counties and some other governmental units. These bonds are typically payable solely from revenues derived from loan, lease or installment sale payments with the private party utilizing the bond proceeds.

b. These bonds are specifically authorized by statute (e.g., Chapters 243 (Educational Facilities), Chapter 154 (Health Facilities), Chapter 159 (Industrial Development, Housing Development, Research Development)).

5. Community Redevelopment Agency/Tax Increment Bonds

Bonds issued under Chapter 163, Florida Statutes for purposes of community redevelopment may be payable from the "tax increment" or the difference between the assessed value of the property before and after the redevelopment project (so called "TIF Bonds"). *See State v. Miami Redevelopment Agency*, 392 So. 2d 875 (Fla. 1980); *see also, Holloway v. Lakeland Downtown Dev. Auth.*, 417 So. 2d 963 (Fla. 1982). In 2008, the Florida Supreme Court confirmed this method of finance; in *Strand v. Escambia Cty.*, the Florida Supreme Court reversed its earlier opinion issued in 2007, which had reversed a circuit court's judgment validating TIF Bonds proposed for issuance by Escambia County, and upheld the constitutionality of tax increment financing without referendum approval. 992 So. 2d 150 (Fla. 2008).

6. Special Assessment Bonds

Since special assessments do not constitute ad valorem taxation, bonds payable from special assessments on property specially benefitted from the improvements are considered revenue bonds.

D. Public Offerings/Private Placements

1. Public Offerings

Bonds offered through an underwriting by an investment banking firm acting on behalf of the government are referred to as "publicly offered." Publicly offered municipal bonds involve the preparation and distribution of offering materials (typically referred to as an official statement) to prospective purchasers of the bonds.

2. Private Placements

Unlike a public offering, a private placement typically involves the purchase of a single bond for the entire par amount of the issue by a financial institution which will hold the bond as security for the loan of the proceeds of the bond to the government.

II. PREREQUISITES TO ISSUANCE

A. Constitutional Restrictions

1. Public Purpose

a. Projects to be financed by municipalities must constitute a valid municipal purpose. Municipalities have governmental, corporate and proprietary powers to enable them to conduct municipal government, perform municipal functions and render municipal services, and may exercise any power for municipal purposes except as otherwise provided by law. Art. VIII, § 2(b), Fla. Const.; *see also*, *State v. City of Sunrise*, 354 So. 2d 1206 (Fla. 1978); *Poe v. Hillsborough Cty.*, 695 So. 2d 672 (Fla. 1997).

b. Charter counties have all powers of local self-government not inconsistent with general law. Art. VIII, § 1(g), Fla. Const.; *see also* *State v. Broward Cty.*, 468 So. 2d 965 (Fla. 1985).

c. Non-Charter Counties have such powers of self-government as is provided by general or special law. The board of county commissioners of a county not operating under a charter may enact county ordinances not inconsistent with general or special law. *Speer v. Olsen*, 367 So. 2d 207 (Fla. 1978); *State v. Orange County*, 281 So. 2d 310 (Fla. 1973); *Fillingim v. State*, 446 So. 2d 1099 (Fla. 1st DCA 1984); *Taylor v. Lee Cty.*, 498 So. 2d 424 (Fla. 1986).

d. What constitutes a public purpose has changed over the years. Great deference is paid to a legislative finding of public purpose. Generally, courts will not overturn legislative findings of public purpose unless clearly erroneous. *See Miccosukee Tribe of Indians of Fla. v. S. Fla. Water Mgmt. Dist.*, 48 So. 3d 811 (Fla. 2010); *Strand v. Escambia Cty.*, 992 So. 2d 150 (Fla. 2008); *see e.g., Boschen v. City of Clearwater*, 777 So. 2d 958 (Fla. 2001).

2. No Lending of Credit

Article VII, Section 10 of the Florida Constitution, prohibits municipal corporations from giving, lending or using their taxing power or credit to aid any corporation, association, partnership or person. *Miccosukee Tribe of Indians of Fla. v. S. Fla. Water Mgmt. Dist.* contains a detailed analysis of this constitutional provision and the public purpose test to be met before a municipality's credit may be pledged to a bond issue. 48 So. 3d 811 (Fla. 2010); *see also Jackson-Shaw Co. v. Jacksonville Aviation Auth.*, 8 So. 3d 1076 (Fla. 2008); *see e.g., State v. Miami Beach Redevelopment Agency*, 392 So. 2d 875 (Fla. 1980). The lending of credit test is closely related to the public purpose test described above.

3. No Mortgage

Generally, local governments may not secure debt obligations with a mortgage on public property. *See Nohrr v. Brevard Cty. Educ. Facilities Auth.*, 247 So. 2d 304 (Fla. 1971). In 1987, the Florida Supreme Court in *Wilson v. Palm Beach Cty. Hous. Auth.* modified the mortgage restriction to only those governmental units with ad valorem taxing power. 503 So. 2d 893 (Fla. 1987).

This restriction on mortgages includes granting security interests in property, including purchase money security interests. This issue is raised particularly in the area of equipment and other leasing as discussed above, as well as installment sales. Under this rule, a local government with taxing power may not grant a security interest in public property, absent voter approval.

This rule does not apply, however, to the pledging of a revenue stream to the repayment of debt.

4. Extraterritorial Powers

The exercise of extra-territorial powers by municipalities shall only be as provided by general or special law. Art. VIII, § 2(c), Fla. Const. Therefore, to extend powers beyond corporate limits of municipality requires specific statutory authority.

Chapter 180, Florida Statutes, authorizes the extension of utility services outside the corporate limits of a municipality. Florida case law does not specify a limitation of the geographic area in which a municipality may extend its municipal utility services. In *State By & Through Overstreet v. City of Cocoa*, where the city charter granted the city authority to extend its water system beyond city limits, the court held there was no abuse of authority by the city in extending its water mains 20 miles beyond city limits when evidence supported the finding of the

urgent need for water. 92 So. 2d 537 (Fla. 1957). The Florida Supreme Court has upheld the exercise of extraterritorial powers, particularly with respect to proprietary projects, by municipalities where such powers are supported by or derived from a legislative grant. *See Town of Riviera Beach v. State*, 53 So. 2d 828 (Fla. 1951); *see State v. City of Pensacola*, 197 So. 520 (Fla. 1940); *see Town of Palm Beach v. City of West Palm Beach*, 239 So. 2d 835 (Fla. 4th DCA 1970); *see also, City of Ocala v. Red Oak Farm, Inc.*, 636 So. 2d 81 (Fla. 5th DCA 1994). On April 18, 2019 the Supreme Court of Florida ruled on an extraterritorial powers case. *Halifax Hosp. Med. Ctr. v. State*, 278 So. 3d 545 (Fla. 2019). Halifax (a special district) was found not to be authorized to undertake a project outside of its geographic boundaries notwithstanding its interlocal agreement with the City of Deltona. *Id.*

Section 125.01(1)(p), Florida Statutes, provides that a county has the power to enter into agreements with other government units within or outside the boundaries of the county for joint performance or for performance by one unit on behalf of the other for any of either agency's authorized functions.

B. Statutory Authorization and Statutory Restrictions

1. Typical Revenue Bonds and General Obligation Bonds

Part II of Chapter 166, Florida Statutes, contains the basic home rule power for cities to issue bonds or incur debt. Chapter 125, Florida Statutes, provides basic authority for counties to issue bonds. Other authority is contained in Chapters 132, 153 and 159, Florida Statutes. Interestingly, Chapter 166, Part II, Florida Statutes, authorizes the issuance of revenue bonds for "any capital or other project." *See Op. Att'y Gen. Fla. 89-58* (1989).

2. Certificates of Participation/ School Districts

There are certain statutory provisions relating to the lease purchase of facilities for school districts (Section 1013.15, Florida Statutes) and counties (Section 125.031, Florida Statutes). Cities may enter into lease purchase transactions under home rule powers. School Districts undertaking capital outlay loans must comply with Section 1011.14 Florida Statutes, which includes a provision that the amount of certain loans cannot exceed one-fourth of the school district's ad valorem tax revenues for the preceding year. *See also Fla. Stat. § 1013.64* (regarding school districts).

3. Conduit Bonds

Chapters 159, Parts II and III, Florida Statutes, provides basic authority for issuance of a broad range of conduit bonds. Examples include bonds issued for manufacturing facilities, tourism facilities, educational facilities and social service facilities. These bonds may not be payable from revenues of the issuer, other than revenues received under the loan agreement. *See State v. Dade Cty.*, 250 So. 2d 875 (Fla. 1971); *see State v. Putnam Cty. Dev. Auth.*, 249 So. 2d 6 (Fla. 1971); *see State v. Leon Cty., Fla.*, 410 So. 2d 1346 (Fla. 1982).

Chapter 154, Part III, Florida Statutes, provides authority for the issuance of bonds to finance health facilities.

Chapter 159, Part IV, Florida Statutes, provides authority for the issuance of bonds to finance housing projects, including both single family and multi-family projects. Article VII Section 16 of the Florida Constitution provides that when authorized by law, revenue bonds may be issued without an election to finance or refinance housing or related facilities in Florida. Chapter 159, Part IV, Florida Statutes, provides that each county of the state may create a housing finance authority in order to facilitate the construction and rehabilitation of housing for low income families through the use of public financing.

4. Community Redevelopment Agency and Tax Increment Bonds

Part III of Chapter 163, Florida Statutes, establishes the Community Redevelopment Act. Any county or municipality may create a community redevelopment agency by finding that one or more slums or blighted areas, or one or more areas in which there is a shortage of housing affordable to residents of low or moderate income exist in the community and that rehabilitation, conservation or redevelopment of such an area is necessary in the interest of the public health, safety, morals or welfare of the residents. The purpose of the redevelopment project is the elimination and prevention of the development or spread of slums and blight or for the provision of affordable housing, whether for rent or for sale, to residents of low or moderate income.

"Slum area" or "blighted area" may not be limited to typical downtown areas needing revitalization. Section 163.340(8), Florida Statutes, provides a definition and factors to consider for determining a "blighted area". *See e.g. Panama City Beach Cmty. Redevelopment Agency v. State*, 831 So. 2d 662 (Fla. 2002) (holding that undeveloped land may qualify as a blighted area); *see also, Strand v. Escambia Cty.*, 992 So. 2d 150 (Fla. 2008).

Section 163.385, Florida Statutes, authorizes the governing body of a county or municipality to issue redevelopment revenue bonds and refunding bonds to finance any undertaking of any community redevelopment plan.

5. Special Assessment Bonds

a. A special assessment is a charge imposed against property in a particular locality because that property receives a special benefit by virtue of some public improvement, separate and apart from the general benefit accruing to the public at large. Special assessments must be apportioned according to the value of the benefit received, rather than the cost of the improvement, and may not exceed the value of such benefit or the cost of the improvement.

b. Chapter 170, Florida Statutes, is the general law providing for special assessments for municipalities. Assessments for counties are generally levied pursuant to an ordinance enacted under Chapter 125, Florida Statutes.

c. Chapter 170, Florida Statutes, authorizes special assessments for statutorily enumerated projects. Section 170.11, Florida Statutes, provides that bonds may be issued to an amount not exceeding the amount of liens assessed for the cost of improvements to be paid by special assessment. The equalization, approval and confirmation of the levying of the special assessments for improvements must be completed before the governing authority authorizes the issuance of the bonds.

d. An alternative form of authority may be in the form of a municipal ordinance adopted in accordance with home rule powers. In *City of Boca Raton v. State*, the Florida Supreme Court held that a City has the power to impose special assessments under its home rule power. 595 So. 2d 25 (Fla. 1992). Thus, municipalities are able to broaden the qualifying projects and simplify the procedural requirement by an enactment of alternative authority for the imposition of special assessments.

e. Chapter 153, Florida Statutes, also provides statutory authority for the imposition of special assessments by counties in connection with improvements to a water and sewer system, as well as the authority for the issuance of bonds for water and sewer system improvements, including acquisitions.

f. Special assessments and home rule powers in general are addressed in a separate outline.

6. Others

a. Chapter 159, Part VII, Florida Statutes, provides the procedure for issuing taxable bonds.

b. Chapter 190, Florida Statutes, provides authority for issuance of bonds by Community Development Districts.

c. Chapter 189, Florida Statutes, provides restrictions on issuance of certain types of debt by special districts.

d. Section 129.07, Florida Statutes, provides a limitation on Counties on entering into a contract or expending county funds in excess of amounts appropriated in the budget. Contractual provisions in debt instruments requiring a Florida County to pay amounts which are not quantified and are open ended should be analyzed under this statute and under the process for budgetary amendments.

e. Section 768.28, Florida Statutes, provides a limited waiver of sovereign immunity in tort actions by the State or any of its agencies or subdivisions. Sovereign immunity can be waived by contract. *See Am. Home Assur. Co. v. Nat'l R.R. Passenger Corp.*, 908 So. 2d 459 (Fla. 2005). It is not unusual for debt instruments to include provisions requiring indemnification from an issuer or a borrower for the benefit of another transaction participant. Care must be taken to review such provisions and, unless intentional, to expressly align the

governmental entities indemnification exposure to that provided for in Section 768.28, Florida Statutes.

C. Charter and Ordinance Restrictions

In addition to constitutional and statutory restrictions, practitioners should be aware the local charters and ordinances may contain additional restrictions for issuance of debt. Typical examples include requirements that all bonds be signed by the City Attorney or that debt be incurred pursuant to ordinance rather than by resolution. However, more significant restrictions may be contained in a charter. *See e.g. State v. Sarasota Cty.*, 549 So. 2d 659 (Fla. 1989) (providing that charter prohibited issuance of bonds secured by taxes).

Authorization of bonds by ordinance will not repeal any conflicting provisions of ordinances of local government.

D. Contractual Restrictions

A review of possible contractual prohibitions should be made prior to the issuance of the bonds. Examples typically include "parity" provisions in outstanding bond documents regarding whether the debt sought to be issued may have equal lien status with the existing debt. In covenant to budget and appropriate transactions, an anti-dilution test may be present which provides that no debt will be issued unless non-ad valorem revenues are at certain levels. Other documentary provisions may include restrictions on use of revenues and consent procedures from credit enhancers or bondholders.

Additional restrictions may also be found in contractual documents with vendors, credit providers and other contracting parties with local governments.

E. Pledge and Lien on Revenues

Often times, local governments issue bonds payable from a specific revenue source. In order to secure payment, the bond resolution or ordinance authorizing the issuance of bonds typically provides for the creation of various funds and accounts to provide a tracking of the pledged revenues. These provisions also ensure the revenues are in trust funds. Security arrangements are particularly important to holders of revenue bonds, who cannot look to the ad valorem taxing power of the issuer for repayment.

Bondholders often require attorneys to provide a legal opinion to the effect that the security interest in revenues is valid and binding. Outside of the public arena, laws regarding the creation and perfection of security interests are contained in Article 9 of the Uniform Commercial Code. In 2001, the Florida Legislature adopted revisions to Florida's Uniform Commercial Code relating to secured transactions via Chapter 679, Florida Statutes. Under the rewritten code, transfers by governments and governmental units continue to remain exempt from the provisions of the uniform commercial code relating to secured transactions. Fla. Stat. § 679.1091(4)(n).

The creation of a pledge of revenues may be accomplished through a trustee or through the creation of trust funds and accounts. Most Florida statutes providing for issuance of bonds also include language regarding the validity of a pledge.

If validly pledged, the revenues may not be repealed by the local government or the Florida Legislature because of the protection of the Contracts Clause in Article I, Section 10 of the Florida Constitution. However, with revenues not controlled by local governments, it is important to find specific authority to pledge such revenues and to ensure that the Legislature has not reserved the right to revoke this funding source in the future or been silent on the issue.

The Impairment of Contracts doctrine is a clause to both federal and state Constitution Law. *See* U.S. Const. Art. I, § 10, ("No state shall . . . pass . . . any law impairing the Obligation of Contracts"); *see* Art. I, § 10, Fla. Const. ("No bill of attainder, ex post facto law or law impairing the obligation of contracts shall be passed."). Historically, the Legislature has taken great care to ensure that bondholders secured by revenues that are affected by state law are not negatively affected. *See* Fla. Stat. § 202.41, Florida Statutes (providing that revenue received by a taxing authority under the community's services taxes shall redeem to replace any taxes or fees repealed by that act). Absent specific authority to pledge the revenues, however, there may be some cause for concern that the Legislature may reduce amounts from revenue sharing without replacing such revenue sources elsewhere.

III. BOND VALIDATION

A. Chapter 75, Florida Statutes, provides for circuit court validation proceedings confirming the legality and authority for the issuance of bonds, bonded debt, certificates of debt and matters related thereto, prior to the issuance of such obligations. The issuer files the validation action and seeks an order to show cause why the bonds should not be validated, and the local state attorney defends the action.

B. Case law also addresses validation of interlocal agreements under which a local government is obligated to make payments and lease purchase agreements.

C. Issues to be considered in a validation proceeding include the validity of the bonds, or other obligations, the validity of any taxes, assessments or revenues which are pledged for the repayment of the bonds, the proceedings authorizing the issuance of the bonds and any remedies provided for their collection. *See Miccosukee Tribe of Indians of Fla. v. S. Fla. Water Mgmt. Dist.*, 48 So. 3d 811 (Fla. 2010); *Strand v. Escambia Cty.*, 992 So. 2d 150 (Fla. 2008).

D. Collateral issues should not be considered

1. Collateral issues do not need to be decided to determine the validity of the bonds, however, the issues are related to the bonds and are often material to the economic viability of the bond issue.

2. Examples of collateral issues include:

- a. The wisdom or expedience of a bond issue. *Speer v. Olson*, 367 So. 2d 207 (Fla. 1978);
- b. The possibility that revenues will be insufficient to meet the obligations incurred. *Nat'l Airlines v. Dade Cty.*, 76 So. 2d 277 (Fla. 1954);
- c. The necessity or feasibility of the improvements to be funded with the bonds. *Partridge v. St. Lucie Cty.*, 539 So. 2d 472 (Fla. 1989);
- d. The financial and economic feasibility of issuing the bonds in question. *State v. City of Daytona Beach*, 431 So. 2d 981 (Fla. 1983);
- e. The exemption of the bonds from taxation. *State v. City of Miami*, 116 Fla. 517 (1934);
- f. The tax-exempt status of the issuer. *Wald v. Sarasota Cty. Health Facilities Auth.*, 360 So. 2d 763 (Fla. 1978); and
- g. The validity of contracts collateral to the issuance of the bonds. *State v. Sarasota Cty.*, 159 So. 797 (Fla. 1935).

E. Independent Special Districts must allege in the complaint the creation of a trust indenture established by the petitioner for a bonded trustee acceptable to the court who shall certify the proper expenditure of the proceeds of the bonds.

F. Procedural matters

1. Validation proceedings are filed in Circuit Court.

2. Chapter 75, Florida Statutes, provides that the plaintiff in a bond validation proceeding is the issuer of the bonds (e.g., county, municipality, taxing district or other political district of the state). The State Attorney is served with complaint and represents the "defendant" State and property owners, although property owners and affected persons may intervene.

3. Section 75.06, Florida Statutes requires Order to Show Cause to be published once a week for 2 consecutive weeks, the first publication at least 20 days prior to hearing date.

4. The only necessary parties are the proposed issuer of the bonds and the State. See *State v. Osceola Cty.*, 752 So. 2d 530 (Fla. 1999).

5. Section 75.08, Florida Statutes, provides for direct appeal of validation orders to the Florida Supreme Court.

G. Effect of Validation

1. Binding effect of validation is based upon the doctrine of *res judicata*, the principal that the issues raised in the validation proceeding may not be relitigated. *See* Fla. Stat. § 75.16.

2. Validation judgments may still be subject to collateral attack with respect to issues not raised and adjudicated in validation proceedings.

IV. BOND REFERENDA MATTERS

A. Chapter 100, Florida Statutes, provides for specific procedures for bond referenda, but generally, procedures applicable to general elections are applicable to bond referenda.

B. If a bond issue is defeated at referendum, no other referendum may be held with respect to such bonds for the same purpose for a period of 6 months.

C. Ballot must include the amount of bonds to be issued, a statement as to the purpose for the bonds, and the rate of interest on the bonds; although a statement that the interest rate shall not exceed the maximum rate permitted by law is sufficient.

D. Notice of the bond referendum must be published in a newspaper of general circulation at least 30 days prior to the election, at least twice, once in the fifth week and once in the third week prior to the week in which the election is to be held.

E. Any taxpayer may bring a test suit within 60 days of the election to test the validity of the referendum. However, if the issuer institutes a bond validation proceeding, then any such taxpayer is bound to intervene in such validation proceeding. The court hearing the bond validation proceeding is given exclusive jurisdiction to determine the validity of the referendum.

V. STATE REPORTING AND DISCLOSURE REQUIREMENTS

A. Definitions

1. "Unit of local government" means, in addition to counties and municipalities, special districts, local agencies, authorities, consolidated city-county governments or any other local governmental body with the power to issue general obligation or revenue bonds.

2. "General obligation or revenue bonds" means debt obligations issued by units of local government which mature in more than one year, including general obligation

bonds, revenue bonds, limited revenue bonds, special obligation bonds, debenture, and other similar instruments, but not bond anticipation notes.

B. Provision of Notice

Every unit of local government is required to provide the Division of Bond Finance with advance written notice of the impending sale of its general obligation or revenue bonds. Public notice rules must be complied with for all local government meetings which authorize the issuance of the general obligation or revenue bonds and sunshine rules should be adhered to.

C. Bond Information Forms (Combined Form 2003/2004)

1. As soon as possible after general obligation or revenue bonds are issued, Form 2003/2004 must be filed with the Division of Bond Finance.

2. Form 2003 includes general information about general obligation or revenue bonds, including names and addresses of participants.

3. Form 2004 (separate versions for competitive and negotiated sale) includes required disclosure of any fee paid by underwriter and issuer as well as underwriting spread components and other attorney and consultant fees paid; both must be filed within 120 days of issuance.

4. Form 2004 forms need not be filed for certain conduit financings (industrial development bonds, health facilities revenue bonds, educational facilities revenue bonds).

D. Units of local government must also file a copy of final official statement (disclosure document), if prepared.

E. Failure to Comply

A failure to comply with these reporting requirements may be reported to the Legislative Auditing Committee and could result in withholding of state funds.

F. Underwriters Disclosure Statement and Truth-in-Bonding Statement

1. Disclosure of fees paid by underwriter, including any finder's fee, must be made prior to sale of general obligation or revenue bonds.

2. Finder's Fee must be disclosed in Official Statement for general obligation or revenue bonds.

3. Executed Truth-in-Bonding Statement must be included in any proposal for the purchase of general obligation or revenue bonds (e.g., bond purchase agreement). Such statement must include identification of source of repayment for the general obligation or

revenue bonds and the amount of pledged funds not available for other uses during term of general obligation or revenue bonds, as well as the forecasted rate of interest on the general obligation or revenue bonds.

G. General obligation or revenue bonds must be sold at public sale by competitive bid unless certain findings have been made by resolution as to the reasons requiring the negotiated sale and determining that a negotiated sale is in the best interest of the unit of local government. For competitive sales, Section 218.385(1), Florida Statutes requires notice of the be published at least 10 days prior to sale.

H. Section 215.84, Florida Statutes, sets forth the maximum rate of interest for local government bonds, excluding bonds rated in any one of the three highest rating categories by a national rating service (Moody's Investor Services, Inc., Standard & Poor's Rating Group, etc.). Chapter 159, Part VII, Florida Statutes, sets forth a higher rate for taxable bonds; though Section 215.84 applies to both taxable and tax-exempt bonds, Chapter 159, Part VII, Florida Statutes, is more recent, expressly supersedes any conflicting law regarding the issuance of taxable bonds (Section 159.824, Florida Statutes) and thus holds higher authority allowing this higher rate of interest. An issuer may apply to the State Board of Administration for an exemption from these requirements. A statutory formula is given for variable rate transactions. Section 215.84(7) and (8), Florida Statutes, expressly excludes certain conduit bonds and municipal utility bonds from this limitation.

VI. ASSESSMENT VS. TAX VS. USER FEES VS. IMPACT FEES

A. Assessments are charges assessed against the property of some particular locality because that property derives some special benefit from the expenditure of funds.

1. Two requirements for the levy of special assessments: (1) the property must be a special benefit from the service provided or project constructed, and (2) the assessment must be fairly and reasonably apportioned among properties that receive the special benefit.

2. If a special assessment fails to meet the Florida case law requirements of special benefit and fair apportionment applicable to their imposition, then the charges imposed are taxes. If a charge is a tax, it must be authorized by general law.

B. Collection of the special assessment may be secured by a lien on the benefitted property, enforceable through foreclosure proceedings. Additionally, Section 197.3632, Florida Statutes, provides for the collection of non-ad valorem assessments by including these assessments on the annual tax bill. Enforcement proceedings applicable to taxes are then available for the enforcement of assessments, including sale of tax certificates.

C. User Fees are authorized by statute to be imposed directly by municipalities and charter counties and indirectly for non-charter counties through the use of municipal service taxing or benefit units for various governmental purposes. Fla. Stat. § 166.201; *see generally* Fla. Stat. § 125.

1. User fees are payments for voluntarily purchased services which benefit the specific individual to the exclusion of non-feepayers.

2. The Florida Supreme Court struck down a transportation utility fee, stating that such fee was in reality a tax because it sought to charge for a general government service (maintenance of public roads). See *State v. City of Port Orange*, 650 So. 2d 1 (Fla. 1994). However, in *Pinellas Cty. v. State*, a mandatory reclaimed water "availability fee" was found not to be a tax, but a valid utility user fee even though the reclaimed water might not actually be utilized. 776 So. 2d 262 (Fla. 2001).

D. Impact Fees are fees imposed by local government to offset the cost of new development on existing facilities and are valid to the extent that the fees do not exceed a pro rata share of the reasonably anticipated costs of expansion, where expansion is reasonably required, and the use of the fees is limited to meeting the cost of expansion.

1. Local governments must show a reasonable connection between the need for additional capital facilities and the growth in the population generated by the development.

2. Local government must also demonstrate there is a reasonable connection between the expenditure of funds collected and the benefits accruing to the development.

3. Impact fees are generally imposed for water and sewer facilities, road facilities and parks and recreational facilities.

4. The Florida Supreme Court has upheld impact fees for education facilities; however, they seem to retreat to a home rule power analysis, rather than comparing impact fees to user fees as in prior cases.

E Article VII, Section 9(a) of the Florida Constitution provides the authentication to levy taxes permitted by law. Payments under a PILOT (payments in lieu of taxes) agreement are imposed under the proprietary powers of government (not sovereign right) and the payments are not invalid as taxes. *City of Largo v. AHF-Bay Fund, LLC*, 215 So. 3d 10, 17 (Fla. 2017).

VII. SPECIAL DISTRICTS

A. Uniform Special District Accountability Act of 1989 (Chapter 189, Florida Statutes) governs creation, dissolution, meeting notices, reporting, elections and other requirements for special districts.

B. "Special District" means a local unit of special purposes, as opposed to general purpose government, within a limited boundary, created by general law, special act, local ordinance, or by rule of the Governor and Cabinet. The special purpose or purposes of special districts are implemented by specialized functions and related prescribed powers. The term does not include school districts, a community college district, a special improvement district created pursuant to Section 285.17, Florida Statutes, a municipal service taxing or benefit unit as

specified in Section 125.01, Florida Statutes, or a board which provides electrical service and which is a political subdivision of a municipality or is part of a municipality.

C. "Dependent special district" means a special district that meets at least one of the following criteria:

1. The membership of its governing body is identical to that of the governing body of a single county or a single municipality;
2. All members of its governing body are appointed by the governing body of a single county or a single municipality;
3. During their unexpired terms, members of the special district's governing body are subject to removal by the governing body of a single county or a single municipality; or
4. The district has a budget that requires approval through an affirmative vote or can be vetoed by the governing body of a single county or a single municipality.

D. "Independent special district" means a special district that is not a dependent special district as defined above. A district that includes more than one county is an independent special district.

E. Special districts are now required to maintain an official website. The information required to be accessible on their website is listed in Section 189.069, Florida Statutes. The agenda for a meeting and any available material for such meeting must be posted at least seven (7) days before the meeting.

F. Bonds issued by special districts (other than Bonds approved by a referendum) must meet one of the following criteria:

1. The bonds were rated in one of the highest four ratings by a nationally recognized rating service;
2. The bonds were privately placed with or otherwise sold to accredited investors;
3. The bonds were backed by a letter of credit from a bank, savings and loan association, or other creditworthy guarantor, or by bond insurance, guaranteeing payment of principal and interest on the bonds; or
4. The bonds were accompanied by an independent financial advisory opinion stating that estimates of debt service coverage and probability of debt repayment are reasonable, which opinion was provided by an independent financial advisory, consulting, or accounting firm registered where professional registration is required by law and which is in good standing with the State and in conformance with all applicable professional standards for such opinions.

VIII. INVESTMENT POLICIES AND PROCEDURES

A. Several legal documents may control the investment of funds by cities, counties and other local governments.

B. Specific statutory authority for counties (Section 125.013, Florida Statutes); cities (Section 166.121, Florida Statutes); school boards (Section 1011.12, Florida Statutes); and special districts (Section 189.031, Florida Statutes).

C. Additionally, Section 218.415, Florida Statutes, limits the types of investments which may be used for the investment of surplus funds of local governments to certain investments listed in the statute.

D. Local Governments cannot invest in any investment other than the listed investments unless the local government has adopted a formal written investment policy, which is required to place primary priority on the safety and liquidity of funds and secondary priority on the optimization of investment returns.

E. Investments in derivative financial products must be specifically authorized and may be considered only if the chief financial officer has developed sufficient understanding of the derivative products and has the expertise to manage them. The use of reverse repurchase agreements or other forms of leveraged investments shall be prohibited or limited to transactions where the proceeds are intended to provide liquidity and for which the unit of local government has sufficient resources and expertise.

IX. DISCLOSURE REQUIREMENTS

A. Bonds of a local government which are publicly sold (by competitive bid or negotiated sale) are typically sold by an underwriter through the use of a disclosure document (usually an "official statement"). The official statement includes a description of the terms of the bonds, the security for the bonds and financial information about the issuer and the source of payment (water and sewer revenues, sales tax, ad valorem taxes, etc.).

B. The official statement speaks only as of its date and must be complete and accurate as of its date in order to comply with the antifraud provisions of the federal securities laws.

C. In November 1994, the SEC released amendments (the "Amendments") to Rule 15c2-12 promulgated under the Securities Exchange Act of 1934, as amended (the "Rule"), which effectively requires issuers to commit to continuing disclosure as a condition to access to the public bond markets. A summary of these Amendments is set forth below. In July 2009, May 2010 and October 2018, pursuant to Release No. 34-59062, Release No. 34-62184 and Release 34-83885, respectively, the SEC adopted additional amendments to the Rule. *See* "E," "F" and "G" below.

D. Key Elements of 1994 Amendments to the Rule.

1. Except for certain exemptions, the Amendments require the issuer or other obligated person for which information is provided in the final official statement (either individually or in combination with other issuers or obligated persons) to covenant to provide both annual financial information (and audited financial statements, if and when available) and material event disclosure (the "Continuing Disclosure Undertaking"). As a practical matter, if neither the issuer nor an obligated person agrees to the required Continuing Disclosure Undertaking, the offering will be effectively shut out of the municipal securities market under the Rule, unless the issue qualifies for one of the exemptions.

2. Content and Location of Covenant.

a. The Continuing Disclosure Undertaking must specify (a) the type of financial information and operating data to be provided, (b) the obligated persons to whom it will relate, (c) the accounting principles to be applied in the preparation of such information, and (d) the annual date such information will be provided and to whom it will be provided.

b. The Continuing Disclosure Undertaking must be set out in a written agreement or contract, which may be the bond resolution or ordinance, trust indenture or other agreement. The key is that the agreement must be for the benefit of the bondholders.

3. "Obligated Persons."

The Continuing Disclosure Undertaking is required of the issuer or other obligated person for whom information is provided in the final official statement.

An "obligated person" is defined to mean a person who is either generally, or through an enterprise, fund or account of such person, committed by contract or other arrangement to support payment of all or part of the obligations on municipal securities, other than providers of municipal bond insurance, letters of credit or other liquidity facilities.

An entity may be an obligated person even though it has no direct contract with bondholders. For example, the obligations supported by the obligated person can be obligations which run only to the issuer, such as a lease, loan agreement or other conduit structure or purchase agreement, a take-or-pay contract, or other contract or arrangement structured to support payment of the obligations relating to the municipal securities.

a. Annual Information

(1) The annual information required by a Continuing Disclosure Undertaking includes annual financial information for each obligated person for whom financial information or operating data was included in the final official statement and, if not submitted with the annual financial information, includes annual audited financial statements if and when available.

(2) The annual financial information must be filed. The timing of the annual filing is not prescribed in the Rule; rather, it is to be set forth in the undertaking.

b. Material Event Notices. The Amendments require the following events, if material, be disclosed in a timely manner:

- Principal and interest payment delinquencies
- Nonpayment related defaults
- Unscheduled draws on reserves reflecting financial difficulties
- Unscheduled draws on credit enhancements reflecting financial difficulties
- Substitution of credit or liquidity providers, or their failure to perform
- Adverse tax opinions or events affecting tax-exempt status of the security
- Modifications to rights of security holders
- Bond calls
- Defeasances
- Release, substitution or sale of property securing repayment of the securities
- Rating changes
- Tender offers
- Bankruptcy, insolvency, receivership or similar proceeding of the obligated person
- The consummation of certain mergers, consolidations, or acquisitions
- Appointment of a successor or additional trustee, or the change of name of a trustee, if material.

See also F.5. and G. below.

c. Failure Notice. Additionally, the issuer or obligated person must make certain notifications in the event the required annual financial information is not provided on or before the date required in the written undertaking.

4. Exemptions from the Rule. The preexisting exemptions in the Rule (private placements, short term issues and obligations subject to tender for purchase) also apply to the undertaking requirement and information systems requirement relating to continuing secondary market disclosure. Additionally, the Rule includes additional exemptions from the continuing disclosure requirement as discussed below.

a. Small Issuer Exemption. The Rule provides relief from aspects of the Continuing Disclosure Undertaking requirement if at the time the securities are delivered (i) no one obligated person (including the issuer, when it is an obligated person) will be an obligated person with respect to more than \$10,000,000 in the aggregate of outstanding municipal securities, excluding securities exempt under the existing Rule exemptions, (ii) an issuer or

obligated person agrees to provide (A) upon request to certain entities financial information or operating data as described in the continuing disclosure undertaking, and (B) the material events notices described above to the Municipal Securities Rulemaking Board (known as the "MSRB"), and (iii) the final official statement includes the name, address and telephone number of the appropriate persons from which the foregoing information, data and notices may be obtained.

b. Short-term Securities Exemption. Securities with a maturity of 18 months or less are exempt from the requirement that there be a covenant to provide annual information, but not from the material event notice covenant requirement.

E. 2009 Amendments.

1. Summary. The Commission, pursuant to Release No. 34-59062 adopted amendments to the Rule in connection with the adoption and implementation of the MSRB's EMMA system for municipal securities disclosures. The effective date of the amendments was July 1, 2009 (with certain document formatting requirements beginning January 1, 2010). In brief, the new amendments provide for the electronic submission of continuing disclosure documents, in a specified format and accompanied by specified identifying information, to the MSRB alone, and no longer to the NRMSIRs. All references to NRMSIRs and SIDs have been deleted from the Rule; however, state law requirements for SID submission still applies to those issuers and obligated persons subject to such disclosure requirements. Access to the Electronic Municipal Market Access ("EMMA") system is free to the public, although there is an optional subscription to a fee-based real-time data stream.

2. MSRB as Repository. As mentioned above, the most sweeping change was to eliminate the terms NRMSIR and SID from the Rule. The MSRB is now the only repository referenced in the Rule. Submissions must be made electronically and accompanied by certain identifying information. The amendments will also require that the underwriter reasonably determine that the issuer or obligated person has undertaken in writing to accompany continuing disclosure documents submitted to the MSRB with identifying information as prescribed by the MSRB. The Rule does not identify the information that must accompany the submission nor the electronic form that they must take, but states that the MSRB may prescribe such criteria. No changes were made to the exemptions in (d)(1) of the Rule by the 2009 Amendments – i.e., exemption for securities with denominations of \$100,000 or more AND limited offering to sophisticated investors, maturity of nine months or less, OR variable rate debt with put option with a frequency of at least every nine months. See, however, F.6. below.

F. 2010 Amendments.

1. Summary. The SEC, continuing with its current theme of improving the quality, timing and dissemination of disclosure in the municipal securities market, issued Release No. 34-62184, which provides for certain amendments to the Rule. The amendments to the Rule affect the secondary market disclosure requirements of the Rule, which require brokers, dealers, and municipal securities dealers ("Dealers" or, when used in connection with a primary offering, a "Participating Underwriter"), prior to purchasing or selling municipal securities in connection with an offering, to reasonably determine that an issuer of such municipal securities, or an

obligated person for whom financial or operating data is presented in the final official statement, has undertaken in a written agreement to provide to the holders of such securities certain financial information and to report the occurrence of certain materials events relating to the securities. The amendments became effective August 9, 2010, with a compliance date of December 1, 2010.

2. **Timeframe for Submitting Event Notices.** The SEC has modified the Rule to require a Participating Underwriter to reasonably determine that the issuer or obligated person has agreed in its continuing disclosure agreement to submit notices of certain material events to the MSRB "in a timely manner not in excess of ten business days after the occurrence of the event," instead of just "in a timely manner," as the Rule previously provided. This amendment ties the ten business days to the occurrence of the specific event, as opposed to knowledge of such an event by the issuer or obligated person.

3. **Materiality Determinations.** The SEC has deleted the condition in the Rule that presently provides that notices of all of the listed events need be made only "if material," and removed the materiality determination for certain events.

4. **Event Notices Regarding Adverse Tax Events.** The current Rule provides for an event disclosure for "adverse tax opinions or events affecting the tax-exempt status of the security," if material and the 2010 amendments to the Rule provide for certain other specific tax matters to be disclosed.

5. **Additional Events to be Disclosed.** The amendments to the Rule also include four additional events that must be disclosed in an event notice. These events include: (1) tender offers; (2) bankruptcy, insolvency, receivership or similar proceeding of the obligated person; (3) the consummation of certain mergers, consolidations, or acquisitions; and (4) appointment of a successor or additional trustee, or the change of name of a trustee, if material.

6. **No longer an Exemption for Demand Securities.** Previously, the Rule provided for an exemption from the annual financial and operating data reporting and material event notice requirements for a primary offering of municipal securities in authorized denominations of \$100,000 or more if such securities, at the option of the holder, may be tendered to an issuer of such securities or its designated agent for redemption or purchase at par value or more at least as frequently as every nine months until maturity, earlier redemption, or purchase by an issuer or its designated agent. The SEC has deleted this exemption.

7. **Additional and Voluntary Disclosures to the MSRB.** The SEC has also given approval to the MSRB to accept additional types of filings on its Electronic Municipal Market Access ("EMMA") website. Underwriters of municipal securities will be required to provide – and issuers will be able to provide voluntarily – information to assist investors and other market participants in assessing the availability of ongoing disclosures made by issuers through the EMMA website.

G. 2019 Amendments.

1. Summary. New Continuing Disclosure Undertaking agreements executed and delivered on or after February 27, 2019, shall include, in addition to the existing list of 14 ongoing event disclosure obligations listed under D.3. above, two new events.

2. New Events. The two new events are as follows:

(a) Incurrence of a financial obligation of the issuer or obligated person, if material (a "new obligation event"), or an amendment to covenants, events of default, remedies, priority rights, or other similar terms of a financial obligation of the issuer or obligated person, any of which affect security holders, if material (a "revised obligation event"); and

(b) A default, event of acceleration, termination event, modification of terms, or other similar events under the terms of the financial obligation of the issuer or obligated person, which reflect financial difficulties (a "financial distress event"). (Note the lack of a materiality standard in this event when compared to the description in (a) above). "Financial Obligation" is defined to mean a (i) debt obligation; (ii) derivative instrument entered into in connection with, or pledged as security or a source of payment for, an existing or planned debt obligation; or (iii) a guarantee of (i) or (ii). The term Financial Obligation shall not include municipal securities as to which a final official statement has been provided to MSRB consistent with the Rule. The SEC's adopting release indicates that "financial obligation" includes only debt, debt-like and debt-related obligations.

3. Example. Examples of a financial obligation (i.e., a new obligation event) include but are not limited to a debt obligation, a bank loan, the closing of a draw down line of credit, initial establishment of a new commercial paper program, a forward interest rate swap, a cap, a collar, a traditional interest rate swap, a derivative, a guarantee, an interlocal funding agreement, an equipment lease financing which is a borrowing, a certificate of participation, a subject to annual appropriation financial obligation, etc. In a lease-purchase, in determining whether a financial obligation has occurred, it is required that lessor obtain title to the equipment at the end of the lease. Each draw down on a line of credit or issuance of a tranche of CP is not a separate reported financial obligation. An example of a "revised obligation event" includes covenants in a private placement or loan agreement being changed because of improvements to the financial condition of the issuer or if the parties wish to restructure the loan for other reasons. It is not necessary that a revised obligation event reflect financial difficulties. Substitution of existing security with other security for non-financial reasons is a revised obligation event.

X. TAX POST ISSUANCE COMPLIANCE

A. The IRS is pushing for heightened compliance practices by issuers, most recently in 2012 by requiring issuers to certify on Form 8038 and Form 8038-G that they have written procedures in place to monitor and remediate any nonqualified tax-exempt bonds.

B. In 2012, the IRS reported the results of a compliance check on governmental bond issuers. While a majority of issuers reported that they had written compliance procedures in place, the IRS found that fewer than 20% of issuers had implemented specific written procedures or ad hoc processes at the level the IRS deems appropriate.

C. A compliance plan is intended to provide written procedures for handling matters that arise after issuance of bonds. The plan should detail record retention policies, private use monitoring, arbitrage rebate and yield restriction, expenditure of bond proceeds, remedial actions and other issues that may arise over the life of a bond issue.

D. Also, the IRS recently released its Publication 5005, Your Responsibilities as a Conduit Issuer of Tax-Exempt Bonds, which provides an overview for state and local governments of the responsibilities of the conduit issuer with respect to tax compliance in municipal financing arrangements commonly known as conduit financings. Because the conduit issuer is treated as a "taxpayer" for federal tax purposes and procedures, the issuer is the party generally responsible for tax compliance. However, the bond documents generally provide for delegation of certain responsibilities to the conduit borrower.

E. Publication 5005 lists several items the IRS suggests that issuers consider when developing such post-issuance compliance procedures:

1. Designating a particular conduit issuer official to assist in post-issuance compliance;
2. Requiring conduit borrowers to identify a particular official responsible for assisting the issuer with post-issuance compliance monitoring;
3. Providing training or other technical support to designated official(s) of the conduit issuer and conduit borrower;
4. Requiring the conduit borrower to demonstrate that it has adopted written post-issuance compliance monitoring procedures before the approval of a bond issue;
5. Designating time intervals within which compliance monitoring activities will be completed by the issuer and borrower;
6. Timely completing remedial actions to correct or otherwise resolve identified noncompliance; and

7. Requiring conduit borrowers to notify the conduit issuer of the completion of post-issuance compliance monitoring activities.

F. In summary, local government issuers of tax-exempt bonds should have in place compliance programs to monitor and document activities post issuance. This encourages the prevention of problems and timely remediation should a problem arise.

XI. MUNICIPAL BANKRUPTCIES

A. Florida Law.

1. Florida is one of 12 states that conditionally authorizes municipal bankruptcies.

2. Florida Statute 218.01 is the authorizing authority for the bankruptcy laws "for the benefit and relief of municipalities, taxing districts and political subdivisions."

3. States cannot file bankruptcy cases (sovereign).

B. Federal Law.

1. Chapter 9 of the Federal Bankruptcy Code provides for financial reorganization.

2. The purpose of filing is to provide financially distressed governments protection from creditors while reorganizing to become fiscally stable.

C. Chapter 9 Eligibility.

1. The municipality must have specific authority to file for Chapter 9 bankruptcy from the state;

2. The municipality must be insolvent;

3. The municipality must prove its desire to adopt a plan to adjust its debt;

4. The municipality must satisfy at least one of four specified conditions to demonstrate that it has obtained or tried to obtain an agreement with its creditors, that it is not feasible to negotiate with its creditors holding at least the majority of the claims in each class that the entity intends to impair under its debt adjustment plan, or that it has reason to believe its creditors might attempt to obtain preferential payment or transfer of the entity's assets; and

5. The municipality must show that it has filed for bankruptcy in good faith.

APPENDIX A

TOP 10 BOND CASE GROUPS

CONSTITUTIONAL POWER / HOME RULE AUTHORITY

COUNTY

1. *State v. Orange Cty.*, 281 So. 2d 310 (Fla. 1973) - Non-charter County passed ordinance to issue revenue bonds payable from racetrack and jai alai funds. Court found that non-charter county was authorized to issue revenue bonds without referendum pursuant to new constitution and chapter 125 (intent of Legislature was to eliminate need for county to go to legislature for a special act). Dissent felt majority was wrong and distinction between non-charter and charter counties was that non-charter only got power from special acts and ability to issue revenue bonds hadn't been given through special act.

Speer v. Olson, 367 So.2d 207 (Fla. 1978) - Reiterates *State v. Orange County* (intent of Legislature in enacting amendments to Chapter 125, Florida Statutes was to enlarge powers of counties through home rule to govern themselves through home rule ordinance). County approved issuance of water and sewer revenue bonds payable from water and sewer revenues and ad valorem taxes. The Court held that since there was no statute, general or special, either specifically authorizing or restricting the non-charter County from issuing the bonds in question, the statute granting County full power to carry on county government empowered the county board to proceed under its home rule power to accomplish such purpose. The Court also stated that an act, when it recites that it is an additional and supplemental grant of power, can be used in addition to, or rejected in favor of, other sources of power.

2. *State ex rel. Volusia Cty. v. Dickinson*, 269 So. 2d 9 (Fla. 1972) - County wanted to levy excise tax on sale of cigarettes in unincorporated areas of the county. Court held that as a charter county, county had same taxing power as municipality.

McLeod v. Orange Cty., 645 So. 2d 411 (Fla. 1994) - Orange County (now a charter county) proposed to issue public service tax revenue bonds and impose public service tax on unincorporated areas of county. Court reiterated *State ex rel. Volusia Cty. v. Dickinson* and stated that charter counties have same taxing power as municipalities. Taxpayer argued that public service tax was illegal unless projects to be financed provided a real and substantial benefit to the unincorporated areas of the County. Court held there was no prohibition on county taxing public services in unincorporated areas to benefit incorporated areas (there is prohibition on taxing of property-but not purchases- within the municipality for services exclusively for the benefit of unincorporated areas).

MUNICIPALITY

3. *State v. City of Sunrise*, 354 So. 2d 1206 (Fla. 1978) - City wanted to issue "double advance refunding" bonds to refund water and sewer bonds. Court held that this was an

acceptable method of financing municipal projects and that the constitutional provision requiring refunding to result in lower net average interest cost only applied to bonds payable from ad valorem taxes (not revenue bonds). Double advance refunding bonds could be issued as long as it was pursuant to an exercise of a valid municipal purpose. Court also stated that the feasibility and advisability of the project were beyond the scope of judicial review in a validation proceeding.

GENERAL OBLIGATION AND REVENUE BONDS

GENERAL OBLIGATION

4. *Volusia Cty. v. State*, 417 So. 2d 968 (Fla. 1982) – County filed complaint for validation of improvement bonds for new jail, the security for which was the County's pledge of all legally available unencumbered revenues other than ad valorem taxation along with covenant to do all things necessary to continue receiving the revenues. Trial court denied validation and the Supreme Court affirmed. The court held that the pledge of all legally available revenues other than ad valorem revenues (as opposed to specific sources of revenue) combined with the promise to maintain the programs and services which generated the fees and user charges would inevitably require increased ad valorem taxation in order for the County to have sufficient funds to maintain the programs and services that generated the pledged revenues. Therefore, a referendum was required.

Strand v. Escambia Cty., 992 So. 2d 150 (Fla. 2008) – County sought validation of bond issuance to finance a four-lane road-widening project inside a dependent special district. The bonds were secured by a pledge of tax increment revenues created as a result of increased property values caused by the construction. The Florida Supreme Court issued an opinion in 2007 which had reversed a circuit court's judgment validating the proposed bonds. In its original September 6, 2007 decision, the Court concluded that the County was without authority to issue the bonds secured by tax increment revenues in the absence of having first obtained voter approval by referendum because the County would use ad valorem tax revenues to pay the bonds. In doing so, the Court had receded from its earlier decision in *State v. Miami Beach Redevelopment Agency*, the first case upholding tax increment financing in Florida by validating the issuance of TIF Bonds by the Miami Beach Redevelopment Agency without the issuance of such bonds having been approved by referendum. *Cf.* 392 So. 2d 875 (Fla. 1980). However, on September 18, 2008, the Florida Supreme Court released a revised opinion, withdrawing its September 2007 opinion reaffirming its long-held distinction between (1) pledges of the ad valorem taxing power and (2) use of ad valorem tax revenues.

REVENUE

Rowe v. Pinellas Sports Auth., 461 So. 2d 72 (Fla. 1984) – A consolidated action was brought before the Circuit Court to validate revenue bonds to finance a new stadium. The Issuer was to be the Pinellas Sports Authority (PSA) and the bonds were to be payable from tourist development taxes collected by Pinellas County (the "County") and a portion of the City of St. Petersburg's (the "City") excise taxes pursuant to an Interlocal agreement entered into between PSA, the City and the County. A general law allowed Florida counties to levy a tourist

development tax to "be pledged to secure and liquidate revenue bonds issued by the county for the purposes" of building stadiums. A subsequent special act-chartered PSA and empowered the County to pledge non-ad valorem moneys (including revenues from the tourist development tax) to the payment of revenue bonds issued by the PSA. The County thereafter passed ordinances imposing the tourist development tax and, under the interlocal agreement, proceeds of the tax were committed to pay a portion of the debt service on bonds issued by the PSA. Certain taxpayers sought declaratory and injunctive relief, but the trial court entered a final judgment validating issuance of the bonds. On direct appeal to the Florida Supreme Court, the taxpayers argued that under the general law the county's tourist development tax revenues could not be pledged to pay off bonds issued by a governmental entity other than the county. The Court rejected this argument, holding that when a special act (such as the PSA charter) and a general law conflict, the special act will prevail. Because the PSA charter was enacted by subsequent special act, the authority for the pledging of tourist development tax revenues by the county to secure obligations issued by the PSA controlled over any limitation imposed upon such a pledge by the general law. The Court also held that no referendum was required because the interlocal agreement required only the collection of sufficient revenue from the alternative sources allowed by statute and the bondholders had no right to compel ad valorem taxation or legislation of funds not pledged for the payment of debt service.

PUBLIC PURPOSE / PARAMOUNT PUBLIC PURPOSE

5. *Poe v. Hillsborough Cty.*, 695 So. 2d 672 (Fla. 1997) - City of Tampa, Hillsborough County and Tampa Sports Authority (TSA) wanted to build new stadium for the Bucs. TSA was going to issue bonds payable from state sales tax to pay for stadium and taxpayer sued. Circuit court refused to validate but found that project would meet paramount public purpose test but for one clause in the stadium lease that granted the Bucs the first \$2 million in revenue from non-Bucs events. The Supreme Court held that the purpose of the facility was both to increase trade by attracting tourists and to provide recreation for the citizens of the District and that it would serve a valid public purpose and the private benefit and gain would be incidental. Taxpayer also contended that the credit of the District was being loaned to a private entity which violated Art IX, Sec.10 of the Florida Constitution. Court held that once public purpose is established, constitution is not violated even though some private parties may be incidentally benefited.

State v. City of Orlando, 576 So. 2d 1315 (Fla. 1991) - The City adopted resolutions providing for the issuance of revenue bonds to finance qualifying projects of local agencies either through the execution of Local Agency Loan Agreements (LALA) or through purchase of local agency securities. The bonds would be repayable only through funds derived from repayment of the loans by the local agencies and the City itself could borrow money pursuant to a LALA. Profits earned on the loans would be placed in general revenue to be later used as determined by city commissioners. The fact that there was no identification of specific projects, which agency would receive the loans or which revenues would be pledged for repayment in addition to the fact that the City Council got to decide how to spend the profits at a later date deprived the court of the ability to determine if the funds would be used for paramount public purpose. Additionally, court determined that borrowing money for reinvestment was not a valid municipal purpose.

Orange Cty. Indus. Dev. Auth. v. State, 427 So. 2d 174 (Fla. 1983) - IDA proposed to issue bonds to expand TV station. Court found this was not one of listed projects allowed pursuant to Chapter 159, Florida Statutes, and primary benefit was to private party not public, therefore did not meet paramount public purpose.

State v. Osceola Cty., 752 So. 2d 530 (Fla. 1999) - County wanted to issue tourist development tax revenue bonds to pay for new convention center. Center would be owned by county but operated by a private entity who would also construct the facility. Court held this to be authorized even though Section 125.0104(3)(I), Florida Statutes, specified the tax could be levied to pay debt service on bonds issued for the "construction" of facility, not acquisition, because legislative history indicated greater concern with means of attracting and retaining outside sports franchise rather than distinguishing between acquisition and construction. Acquiring and constructing convention center was a valid public purpose because it would promote gainful employment, outside business interest and tourism and provide forum for educational, recreational and entertainment activities.

COMMUNITY REDEVELOPMENT AGENCY BONDS

6. *State v. Miami Beach Redevelopment Agency*, 392 So. 2d 875 (Fla. 1980) - Miami Beach Redevelopment Agency ("MBRA") proposed issue of bonds to completely revamp south Miami Beach. Court held MBRA was authorized by statute to issue bonds (despite fact that prerequisites occurred out of order based on statute); redevelopment bonds met a public purpose; financing plan did not require referendum; after bonds have been issued, validated and sold, statutory authority to devote governmental revenues to the retirement of the bonds becomes a contractual duty, but this fact did not require referendum because the distinction is that after the sale of the bonds, a bondholder would have no right, if the redevelopment trust fund were insufficient to meet the bond obligations and the available resources of the county or city were insufficient to allow the promised contributions, to compel by judicial action the levy of ad valorem taxation. Only obligation is to appropriate a sum equal to any tax increment generated in a particular year from the ordinary, general levy of ad valorem taxes otherwise made in the city and county that year.

Panama City Beach Cmty. Redevelopment Agency v. State, 831 So. 2d 662 (Fla. 2002) - CRA wanted to issue bonds to develop blighted area that had previously been undeveloped. Trial court denied validation holding that the area had to be "redeveloped". The Supreme Court held that the statute clearly contemplated open land and that trial court erred in not paying deference to the legislative finding of blight by the City Council, as the finding was "fairly debatable."

Bay Cty. v. Town of Cedar Grove, 992 So. 2d 164 (Fla. 2008) - Town's proposed tax increment bond issues to finance improvements in redevelopment areas were properly validated. No referendum approval was required, as the "bondholders would have no right, if the trust funds were insufficient to meet the bond obligations, to compel the levy of ad valorem taxation."

City of Parker v. State, 992 So. 2d 171 (Fla. 2008) - City's proposed tax increment bonds to finance various capital projects are entitled to validation even though the city levies no ad valorem taxes and will instead receive the increment from other taxing bodies. And the redevelopment area was properly found to be blighted. Nor was referendum approval required, as the "bondholders have no right, if the trust funds were insufficient to meet the bond obligations, to compel the levy of ad valorem taxation."

FEE vs. TAX

7. *State v. City of Port Orange*, 650 So. 2d 1 (Fla. 1994) - City attempted to issue transportation revenue bonds payable from transportation utility fees levied against owners of developed property only. Circuit court held that fees were a user fee and validated bonds. Supreme Court reversed and found the fees to be a tax. The Court held that funding for the maintenance and improvement of an existing municipal road system even when limited to capital projects, is revenue for exercise of a sovereign function contemplated within the definition of a tax. User fees are charges based upon the proprietary right of the governing body permitting the use of the instrumentality involved. User fees share common traits that distinguish them from taxes: they are charged in exchange for a particular governmental service which benefits the party paying the fee in a manner not shared by other members of society and they are paid by choice in that the party paying the fee has the option of not utilizing the governmental service and thereby avoiding the charge.

Pinellas Cty. v. State, 776 So. 2d 262 (Fla. 2001) - County brought action to validate sewer revenue bonds to fund a reclaimed water system. Circuit Court denied based on fact that County hadn't obtained consent of municipalities in service area prior to the reclaimed water system and that availability charge was an impermissible tax. The Supreme Court reversed holding that Availability Charge was a valid user fee (provided unlimited use of reclaimed water to those who paid fee, portion of fee went to improve distribution lines to individual properties) and that based on Special Acts and County's charter, obtaining municipalities consent was not necessary (County did not rely on supplemental authority of Chapter 153, Florida Statutes, to add reclaimed water improvements; therefore, did not need to comply with requirements of said chapter).

SPECIAL ASSESSMENTS / IMPACT FEES

ASSESSMENTS

8. *City of Boca Raton v. State*, 595 So. 2d 25 (Fla. 1992) – Circuit Court declined to validate City's proposed special assessment improvement bonds because it said City did not have the authority to impose special assessments to fund the bonds; it was a tax and violated Chapter 170, Florida Statutes, which set forth specific conditions under which cities could impose a special assessment. Supreme Court reversed holding that a legally imposed special assessment is not a tax; taxes and special assessments are distinguishable in that, while both are mandatory, there is no requirement that taxes provide any specific benefit to the property and they may be levied throughout the particular tax unit for general benefit of residents and property. Special assessments must confer specific benefit upon land burdened by the assessment, and it must be

fairly and reasonably apportioned among the properties that receive the special benefit. Additionally, the Court held that Chapter 170, Florida Statutes, did not preempt authority of municipalities to impose special assessments under other circumstances and it was not the only method by which municipalities may impose a special assessment.

City of Winter Springs v. State, 776 So. 2d 255 (Fla. 2001) – City brought action to validate special assessment bonds for improvements to a planned unit development. Circuit Court refused to validate, holding that the special assessment was not in compliance with the law. The Supreme Court reversed and remanded. The Supreme Court reiterated the test for valid special assessments set forth in *City of Boca Raton v. State* and held that, based on the various legislative findings of the City, if reasonable persons may differ as to whether the land assessed was benefited by the local improvement, the findings of the city officials must be sustained. *See* 595 So. 2d 25 (Fla. 1992). The City's legislative findings were not arbitrary and therefore were entitled to a presumption of correctness; in substituting its own judgment for that of the locally elected officials, the trial court erred as a matter of law.

IMPACT FEES

9. *Hollywood, Inc. v. Broward Cty.*, 431 So. 2d 606 (Fla. 5th DCA 1983) - Circuit Court concluded that a county ordinance requiring developer/subdivider, as a condition to plat approval, to dedicate land or pay a fee to be used in expanding the county level park system sufficiently to accommodate the new residents was within the County Charter and was permissible. District Court upheld the Circuit Court's decision and held that for impact fees to be valid, local government must demonstrate reasonable connection, or rational nexus, between need for additional capital facilities and growth in population generated by the subdivision. In addition, they must show reasonable connection, or rational nexus, between expenditures of funds collected and benefits accruing to subdivision.

Collier Cty. v. State, 733 So. 2d 1012 (Fla. 1999) – County filed complaint to validate revenue certificates payable from "interim governmental services fee." Trial court held that fee was an unauthorized tax and denied validation, Supreme Court upheld. The purpose of the fee was to recoup the equivalent of a partial year assessment of ad valorem taxes on improvements to property completed after January 1 that would not otherwise be subject to taxation at the increased value for up to 27 months. County argued the fee was a special assessment because of the increased cost of providing "growth-sensitive" services as a result of the improvements. Alternatively, the County argued that if the fee was found not to be a valid special assessment, it would collect it as a fee upon the issuance of the certificate of occupancy. However, since the "growth-sensitive" services identified by the County were the same services that the County provided to all its residents for their general benefit (police, libraries, courts, etc.), there was no special benefit and therefore the fee was not a valid special assessment but an unauthorized tax. Similarly, the fee was not a valid impact or user fee because there was no direct benefit to the property and those paying the fee were not benefited by the services in a manner not shared by those not paying fee.

CERTIFICATES OF PARTICIPATION

10. *State v. Brevard Cty.*, 539 So. 2d 461 (Fla. 1989) – Circuit Court validated County's certificates of indebtedness under a lease-purchase arrangement. Supreme Court affirmed holding that County's lease-purchase arrangement for equipment, under which county established not-for-profit corporation to purchase equipment for lease back to county, did not violate state constitutional provision prohibiting counties from issuing, without voter approval, certificates of indebtedness payable from ad valorem taxation and maturing more than 12 months after issuance. Because the County's obligation was secured solely by non-ad valorem revenues and because County preserved the right to terminate lease without further obligation, it was not inevitable that arrangement would lead to higher ad valorem taxes.

State v. Sch. Bd. of Sarasota Cty., 561 So. 2d 549 (Fla. 1990) – School Boards and not-for-profit entity brought actions against the State to validate ground lease of school land to not-for-profit entities, the School Board's leaseback of facilities to be constructed, and the trust agreement conveying entities' lease rights to trustees that were to market bonds and disburse funds to finance construction. The Florida Supreme Court held that the certificates of participation were not payable from ad valorem taxation and did not need to be approved by referendum as the obligations were not supported by a pledged of ad valorem taxation.

Miccosukee Tribe of Indians of Fla. v. S. Fla. Water Mgmt. Dist., 48 So. 3d 811 (Fla. 2010) – Water Management District sought validation of proposed issuance of certificates of participation in order to purchase land upon which to build Everglades restoration projects. The Florida Supreme Court held that the purchase of property served the public purpose of furthering Everglades' restoration and management of water resources. As such, the Water Management District did not violate the state constitutional provision prohibiting using the state's taxing power or credit to aid a private entity or person. The Court also held that the Florida Constitution's bond referendum requirement did not apply to the issuance of certificates of participation where the Water Management District did not pledge its ad valorem taxing powers to pay the sum under the lease agreement.

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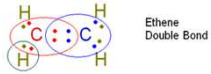
I. SUMMARY OF CLASSIFICATIONS OF MUNICIPAL BONDS



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I. SUMMARY OF CLASSIFICATIONS OF MUNICIPAL BONDS



Ethene
Double Bond



Cyanogen Chloride
Triple Bond

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I. SUMMARY OF CLASSIFICATIONS OF MUNICIPAL BONDS



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I. SUMMARY OF CLASSIFICATIONS OF MUNICIPAL BONDS

- Municipal debt obligations may be classified in several different ways. Under the laws of most states and under Florida law, two significant classifications of public debt are used:

A. General Obligation Bonds

B. Revenue Bonds

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I. SUMMARY OF CLASSIFICATIONS OF MUNICIPAL BONDS

- General Obligation Bonds
 1. Security is the full faith and credit of an issuer with taxing power.
 2. Subject to the referendum requirement and may only be issued for "capital projects."
 3. A general description of the provisions of Florida law relating to the holding of a referendum election may be found in Chapter 100 and Chapter 101, Florida Statutes.
 4. Generally, a second referendum is not required for bonds issued to refund or refinance bonds which were subject to the referendum if the refunding or refinancing results in a lower net average interest rate.
 5. Maturing more than 12 months (if less than 12 months don't need a referendum).

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I. SUMMARY OF CLASSIFICATIONS OF MUNICIPAL BONDS

- Revenue Bonds
 1. Revenue bonds are debt obligations as to which: (i) the full faith and credit of an issuer with taxing power is not pledged, but are payable from specific sources of revenue; and (ii) do not permit the bondholders to compel taxation or legislative appropriation of funds not pledged for payment of debt service.
 2. Generally, no voter approval is required under state law prior to issuance of such bonds.

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I. SUMMARY OF CLASSIFICATIONS OF MUNICIPAL BONDS

- Revenue Bonds:
 - Examples include:
 - (i) bonds payable from utility revenues, such as water and sewer revenues; and (ii) bonds payable from various sources of non-ad valorem revenues, such as excise taxes, gas taxes or state revenue sharing moneys (e.g. Guaranteed Entitlement Revenues and the Local Government Half-Cent Sales Tax).
 - "Covenant to Budget & Appropriate"
 - Secured by a covenant of the local government to budget and appropriate legally available non-ad valorem revenues for the payment of debt service.
 - Not secured by a specific lien upon or pledge of specific non-ad valorem revenues.
 - Covenant is subject to the requirement that the local government pay for all essential governmental services.

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I. SUMMARY OF CLASSIFICATIONS OF MUNICIPAL BONDS

- Revenue Bonds:
 - "Certificates of Participation" (a.k.a. "COPs")
 - Developed in the late 1980's and early 1990's by local governments searching for additional and innovative methods of financing local government projects.
 - Represent an undivided interest in lease payments from a governmental unit.
 - Local government enters into a lease agreement with a not-for-profit corporation.
 - The trustee sells interests in the lease agreement to outside investors.
 - Outside investors hold a certificate representing the right to participate in the lease payments.
 - Lease is subject to appropriation each year.
 - Lease terms coincide with the fiscal year of the issuer, and if no appropriation is made, the lease terminates.
 - Lease may be payable from any revenues of the local government, including ad valorem taxes.

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I. SUMMARY OF CLASSIFICATIONS OF MUNICIPAL BONDS

- Revenue Bonds:
 - Equipment Leases
 - Typically used for computer, vehicle and other equipment financings.
 - Annual lease payments are subject to appropriation and no revenue stream is pledged.
 - Similar to COPs (discussed above), however, on a smaller scale without the public issuance and sale of COPs.
 - Some form documents from vendors include a covenant to budget and appropriate the lease payments each year, which would make that particular transaction more akin to general revenue bonds.
 - Remedies should be limited to traditional lease remedies, such as return of property – foreclosure cannot be a remedy (without a referendum) due to the restrictions on a local government's ability to mortgage property or grant a security interest in property.

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I. SUMMARY OF CLASSIFICATIONS OF MUNICIPAL BONDS

- Revenue Bonds:
 - Conduit Bonds
 - Broad category that includes conduit bonds issued by: (i) local Industrial Development Authorities; (ii) Housing Finance Authorities; (iii) Health Facility Authorities; and (iv) other governmental units on behalf of an underlying borrower.
 - May also be issued directly by cities and counties and some other governmental units.
 - Typically payable solely from revenues derived from loan, lease or installment sale payments with the private party utilizing the bond proceeds.
 - Specifically authorized by statute (e.g., Ch. 243 (Educational Facilities), Ch. 154 (Health Facilities), and Ch. 159 (Industrial Development, Housing Development, and Research Development)).

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I. SUMMARY OF CLASSIFICATIONS OF MUNICIPAL BONDS

- Revenue Bonds:
 - Community Redevelopment Agency/Tax Increment Bonds (a.k.a. "TIF Bonds")
 - Issued under Ch. 163 for purposes of community redevelopment.
 - Often payable from the "tax increment" or the difference between the assessed value of the property before and after the redevelopment project.
 - On September 18, 2008, the Florida Supreme Court released its much anticipated decision in Strand v. Escambia County, upholding the constitutionality of TIF Bonds without referendum approval.

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I. SUMMARY OF CLASSIFICATIONS OF MUNICIPAL BONDS

- Revenue Bonds:
 - Special Assessment Bonds
 - Since special assessments do not constitute ad valorem taxation, bonds payable from special assessments on property specially benefitted from the improvements are considered revenue bonds.

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I. SUMMARY OF CLASSIFICATIONS OF MUNICIPAL BONDS

- Revenue Bonds:
 - Public Offerings/Private Placements
 - Public Offerings: Bonds offered through an underwriting by an investment banking firm acting on behalf of the government are referred to as "publicly offered." Publicly offered municipal bonds involve the preparation and distribution of offering materials (typically referred to as an official statement) to prospective purchasers of the bonds.
 - Private Placements: Unlike a public offering, a private placement typically involves the purchase of a single bond for the entire par amount of the issue by a financial institution which will hold the bond as security for the loan of the proceeds of the bond to the government.

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II. PREREQUISITES TO ISSUANCE

- Constitutional Restrictions
 - Public Purpose
 - No Lending of Credit
 - No Mortgage
 - Extraterritorial Powers

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II. PREREQUISITES TO ISSUANCE

- Public Purpose
 - Projects to be financed by municipalities must constitute a valid municipal purpose. Municipalities have governmental, corporate and proprietary powers to enable them to conduct municipal government, perform municipal functions and render municipal services, and may exercise any power for municipal purposes except as otherwise provided by law.



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II. PREREQUISITES TO ISSUANCE

- Charter counties have all powers of local self-government not inconsistent with general law.
- Non-Charter Counties have such powers of self-government as is provided by general or special law. The board of county commissioners of a county not operating under a charter may enact county ordinances not inconsistent with general or special law.
- What constitutes a public purpose has changed over the years. Great deference is paid to a legislative finding of public purpose. Generally, court will not overturn legislative finding of public purpose unless clearly erroneous.

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II. PREREQUISITES TO ISSUANCE

- No Lending of Credit
 - Art. VII, Sec. 10, Florida Constitution, prohibits municipal corporations from giving, lending or using their taxing power or credit to aid any corporation, association, partnership or person. State v. Miami Beach Redevelopment Agency, 392 So. 2d 875 (Fla. 1980) contains a detailed analysis of this constitutional provision and the public purpose test to be met before a municipality's credit may be pledged to a bond issue. The lending of credit test is closely related to the public purpose test described above.



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II. PREREQUISITES TO ISSUANCE

- No Mortgage
 - Generally, local governments may not secure debt obligations with a mortgage on public property.
 - This restriction on mortgages includes granting security interests in property, including purchase money security interests. This issue is raised particularly in the area of equipment, and other leasing as discussed above, as well as installment sales. Under this rule, a local government with taxing power may not grant a security interest in public property, absent voter approval.
 - This rule does not apply, however, to the pledging of a revenue stream to the repayment of debt.

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II. PREREQUISITES TO ISSUANCE

- Extraterritorial Powers
 - The exercise of extra-territorial powers by municipalities shall only be as provided by general or special law – Article VIII, Section 2(c), Florida Constitution. Therefore, to extend powers beyond corporate limits of a municipality requires specific statutory authority.
 - Chapter 180, Florida Statutes, authorizes the extension of utility services outside the corporate limits of a municipality.
 - Florida case law does not specify a limitation of the geographic area in which a municipality may extend its municipal utility services.
 - The Florida Supreme Court has upheld the exercise of extraterritorial powers, particularly with respect to proprietary projects, by municipalities where such powers are supported by, or derived from, a legislative grant.

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II. PREREQUISITES TO ISSUANCE

- Extraterritorial Powers (continued)
 - On April 18, 2019 the Supreme Court of Florida ruled on a extraterritorial powers case in *Halifax Hosp. Med. Ctr. v. State*, 278 So. 3d 545 (Fla. 2019). Halifax (a special district) was found not to be authorized to undertake a project outside of its geographic boundaries notwithstanding its interlocal agreement with the City of Deltona.
 - Section 125.01(1)(p), Florida Statutes, provides that a county has the power to enter into agreements with other government units within or outside the boundaries of the county for joint performance or for performance by one unit on behalf of the other for any of either agency's authorized functions.

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II. PREREQUISITES TO ISSUANCE

- Statutory Authorization and Statutory Restrictions
 - Typical Revenue Bonds and General Obligation Bonds
 - Part II of Chapter 166 contains the basic home rule power for cities to issue bonds or incur debt.
 - Chapter 125 provides basic authority for counties to issue bonds.



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II. PREREQUISITES TO ISSUANCE

- Other authority is contained in Chapter 132, 153 and 159, Florida Statutes.
 - Interestingly, Chapter 166, Part II, Florida Statutes, authorizes the issuance of revenue bonds for "any capital or other project."
- Statutory Authorization and Statutory Restrictions
 - Certificates of Participation
 - There are certain statutory provisions relating to the lease purchase of facilities for school districts (Sect. 1013.15) and counties (Sect. 125.031).
 - Cities may enter into lease purchase transactions under home rule powers.

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II. PREREQUISITES TO ISSUANCE

- Statutory Authorization and Statutory Restrictions
 - Conduit Bonds
 - Chapters 159, Parts II and III provides basic authority for issuance of a broad range of conduit bonds (e.g. manufacturing facilities, tourism facilities, educational facilities and social service facilities). These bonds may not be payable from revenues of the issuer, other than revenues received under the loan agreement.
 - Chapter 154, Part III provides authority for the issuance of bonds to finance health facilities.
 - Chapter 159, Part IV provides authority for the issuance of bonds to finance housing projects, including both single family and multi-family projects. Article VII Section 16, Florida Constitution provides that when authorized by law, revenue bonds may be issued without an election to finance or refinance housing or related facilities in Florida.
 - Chapter 159, Part IV provides that each county of the state may create a housing finance authority in order to facilitate the construction and rehabilitation of housing for low income families through the use of public financing.

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II. PREREQUISITES TO ISSUANCE

- Statutory Authorization and Statutory Restrictions
 - Community Redevelopment Agency and Tax Increment Bonds
 - Part III of Chapter 163 establishes the Community Redevelopment Act.
 - Any county or municipality may create a community redevelopment agency by finding that one or more slums or blighted areas, or one or more areas in which there is a shortage of housing affordable to residents of low or moderate income exist in the community, and that rehabilitation, conservation or redevelopment of such an area is necessary in the interest of the public health, safety, morals or welfare of the residents.
 - The purpose of the redevelopment project is the elimination and prevention of the development or spread of slums and blight, or for the provision of affordable housing, whether for rent or for sale, to residents of low or moderate income.
 - "Slum area" or "blighted area" may not be limited to typical downtown areas needing revitalization.
 - Section 163.385 authorizes the governing body of a county or municipality to issue redevelopment revenue bonds and refunding bonds to finance any undertaking of any community redevelopment plan.

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II. PREREQUISITES TO ISSUANCE

- Statutory Authorization and Statutory Restrictions
 - Special Assessment Bonds
 - A special assessment is a charge imposed against property in a particular locality because that property receives a special benefit by virtue of some public improvement, separate and apart from the general benefit accruing to the public at large.
 - Special assessments must be apportioned according to the value of the benefit received, rather than the cost of the improvement, and may not exceed the values of such benefit or the cost of the improvement.
 - Chapter 170 Florida Statutes is the general law providing for special assessments for municipalities. Assessments for counties are generally levied pursuant to an ordinance enacted under Chapter 125, Florida Statutes.
 - Chapter 170 authorizes special assessment for statutorily enumerated projects.

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II. PREREQUISITES TO ISSUANCE

- Statutory Authorization and Statutory Restrictions
 - Special Assessment Bonds
 - Section 170.11 provides that bonds may be issued to an amount not exceeding the amount of liens assessed for the cost of improvements to be paid by special assessment. The equalization, approval and confirmation of the levying of the special assessments for improvements must be completed before the governing authority authorizes the issuance of the bonds.
 - An alternative form of authority may be in the form of a municipal ordinance adopted in accordance with home rule power.
 - Thus, municipalities are able to broaden the qualifying projects and simplify the procedural requirement by an enactment of alternative authority for the imposition of special assessments.
 - Chapter 153 also provides statutory authority for the imposition of special assessments by counties in connection with improvements to a water and sewer system, as well as the authority for the issuance of bonds for water and sewer system improvements, including acquisitions.
 - Special assessments and home rule powers in general are addressed in a separate outline.

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II. PREREQUISITES TO ISSUANCE

- Statutory Authorization and Statutory Restrictions
 - Others
 - Part VII of Chapter 159 provides the procedure for issuing taxable bonds.
 - Chapter 190 provides authority for issuance of bonds by Community Development Districts.
 - Chapter 189 provides restrictions on the issuance of certain types of debt by special districts.
 - Chapter 129.07 provides a limitation on Counties on entering into a contract or expending county funds in excess of amounts appropriated in the budget. Contractual provisions in debt instruments requiring a Florida County to pay amounts which are not quantified and are open ended should be analyzed under this statute and under the process for budgetary amendments.
 - Section 768.28, Florida Statutes, provides a limited waiver of sovereign immunity in tort actions by the State or any of its agencies or subdivisions. Sovereign immunity can be waived by contract. See *Am. Home Assur. Co. v. Nat'l R.R. Passenger Corp.*, 908 So. 2d 459 (Fla. 2005). It is not unusual for debt instruments to include provisions requiring indemnification from an issuer or a borrower for the benefit of another transaction participant. Care must be taken to review such provisions and, unless intentional, to expressly align the governmental entities indemnification exposure to that provided for in Section 768.28, Florida Statutes.

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II. PREREQUISITES TO ISSUANCE

- Charter and Ordinance Restrictions
 - In addition to constitutional and statutory restrictions, practitioners should be aware the local charters and ordinances may contain additional restrictions for issuance of debt (e.g., all bonds be signed by the City Attorney or issuance of bonds secured by taxes).
 - Authorization of bonds by ordinance will not repeal any conflicting provisions of ordinances of local government.



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II. PREREQUISITES TO ISSUANCE

- Contractual Restrictions
 - A review of possible contractual prohibitions should be made prior to the issuance of the bonds (e.g. "parity" provisions in outstanding bond documents regarding whether the debt sought to be issued may have equal lien status with the existing debt).
 - In covenant to budget and appropriate transactions, an anti-dilution test may be present which provides that no debt will be issued unless non-ad valorem revenues are at certain levels.
 - Other documentary provisions may include restrictions on use of revenues and consent procedures from credit enhancers or bondholders.
 - Additional restrictions may also be found in contractual documents with vendors, credit providers and other contracting parties with local governments.

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II. PREREQUISITES TO ISSUANCE

- Pledge and Lien on Revenues
 - Often times, local governments issue bonds payable from a specific revenue source.
 - In order to secure payment, the bond resolution or ordinance, authorizing the issuance of bonds typically provides for the creation of various funds and accounts to provide a tracking of the pledged revenues. These provisions also ensure the revenues are in trust funds. Security arrangements are particularly important to holders of revenue bonds, who cannot look to the ad valorem taxing power of the issuer for repayment.
 - Bondholders often require attorneys to provide a legal opinion to the effect that the security interest in revenues is valid and binding. Outside of the public arena, laws regarding the creation and perfection of security interests are contained in Article 9 of the Uniform Commercial Code.

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II. PREREQUISITES TO ISSUANCE

- Pledge and Lien on Revenues
 - In 2001, the Florida Legislature adopted revisions to Florida's uniform commercial code relating to secured transactions (Ch. 679). Under the rewritten code, transfers by governments and governmental units continue to remain exempt from the provisions of the uniform commercial code relating to secured transactions (§679.1091(4)(n)).



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II. PREREQUISITES TO ISSUANCE

- Pledge and Lien on Revenues
 - The creation of a pledge of revenues may be accomplished through a trustee or through the creation of trust funds and accounts. Most Florida statutes providing for issuance of bonds also include language regarding the validity of a pledge.
 - If validly pledged, the revenues may not be repealed by the local government or the Florida Legislature because of the protection of the Contracts Clause in Article I, Section 10 of the Florida Constitution. However, with revenues not controlled by local governments, it is important to find specific authority to pledge such revenues and to ensure that Legislature has not reserved the right to revoke this funding source in the future or been silent on the issue.
 - The Impairment of Contracts doctrine is a clause to both federal and state Constitution Law.
 - Historically, the Legislature has taken great care to ensure that bondholders secured by revenues that are affected by state law are not negatively affected. See §202.41 providing that revenue received by a taxing authority under the communication service taxes shall redeem to replace any taxes or fees repealed by that act. Absent specific authority to pledge the revenues, however, there may be some cause for concern that the Legislature may reduce amounts from revenue sharing without replacing such revenue sources elsewhere.

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III. BOND VALIDATION



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III. BOND VALIDATION

- Chapter 75 provides for circuit court validation proceedings confirming the legality and authority for issuance of bonds, bonded debt, certificates of debt and matters related thereto, prior to the issuance of such obligations.
- The issuer files the validation action and seeks an order to show cause why the bonds should not be validated and the local state attorney defends the action.
- Case law also addresses validation of interlocal agreements under which a local government is obligated to make payments and lease purchase agreements.
- Issues to be considered in a validation proceeding include the validity of the bonds, or other obligations, the validity of any taxes, assessments or revenues which are pledged for the repayment of the bonds, the proceedings authorizing the issuance of the bonds and any remedies provided for their collection.
- Collateral issues should not be considered.

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III. BOND VALIDATION

- Independent Special Districts must allege in the complaint the creation of a trust indenture established by the petitioner for a bonded trustee, acceptable to the court, who shall certify the proper expenditure of the proceeds of the bonds.
- Procedural matters:
 - Validation proceedings are filed in Circuit Court;
 - The plaintiff in a bond validation proceeding is the issuer of the bonds (e.g. county, municipality, taxing district or other political district of the state);
 - The State Attorney is served with the complaint and represents the "defendant" State and property owners, although property owners and affected persons may intervene; and
 - Section 75.06, Florida Statutes requires an Order to Show Cause to be published once a week for 2 consecutive weeks, the first publication at least 20 days prior to the hearing date.
- The only necessary parties are the proposed issuer of the bonds and the State.
- Section 75.08, Florida Statutes, provides for direct appeal of validation orders to the Florida Supreme Court.
- Effect of Validation:
 - Binding effect of validation is based upon the doctrine of *res judicata*. Section 75.06, Florida Statutes
 - Validation judgments may still be subject to collateral attack with respect to issues not raised and adjudicated in validation proceedings.

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IV. BOND REFERENDA MATTERS



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IV. BOND REFERENDA MATTERS

- Ch. 100 provides for specific procedures for bond referenda, but generally, procedures applicable to general elections are applicable to bond referenda.
- If a bond issue is defeated at referendum, no other referendum may be held with respect to such bonds for the same purpose for a period of 6 months.
- Ballot must include: (i) the amount of bonds to be issued; (ii) a statement as to the purpose for the bonds; and (iii) the rate of interest on the bonds (a statement that the interest rate shall not exceed the maximum rate permitted by law is sufficient).
- Notice of the bond referendum must be published in a newspaper of general circulation at least 30 days prior to the election, at least twice, once in the 5th week and once in the 3rd week prior to the week in which the election is to be held.
- Any taxpayer may bring a test suit within 60 days of the election to test the validity of the referendum. However, if the issuer institutes a bond validation proceeding, then any such taxpayer is bound to intervene in such validation proceeding. The court hearing on the bond validation proceeding is given exclusive jurisdiction to determine the validity of the referendum.

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V. STATE REPORTING AND DISCLOSURE REQUIREMENTS

- Definitions
- Provision of Notice
- Bond Information Forms
 - Combined Form 2003/2004
 - Official Statement
 - Failure to Comply
- Purchaser's Disclosure Statement and Truth in Bonding Statement
- Public Sale vs. Negotiated Sale
- Interest Rates

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V. STATE REPORTING AND DISCLOSURE REQUIREMENTS

- Definitions
 - "Unit of local government" means, in addition to counties and municipalities, special district, local agencies, authorities, consolidated city-county governments or any other local governmental body with the power to issue general obligation or revenue bonds.
 - "General obligation or revenue bonds" means debt obligations issued by units of local government which mature in more than one year, including general obligation bonds, revenue bonds, limited revenue bonds, special obligation bonds, debenture, and other similar instruments, but not bond anticipation notes.

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V. STATE REPORTING AND DISCLOSURE REQUIREMENTS

- Provision of Notice
 - Every unit of local government is required to provide the Division of Bond Finance with advance written notice of the impending sale of its general obligation or revenue bonds. Public notice rules must be complied with for all local government meetings which authorize the issuance of the general obligation or revenue bonds, and sunshine rules should be adhered to.
- Bond Information Forms (Combined Form 2003/2004)
 - As soon as possible after general obligation or revenue bonds are issued, Form 2003/2004 must be filed with the Division of Bond Finance.
 - Form 2003 includes general information about general obligation or revenue bonds, including names and addresses of participants.

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V. STATE REPORTING AND DISCLOSURE REQUIREMENTS

- Form 2004 (separate versions for competitive and negotiated sale) includes required disclosure of any fee paid by underwriter and issuer as well as underwriting spread components and other attorney and consultant fees paid; both must be filed within 120 days of issuance.
- Form 2004 forms need not be filed for certain conduit financings (industrial development bonds, health facilities revenue bonds, educational facilities revenue bonds).
- Units of local government must also file a copy of the final official statement (disclosure document) if prepared.
- Failure to Comply
 - Failure to comply with these reporting requirements may be reported to the Legislative Auditing Committee and could result in withholding of state funds.

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V. STATE REPORTING AND DISCLOSURE REQUIREMENTS

- Purchaser's Disclosure Statement and Truth in Bonding Statement
 - Disclosure of fees paid by underwriter, including any finder's fee, must be made prior to sale of general obligation or revenue bonds.
 - Finder's Fee must be disclosed in Official Statement of general obligation or revenue bonds.
- Executed Truth in Bonding Statement must be included in any proposal for the purchase of general obligation or revenue bonds (e.g. bond purchase agreement). Such statement must include identification of source of repayment for the general obligation or revenue bonds and the amount of pledged funds not available for other uses during term of general obligation or revenue bonds, as well as the forecasted rate of interest on the general obligation or revenue bonds.
- General obligation or revenue bonds must be sold at public sale by competitive bid unless certain findings have been made by resolution as to the reasons requiring the negotiated sale and determining that a negotiated sale is in the best interest of the unit of local government.

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V. STATE REPORTING AND DISCLOSURE REQUIREMENTS

- For competitive sales, notice of sale must be published at least 10 days prior to sale.
- Bonds may be sold by negotiated sale if the governing body shall, by resolution adopted at a public meeting, determine that a negotiated sale is in the best interest of the issuer.
- Section 215.84, Florida Statutes sets forth the maximum rate of interest for local government bonds.
- Chapter 159 Part VII sets forth a higher rate for taxable bonds; though Section 215.84 applies to both taxable and tax-exempt bonds, Chapter 159, Part VII, Florida Statutes, is more recent, expressly supersedes any conflicting law regarding the issuance of taxable bonds (Section 159.824, Florida Statutes)
- An issuer may apply to the SBA for an exemption.
- Section 215.84(7) and (8), Florida Statutes, expressly excludes certain conduit bonds and municipal utility bonds from this limitation.

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VI. ASSESSMENT VS. TAX VS. USER FEES VS. IMPACT FEES

- Assessments: Charges assessed against the property of some particular locality because that property derives some special benefit from the expenditure of funds.
 - Two requirements for the levy of special assessments: (1) the property must be a special benefit from the service provided or project constructed; and (2) the assessment must be fairly and reasonably apportioned among properties that receive the special benefit.
- If a special benefit fails to meet the Florida case law requirements of special benefit and fair apportionment applicable to their imposition, then the charges imposed are taxes.

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VI. ASSESSMENT VS. TAX VS. USER FEES VS. IMPACT FEES



- If a charge is a tax, it must be authorized by general law.
- Collection of the special assessment may be secured by a lien on the benefitted property, enforceable through foreclosure proceedings.
- Additionally, Sec. 197.3632 provides for the collection of non-ad valorem assessments by including these assessment on the annual tax bill.
- Enforcement proceedings applicable to taxes are then available for the enforcement of assessments, including sale of tax certificates.

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VI. ASSESSMENT VS. TAX VS. USER FEES VS. IMPACT FEES

- User Fees: Authorized by statute to be imposed directly by municipalities and charter counties and indirectly for non-charter counties through the use of municipal service taxing or benefit units for various governmental purposes.
 - User fees are payments for voluntarily purchased services which benefit the specific individual to the exclusion of non-fee-payers.
 - Florida Supreme Court struck down a transportation utility fee, stating that such fee was in reality a tax because it sought to charge for a general government service (maintenance of public roads).
 - However, in 2001 the Court held that a mandatory reclaimed water "availability fee" was found not to be a tax, but a valid utility user fee even though the reclaimed water might not actually be utilized.

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VI. ASSESSMENT VS. TAX VS. USER FEES VS. IMPACT FEES

- **Impact Fees:** Fees imposed by local government to offset the cost of new development on existing facilities and are valid to the extent that the fees do not exceed a pro rata share of the reasonably anticipated costs of expansion, where expansion is reasonably required, and the use of the fees is limited to meeting the cost of expansion.
 - Local governments must show a reasonable connection between the need for additional capital facilities and the growth in the population generated by the development.
 - Local government must also demonstrate there is a reasonable connection between the expenditure of funds collected and the benefits accruing to the development.
 - Impact fees are generally imposed for water and sewer facilities, road facilities and parks and recreation facilities.
 - The Supreme Court has upheld impact fees for education facilities, however, they seem to retreat to a home rule power analysis, rather than comparing impact fees to user fees as in prior cases.
- **Payments in Lieu of Taxes:** Payments under a PILOT Agreement are imposed under proprietary powers of government, and not sovereign right and therefore are not invalid as taxes.

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VII. SPECIAL DISTRICTS

- Uniform Special District Accountability act of 1989 governs creation, dissolution, meeting notices, reporting, elections and other requirements for special districts.
- "Special District" means a local unit of special purposes, as opposed to general purpose government, within a limited boundary, created by general law, special act, local ordinance, or by rule of the Governor and Cabinet.
- The special purpose or purposes of special districts are implemented by specialized functions and related prescribed powers.
- The term does not include school districts, a community college district, a special improvement district created pursuant to Sect. 285.17, a municipal service taxing or benefit unit as specified in Sect. 125.01, or a board which provides electrical service and which is a political subdivision of a municipality or is part of a municipality.

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VII. SPECIAL DISTRICTS

- "Dependent Special District" means a special district that meets at least one of the following criteria:
 1. The membership of its governing body is identical to that of the governing body of a single county or a single municipality;
 2. All members of its governing body are appointed by the governing body of a single county or a single municipality;
 3. During their unexpired terms, members of the special district's governing body are subject to removal by the governing body of a single county or a single municipality; or
 4. The district has a budget that requires approval through an affirmative vote or can be vetoed by the governing body of a single county or a single municipality.

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VII. SPECIAL DISTRICTS

- "Independent Special District" means a special district that is not a dependent special district as defined before. A district that includes more than one county is an independent special district.
- Special districts are now required to maintain an official website. The information required to be accessible on their website is listed in Section 189.069, Florida Statutes. The agenda for a meeting and any available material for such meeting must be posted at least seven (7) days before the meeting.

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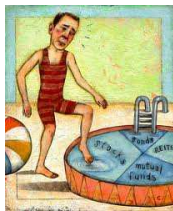
VII. SPECIAL DISTRICTS

- Bonds issued by special districts (other than Bonds approved by a referendum) must meet one of the following criteria:
 1. The bonds were rated in one of the highest four ratings by a nationally recognized rating service;
 2. The bonds were privately placed with or otherwise sold to accredited investors;
 3. The bonds were backed by a letter of credit from a bank, savings and loan association, or other creditworthy guarantor, or by bond insurance, guaranteeing payment of principal and interest on the bonds; or
 4. The bonds were accompanied by an independent financial advisory opinion stating that estimates of debt service coverage and probability of debt repayment are reasonable, which opinion was provided by an independent financial advisory, consulting, or accounting firm registered where professional registration is required by law and which is in good standing with the State and in conformance with all applicable professional standards for such opinions.

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VIII. INVESTMENT POLICIES AND PROCEDURES



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VIII. INVESTMENT POLICIES AND PROCEDURES

- Several legal documents may control the investment of funds by cities, counties and other local governments.
- There is specific statutory authority for
 - Counties (Chapter 125, Florida Statutes);
 - Cities (Chapter 166, Part III, Florida Statutes);
 - School Boards (Chapter 1011, Florida Statutes); and
 - Special Districts (Chapter 218, Part III, Florida Statutes).
- Additionally, Sect. 218.415 limits the types of investments which may be used for the investment of surplus funds of local governments to certain investments listed in the statute.

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VIII. INVESTMENT POLICIES AND PROCEDURES

- Local Government cannot invest in any investment other than the listed investments unless the local government has adopted a formal written investment policy, which is required to place primary priority on the safety and liquidity of funds and secondary priority on the optimization of investment returns.
- Investments in derivative financial products must be specifically authorized and may be considered only if the chief financial officer has developed sufficient understanding of the derivative products and has the expertise to manage them. The use of reverse repurchase agreements or other forms of leveraged investments shall be prohibited or limited to transactions where the proceeds are intended to provide liquidity and for which the unit of local government has sufficient resources and expertise.

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IX. DISCLOSURE REQUIREMENTS

- Bonds of a local government which are publicly sold (by competitive bid or negotiated sale) are typically sold by an underwriter through the use of a disclosure document (usually an "official statement").
- The official statement includes a description of the terms of the bonds, the security for the bonds and financial information about the issuer and the source of payment (water and sewer revenues, sales tax, ad valorem taxes, etc.).
- The official statement speaks only as of its date and must be complete and accurate as of its date in order to comply with the antifraud provisions of the federal securities laws.
- In November 1994, the SEC released amendments (the "Amendments") to Rule 15c2-12 promulgated under the Securities Exchange Act of 1934, as amended (the "Rule") which effectively requires issuers to commit to continuing disclosure as a condition to access the public bond markets.
- In July 2009, May 2010 and October 2018, pursuant to Release No. 34-59062, and in May 2010, pursuant to Release No. 34-62184, Release No. 34-62184 and Release 34-83885, respectively, the SEC adopted additional amendments to the Rule.

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IX. DISCLOSURE REQUIREMENTS

- Key Elements of 1994 Amendments to Rule 15c2-12
 - Except for certain exemptions, the Amendments require the issuer or other obligated person for which information is provided in the final official statement (either individually or in combination with other issuers or obligated persons) to covenant to provide both annual financial information (and audited financial statements, if and when available) and material event disclosure (the "Continuing Disclosure Undertaking").
 - As a practical matter, if neither the issuer nor an obligated person agree to the required Continuing Disclosure Undertaking, the offering will be effectively shut out of the municipal securities market under the Rule, unless the issue qualifies for one of the exemptions.

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IX. DISCLOSURE REQUIREMENTS

- Key Elements of 1994 Amendments to Rule 15c2-12
 - "Obligated Persons"
 - The Continuing Disclosure Undertaking is required of the issuer or other obligated person for whom information is provided in the final official statement.
 - An "obligated person" is defined to mean a person who is either generally, or through an enterprise, fund or account of such person, committed by contract or other arrangement to support payment of all or part of the obligations on municipal securities, other than providers of municipal bond insurance, letters of credit or other liquidity facilities.
 - An entity may be an obligated person even though it has no direct contract with bondholders. For example, the obligations supported by the obligated person can be obligations which run only to the issuer, such as a lease, loan agreement or other conduit structure or purchase agreement, a take-or-pay contract, or other contract or arrangement structured to support payment of the obligations relating to the municipal securities.

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IX. DISCLOSURE REQUIREMENTS

- Key Elements of 1994 Amendments to Rule 15c2-12
 - Annual Information:
 - Includes annual financial information for each obligated person for whom financial information or operating data was included in the final official statement and, if not submitted with the annual financial information, includes annual audited financial statements if and when available.
 - Must be filed. The timing is not prescribed in the Rule; rather, it is to be set forth in the undertaking.
 - Failure Notice
 - The issuer or obligated person must make certain notifications in the event the required annual financial information is not provided on or before the date required in the written undertaking.

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IX. DISCLOSURE REQUIREMENTS

- Summary of the Key Elements of 2009 Amendments
 - The Commission, pursuant to Release No. 34-59062 adopted amendments to the Rule in connection with the adoption and implementation of the MSRB's EMMA system for municipal securities disclosures. In brief, the new amendments provide for the electronic submission of continuing disclosure documents, in a specified format and accompanied by specified identifying information, to the MSRB alone, and no longer to the NRMSIRs. All references to NRMSIRs and SIDs have been deleted from the Rule. Access to the Electronic Municipal Market Access ("EMMA") system is free to the public, although there is an optional subscription to a fee-based real-time data stream.

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IX. DISCLOSURE REQUIREMENTS

- Key Elements of 2009 Amendments - MSRB as Repository
 - The MSRB is now the only repository referenced in the Rule. Submissions must be made electronically and accompanied by certain identifying information. The amendments will also require that the underwriter reasonably determine that the issuer or obligated person has undertaken in writing to accompany continuing disclosure documents submitted to the MSRB with identifying information as prescribed by the MSRB.
 - No changes were made to the exemptions in (d)(1) of the Rule by the 2009 Amendments – i.e., exemption for securities with denominations of \$100,000 or more AND limited offering to sophisticated investors, maturity of nine months or less, OR variable rate debt with put option with a frequency of at least every nine months.

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IX. DISCLOSURE REQUIREMENTS

- Key Elements of 2010 Amendments
 - Summary. The SEC, continuing with its current theme of improving the quality, timing and dissemination of disclosure in the municipal securities market, issued Release No. 34-62184 which provides for certain amendments to Rule 15c2-12.
 - The amendments to the Rule affect the secondary market disclosure requirements of the Rule, which require brokers, dealers, and municipal securities dealers, prior to purchasing or selling municipal securities in connection with an offering, to reasonably determine that an issuer of such municipal securities, or an obligated person for whom financial or operating data is presented in the final official statement, has undertaken in a written agreement to provide to the holders of such securities certain financial information and to report the occurrence of certain materials events relating to the securities.

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IX. DISCLOSURE REQUIREMENTS

- Key Elements of 2010 Amendments
 - Timeframe for Submitting Event Notices
 - The SEC has modified the Rule to require a participating underwriter to reasonably determine that the issuer or obligated person has agreed in its continuing disclosure agreement to submit notices of certain material events to the MSRB "in a timely manner not in excess of ten business days after the occurrence of the event," instead of just "in a timely manner," as the Rule previously provided. This amendment ties the ten business days to the occurrence of the specific event, as opposed to knowledge of such an event by the issuer or obligated person.
 - Materiality Determinations
 - The SEC has deleted the condition in the Rule that presently provides that notices of all of the listed events need be made only "if material," and removed the materiality determination for certain events.

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IX. DISCLOSURE REQUIREMENTS

- Key Elements of 2010 Amendments
 - Event Notices Regarding Adverse Tax Events
 - The current Rule provides for an event disclosure for "adverse tax opinions or events affecting the tax-exempt status of the security," if material and the 2010 amendments to the Rule provide for certain other specific tax matters to be disclosed.
 - Additional Events to be Disclosed
 - The amendments to the Rule also include four additional events that must be disclosed in an event notice. These events include: (1) tender offers; (2) bankruptcy, insolvency, receivership or similar proceeding of the obligated person; (3) the consummation of certain mergers, consolidations, or acquisitions; and (4) appointment of a successor or additional trustee, or the change of name of a trustee, if material.

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IX. DISCLOSURE REQUIREMENTS

- Additional and Voluntary Disclosures to the MSRB
 - The SEC has also given approval to the MSRB to accept additional types of filings on its Electronic Municipal Market Access ("EMMA") website. Underwriters of municipal securities will be required to provide – and issuers will be able to provide voluntarily – information to assist investors and other market participants in assessing the availability of ongoing disclosures made by issuers through the EMMA website.

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IX. DISCLOSURE REQUIREMENTS

- Municipalities Continuing Disclosure Cooperation Initiative
 - The SEC rolled out its Municipalities Continuing Disclosure Cooperation Initiative (the "MCDC Initiative") which intended to address what the SEC views as potentially widespread violations of the federal securities law by municipal issuers and underwriters of municipal securities.
 - Municipal issuers who may have made materially inaccurate statements in a final official statement regarding their prior compliance with their continuing obligations as described in Rule 15c2-12 were given the opportunity to self-report to the SEC to take advantage of the MCDC Initiative.
 - The program was open for filings in 2014 and the self reporting period has now closed. Filings were not made public and the SEC is now entering into enforcement actions and settlements. Inquires can be directed to MCDCinquiries@SEC.gov.

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IX. DISCLOSURE REQUIREMENTS

• 2019 Amendments

The 2019 Amendments, effective February 22, 2019, add two new events as follows:

- Incurrence of financial obligation of the issuer or obligated person, if material (a "new obligation event"), or an amendment to covenants, events of default, remedies, priority rights, or other similar terms of a financial obligation of the issuer or obligated person, any of which affect security holders, if material (a "revised obligation event"); and
- A default, event of acceleration, termination event, modification of terms, or other similar events under the terms of the financial obligation of the issuer or obligated person, which reflect financial difficulties (a "financial distress event"). (Note the lack of materiality standard in this event when compared to the description above.)

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X. POST ISSUANCE COMPLIANCE

- The IRS is pushing for heightened compliance practices by issuers, most recently in 2012 by requiring issuers to certify on Form 8038 and Form 8038-G that they have written procedures in place to monitor and remediate any nonqualified tax-exempt bonds.



- In 2012, the IRS reported the results of a compliance check on governmental bond issuers. While a majority of issuers reported that they had written compliance procedures in place, the IRS found that fewer than 20% of issuers had implemented specific written procedures or ad hoc processes at the level the IRS deems appropriate.
- A compliance plan is intended to provide written procedures for handling matters that arise after issuance of bonds. The plan should detail record retention policies, private use monitoring, arbitrage rebate and yield restriction, expenditure of bond proceeds, remedial actions and other issues that may arise over the life of a bond issue.

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X. POST ISSUANCE COMPLIANCE

- Also, the IRS recently released its Publication 5005, Your Responsibilities as a Conduit Issuer of Tax-Exempt Bonds, which provides an overview for state and local governments of the responsibilities of the conduit issuer with respect to tax compliance in municipal financing arrangements commonly known as conduit financings. Because the conduit issuer is treated as a "taxpayer" for federal tax purposes and procedures, the issuer is the party generally responsible for tax compliance. However, the bond documents generally provide for delegation of certain responsibilities to the conduit borrower.

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X. POST ISSUANCE COMPLIANCE

- Publication 5005 lists several items the IRS suggests that issuers consider when developing such post-issuance compliance procedures:
 - Designating a particular conduit issuer official to assist in post-issuance compliance;
 - Requiring conduit borrowers to identify a particular official responsible for assisting the issuer with post-issuance compliance monitoring;
 - Providing training or other technical support to designated official(s) of the conduit issuer and conduit borrower.
 - Requiring the conduit borrower to demonstrate that it has adopted written post-issuance compliance monitoring procedures before the approval of a bond issue;
 - Designating time intervals within which compliance monitoring activities will be completed by the issuer and borrower;
 - Timely completing remedial actions to correct or otherwise resolve identified noncompliance; and
 - Requiring conduit borrowers to notify the conduit issuer of the completion of post-issuance compliance monitoring activities.

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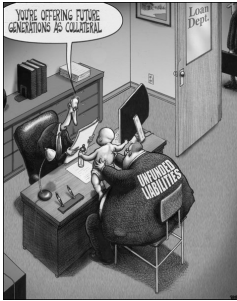
X. POST ISSUANCE COMPLIANCE

- In summary, local government issuers of tax-exempt bonds should have in place compliance programs to monitor and document activities post issuance.
- This encourages the prevention of problems and timely remediation, should a problem arise.

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XI. MUNICIPAL BANKRUPTCIES



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XI. MUNICIPAL BANKRUPTCIES

- Florida Law:
 - Florida is one of 12 states that conditionally authorizes municipal bankruptcies.
 - Florida Statute 218.01 is the authorizing authority for the bankruptcy laws "for the benefit and relief of municipalities, taxing districts and political subdivisions."
 - States cannot file bankruptcy cases (sovereign).
- Federal Law:
 - Chapter 9 of the Federal Bankruptcy Code provides for financial reorganization.
 - Purpose of filing to provide financially distressed governments protection from creditors while reorganizing to become fiscally stable.

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XI. MUNICIPAL BANKRUPTCIES

- Chapter 9 Eligibility:
 - The municipality must have specific authority to file for Chapter 9 bankruptcy from the state;
 - The municipality must be insolvent;
 - The municipality must prove its desire to adopt a plan to adjust its debt;
 - The municipality must satisfy at least one of four specified conditions to demonstrate that it has obtained or tried to obtain an agreement with its creditors, that it is not feasible to negotiate with its creditors holding at least the majority of the claims in each class that the entity intends to impair under its debt adjustment plan, or that it has reason to believe its creditors might attempt to obtain preferential payment or transfer of the entity's assets; and
 - The municipality must show that it has filed for bankruptcy in good faith.

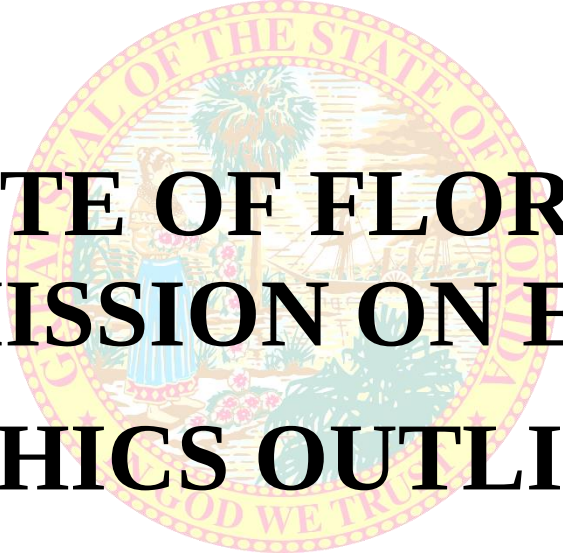
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**Ethics Under Part III, Ch. 112, F.S.,
Conflicts of Interest, Financial
Disclosures**

By

**Steven Zuilkowski, Florida
Commission on Ethics, Tallahassee**



STATE OF FLORIDA COMMISSION ON ETHICS ETHICS OUTLINE

**Conflicts of Interest, Financial Disclosure, Gift Laws,
Postemployment Restrictions, Voting Conflicts, and More**

February 2022

Prepared by the Commission on Ethics Office of General Counsel

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The ethics opinions cited in this ethics outline can be accessed
from the website of the Commission on Ethics: <http://ethics.state.fl.us>

We endeavor to update this ethics outline in the first quarter of every year.
We invite you to contact us for the newest version.

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I. PERSONS GOVERNED BY THE ETHICS LAWS; MANDATORY ETHICS TRAINING

A. Public Officers

1. A "public officer" is defined in F.S. 112.313(1) and 112.3143(1)(b) to include persons "elected or appointed to hold office in any agency, including any person serving on an advisory body." One can be "appointed" by various means (CEO 02-15). CEO 16-5 found that one privately employed by the professional association of a District Medical Examiner (as opposed to the District Medical Examiner and Associate Medical Examiners) was not a public officer. CEO 20-2 found one appointed by city council to be "mayor emeritus" was a public officer as he had authority to represent the city on various matters and to advocate for the city's interests. And CEO 20-7, Question 1 found appointees to a purely advisory body could be public officers.

2. Officers and directors of nonprofit corporations organized under Ch. 617, F.S. have been found not to be public officers subject to the Code of Ethics. CEO 84-17, CEO 91-41. However, Chapter 2009-126, L.O.F., created F.S. 112.3136, subjecting the officers, directors, and chief executive officer of a corporation, partnership, or other business entity that is serving as the chief administrative or executive officer or employee of a political subdivision, and any business entity employee who is acting as the chief administrative or executive officer or employee of the political subdivision, to a number of provisions of the code of ethics. CEO 10-1. In a particular situation, neither a hospital authority's financial services firm nor the firm's personnel were found to be subject to F.S. 112.3136. CEO 09-17.

3. Members of advisory board of city-operated charter school are public officers. CEO 99-2. However, in a particular context, officers and directors of nonprofit governing organization of a charter school were not found to be public officers. CEO 99-10. But note that Chapter 2009-214, L.O.F., amended F.S. 1002.33 to make members of charter school governing boards, including governing boards of schools operated by a private entity, subject to F.S. 112.313(2), (3), (7), and (12) and F.S. 112.3143(3), of the Code of Ethics. Also, charter school personnel in schools operated by a municipality or other public entity have been made subject to F.S. 112.3135 (the anti-nepotism law). Further, certain charter school personnel in a charter school operated by a private entity have been made subject to restrictions like the restrictions of F.S. 112.3135, but apparently without the administration of the restrictions being placed in the commission on ethics. F.S. 1002.33(24) and (26); F.S. 1002.33(26)(c).

4. See F.S. Chapter 288 regarding the president, senior managers, and members of the board of directors of Enterprise Florida, Inc., and the officers and members of the divisions of Enterprise Florida, Inc., the subsidiaries of Enterprise Florida, Inc., corporations created to carry out the missions of Enterprise Florida, Inc., and corporations with which a division is required by law to contract to carry out its missions, being subject to certain ethics laws. Additionally, see Chapter 2017-233, L.O.F., regarding the Florida Tourism Industry Marketing Corporation.

5. As to Citizens Insurance board members, Citizens Insurance senior managers, and the Citizens Insurance executive director, see F.S. 627.351(6). CEO 14-07.

6. See F.S. 155.40(14) regarding governing board members of public hospitals and sales or leases of such hospitals.

7. Members of community alliances are subject to the Code of Ethics. F.S. 20.19(5)(h).

8. See F.S. 445.007 regarding local workforce development boards.

9. See F.S. 627.311 regarding senior managers, officers, and members of the board of governors of joint underwriters and joint reinsurers.
10. See Chapter 288 F.S. regarding Triumph Gulf Coast, Inc.
11. See F.S. 288.9625 regarding the Institute for Commercialization of Public Research.
12. See F.S. 626.9931 and 626.9932, regarding the Interstate Insurance Product Regulation Commission.
13. See F.S. 985.664(11) regarding juvenile justice circuit advisory boards.
14. Members of the board of directors of Florida Is For Veterans, Inc., are subject to F.S. 112.313, F.S. 112.3135, and F.S. 112.3143; are required to file financial disclosure; and are potentially subject to a possible misdemeanor penalty for having an interest in certain business of the corporation during, and for two years following, their board service. In addition, employees of the corporation "shall comply with the Code of Ethics for Public Officers and Employees under part III of chapter 112," and corporation staff must refrain from having interests regarding the corporation's business both during and after their service for the corporation. F.S. 295.21(4) and (7), as created by Chapter 2014-1, L.O.F.
15. Appointees to the Florida Coordinating Council for the Deaf and Hard of Hearing must attend, prior to serving on the Council, orientation training that includes, but is not limited to, the Code of Ethics and conflict of interest laws. F.S. 413.271.
16. Any special district as defined in F.S. 189.012 is an "agency." F.S. 112.312(2), as amended by Chapter 2014-22, L.O.F. However, special districts appear to have been within the prior definition of "agency." Newly elected or appointed members of governing bodies of special districts may have available to them education programs that include courses on the Code of Ethics. F.S. 189.063. See also Chapter 2016-22, L.O.F.
17. Members of the Technology Advisory Council "shall be governed by the Code of Ethics for Public Officers and Employees as set forth in part III of chapter 112, and each member must file a statement of financial interests pursuant to s. 112.3145." F.S. 20.61.
18. Members of the executive council of the Florida Clerks of Court Operations Corporation have been made subject to some provisions of the Code of Ethics. F.S. 28.35, as amended by Chapter 2014-183, L.O.F.
19. Citizen support and direct-support organizations created or authorized pursuant to law must adopt their own ethics codes. F.S. 112.3251, created via Chapter 2014-183, L.O.F. Expenditures of juvenile justice system direct-support organizations may not be used for the purpose of lobbying as defined in s. 11.045. F.S. 985.672.
20. Water Management District lobbyists have to be registered. F.S. 112.3261, new via Chapter 2014-183, L.O.F.
21. Florida Development Finance Corporation board of directors members are subject to portions of the Code of Ethics. F.S. 288.9604, as amended by Chapter 2014-183, L.O.F.
22. Chapters 2014-183, 2014-171, and 2016-122, L.O.F., affected expressway authorities.
23. See Chapter 2014-254, L.O.F. (CS CS HB 1445), a local bill, concerning the Citrus County Hospital Trust.
24. See Chapter 2016-263, L.O.F., regarding the City of Webster.
25. The Florida Housing Finance Corporation is subject to F.S. 112.313 but not to F.S. 112.3143. CEO 17-07.
26. See Chapter 2017-116, L.O.F., regarding schools of hope.

27. Chapter 2017-195, L.O.F., regarding the Village of Indiantown.
28. Chapter 2017-200, L.O.F., regarding the Gainesville Regional Utilities Authority.
29. Chapter 2017-206, L.O.F., regarding the East Nassau Stewardship District.
30. Chapter 2017-220, L.O.F., regarding the Sunbridge Stewardship District.
31. Chapter 2017-221, L.O.F., regarding the Pace Fire Rescue District.
32. Chapter 2018-166, L.O.F., regarding the Town of Hobe Sound.
33. Chapter 2019-169, L.O.F., regarding the Miami-Dade Expressway Authority. See F.S. 348.0305(1).

B. Public Employees

1. "Employee"

The term "employee" is not defined in the Code of Ethics, but the First District Court of Appeal has applied in an ethics context the same definition of "employee" as is used in tort actions. Wright v. Commission on Ethics, 389 So.2d 662 (Fla. 1st DCA 1980).

2. "Independent Contractor"

"Independent contractors" are not employees and therefore are not governed by provisions in the Code that are applicable to public employees. CEO 81-48, CEO 81-61. Also, see CEO 83-2 regarding a "contract city manager." However, see this outline below regarding "local government attorneys," and above regarding F.S. 112.3136. An adjunct professor at a State University can be an independent contractor, rather than an employee. CEO 77-132. CEO 16-5 found an employee of a certain District Medical Examiner's company not to be a public employee.

3. Charter School Employees

See CEO 99-10 and F.S. 1002.33(24) and (26) regarding certain charter school employees.

C. Candidates for public office

Defined in F.S. 112.312(6) to mean any person who has filed financial disclosure and qualification papers, has taken the candidate's oath, and seeks to become a public officer by election] are subject to a limited number of Code provisions; and successful former candidates who have not yet taken office are subject to the gifts law contained in F.S. 112.3148.

D. Local government attorneys

(see below) also are subject to a limited number of Code provisions.

E. Constitutional officers

Constitutional officers are required by F.S. 112.3142 (new, via Chapter 2013-36, L.O.F.) to complete 4 hours of ethics training, annually, that addresses ethics laws, public records laws, and public meetings laws. CEO 13-15; CEO 13-24. The training requirement of F.S. 112.3142 was extended to elected municipal officers; and Constitutional officers and municipal officers must certify on their financial disclosure forms that they have completed the required training. Chapter 2014-183, L.O.F. Beginning in 2016, Public Service Commissioners must annually complete 4 hours of such training; F.S. 350.041(3). And, beginning on January 1, 2020, commissioners of community redevelopment agencies created under part III of Chapter 163 must annually complete the 4 hours of training. F.S. 112.3142(2)(c). However, elected members of Community Development District boards and elected members of other special district boards are not "elected municipal officers" subject to the annual ethics training requirement. CEO 14-29. The training is not required for outgoing officers. CEO 15-5.

F. Governing Bodies of Commercial Service Airports

Beginning on January 1, 2021, the members of the governing bodies of commercial service airports must also receive four hours of ethics training, annually, that address Article II of Section 8 of the State Constitution, the ethics laws, and the laws concerning public records and public meetings. This training requirement is found in Section 332.0075(4)(b) and, while nearly identical to the training required by Section 112.3142, exists as a separate statute and extends no enforcement power to the Commission. Constitutional officers and elected municipal officers who also serve on the governing bodies of commercial service airports who complete the training required by Section 112.3142 are considered in compliance with Section 332.0075(4)(b).

II. ANTI-NEPOTISM PROHIBITION

A. Generally

1. The anti-nepotism law (F.S. 112.3135) prohibits a public official from appointing, employing, promoting, or advancing, or advocating the appointment, employment, promotion, or advancement of a relative. It does not prohibit two relatives from being employed within the same agency. CEO 90-62, CEO 93-1, CEO 94-26. The law addresses placement in "a position in [an] agency," and thus has been found not to address situations in which a relative is hired as an independent contractor. CEO 96-13. Of course, a private law firm is not a public "agency" within the meaning of the law. CEO 11-04 and CEO 20-12, Question 1.

2. At the State level, the law applies to all agencies (executive, legislative, and judicial), except for "an institution under the jurisdiction of the Board of Governors of the State University System." At the local level, the law applies to counties, cities, and "any other political subdivision," except for school and community college districts. F.S. 112.3135(1)(a), (AGO 72-72, AGO 82-48). CEO 14-08 found state colleges to be the same as community colleges for purposes of exemption from the law. However, the Florida K-20 Education Code prohibits a district school board member (and, effective July 1, 2019, a district school superintendent) from employing or appointing a "relative" (as defined in F.S. 112.3135) to work under his or her direct supervision; and, effective July 1, 2019, the Commission on Ethics is given jurisdiction to accept and investigate alleged violations. F.S. 1012.23(2). Section 1012.23(2)'s application to a district school superintendent, though, is limited to the actual appointment or employment of a relative to work under the superintendent's supervision; it is not triggered if a superintendent makes only a recommendation concerning a relative's appointment or employment, or proposes a salary increase or bonus for a relative. See CEO 19-12. A city charter school authority (as opposed to its sponsoring school district) is subject to F.S. 112.3135. CEO 06-13. And, see F.S. 1002.33(24), as amended by chapter 2009-214, L.O.F., making certain charter school officers or personnel subject to F.S. 112.3135 or to similar restrictions. The law applies to appointments made by a community redevelopment agency (CRA) and by a city commission to the city's enterprise zone development agency. CEO 96-5, *aff'd* by PCA sub nom. City of Gainesville v. State Commission on Ethics, 683 So. 2d 487 (Fla. 1st DCA 1996).

C. Relative

The definition of "relative" for purposes of the anti-nepotism law is broader than the term as used in the voting conflicts law, but narrower than the term as it applies in the context of the gift law. Compare F.S. 112.312(21), 112.3135(1)(d), and 112.3143(1)(c). The Commission has found that one's mother's sister's husband is not one's "uncle" under the anti-nepotism law (CEO 99-5), that a person is not one's "sister-in-law" by virtue of marriage to one's wife's brother (CEO 96-6), that one's paramour is not one's "relative" (CEO 02-3), that the daughter of one's former spouse is not one's "stepdaughter" (CEO 14-09), and that the stepmother of one's spouse (stepmother-in-law) is not one's "relative" (CEO 19-8).

D. Appointment, Employment, Promotion, Advancement, or Advocacy

The anti-nepotism law does not apply to actions other than appointment, employment, promotion, advancement, or advocacy of the same. Supervising or assigning work to a relative is not addressed or prohibited in the law. CEO 90-62, CEO 00-17. An advancement or promotion is "only an increase in grade which elevates an employee to a higher rank or position of greater personal dignity or importance" [*Slaughter v. City of Jacksonville*, 338 So. 2d 902 (Fla. 1st

DCA 1976)]; however, see CEO 94-30 (in which the Commission found that designation of the position of chief deputy property appraiser for inclusion into the Florida Retirement System's Senior Management Service Class was an advancement or promotion) and compare CEO 94-26 (in which the Commission found that a special pay increase for a brother of the Secretary of the Department of Community Affairs was not a promotion or advancement); see also CEO 94-39 (action labeled "lateral transfer" substantively a promotion or advancement), CEO 98-23 (sheriff's brother-in-law's promotion to deputy first class not a "promotion" or "advancement" under the law), and In re Wanda Range, Comm. On Ethics Compl. No. 17-113 (Stipulated Final Order 20-001), aff'd by PCA sub nom. Wanda Range v. Comm. on Ethics, 1D20-489 (Fla. 1st DCA 2020) (mayor voting on appointing relative to be "mayor pro tem" considered a "promotion" or "advancement"). See CEO 13-7 as to elevation of planning and zoning board members being promotions or advancements. Also, when a seemingly prohibited relationship develops after lawful employment (such as via marriage of a public official and an existing employee of the same agency), discharge of the employee is not required, as there is a "grandfathering"; but the employee cannot be advanced or promoted. CEO 94-6, CEO 91-27. However, "rehires" are not grandfathered. CEO 92-10 (county commission hiring relative of commissioner as correctional officer when commission takes over jail operations from sheriff who formerly employed the relative); CEO 09-15 (reappointments).

E. Former Law & Participation by Board Members in the Appointment

1. Under the former law, when an appointment was made by a board or commission, a relative of one of the board members could be appointed so long as the board member did not participate in the decision or advocate the appointment. City of Miami Beach v. Galbut, 626 So. 2d 192 (Fla. 1993).

2. However, an amendment to the statute after Galbut specifies that a relative of a board member cannot be appointed by the board, regardless of whether the related board member does not participate. CEO 09-15. An exception is made in municipalities of less than 35,000 population for appointments to boards not having land-planning or zoning responsibilities. This exception applies regardless of whether the related public official voted on the appointment and regardless of whether the appointment was made before the exception was adopted. Kinzer v. Commission on Ethics, 654 So. 2d 1007 (3d DCA 1995). See CEO 98-22 regarding the meaning of "land-planning or zoning responsibilities."

G. Delegation of Authority

The receipt of delegated authority to hire, promote, or advance will bring one under the statute in regard to his or her relatives; but one vested with hiring/promotion/advancement authority cannot avoid the statute by attempted delegation of the authority. Morris v. Seeley, 541 So. 2d 659 (Fla. 1st DCA 1989). Merit promotions/advancements going to the highest-scoring applicant and involving no discretion have been found, in at least one instance, not to be violative of the statute. CEO 98-2 [promotions of wildlife officer sons of GFC (FWC) Commission member]. However, see CEO 19-24, finding a merit-based pay increase that exceeds the pay grade authorized for a relative's position to be a prohibited "promotion" or "advancement." A county commission is not necessarily the "public official" vested with hiring/promotion/advancement authority in relation to all county positions; see CEO 93-1, in which the Commission found that the law was not violated where a county commissioner's wife was promoted in the county's solid waste department because under the county's charter the county manager held the promotion authority. Also, there is support for the position that the law does not apply in situations where a public official merely has the

ability to approve or disapprove (rather than make) the hire or appointment (AGO 83-13, AGO 73-75, AGO 71-158); however, be very careful in such situations not to confuse approval/disapproval with attempted delegation of the authority to hire or appoint.

H. Paid and Unpaid Positions

The law applies to paid and unpaid positions (CEO 95-12, CEO 13-1) and to reappointments (CEO 95-12, CEO 09-15).

I. Positions Exempted from Prohibition

Certain volunteer emergency medical, volunteer firefighting, and volunteer police services positions are exempted from the law. CEO 13-1.

J. Hiring During an Emergency

Agencies may authorize by regulation temporary employment in the event of an emergency as defined in F.S. 252.34.

K. Hiring Agency Head's Relative by Manager with Authority to Hire

Son of utility board chairman's selection by general manager/chief executive officer of board did not transgress the statute; CEO 18-17.

III. DOING BUSINESS WITH ONE'S AGENCY

A. Generally

1. F.S. 112.313(3) contains two prohibitions, the first of which prohibits a public officer acting in an official capacity, or public employee acting in an official capacity as a purchasing agent (CEO 09-3), from directly or indirectly purchasing, renting, or leasing realty, goods, or services (but, maybe, not intangible personal property, CEO 86-26) for the person's own agency from a business entity of which the person or the person's spouse or child (or any combination of them) is an officer, partner, director, proprietor, or the owner of a "material interest." CEO 17-10 found that a stepson is not a "child" within the meaning of F.S. 112.313(3). Note that certain "private" charter school governing board members and certain "privatized" chief administrative officers of political subdivisions are now subject to the statute. F.S. 1002.33(26) and F.S. 112.3136. However, neither the first nor the second prohibition of F.S. 112.313(3) prohibits a public officer's or public employee's purchase of realty, goods, or services from his or her political subdivision or an agency thereof [CEO 01-16, CEO 04-5, CEO 07-11 (note 8), CEO 10-24 (note 6), CEO 21-7 Question 1]; nevertheless, such a purchase may be violative of F.S. 112.313(7). Also, note that a director or officer can come within the prohibition whether or not he or she is paid or compensated (CEO 97-9, Note 8, CEO 06-26, CEO 10-2, CEO 20-13); that nonprofit corporations are "business entities" (CEO 94-17); but that public "agencies" (e.g., state universities, state colleges, school districts) are not "business entities" (CEO 06-2, CEO 15-8).

2. See Chapter 2016-263, Section 18, L.O.F., regarding the City of Webster.

B. Definitions

1. "Purchasing agent" is defined in F.S. 112.312(20).
2. "Business entity" is defined in F.S. 112.312(5); and, under appropriate circumstances, may or may not include an individual natural person in their personal capacity. CEO 10-4.
3. "Material interest" is defined in F.S. 112.312(15) to mean the direct or indirect ownership of more than 5% of the total assets or capital stock of a business entity.
4. "Indirectly" doing business does not include situations where the officer's or employee's corporation does business with a business entity that is selling to his or her agency. CEO 78-83, CEO 88-43, CEO 07-2, CEO 08-8 (Question 2). See also CEO 00-21 regarding a county manager's sale of land to an entity that in turn donates the land to the county; however, this opinion is of little precedent value in that it is expressly limited to its peculiar facts.

C. The First Prohibition – Acting in an Official Capacity to Buy, Rent, or Lease

A public officer "acts in his or her official capacity" for purposes of the first prohibition when a board of which he or she is a member (e.g., a county commission) acts collegially to purchase, rent, or lease, regardless of whether the public officer abstains from voting on the matter. CEO 90-24, CEO 10-4. It has been found that a city commissioner does not act to purchase when the city physician, rather than the city commission, acts to purchase. CEO 82-24. The first prohibition is not violated where the purchase, rental, or leasing by the public agency occurs before the public officer of the public agency became connected privately to the business entity. CEO 07-1. Nor is a city councilmember in violation of the first prohibition when his city pays a chamber of commerce, where he serves as an uncompensated director, to perform services for the benefit of the general public, as the city is not purchasing services for itself. See CEO 20-13.

D. The Second Prohibition – Acting in a Private Capacity to Sell, Rent, or Lease

The second prohibition in F.S. 112.313(3) is against a public officer or employee acting in a private capacity to rent, lease, or sell any realty, goods, or services to the person's agency, or to the political subdivision served by the person, or any agency of the political subdivision. CEO 15-02 found that public school teachers could not sell items to their school, their school district, or any school within their school district, absent applicability of an exemption. Note that an "agency of a political subdivision" has been found to include agencies of a county headed by Constitutional officers elected separately from the county commission (e.g., sheriff, clerk of court, supervisor of elections, tax collector, property appraiser). CEO 12-13.

1. Involvement in the Sale

"Acting in a private capacity" includes situations where one personally is involved with the sale to the agency or political subdivision (CEO 81-50, CEO 94-3, CEO 12-13), as well as where one is an officer, director, or owner of more than a 5% interest in a business that is selling to the agency or political subdivision. CEO 81-2; CEO 09-1. The statute does not apply to a situation where one merely is an employee of a business entity and personally is uninvolved with the sale (CEO 94-3); however, see F.S. 112.313(7) below. One does not act in a private capacity where he or she was a member of the public agency, but held no connection to the business entity, at the time of the rental, lease, or sale to the public agency. CEO 07-1. One does not act in a private capacity to rent, lease, or sell to his political subdivision or an agency thereof where his or her company subcontracts with another company that in turn is renting, leasing, or selling to his political subdivision or agency thereof. CEO 07-2, CEO 08-8 (Question 2). "Selling" requires a sale (CEO 08-14). But a "sale" or "selling" has not been limited to cash sales for an express service; rather, a sale can be present in broader situations involving a valuable consideration (CEO 11-9). CEO 15-6 found that a police officer was not selling services to his city where the city received services but a third party, and not the city, paid.

2. Firm Selling Services

The statute applies to prevent an agency employee from being a partner in a law firm which is providing services to the agency. Howard v. Commission on Ethics, 421 So. 2d 37 (Fla. 3d DCA 1982); CEO 08-15. However, one's public employee duties can be increased for extra pay without violating the statute. CEO 08-15, Question 2. [And see "local government attorneys" below.]

3. Selling Services to Agency that the Agency is Obligated to Provide

A public officer's or public employee's selling to his agency includes situations where his or her business entity provides services to a clientele that the agency itself would be legally obligated (not just voluntarily choosing) to serve but for the proxy actions of the entity paid for or supported by the agency. CEO 07-11 (note 9), CEO 82-22, CEO 82-9, CEO 15-14. But compare CEO 19-18 where statute was found inapplicable when city provided funds to an entity providing services to clientele that the agency was not obligated to serve. Also was found not to apply in a situation where a school board member's company sold uniforms to parents of school children, not to the school district or the district's schools. CEO 10-12. See CEO 15-14 regarding a county employee acting as a private landlord contracting with the county to provide housing to H.U.D. Section 8 tenants.

E. Donations to Agency & Purchases from Agency

Donations to one's agency have been found not to fall within the scope of this prohibition. CEO 82-15; CEO 13-13. CEO 17-12 dealt with a donation by a company connected to a member of the Board of Governors of the State University System (BOG). Neither does a real estate sale involving a public official as a real estate professional without a commission (CEO 82-50), the

bringing of a lawsuit (CEO 77-14), nor the condemnation of an official's land by the official's agency (CEO 78-8). Note that the statute does not address purchases from one's agency or political subdivision; but also note the possible applicability of F.S. 112.313(7). CEO 82-50, CEO 01-16, CEO 07-11 (note 8).

F. Exceptions to Section 112.313(3):

1. Grandfathering - F.S. 112.313(3) expressly "grandfathers" in certain existing contracts, including those entered into prior to qualification for elective office, appointment to public office, or beginning public employment. CEO 96-30; CEO 09-1; CEO 20-12, Question 1. However, changes in contracts after a person assumes a public position are deemed to be new contracts not subject to this exemption (CEO 85-40 and CEO 84-43), unless the renewals are completely nondiscretionary (CEO 82-10) or unless the original agreement expressly provides for renewal for a specified period and the provisions of the contract under the renewal are the same as the provisions of the original agreement (CEO 85-40). Also, see CEO 02-14, CEO 07-1, CEO 08-8 (Question 1), and CEO 09-1. Further, the Commission has used F.S. 112.316 to grandfather contracts entered into between qualification for elective office and assumption of office (CEO 95-13); and has used F.S. 112.316 to negate the prohibition in situations involving a "unity of interest" (CEO 06-26, county tax collectors acquiring integrated tax management system; and CEO 19-25, finding unity of interest when county commissioner joins board of nonprofit managing county park). See also CEO 11-17 regarding a hospital district board commissioner and grandfathering. CEO 14-16 grandfathered a contract predating the employment of physicians at a hospital district. CEO 19-7 grandfathered a contract preceding an individual's appointment to a water management district board.

2. Exemptions in F.S. 112.313(12)

a. *Waiver for Advisory Board Members & Form 4A – Section 112.313(12), F.S.* – Advisory board members may receive a waiver in a particular instance by the appointing authority, made in a public meeting after a written disclosure is made on Commission Form 4A. CEO 20-7, Question 3 and CEO 16-2. CEO 16-4 found the "appointing authority" of a particular county advisory board member to be the county commission. Note that advisory status requires a detailed examination of the attributes of the governmental body, and is not controlled by any perceived insignificance of the body (CEO 96-19, county fine arts council not advisory); note that it has been found that the whole of the body's attributes and operations must be advisory, note merely some of its nature (CEO 10-24); and note that for purposes of the exemption in F.S. 112.313(12), but not for purposes of financial disclosure under F.S. 112.3145, that an advisory board need only be "solely advisory," irrespective of the amount of its budget or authorized expenditures (CEO 77-178). See also CEO 06-24, in which a county transportation service board was found not to be an advisory board.

b. *Rotation System – Section 112.313(12)(a), F.S.* – At the local government level, when the business is to be transacted by rotation among all qualified suppliers, the official's business may be placed on the rotation list. "Qualified" means that reasonable, but not unduly restrictive, conditions may be placed on the suppliers by the purchasing agency, such as the ability to supply merchandise of acceptable quality or specifications. F.S. 112.313(12)(a). CEO 20-6, CEO 89-64 and CEO 92-27. Other conditions may include ensuring there is an equitable rotation of purchase frequency and amounts amongst the qualified suppliers. See CEO 20-6. The use of selection criteria that include the volume of current and prior work done with a firm does not constitute a "rotation system." CEO 96-23. See CEO 01-15 and CEO 11-9, regarding providers from outside of the political subdivision being included in the rotation.

c. *Sealed Competitive Bidding – Section 112.313(12)(b), F.S.* – When the business is to be transacted through a sealed, competitive bidding process, the official's business may submit a bid and be awarded the contract. F.S. 112.313(12)(b). However, the official must file a written disclosure prior to or at the time the bid is submitted (Commission Form 3A), and must not participate in the process. This exemption has been found not to apply when a public agency is selling surplus property or leasing real property to a business entity, as opposed to selling or leasing property from a business entity. See CEO 86-37 and CEO 80-10. In CEO 10-5, the Commission found that a water management district governing board member's earlier general involvement regarding a district real property did not equate to "participation in the determination of the bid specifications" regarding a subsequent lease of the property. And see CEO 07-23, applying F.S. 112.316 to negate a conflict in a "piggy-back" contract situation not technically in compliance with the exemption. Contracts awarded under the Consultants' Competitive Negotiation Act (F.S. 287.055) do not constitute a sealed bidding process. CEO 81-28 and CEO 01-15. Nor do RFPs (CEO 89-48). However, while the exemption will insulate one from conflicts based upon the business between the official's public agency and the provider of goods, services, or realty to the public agency, it will not exempt conflicts arising independent of the competitively bid business. CEO 96-7. However, note that F.S. 1001.42(12)(i), a provision of law outside of the Code of Ethics and not administered by the Commission on Ethics (a provision of the Florida K-20 Education Code), prohibits school board members and school superintendents from having certain interests regarding contracts for materials, supplies, or services. AGO 06-50.

d. *Legal Advertising in a Newspaper – Section 112.313(12)(c), F.S.* – Legal advertising in a newspaper, utilities service, and passage on a common carrier are exempted. F.S. 112.313(12)(c). Legal advertising means only that advertising required by law. CEO 90-57. Utilities service includes telephone service (CEO 83-7), but does not include bulk fuel oil (CEO 95-8) or utility location services (CEO 11-12, note 7). The exemption for passage on a common carrier applies to purchase of tickets by the agency directly from the carrier, but does not apply to purchases from a travel agency (CEO 80-1).

e. *Emergency Purchase or Contract – Section 112.313(12)(d), F.S.* – Emergency purchases are exempted, but only when made "in order to protect the health, safety, or welfare" of the citizens. F.S. 112.313(12)(d). CEO 21-5 applied the exception to a city's purchasing of COVID-19 lab testing services from a hospital where the mayor was also a member of the hospital's board of directors, because the city and state had both announced a state of emergency related to the pandemic.

f. *Sole Source of Supply – Section 112.313(12)(e), F.S.* – When the official's business is the only source of supply within the political subdivision, an exemption is provided, as long as disclosure is made prior to the transaction, on Commission Form 4A. F.S. 112.313(12)(e). A television station has been found, in a certain context, to be a sole source of supply. CEO 00-10. Real property owned by a corporation in which an assistant principal has a one-third interest has been found, in a certain context, to be a sole source of supply of real property for construction of new schools. CEO 06-28. The purchase of parcels for road right-of-way can be a series of sole source purchases. CEO 91-31. In CEO 09-18, the exemption was found to be inapplicable to a relationship between a city and a developer, where the relationship involved interests of the developer beyond its provision of sole source items to the city. See, similarly, CEO 19-10, finding the exemption inapplicable to a series of agreements between a county and a nonprofit performing arts corporation whereby the corporation would attempt to enhance performing arts within the community by, among other things, managing a performing arts center.

In CEO 10-4, realty adjacent to a county park was found to be a sole source item. CEO 11-02 found a landowner employing a water management district governing board member to be a sole source of a water project agreement. CEO 10-17 found a corporation employing a reserve deputy sheriff to be the only source of supply for computer applications that enable information sharing between police agencies. CEO 16-7 addressed growth modeling as a sole source item. CEO 16-8 addressed the sole source exemption in the context of a county commissioner being employed by a company providing vehicle parts to the county. CEO 18-03, high-visibility badge holders. CEO 18-16, electronic advertising (electronic billboards). CEO 19-7 in the context of a water management district purchasing real property from an entity in which a prospective board member was a minority shareholder. CEO 20-1 applied the sole source exemption to the sale of real property from a limited liability company managed by a city councilmember to the city. As with the rotation exemption, the sole source exemption is not available to State-level agencies.

g. *Transactions Less than \$500 per Calendar Year – Section 112.313(12)(f), F.S.* – Transactions not exceeding \$500 in the aggregate in a calendar year may be made between the agency and the official's business. F.S. 112.313(12)(f). This exemption applies only when a public officer stands to gain—at most—\$500 from a given transaction or series of transactions, meaning the officer is selling or leasing something to the agency and obtaining a minimal benefit. CEO 21-4. It will not apply when an agency is the provider and is reducing a higher selling price to \$500 or less for the public officer's benefit, which would be to the agency's detriment. See CEO 80-10 (finding exemption inapplicable to school board leasing school facility for \$1 per year to a board member's nonprofit foundation).

h. *Using a Bank as a Depository – Section 112.313(12)(g), F.S.* – A municipal, county, or district public official may be a stockholder, officer, or director of a bank acting as a depository of the agency's funds, provided that the governing body of the agency (e.g., city commission, county commission, school board, water management district board) has determined that the official has not favored that bank over other qualified banks. F.S. 112.313(12)(g), CEO 83-48, and CEO 83-81. Note that this applies only when the bank will be acting as a depository; other banking functions, such as loans, are not encompassed by the exemption.

i. *University Sponsored Research or Intellectual Property – Section 112.313(12)(h), F.S.* – The transaction is made pursuant to F.S.1004.22 or F.S. 1004.23 and is specifically approved by the president and the chair of the university board of trustees. F.S. 112.313(12)(h). See CEO 21-8 for an application of the exemption to negate a conflict.

3. *Applications of Section 112.316, F.S.* – When the public officer or employee has and had no influence or public responsibility in relation to the business between the agency and the private business entity with which the officer or employee is connected, the Commission has viewed F.S. 112.316 as negating the literal language of the prohibition in F.S. 112.313(3). CEO 76-38. As a result, members of subordinate boards of a city or county would not, in certain circumstances, be prohibited from doing business with the city or county, so long as their board had nothing to do with the transaction [see, for example, CEO 81-66, CEO 88-17, and In re Stephen Huie, 13 FALR 1852 (Comm. on Ethics 10/26/89)] and so long as no other conflicting factors existed (see CEO 05-14, member of personnel board leasing space to county where member might be tempted to favor county in issues before the board). Also, via F.S. 112.316, a county commissioner is not prohibited from serving as a county-funded indigent defense counsel specially appointed by the court (under a scheme set prior to his becoming a commissioner), although the statute would not legitimize the commissioner's contracting with the county as a special contract

public defender (CEO 02-6). Further, see CEO 94-19 (city police officers receiving rent reduction in exchange for providing security services), CEO 09-3 (city fire department personnel taking courses from fire lieutenant's company), and CEO 10-23 (city tennis professional employee also operating pro shop). See CEO 11-23, finding no prohibited conflict for public district school board members, the district superintendent, and district employees occasioned by their uncompensated service as board members of charter schools, where the district school board applied to itself for the charter school. CEO 18-04 applied F.S. 112.316 to a consolidated government (Jacksonville) city council member selling services to the local school board. CEO 18-05, city planning and zoning board member and F.S. 112.316. See CEO 14-24, regarding application of F.S. 112.316 to negate conflict where a certain county employee contracted with the county to be an independent contractor for the county after her retirement. See CEO 19-9, applying F.S. 112.316 to negate conflict when state university technical support employees provide catering services to university events. CEO 14-11 and CEO 14-12 found a "unity of interest" to negate conflict under F.S. 112.313(3), via application of F.S. 112.316, regarding uncompensated service for a county economic development council (EDC) receiving funding from the county. CEO 14-15 applied F.S. 112.316 to negate conflict where certain city police department employees provided equestrian services to the city.

G. Blind Trusts

The blind trust statute, F.S. 112.31425, which provided exemptions to the application of F.S. 112.313(3) and (7), as well as F.S. 112.3143, was repealed in 2019. See Chapter 2019-60, L.O.F.

H. Early Learning Coalitions

F.S. 1002.84(20) is an additional provision relating to contracts involving members, members' relatives, and employees of early learning coalitions.

IV. CONFLICTING EMPLOYMENT AND CONTRACTUAL RELATIONSHIPS

A. The First Prohibition of Section 112.313(7)(a), F.S.

F.S. 112.313(7) prohibits a public officer or employee (but not a mere candidate for office, CEO 09-20, and not a relative of the public officer or employee, CEO 11-04 and CEO 20-12, n.4) from having a contractual relationship or employment with an agency or a business entity that is either subject to the regulation of, or doing business with, the officer's or employee's agency. Note, as regarding F.S. 112.313(3), applicability of the statute to "private" charter school board members and to "privatized" chief administrative officers of political subdivisions. F.S. 1002.33(26), F.S. 112.3136.

1. Employment

"Employment" requires that one be compensated, or receive some consideration. CEO 76-21; CEO 80-29. "Employment" is not limited to a master/servant relationship, but also includes being an owner, partner, sole proprietor of a business, or self-employed person (CEO 84-95, CEO 16-12), includes compensated directors of nonprofit entities (CEO 85-89), and can include a real estate sales associate "hanging" his license with a broker (CEO 12-15). Refusal, in advance and in writing, of compensation has been held to negate the required element of compensation (CEO 00-23; CEO 08-22).

2. Contractual Relationship

Whether a "contractual relationship" exists has been governed by the substantive law of contract.

a. *Third-Party Beneficiaries to Contracts* – It has not been limited to contracting parties, but has been found to include third party beneficiaries. CEO 76-85.

b. *Examples of Contractual Relationships* – Sales of goods or realty, the provision of services for compensation, the ownership of shares of stock (CEO 99-13, CEO 11-05), the holding of stock options (CEO 05-18, note 8), and the "hanging" of a real estate sales associate's license (CEO 12-15) have been found to constitute contractual relationships.

c. *Members of Law Firms* – Members (partners, shareholders, associates), but not "of counsel attorneys," of law firms have contractual relationships with each client of the firm regardless of whether a particular attorney performs or supervises work for a particular client (CEO 80-79, CEO 94-5, CEO 96-1, CEO 03-7, CEO 04-9, CEO 10-20, CEO 10-24, CEO 16-9, CEO 20-4); but accountants have not been found to have similar "firm-based" contractual relationships (CEO 11-15). Proprietors of unincorporated insurance agencies have been found to hold contractual relationships with each client of the insurance agency (CEO 94-10). But, in CEO 09-19, under particular facts, it was found that an insurance agent's contractual relationship with a developer ended with the renewal of a policy she brokered for the developer. See, also, CEO 20-4, finding a public officer's contractual relationship with clients of his law firm ends once he sells the firm; and CEO 20-8, Question 1, finding the informal referral of legal clients does not create a contractual relationship.

d. *Uncompensated Service* – Uncompensated service has been found not to constitute a contractual relationship (CEO 06-26, CEO 20-13, CEO 21-7 Question 1), even if travel and lodging expenses are received (CEO 93-23, CEO 19-03); but see the Order Finding Probable Cause in In re TRIEU NGUYEN, Commission on Ethics Complaint No. 15-011, under a specific factual situation involving reimbursement for travel expenses. However, lack of compensation is not controlling if consideration or substitutes for consideration are present, or if services under professional licensure (e.g., insurance agent licensure in CEO 94-37, real estate

broker licensure in CEO 95-28 and CEO 08-7, engineer licensure in CEO 08-8, landscape architect licensure in CEO 11-6, pharmacist licensure in CEO 21-3, and land surveyor licensure in CEO 21-4 Questions 1-2) are involved. And note that a president of a voluntary association can have a conflicting contractual relationship (CEO 06-12), as can an officer or director of a voluntary association (CEO 08-7, Question 2); however, mere membership in the association or service on one of its committees likely would not support the existence of a conflicting contractual relationship. CEO 08-7; CEO 08-22. An uncompensated director of a nonprofit corporation, who is not a member (analogous to a shareholder) of the corporation, was not found to hold a contractual relationship with the corporation (CEO 10-2, CEO 14-12). See CEO 13-26 regarding a State university medical school department chair also involved with a private, nonprofit research foundation. And see CEO 09-7 (county commissioner serving on economic development council). A member of a limited liability company (LLC) has a contractual relationship with the company. CEO 08-7; CEO 12-2. Less than full-time work has been found to constitute a contractual relationship. CEO 12-9. Marriage does not constitute a contractual relationship between the husband and wife. CEO 90-77. The statute has been found to address contractual relationships of the public officer or employee, not those of his or her spouse (CEO 12-2, CEO 15-11). Also, while membership in a social or recreational club can constitute a contractual relationship, it will not be enough to constitute a conflicting contractual relationship under Section 112.313(7)(a) when the membership conveys no financial, equitable, or proprietary interest in the club. See CEO 20-3 and CEO 90-30, applying Section 112.316 to negate the application of Section 112.313(7)(a) when public officer has membership in social club interfacing with his agency.

e. *Office Holding* – The holding of an office (e.g., a county/city commission seat, school board seat, state college trustee) has been found not to be employment or a contractual relationship, even if it is a compensated position. CEO 92-39; CEO 15-8. And the mere holding of a government-issued (DBPR) license was found not to constitute employment or a contractual relationship. CEO 15-4.

f. *The Contractual Relationships of One's Company* – One does not hold a contractual relationship with a company merely because one's corporation or company holds a contractual relationship with the company. CEO 08-23; CEO 14-27. However, CEO 14-02 found that the statute applied to prohibit a city commissioner's private performance of talk show services for a radio station doing business with the city, finding that the station sought the personal services of the commissioner and paid him through his firm; nevertheless, the opinion went on to find that the firm's provision of consulting services to the station, without the station seeking the commissioner's personal services and without his agreeing to perform personal services, was not prohibited. CEO 14-14 found that a city councilperson's employment with a bank did not mean that he also held employment with a company (which was doing business with the city) owned by a member of the bank's board of directors.

g. *Non-Contemporaneous Contractual Relationships* – Past or possible future contractual relationships have been found not to violate the statute; the contractual relationship or employment must exist simultaneously with the other elements of the statute. CEO 88-11; CEO 08-14; CEO 12-3.

3. Business Entity

A "business entity" is defined in F.S. 112.312(5). A private university is a business entity (CEO 99-11), as is a nonprofit youth center (CEO 78-18) and a foundation/nonprofit corporation/tax-exempt organization (CEO 07-11). Different companies have been found to be separate business entities even when one company has an interest in or owns shares in the other company (CEO 11-

13, regarding a healthcare executive/state university trustee/teaching hospital). CEO 13-5. Further, parent and subsidiary corporations have been found to be separate business entities (CEO 86-12, CEO 05-8), except for situations involving holding companies or subsidiaries where the parent owns only the asset of the subsidiary (CEO 94-5, CEO 99-13, CEO 03-1, CEO 09-2, CEO 11-05). Even an individual, such as a self-employed person privately providing tutoring services, can be a “business entity” (CEO 04-17, CEO 11-14); however, natural persons who merely own personal or real property are not necessarily “business entities” (CEO 92-2; CEO 82-88; CEO 07-18, note 4; CEO 08-12).

5. Agency

"Agency" is defined in F.S. 112.312(2). The definition does not necessarily include the entire department or political subdivision of the officer or employee, but rather refers to the lowest departmental unit within which a public officer's or employee's influence might reasonably be considered to extend. CEO 93-31 and CEO 99-7. Determining the agency of the officer or employee can be critical to an analysis of how the statute applies. For example, the agency of some appointed board members has been found to be that board (CEO 90-7), while the agency of other board members, particularly boards with only ad hoc advisory authority, may be the unit of government they are advising, as well as their particular board (CEO 94-36, CEO 99-2, CEO 99-11, CEO 16-2, CEO 16-9). A city planning board is a separate agency from the city commission (CEO 01-16; CEO 11-6). A city's downtown development review board was not found to be a separate agency from its economic development commission (CEO 10-24). However, a city manager's agency was found to be much more of city government than the city manager's office (CEO 96-15). The agency of a county personnel board member is the board (CEO 05-14). The agency of a county transportation service board member has been found to be the board (CEO 06-24). The agency of a county board of adjustment member was found to be the board (CEO 88-17). A school board member's agency does not include the county value adjustment board where he or she is not one of the two school board appointees to the board and where the remaining members of the school board could be asked to substitute for the named appointees but seldom have (CEO 02-5). A public school teacher's or principal's agency is his or her school, not the whole of the school district (CEO 04-17, CEO 10-15, CEO 16-12). The agency of an employee of the operations department of a school district's central office was found to be the operations department (CEO 14-28). A school board member's agency has been found to be the entire school district (CEO 14-21; CEO 14-27). In CEO 08-1 (see also CEO 21-7, footnote 6), the agency of a city councilman for purposes of F.S. 112.313(7) was determined to be the city council, and in CEO 12-13 the agency of a county commissioner was determined to be the county commission; but note that F.S. 112.313(3), see above, can apply regarding the whole of an officer's or employee's political subdivision. CEO 15-6 found the agency of a police officer to be the city police department, not the city commission. The whole of a water management district has been found to be the agency of a water management district engineer (CEO 96-3). At the State level, one's agency may only be one's bureau (CEO 92-48, CEO 15-4) or one's district (CEO 87-20, CEO 01-7), and not the whole of an executive department. But note that the agency of an employee of the State Agency for Persons with Disabilities (APD) is the entire APD. CEO 05-6, CEO 05-7. The agency of a member of the Florida Statewide Passenger Rail Commission has been found to be the Commission rather than FDOT. CEO 10-20. The agency of an employee of a county health department has been found to be the employee's health department and not health departments within other counties. CEO 98-20, CEO 90-65. CEO 14-05 found the agency of the general counsel of the Office of Financial Regulation (OFR) to be OFR. CEO 14-06 found the agency of

the general counsel of the Department of Business and Professional Regulation (DBPR) to be DBPR. CEO 15-14 found the agency of a certain county employee to be the administrative division of the county's community services department.

6. Subject to the Regulation Of

A business entity is "subject to the regulation of" an agency when the business' operations or modes of doing business are subject to the control or authority of the agency. CEO 74-8. In CEO 09-18, a corporation which had entered into a development agreement with a city was found to be "subject to the regulation of" the city council, due to the many terms and conditions contained in the agreement. Occupational licensing for revenue purposes is not "regulation." CEO 79-82. Incidental or passive governmental influence, such as the enactment of ordinances that affect a broad number of people, does not constitute "regulation." CEO 20-8, Question 2 and CEO 78-59. County phosphate mining ordinances have been held not to constitute "regulation" by county commissions of mining companies. CEO 00-14. In some situations, a city council or a county commission may not regulate a developer, even though the city's board of adjustment and building department may. CEO 08-1, CEO 08-7. The Commission found in CEO 11-6 that activities of a city planning and zoning board are too passive and incidental to constitute "regulation," although the Commission receded from this reasoning in CEO 20-8, Question 2, finding planning and zoning decisions can have an insular effect on a requestor. The enforcement of laws of general applicability does not constitute "regulation." CEO 20-8, CEO 91-22, CEO 04-14. However, an agency may be subject to the regulation of another agency, as in CEO 97-03, where the State Board of Community Colleges was found to regulate community colleges. A city building and planning department regulates licensed contractors doing business in the city (CEO 96-15), but a city commission usually does not (CEO 99-7). A city manager's ministerial (nondiscretionary) function to sign a subdivision plat has been found not to constitute regulation of a developer (CEO 76-205, Question 2). Annexation constitutes neither "regulation" nor "doing business." CEO 03-7. A waiver of taxes or granting of a similar economic incentive by a city's economic development commission was found not to constitute regulation or the doing of business, but café permitting or similar functions by its downtown development review board were found to constitute regulation (CEO 10-24). A port authority regulates a shipping company operating at the port (CEO 03-17), the interests of a shipping agent (CEO 08-5), and a company moving cargo through port terminals (CEO 13-11). A county manatee rule review committee (an ad hoc advisory body) does not exercise regulatory authority (CEO 04-14). A city housing authority does not regulate a state university where the two cooperate to carry out tutoring of at-risk children under a federal program (CEO 06-2). CEO 97-7 found that a charter school is subject to the regulation of its sponsoring school district; but, in a particular context, CEO 09-23 used F.S. 112.316 and "the spirit of" F.S. 112.313(15) to negate a conflict of a school board member employed as an adjunct faculty member at a State college operating a charter school approved by the school board. A franchise has been found to be "regulation," in addition to constituting "doing business" (CEO 12-9). The Florida Virtual School was found not to be subject to the regulation of a local school district. CEO 13-22. In CEO 12-21, a county was not found to regulate a municipality. Note that possible future regulation is not "regulation" under the statute; one's contractual relationship must occur at the same time as the regulatory relationship (CEO 90-65).

7. Doing Business With

A business entity is "doing business with" an agency where the parties have entered into a lease, contract, or other type of arrangement where one party would have a cause of action against the other in the event of a breach or default. CEO 86-24, CEO 07-11, CEO 11-14, CEO 11-15, CEO

12-15. In contrast, CEO 15-01 found that a city's donation without obligation of in-kind services to a chamber of commerce did not constitute "doing business"; see also CEO 17-12 (donation/member of Board of Governors of State University System). CEO 17-15 concerned a donation (not a prohibited conflict) of property by a city to a charter school for which a city commissioner served as an attorney, or, in the alternative, a sale (prohibited conflict) of the property. CEO 14-04 found that a business entity seeking a contract would not be "doing business" with an agency until the agency awarded the contract to the company. Note that the public officer or public employee personally does not have to be involved on the private side of the business between his private employer and his public agency in order for the "doing business" element to be present. CEO 10-7. A public officer or employee does not hold employment or a contractual relationship with a company that is doing business with his or her public agency merely because a company of which he or she is an owner or officer subcontracts with the other company (CEO 88-43, CEO 07-2, CEO 11-12, CEO 11-18, CEO 12-8); however, see CEO 14-02, regarding a city commissioner whose personal services for a radio station were sought "through his firm." The company of a school board member was not found to be doing business with the school district when it sold uniforms to parents of school students but not to the district or the district's schools, provided no solicitation or pressuring of school personnel occurred. CEO 10-12. The Commission has found that a direct support organization is doing business with the agency (e.g., college, university) which created it (CEO 89-36, CEO 11-15). A lawsuit between a business entity and an agency does not constitute "doing business" (CEO 77-14); nor does the mere donation of property to an agency (CEO 82-13) or from an agency (CEO 04-5, Question 3, and CEO 04-6). Agreements between governmental entities for the provision of services generally do not constitute "doing business" [CEO 76-2, CEO 81-5, CEO 04-9, Question 3, CEO 06-2, CEO 12-21, (CEO 13-22, agreement between county school district and Florida Virtual School)], CEO 19-02, but the extension of a grant from one agency to another may (CEO 77-65). In CEO 08-6, it was determined that a sheriff's office's contracting with a city to provide municipal law enforcement services did not constitute "doing business," where a city commissioner's employment with the sheriff's office was not connected to the sheriff's provision of services to the city. The existence of a warranty on a sheriff's mobile command post constitutes "doing business" (CEO 06-25), as does the relationship between a charter school and its sponsoring school district (CEO 97-7). A city was found to be "doing business" with a corporation by their entry into a development agreement with one another (CEO 09-18). A franchise has been found to constitute "doing business" (CEO 12-9). Receiving funds from a CRA through its commercial loan subsidy program has been found to constitute "doing business," and thus conflicting for CRA board members. CEO 12-7. Further, in CEO 12-7, the Commission found that the special voting conflict language applicable to CRAs for purposes of F.S. 112.3143 did not operate as an exemption to a conflict under F.S. 112.313(7). However, see CEO 12-14 regarding redevelopment area board members, as opposed to CRA members.

8. Examples of conflicts under this prohibition

City commissioner prohibited from being employed by brokerage firm if firm is selected as underwriter for one or more city bond issues (CEO 85-29); county commissioner prohibited from employment with national brokerage firm contracting with county for underwriting services for proposed bond issue (CEO 88-80); city commissioner employed by two city franchisees [Gordon v. Commission on Ethics, 609 So. 2d 125 (Fla. 4th DCA 1992)]; and health facilities authority's employee's law firm providing services to authority (CEO 08-15, Question 1).

9. City of Webster

See Chapter 2016-263, Section 18, L.O.F., regarding the City of Webster.

B. The Second Prohibition of Section 112.313(7)(a), F.S.

F.S. 112.313(7) also prohibits a public officer or employee from having a contractual relationship or employment that will create a "continuing or frequently recurring" conflict of interest, or that would "impede the full and faithful discharge" of public duties.

1. Generally

The statute is grounded in the principle that one cannot serve two masters. It does not require proof that the public officer or employee has failed to perform his responsibilities or has acted corruptly; the statute is entirely preventative in nature, intended to prevent situations in which private considerations may override the faithful discharge of public responsibilities. It is concerned with what might happen, with the temptation to dishonor. See Zerweck v. Commission on Ethics, 409 So. 2d 57 (Fla. 4th DCA 1982), finding the statute not unconstitutionally vague.

2. Examples

An impediment to public duty can be based on a single incident or transaction. For example, the Commission has concluded that representing a client before the board of which one is a member interferes with the full and faithful discharge of one's public duties and, where such representations are frequent, presents a continuing or frequently recurring conflict. CEO 77-126, CEO 78-86, and CEO 20-8, Question 1. The same conflict would exist when another member or employee of the public officer's professional firm undertakes to represent a client before the officer's board (CEO 88-40, CEO 11-6, CEO 15-3), or where a member or employee of a law firm of which the public officer is "of counsel" seeks to represent a client before the officer's board [CEO 20-8, Question 1 and CEO 96-1, aff'd by PCA sub nom. Korman v. State Commission on Ethics, 710 So. 2d 553 (Fla. 1st DCA 1996)]. Also, an appearance by one's firm before one's public board, not for a client but for one's own firm's development plans, has been found to be conflicting (CEO 11-6). And note that such a conflict has been recognized to exist if the public officer's firm represents the client in the matter, regardless of whether the firm's work includes an appearance before the public officer's assembled board or the work stops short of such an appearance. CEO 10-24; CEO 11-6. And see CEO 09-10. Regarding representation before other boards of a city, a conflict will exist if a member of a municipal governing board represents his clients or his law firm's clients before subordinate boards or staff, given the temptation to use his authority and influence on the client's behalf (unless the representation concerned an informational request that entails no discretionary decision-making). See CEO 20-8, Question 4. See CEO 12-21 regarding a county commissioner's law firm serving as special counsel to a municipality located within the county. CEO 17-04 concerned a member of the City of Jacksonville's Ethics Commission being a member of a law firm representing a client in litigation involving the City and independent agencies of the City. However, commentary in a private capacity to one's own public board regarding delivery of a product has been distinguished from prohibited representation of a client before one's public board. CEO 07-2, CEO 08-8 (note 6). Also, even though a conflict of interest would be created were a State Senator to personally represent a client before the Legislature, a conflict would not be created were another attorney of a law firm with which the Senator has an "of counsel" relationship to represent a client before the Legislature, provided certain conditions are adhered to. CEO 03-3. See CEO 05-10 regarding the law firm of a member of the Florida Building Commission Technical Advisory Committee representing clients regarding the Commission, the Committee, or the Accessibility Advisory Council [however, the result of this opinion may be affected by F.S. 553.74(5)].

3. *Relation to other Provisions of the Code of Ethics*

This prohibition can interface with other aspects of the Code, such as F.S. 112.313(8), regarding the temptation to disclose or use information not available to the general public and gained by reason of one's official position (CEO 92-18, deputy clerks of court developing software for sale to other clerks' offices having access to proprietary information via their public positions; CEO 11-14, district school board employee privately marketing computer workbook tool).

4. *More Examples*

The statute would prohibit a county commission candidate from entering into a binding contract containing campaign promises and a penalty clause with a political action committee. CEO 96-24 and CEO 96-25. However, statute does not prohibit a State Senator's filing and supporting general and special legislation of interest to his private law client, where Senator is not compensated in any way by the client for his efforts as a member of the Legislature. CEO 03-11. But the statute would prohibit a State Representative from serving as president of the Florida Association of Realtors (CEO 06-12) and it would prohibit a State Representative from consulting with a waste management company as its manager of community and municipal relations (CEO 06-19). And see CEO 09-8 regarding a State Representative's working privately to cultivate, for his private employer, clients employing Legislative lobbyists. It would prohibit a county probation officer from being employed by an entity that is providing services to probationers. CEO 96-28. Absent aggravating facts, it would not prohibit Fish and Wildlife Conservation Commission law enforcement officers from providing security services to private landowners. CEO 07-25. It would prohibit a city mayor from contracting to promote charter schools with a subsidiary of a company doing business with the city. CEO 01-9. It would prohibit a district school board member from being employed as an assistant principal at a charter school sponsored by the school board (CEO 06-23); or from being president and owner of a corporation providing career preparation coaching to students of a charter school (CEO 10-10). It would prohibit a public school teacher from privately tutoring for pay his or her own public school students; but it would not, under certain circumstances, prohibit the teacher's private tutoring of other public school students. CEO 04-17. While the statute would not prohibit a teacher from operating, for a fee, a summer art camp, it would prohibit the teacher's contracting with parents of students who are in the teacher's classes to have their children participate in the camp. CEO 10-15; see, also, CEO 12-23. CEO 13-21 (teacher secondarily employed providing programs to students) found a prohibited conflict if the programs were provided privately, but not if the teacher performed extra school district public employee duties for extra public salary in providing the programs; and CEO 15-02 concerned teachers selling items to students in their classes or to the students' parents. CEO 16-12 addressed a public school teacher's employment as an attorney, including in lawsuits involving the teacher's school board/district and others. And see CEO 09-3 (city fire department personnel taking courses from fire lieutenant's company). Also, it would prohibit a sheriff's administrative/disciplinary review board member from serving as president of a police union local. CEO 04-13. And, it has been found to prohibit a county commissioner from being employed by the same county's sheriff's office. CEO 12-12. The statute would not prohibit a trustee of a city's pension boards (who personally is not a member of any pension plan/system of the city) from being employed as the city's finance director. CEO 06-16. It would prohibit a member of the Florida Real Estate Commission from being employed as an instructor at a real estate school (CEO 06-9); however, no prohibited conflict was found where a member of a hospital district board, acting in his private capacity as a real estate professional, received a commission regarding the purchase of a home by district personnel, where the member did not solicit the business (CEO 07-

18). It would prohibit a DCF contract manager from being employed by a subcontractor of a nonprofit corporation contracting with DCF. CEO 07-9. Under certain conditions, the statute was not found to prohibit a city police officer's privately locating and recovering chattel property for lenders (CEO 08-16); but was found to prohibit a police officer's conducting surveillance in unfaithful spouse cases and employee theft cases (CEO 13-16). It was not found, under certain conditions, to prohibit a school board member's company from selling school uniforms to parents of students (CEO 10-12). CEO 14-21 opined on a school board member's employment with a nonprofit literacy foundation. CEO found a prohibited conflict would be created were a school board member's company to engage teachers from her school district to provide private tutoring, were it to provide services to students of her district, or if it were to provide STEM training using teachers of her district or to students of her district. The statute can apply when a public employee inspects his own private work or when another employee of his public agency inspects his private work (CEO 87-12, Question 2); but determining the scope of one's "agency" and possible application of F.S. 112.316, Florida Statutes, should be a part of the analysis in a given matter, especially if the other employee is not subordinate in his public capacity to the employee with the private endeavor. See CEO 11-03, regarding a State Representative being engaged as an expert witness by a law firm representing the Department of Financial Services in litigation. In CEO 11-05, under the circumstances presented, the Commission found that a Governor's passive investments in large national corporations and investment funds did not create a prohibited conflict under the statute; and the Commission found that the Governor could place non-conflicting investments in a blind trust without there being a prohibited conflict, even if the trust later invested in a Florida company in which the Governor would be prohibited from directly owning an interest. CEO 12-18 found that a DCF supervisor for the food stamp program would not have a prohibited conflict due to her part-time employment at a gas station/convenience store that accepts food stamps. CEO 12-8 found that a school board budget advisory committee member who consulted, through his LLC, with a charter school company did not, under the particular facts of the opinion, have a prohibited conflict under the second part of F.S. 112.313(7)(a). CEO 14-04 found a conflict would be created under the second part of the statute were a FDOT employee whose former private employer held his pension funds to be involved in the selection process for award of a FDOT contract sought by the former employer. CEO 14-07 found, under particular circumstances, no prohibited conflict where the chief risk officer of Citizens Property Insurance Corporation recommended actuarial services to his former private clients. CEO 15-6 found that a prohibited conflict would be created were a city police officer's business to serve as a receiver for properties encumbered by city code enforcement liens. CEO 15-14 found a prohibited conflict where a county employee served on a committee which determined whether current or prospective tenants of the employee's H.U.D. Section 8 rental business were Section 8 eligible; but did not find a prohibited conflict based on simple, nondiscretionary county employee duties. CEO 16-9 determined that a prohibited conflict would be created were a member of a county human services advisory board to represent a client in a lawsuit against a nonprofit entity whose funding request had to come before the board. CEO 17-05 found that a prohibited conflict would be created were a city commissioner's company to have city vendors advertising on its website.

5. Interpretation

The Commission on Ethics has wide discretion to interpret the statute, and courts must defer to its interpretation unless clearly erroneous. Velez v. Commission on Ethics, 739 So. 2d 686 (Fla. 5th DCA 1999).

6. Use of Leave Time

Issues of use of leave time from one's public position to attend to one's private business endeavor and whether a public employee has adequate time to perform both his public and private jobs have been found not to be governed by the statute. CEO 86-81, CEO 90-65.

C. Exemptions to the Application of 112.313(7):

1. Express Exceptions in F.S. 112.313(7)

a. *Section 112.313(7)(a)1., F.S.* - When the agency is a special tax district created for the purpose of financing, constructing, and maintaining improvements in the district, or is a Ch. 298 F.S. water control district, employment or contracts with the business entity developing the property will not be prohibited, per se. However, the district must be created by general or special law, as opposed to local ordinance. CEO 84-4. F.S. 112.313(7)(a)1.

b. *Section 112.313(7)(a)2., F.S.* - When the agency is a legislative body and the regulatory power exercised over the business entity resides in another agency or is exercised strictly through the enactment of laws or ordinances, employment and contracts with the business entity are not prohibited. F.S. 112.313(7)(a)2. CEO 91-1. CEO 08-20 (state senator in private equity firm). CEO 09-8 (Florida House member). CEO 09-13 (House member employed by Office of Criminal Conflict and Civil Regional Counsel).

c. *Section 112.313(7)(b), F.S.* - When legislative act or local ordinance requires or allows certain public officers or employees to engage in certain occupations or professions in order to be qualified to hold their public positions, then 112.313(7) does not prohibit the officer or employee from practicing in that occupation or profession. F.S. 112.313(7)(b). For example, in CEO 84-63, where a port authority member was required to be a representative of business entities doing business with or at the port, the member's employment as vice president of a shipping company at the port was considered exempted; but see CEO 08-5. In *Brevard County v. Commission on Ethics*, 678 So. 2d 906 (Fla. 1st DCA 1996), the court affirmed CEO 95-27, an opinion concluding that the county's firefighters would be prohibited from being employed by local ambulance companies and that F.S. 112.313(7)(b) would not allow the County to exempt its firefighters' employment from the prohibition of F.S. 112.313(7)(a). See also CEO 01-10 [F.S. 112.313(7)(b) not applicable to Florida Building Commission member]. Regarding architectural review board members, see CEO 04-1. CEO 17-01 found F.S. 112.313(7)(b) to apply to board members of a city employees' retirement plan. CEO 19-18 found Section 112.313(7)(b) applied to city council member serving on opioid abuse prevention committee, given the professional requirements set out in city ordinance for committee members. And CEO 20-7, Question 3 found F.S. 112.313(7)(b) to apply to land use and real estate development attorneys occupying those seats on a municipal advisory board which were to be filled by attorneys practicing in those areas, pursuant to the enacting ordinance. See, similarly, CEO 19-19, CEO 19-20, CEO 19-21, CEO 19-22. See F.S. 627.351(6)(c)4 regarding certain Citizens Property Insurance Corporation board members.

2. Section 112.313(15), F.S. – Additional Exemption Concerning Certain Tax-Exempt Organizations

An elected public officer may be employed by a "501(c)" tax-exempt organization that contracts with the officer's agency, as long as the officer's employment is not compensated as a result of the contract, the officer does not participate in the agency's decision to contract, and the officer abstains from voting on matters involving the officer's employer and otherwise follows the voting conflicts law. F.S. 112.313(15), CEO 97-05, CEO 01-4, CEO 07-11, CEO 10-16, CEO 15-01, CEO 18-06 (county commissioner employed by food bank receiving grant funding from county).

Note that this exemption only applies to "employment"; it does not apply to "contractual relationships" (CEO 98-11, note 2). Under particular facts, CEO 09-23 applied the exemption, via F.S. 112.316, to a school board member's employment with a State college [not a 501(c) organization] which operated a charter high school approved by the school board.

3. Exemptions in F.S. 112.313(12)

a. *Waiver for Advisory Board Members – Section 112.313(12), F.S.* - The exemptions contained in F.S. 112.313(12) (noted above) are applicable to exempt conflicts under 112.313(7): for advisory board members (CEO 16-2, CEO 16-9) [but see above under F.S. 112.313(3) regarding how to determine whether a given board is or is not "advisory"]; depositories of public funds; passage on a common carrier; contracts awarded by sealed, competitive bid; emergency purchases; legal advertising in a newspaper; aggregated transactions not exceeding \$500; and utilities service (CEO 11-12, note 7). And, at the local government level, business/work handled through a rotation system (CEO 11-9) or sole sources of supply (CEO 20-1).

b. *Price Available to the Public (Doing Business with Agency) - Section 112.313(12)(i), F.S.* - When a public officer or employee privately purchases goods or services from a business entity which is doing business with his or her agency, the transaction is exempted from 112.313(7) if the purchase is "at a price and upon terms available to similarly situated members of the general public." F.S. 112.313(12)(i).

c. *Price Available to the Public (Subject to the Regulation Of) Section 112.313(12)(j), F.S.* - Similarly, an officer or employee may purchase goods or services from a regulated business when the price and terms are available to similarly situated members of the public and full disclosure of the relationship is made prior to the transaction to the State agency head or local governing body (e.g., county commission). F.S. 112.313(12)(j). Found not to apply when officer's corporation, rather than officer as a natural person, purchased limousine service. CEO 08-23.

4. Applications of Section 112.316, F.S.: Grandfathering

The Commission has applied F.S. 112.316 to "grandfather" in employment or contractual relationships with business entities doing business with the officer's or employee's agency, usually when both the employment or contractual relationship and the business relationship with the agency predate the officer's holding office or the employee's public employment. CEO 82-10, CEO 96-31, CEO 96-32, CEO 02-14, CEO 02-19 (employee county attorney), CEO 08-4 (note 6), CEO 09-1. And see CEO 09-20, in which it was found that grandfathering was available to negate a conflict where the business was entered into during a prior office holding, during which an official held no employment with the company, and where the official then left office, followed by his employment with the company and his subsequent election and taking of office again. But renewals/extensions/amendments, after one takes office, of a grandfathered contract can violate the statute (CEO 02-14, CEO 08-8, CEO 09-1), as can entry into new contracts after one takes office (CEO 09-20, CEO 10-16). And the Commission also has applied F.S. 112.316 to negate a conflict in a "piggy-back" contract situation. CEO 07-23. However, F.S. 112.316 is not necessarily applicable, via "grandfathering," to negate a conflict under the second, as opposed to the first, part of F.S. 112.313(7)(a). CEO 97-15. See CEO 11-17 regarding a hospital district board commissioner and grandfathering. CEO 14-16 grandfathered a contract regarding physicians who would become employees of a hospital district. CEO 19-7 grandfathered a contract between a water management district and a corporation entered into prior to a corporate shareholder's appointment to the district board. In addition, F.S. 112.316 has been applied to negate a conflict under F.S. 112.313(7)(a) where a member of a housing authority joined a law

firm contracting with the authority, where the contract/business between the authority and the law firm was entered into before the member became connected to the firm. CEO 07-1. And, F.S. 112.316 was applied to negate, without the use of grandfathering, a conflict regarding a severance package from a former employer held by an executive director of a shipping port. CEO 13-11. But be careful to analyze a given situation in light of the second part of F.S. 112.313(7)(a), as a F.S. 112.316 grandfathering alone may not be adequate to exempt a situation from creating a continuing or frequently recurring conflict or an impediment to public duty. CEO 09-1.

5. Applications of Section 112.316, F.S.: No Public Role - As with situations under F.S. 112.313(3), F.S. 112.316 may apply to negate conflict under F.S. 112.313(7) occasioned by matters in which a public officer or employee played and plays no material public role regarding his or her business or secondary employer (but note that application of F.S. 112.316 can be limited, especially regarding governing board members and other high-ranking personnel or "central office" personnel, CEO 12-9, CEO 12-15). See, for example, CEO 01-12 and CEO 02-6 [county commissioner serving as county-funded, court-appointed indigent defense counsel (but not as special public defender contracting with county), under scheme set prior to his becoming a commissioner]; see CEO 03-9 (county parks and recreation department employees providing on-site security for county parks); see CEO 06-10 (Department of Agriculture and Consumer Services employees participating in cost-share programs administered by the Division of Forestry); see CEO 08-28 (county recreation employee also Special Olympics employee); see CEO 09-3 (city fire lieutenant); see CEO 10-23 (city tennis professional employee also operating pro shop); see CEO 14-24 (county employee contacting with county to be independent contractor after retirement); see CEO 10-24 (city economic development commission/downtown development review board); see CEO 19-9 (state university technicians providing catering services to university events); see CEO 19-14 (municipal employee contracting with municipal CRA to obtain housing loan, despite fact that CRA does business with her municipal agency). Also, see CEO 05-6 (not applicable to negate conflict of employee of Agency for Persons with Disabilities occasioned by employee's operation of group home); but see F.S. 393.0654 (and CEO 14-23, which construes F.S. 393.0654). Additionally, see CEO 06-25 (deputy sheriff employed by company contracting with sheriff's office), and see CEO 17-12 as to a member of the Board of Governors of the State University System.

6. Applications of Section 112.316, F.S.: Stock Ownership - Regarding the application of F.S. 112.316 to a conflict under the F.S. 112.313(7) due to stock ownership, CEO 14-04 applied F.S. 112.316 to negate the application of the first part of F.S. 112.313(7)(a) where a FDOT employee removed himself from the contract-selection process involving his former private employer and where the employee's remaining relationship with the former employer involved only his holding a very small percentage of its stock via his pension. Further, F.S. 112.316 has been applied in a situation in which a county commissioner owned a small number of shares in a large, publicly-traded corporation (CEO 05-8), and in a situation in which a State-level employee owned a small number of stock options in a large, publicly-traded telecommunications company (CEO 05-18).

7. Applications of Section 112.316, F.S.: Case-Specific Applications - Further situations in which F.S. 112.316 has been applied are case specific and hinge on unique facts involved, such as in CEO 10-7 when a hospital district board member was employed by a large corporation making limited sales of equipment to the district. F.S. 112.316 also was relevant to a decision of no prohibited conflict where an airport authority commissioner donated (with mutual obligations) his right to purchase a property to the authority. CEO 13-13. And in CEO 20-09, F.S.

112.316 was used to negate the application of the first part of F.S. 112.313(7) to find that businesses owned by governing board members of a water management district could apply through the district's cost-share program for funds to reimburse their purchase of irrigation equipment, although the finding was contingent on several specific factors unique to the inquiry, the absence of any one of which would have resulted in a finding of a conflict. CEO 21-6 applied F.S. 112.316 to negate a conflict in "the spirit of" exemptions in F.S. 112.313(12)(i) and 112.313(12)(f), and very unique and particular facts and context.

8. Unions and Collective Bargaining Organizations - Officers of collective bargaining organizations (e.g., police unions) can be excluded from the prohibitions of the first part of the statute, but not necessarily from the prohibitions of the second part. CEO 04-13.

9. Applications of Section 112.316, F.S.: Unity of Interest - F.S. 112.316 can be applied to negate a rote application of F.S. 112.313(7)(a), and thus find no prohibited conflict of interest, where there is a "unity of interest." See, for example, CEO 11-23, which found no prohibited conflict for district school board members, the district superintendent, and district employees, where they served without compensation on the board of a charter school created by the district board's application to itself for the charter school. A seat on the board of directors of a nonprofit entity that is reserved for a political subdivision to appoint a person, potentially one of its own members, may indicate a unity of interest between the political subdivision and the nonprofit. CEO 84-63, CEO 96-30, CEO 14-12, and CEO 19-25.

10. Firewalls/Removal of Duties - Removal of a public employee's public capacity interaction with certain persons or entities interfacing with the employee's public agency has been recognized, in a certain situation, as a factor in negating a prohibited conflict under the second part of the statute. CEO 13-12 and CEO 20-4.

D. Abstaining from a Vote Does Not Alleviate the Conflict

Compliance with the voting conflicts law, F.S. 112.3143, will not obviate a conflict under F.S. 112.313(7); the two statutes operate independently. CEO 94-5, CEO 12-9. See, also, In re Milton West, Comm. On Ethics Compl. No. 16-032 (Final Order 2017), aff'd by sub nom. Milton West v. Comm. On Ethics, 5D17-2075 (Fla. 5th DCA 2017).

V. PROHIBITION ON EMPLOYEES HOLDING OFFICE; DUAL PUBLIC EMPLOYMENT

A. Employees Holding Office – Section 112.313(10), F.S.

No person may both be an employee of a county, municipality, special taxing district, or other political subdivision, or of a State agency, and hold office as a member of the governing board, council, commission, or authority which is his or her employer. F.S. 112.313(10). Both positions must be held at the same time for a violation to exist. CEO 12-3; CEO 19-6.

1. Exceptions

a. *Leave of Absence from Employment* - However, a schoolteacher may take a leave of absence without pay to serve on the school board without violating this prohibition. Wright v. Commission on Ethics, 389 So. 2d 662 (Fla. 1st DCA 1980). CEO 14-10 found a county employee who would serve on the county commission to be similarly protected by an unpaid leave of absence.

b. *Different Political Subdivisions* - Does not prohibit simultaneous employment/office-holding for different political subdivisions. For example, a public school teacher or other school district employee is not prohibited by this provision from serving as a member of the city council of a city located within the school district. CEO 02-4. But see F.S. 112.3125, below.

c. *Refusal of Salary From Employment* - A fire district commissioner's service as a district firefighter, provided he refuses in advance and in writing his compensation (per-run payments), is not violative of the statute. CEO 00-23.

d. *Section 112.316, F.S.* - The prohibition can be negated, in particular circumstances, by the application of F.S. 112.316. CEO 06-2 (city housing authority commissioner manager of tutoring site on authority property).

2. Conflicts Under Section 112.313(7)(a)

F.S. 112.313(10) has been found not to prohibit a county commissioner from being employed in the same county's sheriff's office; but note that this dual position-holding was found to be prohibited by F.S. 112.313(7)(a). CEO 12-12.

3. Distinct from Constitutional Dual Office Holding Prohibition

The prohibition of F.S. 112.313(10) is separate from the "dual office-holding" prohibition of Article II, Section 5(a), Florida Constitution.

B. Dual Employment Prohibition – Section 112.3125, F.S.

Chapter 2013-36, L.O.F., created F.S. 112.3125. The new statute greatly restricts the ability of elected state or local officers, and candidates for such offices, to accept employment with the State or any of its political subdivisions. There is a limited "grandfathering," but not as to promotions, advancements, or additional compensation. The law is self-explanatory; therefore, its detail will not be repeated here. In CEO 13-10, the Commission found that the law did not apply to a situation where a county commissioner's limited liability company contracted with a school board/district. CEO 14-10 found that a county employee who took a leave of absence to serve on the county commission and who was no longer a county commissioner when he was reactivated as a county employee would not violate the statute. Under a particular set of facts, CEO 15-7 found that the statute would not prohibit a school board member from also serving as a county manager. CEO 15-8 found that neither school board membership nor state college trusteeship constituted "public employment" prohibited by the statute.

VI. RESTRICTION ON PROFESSIONAL AND OCCUPATIONAL LICENSING BOARD MEMBERS; RESTRICTION ON BOARD OF GOVERNORS OF STATE UNIVERSITY SYSTEM AND TRUSTEES OF UNIVERSITIES SERVING AS A LEGISLATIVE LOBBYIST

A. Section 112.313(11)

No officer, director, or administrator of a Florida state, county, or regional professional or occupational organization or association, while holding such position, shall be eligible to serve as a member of a State examining or licensing board for the profession or occupation. F.S. 112.313(11). However, the restriction does not encompass enumerated service with a national or regional (e.g., southern states) organization or association (CEO 85-74 and CEO 83-68); and the restriction applies only to enumerated positions within a covered organization or association (CEO 90-61). Was found, under specific facts, not to apply to simultaneous service on the Florida Real Estate Appraisal Board and service for a private organization whose members came from various professions (CEO 13-18).

B. Section 112.313(17)

F.S. 112.313(17) prohibits citizen members of the Board of Governors of the State University System and citizen members of boards of trustees of local constituent universities from holding employment or a contractual relationship as a legislative lobbyist requiring annual registration and reporting pursuant to F.S. 11.045.

VII. MISUSE OF PUBLIC POSITION

A. Generally

Public officers, public employees, local government attorneys, and "privatized" chief administrative officers of political subdivisions (F.S. 112.3136) may not corruptly use or attempt to use their official position or any property or resource within their trust, or perform their official duties, to secure a special privilege, benefit, or exemption for themselves or another. F.S. 112.313(6).

B. Constitutionality

The statute has been upheld as not being void for vagueness. Tenney v. Commission on Ethics, 395 So. 2d 1244 (Fla. 2d DCA 1981); Garner v. Commission on Ethics, 415 So. 2d 67 (Fla. 1st DCA 1982).

C. Intent Element: "Corruptly"

"Corruptly" is defined in F.S. 112.312(9) to mean:

done with a wrongful intent and for the purpose of obtaining, or compensating, or receiving compensation for, any benefit resulting from some act or omission of a public servant which is inconsistent with the proper performance of his or her public duties.

1. Case Law

In order to have acted "corruptly," one must have acted "with reasonable notice that conduct was inconsistent with the proper performance of her public duties and would be a violation of the law or the code of ethics." Blackburn v. Commission on Ethics, 589 So.2d 431 (Fla. 1st DCA 1991). A determination that one acted corruptly must be supported by substantial competent evidence. Kinzer v. Commission on Ethics, 654 So. 2d 1007 (Fla. 3d DCA 1995). The standard of proof is clear and convincing evidence. Latham v. Florida Commission on Ethics, 694 So. 2d 83 (Fla. 1st DCA 1997).

2. Intentional conduct required

Mismanagement, "waste in government," and negligent acts are not sufficient; there must be intentional conduct to benefit oneself or another.

D. Sexual Harassment

Sexual harassment (use of position to benefit oneself) can be a violation. See Bruner v. Commission on Ethics, 384 So.2d 1339 (Fla. 1st DCA 1980), and Garner v. Commission on Ethics, 415 So.2d 67 (Fla. 1st DCA 1982); also Garner v. Commission on Ethics, 439 So.2d 894 (Fla. 2d DCA 1983).

E. Applications of F.S. 112.313(6)

See CEO 02-13 regarding proper/improper use of public agency "business cards"; see CEO 07-24 regarding a sheriff's office employee (candidate for sheriff) wearing uniform and equipment while campaigning; see CEO 08-20 regarding identification of a senator's public position in private firm descriptive information; see CEO 09-7, note 9, as to a county commissioner's promoting job creation; see CEO 13-25 regarding a senator's providing a letter of support for grant funding or for a hospice's certificate of need application; see CEO 16-2 regarding an advisory board member placing items on public meeting agendas, writing columns while identifying herself as a public

officer, and engaging in similar or related conduct; and see CEO 19-13 regarding a police chief wearing his police uniform or mentioning his police title while fundraising for a nonprofit.

F. Local Government Attorneys

Robinson v. Commission on Ethics, 242 So. 3d 467 (Fla. 1st DCA 2018), involved a local government attorney misusing his public position in violation of F.S. 112.313(6).

VIII. CONSTITUTIONAL PROHIBITION AGAINST ABUSE OF PUBLIC POSITION

A. Generally

Article II, Section 8(h)(2) of the Florida Constitution, approved as a constitutional amendment in 2018, states:

A public officer or public employee shall not abuse his or her public position in order to obtain a disproportionate benefit for himself or herself; his or her spouse, children, or employer; or for any business with which he or she contracts; in which he or she is an officer, a partner, a director, or a proprietor; or in which he or she owns an interest. The Florida Commission on Ethics shall, by rule in accordance with statutory procedures governing administrative rulemaking, define the term "disproportionate benefit" and prescribe the requisite intent for finding a violation of this prohibition for purposes of enforcing this paragraph. Appropriate penalties shall be prescribed by law.

Pursuant to the constitutional prohibition, public officers or public employees are prohibited from abusing their public positions, with requisite intent, to obtain a disproportionate benefit for themselves or for an individual or entity identified in the prohibition's language. Note that the constitutional prohibition requires not just conduct resulting in a disproportionate benefit, but that the disproportionate benefit was obtained through some intentional abuse of public position. See CEO 19-23.

B. Definitions

Pursuant to the rulemaking authority granted to the Commission in Article II, Section 8(h)(2), Rule 34-18(2)(a) defines "disproportionate benefit" as "a benefit, privilege, exemption or result arising from an act or omission by a public officer or public employee inconsistent with the proper performance of his or her public duties." Rule 34-18(3) sets out factors the Commission must consider in determining whether a benefit, privilege, exemption, or result constitutes a "disproportionate benefit." In the context of special districts, CEO 19-23 states that if a particular benefit, privilege, exemption, or result arising from a district supervisor's vote is contemplated and allowed by the standards governing his or her behavior, it will not constitute a "disproportionate benefit" triggering the constitutional prohibition.

C. Intent Element: "Wrongful Intent"

Pursuant to the rulemaking authority granted to the Commission in Article II, Section 8(h)(2), Rule 34-18(4) sets out the requisite intent needed to violate the constitutional prohibition. The intent needed is for a public officer or public employee to act, or refrain from acting, "with a wrongful intent for the purpose of obtaining any benefit, privilege, exemption, or result from the act or omission which is inconsistent with the proper performance of his or her public duties." The presence of a benefit, even a disproportionate benefit, for a public officer or employee, without more, is not automatically indicative of an abuse or a wrongful intent; some other fact indicating a wrongful intent is required to find a violation. CEO 21-1.

D. Comparison to F.S. 112.313(6)

Article II, Section 8(h)(2) differs from Section 112.313(6) in that the constitutional prohibition requires a "disproportionate benefit" resulting from abusive conduct, while the statutory prohibition is triggered when a "special privilege, benefit, or exemption" of any degree results. Also, the constitutional prohibition requires a "disproportionate benefit" to be received by the public officer or public employee, his or her spouse, child, or employer, or a business with which he or she has an enumerated affiliation, while the statutory prohibition contains no limitation on the recipient of the benefit. However, because the intent needed to violate the constitutional prohibition—namely a "wrongful intent" to obtain a result "inconsistent with the proper performance of one's public duties"—is highly similar, if not identical, to the "corrupt" intent needed to violate the statutory prohibition (see definition of "corruptly" in Section 112.312(9)), any authority clarifying the intent needed to violate Section 112.313(6) may be used to guide intent-related questions concerning Article II, Section 8(h)(2). See, generally, CEO 19-23 and CEO 21-1.

E. Penalties

The penalties specified in Section 112.317 are to be used for violations of the prohibition found in Art II, Section 8(h)(2). See Chapter 2020-182, L.O.F.

F. Clarification for Special Districts and Community Development Districts

Sections 189.031(6) and 190.007(1) indicate that, for board members and public employees of special districts and community development districts, they are not considered to have abused their public positions for the purpose of this prohibition if they commit an act or omission that is authorized under Sections 112.313(7), 112.313(12), 112.313(15), 112.313(16), or 112.3143(3)(b), and an abuse of a board member's position on a special district or community development district will not include any acts or omissions in connection with a vote when the board member has followed the procedures required by Section 112.3143.

G. Applications

See CEO 21-2, Question 2, for an application of Art. II, Section 8(h)(2), to county commissioners voting to award themselves a retirement compensation distribution for a 401(a) local annuity program.

IX. PROHIBITION AGAINST DISCLOSURE OR USE OF CERTAIN INFORMATION

Current and former public officers, public employees, and local government attorneys are prohibited from disclosing or using information not available to members of the general public and gained by reason of their official position (except for information relating exclusively to governmental practices) for their personal gain or benefit or for the personal gain or benefit of any other person or business entity. F.S. 112.313(8); CEO 11-01. Does not prohibit use of one's general expertise or skill, but can be violated where one would work privately regarding a particular project or matter about which he or she gained knowledge or expertise via his or her public position. CEO 04-15. Note that the statute now has applicability to "privatized" chief administrative officers of political subdivisions (F.S. 112.3136).

X. PROHIBITION AGAINST SOLICITATION AND ACCEPTANCE OF CERTAIN GIFTS

A. Generally

Under F.S. 112.313(2), public officers, public employees, local government attorneys, "private" charter school board members [F.S. 1002.33(26)(a)], "privatized" chief administrative officers of political subdivisions [F.S. 112.3136], and candidates for nomination or election are prohibited from soliciting or accepting anything of value to the recipient based on any understanding that the vote, official action, or judgment of the official, employee, attorney, or candidate would be influenced thereby. CEO 09-21. CEO 13-2, Question 2. CEO 14-26 dealt with a city council member accepting designation by a chamber of commerce as an endorsed vendor. CEO 15-13 addressed an FDOT employee's acceptance of an opportunity from an industry association to volunteer his services on a charitable construction project team. See also In re Alexis Rodriguez, Comm. on Ethics Compl. No. 20-225, Final Order No. 21-031 (candidate for State Senator fined \$10,000 for accepting money from another based on the understanding that he would change his party affiliation, qualify to run in the 2020 Florida Senate race, and file a false CE Form 6, "Full and Public Disclosure of Financial Interests.").

B. Things of Value

Things of value under this provision include, but are not limited to, gifts, loans, rewards, promises of future employment, favors, and services.

C. Bribery

Essentially amounts to bribery and requires a quid pro quo.

XI. PROHIBITION AGAINST UNAUTHORIZED COMPENSATION

A. Generally

Public officers, employees, local government attorneys, and their spouses and minor children (but not other relatives, e.g., a son-in-law, CEO 11-04) are prohibited from accepting any compensation, payment, or thing of value when the official knows or, with the exercise of reasonable care, should know that it is given to influence a vote or other action in which the official was expected to participate in his/her official capacity. F.S. 112.313(4).

B. Applications of the Prohibition

The Commission has found this standard violated when a legislator received a lobbyist-paid hunting trip, when a legislator received a lobbyist-paid trip to Key West, when a mayor received free cable television service from the city's cable franchisee, and when city officials received free memberships from a country club leasing its facilities from the city. Also, this provision would be violated were an employee of the Department of Children and Family Services to receive \$100 for participation in a brief survey regarding a company doing business with the Department (CEO 01-2); but see CEO 04-11 (violation unlikely under circumstances where school superintendent received "to-be-forgiven" home loan). In CEO 08-12, a fair market value, arms-length residential rental to a school board member was not found to violate the statute. CEO 94-19 and CEO 21-1 found that the bartered-for exchange of labor for a reduction in rent mitigates against the arrangement being viewed as an attempt to influence official conduct. In CEO 09-21, a public officer's not knowing the identity of contributors to a fund to help her ill son-in-law was a factor in there being no violation of the statute. CEO 10-9 found that the statute was not violated where the wife of a Public Service Commission member obtained contract work with a private school, where the husband of a member of the school's advisory board frequently represented intervenors before the PSC. CEO 15-11 addressed a water management district's executive director's spouse being employed by a law firm representing clients in district matters. CEO 15-13 addressed an FDOT employee's acceptance of an opportunity from an industry association to volunteer his services on a charitable construction project team. See CEO 14-26, which opined as to F.S. 112.313(4) in the context of a city council member accepting a chamber of commerce's designation as an endorsed vendor. See CEO 18-15 regarding a County economic development director's participation in events funded by local economic development corporation.

C. Constitutionality

The Third District Court of Appeal held the statute unconstitutionally vague in Barker v. Commission on Ethics, 654 So. 2d 646 (Fla. 3d DCA 1995), but the Supreme Court reversed in Commission on Ethics v. Barker, 677 So. 2d 254 (Fla. S. Ct. 1996). The First District Court of Appeal held the statute not to be unconstitutionally vague. Goin v. Commission on Ethics, 658 So. 2d 1131 (Fla. 1st DCA 1995).

D. Business Entities Serving as Chief Administrative Officer

F.S. 112.313(6) has applicability to "privatized" chief administrative officers of political subdivisions. F.S. 112.3136.

XII. GIFT PROHIBITIONS AND DISCLOSURES FOR "REPORTING INDIVIDUALS" AND "PROCUREMENT EMPLOYEES"

A. "Reporting Individuals" and "Procurement Employees" (RIPEs)

"Reporting Individuals" and "Procurement Employees" (RIPEs) also are subject to the detailed gift law provided in F.S. 112.3148. The persons subject to this law include, but are not limited to, district school board members. However, note that district school board members also are subject to F.S. 1001.421, which prohibits district school board members and their relatives, as defined in F.S. 112.312(21), from directly or indirectly soliciting or accepting any gift, as defined in F.S. 112.312(12), in excess of \$50, from any person, vendor, "potential vendor," or other entity doing business with the school district; and note that F.S. 1001.421 is not a part of the Code of Ethics contained in F.S. Part III, Chapter 112. And, note the additional gift provision applicable to employees and board members of Citizens Property Insurance Corporation. F.S. 627.351(6)(d)4.

1. "Reporting Individuals"

"Reporting individuals" are defined to include persons who are required by law to file the full financial disclosure statement specified in Art. II, Sec. 8, Fla. Const. (CE Form 6), and persons required to file the limited financial disclosure statement specified in F.S. 112.3145 (CE Form 1). F.S. 112.3148(2)(d); and see F.S. 112.3136 regarding chief administrative officers of political subdivisions. Reporting Individuals who are suspended from office have been found to remain subject to the gift law while suspended. CEO 10-19. "Procurement employees" are defined to include any employee of an officer, department, board, commission, council, or agency of the executive branch or judicial branch of state government who has participated in the preceding 12 months through decision, approval, disapproval, recommendation, preparation of any part of a purchase request, influencing the content of any specification or procurement standard, rendering of advice, investigation, or auditing or in any other advisory capacity in the procurement of contractual services or commodities as defined in F.S. 287.012, if the cost of such services or commodities exceeds or is expected to exceed \$10,000 in any fiscal year. F.S. 112.3148(2)(e).

a. *Local Government Attorneys* - Local government attorneys who are RIPEs (by virtue of filing limited disclosure) generally are only the city attorney or the county attorney. Assistant city or county attorneys, attorneys for local government boards, and attorneys for special districts are not RIPEs. See CEO's 83-56, 84-5, 85-49. District School Board attorneys are not RIPEs, unless they come within a generic definition [e.g., "purchasing agent" as defined in F.S. 112.3145(1)(a)3, Florida Statutes (a F.S. 287.017 CATEGORY TWO purchasing agent).]

b. *Practice Tip* - Based on information submitted by State and local agencies, the Commission prepares lists of persons required to file full and limited disclosure. F.S. 112.3145(8). These lists are helpful as a starting point for information about who is a reporting individual.

B. Prohibition against RIPEs Soliciting Gifts

A RIPE is prohibited from soliciting any gift from a lobbyist who lobbies the RIPE's agency, from the partner, firm, employer, or principal of such a lobbyist, from a vendor doing business with the RIPE's agency, or from a political committee as defined in the election laws (F.S. 106.011), if it is for the personal benefit of the RIPE, another RIPE, or a parent, spouse, child, or sibling of a RIPE. F.S. 112.3148(3). See CEO 19-13, n.10, regarding Section 112.3148(3) being inapplicable to solicitations for the benefit of individuals not identified in the statutory prohibition.

1. The prohibition against solicitation is comprehensive, there is no valuation threshold, and it applies even to food and beverages.

2. The gift must be for the personal benefit of the RIPE, a family member, or one or more other RISEs. Therefore, a RIPE cannot solicit lobbyists for contributions toward a banquet for other RISEs. But, solicitation of a gift intended for one's agency or for a charity, for example, is not prohibited. CEO 91-52. Under the facts of CEO 09-21 (fund established to benefit ill son-in-law of county commissioner), solicitation was not found.

3. Note that there may be provisions outside the Code of Ethics which place further restrictions on solicitations of items, but which cannot "relax" the provisions contained within the Code. See, for example, F.S. 334.195, concerning solicitation of funds by FDOT personnel from "any person who has, maintains, or seeks business relations with the department."

C. General Rule on Accepting Gifts

Subject to specific, limited exceptions, a RIPE (and any other person on behalf of the RIPE) is prohibited from knowingly accepting a gift which he or she knows or reasonably believes has a value exceeding \$100: (1) directly or indirectly from a lobbyist who lobbies the RIPE's agency or from a political committee or vendor; or (2) directly or indirectly made on behalf of the partner, firm, employer, or principal of such a lobbyist. F.S. 112.3148(4); see CEO 19-17 for general overview of prohibition. CEO 18-08 found that pro bono legal services provided to a city in a lawsuit in which a city commissioner was named in his official capacity as a commissioner was not a gift to the commissioner. CEO 19-01 found that a nonprofit's acceptance of donations from school district vendors did not constitute gifts to a school board member even though the member had a certain affiliation with the nonprofit.

1. Knowledge

On the issue of knowledge, note that Commission Rule 34-13.310(4), F.A.C., provides that "reasonable inquiry" should be made of the source of the proposed gift to determine whether it is prohibited. [All further citations to Commission rules are to F.A.C. Chapter 34-13.]

2. Indirect Gifts

Where the gift is given to someone other than a RIPE by one of the prohibited group of donors and is given with the intent to benefit the RIPE, the gift is considered an indirect gift to the RIPE. Rule 310(6). This rule also provides examples of what would be considered prohibited and permitted indirect gifts, as well as the factors the Commission considers in determining whether an indirect gift has been made. See CEO 99-6 (Republican Party fundraiser at Disney World attended by public officers) and CEO 05-5 (city officials accepting admissions to speedway suite). See also CEO 06-27 (city paying travel expenses for companions of city officials) and CEO 07-3 (conference sponsor offering discounted registration rate to employees of Office of Financial Regulation). In CEO 08-2, it was determined that appearances by the Attorney General in public service announcements promoting a Florida conference for women (although constituting a gift) would not constitute an indirect gift from a prohibited donor. CEO 09-21 (fund established to benefit ill son-in-law of county commissioner) did not find an impermissible indirect gift. The concept of an indirect gift was explored in CEO 19-13, wherein donations given to a nonprofit where a police chief served as an uncompensated director were not considered indirect gifts to the police chief, unless the nonprofit intended to use the donations to purchase equipment and gear for the police department which, ultimately, would be used by the police chief. CEO 21-7, Question 2, found that the transfer of equivalent residential unit (ERU) credits by a city to a nonprofit organization upon which a city council member sits as an uncompensated member of the board of directors was not an indirect gift to the city council member. See also CEO 19-17 for discussion on complimentary tickets given to agency from nonprofit and intended to be distributed to specific agency officials.

3. Exceptions to the General Rule on Accepting Gifts

Aside from the exemption for gifts from relatives, there are only three express exceptions to the general rule against accepting gifts worth more than \$100 from one of the prohibited group of donors:

a. *Acceptance on Behalf of a Governmental Entity* - When the gift is accepted on behalf of a governmental entity or a charitable organization. CEO 13-2, Question 2. In this instance, the recipient may maintain custody of the gift for only the time reasonably necessary to arrange for the transfer of custody and ownership of the gift. F.S. 112.3148(4). These gifts need not be reported. Rule 400(2)(d). Note that Rule 320(1)(b) defines "charitable organization" to mean an organization described in s. 501(c)(3) of the Internal Revenue Code and exempt from tax under s. 501(a). Note that travel expenses of a public official provided directly to the official by persons or entities other than the official's own public agency have been found to be gifts to the official and not gifts to his governmental entity; but that reimbursement to an agency for the official's travel or donations to an agency travel fund can be permissible as gifts to the governmental entity. CEO 13-3.

b. *Donor is a Certain Kind of Governmental Entity* - When the gift is from one of certain kinds of governmental entities (an entity of the legislative or judicial branch, a department or commission of the executive branch, a county, a municipality, an airport authority, a water management district created pursuant to F.S. 373.069, the South Florida Regional Transportation Authority, a county, a municipality, or a school board), provided that a public purpose can be shown for the gift. F.S. 112.3148(6)(a) & (b). These gifts must be reported; however, in CEO 01-14, the Commission on Ethics found that office space made available by a municipality to a Legislator for use as his district office was not a "gift." Note that Rule 320(2) defines "public purpose," specifies that there must be a public purpose for the entity's having given the gift and for the RIPE's accepting the gift, and concludes that there is no public purpose for a gift involving attendance at a spectator event unless the donee has direct supervisory or regulatory authority over the event, persons participating in the event, or the entity which gave the tickets. See also CEO 91-53 (county provides telephone service to legislative delegation).

c. *Direct-Support Organizations* - When the gift is from a direct-support organization (DSO) specifically authorized by law to support a governmental entity, so long as the RIPE is an officer or employee of that governmental entity. F.S. 112.3148(6)(a) & (b). These gifts must be reported. See CEO 92-14 (DSO for state university).

D. Gift Disclosures for RIPEs.

1. Quarterly Gift Disclosure (CE Form 9)

Each RIPE must file this form to list each gift worth over \$100 accepted by the RIPE, except for gifts from relatives, gifts required to be disclosed on other forms, and gifts the RIPE is prohibited from accepting. The deadline is the last day of the calendar quarter following the calendar quarter in which the gift was received. The form need not be filed if no reportable gift was received during the calendar quarter. However, note that the Commission rule requires a RIPE to disclose a gift reportable on this form received during the time the RIPE held his or her public position, regardless of whether the position was vacated before the form is due. The form is filed with the Commission. F.S. 112.3148(8); Rule 400.

2. Annual Gift Disclosure (CE Form 10)

Each RIPE must file this form to list each gift worth over \$100 received by the RIPE: from a governmental entity, for which a public purpose can be shown; or from a direct-support organization. For example, see CEO 10-11 (direct-support organization of hospital district

providing gifts to district board members). The deadline is July 1 of the year following the year in which the gift was received. The form is filed along with the annual financial disclosure form. A procurement employee files with the Commission on Ethics. The form need not be filed if no reportable gift was received. F.S. 112.3148(6)(d); Rule 410. The report filed by a reporting individual or procurement employee who left office or employment during the calendar year covered by the report shall be filed by July 1 of the year after leaving office or employment at the same location as his or her final financial disclosure statement or, in the case of a former procurement employee, with the Commission on Ethics.

E. Gift Prohibitions for Donors

1. Generally

A lobbyist who lobbies a RIPE's agency; the partner, firm, employer, or principal of a lobbyist; another on behalf of the lobbyist or partner, firm, principal, or employer of the lobbyist, a political committee, or a vendor are prohibited from giving, either directly or indirectly, a gift that has a value in excess of \$100 to the RIPE or any other person on the RIPE's behalf. F.S. 112.3148(5)(a).

2. Exceptions to the Prohibitions for Donors

Exceptions to this prohibition mirror those for RISEs: a gift worth over \$100 may be given if it is intended to be transferred to a governmental entity or charitable organization; a gift worth over \$100 may be given by certain governmental entities if a public purpose can be shown for the gift; a gift worth over \$100 may be given by a direct-support organization to an officer or employee of the agency supported by the DSO.

F. Gift Disclosures Applicable to Donors.

1. Quarterly Gift Disclosure (CE Form 30)

A lobbyist who lobbies a RIPE's agency, or the partner, firm, employer, or principal of such a lobbyist, who makes or directs another to make a gift having a value over \$25 but not over \$100 to a RIPE of that agency, must file this form to report the gift. Each political committee which makes or directs another to make a gift having a value over \$25 but not over \$100 to a reporting individual or procurement employee must file this form to report the gift. In addition, the donor must notify the intended recipient at the time the gift is made that the donor, or another on the donor's behalf, will report the gift. The report is filed with the Commission, except with respect to gifts to RISEs of the legislative branch (of State government), in which case the report shall be filed with the Office of Legislative Services. F.S. 112.3148(5)(b); Rule 420.

a. *Gifts Not Requiring Disclosure* – The disclosure requirement does not apply to the following gifts: those which the donor knows will be accepted on behalf of a governmental entity or charitable organization; those from a direct support organization (DSO) to a RIPE of the agency supported by the DSO; or those from an entity of the legislative or judicial branch, a department or commission of the executive branch, a water management district created pursuant to F.S. 373.069, the South Florida Regional Transportation Authority, the Technological Research and Development Authority, a county, a municipality, an airport authority, or a school board.

b. *Disclosure Due Date* – The deadline is the last day of the calendar quarter following the calendar quarter in which the gift was made. The same gift need not be reported by more than one person or entity, and the form need not be filed if no reportable gift was made during the calendar quarter.

c. *Donor Disclosure* – Note that the Commission rule requires the donor to disclose a gift reportable on this form, regardless of whether the donor is within the prohibited group at the time the form is due.

2. *Annual Gift Statements by Governmental Entities and DSOs*

No later than March 1 of each year, each governmental entity or DSO which has given a gift worth over \$100 to a RIPE during the previous calendar year (where the gift is exempted) must give the RIPE a statement describing the gift, the date of the gift, and the value of the total gifts given by the entity or DSO to that RIPE during the calendar year. CEO 10-11. A governmental entity may provide a single statement covering gifts provided by the entity and any associated DSO. No form has been promulgated by the Commission for this statement. F.S. 112.3148(6)(c); Rule 430.

G. Gifts from Relatives:

1. *Generally*

Gifts solicited or accepted by a RIPE from a relative are not prohibited or reportable by either the RIPE or the relative, regardless of whether the relative is a lobbyist, the partner, employer, or principal of a lobbyist, or a vendor. F.S. 112.3148(1); Rules 300(3), 320(4), 400(2), 420(7).

2. *Definition*

The definition of "relative" is expansive, including not only family members such as in-laws and step-relatives, but also persons engaged to RИPEs, persons who hold themselves out as or are generally known as intending to marry or form a household with the RIPE, and any person having the same legal residence as the RIPE. F.S. 112.312(21). CEO 16-1 found that a boyfriend was not a relative.

H. The Definition of "Gift"

Although comprehensive in many respects, including what may be provided to the donee directly, indirectly, or through another, the definition of "gift" [F.S. 112.312(12)] contains several important exceptions. Since the definition is uniformly applicable to the prohibitions and disclosures, this has the effect of exempting transactions within an exception to the definition of gift (e.g., gifts from relatives, items received in exchange for equal or greater consideration) from being prohibited or subject to disclosure. (As the definition contains a long list of examples of what is a gift and what is not, it is not quoted here; only major concepts and exceptions are reviewed.)

1. *Atypical Gifts*

Included in the definition are several items that might not normally be considered a gift. These include the use of real or personal (tangible and intangible) property; a preferential rate or terms on a debt, loan, goods, or services, which rate is not a government rate or available to similarly situated members of the general public by virtue of certain private attributes; transportation (other than transportation provided by an agency in relation to officially approved governmental business), lodging, and parking; personal and professional services; and any other service or thing having an attributable value. Free publicity or exposure for members of the Legislature can constitute a "gift" (CEO 05-11 and CEO 20-5, n.9), as it can for a city commissioner (CEO 08-29). Informational material can be a gift (CEO 16-3).

2. *Consideration Given in Exchange*

If equal or greater consideration is given (within 90 days of receipt of the gift), it is not a gift; "consideration" does not include a promise to pay or otherwise provide something of value unless the promise is in writing and enforceable through the courts. F.S. 112.312(12)(a) and 112.312(12)(d). Based upon this concept, the Commission's rule specifies that salary, benefits, services, fees, or other expenses (including travel expenses when a public purpose for the travel

exists) received by a RIPE from his or her public agency do not constitute gifts. However, services rendered by the RIPE on behalf of the RIPE's agency by use of official position do not count as consideration for a gift from a person or entity other than the agency. CEO 01-19, CEO 05-5 (regarding speedway admissions). The rule provides that substantiating equal or greater consideration is the responsibility of the donee. CEO 01-13. This can be done by providing information demonstrating the fair market value of items of merchandise, supplies, raw materials, or finished goods provided by the donee to the donor. In the case of personal labor or effort for the benefit of the donor, the length of time, value of the service provided, and whether others providing similar services for the donor received a comparable gift will be reviewed by the Commission. Rule 210. CEO 01-13. In CEO 13-2, the Commission found that a charity auction purchase by a public officer of a poker party provided to the charity by a principal of a lobbyist of the officer's public agency was not a gift because the auction was open to all and the auction price was adequate consideration for the poker party. CEO 16-1 found that if a couple (public officer and her boyfriend) shared the cost equally of travel, meals, lodging, or entertainment, the officer had provided adequate consideration and thus had not received a gift. CEO 17-13 found that meet and greet services, media services, and other platforms for which fair market values were paid are not "gifts."

3. Exclusions from the Definition of Gift

There is a significant exclusion for salary, benefits, services, fees, commissions, expenses, and even gifts associated primarily with the donee's employment or business, or with the donee's service as an officer or director of a corporation or organization. F.S. 112.312(12)(b)1; CEO 14-26; CEO 09-1; CEO 10-11; CEO 15-9. Rule 34-13.214 states that this means those things associated with the donee's principal employer or business occupation and unrelated to the donee's public position. EXAMPLE: Fees or even gifts received by a RIPE from a client of his or her private law practice, with no other relationship between the RIPE and the client, would not be a prohibited or reportable gift. However, in CEO 92-33 tickets from one's agency to theater performances were not considered "benefits" under the rule, unlike benefits typically associated with employment. See, also, CEO 19-17, in which a city purchased a sponsorship package to an event hosted by a private entity, and the tickets included in that sponsorship package, and given to city employees on a first-come, first-served basis, were considered reportable gifts from the city if their value exceeded \$100.

4. Campaign Contributions

Except as provided in F.S. 112.31485, contributions or expenditures reported under the campaign financing law, campaign-related personal services provided by volunteers, and any other contribution or expenditure by a political party are exempted.

5. Honoraria and Honoraria Event-Related Expenses

An honorarium or expense related to an honorarium event paid to a RIPE or spouse is exempted. These are treated exclusively under the honorarium law.

6. Food Consumed in a Single Sitting

Effective January 1, 1997, food and beverages consumed at a single sitting or event came within the definition of gift. Chapter 96-328, Laws of Florida. Therefore, a cup of coffee or a meal may be prohibited or reportable, depending on value.

7. A Gift Must Have an Attributable Value

A "gift" only covers services or things having an attributable value. F.S. 112.3148(12)(a)14. Conduct which might bolster a RIPE's reputation, or bring recognition or philanthropic/altruistic satisfaction to the RIPE, but has not value in itself, are exempt. See CEO 19-13, n.8.

I. Gifts from Lobbyists

1. Definition of a "Lobbyist"

A "lobbyist" is defined to mean any natural person who is compensated for seeking to influence the governmental decisionmaking of a RIPE or the agency of a RIPE or for seeking to encourage the passage, defeat, or modification of any recommendation or proposal by a RIPE or the RIPE's agency; it also includes any person who did so during the preceding 12 months. F.S. 112.3148(2)(b); Rule 34-13.240

2. Compensation

A lobbyist is being compensated when receiving a salary, fee, or other compensation for the action taken. Rule 34-13.240. Thus, any employee of an organization, including the chief executive officer or a salesperson, who is contacting the agency as part of his or her job may be lobbying. On the other hand, an unpaid volunteer member of a nonprofit organization who seeks to influence governmental decision making will not be a lobbyist (but see 4, below, for a possible exception).

3. Governmental Decisionmaking

All types of governmental decisionmaking or recommendations are included, whether they fall in the area of procurement, policymaking, investigation, adjudication, or any other area. Rule 34-13.240(3).

4. Informational Requests

A purely informational request made to an agency and not intended in any way to directly or indirectly affect a decision, proposal, or recommendation of a RIPE or an agency does not constitute lobbying. One must have the intent to affect a decision, proposal, or recommendation and take some action that directly or indirectly furthers or communicates one's intention. Rule 34-13.240(4).

5. Agency Lobbyist Registration Systems

For agencies that have established by rule, ordinance, or law a registration or other designation process for persons seeking to influence decision making or to encourage the passage, defeat, or modification of any proposal or recommendation by such agency or an employee or official of the agency, a "lobbyist" includes only a person who is required to be registered or otherwise designated as a lobbyist in accordance with that process or who was so required during the preceding 12 months. F.S. 112.3148(2)(b). However, the local registration system must be at least as broad in defining who is a "lobbyist" as the Legislature's registration system in order to define who is a lobbyist for purposes of the gift and honoraria laws.

6. Influencing One's Own Agency

Public employees seeking to influence the official actions of other public officers of their own agency are not engaged in "lobbying," and, therefore, are not encompassed within the definition of "lobbyists" for purposes of Section 112.3148. See CEO 92-33 and CEO 19-17.

J. Valuation of Gifts.

1. Generally: Actual Cost to the Donor

The general method for valuation uses the actual cost to the donor (less taxes and gratuities) rather than fair market value of the gift, but several exceptions are provided. The Commission's Rule specifies that "actual cost" means the price paid by the donor which enabled the donor to provide the gift to the donee; if the donor is in the business of selling the item or service (other than personal services), the donor's actual cost includes the total costs associated with providing the items or services divided by the number of units of goods or services produced. F.S. 112.3148(7); Rule 500(1). CEO 17-16 found, under particular circumstances, that the naming of a public facility for a sitting public official involved not cost to the donor, and thus was not a prohibited gift.

2. Personal Services

Personal services provided by the donor, meaning individual labor or effort performed by one person for the benefit of another, are valued at the reasonable and customary charge regularly charged for such service in the community in which the service is provided. F.S. 112.3148(7)(a); Rule 34-13.500(2).

3. Compensation Given Back to Donor

Compensation provided by the donee to the donor is deducted from the value of the gift in determining the value of the gift. Under the Commission's rule, compensation includes only payment by the donee to the donor and excludes personal services rendered by the donee for the benefit of the donor. However, recall that services by the donee may constitute equal or greater consideration, with the result that no gift has been made. The compensation principle gives rise to the so called "\$100 deductible," under which the official pays all but \$100 of the value of the gift in order to be allowed to accept the gift; but see above regarding the requirement of payment within 90 days.

4. Events

If the actual value attributable to a participant at an event cannot be determined, the total costs are prorated among all invited persons, including non-RIPEs. F.S. 112.3148(7)(c).

5. Transportation

Transportation is valued on a round-trip basis and is a single gift, unless only one-way transportation is provided. Transportation in a private conveyance is given the same value as transportation provided in a comparable commercial conveyance. The rule specifies that this means a similar mode and class of transportation which is available commercially in the community; transportation in a private plane is valued as an unrestricted coach fare. If the donor transports more than one person in a single conveyance at the same time, the value to each person is the same as if it had been in a comparable commercial conveyance. F.S. 112.3148(7)(d); Rule 34-13.500(4).

6. Lodging

Lodging on consecutive days is a single gift. Lodging in a private residence is valued at \$44 per night (the per diem rate less the meal rate provided in F.S. 112.061). F.S. 112.3148(7)(e).

7. Trips

Where the gift received by a donee is a trip and includes payment or provision of the donee's transportation, lodging, recreational, or entertainment expenses by the donor, the value of the trip is equal to the total value of the various aspects of the trip. Rule 34-13.500(3).

8. Food and Beverage

Food and beverages consumed at a single sitting or event are considered a single gift, valued according to what was provided at that sitting or meal; other food or beverages provided on the same calendar day are considered a single gift, valued at the total provided on that day. F.S. 112.3148(7)(f). If the gift is food, beverage, entertainment, etc. provided at a function for more than ten people, the value of the gift is the total value of the items provided divided by the number of persons invited, unless the items are purchased by the donor on a per person basis.

9. Tickets or Admission Fees

Tickets and admissions to events, functions, and activities are a frequent source of inquiries. Generally, the rule is that the value is the face value of the ticket or admission fee, but if the gift is an admission ticket to a charitable event AND is given by the charitable organization, that portion of the cost which represents a charitable contribution is not included in valuing the gift. F.S. 112.3148(7)(k) and CEO 04-12 (opining as to a charitable golf tournament); but see CEO 19-17

(tickets purchased from a charity by a municipality, and then given to municipal employees, are gifts from the municipality, not the charity). Rule 34-13.500(5) provides a number of specific examples and principles for valuing this type of gift, especially relating to football tickets, booster fees, and seating in a skybox. Skybox tickets given by a county for professional basketball playoff games would be valued at the cost of admission to persons with similar tickets. CEO 95-36 and CEO 96-02. Multiple tickets received at one time by a RIPE to be used by the RIPE or given to others are valued by multiplying the number of tickets given times the face value of each (CEO 92-33). CEO 16-10 valued tickets/admission to a particular charity polo match.

10. Required Additional Expenses

Where the donor is required to pay additional expenses as a condition precedent to being eligible to purchase or provide the gift, and where the expenses are for the primary benefit of the donor or are of a charitable nature, those expenses are not included in determining the value of the gift. Examples: A lobbyist's golf club membership fees, for the personal benefit of the lobbyist, are not included when valuing the gift of a round of golf; and the portion of a skybox leasing fee allocated to the FSU Foundation, Inc. (expenses of a charitable nature) is not included in the value of a skybox seat. Rule 500(7) and CEO 94-43. However, when city co-sponsors a local charitable event, and receives tickets as part of a sponsorship package, the portion of the sponsorship contribution identified by the charity as tax deductible is not a condition precedent that can be "backed out" of the cost of the tickets. CEO 19-17.

11. Membership Dues

Membership dues paid to one organization during any 12-month period are considered a single gift. F.S. 112.3148(7)(g).

12. Per-Occurrence Valuation

Unless otherwise noted, a gift is valued on a per occurrence basis, meaning each separate occasion on which a donor gives a gift to a donee. F.S. 112.3148(7)(i); Rule 500(6).

K. Multiple Donors.

1. Generally

In determining whether a gift is prohibited, the value of the gift provided to a RIPE by any one donor equals the portion of the gift's value attributable to that donor based upon the donor's contribution to the gift. The value of the portion provided by any lobbyist or other prohibited donor cannot exceed \$100; if it does, the RIPE cannot accept the gift. Rules 34-13.310(5), 34-13.510(2). CEO 08-19.

2. Recipient's Disclosure of Gift with Multiple Donors

Regardless of whether the gift is provided by multiple donors, the RIPE must disclose it if the value of the gift as a whole exceeds \$100. Rule 34-13.510(1). CEO 08-19.

3. A Donor's Disclosure of Gift with Multiple Donors

In determining whether a donor must disclose a gift (\$25-\$100) or provide a statement to the RIPE about the gift (over \$100), the value of the gift provided by any one donor equals the portion of the gift's value attributable to that donor based upon the donor's contribution to the gift. If that value exceeds the threshold, the donor must disclose the gift or provide the statement. Rules 34-13.420(9), 34-13.430(4), 34-13.510(3). CEO 08-19.

L. Political Committees

F.S. 112.31485 (via Chapter 2013-36, L.O.F.) prohibits a RIPE or a member of a RIPE's immediate family from soliciting or knowingly accepting, directly or indirectly, any "gift" from a political committee; and prohibits a political committee from giving such a gift. For purposes of this

prohibition, "gift" is defined to mean "any purchase, payment, distribution, loan, advance, transfer of funds, or disbursement of money or anything of value that is not primarily related to contributions, expenditures, or other political activities authorized pursuant to chapter 106." This statute is in addition to the provisions of F.S. 112.3148, discussed above.

M. Citizens Property Insurance

F.S. 627.351(6)(d)4 contains an additional gift prohibition for employees and board members of Citizens Property Insurance Corporation.

N. Exception for Declared State of Emergency

After CEO 20-5 was published, (note CEO 20-5, n.7 which finds that—unlike other provisions in the Code of Ethics—there is no exemption to Section 112.3148 for emergency situations, regardless of the merit or lack of merit behind the offered gift), F.S. 252.36(12) was amended to create an exception to F.S. 112.3148 for certain enumerated public officers disseminating public service announcements during a declared state of emergency. See Chapter 2021-8, Section 8, L.O.F.

XIII. PROHIBITED "EXPENDITURES" AT THE STATE LEVEL

[Note: In addition to the gift and honoraria laws codified at F.S. 112.3148 and 112.3149, the legislature enacted, in a December 2005 Special Session, Chapter 2005-359, L.O.F. (amending F.S. 112.3215), which addresses legislative and executive-branch lobbying at the state level. The law contains substantial obligations, prohibitions, and requirements. However, while the law may apply to certain lobbying-related gifts, expenditures, or activities made by or on behalf of local governments to state level officials, it does not apply to such items or activities directed at local government officials. Nevertheless, the law did not repeal any prohibition of sections 112.3148 and 112.3149, which continue to apply at both the state and local levels. The Commission on Ethics has developed rules and renders advisory opinions regarding the portion of the law which it administers (Executive-Branch portion, F.S. 112.3215, Florida Statutes); and the legislature has established lobbying guidelines for the House and Senate.]

A. Generally

See CEO 06-4 (Executive Branch lobbying, agency officials and employees buying tickets to association's annual legislative reception), CEO 06-6 (engagement party or wedding gifts paid for by lobbyists), CEO 06-7 (donations to the Department of Agriculture and Consumer Services and its direct-support organization given by principals of lobbyists), CEO 06-11 (Governor and staff traveling on trade mission paid for by Enterprise Florida, Inc.), CEO 06-14 (corporate donations used to underwrite costs of annual Prudential Financial-Davis Productivity Awards), CEO 06-15 (corporate gifts and donations to the United Way for the annual Florida State Employees' Charitable Campaign), CEO 06-17 (promotional items given away by insurance provider to state employees attending benefit fairs), CEO 06-18 (discounted cellular telephone service offered to Department of Revenue employees by company whose lobbyists are registered to lobby the executive branch), CEO 07-3 (conference sponsor offering discounted registration rate to employees of Office of Financial Regulation), CEO 07-8 (lobbying firms and prohibited indirect expenditures), CEO 08-2 (Attorney General appearing in public service announcements), CEO 09-1 (Citizens Insurance board member), and CEO 20-5 (publicity or exposure for an executive branch officer or employee appearing in public service announcement regarding the coronavirus pandemic). Also, see F.S. 112.3215(1)(d) regarding what is an "expenditure." Many government entities have been found not to be an "agency" for purposes of F.S. 112.3215 (CEO 08-19). Expenditures from one who lobbies any executive branch agency have been found to be prohibited as to certain officials or employees of all executive branch agencies (CEO 08-19). Reimbursement to a public agency, as opposed to an agency employee, has been found not to be a prohibited expenditure (CEO 08-26). See CEO 12-16, regarding recorded greetings by the Governor being played on airport shuttle buses. CEO 16-3 found that attendance, at no cost, at purely informational briefings and gatherings (hosted by companies which were principals of executive branch lobbyists) at which the only thing of value received was the oral and written information distributed, was not prohibited. CEO 17-16 found, under particular circumstances, that the naming of a public facility for a sitting public official was not a prohibited expenditure.

B. Exception for Declared State of Emergency

After CEO 20-5 was published, (note CEO 20-5, n.7 which finds that—unlike other provisions in the Code of Ethics—there is no exemption to Section 112.3215 for emergency situations, regardless of the merit or lack of merit behind the offered expenditure), F.S. 252.36(12) was amended to create an exception to F.S. 112.3215 for certain enumerated public officers

disseminating public announcements during a declared state of emergency. See Chapter 2021-8, Section 8, L.O.F.

XIV. HONORARIA AND HONORARIUM EVENT-RELATED EXPENSES

A. Definition of "Honorarium"

An "honorarium" is defined to mean a payment of money or anything of value, directly or indirectly, to a RIPE or to any other person on the RIPE's behalf, as consideration for a speech, address, oration, or other oral presentation; or for a writing (other than a book) which is or is intended to be published. F.S. 112.3149(1)(a).

1. Included in the Definition

The Commission's rule specifies that the speech or other oral presentation means a formal address, lecture, panel discussion, or other presentation which a RIPE has been invited to make to a gathering of persons, and further provides examples of documentation evidencing a genuine presentation by the RIPE, rather than a subterfuge to allow an otherwise prohibited gift. Rule 34-13.220.

2. Excluded from the Definition

The term "honorarium" specifically excludes: payment for services related to outside employment; ordinary payments or salary received for services related to the RIPE's public duties; a campaign contribution reported as required by law; and the payment or provision of actual and reasonable transportation, lodging, event or meeting registration fees, and food and beverage expenses related to the honorarium event for the RIPE and spouse. F.S. 112.3149(1)(a). Rule 34-13.220(3) concludes that to the extent that the expenses paid or provided for exceed those that are actual and reasonable, that amount constitutes an honorarium. The rule also specifies a number of circumstances the Commission will consider in determining the reasonableness of expenses paid or provided, again in an effort to see that this exception does not allow an otherwise prohibited gift or honorarium.

B. Prohibition against Solicitation of Honoraria

A RIPE is prohibited from soliciting an honorarium from anyone, regardless of amount, when the subject of the speech or writing relates to the RIPE's public office or duties. F.S. 112.3149(2).

C. Prohibition against Accepting or Providing Honoraria

A RIPE is prohibited from knowingly accepting an honorarium from: a lobbyist; the employer, principal, partner, or firm of a lobbyist; a political committee; or a vendor. Similarly, these persons and entities are prohibited from providing an honorarium to a RIPE. There is no \$100 threshold for honoraria, as there is for gifts. As with gifts, the Commission's rule states that "reasonable inquiry" should be made by the RIPE to determine whether the honorarium is prohibited. F.S. 112.3149(3) & (4); Rules 34-13.620 & 34-13.630.

D. Disclosure

A RIPE must disclose the receipt of payment for, or the provision of, expenses related to an honorarium event from a person or entity that is prohibited from paying an honorarium to the RIPE. There is no \$100 threshold for this disclosure requirement. Honoraria or honorarium event-related expenses paid or provided by any other person or entity are not required to be disclosed. CEO 91-57. The statement (CE Form 10) is due by July 1 for expenses paid for or provided during the prior calendar year, but the form need not be filed if there is nothing to report. The form is filed along with the annual financial disclosure. F.S. 112.3149(6); Rule 34-13.710. A procurement employee files with the Commission on Ethics. The statement filed by a reporting individual or procurement employee who left office or employment during the calendar year covered by the

statement shall be filed by July 1 of the year after leaving office or employment at the same location as his or her final financial disclosure statement or, in the case of a former procurement employee, with the Commission on Ethics.

E. Requirements for Donor of Honorarium

No later than 60 days after the honorarium event, the person or entity paying or providing a RIPE's honorarium event-related expenses must provide to the RIPE a statement listing the name and address of the person or entity, a description of the expenses provided each day, and the total value of the expenses provided for the event. This applies only to persons and entities that are prohibited from paying an honorarium to the RIPE. No form has been promulgated by the Commission for this statement. F.S. 112.3149(5).

F. Application of Expenditure Ban

Note that the expenditure ban of F.S. 112.3215(6)(a) may prohibit honoraria event-related expenses not prohibited under F.S. 112.3149; and that F.S. 112.31485 (gifts involving political committees) could prohibit the payment of expenses not prohibited by F.S. 112.3149.

XV. LOCAL GOVERNMENT ATTORNEYS

A. Generally

All "local government attorneys" are subject to the provisions of the Code of Ethics contained in F.S. 112.313(2), (4), (5), (6), & (8). Government employee (not independent contractor) local government attorneys, and public officer local government attorneys (e.g., a city attorney where the city's charter states that the city attorney is among the officers of city government, like the mayor or the police chief), also are subject to F.S. 112.313(3) & (7). F.S. 112.313(16); CEO 02-19, note 3.

B. Definition of "Local Government Attorney"

A "local government attorney" is defined to mean "any individual who routinely serves as the attorney for a unit of local government." "Unit of local government" includes, but is not limited to, municipalities, counties, and special districts. Expressly excluded from the definition are attorneys who render services limited to a specific issue or subject, to specific litigation, or to a specific administrative proceeding.

C. Services by the Law Firm of the Local Government Attorney

Unless the local government attorney is a full-time employee or governing board member of the unit of local government, it is not conflicting under F.S. 112.313(3) or 112.313(7) for the attorney's law firm to provide services to the governmental unit; however, the local government attorney may not refer legal work to his or her firm unless authorized by contract. Also, the firm may not represent private clients before the governmental unit; F.S. 112.313(16); Robinson v. Commission on Ethics, 242 So. 3d 467 (Fla. 1st DCA 2018).

D. Applications of F.S. 112.313(16)

The Commission on Ethics did not find F.S. 112.313(16) to apply to a situation involving a public employee general counsel/executive director whose employment was not limited to the provision of legal services. CEO 08-15. See CEO 17-18, finding an attorney serving as the attorney for a value adjustment board to be a "local government attorney," and finding the board to be a "unit of local government."

XVI. BUSINESS ENTITIES SERVING AS CHIEF ADMINISTRATIVE OFFICERS OF POLITICAL SUBDIVISIONS

A. Generally

The officers, directors, and chief executive officer of a corporation, partnership, or other business entity that is serving as the chief administrative or executive officer or employee of a political subdivision, and any business entity employee who is acting as the chief administrative or executive officer or employee of the political subdivision, for the purposes of the following sections, are public officers and employees who are subject to F.S. 112.313 [various standards of conduct, with qualifications], 112.3145 [financial disclosure and other disclosures], 112.3148 [gift laws], and 112.3149 [honorary laws]. F.S. 112.3136. CEO 09-17, CEO 10-01. CEO 14-13 found, under the facts presented regarding a particular city, that neither the city's financial services firm nor the firm's personnel were subject to F.S. 112.3136.

B. Definition of "Agency"

For F.S. 112.313 purposes, their "agency" is the political subdivision that they serve.

C. Exceptions to F.S. 112.313(3) or (7)

The contract under which the business entity serves as chief executive or administrative officer is not deemed to violate F.S. 112.313(3) or (7).

XVII. CHARTER SCHOOL BOARD MEMBERS/PERSONNEL [F.S. 1002.33(24) & (26)]

A. Charter School Board Members Subject to Limited Provisions of the Code

Charter school governing board members, including members of governing boards of charter schools operated by a private entity, are subject to F.S. 112.313(2), (3), (7), and (12), and to F.S. 112.3143(3). F.S. 1002.33(26)(a). CEO 11-23.

B. Personnel: Charter School Operated by Municipality/Public Entity

Charter school personnel in schools operated by a municipality or other public entity have been made subject to F.S. 112.3135 (the anti-nepotism law). F.S. 1002.33(24). And to F.S. 112.3145 (financial disclosure), via Chapter 2011-232, L.O.F. F.S. 1002.33(26)(b).

C. Personnel: Charter School Operated by Private Entity

Certain charter school personnel in charter schools operated by a private entity are subject to restrictions like the restrictions of F.S. 112.3135, but apparently without the administration of the restrictions being placed in the Commission on Ethics. AGO 10-14.

D. Restrictions on Charter School Governing Board Membership

An employee of a charter school, or his or her spouse, or an employee of a charter management organization, or his or her spouse, may not be a member of the governing board of the charter school. F.S. 1002.33(26)(c).

XVIII. POST OFFICE-HOLDING AND POSTEMPLOYMENT (REVOLVING DOOR) RESTRICTIONS

A. Former Legislators, Statewide Elected Officers, SES/SMS Employees, etc. Appearing Before Their Former Agencies

F.S. 112.313(9) contains a two-year prohibition on former legislators, statewide elected officers, selected exempt service employees, senior management service employees, and certain others representing persons or entities before their former agencies. See CEO 81-57 and CEO 90-4 for a discussion on the prohibition's similarities to the portion of the Sunshine Amendment found in Article II, Section 8(e), Florida Constitution. CEO 10-14 found that a former Assistant State Attorney was not subject to the prohibition because his public position had not been that of an "employee" under the applicable definition; and CEO 16-11 found that a staff director of the House of Representatives Bill Drafting Service was not an "employee" subject to the prohibition. Applies only to certain former State-level employees or officers; does not apply to former local (e.g., city housing authority) employees or officers (CEO 07-19, note 3). CEO 14-20 found that a member of the New Motor Vehicle Arbitration Board is an appointed state officer subject to the prohibition.

1. Former Career Service Employees

Usually does not apply to former career service employees. CEO 00-09. Under certain circumstances, was found not to apply to former career service employees subjected to an *en masse* transfer to selected exempt service (CEO 02-1); but see Section 2, Chapter 2006-275, L.O.F., bringing those transferred *en masse* under the prohibition. CEO 12-4. In CEO 14-31, the Commission found that the position of Administrative Law Judge (ALJ) of the Division of Administrative Hearings (DOAH) is not a position within the prohibition. CEO 18-01 found F.S. 112.313(9)(a)4 not to be applicable to a former employee of the Florida Housing Finance Corporation.

2. Other Personal Services (OPS)

Was found, in a particular situation, not to apply to a former Other Personal Services (OPS) employee (CEO 05-1); but see Section 2, Chapter 2006-275, L.O.F., bringing OPS employees under the prohibition.

3. Represent

If applicable, effects are broad due to definition of "represent" codified in F.S. 112.312(22). CEO 09-5; CEO 11-24, note 10. But see CEO 11-03, finding, under a similar prohibition, that certain expert witness services involving a public agency did not amount to "representation" before the agency; and see CEO 11-7, finding that a former Secretary of the Department of Community Affairs could serve as an expert witness.

a. *Merely Listed in a Bid Response* – prohibition has been found not to apply where the former employee is listed in bid response documents written or filed by another person. CEO 09-6.

4. Before One's Agency

To be applicable, the representation must be regarding a matter before one's former agency; however, note that a matter can be "before" one's former agency regardless of whether or not the former agency is the locus of the authority to take final action regarding the matter. See CEO 06-1, in which the Commission found that a FDOT former SES employee would be prohibited by F.S. 112.313(9)(a)4 from personally representing another person or entity for compensation against FDOT in eminent domain proceedings, in eminent domain presuit negotiations, in an inverse condemnation lawsuit, and in negotiations prior to an inverse condemnation lawsuit. As to the

extent of one's former "agency," see CEO 02-12, CEO 03-10, CEO 04-16, CEO 06-1, CEO 07-4 (former employee of Department of Financial Services and Office of Insurance Regulation), CEO 09-6 (former employee of Commission for the Transportation Disadvantaged), CEO 09-11 (former DCF employee), CEO 10-13 (former senior attorney of Agency for Workforce Innovation), CEO 11-19 (former DCA/AWI employee), and CEO 16-14 (former FDEP employee). The whole of the Department of Revenue was found to be the agency of a former senior attorney of the Department, in CEO 17-02. For purposes of the prohibition, CEO 08-18 found that the agency of a former employee of the Florida Turnpike Enterprise (FTE) was the FTE, not the whole of the FDOT. Note that CEO 11-10 clarified that the "agency" of a particular former FDOT District employee was the District, and not the whole of FDOT; but that CEO 11-21 and CEO 12-17 found that other FDOT employees had two Districts as their "agency," due to their particular work histories. And see CEO 11-24, as to "agency," finding that a former DCF employee was restricted as to both DCF's Central Region and its SAMH Tallahassee Program Office, due to her having a presence at both during her DCF employment. CEO 12-22 found the "agency" of a former FDOT central office employee to be the central office and all FDOT Districts, due to his work history at FDOT. CEO 18-02, former Department of Health senior attorney.

5. Exception: Grandfathering

Is ameliorated by certain "grandfathering." CEO 94-20; CEO 00-01; CEO 08-21 (as to former PSC employee); CEO 14-30 (former FDOT employee grandfathered); but CEO 14-01 found that a former FDOT employee was not grandfathered out of the prohibition where he had changed from one district to another within FDOT after the 1989 grandfather date, even though he had begun work (in the other FDOT district) prior to the grandfather date.

6. Actions Not Included in the Prohibition

Applies only to representations before one's former "agency," and not to representations before all of State government. CEO 00-20, CEO 00-11, CEO 02-12, CEO 12-4. Actions necessary to carry out, as opposed to actions to obtain, a contract with one's former agency apparently do not constitute "representation" within the meaning of the prohibition (CEO 00-6; CEO 01-5; CEO 05-16; CEO 05-19, note 5; CEO 06-3; CEO 09-5; and CEO 12-17); but see F.S. 112.3185 below. CEO 11-19 found that one's provision of good-faith responses to unsolicited inquiries for information would not amount to prohibited "representation."

7. People Not Included in the Prohibition

Does not apply vicariously to other members of one's post-public-service firm. CEO 00-20; CEO 09-5.

8. Appointment

One was found to be an "appointed" state officer when he was chosen by other members of his public board rather than selected by a more traditional method of "appointment." CEO 13-6.

9. New Employment with State Agency

Former employees are exempt if their new employment is with another agency of State (not local or regional) government. CEO 11-22. A State University is an agency of State government satisfying the exemption. CEO 14-32.

a. Former Legislators - Former legislators are not expressly exempted via taking State-level public employment; but in certain contexts the Commission on Ethics has constructed such an exemption. CEO 00-7, CEO 00-18. However, the Commission receded from CEO 00-7 and CEO 00-18 in CEO 09-4.

12. Applications of the Two-Year Ban

As to a former Attorney General, see CEO 10-22. As to a former commissioner and chair of the Florida Commission on Offender Review, see CEO 16-13. CEO 13-23 found that a former legislator was prohibited for two years from asking legislative officials to designate legal services plans as available employee benefits to enable him to market the plans to legislative employees. CEO 17-08 addressed the particular work history of a former chief of staff of the Department of Management Services (DMS), under F.S. 112.313(9)(a)4 and other provisions of the Code of Ethics. See CEO 17-14 regarding a particular former employee of the Department of Business and Professional Regulation. CEO 17-17 addressed a former Department of Environmental Protection employee with a particular work history.

B. Former Legislators Acting as a Lobbyist for Compensation

F.S. 112.313(9)(a)3.b. (via Chapter 2013-36, L.O.F.) prohibits former Legislators from acting as a lobbyist for compensation before an executive branch agency, agency official, or employee for two years following vacation of office. CEO 13-23.

C. Former Local Elected Officers Lobbying for Compensation

Persons who have been elected (not appointed, CEO 07-19, note 3) to any county, municipal, school district, or special district office are prohibited by F.S. 112.313(14) from representing another person or entity for compensation before the government body or agency of which they were an officer for a two-year period after leaving office. For the statute to apply, one must have been elected to office, not merely appointed to an elective office. CEO 09-16. Was found to be applicable to representations before the former governing body, before individual members of the former governing body, and before aides to members; but not to representations before other boards of the political subdivision that are not the "governing body" or "part of the governing body." CEO 05-4. However, F.S. 112.313(14), as amended by Section 2, Chapter 2006-275, L.O.F., now defines "government body or agency," differently for various local governments. As a result, a former county commissioner is prohibited for two years after he leaves office from representing a client for compensation before the county commission collegially, or its individual members, as well as the commissioners' aides and others. "Representation" includes mere physical attendance at a county commission meeting or workshop, even if the former county commissioner does not directly address the commission. CEO 06-22. A former county commissioner is not prohibited from merely attending, in behalf of a client for compensation, gatherings which are not regular meetings of the county commission and which are not advertised or noticed under the Sunshine Law; however, the former county commissioner is prohibited from making comments in behalf of a client at such a gathering if a county commissioner or one or more enumerated county employees is present. CEO 07-6. Also, see CEO 09-20. In CEO 12-3, F.S. 112.316 was applied to negate the prohibition as to a former school board member representing a school district direct support organization, the Commission on Ethics finding a unity of interest. CEO 13-10 found that the prohibition restricted a former school board member's representation of his own company before his former school district. Moreover, CEO 19-6 found that the prohibition restricted a former city council member from representing other departments of the executive branch before the city council, rejecting the argument that the executive branch departments were part of the same "agency" as the city council. See CEO 16-15 regarding a former county commissioner engaging in various activities, including activities involving her LLC and its clients, within two years of vacating her public position.

C. Local Ordinances

At the option of the local governing body through ordinance or resolution, appointed county, municipal, school district, and special district officers and employees of these entities may be subjected to a similar two-year prohibition, except for collective bargaining matters, under F.S. 112.313(13). However, if enacted, such an ordinance or resolution is not within the jurisdiction of the Commission on Ethics and a violation of it would not constitute a violation of the State Code of Ethics (CEO 07-19).

D. City of Webster

See Chapter 2016-263, Section 18, L.O.F., for an additional prohibition regarding former officials of the City of Webster.

XIX. ADDITIONAL RESTRICTIONS (STATE-LEVEL EMPLOYEES; LEGISLATORS)

A. F.S. 112.3185(2)

F.S. 112.3185(2) prohibits certain public employees who have a role in the procurement of "contractual services" (as set forth in Chapter 287) from simultaneously being an employee of a public agency and an employee of a person contracting with the agency.

B. F.S. 112.3185(3)

F.S. 112.3185(3) contains a restriction, unlimited in duration (CEO 11-24, note 6), on former public employees holding employment or a contractual relationship with a business entity in connection with any contract in which the employee participated personally and substantially [see CEO 02-17, CEO 03-8 (former State Technology Office employees), CEO 05-9 (former Department of Juvenile Justice employee), and CEO 08-17 (former FDOT employee) regarding "substantial"] through decision, approval, disapproval, recommendation, rendering of advice, or investigation (activities concerning development or procurement of a contract, CEO 83-8, CEO 06-3, CEO 11-20). Also, see CEO 11-20 (former FDOT intelligent transportation system project manager) regarding "substantial," in a very specific context; and see CEO 12-5. Applies only to employment/contractual relationship "in connection with" the contract (CEO 01-6, CEO 09-11); and can apply to contracts coming into existence before or after one leaves public employment (CEO 00-6; CEO 11-20; CEO 11-24, note 6). Along with F.S. 112.3185(4), has been found not to be violated in a specific situation due to the application of F.S. 112.316 (CEO 05-16); see also CEO 05-19. The public employee's public agency duties must have concerned a particular contract between the agency and the business entity in order for a violation to exist; mere participation in an entire program or subject matter (without participation as to the particular contract) will not violate the statute (CEO 06-3, note 6). The restriction cannot be avoided by employment with a different company than the company contracting with one's former public agency (e.g., cannot be avoided via subcontracting), if one's actual post-public-employment (private) work is in connection with the contract (CEO 07-16, note 3). CEO 17-06 found the statute not to apply in the context of a certain Space Florida contract. See CEO 17-08 regarding a former chief of staff of the Department of Management Services (DMS). CEO 17-09 concerned a former Chief Inspector General in the Executive Office of the Governor. However, when the agency employee's position is eliminated and his or her duties are performed by the business entity, this subsection does not prohibit him or her from employment or contractual relationship with the business entity if the employee's participation in the contract was limited to recommendation, rendering of advice, or investigation and if the agency head determines that the best interests of the state will be served thereby and provides prior written approval for the particular employee. And note the prohibition is limited only to new employment with a "business entity other than an agency," meaning its application is confined to "business entities," a term defined in F.S. 112.312(5), and does not extend to new employment at government agencies, whether state or local. See CEO 17-6 and CEO 88-32, Question 1.

C. F.S. 112.3185(4)

F.S. 112.3185(4) is a two-year restriction on former public employees holding employment or a contractual relationship with any business entity in connection with any contract for "contractual services" which was within the employee's responsibility. But see CEO 01-5 (former DBPR employee "outsourcing" with DBPR) and B above. "Within responsibility" is not mere incidental

contact with the contract (CEO 93-2, CEO 06-3). However, "within responsibility" includes situations in which one is the supervisor of another who actually participates (for example, who actually monitors/manages) regarding a contract (CEO 07-16, CEO 01-6); also, see CEO 08-17 and CEO 11-24. Depending on particular facts, restriction can be negated by F.S. 112.316, Florida Statutes (CEO 07-16; CEO 12-20, in a particular circumstance regarding one who was in the chain of supervision of actual monitors/managers; and CEO 19-5, pertaining to circumstance again where public officer had supervisory role sufficiently removed from subordinates doing actual monitoring/managing); see, also, CEO 18-18 (former FDOT construction manager). Unlike F.S. 112.3185(3), cannot apply to contract not in existence until after employee leaves public employment (CEO 84-30, CEO 00-6, CEO 02-17, CEO 03-8, CEO 11-20, CEO 11-24). "Contractual services" are defined as set forth in F.S. Chapter 287. CEO 06-3; F.S. 112.3185(1)(a). The restriction cannot be avoided by employment with a different company than the company contracting with one's former public agency (e.g., cannot be avoided via subcontracting), if one's actual post-public-employment (private) work is in connection with the contract (CEO 07-16, note 3; CEO 11-24). But, the prohibition is specific to particular contracts; it does not encompass entire programs or subject matters. CEO 11-24. However, if the agency employee's position is eliminated and his or her duties are performed by the business entity, this subsection may be waived by the agency head through prior written approval for a particular employee if the agency head determines that the best interests of the state will be served thereby. CEO 11-24, note 7. As to the mechanics of waiver in a certain context, see CEO 14-22 (former State University employee). Was found to be inapplicable to purchases from, as opposed to purchases by, the Florida Lottery. CEO 13-8. CEO 15-15 concerned a former DCF contract manager accepting employment with a managing care entity; and see CEO 16-6 (not applying F.S. 112.316 to negate conflict in a given situation). CEO 17-06 found that a certain Space Florida contract did not involve "contractual services." See CEO 17-08 regarding a former chief of staff of the Department of Management Services (DMS). CEO 18-09, former employee of Department of Economic Opportunity contracting with recipient of specific legislative appropriation. Finally, as with F.S. 112.3185(3), the prohibition in F.S. 112.3185(4) states it applies only to new employment or contractual relationship "with a business entity other than an agency," meaning it does not apply to new employment at a state or local government agency. See CEO 17-6 and CEO 88-32, Question 1.

D. F.S. 112.3185(5)

F.S. 112.3185(5) caps the amount of money (at the amount of annual salary at severance from public employment) a former public employee can be paid by his or her former agency for "contractual services" provided to the agency during the first year after the employee vacates his or her public employment; and the gross amount paid, rather than the net received, is the measure (CEO 08-14). This prohibition may be waived by the agency head for a particular contract, upon a time/cost savings to the State determination by the head. CEO 01-5. Applies to situations where a former employee (personally or through a closely-held entity) contracts with his or her former agency; does not apply to situations where one works arm's length for a business entity contracting with his or her former agency [this is the type of situation addressed by F.S. 112.3185 (3) & (4)]; see CEO 93-2 and CEO 00-6. If former public employee is employed at arm's length by a bona fide company (rather than being employed by his or her former public agency or by a sham/straw man company), the prohibition does not apply, regardless of the amount of money paid to the former public employee by the bona fide company. CEO 05-13; CEO 08-17; CEO 11-24.

E. F.S. 112.3185(6)

F.S. 112.3185(6) contains a prohibition similar to that contained in F.S. 112.313(3). However, the prohibition is broader in that it applies in part to an employee's "relative," as defined in F.S. 112.312(21), and not just to an employee's spouse or child. The prohibition does not apply to local government officials. CEO 11-04, note 1.

F. Applications of F.S. 112.3185

Regarding F.S. 112.3185, see, for example, CEO 86-21 (former FDOT attorney, note that definition of "contractual services" has changed since opinion issued); CEO 87-8 (former FDOT engineer); CEO 93-2 (former FDOT public transit specialist); CEO 00-1; CEO 00-6 (FDOT selected exempt service employee); and CEO 01-5 (former DBPR employee "outsourcing" with DBPR). CEO 18-1 found that none of F.S. 112.3185 applies to a former employee of the Florida Housing Finance Corporation.

G. Definitions

"Agency" is specially defined within the statute; but "employee" has its usual and ordinary meaning. CEO 12-5, note 2. As to an application of F.S. 112.3185 to former State University employees, see CEO 88-12 and CEO 08-14.

H. Article II, Section 8(e), Florida Constitution, and F.S. 112.313(9)(a)3.

Also, Article II, Section 8(e), Florida Constitution, and F.S. 112.313(9)(a)3 contain term-of-office representation prohibitions for legislators. They apply to representation before State-level (not local) agencies. CEO 03-11; CEO 09-8; CEO 09-13. See CEO 13-4 as to State Universities, but not State Colleges or Community Colleges, being "state agencies." Exempt from the prohibitions are representations before judicial tribunals involving State agencies; but note that formal administrative proceedings pursuant to F.S. Chapter 120 (DOAH hearing officer/ALJ proceedings) have not been found to be within the "judicial tribunal" exemption. CEO 91-54, CEO 84-6, CEO 78-2. In CEO 11-3, the Commission found that a State Representative would not be personally "representing" another person or entity for compensation before a State agency when negotiating with a law firm to extend a contract for his expert witness services, when acting as an expert witness in fulfillment of the contract and testifying in court, or when consulting with counsel or communicating with agents and employees of the Department of Financial Services, where the law firm represented the Department in litigation.

XX. VOTING CONFLICTS OF INTEREST

A. **Generally**

A voting conflict arises when the official is called upon to vote on:

any measure which would inure to the officer's special private gain or loss; which he or she knows would inure to the special private gain or loss of any principal by whom the officer is retained or to the parent organization or subsidiary of a corporate principal by which the officer is retained; or which the officer knows would inure to the special private gain or loss of a relative or business associate of the public officer

F.S. 112.3143.

1. Special Private Gain or Loss

The statute now defines, via Chapter 2013-36, L.O.F., "special private gain or loss." The definition is consistent with the Commission's decisional history, but makes it clear that gain or loss must be of an "economic" nature. Note: gain or loss to an entity (for example, a corporation) in which a natural person owns a substantial interest necessarily constitutes gain or loss to the natural person. CEO 90-54, Question 2; CEO 06-20, note 6; CEO 08-7, Question 1. Similarly, see CEO 10-6 regarding family/closely-held entities. F.S. 112.3143(1)(d) defines "special private gain or loss" to mean "an economic benefit or harm"; e.g., an effect on one's kayak rental business (CEO 16-2).

2. Principal by Whom the Officer is Retained

A "principal by whom the officer is retained" includes: the officer's employer (CEO 20-11 and CEO 78-27); clients of one's multi-discipline planning/development firm (CEO 11-6); a client of the officer's legal, accounting, or other professional practice (CEO 84-11, CEO 84-1, CEO 76-107, CEO 78-59, CEO 79-2, CEO 85-14, CEO 08-7, Question 1, CEO 11-6, CEO 11-15; but see CEO 03-7 regarding an "of counsel" relationship); a corporation for which the officer serves as a compensated director (CEO 84-107); and clients of an official who is an insurance agent (CEO 94-10)—but, compare CEO 09-19. However, a non-lawyer employee of a law/lobbying firm was not found to be retained by clients of the firm other than her clients, although she would be retained by the firm (CEO 08-13). A corporation which wholly owns a corporation which wholly owns another corporation which employs a city council member is a parent organization of a corporate principal by whom the council member is retained (CEO 03-13); see, also, CEO 20-10 (corporate parent and owner of employer is county commissioner's "principal"). Depending on the facts of a given situation, persons or entities other than the person or entity who signs one's paycheck can also be one's employer or principal. CEO 06-21; In re Irving Ellsworth, Comm. on Ethics Compl. No. 02-108 (final order 06-024), affirmed, per curiam, as Ellsworth v. Commission on Ethics, 944 So. 2d 359; and CEO 09-2. Note that the principal-agent relationship must exist at the time of the vote; the voting conflicts law addresses present (not past or possible future) employment. CEO 06-5, CEO 09-9. F.S. 112.3143 now defines, via Chapter 2013-36, L.O.F., "principal by whom retained." The definition mirrors the Commission's decisional history.

a. *Not a Principal by Whom the Officer is Retained* - Situations where the person or entity in question has not been found to be a "principal by whom the officer is retained" include: the officer's church (CEO 90-24); the officer's landlord (CEO 87-86, CEO 08-

12); a homeowner's association of which the officer is a member (CEO 84-80); a non-profit corporation of which the officer is an uncompensated director (CEO 84-50; CEO 08-4, Question 4; CEO 09-7; CEO 10-2; CEO 21-7, Question 3); an economic development council (EDC) of which one is an uncompensated board member (CEO 14-11, CEO 14-12); a charter school of which one is an uncompensated board member (CEO 11-23); the hospital where the officer is on the medical staff (CEO 84-3, CEO 02-16); customers of the officer's retail store (CEO 76-209); a person with whom the officer merely holds a contractual relationship (CEO 08-1); a volunteer fire department from which a city commissioner does not receive funds and for which he is not an officer or director (CEO 08-22); a developer for whom an insurance broker previously obtained a policy (CEO 09-19); and a principal of an officer's spouse or other relative (CEO 11-4, CEO 11-8)—but see the discussion below regarding votes affecting an officer's relatives.

3. Relative

One's "relative" is defined to include only one's father, mother, son, daughter, husband, wife, brother, sister, father-in-law, mother-in-law, son-in-law, and daughter-in-law. F.S. 112.3143(1)(c). However, in CEO 10-6, notwithstanding that "brother-in-law" is not included in the definition, a voting conflict was found because the vote/measure affecting the brother-in-law of a mosquito district commissioner also affected the commissioner's "sister" (a relationship within the definition), due to the sister and her husband (the brother-in-law) sharing a household and living expenses. Note that a measure affecting a public officer's relative's private firm (e.g., an officer's husband's employer) or its clients can, but does not necessarily, inure to the special private gain or loss of the relative. CEO 07-5, CEO 08-30, CEO 11-4 (county commissioner's son-in-law non-equity shareholder in law firm when county commission voting on land use matter in which firm is representing the property owner), CEO 11-8 (city commissioners voting on contract where bidders employ their sons), CEO 11-16, note 3 (planning commissioner's wife employed by city development corporation); CEO 12-11 (city councilmember voting on proposal for city contract for law enforcement services with sheriff's office where councilmember's father is employee of sheriff's office); CEO 20-12, Question 2 (city councilmember voting on measures involving engagement of husband's law firm where husband has divested himself of equitable shareholder status in the firm and would receive no compensation from any firm fee derived from the firm's work on matters involving the city).

4. Business Associate

"Business associate" is defined to mean "any person or entity engaged in or carrying on a business enterprise with a public officer, public employee, or candidate as a partner, joint venture, corporate shareholder where the shares of such corporation are not listed on any national or regional stock exchange, or co-owner of property." F.S. 112.312(4). In order for persons to be "business associates" they must be engaged in a common business undertaking (a "business enterprise"); it is not sufficient that they merely hold a nominal status in relation to one another; see CEO 98-9 in which the Commission found that common ownership of a houseboat used for recreational (not commercial) purposes (even via ownership of shares of stock of a for-profit corporation holding title to the houseboat) did not make the owners business associates of one another. Also, see CEO 01-17 (county commissioner member of educational/networking forum not a business associate of other forum members by virtue of forum membership). In CEO 08-4, it was determined that other directors of a bank's board of directors are not, by virtue of being directors, business associates of a county commissioner/bank director. CEO 14-14 found that persons who both own stock (not listed on any national or regional exchange) in a bank's holding company are business associates. In CEO 08-12, a residential landlord and tenant were not found to be business associates via the

rental. CEO 09-2 did not determine that persons who merely held responsibilities for a corporation were business associates; and see CEO 09-12. Note that the definition has been found to require a present, not a past or possible future, relationship (CEO 09-12). CEO 15-12 found that a mayor/commissioner and a person or entity from whom he purchased personal website hosting and management were not business associates.

5. Public Officer

A "public officer" is any person elected or appointed to hold office in an agency, including persons serving on an "advisory body." F.S. 112.3143(1)(b). Note F.S. 1002.33(26), subjecting board members of "private" charter schools to F.S. 112.3143; F.S. 288.901(1)(c), regarding the board of directors of Enterprise Florida, Inc.; F.S. 445.007, regarding regional workforce boards; F.S. 627.311(5)(m), regarding joint underwriters and joint reinsurers; and F.S. 627.351(6), regarding Citizens Property Insurance Corporation.

6. Applicable to Members of School Boards

Note that members of school boards are subject to the voting conflicts law (F.S. 112.3143) regarding measures which would inure to the special private gain or loss of their relatives (e.g., measures to hire their relatives to school positions), even though the anti-nepotism law (F.S. 112.3135), as opposed to F.S. 1012.23(2), is not applicable to school boards and school districts. CEO 87-50, AGO 72-72, AGO 82-48.

B. Voting Conflict Duties of State Public Officers

Via Chapter 2013-36, L.O.F., effective May 1, 2013, State-level public officers are prohibited from voting on any matter that the officer knows would inure to his or her special private gain or loss. The new law also changes disclosure and filing requirements for State-level public officers. See CE Form 8A (the version incorporating the specifics of the new law). Also, Legislators have a choice of forms for the required disclosures. Further, under the new law, if disclosure of specific information would violate confidentiality or privilege pursuant to law or rules governing attorneys, a public officer, who is also an attorney, may comply with the disclosure requirements of the voting conflicts law by disclosing the nature of the interest in such a way as to provide the public with notice of the conflict. Similar to appointed local officers, appointed State officers also have requirements regarding "participation" in certain matters that are not applicable to elected officers. In CEO 11-12 (see note 8), the Commission found that an appointed governing board member of a utility authority was subject to the "participation" limitations of F.S. 112.3143(4) regarding matters of the authority, notwithstanding that he was a nonvoting member of the board. See F.S. 288.92, as amended by Chapter 2014-183, L.O.F., regarding the members of the board of directors of the Florida Tourism Industry Marketing Corporation. Also, see F.S. 310.151(1)(c) regarding participation by members of the Pilotage Rate Review Committee. And see F.S. 627.351(6)(d)3 regarding Citizens Insurance board members. CEO 17-07 found that members of the Board of Directors of the Florida Housing Finance Corporation are not "state public officers" subject to the voting conflicts law of F.S. 112.3143, even though F.S. 112.313 is applicable. A member of the Board of Governors of the State University System is a "state public officer." CEO 17-12.

C. Voting Conflict Duties of Local Public Officers

1. Local Officials Holding Elective Office

If there is a voting conflict under the terms of the statute, a local official holding an elective position must:

- a. Abstain from voting on the measure;
- b. Before the vote, publicly state to the assembly the nature of his or her interest in the matter; and
- c. Within 15 days of the vote, file a memorandum of voting conflict (Commission Form 8B) with the person responsible for recording the minutes of the meeting, who incorporates the form in the minutes.

- d. However, as with State-level officers who are attorneys (see, above), local officers have an alternative method of disclosure. F.S. 112.3143(5), as amended by Chapter 2013-36, L.O.F.

[Note that elected officials are not subject to the same limitation on their ability to "participate" in the matter as appointed officials; and note that one appointed to fill a position normally filled by election is not an appointed official (CEO 87-14, CEO 09-9). "Participate" is defined in F.S. 112.3143(4)(c) to mean "any attempt to influence the decision by oral or written communication, whether made by the officer or at the officer's direction." In CEO 11-12 (see note 8), the Commission found that an appointed governing board member of a utility authority was subject to the "participation" limitations of F.S. 112.3143(4) regarding matters of the authority, notwithstanding that he was a nonvoting member of the board. Also, note that the voting conflicts law itself (as opposed to possible quasi-judicial/due process concerns) does not require full or complete "recusal." CEO 11-9.]

2. Local Officials Holding Appointive Office

Local officials holding appointive positions must follow more complex guidelines. If they do not intend to "participate" in the measure, they follow the same procedures as elected officials: make the oral declaration, abstain, and follow up with the written form within 15 days. If they do intend to "participate," they must abstain, but must make their disclosure before they participate. This is accomplished by either:

- a. Filing the memorandum of voting conflict (Form 8B) prior to the meeting, in which case the memorandum is to be provided immediately to the other members of the agency and is to be read publicly at the next meeting after its filing; or

- b. If the disclosure has not been made prior to the meeting at which the measure will be considered or the conflict was unknown prior to the meeting, making the disclosure orally at the meeting before "participating," followed by the written memorandum (Form 8B) within 15 days after the oral disclosure, which would be provided immediately to the other members of the agency and be read at the next meeting after its filing.

- c. Also, see F.S. 445.007 regarding local workforce development boards.

- d. See Chapter 2016-263, Section 18, L.O.F., regarding officials and employees of the City of Webster.

D. Special Private Gain or Loss: Size of the Class of Persons Affected

1. Generally

Obviously, a measure to reduce taxes would inure to the private gain of each taxpayer, including the public officials who are to vote on the proposal. The Commission has recognized that the concept of "special" gain can relate to the number of persons affected, stating:

Whether a measure inures to the special private gain of an officer or his principal will turn in part on the size of the class of persons who stand to benefit from the measure. Where the class of persons is large, a special gain will result only if there are circumstances unique to the officer or principal under which he stands to gain more than the other members of the class. Where the class of persons benefiting from the measure is extremely small, the possibility of special gain is much more likely. [CEO 77-129.]

2. "Size of the Class" Considerations in Opinions

a. On the one hand, where the official would be the only beneficiary of the measure, there clearly would be "special" gain. See CEO 89-16 (citizen advisory task force member prohibited from voting to recommend the approval of his own application to receive community development block grant funds).

b. On the other hand, the Commission advised that a city council member would not be prohibited from voting on a proposed sign ordinance where the council member owned a commercial art shop that produced signs, among other products, and other members who owned an advertising business that recommended and purchased billboard space for its clients and who owned an electrical contracting company that had contracted to do work for a sign company also could vote on the ordinance. As the ordinance would have only an indirect effect on the council members' businesses and there was no indication that the members would be affected by the ordinance to a significantly greater or lesser degree than other affected businesses, the Commission concluded that the ordinance would not inure to the "special" gain of the members. (CEO 86-59)

3. When the Official Constitutes 1-2% of the Class

Subsequent decisions by the Commission indicate that the threshold for "special gain" occurs when the official constitutes around 1-2% of the size of the class of persons affected. The Commission has concluded that a vote on an ordinance limiting the number of wrecker businesses on a city wrecker rotation list from 18 to 11 violated the statute when the city councilman worked for one of the 11 wrecker companies. In re Thomas R. Tona, 13 FALR 1845 (Fla. Comm. on Ethics 1989). Similarly, the Commission concluded that a county commissioner had been prohibited from voting to pave the road to his residence, where his was one of 13 residences on the paved portion and he owned the majority of the land abutting one side of the paved portion of the road. In re T. Butler Walker, Comm. on Ethics Compl. No. 92-30 (1994).

a. *Opinions Where the Interest was Proportionally Large* – In groups of a larger size, the Commission advised in CEO 93-10 that a town council member was prohibited from voting on a measure to resolve a real property ownership dispute between the town and 43 private property owners, including the council member; see also CEO 04-10 (measure affecting 55 employees one of whom is relative of public officer requires abstention). In CEO 90-64, the Commission concluded that a city commissioner was prohibited from voting on a renovation project that would benefit property in which he owned an interest, where part of the cost of the project would be assessed against the property owners. There, the commissioner owned 50% of one of 55 parcels that would be affected, the parcels were owned by over 40 persons or entities, and the property's frontage was 2.7% of the total frontage upon which the assessment would be based. In CEO 92-37, the Commission advised that a city commissioner would be prohibited from

voting on a measure to add to a local historic preservation district an area that included five hotel or apartment buildings owned by closely-held corporations that were owned by him and his relatives. There, the buildings constituted either 5 of 60 sites to be included or 5 of 168 sites to be included, depending on how the measure was framed. In CEO 95-4, the Commission advised that a county planning commissioner would be prohibited from voting on a comprehensive plan amendment affecting the designation of 1,200 acres of property owned by the planning commissioner, his relatives, and his business associates, where the measure would have affected a total of approximately 32,000 acres. In one case the Commission concluded that a county commissioner should not have voted on the extension of a road along a boundary of her property, where the commissioner owned 260 acres, was one of 32 property owners along the proposed road extension, and was the fifth largest land owner along the road extension, with the next largest land owner having 20 acres. In re Jeanne McElmurray, Comm. on Ethics Compl. Nos. 87-024 & 87-026 (Stipulated Final Order 1988).

b. *Opinions Where the Interest was Proportionally Small* – A series of other opinions involve situations where the class of persons affected was sufficiently large that no "special" gain was deemed to occur. In CEO 90-55, the Commission advised that a city mayor was not required to abstain from voting on measures involving the proposed expansion and renovation of a private club of 2,000 members. In CEO 87-18, the Commission concluded that a planning commissioner was not required to abstain from voting on a comprehensive plan amendment that would have affected 29,000 acres because his principal was leasing 300 acres of the affected area. In CEO 90-71, the Commission advised that a town commissioner was not prohibited from voting on issues relating to a project that would benefit his neighborhood and that would be assessed against the property owners in the neighborhood, when the commissioner owned 1.2% of the 83 lots that would be included in the assessment. Also, see CEO 99-12 (regarding an airport authority commissioner), CEO 00-13 (regarding a city commissioner receiving and voting on pension benefits), CEO 11-01 (city councilmember voting on collective bargaining measures affecting her police officer-husband), CEO 06-20 (regarding a county commissioner voting on measures concerning a proposed judicial complex near her properties), and CEO 07-22 (county commissioner voting on matter affecting developers including homebuilder spouse). But see CEO 06-21 (no special private gain where each of a town's residents was similarly impacted by a rezoning vote, notwithstanding the small number of town residents) and CEO 07-17 (no special private gain where votes will impact virtually all of a town's residents similarly). CEO 10-2 found no special private gain or loss to a county commissioner's husband who was one of many healthcare providers who would be similarly affected by a measure regarding a healthcare information network. See CEO 12-6 regarding a city councilmember receiving pension benefits as a former city firefighter voting on an increase in benefits. CEO 13-20 found no voting conflict where a mayor voted on de-annexation from a town's boundaries the part of a subdivision (108 lots/85 homes) where he resided. CEO 14-19 found a sufficiently large class to negate a voting conflict regarding the siting of a baseball stadium. CEO 18-14, property within city center zoning district.

c. *Special Gain or Loss Required* – A vote/measure of a SAC (school advisory council) to award "A plus" school recognition moneys to teachers/staff of the school, including teacher/staff members of the SAC, was not found to involve "special" gain or loss, notwithstanding the number of persons affected by the vote/measure, provided the vote/measure did not address a particular person/customized amount. CEO 10-21.

4. Votes on Budgets and Appropriations

Budgets and appropriations acts are another type of measure that have a broad impact, but that may, in one aspect (e.g., line item), inure to the gain or loss of the voting official or the official's employer/principal. CEO 15-1, Question 2, found a voting conflict in such a situation, receding from several CEOs. CEO 21-3, Question 2, found a voting conflict where a Jacksonville city council member would be presented with a vote to approve a city budget that included a line item for the Jacksonville Sheriff's Office, which had hired a business entity that subcontracted pharmacy work, funded by the budget, to the member. Both CEO 15-1 and CEO 21-3 suggest that boards can bifurcate votes on a budget to separate the portions of the budget giving rise to a voting conflict from the remaining non-conflicting items of the budget, allowing board members to vote first on the non-conflicting majority of the budget and abstain from the second vote pertaining to the conflict. See CEO 16-9 regarding votes/measures where the funding of an applicant may affect the availability of funding for other applicants.

E. Special Private Gain or Loss: Remote or Speculative

1. Generally

In some situations the Commission has concluded that any gain or loss resulting from the measure would be so remote or speculative that it could not be said to inure to the official's special gain or loss. In CEO 85-46, the Commission advised that a city commissioner could vote on a petition for annexation of property, where the commissioner's employer had sold the property, retained a mortgage, and also owned adjoining property; see also CEO 09-14 (county purchase of airport buffer where mortgage retained). In CEO 93-4, a city commissioner was advised that he could vote on rent increases for a mobile home park owned by the city and located near a proposed recreational vehicle park he owned, because the possibility that he could in the future justify charging higher rent for his park if the city's park had higher rent was too speculative to conclude that the rent increases would inure to his special gain. See also CEO 05-2 (village affordable housing committee member owner of mobile home park and voting on mobile home park measures), CEO 05-3 (county commissioner and relatives owning interest in parcels of land near proposed road), CEO 05-17 (airport authority member voting on matters concerning road project near her business), and CEO 09-7, note 7, (county commissioner voting to fund EDC where his corporate cash pay-out tied to land sale). In CEO 88-27, the Commission concluded that a city commissioner was not prohibited from voting on the rezoning of property that was being sold contingent upon rezoning, where the commissioner supported another group that was interested in purchasing the same property and the commissioner probably would have been the building contractor for that group in the event the group were to purchase the property. There, the Commission reasoned that the failure of the rezoning measure would not be the only contingency that would have to occur for the commissioner to benefit from the development of the property, as the existing owner would have to agree to sell to the group. However, the Commission noted, if the property were sold to the group, the commissioner could not vote on matters affecting the development of the property so long as he were the contractor for the development. See also CEO 00-8 and CEO 01-18. In CEO 07-14 and CEO 07-15 (identical opinions issued to two city commissioners), the Commission found that any gain or loss would be remote or speculative regarding measures to hire or dismiss city attorneys who might counsel city conduct regarding lawsuits to which the city was a party and to which the commissioners were nominal, private-capacity parties; and also found that city measures to continue or settle the lawsuits, or measures to repeal the ordinance underlying the litigation, would not cause gain or loss to the commissioners, inasmuch as they were nominal parties not personally responsible for paying for the litigation. In

CEO 10-8, a mayor was not found to have a voting conflict regarding measures concerning a commuter rail station in his city, where he was employed by a hospital corporation whose interests in a neighboring city were tied to commuter rail; but see, CEO 20-11, finding a rail commissioner would have a voting conflict concerning votes to adopt a memorandum of understanding that could affect his employer, despite the exploratory nature of the memorandum, and that the circumstances involved showed the effect of the vote was not remote or speculative. See CEO 13-9 finding that a county commissioner was not prohibited from voting on the sheriff's budget where the commissioner's brother was a deputy sheriff applicant.

2. Construction or Development Near Property Owned by Public Officer

Several Commission opinions have involved the impact of nearby development on a business owned by the voting official or employing the official--all of these have concluded that any gain resulting from the development was too remote and speculative to inure to the special gain of the official or employer. See CEO 85-77, CEO 85-87, CEO 86-44, CEO 89-32, CEO 91-70, CEO 06-8, and CEO 06-20; however, compare CEO 01-8. Later, under the particular facts of CEO 08-1, a city's relinquishment of an outfall (drainage) easement burdening property of a developer upstream from a city councilman's property was found not to create a voting conflict. CEO 14-03 found that a county commissioner was not presented with a voting conflict regarding measures to amend or approve a management agreement and a purchase and sale agreement for a county-owned airport adjacent to his property, determining any gain or loss to be remote and speculative; note, however, that the situation involved an existing airport, not the locating of an airport where no airport existed. CEO 14-19 found that gain or loss from the siting of a baseball stadium near already-developed property of a city commissioner would be remote and speculative.

3. Examples that were not Remote and Speculative

Not every instance of indirect gain has been classified as too remote and speculative to constitute "special gain," however. In CEO 88-27, the Commission advised that a city commissioner should abstain from voting on the rezoning of property where his employer had contracted to purchase the property contingent upon its receiving a particular zoning designation from the city. In CEO 93-29, the Commission concluded that a city commissioner would be prohibited from voting on matters involving the city's proposed purchase of property where the commissioner and his son owned interests in the mortgage encumbering the property. The Commission also has found a violation where a city/county planning commissioner voted to rezone a parcel of property to permit a higher density, when the commissioner had assigned his contract to purchase the property to the rezoning applicant and he was owed \$10,000 by the applicant as part of the assignment. In re John S. Mooshie, 15 FALR 382 (1992), affirmed, per curiam, as Mooshie v. State Commission on Ethics, 629 So. 2d 138 (Fla. 1st DCA 1993). Voting on altering the language of a funding agreement has been found not to be remote or speculative as to gain or loss, where the public officer privately was involved in seeking funding from the program; but voting on the membership of the program's advisory board was found to present no voting conflict. CEO 13-19.

4. More Examples

In some situations, a series of decisions are made, some of which would inure to the special gain of the official and others of which would not, depending on the circumstances and the extent of the official's private participation in the process. Construction projects provide a good example of this. In CEO 89-45, the Commission considered a situation where a city commissioner owned a steel company that designed and bid steel packages to general contractors and developers, who generally would appear before the city commission prior to the commissioner's having submitted a bid on the proposed project. The Commission advised that if the commissioner had not submitted

a proposal at the time of the vote, then any perceived gain to him would be too speculative to require him to abstain. However, if the commissioner had contacted or was in the process of negotiating with the contractor or developer, but had not yet submitted a proposal, then he would be required to abstain. See also CEO 11-18. But see CEO 07-7, in which a city councilman whose company was a supplier of a local manufacturer of fire trucks was not presented with a voting conflict regarding a measure to provide financial incentives to the manufacturer in an effort to keep the manufacturer from relocating. See also CEO 00-5 (effect of transient rental ordinance on a grocery store not remote and speculative). Citing the remote and speculative nature of any gain or loss, the Commission determined that no voting conflict would be created were a city commissioner to vote on a measure to amend the city's affordable (work force) housing ordinance, where one of the commissioner's private legal clients was a potential developer of affordable housing within the city. CEO 05-15. Also, see CEO 12-19 regarding voting on recommendations concerning expansion of alcohol sales. And see CEO 06-21 (regarding Town of Marineland). In CEO 12-1, any gain or loss to businesses owned by city commissioners and frequented by cruise ship passengers due to a city commission vote/measure to seek a ship channel-widening feasibility study was found to be remote and speculative. In CEO 12-3, the Commission found that a school board member was presented with a voting conflict regarding a measure which would select her for or eliminate her from a position of employment to begin after she left the school board.

5. *Inclusion in Definition of "Special Private Gain or Loss"*

The new statutory definition of "special private gain or loss" also recognizes that the uncertain, or remote and speculative, nature of a given measure/vote is important under the voting conflicts law.

F. Special Private Gain or Loss-- Procedural or Preliminary Issues

Some measures are simply procedural or preliminary to the later actions that would result in actual gain or loss, and therefore do not present voting conflicts for officials who would have voting conflicts if called to vote on more substantive measures concerning the same subject. See CEO 78-74 (removing item from consent agenda, to enable it to be discussed). However, in CEO 93-10 the Commission concluded that a town council member who was prohibited from voting on a measure to resolve a real property ownership dispute between the town and private property owners, including the council member, also would be prohibited from voting on a measure to order a survey regarding the disputed property. The Commission reasoned that, since the dispute could not be resolved without a survey being done and the resolution of the dispute would inure to the special gain of the council member, the decision not to order a survey would effectively preclude the resolution of the dispute. Therefore, ordering a survey of the disputed property would not simply be preliminary to an issue where gain or loss could occur.

G. Exceptions to the Voting Conflict Rules

1. *Special Private Gain or Loss of an Agency*

When the principal retaining the official is a public agency, the Commission has concluded that the official is not prohibited from voting on a measure inuring to the special gain of the agency and is not required to make any specific disclosures. CEO 86-86, CEO 88-20, CEO 91-20, CEO 15-8. See F.S. 112.312(2) for the definition of "agency." CEO 13-22 found the Florida Virtual School to be an "agency."

2. *Section 112.3143(3)(b), F.S. – CRAs and Certain Independent Tax Districts*

Commissioners of community redevelopment agencies created or designated pursuant to F.S. 163.356 or 163.357, as well as officers of independent special tax districts elected on a one-acre, one-vote basis, are not prohibited from voting. F.S. 112.3143(3)(b). CEO 12-7. In CEO 86-13

and CEO 10-24, the Commission advised that a CRA official may vote on matters affecting his or her interests but still would be required to publicly announce the conflict and file a voting conflict memorandum; similarly, see CEO 87-66, regarding a community development district supervisor elected on a one-acre, one-vote basis. And see F.S. 163.367(2), a provision outside the Code of Ethics, which independently requires certain disclosures by CRA officials, commissioners, and employees.

3. Section 112.313(5), F.S. – Votes Affecting Salary, etc.

Public officers are not prohibited from voting on matters affecting their salary, expenses, or other compensation as a public officer, as provided by law. F.S. 112.313(5). See CEO 08-24 and CEO 08-25, regarding voting to appoint oneself to paid mayor or council office. Under the circumstances presented, CEO 14-17 found that a mayor was not prohibited from voting on an amendment to the city budget which established the salary of the mayor. Note also that this provision specifies that local government attorneys may consider matters affecting their salary, expenses, or other compensation as the local government attorney, as provided by law. CEO 21-2 found county commissioners were not prohibited from voting on a resolution to award themselves a retirement compensation distribution to fund a 401(1) local annuity plan.

H. Interaction with Section 286.012, F.S.

Note also the "voting requirements law," F.S. 286.012. See CEO 08-11 and CEO 11-8. This law was amended via Chapter 2014-183, L.O.F., to extend the exception to its voting requirement to certain quasi-judicial contexts, and to provide for potentially differing disclosures depending on whether one's possible voting conflict is based in a local, versus a State, ethics prohibition. In CEO 21-7, the Commission suggested that a city council member abstain from a vote pursuant to F.S. 286.012 to avoid the appearance of a voting conflict and found that, if the council member did in fact abstain, that she should comply with the steps for responding to a voting conflict as described in F.S. 112.3143(3)(a).

XXI. FINANCIAL DISCLOSURE (FORM 6)

Note: See Form 6, available on the Commission's website (www.ethics.state.fl.us), for a listing of a number of persons/positions who must file; however, if one is unsure as to whether he or she must file, the Commission on Ethics should be contacted. On January 1, 2022, the Commission launched the "Electronic Financial Disclosure Management System" (E-Filing System) located at disclosure.floridaethics.gov for the electronic creation and filing of all Form 6, Form 6X (all years), and Form 6F. See also F.S. 112.31446.

A. Who Must File?

"Full" disclosure (Commission Form 6--Full and Public Disclosure of Financial Interests) is required of persons holding and seeking elective constitutional office, and is required of other public officers, candidates, and public employees as determined by law. Art. II, Sec. 8(a) and (h), Fla. Const.

B. When Is the Form Due, and Where Is It Filed?

1. Incumbents

Incumbents file with the Commission on Ethics in Tallahassee no later than July 1 of each year. If the form is not filed timely, the Commission sends a reminder notice, advising of a grace period until September 1st; those who ignore the grace period will face an "automatic" \$25-per-day-late fine, up to a maximum of \$1,500, and may face additional penalties if an ethics complaint is filed. F.S. 112.3144(8)(f). Willful refusal to file after receiving a maximum automatic fine could result in removal from public office or employment. Chapter 2014-183, L.O.F., amending F.S. 112.3144. Article V, Florida Constitution, judges and justices do not receive reminder notices and do not get the grace period; however, they are not subject to the statutory automatic fines (their conduct is cognizable by the Judicial Qualifications Commission).

2. Candidates

Candidates must file prior to or at the time they file their qualifying papers, with the officer before whom they qualify. Plante v. Smathers, 372 So. 2d 933 (Fla. 1979); F.S. 99.061; F.S. 99.063; F.S. 105.031. Beginning January 1, 2022, an incumbent candidate may submit a copy of the Form 6 filed with the Commission via the E-Filing System or a verification or receipt of the filing, with the office before whom he/she qualifies. A non-incumbent candidate not subject to an annual filing requirement does not file with the Commission, but may complete and print a Form 6 to file with the office before whom they qualify. F.S. 112.3144(4).

3. People Leaving Public Positions

Persons leaving public positions must file (Commission Form 6F) within 60 days of leaving, unless within the 60-day period the person takes another position requiring full disclosure. Note that persons required to file a Form 6F must also file a Form 6 on or before July 1, if they were in office on December 31 of the year prior to the year in which their partial service necessitated the need for the Form 6F filing.

C. What Must Be Disclosed?

1. Assets

Each asset worth more than \$1,000 must be described and valued [household goods and personal effects may be reported in a lump sum--see F.S. 112.3144(5)]. Art. II, Sec. 8(a) and (h), Fla. Const. The Commission has advised that an "asset" includes all forms of property interests that can be sold to be applied to the payment of one's debts. CEO 87-84 and CEO 78-1. The asset should be valued at fair market value, as of the date used for reporting one's net worth. Property owned

solely by one's spouse need not be reported. CEO 77-158. However, the full value of property held in tenancy by the entirety (held as husband and wife), or otherwise held jointly with right of survivorship, must be reported. CEO 74-27. Assets held jointly, other than in tenancy by the entirety or in joint tenancy with right of survivorship, can be reported based on the percentage of value owned by the reporting person. F.S. 112.3144(6)(a). Investment products held in IRAs, 401(k)s, the Florida Retirement Investment Plan, the Florida College Prepaid Plans, and Deferred Option Retirement Accounts should be reported as assets; when funds are held in a bank, credit union, or other institutional account, the account should be identified as an asset. CEO 12-10. For disclosing real property, a street address should be used if a street address exists for the property. For disclosing a vehicle lease, see CEO 14-18. This also includes loans made as a candidate to one's own campaign. F.S. 106.11(6).

2. Liabilities

Each liability worth in excess of \$1,000 must be described and valued (Art. II, Sec. 8(a) and (h), Fla. Const.), except for credit card and retail installment accounts, taxes owed unless reduced to a judgment, indebtedness on a life insurance policy owed to the company of issuance, contingent liabilities, and accrued income taxes on net unrealized appreciation. F.S. 112.312(14). Valuation depends on the face amount of the debt and the basis for liability (e.g., joint or several). For disclosing a vehicle lease, see CEO 14-18. Liability for a debt that is secured by property owned by the reporting individual but that is held jointly, with right of survivorship, must be reported at 100 percent of the total amount owed. F.S. 112.3144(6)(b). Liability on a promissory note only as a guarantor (CEO 86-40) or as a partner (CEO 95-1) is contingent and not reportable. Liability as a comaker of the note must be reported. CEO 89-5.

3. Net Worth

The net worth of the reporting person as of the close of the prior calendar year, or a more current date. Art. II, Sec. 8(a) and (h), Fla. Const.

4. Income

Income reporting requirements can be satisfied by reporting the name and address, and amount, of each source of income exceeding \$1,000 received during the prior year, including a statement of all "secondary sources" of income. "Secondary sources" mean each source of income exceeding 10% of the gross income of a business entity of which the reporting individual owned more than a 5% interest and from which the reporting individual received more than \$1,000 of gross income. Amounts of secondary income are not disclosed. Art. II, Sec. 8(h), Fla. Const.; Commission Rule Ch. 34-8, F.A.C. As to correct reporting of "declined payment of salary," see CEO 04-8. As of January 1, 2022, filers may not attach a copy of their tax return for the purposes of disclosing income. F.S. 112.3144(7)(a).

D. Amendments

(Commission Form 6X) to full disclosure filings are allowed. However, the curative effect of an amendment can vary.

E. Public Records

Form 6 filings are scanned and made publicly available through a searchable Internet database.

F. Collection of Fines

The law also provides for additional collection methods (garnishment and wage withholding) for unpaid "automatic" financial disclosure fines. The collections actions statute of limitations is 20 years.

XXII. FINANCIAL DISCLOSURE (FORM 1)

Note: Consult the Form itself, on the Commission's website (www.ethics.state.fl.us), for a listing of some persons/positions who must file; however, if one is unsure of whether he or she is required to file, the Commission on Ethics should be contacted. Beginning January 1, 2023, all Form 1, Statement of Financial Interests, will be created and filed electronically via the Commission's E-Filing System located at disclosure.floridaethics.gov. F.S. 112.3145(2)(e) and 112.31446.

A. Who Must File?

"State officers" (CEO 02-15, Question 2), "local officers," and "specified state employees" (for example, full-time state employees serving as counsel or assistant counsel to a state agency, a criminal conflict and civil regional counsel, and an assistant criminal conflict and civil regional counsel), as defined in F.S. 112.3145(1), are required to file the "limited" financial disclosure statements (Commission Form 1--Statement of Financial Interests). Members of the Marjory Stoneman Douglas High School Public Safety Commission, CEO 18-10. Not members of the Virginia Key Advisory Board, CEO 18-11. State university "grants compliance analysts" who have no authority to apply for or award grants and no authority to decide how grant funds are spent were determined not to be "grants coordinators," and thus do not have to file (CEO 10-25). Trial court staff attorneys are not required to file (CEO 03-12); but see CEO 05-12, requiring filing by various employees of the State Courts System in a Judicial Circuit. Support Enforcement Hearing Officers appointed pursuant to Rule 12.491(c), Florida Family Law Rules of Procedure are not required to file (CEO 02-18). A Regional Counsel for the Office of Criminal Conflict and Civil Regional Counsel is required to file as a "specified state employee" due to his status as a "purchasing agent" with the requisite purchasing authority. CEO 08-9. Chapter 2017-76, L.O.F., changed the filing requirement from Form 6 ("full disclosure") to Form 1 ("limited disclosure") for some members of the Florida Prepaid College Board. "Local officers" include the following:

1. Persons elected to office in any political subdivision, or appointed to fill a vacancy in such an office, except for the elected constitutional officers who file Form 6. F.S. 112.3144(4).
2. Candidates for such local offices. F.S. 112.3145(2)(a).
3. Members of various, but not all, appointed bodies. See CE Form 1, F.S. 112.3145(1)(a)2., CEO 01-11, CEO 01-20, CEO 15-10 (St. Augustine Historic Architectural Review Board), CEO 17-03 (Jacksonville Ethics Commission).
4. Certain personnel of private businesses serving as the chief administrative/executive officer of a city or other political subdivision. F.S. 112.3136. CEO 10-01.
5. Members of governing boards of charter schools operated by a city or other public entity. F.S. 1002.33(26).
6. Any appointed member of a local government board who is required to file a statement of financial interests by the appointing authority or the enabling legislation, ordinance, or resolution creating the board. F.S. 112.3145(1)(a)2.
7. Persons holding any of the following positions:

mayor; county or city manager; chief administrative employee of a county, municipality, or other political subdivision; county or municipal attorney; finance director of a county, municipality, or other political subdivision; chief county or municipal building code

inspector; county or municipal water resources coordinator; county or municipal pollution control director; county or municipal environmental control director; county or municipal administrator, with power to grant or deny a land development permit; chief of police; fire chief; municipal clerk; district school superintendent (other than those superintendents who file Form 6); community college president; district medical examiner; or purchasing agent having the authority to make any purchase exceeding the amount in F.S. 287.017 CATEGORY TWO, for any political subdivision of the state or any entity thereof. F.S. 112.3145(1)(a)3.

a. "County or municipal attorney" includes only the city or county attorney, and not assistant city or county attorneys. CEO 85-49. Includes a city attorney whose firm is retained as an independent contractor. CEO 08-27. A private attorney who routinely provides more legal service, for compensation, to a town than any other attorney can be considered a "local officer," despite the fact that the town charter does not expressly provide for a town attorney position. CEO 19-15.

b. Rather than simply reviewing an employee's title, a functional analysis of the employee's duties is required to determine if the employee is a "local officer." Thus, a city building and zoning director not having the power to grant or deny a building permit and lacking purchasing authority would not be required to file. CEO 84-61. A city public utilities department director whose responsibilities include the operation of the city's water and sewer facilities would be considered a water resources coordinator, required to file. CEO 84-70. A "mayor emeritus" appointed by the city council was not required to file as the position was not as mayor and did not have the duties typically reserved for a mayor. CEO 20-2.

c. A "purchasing agent" is defined in F.S. 112.312(20) to mean "a public officer or employee having the authority to commit the expenditure of public funds through a contract for, or the purchase of, any goods, services, or interest in real property for an agency, as opposed to the authority to request or requisition a contract or purchase by another person." Thus, this category may include a number of administrative personnel whose positions are not specified otherwise. See CEO 88-62.

d. Members of health facilities authorities created pursuant to Chapter 154, Part III, Florida Statutes, were found not to be "local officers." CEO 03-5. Appointed and ex officio members of the Citrus Levy Marion Regional Workforce Development Board, Inc. were not found to be subject to filing financial disclosure (CEO 08-3); but see below regarding Local Workforce Development Boards.

e. A "finance director of a county, municipality, or other political subdivision" (required to file via Chapter 2013-36, L.O.F.) was found not to include a finance director of a sheriff's office. CEO 13-17. CEO 17-11 found one position-holder in a county's government to be a "finance director" and another to not.

f. Trustees of a voluntary employees' beneficiary association were found not to be "local officers." CEO 14-25.

8. A non-voting member of a board has been found to be a "member" required to file financial disclosure (CEO 07-20), and a suspended city commissioner has been found to be required to file (CEO 10-19).

9. Members of Local Workforce Development Boards and the executive director of such Boards (or the equivalent of the executive director) must file CE Form 1, pursuant to F.S. 112.3145, unless they are required to file CE Form 6. F.S. 445.007(1).

10. Members of the Jacksonville Transportation Authority file Form 1 with the Commission on Ethics. F.S. 349.03(3)(a). Members of the Gasparilla Island Bridge Authority file Form 1 with the Commission on Ethics. Chapter 2012-242, L.O.F.

11. Members of the governing bodies of large-hub commercial service airports, except for members who must already complete a Form 6. A "large-hub commercial service airport" means a publicly owned airport that has at least 1 percent of the annual passenger boardings in the United States as reported by the Federal Aviation Administration. Section 112.3144(1)(c).

B. When Is the Form Due, and Where Is It Filed?

1. Candidates

Candidates for local office must at the time they file their qualifying papers, with the officer before whom they qualify. F.S. 99.061, 112.3145(2)(a), and 112.3145(2)(d).

2. State Officers, Local Officers, and Specified State Employees

Others must file within 30 days of their appointment or employment and annually thereafter, by July 1st, with the supervisor of elections of the county where they reside (if they are not permanent residents of any county, they file where their agency is headquartered). F.S. 112.3145(2)(b). State officers and specified State employees file with the Commission on Ethics. If the form is not filed timely, a reminder notice advising of a grace period until September 1st is sent. Those who ignore the notice and grace period will face an "automatic" \$25-per-day-late fine, up to a maximum of \$1,500, and may face additional penalties if an ethics complaint is filed. F.S. 112.3145(8). Willful refusal to file after receiving a maximum automatic fine could result in removal from public office or employment. F.S. 112.3145, as amended by Chapter 2014-183, L.O.F.

3. People Leaving Public Positions

The obligation to file accrues at the close of a calendar year in which the officer or employee holds his or her office or employment. However, persons who leave their office or employment must file Commission Form 1F within 60 days after leaving, unless another reporting position is taken within the 60-day period. F.S. 112.3145(2)(b). The form must be filed even if there is nothing to report. F.S. 112.3145(3). Filing of a Form 1F does not relieve the filer of the obligation to file a Form 1, if the person was in their public position for the whole of the year preceding the partial year necessitating the filing of a Form 1F.

C. What Must Be Disclosed? (Comparative Thresholds, F.S. 112.3145(3)(a))

Note: Beginning January 1, 2023, the Dollar-Value Threshold methodology will be the only reporting method used for reporting purposes. F.S. 112.3145(3).

1. Limited Disclosure, Generally

The Form 1 disclosure is considered "limited" disclosure, because it requires no disclosure of dollar amounts for income, assets, or liabilities. Disclosure thresholds are relative, based on percentages or comparisons, rather than based on absolute dollar amounts. The filer must select the manner of calculating his reportable interests—whether based on percentages or thresholds—for the Form 1 to be considered complete. Villanueva v. Comm. on Ethics, 286 So.3d 389, 389-390a (Fla. 1st DCA 2020).

2. Disclosure Period

The "disclosure period" covered by the form is the taxable year, whether calendar or fiscal, immediately preceding the last day of the period during which the statement is required to be filed. F.S. 112.312(10).

3. Income

All sources of income in excess of 5% of the reporting person's gross income received by the person in his or her name "or by any other person for his or her use or benefit." Public salary need not be reported, although it should be included when calculating the total amount of one's gross income; nor are sources belonging only to one's spouse or business partner to be reported. F.S. 112.3145(3)(a); CEO 75-19.

4. Secondary Sources of Income

Secondary sources of income (major clients or customers of businesses owned by the reporting individual) must be disclosed. "Secondary sources" mean each source of income exceeding 10% of the gross income of a business entity of which the reporting individual owned more than a 5% interest and from which the reporting individual received more than 10% of his or her gross income, and at least \$1,500. F.S. 112.3145(3)(a)2.

5. Real Property

The location or description of Florida real property, except for residences and vacation homes, in which the reporting person owns directly or indirectly more than 5% of the value of the property, must be disclosed. A street address should be used if a street address exists for the property. "Indirect" ownership includes ownership of a beneficial interest in a trust owning the property or in a corporation owning the property, but does not include ownership by a spouse or minor child. F.S. 112.312(13) and 112.3145(3)(a)3; CEO 83-3; CEO 76-162.

6. Intangible Personal Property

Intangible personal property worth more than 10% of the reporting individual's total assets must be reported. F.S. 112.3145(3)(a)3. Regarding reporting of funds or investment products held in IRAs and regarding reporting of other intangible personal properties, see CEO 11-11. This includes loans made as a candidate to one's own campaign. F.S. 106.11(6).

7. Liabilities

Any liability that equals more than the reporting individual's net worth must be disclosed, except for credit card and retail installment accounts, taxes owed unless reduced to a judgment, indebtedness on a life insurance policy owed to the company of issuance, contingent liabilities, and accrued income taxes on net unrealized appreciation. F.S. 112.312(14) and 112.3145(3)(a)4. Valuation depends on the face amount of the debt and the basis for liability (e.g., joint or several). Liability on a promissory note only as a guarantor (CEO 86-40) or as a partner (CEO 95-1) is contingent and not reportable. Liability as a co-maker of the note would be reportable. CEO 89-5.

D. What Must Be Disclosed? (Dollar-Value Thresholds F.S. 112.3145(3)(a))

As noted above, after January 1, 2023, the Dollar-Value Threshold methodology will be the only reporting method. F.S. 112.3145(3).

1. Income

All sources of gross income in excess of \$2,500.

2. Secondary Sources of Income

All sources of income to a business entity in excess of 10 percent of the gross income of a business entity in which the reporting person held a material interest and from which he or she received gross income exceeding \$5,000 during the disclosure period.

3. Real Property

The location or description of real property in Florida, except for residences and vacation homes, owned directly or indirectly by the reporting person, when such person owns in excess of 5 percent of the value of such real property.

4. Intangible Personal Property

A general description of any intangible property worth in excess of \$10,000. Regarding reporting of funds or investment products held in IRAs and regarding reporting of other intangible personal properties, see CEO 11-11.

5. Liabilities

Every liability in excess of \$10,000.

E. Property with Shared Ownership

For valuation purposes, property held by husband and wife as tenancy by the entirety should be valued at full value; other joint property should be based on the percentage of ownership. CEO 82-30. Bank accounts where each joint tenant is authorized to withdraw the full amount are valued at full value. CEO 82-30.

F. Collection of Fines

As with Form 6, see above, Chapter 2013-36, L.O.F., provided for additional collection methods (garnishment and wage withholding) for unpaid "automatic" fines, and extended the collections actions statute of limitations to 20 years.

XXIII. DISCLOSURE OF SPECIFIED BUSINESS INTERESTS

A. Generally

Persons required to file Form 6 or Form 1 who are or were during the disclosure period an officer, director, partner, proprietor, or agent (other than a resident agent solely for service of process), or who own or owned more than a 5% interest in one of certain types of business entities, are required to disclose the fact as part of their Form 6 or Form 1 disclosures. F.S. 112.3145(7).

B. List of Specified Businesses

The types of businesses for which this disclosure must be made include state and federally chartered banks, state and federal savings and loan associations, cemetery companies, insurance companies, mortgage companies, credit unions, small loan companies, alcoholic beverage licensees, pari-mutuel wagering companies, utility companies, entities controlled by the PSC, and entities granted a franchise to operate by either a city or a county government. F.S. 112.312(19).

XXIV. CLIENT DISCLOSURE (FORM 2)

A. Who Must File?

State officers, local officers (note addition of "privatized" chief administrative officers, F.S. 112.3136), specified state employees, and elected constitutional officers are required to report, on a quarterly basis, the names of clients represented for a fee or commission before agencies at their level of government, using Commission Form 2. F.S. 112.3145(6).

B. When Is the Form Due and Where Is It Filed?

The form should be filed only when a reportable representation is made during a calendar quarter, no later than the last day of the quarter following the quarter in which the representation is made. "Local officers" file with the supervisor of elections of the county in which the officer is principally employed or is a resident. Elected constitutional officers, state officers, and specified state employees file with the Commission on Ethics. F.S. 112.3145(6).

C. What Should Be Disclosed?

1. The names of clients and the names of the agencies before which the clients were represented by the reporting individual or by any partner or associate of a professional firm of which the reporting individual is a member, when the reporting individual has actual knowledge of the representation. Depending on the substance of one's relationship to a law firm, one who is "of counsel" to a law firm may not be a "member" of the firm. CEO 74-55, CEO 92-11.

2. Although the statute requires that reportable representations be at the reporting individual's "level of government," Commission opinions have required only disclosure of representations within the political subdivision served by a given local officer. CEO 80-63, CEO 85-33.

3. Appearances in ministerial matters are not reportable. A "ministerial matter" is one involving "action that a person takes in a prescribed manner in obedience to the mandate of legal authority, without the exercise of the person's own judgment or discretion as to the propriety of the action taken." F.S. 112.312(17).

4. "Representation" includes actual physical attendance on behalf of a client in an agency proceeding, letters written or documents filed on behalf of the client, and personal communications made with the officers or employees of the agency on behalf of the client. F.S. 112.312(22).

5. Contact with staff can be a reportable representation. CEO 79-7.

6. Under F.S. 112.3145(6), the following also do not have to be reported:

- a. Appearances before any court;
- b. Appearances before compensation claims judges;
- c. Representations on behalf of one's agency in one's official capacity;
- d. Preparing and filing forms and applications merely to obtain or transfer a license based on a quota, a franchise of the agency, or a license or operation permit to engage in a profession, business, or occupation, when the action does not require substantial discretion, a variance, a special consideration, or a certificate of public convenience and necessity.

XXV. AUTHORITY TO ADOPT MORE STRINGENT STANDARDS

Agencies, by rule, and political subdivisions, by ordinance, may adopt "additional or more stringent standards of conduct and disclosure requirements," provided that they do not otherwise conflict with the provisions of the Code of Ethics. F.S. 112.326. Counties may specify fines and jail time by ordinance. F.S. 125.69(1).

XXVI. ETHICS COMMISSION PROCESSES AND PROCEDURES

- A. Commission on Ethics created in F.S. 112.320 to serve:
 - 1. As the guardian of the standards of conduct provided in the Code of Ethics for Public Officers and Employees (Part III, Ch. 112, F.S.); and
 - 2. As the independent commission provided for in Art. II, Sec. 8(f), Fla. Const., to "conduct investigations and make public reports on all complaints concerning breach of public trust by public officers or employees not within the jurisdiction of the judicial qualifications commission."
- B. The Commission does so, primarily, in two ways:
 - 1. By rendering binding, judicially-reviewable advisory opinions [F.S. 112.322(3); relevant rules are in Ch. 34-6, Florida Administrative Code]; and
 - 2. By investigating complaints [F.S. 112.324; relevant rules are in Ch. 34-5, Florida Administrative Code]
- C. Advisory Opinions:
 - 1. Standing is limited to:
 - a. the person who is in doubt about the applicability of the law to himself or herself, "in a particular context" (not hypothetical); or
 - b. a public officer or employee having the power to hire or terminate an employee has standing to request an opinion about how the law applies to that applicant or employee
 - 2. Opinion Procedure:
 - a. Written request initiates the proceeding
 - b. Commission staff prepares a draft opinion which is sent to the Commission and to the requestor prior to the meeting at which it will be considered
 - c. Requestor can respond in writing, appear at the meeting and be heard; rendered opinions are numbered, dated and published at Commission's website (www.ethics.state.fl.us)
 - d. Are analogous to declaratory statements under APA (F.S. 120.565), as they are based on the facts provided by the requestor, rather than on adjudicated facts, and are reviewable by appeal to a District Court of Appeal (F.S. 112.3241)
- D. Complaints:
 - 1. Must be made under oath on the form prescribed by the Commission (CE Form 50); a copy must be sent by the Commission to the respondent (accused violator) within 5 days [F.S. 112.324(1)]. Note that the Code of Ethics (Part III, Chapter 112, Florida Statutes) does not expressly require anyone to file an ethics complaint; but note, also, that there may be other statutes or bases requiring a filing [for example, F.S. 1001.64(3), which authorizes community college boards of trustees to ask for investigations of actions by the college's president, and which requires referral of inspector-general-identified potential violations to the Commission on Ethics, FDLE, the Attorney General, or other appropriate authority]. There is a five-year statute of limitations for submitting complaints. F.S. 112.3231.
 - 2. Are confidential, unless confidentiality is waived in writing, up to the point where either the complaint is dismissed by the Commission or the Commission finds "probable cause" [F.S. 112.324(2)]
 - 3. First stage: facial review for legal sufficiency of complaint. If Commission finds complaint to be insufficient to indicate a possible violation of the ethics laws, complaint is dismissed without investigation, but with order explaining reasoning. [Rule 34-5, F.A.C.]

4. Second stage: preliminary investigation to determine "probable cause." Commission or Executive Director orders investigation of complaint; investigator prepares written report, which is provided to the respondent, who is given time to reply. Commission "Advocate" (prosecutor) prepares written probable cause recommendation, which also is provided to the respondent, who can provide a written reply. "Probable cause" hearing before the Commission allows oral argument by the respondent and Advocate (no evidence taken) and allows the complainant to observe. If probable cause is found, Commission can order hearing or allow respondent 14 days to request a public hearing. [F.S. 112.324(3); Rule 34-5]

5. Third stage: determination of whether there was a violation. Either stipulated settlement agreement negotiated between respondent and Advocate or hearing before Division of Administrative Hearings' Administrative Law Judge. ALJ's recommended order reviewed by Commission pursuant to F.S. 120.569 and 120.57. Clear and convincing evidence standard applies to complaint proceedings. Latham v. Fla. Comm. on Ethics, 694 So. 2d 83 (Fla. 1st DCA 1997). Penalties provided for in F.S. 112.317 are imposed by disciplinary officials (typically the Governor), not by the Commission, which can only recommend penalties. Commission's final order is subject to appeal to District Court of Appeal under F.S. 112.3241 and 120.68. On appeal, the Commission's factual findings are reviewed for competent, substantial evidence, its legal conclusions are reviewed de novo, and its recommended penalties are reviewed for abuse of discretion. Villanueva v. Comm. On Ethics, 286 So. 3d 389, 389-390 (Fla. 1st DCA 2020). Orders are published on Commission's website per F.S. 120.53.

6. If a complaint is dismissed, the complainant does not have standing to appeal the Commission's decision, not being considered to be a party to the complaint proceeding. Mulgado v. Rodriguez, 933 So.2d 657 (Fla. 1st DCA 2006), and Mulgado v. Diaz, 933 So. 2d 658 (Fla. 1st DCA 2006).

7. In addition to being able to entertain a matter filed as an ethics complaint, the Commission is authorized, via Chapter 2013-36, L.O.F., to proceed on referrals of possible ethics violations, when the referral comes from the Governor, the Florida Department of Law Enforcement, a State Attorney, or a United States Attorney. The five-year statute of limitations in F.S. 112.3231 appears to apply only to complaints, not to referrals.

8. Also, Chapter 2014-183, L.O.F., amended F.S. 112.3144 and F.S. 112.3145 to mandate that the Commission initiate an investigation, if a person fails to file financial disclosure and accrues the maximum "automatic" fine of \$1,500, for the purpose of determining whether the failure to file was willful. If willful, the Commission must recommend that the official be removed from public office or employment.

9. F.S. 112.324(12), commonly referred to as "the Rudd Amendment," grants the Commission the discretion to dismiss any complaint or referral at any stage if the Commission determines that the public interest would not be served by proceeding further. The public report issued by the Commission shall state the reasons for the dismissal with particularity. Because the text of Rudd Amendment references only complaints and referrals, it cannot be used to dismiss investigations derived from a random audit of lobbying reports. See F.S. 112.3125(8)(c) (differentiating complaints from random audits of lobbying reports).

E. Composition of the Commission:

1. Nine members appointed for two-year terms
2. Five members appointed by the Governor, no more than three of whom are from the same political party, one of whom must be a former city or county official

3. Two members are appointed by the President of the Senate, and two members by the Speaker of the House of Representatives; neither the Speaker nor the President may appoint more than one member from the same political party

4. No member may hold any public employment or be a "lobbyist" under State law or local charter or ordinance; no member may serve more than two full terms in succession. (F.S. 112.321(1))

F. Other Responsibilities of the Commission:

1. Financial disclosure -- compile a list of persons required to file financial disclosure, receive and maintain disclosure forms, and enforce the timely filing of forms by collecting automatic fines imposed by statute for late filings (\$25 per day; \$1,500 maximum) and by hearing appeals from the fines [F.S. 112.3144(8) and 112.3145(8)]

2. Administer and enforce the executive branch lobbyist registration and reporting law, which requires that persons register to lobby executive branch agencies and officials, and Con. Rev. Comm'ns, under certain circumstances (Legislative lobbyists are regulated by the Legislature) [F.S. 112.3215]

3. Investigate complaints alleging a violation of F.S. 11.062(2), which requires executive branch agencies, state universities, community colleges, and water management districts to lobby the legislative and executive branch only by using full-time employees.

4. Investigate suspected violations of limitations on proper use of State motor vehicles and State aircraft when reported by the CFO (F.S. 287.175)

5. Investigate complaints and render opinions concerning the ethics standards applicable to members and staff of the Public Service Commission, and to members of the Public Service Commission Nominating Council. F.S. 350.031 - .043; 350.042(7); 350.0605 (former members).

G. Representing Agency Personnel in Complaints before the Ethics Commission

1. Consider Whether a Conflict of Interest May Prohibit the Representation

a. When an ethics complaint has been filed against an agency officer or employee, the Commission has advised that the Code of Ethics does not prohibit an agency attorney from representing the officer or employee. See CEO 76-144 and CEO 86-57.

b. However, in at least some instances the Bar has concluded that professional ethics considerations would prohibit the agency attorney from representing the officer or employee before the Commission. See Professional Ethics of the Florida Bar Opinion 77-30, May 9, 1978 (county attorney may not represent individual county commissioner before Ethics Commission in matter involving misuse of public office).

c. This opinion was reconsidered by the Board of Governors on Sept. 29, 2006, to clarify its views on conflicts involving a county attorney's representation of a county commissioner who is the subject of an ethics complaint. The reconsidered opinion concludes that there may be a conflict of interest under Rule 4-1.7, and that whether the conflict may be waived depends on the individual circumstances of the matter. In order to waive the conflict, both the commissioner and the county must give informed consent in writing, with the county's consent being given by someone other than the commissioner.

2. Consider the Extent to Which the Attorney Client Privilege May Apply

a. In Re Bruce R. Lindsey, 158 F.3d 1263 (D.C. Cir. 1998): Government attorney-client privilege did not protect from disclosure advice which Deputy White House counsel rendered on political, strategic, or policy issues in connection with lawsuit

involving the President in his personal capacity prior to expansion of Independent Counsel's jurisdiction to investigate whether wrongdoing occurred in connection with that action.

Deputy White House Counsel could not assert government attorney-client privilege to avoid responding to grand jury if he possessed information relating to possible criminal violations.

Deputy White House Counsel could not withhold from grand jury information about possible criminal misconduct that he obtained in conferring with the President and the President's private counsel on matters of overlapping concern to the President personally and in his official capacity.

b. In Re A Witness Before the Special Grand Jury 2000-2, 288 F.3d 289 (7th Cir. 2002):

Attorney-client privilege did not apply to bar grand jury testimony of state government counsel as to communications with officeholder; any privilege ran to the office and not to the employees in that office, and lack of criminal liability for government agencies and duty of public lawyers to uphold the law outweighed any need for a privilege, in context of a federal criminal investigation.

c. Attorney General Opinion 97-61:
Discussions regarding school business between individual school board members and the school board attorney are not attorney-client conversations and, therefore, are not privileged communications.

A school board attorney may memorialize, in writing, any conversations with an individual school board member or the superintendent. These documents are public records subject to inspection and copying.

d. Attorney General Opinion 98-59:
Those records in the files of the city attorney which were made or received in carrying out her duties as city attorney and which communicate, perpetuate, or formalize knowledge constitute public records and are required to be turned over to her successor.

H. Attorney's Fees for Defense Against Ethics Complaint

1. Paid by the Official's Public Agency
a. An official's successful defense of misconduct charges brought in proceedings before the Ethics Commission qualifies under the common law for reimbursement by the official's agency of attorney's fees expended in that defense. (There is no statutory obligation.) Thornber v. City of Fort Walton Beach, 568 So. 2d 914, fn. 7 at p. 918 (Fla. 1990).

b. However, fees may not be awarded when the complaint arises out of a vote by the public official that directly advances the official's private pecuniary interests. Chavez v. City of Tampa, 560 So.2d 1214 (Fla. 2d DCA 1990).

c. Maloy v. Bd. of County Commissioners of Leon County, 946 So.2d 1260 (Fla. 1st DCA 2007), rev. den. 962 So. 2d 337 (Fla. 2007): Court affirmed Leon County's refusal to pay Commissioner's attorney fees for successfully defending against ethics complaint which arose out of his consensual affairs with two women, concluding that the ethics proceeding "did not arise out of and in the course of Maloy's employment with the Board while he served a public purpose."

2. Paid by the Complainant
a. A complainant who has filed an ethics complaint with malicious intent to injure the reputation of the official by filing with the knowledge that the complaint contains one or more false allegations, or with reckless disregard for whether the complaint contains false allegations, of fact material to a violation of the Code of Ethics is liable for costs and reasonable attorney's fees incurred in defending the official. (F.S. 112.317(7); Commission Rule 34-5.0291, F.A.C.)

b. Regardless of whether the official was represented by agency counsel and the official did not incur any out-of-pocket expenses, a complainant who has filed a frivolous ethics complaint with malicious intent to injure the reputation of the official is liable for reasonable costs and attorneys fees incurred in defending the official. Couch v. Commission on Ethics, 617 So. 2d 1119 (Fla. 5th DCA 1993).

c. The amount to be awarded includes fees and expenses incurred in proving entitlement to attorney's fees. Kaminsky v. Lieberman, 675 So.2d 261 (Fla. 4th DCA 1996).

d. For purposes of considering a fees award, the "complaint" filed by the complainant may include statements made by the complainant's attorney to the Commission investigator during the investigation. Osborne v. Commission on Ethics, 951 So.2d 25 (Fla. 5th DCA 2007), rev. dismissed sub nom Milanick v. Osborne, 962 So.2d 337 (Fla. 2007).

e. "[T]he elements of a claim by a public official for costs and attorney fees are that (1) the complaint was made with a malicious intent to injure the official's reputation; (2) the person filing the complaint knew that the statements made about the official were false or made the statements about the official with reckless disregard for the truth; and (3) the statements were material." This is not the "actual malice" standard of NY Times v. Sullivan. Brown v. State Commission on Ethics, et al., 969 So.2d 553 (Fla. 1st DCA 2007), pet. for rev. den. sub nom Burgess v. Brown, 980 So.2d 1070 (Fla. 2008). "Material" means material to a violation of the Code of Ethics; allegations not material, regardless of how inflammatory, disparaging, or conclusory they may be, will not support a request for costs and fees. Hadeed v. Commission on Ethics, 208 So. 3d 782 (Fla. 1st DCA 2016).

f. The procedure for requesting an award of attorney's fees is set out in Commission Rule 34-5.0291, F.A.C., and contemplates the filing of a petition within 30 days of dismissal of the underlying complaint, review of the petition by Commission staff, possible dismissal after an informal hearing, and award of fees only after a formal hearing by the Division of Administrative Hearings.

[illegible]

Disclaimer

- This presentation contains scenarios and with questions and answers. These are not sample questions from the exam.
- The exam can test any of the topics. I have not been told and I do not know what is being tested on the test.
- All scenarios included in this presentation are not provided with guidance from the Certification Committee.

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The image shows the Florida State Seal, which is a circular emblem. It features a central scene with a ship, a sun, and a landscape. The words "THE GREAT SEAL OF THE STATE OF FLORIDA" are inscribed around the border. The seal is set against a background of the Florida state flag, which has a white field with a red saltire (X-shape) and a blue border. The entire slide has a yellow background with a blue vertical bar on the left and a blue horizontal bar at the bottom.

The Ethics Outline

- Contains summaries of formal ethics opinions sorted by topic.
- Used by legal staff of the Commission on Ethics to search past opinions quickly.
- Each opinion is a fact pattern that could appear on the test.
- Opportunity for you to study certain applications of the various ethical requirements. Slides will contain cites to the outline to facilitate that studying.

3

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How to search formal opinions

- <http://ethics.state.fl.us/>
- Click: "Research"
- Search function also available to perform keyword searches



4

Financial Disclosure

How to make disclosures on
Form 1 and Form 6



5

How to study Financial Disclosure

- Form 6: Ethics Outline pp. 71-72
- Form 1: Ethics Outline pp. 73-77
- The forms are promulgated by rulemaking. The instructions are rules.
- Form 6 is not a paper form right now.
 - E-filing: disclosure.floridathics.gov
- Form 1 is on the Commission's website.
 - <https://ethics.state.fl.us/FinancialDisclosure/DownloadAForm.aspx>
- Filing financial disclosure makes you a "reporting individual" for the gifts law.



6

6

Who files financial disclosure?

Form 6 (2,600+ filers)

- Constitutional officers
 - Candidates for constitutional office
- See Art. II, Sec. 8(a), Fl. Const. and § 112.3144, F.S.

Form 1 (36,000+ filers)

- Local officers
 - State officers
 - Specified state employees
- See § 112.3145, F.S.

7

7

Unauthorized Compensation, Bribes, and Gifts

When you can accept & when you must report.

8

Receiving things of value: Three provisions

- Solicitation and Acceptance of Gifts ("Bribes")
Section 112.313(2), F.S.
- Unauthorized Compensation
Section 112.313(4), F.S.
- The Gifts Law
Section 112.3148, F.S.

9

9

Solicitation or Acceptance of Gifts ("Bribes")

- Section 112.313(2), F.S.
- Prohibits asking for or accepting anything of value to the recipient based on an understanding that it will influence your vote, official action, or judgment.
- Essentially, a *quid pro quo* or bribe.

See Ethics Outline p. 26, Section X.

10

10

Unauthorized Compensation

- Section 112.313(4), F.S.
- Prohibits an official, official's spouse, or official's child from accepting anything of value when the official knows, or under the circumstances should know, that it was given to influence a vote or other official action.

See Ethics Outline pp. 26-27, Section XI.

11

11

The Gift Law

- Section 112.3148, F.S.
For the entire Gifts Law, see Ethics Outline pp. 37-46, Section XII.
- Applies to Reporting Individuals (and State-level Procurement Employees)(RIPEs).
For more on Reporting Individuals in the Gifts Law, see Ethics Outline p. 37, Section XII.A.
- A "gift" is anything you get for which you did not give equal or greater consideration within 90 days of receipt.

12

12

Gifts: Topics you should study

- **Definition of a Gift:** See § 112.312(12)(a) & (b), F.S.; Ethics Outline pp. 41-42, Section XII.H.
- **Gifts from Political Committees:** See § 112.31485, F.S.; Ethics Outline p. 45-46, Section XII.L.
 - **Different definition of "gift":** "any purchase, payment, distribution, loan, advance, transfer of funds, or disbursement of money or anything of value that is not primarily related to contributions, expenditures, or other political activities authorized pursuant to chapter 106."
 - **Prohibition:** A reporting individual or procurement employee or a member of his or her immediate family is prohibited from soliciting or knowingly accepting, directly or indirectly, any gift from a political committee.
- **Gifts from Relatives:** See § 112.3148(8)(a)1., F.S.; Ethics Outline p. 41, Section XII.G.
 - A reporting individual can always accept a gift from a relative and never needs to disclose it.

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Gifts: Topics you should study

- **Definition of a Lobbyist:** See § 112.3148(2)(b), F.S.; Ethics Outline p. 43, Section XII.I.
- **General Rule on Soliciting Gifts:** See § 112.3148(3), F.S.; Ethics Outline p. 37-38, Section XII.B.
 - A reporting individual cannot solicit a gift from a vendor/lobbyist/principal of a lobbyist or a political committee. (No solicitation from them, regardless of the value.)
- **General Rule on Accepting Gifts:** See § 112.3148(4), F.S.; Ethics Outline pp. 38-39, Section XII.C.
 - A reporting individual cannot accept a gift valued over \$100 from a vendor/lobbyist/principal of a lobbyist or a political committee. (Under \$100 is ok to accept. \$25-100, donor files Form 30)
- **Disclosures:** See § 112.3148(8), F.S.; Ethics Outline pp. 39-40, Section XII.D.
- **Valuation:** See § 112.3148(7)(a)-(k); Rule 34-12.500, F.A.C.; Ethics Outline pp. 43-45, Section XII.J. & K.
 - Test-taking Tip: When in doubt, the value of a gift is the cost to the donor to provide it. If that feels wrong under the circumstances, it's more likely to be the commercial/market value.
 - See the citation above and the slide on "Valuing Gifts" for more specific info.

14

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Who is a "relative" for the Gifts Law? § 112.312(21), F.S.

▪ father	▪ father-in-law	▪ half sister
▪ mother	▪ mother-in-law	▪ grandparent
▪ son	▪ son-in-law	▪ great grandparent
▪ daughter	▪ daughter-in-law	▪ grandchild
▪ brother	▪ brother-in-law	▪ great grandchild
▪ sister	▪ sister-in-law	▪ step grandparent
▪ uncle	▪ stepfather	▪ step great grandparent
▪ aunt	▪ stepmother	▪ step grandchild
▪ first cousin	▪ stepson	▪ step great grandchild
▪ nephew	▪ stepdaughter	▪ fiancé
▪ niece	▪ stepbrother	▪ someone you intend to form a household
▪ husband	▪ stepsister	▪ person with same legal residence
▪ wife	▪ half brother	▪ (co-inhabitant)

15

15



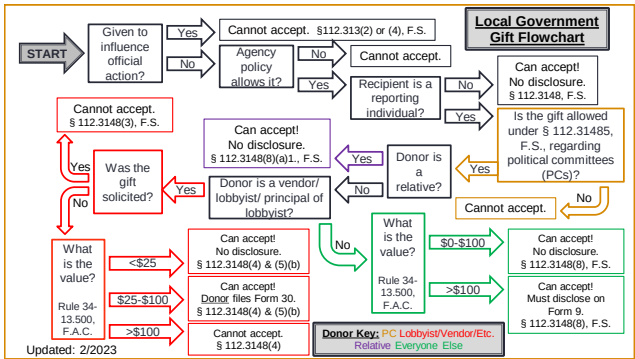
Valuing Gifts

- Generally, cost to the donor
- Personal services: customary charge
- Event: total cost divided by all invited people
- Transportation: round-trip is a single gift; valued at same rate as commercial conveyance
- Lodging: \$44/night
- Food consumed at a single sitting: value of meal
- Entrance fees/tickets: face value or event basis, whichever is greater

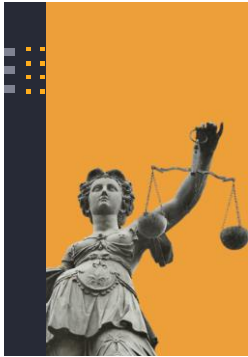
See § 112.3148(7)(a)-(k), F.S. and Rule 34-13.500, F.A.C.

For more on valuation, see Ethics Outline pp. 43-45, Section XII.J.

16



17



Gifts Law Study Tip

- You absolutely must read CEO 19-17.
 - Four good scenarios.
 - This opinion is a hot topic in the local government legal community.
- Tickets as gifts
 - Skybox tickets: CEO 95-36, CEO 96-02
 - Charity events: CEO 16-10

18

Slightly Different Dinner Event

Sunshine, Inc., a nonprofit entity and lobbyist of the City, holds a fundraiser. Sunshine, Inc. is selling sponsorship for the event. A table with ten tickets for ten seats and ten dinners costs sponsors \$2,000. Sunshine, Inc. donates a table to the City with the intention that the City distribute the tickets among the members of the City Council. The City then distributes its ten tickets to the City Council members. City Council Member Steve receives a ticket for himself and a ticket for his wife.

Questions

1. Did Clerk Steve receive a gift?
2. If so, who is the donor and what is the value?
3. Is Steve allowed to accept the tickets?
4. Must Steve report his receipt of the ticket(s) on CE Form 9?

See CEO 19-17, Question 3.

22

22

Slightly Different Dinner Event

Sunshine, Inc., a nonprofit entity and lobbyist of the City, holds a fundraiser. Sunshine, Inc. is selling sponsorship for the event. A table with ten tickets for ten seats and ten dinners costs sponsors \$2,000. Sunshine, Inc. donates a table to the City with the intention that the City distribute the tickets among the members of the City Council. The City then distributes its ten tickets to the City Council members. City Council Member Steve receives a ticket for himself and a ticket for his wife.

Questions

1. Did Clerk Steve receive a gift? **YES**
2. If so, who is the donor and what is the value? Sunshine (indirect gift)
3. Is Steve allowed to accept the tickets? **NO** | Lobbyist gift over \$100
4. Must Steve report his receipt of the ticket(s) on CE Form 9? **N/A**

See CEO 19-17, Question 3.

23

23

Scenario : Door Prizes

County employees attend a seminar hosted by the Chamber of Commerce, a lobbyist of the County. A door prize of \$500 cash is randomly awarded to one person among those who attended. A reporting individual employed by the County wins the door prize.

- 1. Is it a gift? Who's the donor? What's the value?
- 2. Can she accept?
- 3. Must she disclose?

See CEO 91-69

24

24



Scenario : Door Prizes

County employees attend a seminar hosted by the Chamber of Commerce, a lobbyist of the County. A door prize of \$500 cash is randomly awarded to one person among those who attended. A reporting individual employed by the County wins the door prize.

- 1. Is it a gift? Who's the donor? What's the value? **YES**
- 2. Can she accept? **NO** Lobbyist gift over \$100
- 3. Must she disclose? **N/A**

See CEO 91-69

25

25



Scenario: Silent Auction

County employees attend a silent auction hosted by the Rotary Club and is open to the public. A poker party is donated by a poker room business, a lobbyist of the City on a rezoning matter. A City Council Member (reporting individual) bids on the poker party and wins the bid (highest bid of \$250).

- 1. Is it a gift? Who is the donor? What's the value?
- 2. Can she accept?
- 3. Must she disclose?

See CEO 13-2.

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Scenario: Silent Auction

County employees attend a silent auction hosted by the Rotary Club and is open to the public. A poker party is donated by a poker room business, a lobbyist of the City on a rezoning matter. A City Council Member (reporting individual) bids on the poker party and wins the bid (highest bid of \$250).

- 1. Is it a gift? Who is the donor? What's the value? **NO**
- 2. Can she accept? **YES**
- 3. Must she disclose? **NO** Not a gift because consideration paid at market value.

See CEO 13-2.

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Scenario: Sports Tickets

A friend from college (not a relative/vendor/lobbyist/principal of a lobbyist) works for a company (not a vendor/lobbyist/principal of a lobbyist) that has skybox season tickets for the Orlando Magic, an NBA team. Use of the skybox rotates among the company's employees and it is his turn to go to a game. He gets the tickets at no cost to him. He gives you, a reporting individual, two tickets to Game 7 of the playoffs to join him in the skybox. The tickets have a printed face value of \$0. Similar playoff tickets sell for \$105.

Questions

1. Did you receive a gift?
2. If so, who is the donor and what is the value?
3. Are you allowed to accept the tickets?
4. Must you report the receipt of the ticket(s) on CE Form 9?

See CEO 96-2.

28

28

Scenario: Sports Tickets

A friend from college (not a relative/vendor/lobbyist/principal of a lobbyist) works for a company (not a vendor/lobbyist/principal of a lobbyist) that has skybox season tickets for the Orlando Magic, an NBA team. Use of the skybox rotates among the company's employees and it is his turn to go to a game. He gets the tickets at no cost to him. He gives you, a reporting individual, two tickets to Game 7 of the playoffs to join him in the skybox. The tickets have a printed face value of \$0. Similar playoff tickets sell for \$105.

Questions

1. Did you receive a gift? **YES**
2. If so, who is the donor and what is the value? **Friend, 2x\$105=\$210**
3. Are you allowed to accept the tickets? **YES** **Not a vendor/lobbyist/etc.**
4. Must you report the receipt of the ticket(s) on CE Form 9? **YES**

See CEO 96-2.

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29

Conflicts of Interest

Doing business with your agency &

Conflicting contractual relationships

30

Two statutes, four prohibitions

- Section 112.313(3)(Ethics Outline pp. 10-15, Section III.)
 - In your public capacity, buying (for your agency)
 - In your private capacity, selling (to your agency or any agency in your political subdivision)
- Section 112.313(7)(a)(Ethics Outline pp. 16-27, Section IV.)
 - Employment or contractual relationship w/ business entity regulated by/doing business w/ your agency
 - Continuing or frequently recurring conflict

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Doing business with one's own agency

- Section 112.313(3), F.S.
- **Part I:** While acting in your public capacity, do not purchase, rent, or lease any realty, goods, or services FOR your agency FROM any business where you, your spouse, or your child is an officer, partner, director, or proprietor, or where one of you owns more than 5% of the business.

For more on the "public capacity" prohibition, see Ethics Outline p. 10, Section III.C.

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Doing business with one's own agency

- Section 112.313(3), F.S.
- **Part II:** In your private capacity, do not rent, lease, or sell any realty, goods, or services TO your agency or to any agency within the political subdivision.

For more on the "private capacity" prohibition, see Ethics Outline p. 11, Section III.D.

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"Grandfathering" Exceptions to Section 112.313(3)

Contracts entered into:

- before October 1, 1975. See § 112.313(3)(a), F.S.
- before qualification for elective office. See § 112.313(3)(b), F.S.
- after qualification, but before assumption of elective office. See CEO 95-13 (applying § 112.316, F.S.).
- before appointment to public office. See § 112.313(3)(c), F.S.
- before beginning public employment. See § 112.313(3)(d), F.S.

For more on the "grandfathering" exceptions, see Ethics Outline p. 12, Section III.F.1.

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Conflicting employment/contractual relationship: Part I

- Section 112.313(7)(a), F.S.
- A public officer or employee cannot have employment or a contractual relationship with an entity regulated by or doing business with his or her agency.



For more on this type of conflict, see Ethics Outline pp. 16-21, Section IV.A.

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Conflicting employment/contractual relationship: Part I

- **"Employment"**: receives compensation or consideration
- **"Contractual relationship"**: interpreted consistently with contract law
- **"Business entity"**: defined in § 112.312(5), F.S. Basically, any business organization doing business in Florida.

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Contractual Relationships

- Partners, shareholders, and associates of law firms have contractual relationships with every client of the firm. Ethics Outline p. 16, Section IV.A.2.c.
- Uncompensated board service is not employment or a contractual relationship. Ethics Outline p. 16, Section IV.A.2.d.
- Contractual relationship is created when services under professional licensure are rendered. Ethics Outline p. 16-17, Section IV.A.2.d.

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Conflicting employment/contractual relationship: Part I

- "Agency"** defined at § 112.312(2), F.S.
- Lowest departmental unit [of those mentioned in § 112.312(12)] to which a public officer's or employee's influence might reasonably be considered to extend.
- Not always the entire political subdivision, branch, or department.
- Many fact patterns resolve on determining what the agency is.

For more on determining one's "agency," see Ethics Outline pp. 18-19, Section IV.A.5.

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Conflicting employment/contractual relationship: Part II

- Section 112.313(7)(a), F.S.
- A public officer or employee cannot have employment or a contractual relationship that creates a conflict between his or her public duties and private interests or an impediment to his or her public duties.



For more on continuing or frequently recurring conflicts, see Ethics Outline pp. 21-24, Section IV.B.

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Conflicting employment/contractual relationship: Part II

- The big case in this area is: Zerweck v. Commission on Ethics, 409 So. 2d 57 (Fla. 4th DCA 1982).
- Holding: There is a continuing or frequently recurring conflict when employment or a contractual relationship tempts the public officer/employee to dishonor their public duties.
- Ask yourself: does this contractual relationship tempt the employee to dishonor their public duties?

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Examples from Formal Opinions

- Representing a client before the board of which one is a member. CEO 77-127, CEO 20-8.
- Or before subordinate boards. CEO 20-8, Q3.
- A member of one's firm represents a client before one's board. CEO 88-40, CEO 15-3.
- Candidate for elected office entering into a binding contract with a PAC. Contract contained campaign promises and penalties for "breach." CEO 96-24 and 96-25.

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Exceptions to Sections 112.313(3) and (7)(a)

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Waiver of Conflicts for Members of Advisory Boards

- Generally, these conflicts cannot be waived.
- However, for members of advisory boards only, conflicts under Sections 112.313(3) and (7)(a) can be waived by the appointing authority (governing board 2/3's vote).
- Member must make disclosure of the conflict on Form 4A prior to the waiver.

For more on advisory board waivers, see CEO 20-7, Question 3; Ethics Outline p. 12, Section III.F.2.a.; Ethics Outline p. 25, Section IV.C.3.a.

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Exemptions in Section 112.313(12)(a)-(j), F.S.

- (b) Sealed competitive bidding
 - Public officer and spouse/child did not participate in bid creation/determination
 - Did not influence personnel, except by bid submission
 - Filed a disclosure with Commission on Ethics

For more on the sealed competitive bidding exception, see Ethics Outline p. 13, Section III.F.2.c.

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Exemptions in Section 112.313(12)(a)-(j), F.S.

- (e) Sole source of supply
 - The business entity is the sole source of supply for the goods/realty/service in the political subdivision
 - Disclosure (Form 4A) is filed before the transaction

For more on the sole source exception, see Ethics Outline pp. 13-14, Section III.F.2.f.

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Voting Conflicts: Topics you should study

- **Special Private Gain or Loss:** See § 112.3143(1)(d), F.S.; Ethics Outline p. 61, Section XX.A.1.
- **Definition of a Principal by Whom Retained:** See § 112.3143(1)(a), F.S.; Ethics Outline pp. 61-62, Section XX.A.2.
- **Definition of Relative:** See § 112.3143(1)(c), F.S.; Ethics Outline p. 62, Section XX.A.3.
- **Obligations of Local Officers:** See § 112.3143(3)(a) & (4), F.S.; Ethics Outline p. 64, Section XX.C.
 - Different than state-level officers, who have "knowledge" requirement.
- **Special Private Gain or Loss – Size of the Class Considerations:** See § 112.3143(1)(d), F.S.; Ethics Outline pp. 64-67, Section XX.D.
- **Special Private Gain or Loss – Remote and Speculative:** See § 112.3143(1)(d), F.S.; Ethics Outline pp. 67-69, Section XX.E.
- **Special Private Gain or Loss – Procedural Votes:** See Ethics Outline p.69, Section XX.F.
- **Public Salary Exception:** See § 112.313(5), F.S.; Ethics Outline p. 70, Section XX.G.3.

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Voting Conflicts

- **Applies to:** All county, municipal, and other local public officers (elected and appointed)
- **Prohibition:** cannot vote on any measure that will inure to their special private gain or loss or that they know will inure to the special private gain or loss of a relative, a business associate, or principal by which they are retained.

For more on voting conflicts,
See § 112.3143(3)(a) & (4), F.S.; Ethics Outline p. 64, Section XX.C.

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Voting Conflicts

- **Remedy for a Voting Conflict:**
 - Prior to the vote being taken, publicly state to the assembly the nature of the officer's interest in the matter from which he or she is abstaining from voting;
 - Abstain from the vote; **and**
 - File a voting conflict memorandum (Form 8B) within 15 days of the vote.

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Additional Requirement for Appointed Officials

- In addition, if appointed officers want to "participate" in the measure, they must make their disclosure before they participate by either making an oral disclosure at the meeting or by filing Form 8B in advance.

For more on voting conflicts for appointed officers,
See § 112.3143(4), F.S.; Ethics Outline p. 64, Section XX.C.2.

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Special Private Gain or Loss

- Size of the Class
 - Public Officer's interest in the measure is less than 1-2% of the class of people affected by the vote (according to Commission opinions, not any specific rule or statute)
 - For example, a City Council member can vote on the millage rate because it affects the entire city (size of the class affected = thousands). He or she probably cannot vote on a zoning application by their private employer (size of the class affected = 1)

For more on size of the class considerations for voting conflicts,
See § 112.3143(1)(d), F.S.; Ethics Outline pp. 64-67, Section XX.D.

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Special Private Gain or Loss

- Remote and Speculative
 - When the gain or loss resulting from the measure is remote and speculative, it cannot be said to result in a "special" private gain or loss.
 - For example, a City Council member voting on measure regarding development near his or her private business is usually considered too remote and speculative to call any resulting gain/loss "special."

For more on remote and speculative considerations for voting conflicts, See § 112.3143(1)(d), F.S.; Ethics Outline pp. 67-69, Section XX.E.

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Scenario

Combining Conflicts of Interest
and Voting Conflicts

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Sample Fact Pattern

Steve is a member of the Alligator County Board of Commissioners. He also owns a business, Dee, Inc., where he does pharmaceutical consulting. Steve is a licensed pharmacist and is the sole employee of the business. The Alligator County Sheriff's Office (ACSO) oversees jails that require health services and contain institutional pharmacies. ACSO contracts with Bee, Inc. to provide health services. Bee subcontracts to Cee, Inc. for the pharmaceutical services, including the supply of medication. Cee, Inc. wants to subcontract with Dee, Inc., to fill a legally-required role as a supervising pharmacist, for which Dee, Inc., would be compensated.

A → B → C → D → Steve)

Based on CEO 21-3.

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Sample Fact Pattern

As a County Commissioner, Steve votes annually on the County budget, which includes the entire ACSO budget. The health services contract between ACSO and Bee, Inc., is provided for as a line-item in the budget.

1. Is there a conflict of interest if Dee, Inc., is subcontracted?
2. If Dee, Inc. is subcontracted, will Steve have a voting conflict when he is presented with the vote on the County annual budget?

Based on CEO 21-3.

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Resolution of Conflict Interest Fact Pattern

- No conflict under Section 112.313(3)
 - Not acting in an official capacity to buy his business's services.
 - Not acting in a private capacity to sell to his agency or to an agency of his political subdivision. (He's selling the services of Dee to Cee)

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Resolution of Conflict Interest Fact Pattern

- No conflict under Section 112.313(7)(a)
 - **First part:** Steve is employed by a company (Dee) that is doing business with Cee, not his agency. Licensed services (contractual relationship) being provided to ACSO, creating a "contractual relationship" with ACSO, but ACSO is not his agency, either. His agency is the County Commission.
 - **Second part:** Nothing in facts that would "tempt dishonor" of his duties as a County Commissioner.

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Resolution of Voting Conflict Fact Pattern

- There is a voting conflict under Section 112.3143(3)(a).
 - A vote on the annual budget would inure to his special private gain or loss.
 - His business is a principal by whom he is retained.
 - This is a vote on his private salary, so public salary exception does not apply.
- The County could bifurcate the budget vote into two votes. Vote 1: the health services contract (voting conflict); Vote 2: everything else (allowed to vote).

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Misuse of Position & Disclosure of Certain Info

Obtaining a private benefit from the misuse or abuse of public means

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Public Position, Private Benefit

- Section 112.313(6), Florida Statutes
Misuse of Position
- Section 112.313(8), Florida Statutes
Disclosure of Certain Information
- Article II, Section 8(h), Florida Constitution
Abuse of Office to Obtain a Disproportionate Benefit

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Misuse of Public Position – Section 112.313(6), F.S.

- Prohibition: Cannot corruptly use or attempt to use one's public position or resources to secure a benefit or privilege for oneself or others.

For more on misuse of position, see Ethics Outline pp. 30, Section VII.

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What does “corruptly” mean?

- . . . done with a wrongful intent and for the purpose of obtaining . . . any benefit resulting from some act or omission of a public servant which is inconsistent with the proper performance of his or her public duties.
- Not merely mismanagement, waste, negligence, or rude behavior.

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Example of Misuse of Position

- Outside City Attorney to be replaced by newly-created in-house City Attorney.
- Before leaving, Outside City Attorney presents ordinances to create Zoning Hearing Officer and Code Enforcement Special Magistrate.
- Advised City Council he was “uniquely qualified” to do be the hearing officer and the appointment had to be made immediately.

Robinson v. Comm'n on Ethics, 242 So. 3d 467 (Fla.1st DCA 2018).

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Disclosure of Certain Information – Section 112.313(8)

- Applies to current and former employees.
- Cannot disclose or use information not available to members of the general public gained by reason of his/her official position for his/her personal gain or the personal gain of another.

For more on disclosure of certain information, see Ethics Outline p. 34, Section IX.

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New Constitutional Amendment

- Article II, Section 8(h)(2), Florida Constitution
- A public officer or public employee shall not abuse his or her public position in order to obtain a disproportionate benefit for himself or herself; his or her spouse, children, or employer; or for any business with which he or she contracts; in which he or she is an officer, a partner, a director, or a proprietor; or in which he or she owns an interest.
- Effective 12/31/20.

For more on the Constitutional Amendment banning abuses to obtain disproportionate benefits, see Ethics Outline pp. 32-33, Section VIII.

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"Disproportionate Benefit" Explained

- Rule 34-18.001, F.A.C.
- "wrongful intent for the purpose of obtaining any benefit, privilege, exemption, or result from the act or omission which is inconsistent with the proper performance of his or her public duties"
- See CEO 19-23 and CEO 21-1.

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Formal Opinions on “Disproportionate Benefit”

- CEO 19-23: intent requirement is “highly similar” to the “misuse of position” statute.
- Compliance with all statutes and ordinances will ensure no abuse occurs.
- CEO 21-1: receiving a benefit not available to similarly-situated people is not indicative of an abuse or of a wrongful intent to get that benefit.

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Questions?

Contact Information

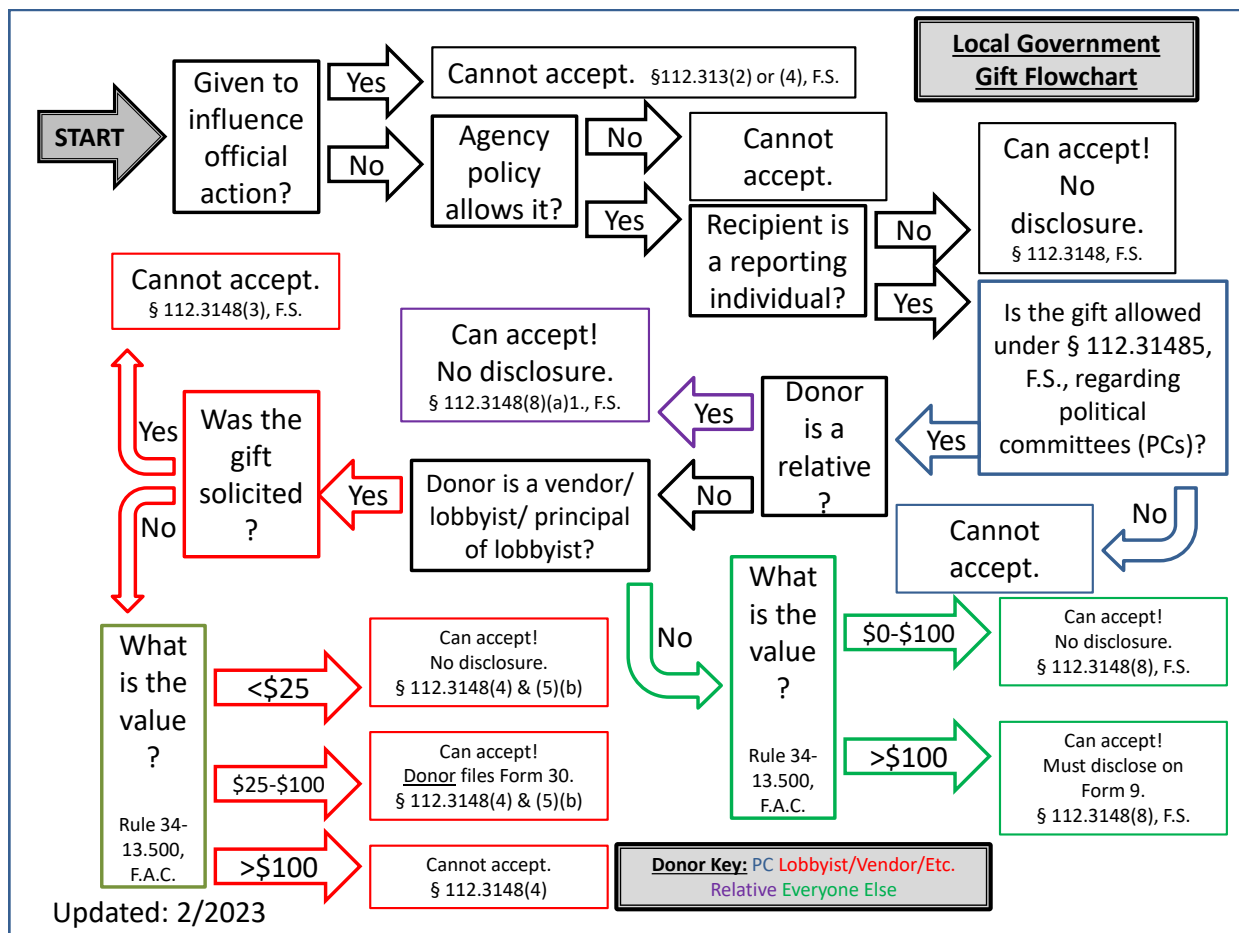
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Please reach out
to me with any
questions you
have, big or small.
I am here to help
you. -Steve

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**Land Use, Zoning, Practice &
Procedure Before Local
Government Legislative & Quasi-
Judicial Boards**

By

**Mark Barnebey, Blalock Walters,
Bradenton**

2023 LAND USE AND ZONING
CITY, COUNTY AND LOCAL GOVERNMENT
CERTIFICATION REVIEW COURSE

BY: MARK P. BARNEBEY, ESQUIRE
BLALOCK WALTERS, P. A.
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This paper will attempt to summarize, in fairly broad terms, basic land use and zoning concepts, which have evolved over the last 200 years while focusing on several hot topic items, which are more likely to appear on the city, county and local government law certification examination.

I. THE FOUNDATION FOR LOCAL LAND USE AND ZONING REGULATION

A. Generally

The basis for all land use regulation is derived from the police power of the government. Police powers are those necessary to protect the health, safety and welfare of the public. Euclid v. Ambler Realty Company, 272 U.S. 365 (1926). The Euclid case involved a due process and equal protection challenge to the residential zoning of property. In holding the zoning constitutional as a valid use of police power, the Supreme Court noted that the law of nuisances should be consulted, not as controlling but as an aid for analogies to the scope of police power.

B. Federal Constitution

The Tenth Amendment of the United States Constitution states as follows:

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the states respectively, or to the people.

Largely, land use and zoning issues have been left to the individual states to regulate.

The author thanks Taylor Falkner, Esq. and paralegal Jennifer Ordóñez, ACP, FRP, for assistance in updating this paper.

C. Florida Constitution

1. Article 8, Section 1(f) of the Constitution of the State of Florida provides that non-chartered counties shall have such powers of self-government as is provided by general or special law.
2. Article 8, Section 1(g) states that chartered counties shall have all powers of local self-government not inconsistent with general law or with special law approved by the vote of the electors.
3. Article 8, Section 2(b) provides that municipalities shall have governmental, corporate and proprietary powers to conduct municipal government, perform municipal functions and render municipal services and exercise any power for municipal purposes, except as otherwise provided by law.

II. FLORIDA STATUTORY AUTHORITY

A. General Authority for Comprehensive Planning and Zoning

The statutory basis for comprehensive planning is generally set forth in Section 125.01, Florida Statutes, for counties and in Chapter 163, Florida Statutes, for both counties and municipalities.

B. General Authority for Counties

Section 125.01, Florida Statutes, provides the following general authorization for counties:

1. Section 125.01(1)(g) authorizes counties to prepare and enforce comprehensive plans for the development of the county.
2. Section 125.01(1)(h) authorizes counties to establish, coordinate, and enforce zoning and business regulations as are necessary for the protection of the public.
3. Section 125.01(1)(i) authorizes the county to adopt and enforce building, housing and other technical codes and regulations.
4. Section 125.01(1)(t) provides the general authorization for the county to adopt ordinances and resolutions necessary for the exercise of its powers.

Other sections of Chapter 125 provide the authorization for other related land use matters, including the authority to provide road, water and sewer systems.

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C. General Authority for Municipalities

Unlike the statutory authorization for counties, Chapter 166, Florida Statutes, does not specifically address municipal planning and zoning powers, but provides for such powers in general terms. Section 166.021 provides that municipalities shall have the governmental, corporate and proprietary powers, which enable them to conduct municipal government, perform municipal functions and render municipal services. Further, municipalities may exercise any power for municipal purposes, except where expressly prohibited by law. There are sections in the general authority chapter for municipalities regarding sign ordinances and a few other land use matters.

D. The Community Planning Act

1. Specific Comprehensive Planning Authority

Section 163.3167, Florida Statutes, provides very specific authority for the adoption of comprehensive plans and management of growth. Subsection (1) provides as follows:

(1) The several incorporated municipalities and counties shall have power and responsibility:

(a) To plan for their future development and growth.

(b) To adopt and amend comprehensive plans, or elements or portions thereof, to guide their future development and growth.

(c) To implement adopted or amended comprehensive plans by the adoption of appropriate land development regulations or elements thereof.

(d) To establish, support, and maintain administrative instruments and procedures to carry out the provisions and purposes of this act.

The powers and authority set out in this act may be employed by municipalities and counties individually or jointly by mutual agreement in accord with the provisions of this act and in such combinations as their common interests may dictate and require.

Further, Section 163.3167(2) requires each local government to prepare a comprehensive plan in a manner set forth in Part II of Chapter 163, which is also known as the "Community Planning Act (the Act)."

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Chapter 163 has undergone substantial changes over the past few years as the Legislature reexamines the role of the state in comprehensive planning.

2. Comprehensive Plan Contents

As stated above, the Act requires each local government to adopt a comprehensive plan. Initially, the governing body must identify a "Local Planning Agency," for preparation of the comprehensive plan or any amendments. Section 163.3174, Florida Statutes. Usually this is a local planning commission, although the board may appoint another body, itself or staff as the local planning agency. Plans need to provide for a 5 or 10 year planning horizon. The comprehensive plan is required to contain a number of elements under Section 163.3177, Florida Statutes, including the following:

- a. A Capital Improvement Element, which sets forth the principals for construction, extension or an increase in the capacity of public facilities. Section 163.3177(3), Florida Statutes. The element must address how to correct existing public facility deficiencies. The element is required to cover at least a five year period, and reviewed on an annual basis. Further, this element must also set out the projected revenue sources to fund the facilities. Projects necessary to ensure any adopted level of service standards are achieved and maintained must be identified as either funded or unfunded and given a level of priority for funding. Section 163.3177, Florida Statutes.

As part of this element, local governments must set forth minimum levels of service for their community in several areas: potable water, sanitary sewer, storm water management, law enforcement, education, health care, fire and emergency response, and general government. Section 163.3177(6), Florida Statutes. For example, a possible level of service for potable water might be to have a minimum of 1,000 gallons of water plant capacity for each resident. Before a development is approved, it must be determined that there will be no deficiencies in any of the requested levels of service at the time of the impacts of the development. This concept is known as concurrency. Other levels of services may be established by a local government, including transportation, schools, and parks and in some cases are subject to specific statutory requirements.

If a county or municipality adopts transportation concurrency, it can create a Transportation Development Authority to focus on existing deficiencies. Section 163.3182, Florida Statutes. The

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Transportation Development Authority can fund transportation projects, borrow money, and create infrastructure plans.

If concurrency is applied to educational facilities, the county and most cities must agree to participate. Concurrency shall be applied on a district wide basis, unless a number of criteria are met. Section 163.3180, Florida Statutes.

- b. An Intergovernmental Coordination Element (ICE), which provides for identifying and implementing joint planning areas and joint infrastructure service areas and shall provide for a dispute resolution process. Section 163.3177(6)(h), Florida Statutes.
- c. A Future Land Use Element, which is to include a Future Land Use Map. The Future Land Use Map must include the distribution of uses for residential, commercial, industrial, agricultural, recreational, conservation, educational, and public uses. If applicable, the following shall also be shown: historic district boundaries and designated historically significant properties, transportation concurrency management and exception areas, multimodal transportation district boundaries, mixed-use categories, as well as a number of cultural resources. The community should provide an appropriate allocation of land uses to ensure a balance of uses to foster “vibrant, viable communities and economic development opportunities. . .” Section 163.3177(6)(a)(4) Florida Statutes.
- d. A Traffic Circulation Element, also known as the Transportation Element. Section 163.3177(6)(b) Florida Statutes.
- e. A General Sanitary Sewer, Solid Waste, Drainage, Potable Water, and Natural Groundwater Aquifer Recharge Element. 163.3177(6)(c), Florida Statutes.
- f. A Conservation Element. Section 163.3177(6)(d), Florida Statutes.
- g. A Recreation and Open Space Element. Section 163.3177(6)(e), Florida Statutes.
- h. A Housing Element. This element shall provide for the creation of preservation of affordable housing for all types of residents and elimination of substandard housing. Section 163.3177(6)(f), Florida Statutes.

- i. An Intergovernmental Coordination Element. Section 163.3177(6)(h), Florida Statutes
- j. For coastal governments, a Coastal Management Element. As of 2015, this Element requires a component that includes development and redevelopment principals, and engineering solutions that result from high-tide events, storm surge, floods, stormwater runoff and sea level rise. Section 163.3177(6)(g) and Section 163.3178(2), Florida Statutes.

Other elements can be added, including Community Design, Safety, Historic Preservation and Economic Elements. A Public Schools Facilities Element is no longer required, but a Public School Interlocal Agreement to coordinate planning is still required. Section 163.3177, Florida Statutes.

The local government may use other specific governmental agency definitions and delineations in applying Comprehensive Plan provisions, where that agency is charged by law with such duties. See Nassau County v. Willis, 41 So.3d 270 (Fla. 1st DCA 2010), reh. den. (Fla. 2010).

3. Comprehensive Plan Adoption and Amendment Process

a. Expedited State Review Process

1) Section 163.3184, Florida Statutes, provides for the adoption and amendment process for comprehensive plans, which is unique from standard ordinance adoption. Small Area Plan Amendments generally affecting ten (10) acres or smaller may be enacted through a much simpler process as outlined below. Section 163.3187, Florida Statutes. Plan amendments that are in an area of critical state concern, propose a rural land stewardship, propose a sector plan, propose a development that is subject to the state coordinated review process, or create a new municipality follow the State Coordinated Review Process below. As provided in Sections 163.3184(3) and (4), Florida Statutes, the Expedited State Review Process is generally as follows:

- a) Local planning agency prepares and recommends a comprehensive plan or amendment to the local governing body.
- b) After the transmittal public hearing, the local governing body will transmit the proposed comprehensive plan or plan amendment to the state

land planning agency and other state and regional agencies for review within ten days, depending on the type of amendment.

c) The reviewing agencies review the proposed plan amendment upon request of the local government, a regional planning council or an affected person. The various agencies may provide comments. State agencies shall only comment on important state resources and facilities that will be adversely impacted by the amendment if adopted.

d) After review of written comments, including those of the state land planning agency, and after a second public hearing, the local government governing body may adopt the amendment with or without changes or determines it will not adopt the changes. A local government's charter can require super majority vote to amend the Comprehensive Plan but cannot grant the public the right to approve or repeal Comprehensive Plan amendments. See Seminole County v. City of Winter Springs, 935 So.2d 521 (Fla. 5th DCA 2006); Citizens for Responsible Growth v. City of St. Pete Beach, 940 So.2d 1144 (Fla. 2nd DCA 2006), reh. den.

e) After adoption by the local government, the amendment shall be sent to the state land planning agency and any other agency responsible for providing comments. The state land planning agency shall notify the government of any deficiencies in the amendment package. If no challenge is filed by a reviewing agency, then the plan amendment becomes effective 31 days after notice of receipt from the state land planning agency that the plan amendment package is complete.

(1) If plan or plan amendment is found to be in compliance, any affected person may file a petition with the agency within 30 days after the local government adopts the amendment. If there is an appeal, the matter will be forwarded to the Division of Administrative Hearings (DOAH) for a hearing. The state land planning agency may not intervene in a

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proceeding filed by an affected person. A plan or plan amendment shall be determined to be in compliance if the local government's determination of the compliance is fairly debatable. Section 163.3184(5), Florida Statutes. Petitions may only be filed by an "affected person" as defined in Section 163.3184(1)(a), Florida Statutes. The petitioner must have adverse interest, which must exceed in degree the general interest of the community. Section 163.3215(2), Florida Statutes. A person who does not live, own property or have a business address in a jurisdiction and merely conducts some business activity in a jurisdiction is not an "affected person." Potiris v. Department of Community Affairs, 947 So.2d 598 (Fla. 4th DCA 2007), reh. den. 962 So.2d 338 (Fla. 2007); Melzer v. Department of Community Affairs, 881 So.2d 623 (Fla. 4th DCA 2004), reh. den.

- (2) If the plan or plan amendment is found not to be in compliance by the state land planning agency, then the matter is automatically forwarded to Department of Administrative Hearings (DOAH) for a hearing. The local government's determination of the comprehensive plan or plan amendment is in compliance is presumed to be correct and shall be sustained, unless it is shown by a preponderance of the evidence that the comprehensive plan or plan amendment is not in compliance. Section 163.3184(5), Florida Statutes. In this type of challenge, the local government's determination that elements of its plan are related to and consistent with each other shall be sustained if fairly debatable. On a small scale amendment, the time for filing a challenge to an amendment is within 30 days of the effective date, not adoption of the Ordinance. Payne v. City of Miami, 913 So.2d 1260 (Fla. 3d DCA 2005), rev. den. 52 So.3d 707 (Fla. 2010).

(3) The DOAH Administrative Law Judge then issues a recommended order and sends it to the State Land Planning Agency, if it finds the plan amendment to be in compliance with Chapter 163. The state land planning agency shall then either concur and issue a final order if it finds the amendment in compliance or forward it to the Administration Commission for final action. Alternatively, if the DOAH Administrative Law Judge finds the plan amendment not to be in compliance then it forwards its recommended order to the Administration Commission. Action by the Agency shall be taken “expeditiously” and if no action is taken on the recommended order within ninety (90) days after issuance, the recommended order shall be final unless the parties agree to an extension. Section 163.3184(5), Florida Statutes.

(4) The Administration Commission (Governor and Cabinet) after receiving a recommended order and holding a hearing, shall issue a final order determining whether the comprehensive plan or plan amendment is not in compliance with the act. Section 163.3184(5), Florida Statutes.

(5) If the plan or plan amendment is found not in compliance with Chapter 163, the Administration Commission may impose a number of penalties primarily in relation to infrastructure funding, the eligibility of the local government to receive grants under a number of state programs and revenue sharing. Section 163.3184(5), Florida Statutes.

b. Small Area Plan Amendments

- 1) Small area plan amendments for map amendments involving 50 acres (or 100 acres for sites within a rural area of critical economic concern adopted pursuant to Section 288.0656 (2)(d), Florida Statutes) or less and this classification

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provides a separate review process. Section 163.3187, Florida Statutes. (Text amendments can be included with map amendments.) Density and use considerations are no longer a factor in determining what qualifies for small area plans. Review does not require a transmittal hearing.

- 2) Upon adoption at a public hearing, an affected party may file a petition with the Division of Administrative Hearings within 30 days following adoption. A hearing shall be held within 60 days of appointment of an Administrative Law Judge. The parties to the hearing will be the petitioner, the local government and any intervenor. The State Land Planning Agency cannot intervene. The standard of review is fairly debatable standard.
- 3) Small scale plan amendments become effective 31 days after adoption, unless challenged.

c. State Coordinated Review Process

- 1) Applies to plan amendments that are in areas of critical state concern, propose a rural land stewardship, propose a sector plan, an amendment to an adopted sector plan, propose a development that is subject to the state coordinated review process, or propose new plans for newly incorporated municipalities. Section 163.3184(4), Florida Statutes.
- 2) Plan amendment must be transmitted to the reviewing agencies and other requesting governments ten days after a public hearing.
- 3) Reviewing agencies may provide comments with 30 days to the State Land Planning. Written public comments go directly to the local government.
- 4) State Land Planning Agency issues an ORC (Objections, Recommendations and Comments) Report as to whether the plan is in compliance with Chapter 163. It shall also identify whether the plan amendment will adversely impact important state resources and how to mitigate that impact. However, State Land Planning Agency may comment on densities and intensities being proposed.
- 5) After receiving comments from State Land Planning Agency, the local government shall hold a second public

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hearing and adopt, adopt with changes or reject the amendment. If the local government fails to hold the second public hearing within 180 days, the amendment is generally withdrawn.

- 6) Upon adoption, the amendment is transmitted to the State Land Planning Agency and other commenting agency.
- 7) Once deemed complete, the Agency shall have 45 days to determine if the amendment is in compliance and issue a Notice of Intent on the Agency's website (not newspaper).
- 8) The plan amendment goes into effect upon issuance of the Notice of Intent, unless challenged.
- 9) Affected persons and State Land Planning Agency may file a petition with DOAH. (What happens if neither a Notice of Intent is issued nor a petition filed with DOAH?)
- 10) State Land Planning Agency challenge is limited to the comments provided to the local government after transmittal.

d. Constitutional Challenge

The statute of limitations for a facial constitutional challenge of a land use ordinance begins to run at the point of enactment or adoption. Manatee County v. Mandarin Development, Inc., 301 So.3d 372 (Fla. 2d DCA 2020). The statute of limitations for an as applied constitutional challenge of a land use regulation would begin at the time of regulation adoption or property acquisition, if a later date, as that is when the property owner would have a bona fide need for a declaration of rights. Manatee County v. Mandarin Development, Inc., Id.

e. Miscellaneous Provisions

- 1) Amendments of Comprehensive Plans can be done as often as desired, under Section 163.3187, Florida Statutes. Some jurisdictions had adopted requirements that a development order approval or change to a Comprehensive Plan were subject to an initiative or referendum process. Section 163.3167(8), Florida Statutes, prohibits an initiative or referendum process regarding these types of approvals, but there is an exception to this prohibition if a local government charter provision was in effect on June 1,

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2011, which provided an initiative or referendum process for development orders or comprehensive plan amendments.

2) The local government (or combination of local governments) sector plans are intended for areas of at least 5,000 acres and shall emphasize urban form, protect regionally significant resources, and protect public facilities. Section 163.3245(1), Florida Statutes. The regional planning council is required to have a scoping meeting and make recommendations to the state land planning agency and local government on issues requested by the local government. Sector plans shall include a long term master plan and development order approving two or more detailed area plans. Section 163.3245(3), Florida Statutes.

3) Section 163.3175, Florida Statutes, provides special requirements for jurisdictions with all or part of a military installation within its boundaries. Each local government must transmit proposed comprehensive plan on land development regulation amendments to the installation's commanding officer for review and comment, if the amendment would affect the intensity, density or use in close proximity to the installation.

4) Decisions on amendments to comprehensive plans are reviewed on a fairly debatable standard of review. Coastal Development of North Florida, Inc. v. City of Jacksonville Beach, 788 So.2d 204 (Fla. 2001). The fairly debatable standard is a rule of reasonableness. Island, Inc. v. City of Bradenton Beach, 884 So.2d 107 (Fla. 2nd DCA 2004), reh. den. A court's application of the fairly debatable standard in reversal of a decision of a denial of a change in land use is limited to situations where there is unrefuted evidence which establishes that an existing land use designation is improper under the terms of the land use plan itself. Pinellas County v. Richman Group of Florida, Inc., 253 So.3d 662 (Fla. 2d 2017), reh. den. Rules of statutory construction are applicable to the interpretation of Comprehensive Plans. Katherine's Bay, LLC v. Fagan, 52 So.3d 19 (Fla. 1st DCA 2010).

5) Under Section 163.3191, every seven (7) years, each local government shall re-evaluate its comprehensive plan to reflect changes in the statutes. At the same time, the local government is encouraged to update plans to reflect changes in local conditions. If changes are needed, the local government has one year to adopt the other plan amendments. Details requiring requirements of the Evaluation Report have been removed.

4. Effect of an Adopted Comprehensive Plan

Once a comprehensive plan has been adopted, the requirements of the comprehensive plan and all of its elements are strictly applied, and compliance of other land use and zoning regulations and project approvals are reviewed on a basis of strict scrutiny. See The Realty Associates Fund IX, L.P. v. Town of Cutler Bay, 208 So.3d 735 (Fla. 3d DCA 2016); Village of Pinecrest v. Grec Pinecrest, LLC, 47 So.3d 948 (Fla. 3d DCA 2010); Board of County Commissioners of Brevard County v. Snyder, 627 So.2d 469 (Fla. 1993); Machado v. Musgrove, 519 So.2d 629 (Fla. 3rd DCA 1987), rev. den., rev. den. 529 So.2d 694 (Fla. 1988). For example, policies relating to school availability must be strictly applied, even if they were not enacted as concurrency requirements. Mann v. Board of County Commissioners, 830 So.2d 144 (Fla. 5th DCA 2002), rev. den. 844 So.2d 646 (Fla. 2003). Further, whether a development is consistent with the comprehensive plan is determined by review of what the order permits, not what the permit holder intends to do. See United States Sugar Corporation v. 1000 Friends of Florida, 134 So.3d 1052 (Fla. 4th DCA 2013). However, the local government has the discretion to decide the maximum development density should not be allowed if some use consistent with the plan is allowed and the decision is supported by substantial competent evidence. Snyder, 627 So.2d 469.

5. Land Development Regulations (LDRs)

LDRs are required under Sections 163.3202 and 163.3194, Florida Statutes. LDRs are to be consistent with and implement the comprehensive plan. At a minimum, LDRs are required to:

- a. Regulate the subdivision of land;
- b. Regulate the use of land and water to ensure the compatibility of adjacent uses and provide for open space;
- c. Provide for the protection of potable water wellfields;
- d. Regulate areas subject to flooding and provide for drainage and stormwater management;
- e. Protect environmentally sensitive lands;
- f. Regulate signage;

- g. Provide that public facilities and services meet or exceed the standards provided in the Capital Improvements Elements of the comprehensive plans and are available when needed for development; and
- h. Ensure safe and convenient traffic flow and address vehicular parking; and
- i. Maintain the existing density of residential properties or recreational vehicle parks if the properties are intended for residential use and are in unincorporated areas of County with sufficient infrastructure and are not located in coastal high level areas.
- j. Incorporate preexisting development orders identified.

A general zoning code is optional in the land development regulations under Section 163.3202(3), Florida Statutes, but inclusionary zoning, planned-unit developments, impact fees and performance zoning are encouraged under the Act. Additionally, in 2004, Section 163.31771 was added to allow a local government that finds that there is a shortage of affordable rentals within its jurisdiction to allow accessory dwelling units in any area zoned for single-family residential use.

It should be noted that the Legislature has selectively limited (or totally preempted) local government control of certain uses. For example, honeybee colonies, nonresidential farm buildings, fences and signs are largely preempted from local government regulation. See Sections 586.10, Florida Statutes, and 604.50, Florida Statutes, respectively. Further, there is a limitation placed on regulation of other uses such as farm worker housing. See Section 381.00896, Florida Statutes.

However, compliance of a Development Order with the Comprehensive Plan is based on the terms, including policies, land use, and densities and intensities, of the Comprehensive Plan, not the terms of the implementing LDRs. Buck Lake Alliance, Inc. v. Board of County Commissioners of Leon County, 765 So.2d 124 (Fla. 1st DCA 2000) reh. den.; See also §163.3194(1)(b), Florida Statutes.

If consistent with the Comprehensive Plan and unless a regulation impacts a suspect class or right, land development regulations shall be upheld if it can be shown that they bear a rational relationship to a legitimate public purpose. City of Dallas v. Stanglin, 490 U.S. 19 (1989); Kuvin v. City of Coral Gables, 62 So.3d 625 (Fla. 3d DCA 2010), rev. den. 64 So.3d 118 (Fla. 2011). Land use restrictions are presumptively valid and will be upheld unless the party attacking can carry the extraordinary burden of proving the regulation is unreasonable and bears no substantial relationship to public health, safety or general welfare. Harrell's Candy Kitchen, Inc. v. Sarasota-Manatee Airport Authority, 111 So.2d 439 (Fla. 1959); Kuvin v. City of Coral Gables, 62 So.3d 625 (Fla. 3d DCA 2010, rev. den. 64 So.3d 118 (Fla. 2011). Generally, a reviewing court will defer to the interpretation of an ordinance given by an agency responsible for its administration. Far Niente, LLC

v. City of Key West, 209 So.3d 43 (Fla. 3d DCA 2016); Shamrock-Shamrock, Inc. v. City of Daytona Beach, 169 So.3d 1253 (Fla. 5th DCA 2015). That deference is not absolute, and if such interpretation is unreasonable, or is clearly erroneous, the interpretation cannot stand. Las Olas Tower Co. v. City of Ft. Lauderdale, 742 So.2d 308 (Fla. 4th DCA 1999). Ordinances should be given plain meaning and any doubts should be construed in favor of the property owner. Colonial Apartments, L.P. v. City of DeLand, 577 So.2d 593 (Fla.5th DCA 1991); Shamrock-Shamrock, Inc. v. City of Daytona Beach, 169 So.3d 1253 (Fla. 5th DCA 2015).

6. Development Agreements

Pursuant to Section 163.3227, Florida Statutes, Development Agreements can be entered into with developers, which set out terms for development, the provision of infrastructure and the adoption of comprehensive plan amendments. Development Agreements may not exceed thirty (30) years in length. Section 163.3229, Florida Statutes.

7. Rural Land Stewardship Areas

- a. These areas are designed to establish a long-term incentive based strategy to guide the allocation of land so as to accommodate future land uses, but still protect natural resources and encourage retention of farmland and rural areas. Section 163.3248(1), Florida Statutes.
- b. These are land use overlay districts to preserve predominantly rural areas but may not receive a need for uses based on population projections. The designation does not eliminate the underlying permitting uses, densities or intensities. After adoption, local government must create a related overlay zoning district. Section 163.3248(2), Florida Statutes.
- c. Areas must be not less than 10,000 acres in size, located outside of cities and urban service areas.
- d. Areas must provide for the creation and conveyance of transferrable rural land use credits. Stewardship credits may only be allowed within a rural land use stewardship area going from “sending areas” to designated “receiving areas”. Credits issues may vary based on the nature of land and remaining permitted uses on the sending area.
- e. Stewardship credits may be transferred from a sending area only after a stewardship easement is placed on the sending area land with assigned stewardship credits. Section 163.3248(8), Florida Statutes.

8. Urban Infill and Redevelopment Areas

- a. These are areas designated for targeting economic development, job creation, housing, transportation, crime prevention, revitalization, and land use incentives. Section 163.2517, Florida Statutes.
- b. Local governments are required to engage in a visioning process for urban core before development and creation of urban infill and redevelopment plan.
- c. Financial incentives can be utilized to finance the plan.

9. Standard Land Use and Zoning Terms

Some of the more commonly used (and often misunderstood) land use and zoning terms include the following:

a. Future Land Use Map

The Future Land Use Map is required as part of the comprehensive plan under Chapter 163. This map, with related policies in the comprehensive plan, identifies a range of uses which may be appropriate for a property within the planning time frame of a comprehensive plan, often 20 years.

b. Zoning Map

(1) Generally

Although not required under Chapter 163, a zoning map is often adopted as one type of land development regulation. The zoning map, with the related land development regulations, identifies uses which are permitted (or permitted with conditions) for a property at the present time.

There are three general types of zoning categories.

- (a) standard zoning categories;
- (b) planned development zoning categories; and
- (c) overlay zoning categories which are superimposed over other zoning categories to limit certain uses.

(2) Site Plan Review

Planned development zoning, unlike standard zoning categories, normally requires the approval of a site plan by the governing body at a public hearing. The level of detail required at the public hearing level can vary greatly from one jurisdiction to another. Site Plan approval may also be conditioned by the local government.

Development rights attributable to the larger parent tract pursuant to an approved site plan do not appear to automatically pass with conveyance of the fee simple interest of a portion of the parent tract and no automatic transfer of a specific portion of the development rights allocated to the parent parcel with if only title is conveyed at the time of transfer. Howard v. Murray, 184 So.3d 1155 (Fla.1st DCA 2015).

For development permits filed after July 1, 2012, the local government may not require as a condition of processing or approval that the applicant obtain a permit or approval from any state or federal agency unless the agency has already issued final agency action denying the federal or state permit. Sections 125.022 and 166.033, Florida Statutes.

c. Conditional Uses, Special Exceptions and Special Permits

Generally, Conditional Uses, including the terms "Special Exception," and "Special Permit" refer to uses which are permitted if certain general criteria are met. The initial burden to establish compliance with criteria is on applicant, but it shifts to local government to establish that the use does not meet the criteria and is, in fact, adverse to the public interest. Irvine v. Duval County Planning Comm'n, 495 So.2d 167 (Fla. 1986). However, the criteria must be sufficiently detailed so as not to be subject to whimsical or capricious application or unbridled discretion. See Cap's-On-The-Water, Inc. v. St. Johns County, 841 So.2d 507 (Fla. 5th DCA 2003), reh. den., rev. den. 851 So.2d 728 (Fla. 2003).

d. Nonconformity

Nonconformity is a use or structure which was a lawful use or structure under the regulations in effect at the time it was approved or built, which no longer conforms to such regulations.

e. Vested Rights (Equitable Estoppel)

1) Generally

Whenever a regulation is enacted or modified, there arises a possibility that a property owner may claim a vested right to proceed with development as if the new or revised regulation had not been adopted. (The corollary argument is that the government is equitably estopped to apply the new regulation to the development. The terms "vested right" and "equitable estoppel" are used virtually interchangeably under Florida law.)

2) The Test

Equitable estoppel shall be invoked upon a local government when the property owner can establish that: (1) he has relied in good faith; (2) upon some act or omission of the government; and (3) has made such a substantial change in position or has incurred such extensive obligations and expenses that it would be highly inequitable and unjust to destroy the acquired right. Franklin County v. Leisure Prop., Ltd., 430 So.2d 475 (Fla. 1st DCA 1983); City of Hollywood v. Hollywood Beach Hotel Co., 283 So.2d 867 (Fla. 4th DCA 1973), rev'd in part, 329 So.2d 10 (Fla. 1976). Upon attaining an authorized development of regional impact, a developer need not commence or continue development in order to retain vested rights. Section 163.3167(5), Florida Statutes. Edgewater Beach Owners Association, Inc. v. Walton County, 833 So.2d 215 (Fla. 1st DCA 2002), rev. den. 845 So.2d 889 (Fla. 2003).

However, the theory of equitable estoppel is based on the rules of fair play. City of Miami Beach v. Cleveland Ocean, L.P., 338 So.3d 16 (Fla. 3rd DCA 2022); Castro v. Miami – Dade County Code Enforcement, 967 So.2d 230 (Fla. 3d DCA 2007), rev. dis'm. 975 So.2d 429 (Fla. 3d 2008), rev. den. 987 So.2d 79 (Fla. 2008). The doctrine of equitable estoppel may only be applied against a governmental entity under exceptional circumstances. Monroe County v. Hemisphere Equity Realty, Inc., 634 So.2d 745 (Fla. 3d DCA 1994), rev. den. 645 So.2d 455 (Fla. 1994).

3) Legislative Vesting

Legislative vesting may be granted to projects which have received a certain level of approvals. For example, Section 163.3167(5), Florida Statutes, states that developments authorized as a Development of Regional Impact under Section 380.06, Florida

Statutes, are vested from compliance with a more recently adopted Comprehensive Plan. Edgewater Beach Owners Association, Inc. v. Walton County, Florida, 833 So. 2d 215 (Fla. 1st DCA 2002), rev. den. 845 So.2d 889 (Fla. 2003).

f. Variance

An exemption granted from certain land development regulations where literal enforcement of the provisions of land development regulations would result in an unnecessary hardship. Nance v. Town of Indiatlantic, 419 So.2d 1041 (Fla. 1982). In reviewing a decision regarding a variance request, the Court must review whether there is substantial competent evidence on the record to support whether the variance review criteria in the applicable code have been met. Wolk v. Board of County Commissioners of Seminole County, 117 So.3d 1219 (Fla. 5th DCA 2013). For a variance request, the applicant carries the burden to establish the criteria necessary to grant the request is met. City of Satellite Beach v. Goersch, 217 So.3d 1143 (Fla 5th DCA); Board of County Commissioners of Dade City v. First Free Will Baptist Church, 374 So.2d 1055 (Fla. 3d DCA 1979). Traditionally, variances are granted only when the following conditions are met:

- 1) special conditions exist which are peculiar to the land;
- 2) the special conditions were not caused by the applicant;
- 3) the granting of the variance will not confer any special privilege to the applicant that is denied to others with the same zoning district;
- 4) strict application of the land development regulations will work an undue hardship on the applicant; see Herrera v. City of Miami, 600 So.2d 561 (Fla. 3d DCA 1992), rev. den. 613 So.2d 2 (Fla. 1992);
- 5) the proposed variance is the minimum necessary to make reasonable use of the property; and
- 6) the grant of the variance will be consistent with the general intent of the regulations and not harm the area. See City of Jacksonville v. Taylor, 721 So.2d 1212 (Fla. 1st DCA 1998); rev. den. 732 So.2d 328 (Fla. 1998).

On review, the Court should not reweigh the evidence presented at the local government hearing. Orange County v. Lust, 602 So.2d 568 (Fla. 5th DCA 1992), rev. den. 613 So.2d 6 (Fla. 1992)

III. DEVELOPMENTS OF REGIONAL IMPACT

Developments of Regional Impact (DRI)

Section 380.06, Florida Statutes, addresses a separate review for projects which may significantly affect more than one jurisdiction called DRI. The DRI process has been significantly altered in the past few years. For new developments, as of 2015, new projects that would have been classified as a DRI are to be approved pursuant to the state coordinated review process used for some comprehensive plan amendments, pursuant to Section 163.3184(4), Florida Statutes, unless the proposed development is consistent with the comprehensive plan. Section 380.06(12), Florida Statutes. DRIs previously authorized may be completed as approved, but amendments to the DRI must obtain local government approval and must comply with the current comprehensive plan. Bay Point Club v. Bay County, 890 So.2d 256 (Fla. 1st DCA 2004), rev. den. 903 So.2d 936 (Fla. 2005); Edgewater Beach Owners Ass'n v. Walton County, 833 So.2d 215 (Fla. 1st DCA 2002), rev.den. 845 So. 2d 889 (Fla. 2003).

Under Section 380.06(11), Florida Statutes, DRI may be proposed to be abandoned by its owner or developer. A local government may also propose to abandon a DRI, but must notify all property owners in writing. Abandonment must be granted if all required mitigation related to the then existing development has been completed.

DRI development rights do not pass automatically with the conveyance of the fee simple interest of the DRI and there is no automatic transfer of a specific (or even a reasonable) portion of the development rights allocated to the larger DRI, if only a conveyance of title is made at the time of conveyance. Howard v. Murray, 184 So.3d 1155 (Fla. 1st DCA 2015).

IV. REVIEW OF LAND USE AND ZONING DECISIONS

A. Traditional Review

1. Land Use as a Legislative Action

Until 1993, all land use and zoning decisions were considered legislative decisions. See Florida Land Co. v. City of Winter Springs, 427 So.2d 170 (Fla. 1983); Palm Beach Co. v. Tinnerman, 517 So.2d 699 (Fla. 4th DCA 1987), rev. den. 528 So.2d 1183 (Fla. 1988).

B. Snyder on Zoning Matters

1. Legislative v. Quasi-Judicial

In 1993, the Florida Supreme Court decided the Board of County Commissioners of Brevard County v. Snyder, 627 So.2d 469 (Fla. 1993), and clarified the standard review of rezoning decisions except when challenged under Section 163.3215, Florida Statutes (See Sec. IV D below). The court stated:

- a. A rezoning is legislative in nature when it affects "a large portion of the public."
- b. Generally, the character of the hearing determines whether or not board action is legislative or quasi-judicial. See Haines City Community Development v. Heggs, 658 So. 2d 523 (Fla. 1995).
- c. A rezoning is quasi-judicial:
 - 1) When it impacts a limited number of persons of identifiable parties and interests.
 - 2) When the decision is contingent on facts arrived at from distinct alternatives presented at the local government hearing; and
 - 3) When the decision can be viewed as policy application, rather than policy setting.
- d. Further, the Florida Supreme Court in Martin County v. Yusem, 690 So.2d 1288 (Fla. 1997), indicated that a rezoning which may have limited impact under a Snyder analysis but requires a comprehensive plan amendment, is legislative.
- e. Mandamus is not available to compel a quasi-judicial action. Key Biscayne Gateway Partners, Ltd. v. Village of Key Biscayne, 172 So.3d 499 (Fla. 3d DCA 2015).

2. Burden of Proof

- a. For legislative matters, the burden of proof is on the property owner to show the government action is arbitrary and capricious.
- b. For quasi-judicial matters, once the property owner proves the requested rezoning to be consistent with the comprehensive plan,

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the burden then shifts to the government to prove that maintaining the existing zoning accomplishes a legitimate public purpose. Snyder, 627 So.2d 469. See also, Alvey v. City of North Miami Beach, 206 So.3d 67 (Fla. 3d DCA 2016). This shift of burden applies to the implementation of conditions on a development order. See Village of Palmetto Bay v. Palmer Trinity Private School, Inc., 128 So.3d 19, (Fla. 3d DCA 2012). However, the property owner is not presumptively entitled to a land use or the maximum intensity or density allowed for that land use.

3. Procedural Due Process

- a. Legislative hearings generally require notice of hearing and an opportunity to be heard.
- b. Quasi-judicial hearings require additional procedural due process requirements, although such hearings do not require the same procedural requirements as a judicial hearing. See Jennings v. Dade County, 589 So.2d 1337 (Fla. 3d DCA 1991), rev. den. 598 So.2d 75 (Fla. 1992). Quasi-judicial hearings meet basic due process requirements if the parties are provided notice of hearing and an opportunity to be heard. They also require that the parties be able to present evidence, cross-examine witnesses, and be informed of all facts upon which the commission acts. Jennings, 589 So.2d 1337 (Fla. 3d DCA 1991), rev. den. 598 So.2d 75 (Fla. 1992); Lee County v. Sunbelt Equities, II, Ltd., 619 So.2d 996 (Fla. 2d DCA 1993), rev. den.

However, non-parties are not entitled to the same level of due process protections, such as the right to cross-examine witnesses. See Carillon Community Residential v. Seminole County, 45 So.3d 7 (Fla. 5th DCA 2010), rev. den. 60 So.3d 386 (Fla. 2011).

- c. Ex Parte Communications (communications between a decision-maker and another without the presence or the permission of all other parties to the proceeding), regarding an upcoming quasi-judicial proceeding are presumptively prejudicial and may violate the due process rights of an interested third party. Jennings, 589 So.2d 1337 (Fla. 3d DCA 1991), rev. den. 598 So.2d 75 (Fla. 1992). If an ex parte communication is found to violate a party's due process rights, then the decision of the body may be overturned and the case remanded back to the body for a new hearing. See Jennings, 589 So.2d 1337 (Fla. 3d DCA 1991), rev. den. 598 So.2d 75 (Fla. 1992). The safest course of action by a decision-maker is to avoid ex parte communications, if possible. If ex parte communications

cannot be avoided, either the decision-maker or the party initiating the discussions should disclose at the hearing everything presented at the ex parte meetings. If a letter is received, then that letter should be made available for public review and comment and entered into the record.

Section 286.0115, Florida Statutes, provides a means to allow ex parte meetings, if adopted by ordinance or resolution. This procedure has extensive disclosure and procedural requirements. It is questionable whether these legislative acts will alleviate due process issues relating to ex parte communications which may be raised by the courts.

4. Type of Hearing before the Circuit Court

- a. Legislative decisions are reviewed in a de novo proceeding before the Circuit Court.
- b. Quasi-judicial proceedings are reviewed on a petition for a writ of certiorari on the record before the deciding body.
- c. Section 163.3215, Florida Statutes, provides the exclusive method for a party to challenge the consistency of development order with a comprehensive plan. Section 163.3215, Florida Statutes; Seminole Tribe of Florida v. Hendry County, 106 So.3d 19 (Fla. 2d DCA 2013).

5. Standard of Review

- a. For legislative land use matters, courts apply the deferential "fairly debatable" standard of review to land use and zoning decisions. Such decisions are presumed to be valid and should not be disturbed unless they were clearly, arbitrarily and unreasonably applied to a property. See, e.g., Orange County v. Costco Wholesale Corp., 823 So.2d 732 (Fla. 2002); but see, City of Lake Wales v. Lamar Advertising Association of Lakeland, Florida, 414 So.2d 1030 (Fla. 1982); Kuvin v. City of Coral Gables, 45 So.3d 836 (Fla. 3d 2010), affirmed 62 So.3d 625 (Fla. 2011); rev. den. 64 So.3d 118 (Fla. 2011).
- b. For quasi-judicial land use matters, decisions must be supported by substantial competent evidence. Further, the local government should be certain to address its standards of review particularly if a finding is required by code. Alvey v. City of North Miami Beach, 206 So.3d 67, (Fla. 3d DCA 2016). However, where there is

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substantial competent evidence to support a choice between alternatives, it is the local government body's responsibility to make that choice, not the Circuit Court. Metropolitan Dade County v. Blumenthal, 675 So.2d 598 (Fla. 3d DCA 1995), dissent adopted on rehearing, rev. dism. 680 So.2d 421 (Fla. 1996). See also, Dusseau v. Metropolitan Dade County, 794 So.2d 1270 (Fla. 2001). "Competent substantial evidence" is defined in the Florida Supreme Court case of DeGroot v. Sheffield, 95 So.2d 912 (Fla. 1957), as:

Substantial evidence has been described as such evidence as will establish a substantial basis of fact from which the fact at issue can be reasonably inferred. We have stated it to be such relevant evidence as a reasonable mind would accept as adequate to support a conclusion. . . . [T]he evidence relied on to sustain the ultimate finding should be sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached. To this extent, the "substantial" evidence should also be "competent." The evidence should specifically address the standards of the Code. See, Alvey v. City of North Miami Beach, 206 So.3d 67 (Fla. 3d DCA 2016).

Competent substantial evidence would include staff and other professional opinion in their fields of expertise. Alachua County v. Eagle's Nest Farms, Inc., 473 So.2d 257 (Fla. 1st DCA 1985), rev. den., 486 So.2d 595 (Fla. 1986); City of Fort Lauderdale v. Multidyne Medical Waste Management, Inc., 567 So.2d 955 (Fla. 4th DCA 1990), rev. den., 581 So.2d 165 (Fla. 1991). Expert testimony can be in the form of oral testimony as well as written reports. A local government's longstanding interpretation of its Code does not bind the hands of the circuit court on review. Town of Longboat Key v. Islandside Property Owners Coalition, LLC, 95 So.3d 1037 (Fla. 2d DCA 2012). City of Hialeah Gardens v. Miami-Dade Charter Foundation, Inc., 857 So.2d 202 (Fla. 3rd DCA 2003), reh. den. Planning commission decisions may also constitute competent substantial evidence, if it is based on such evidence. Hillsborough County Board of County Commissioners v. Longo, 505 So.2d 470 (Fla. 2d DCA 1987), reh. den.; but see, Conetta v. City of Sarasota, 400 So.2d 1051 (Fla. 2d DCA 1981).

Lay person testimony generally will not constitute competent substantial evidence on matters which are technical in nature, but may be considered if it is on a matter which the lay person has particular knowledge, such as a matter related to first hand knowledge of an area or general facts, or how a proposal affects the lay person's quality of life. See, Katherine's Bay, LLC v. Fagan, 52

So.3d 19, (Fla. 1st DCA 2010); Miami-Dade County v. Omnipoint Holdings, Inc., 863 So.2d 375 (Fla. 3d DCA 2003); Florida Power & Light Co. v. City of Dania, 761 So.2d 1089 (Fla. 2000), City of Apopka v. Orange County, 299 So.2d 657 (Fla. 4th DCA 1974); Board of County Commissioners of Pinellas County v. City of Clearwater, 440 So.2d 497 (Fla. 2d DCA 1983). Testimony of attorneys has not traditionally been viewed by courts as competent substantial evidence, but has been considered strictly as legal argument. See National Advertising Company v. Broward County, 491 So.2d 1262 (Fla. 4th DCA 1986); but see, Metropolitan Dade County v. Blumenthal, 675 So.2d 598 (Fla. 3d DCA 1996), dissent adopted on rehearing, rev. dism. 680 So.2d 421 (Fla. 1996). Maps, reports, and other information, when presented with the testimony of professionals or neighbors, will also constitute substantial competent evidence. Miami-Dade County v. Walberg, 739 So.2d 115 (Fla. 3d DCA 1999) rev. granted 760 So.2d 949 (Fla. 2000) rev. dismissed 763 So.2d 1046 (Fla. 2000), but see Machado v. Musgrove, 519 So.2d 629 (Fla. 3d DCA 1987), rev. den., 529 So.2d 693, rev. den., 529 So.2d 694 (Fla. 1988). See, Barnebey, Mark P. and Polk, Bonnie T., "Quasi-Judicial Land Use Hearings: Does Your Evidence Pass Muster?", The Florida Bar Journal (March 1995).

6. Findings of Fact

Findings of fact are not required in rezoning quasi-judicial proceedings. Board of County Commissioners v. Snyder, 627 So.2d 469 (Fla. 1993); Alachua Land Investors, LLC v. City of Gainesville, 15 So.3d 782 (Fla. 1st DCA 2009), reh. den.

7. Rendition of Order

Rendition of the final order is the triggering of the final event that starts the jurisdictional stopwatch, which can be extended by the City rules. See Pettway v. City of Jacksonville, 264 So.3d 210 (Fla. 1st DCA 2018)

C. Review of Decisions

1. For legislative or quasi-legislative matters, review is by action for declaratory or injunctive relief on the grounds the action is arbitrary, capricious, confiscatory or violative of the constitution. City of Homestead v. United States of America, 346 So.3d 1205 (Fla. 3d DCA 2022).

2. For quasi-judicial matters, review is by petition for writ of certiorari. Board of County Commissioners of Brevard County v. Snyder, 627 So. 2d 469 (Fla. 1993).

- a. On certiorari petition of a local government decision to the Circuit Court, the Circuit Court provides a “first tier” certiorari review, in which it determines whether: (1) the local government provided the parties procedural due process, (2) the local government observed the essential requirements of the law, and (3) the local government’s decision is based on substantial competent evidence. Sarasota County v. BDR Investments, LLC, 867 So.2d 605 (Fla. 2d DCA 2004); Town of Manalapan v. Gyongyosi, 828 So.2d 1029 (Fla. 4th DCA 2002). In determining whether substantial, competent evidence exists, the trial court is required to review the entire record to determine whether the local government’s decision is supported competent substantial evidence and not to reweigh the evidence. Miami-Dade County v. Publix Supermarkets, Inc., 305 So.3d 668 (2020); City of Atlantic Beach v. Wolfson, 118 So.3d 993 (Fla. 1st DCA 2013).

This first-tier certiorari review of a local government decision is a matter of right. Miami-Dade County v. Ominpoint Holdings, Inc., 863 So.2d 195 (Fla. 2003). Reversal at this level requires the court to explain the rationale for the reversal. Miami-Dade County v. Torbert, 39 So.3d 482 (Fla. 3d DCA 2010). Interestingly, an applicant affected by a zoning decision is not an indispensable party to a review of that administrative action. Brigham v. Dade County, 305 So.2d 756 (Fla. 1974); City of St. Petersburg Bd. of Adjustment v. Marelli, 728 So.2d 1197 (Fla. 2d DCA 1999). However, the applicant has the right to intervene in the action. Highwoods DLF EOLA, LLC v. Condo Developer, 51 So.3d 570 (Fla. 5th DCA 2010).

- b. Second-tier review of a Circuit Court decision on a writ of certiorari is limited to determining whether the Circuit Court: (1) afforded the parties procedural due process and (2) applied the correct law. Miami - Dade County v. Ominpoint Holdings, Inc., 863 So.2d 195 (Fla. 2003); Seminole Tribe of Florida v. Hendry County, 106 So.3d 19 (Fla. 2d DCA 2013); Sarasota County v. BDR Investments, LLC, 867 So.2d 605 (Fla. 2d DCA 2004); Town of Juno Beach v. McLeod, 832 So.2d 864 (Fla. 4th DCA 2002). On second tier certiorari, Courts may not correct error or re-weigh evidence even if the appellate court is of the opinion the trial court erred in weighing the evidence. Balm Road Investment, LLC et.al. v. Hillsborough County Board of County Commissioners, 336 So.3d 776 (Fla. 2d

DCA 2022); but see, Auerbach v. City of Miami, 929 So.2d 693 (Fla. 3d DCA 2006), where the Court noted that courts of appeal are not “legal potted palms” without the ability to correct manifest errors of law and policy.

At this level of review, the Courts ability to review the lower court’s decision is limited to these two criteria, even if the litigants have no adequate remedy on appeal. Duncan v. United Automobile Insurance Co., 49 So.3d 312 (Fla. 3d DCA 2010). Second-tier certiorari review of a Circuit Court decision on the District Court is not a matter of right and is similar in scope to common law certiorari review. Brasota Mortgage Company, Inc. v. Town of Longboat Key, 865 So.2d 638 (Fla. 2d DCA 2004). See Miami-Dade County v. Omnipoint Holdings, Inc., 863 So.2d 195 (Fla. 2003).

3. The adoption of Article V, Section 21 does not appear to apply to local government actions. Evans Rowing Club, LLC v. City of Jacksonville, 300 So.3d 1249 (Fla. 1st DCA 2020). Article V, Section 21 states that in interpreting a state statute or rule, the court hearing on administrative action pursuant to general law may not defer to the administrative agency’s interpretation of the statute or rule and must consider the matter de novo.
4. Challenges to the constitutionality of a statute or ordinance are not properly raised in a petition for writ of certiorari, but should be raised in an original proceeding before a circuit court. Miami-Dade County v. Omnipoint Holdings, Inc., 863 So.2d 195 (Fla. 2003).

D. Other Types of Land Use Decisions

1. Comprehensive Plan Amendments

Amendments to Comprehensive Plan Future Land Use Maps are legislative. Martin County v. Yusem, 690 So.2d 1288 (Fla. 1997); Board of County Commissioners of Clay County v. Qualls, 772 So.2d 544 (Fla. 1st DCA 2000), rev. den. 791 So.2d 1100 (Fla. 2001); Minnaugh v. County Commission of Broward County, 752 So.2d 1263 (Fla. 4th DCA 2000) approved 783 So.2d 1054 (Fla. 2001). The decision not to amend a comprehensive plan is also legislative. See Younger v. City of Palm Bay, 697 So.2d 589 (Fla. 4th DCA 1997).

2. Overlay Zoning

This type of proceeding is quasi-judicial. Kahana v. City of Tampa, 683 So.2d 618 (Fla. 2d DCA 1996).

3. Special Exceptions and Special Permits

This type of proceeding is quasi-judicial. Irvine v. Duval County, 495 So.2d 167 (Fla. 1986).

4. Variances

This type of proceeding is quasi-judicial. Nance, 419 So.2d 1041.

5. Subdivision Plats

This type of proceeding appears to be quasi-judicial. Hernando County v. Leisure Hills, Inc., 689 So.2d 1103 (Fla. 5th DCA 1997), rev. den. 698 So.2d 1103 (Fla.1997).

6. Site Plans, Building Permits

The law is unsettled in this area. Some courts have indicated that decisions regarding site plans, building permits or other similar final development orders by a local government are also quasi-judicial decisions. Broward County v. G.B.V. Int'l, Ltd., 787 So.2d 838 (Fla. 2001); Park of Commerce Associates v. City of Delray Beach, 636 So.2d 12 (Fla. 1994); Dougherty ex. rel. Eisenberg v. City of Miami, 23 So.3d 156 (Fla. 3d 2009), rev. den.; but see City of St. Pete Beach v. Sowa, 4 So.3d 1245 (Fla. 2d DCA 2009), where court stated issuance of a building permit was an executive decision not reviewable by certiorari.

7. Vacation of Right-of-way and Plats

The courts have traditionally applied a legislative standard of review to street vacations. See Roney Inv. Co. v. City of Miami Beach, 127 Fla. 773 (Fla. 1937); also, Sun Oil Co. v. Gerstein, 206 So.2d 439 (Fla. 3d DCA 1968), cert. den. 211 So.2d 212 (Fla. 1968). However, it has not been determined whether street vacations could be considered quasi-judicial actions under the Board of County Commissioners of Brevard County v. Snyder, 627 So.2d 469 (Fla. 1993) analysis. See Hernando County v. Franklin, 666 So.2d 602 (Fla. 5th DCA 1996); but see Blair Nurseries, Inc. v. Baker County, 199 So.3d 534 (Fla. 2016).

8. Denials of permits to operate adult oriented businesses.

Denials of permits to operate adult oriented businesses are not quasi-judicial acts and are not reviewable by writ of certiorari. Pleasures II Adult Video, Inc. v. City of Sarasota, 833 So.2d 185 (Fla. 2d DCA 2002).

9. Annexations.

Annexations are reviewable by certiorari. Section 171.081, Florida Statutes (2007), see also County of Volusia v. City of Deltona, 925 So.2d 340 (Fla. 5th DCA 2006).

E. Processing of Development Permits and Development Orders.

1. Within thirty (30) days after receiving an application for a development permit or development order, the local government must review the application for completeness and issue a letter indicating any deficiencies. Sections 125.022(1) and 166.033(1), Florida Statutes. The applicant has thirty (30) days to address the deficiencies. Within 120 days after an application is deemed complete or 180 days for an application that requires a quasi-judicial hearing. The local government must approve, deny, or approve with conditions the application. However, the applicant and the local government may agree to an extension. There is no statutory penalty for failure of the local government to meet the timeframes.
2. When a county or municipality denies a development permit, the local is required to give written notice to the applicant identifying the applicable ordinance, rule or regulation used as authority for the denial. See Sections 125.022(3) and 166.033(3), Florida Statutes.
3. A local government may not condition processing of a development permit or development order on obtaining a state or federal permit approval related to the development. Sections 125.022(5) and 166.033(5), Florida Statutes.

F. Section 163.3215 Challenges to Development Orders

Section 163.3215, Florida Statutes, provides the exclusive remedy for an aggrieved or adversely affected party that believe that a local development order will cause that person to suffer an adverse effect to an interest protected or furthered by the jurisdiction's Comprehensive Plan. See Seminole Tribe of Florida v. Hendry County, 106 So.3d 19 (Fla. 2d DCA 2013). However, the type of claim under Section 163.3215, is not unlimited. It allows change only when a development order "materially alters the use or density or intensity of use on a particular piece of property which is not consistent with the comprehensive plan". Section 163.3215(3), Florida Statutes. Heine v. Lee County, 221 So.3d 1254 (Fla. So. 2d 2017). A development order is defined as "any order granting, denying or granting with conditions an application for a development permit." Section 163.3164, Florida Statutes. A "development permit" includes any official action of a local government having the effect of permitting the development of land. Section 163.3164, Florida Statutes. "Development permit" has been interpreted to include

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subdivision plats. Graves v. City of Pompano Beach, 74 So.3d 595 (Fla. 4th DCA 2011), rev. den. 90 So.3d 272 (Fla. 2012). “Aggrieved or adversely affected parties” have been liberally construed to include a potentially broad range of people, including local governments, neighbors homeowners associations and other organizations with affected members. S.W. Ranches Homeowners Ass’n, Inc. v. Broward County, 502 So.2d 931 (Fla. 4th DCA 1987); Bay County v. Harrison, 13 So.3d 115 (Fla. 1st DCA 2009), reh. den.; Save Homassasa River Alliance v. Citrus County, Fla., 2 So.3d 329 (Fla. 5th DCA 2008), reh. den.; Nassau County v. Willis, 41 So.3d 270 (Fla. 1st DCA 2010), reh. den. However, interest groups lack standing to appeal administrative orders conducted pursuant to Section 120.68, Florida Statutes. Martin County Conservation Alliance v. Martin County, 134 So.2d 966 (Fla. 1st DCA 2010.)

Challenges to development orders based on an interpretation of a land development regulation should not be under Section 163.3215, Florida Statutes, but a petition for writ of certiorari. Little Club Condominium Association v. Martin Co., 259 So.3d 864 (Fla. 4th DCA 2018).

In 2002, Section 163.3215, Florida Statutes, was substantially revised to create an alternative method of challenging the consistency of an order with a comprehensive plan. To utilize this alternative method, the local government must adopt an ordinance requiring the mailing and posting of notice within 10 days of filing of an application for development orders except building permits. The notice must delineate the right of the party to request a quasi-judicial hearing. Other procedural requirements must also be included in the ordinance, such as:

1. the holding of a quasi-judicial proceeding before an impartial special magistrate in which there must be a prior disclosure of witnesses and exhibits prior to hearing and the opportunity to take depositions of witnesses; and
2. the granting of the special magistrate authority to take testimony under oath, issue subpoenas, and issue orders necessary for conduct of the proceedings and to compel entry onto the land; and
3. the holding of an additional quasi-judicial hearing before the local government, where the local government is bound by the special Magistrate’s findings of fact, unless not supported by competent substantial evidence.

If the local government has adopted such an alternative process, then all challenges of development orders which materially alter the use or density or intensity of use on a piece of property shall be by the filing of a petition for certiorari. Section 163.3215(4), Florida Statutes. If the local government has not adopted such an ordinance, then the aggrieved or adversely affected party may file a de novo action

for declaratory injunction or other relief in circuit court to challenge the issuance from a development order. The time for bringing de novo actions filed under this Section must be filed within thirty (30) days of rendition of the development order. 5220 Biscayne Blvd., LLC v. Stebbins, 937 So.2d 1189 (Fla. 3rd DCA 2006). For administrative determinations, that thirty-day time frame begins upon filing with the agency clerk responsible for such filings. Presidents' Council of SD, Inc. v. Walton County, 36 So.3d 764 (Fla. 1st DCA 2010).

Sewer and roadway improvements within existing rights of way were not development orders regulating local government growth and development and, therefore, are not subject to challenge under Section 163.3215, Florida Statutes. St. Johns County v. Department of Community Affairs, 836 So.2d 1034 (Fla. 5th DCA 2002), rev. den. 847 So.2d 976 (Fla. 2003).

Third party challenges based on inconsistency with the comprehensive plan must be filed pursuant to and comply with Section 163.3215, Florida Statutes. Parker v. Leon County, 627 So.2d 476 (Fla. 1993); Poulos v. Martin County, 700 So.2d 163 (Fla. 4th DCA 1997). Challenges are available to an “aggrieved or adversely affected party”, which is any person or local government that will suffer an adverse effect to an interest protected or furthered by the Comprehensive Plan, Section 163.3215 (3), Florida Statutes. However, the definition of “aggrieved or adversely affected party” does not clearly exclude applicants for the development order. The filing time frames are jurisdictional. Lee v. St. John's County Board of County Commissioners, 776 So.2d 1110 (Fla. 5th DCA 2001).

Standard of review for compliance with the Comprehensive Plan will be strict scrutiny, which requires a “detailed examination of the development order for exact compliance” with the Comprehensive Plan. Dixon v. City of Jacksonville, 774 So.2d 763 (Fla. 1st DCA 2000), rehearing denied; Pinecrest Lakes, Inc. v. Shidel, 795 So.2d 191 (Fla. 4th DCA 2001), motion to recall mandate denied, 802 So.2d 486 (Fla. 4th DCA 2001), reh. Den, motion to recall mandate denied, The interpretation of staff is not given deference in determining whether consistency with the Comprehensive Plan has been achieved. Pinecrest Lakes, Inc. v. Shidel, 795 So.2d 191 (Fla. 4th DCA 2001), motion to recall mandate denied, 802 So.2d 486 (Fla. 4th DCA 2001), rehearing denied.

If a developer proceeds with development while a challenge is pending, it does so at great risk. At least one District Court has ruled that, in the event of a successful challenge of a development order for failure to comply with a comprehensive plan, any inconsistent development may be ordered to be demolished and removed. Pinecrest Lakes, Inc. v. Shidel, 795 So.2d 191 (Fla. 4th DCA 2001), motion to recall mandate denied, 802 So.2d 486 (Fla. 4th DCA 2001), rehearing denied.

G. Contract Zoning

Contract zoning exists in those situations where a government agrees to rezone land in exchange for consideration given by the property owner. A local government may not contract away its police powers. Hartnett v. Austin, 93 So.2d 86 (Fla. 1956). If the local government has entered such an agreement to contract away its police powers, the agreement is unenforceable. P.C.B. Partnership v. City of Largo, 549 So.2d 738 (Fla. 2d DCA 1989). Even if the local government has only agreed to “support and expeditiously process” a rezone request, the contract is still illegal, and promissory estoppel cannot be used against the local government to enforce it. Morgran Company, Inc., v. Orange County, 818 So.2d 640 (Fla. 5th DCA 2002).

H. Extensions

The Legislature has granted broad statutory time extensions for DRIs and other development orders in Chapter 2009 - 96, Laws of Florida, Chapter 2010 - 147, Laws of Florida, and Chapter 2011 – 139, Laws of Florida. Local governments have taken similar actions during recessionary times.

I. Restrictive Covenants

A local government has no authority to enter into a private contract with a property owner for a rezoning, subject to covenants and restrictions in a collateral deed or agreement to be executed between the city and the property owner, Hartnett v. Austin, 93 So.2d 86 (Fla. 1956).

J. Public Schools

Public schools are subject only to a determination of comprehensive plan consistency unless the school board and local governments agree to additional standards, Section 1013.33, Florida Statutes. Further, school boards are limited to funding infrastructure improvements to only those improvements contiguous to the school site. Section 1013.51, Florida Statutes.

K. Referendums on Local Development Orders

Referendum requirements related to Development Orders are prohibited, unless the charter of the local government has referendum requirements in effect as of June 1, 2011, pursuant to Section 163.3167(8), Florida Statutes. See also, Archstone Palmetto Park, LLC v. Kennedy, 132 So.3d 347 (Fla. 4th DCA 2014); See also, Mullen v. Bal Harbour Village, 241 So.3d 949 (Fla.3d 2018).

V. CODE ENFORCEMENT

A. Prosecution in County Court

Section 125.69, Florida Statutes, for counties, and Section 162.22, Florida Statutes, for municipalities, authorize the imposition of fines up to \$500.00 and imprisonment up to 60 days in jail for a violation of an ordinance.

B. Injunctions

1. Permanent Injunctions

An injunction is an equitable remedy, which is designed to protect one from irreparable harm. City of Coral Gables v. State ex. rel. Worley, 44 So.2d 298 (Fla. 1950). To obtain an injunction one must demonstrate that no adequate remedy of law is available. Johnson v. Killian, 157 Fla. 754, 27 So.2d 345 (Fla. 1946). Injunctive relief is not available unless failure to grant the injunction will result in irreparable injury. South Florida Water Management Dist. v. City of St. Cloud, 550 So.2d 551 (Fla. 5th DCA 1989). An injunction generally can be issued to restrain the commission of an act which would violate an ordinance. Ware v. Polk County, 918 So.2d 977 (Fla. 2d 2006). However, where there is no violation of a law, code or ordinance, no injunction can be issued. Nipper v. Walton County, 208 So.3d 331 (Fla. 1st DCA 2017). However, local government may seek injunction relief where the act sought to be enjoined amounts to a public nuisance or is a threat to the property rights of the local government's citizens. Philbrick v. City of Miami Beach, 147 Fla. 538, 3 So.2d 144 (Fla. 1941). Injunctions may be an appropriate remedy where one knowingly operates without necessary permits. Metropolitan Dade County v. O'Brien, 660 So.2d 364 (Fla. 3d DCA 1995).

2. Temporary Injunctions

This extraordinary remedy may be granted upon a showing that the following are met:

- a. irreparable harm or the likelihood of irreparable harm unless status quo is maintained;
- b. the unavailability of adequate remedies at law, See Miami-Dade County v. Concrete Structures, Inc.; 114 So.3d 333 (Fla. 3d 2013);
- c. a substantial likelihood of success on the merits; and

- d. in some cases, that public interest requires the issuance of a temporary injunction. Snibbe v. Napoleonic Society of America, Inc., 682 So.2d 568 (Fla. 2d DCA 1996), rev. den. However, a temporary injunction must contain more than legal conclusions, and must include sufficient factual findings to justify issuance of the injunction. City of Jacksonville v. Naegele Outdoor Advertising, 634 So.2d 750 (Fla. 1st DCA 1994), rev. granted, 645 So.2d 453 (Fla. 1994), aff'd. 659 So.2d 1046 (Fla. 1995); Angelino v. Santa Barbara Enterprises, 2 So.3d 1100 (Fla. 3d 2009);
- e. In cases where the government seeks an injunction in order to enforce its police power, any alternative legal remedy is ignored and irreparable harm is presumed. Metropolitan Dade County v. O'Brien, 660 So.2d 364 (Fla. 3d DCA 1995); Polk County v. Mitchell, et al, 931 So.2d 922 (Fla. 2d DCA 2006).

The posting of a bond may be required by the Court under Section 60.07 Florida Statutes, and liability will be limited to the amount of the bond. Parker Tampa Two, Inc. v. Somerset Development Corporation, 544 So.2d 1018 (Fla. 1989).

The court has discretion not to require the local government post a bond when granting a temporary injunction. However, if the temporary injunction is ultimately determined to have been issued in error, there is no cap on the liability for the local government. Provident Management Corp. v. City of Treasure Island, 718 So.2d 738 (Fla. 1998), rev. den. Alternatively, the court may require the posting of a bond without surety to cap the local government liability.

Appellate review of the trial court's decision to grant an injunction depends on the grounds for the injunction. If an injunction rests on factual findings, then a trial court's decision must be affirmed absent an abuse of discretion. If the injunction rests on purely legal matters, then the injunction is reviewed de novo. Nipper v Walton County, 208 So.3d 331 (Fla. 1st DCA 2017).

C. Code Enforcement Board and Special Magistrates

1. Generally

Counties and municipalities may establish code enforcement boards to hold hearings and assess fines against violators of their respective ordinances. Section 162.03(2), Florida Statutes, provides that an alternative system may be adopted giving such board or special magistrate, or both, the right to hold such enforcement proceedings against code or ordinance violators. In the

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event a local government implements an alternative system utilizing a special magistrate, the special magistrate “shall have the same status as an enforcement board.” Section 162.03(2), Florida Statutes. Further, Sections 162.01-162.12 are additional or supplemental means for obtaining compliance with local codes, and nothing prohibits a local government from enforcing its codes by other means. Section 162.13, Florida Statutes.

2. Initiation of Proceedings

Generally, counties and municipalities have discretion to file, prosecute, abate or dismiss a building or zoning enforcement action. Detournay v. City of Coral Gables, 127 So.3d 869 (Fla. 3d DCA 2013); City of West Palm Beach v. Haver, __ So.3d __ (Fla. 2021). Code inspectors are responsible to initiate proceedings for code violations, but code enforcement board members may not. Section 162.06(1), Florida Statutes. Adversely affected property owners may pursue relief independent of the local government for code violations of their neighbors. Detournay v. City of Coral Gables, Id.; City of West Palm Beach v. Haver, __ So.3d __ (Fla. 2021). Adversely affect property owners may also pursue relief, through an injunction, against a local government where the local government acted (such as issuing permits) in violation of the government’s own ordinance, City of West Palm Beach v. Haver, __ So.3d __ (Fla. 2021).

3. Subpoena Power

A Code Enforcement Board has the power to subpoena alleged violators, witnesses, and evidence to its hearings. Section 162.08, Florida Statutes.

4. Laches and Equitable Estoppel

Laches is an available defense in a code enforcement case. Monroe County v. Carter, 41 So.3d 954 (Fla. 3d DCA 2010). Further, generally equitable defenses, upon proper proof, may be a defense to a code enforcement action. Siegle v. Lee County, 198 So.3d 773 (Fla. 2d DCA 2016).

5. Fines and Liens

Every final order entered by an administrative agency, such as a code enforcement board or special magistrate, in a quasi-judicial function must contained specific findings of fact upon which ultimate action is taken. See, Michael Hayes, et. al. v. Monroe County, 337 So.3d 442 (Fla. 3d DCA 2022). Under Section 162.09, Florida Statutes, fines may be imposed not to exceed \$250.00 per day for a first violation and \$500.00 per day for a repeat violation, and may also include the costs of any repairs made by the

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local government to prevent a serious threat to the public health, safety and welfare. If the Code Enforcement Board or Special Magistrate finds the violation to be irreparable or irreversible, it may impose a fine not to exceed \$5,000.00 per violation. A County or Municipality having a population greater than 50,000 may adopt, by super majority vote, of the governing body, may increase the maximum amount of the fines. In such case, the fines shall not exceed \$1000.00 per day per violation for the first violation, \$5,000.00 per day for a repeat violation and up to \$15,000.00 per violation if the violation is irreparable or irreversible. Upon recording of a certified copy of an order imposing a fine in the public records, the order constitutes a lien against the land on which the violation exists and any other real or personal property owned by the violator. Liens are valid for 20 years, unless within that time an action is commenced to foreclose on the property. Section 162.10, Florida Statutes. Liens can be a claim, as a petition, in a condemnation case regarding the same property. City of Boynton Beach v. Jarots, 101 So.3d 864 (Fla. 4th DCA 2012). Code enforcement liens do not have priority over previously recorded mortgages pursuant to Section 28.222(2), Florida Statutes. City of Palm Bay v. Wells Fargo Bank, N.A., 114 So.3d 924 (Fla. 2013); Barton v. MetroJax Prop. Holdings, LLC, 207 So.3d 304 (Fla. 3d DCA 2016). The recording of a notice of lis pendens constitutes a bar to enforcement against the property of all interests and liens unrecorded at the time of recording the notice unless the holder of such unrecorded interest or lien intervenes in such proceedings within thirty days of recording the notice. Section 48.23 (1)(d), Florida Statutes. Ober v. Town of Lauderdale-by-the-Sea, 218 So.3d 952 (Fla. 4th DCA 2017).

6. Res Judicata

Administrative res judicata applies to actions of a Code Enforcement Board. Holiday Inns, Inc. v. City of Jacksonville, 678 So.2d 528 (Fla. 1st DCA 1996).

D. Citation System

1. Generally

Section 162.21, Florida Statutes, provides for alternative enforcement proceedings through the issuance of citations by code enforcement officers. Section 162.21, ten items which are required to be included in the citation. The citation must identify the date the particular violation is found and not necessarily the date a violation started. Monroe County Code Enforcement v. Carter, 14 So.3d 1019 (Fla. 3d DCA 2009), reh. den. There must be an opportunity to cure a violation prior to issuing a citation, unless the code enforcement officer has reason to believe that the violation presents a serious threat to public health, safety and welfare. See Lopez v. Miami-

Dade County, Florida Code Enforcement, 2002 WL 220925 (Fla. Cir. Ct. 2002). The local government is required to establish implementing procedures including the schedule of violations and penalties to be assessed by the code enforcement officers.

2. Penalties

The maximum civil penalty allowed under the citation program is \$500.00 per citation and provision must be made to assess less than the maximum penalty allowed if the violator does not contest the citation in county court. A person who willfully refuses to sign and accept a citation shall be guilty of a second degree misdemeanor. Section 162.21, Florida Statutes.

E. Notices to Appear and Civil Actions

Chapter 162 also provides for enforcement through issuance of a notice to appear by a code enforcement officer before county court. Section 162.23, Florida Statutes, as well as bringing forth a civil action, pursuant to Section 162.30, Florida Statutes.

VI. LEGAL LIMITATIONS ON LAND USE AND ZONING REGULATIONS

A. Constitutional Limitations

There are a number of constitutional concerns regarding any type of regulation which should be examined prior to adoption of any such regulations.

1. Due Process

The Fourteenth Amendment to the Constitution of the United States, in part, as follows:

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

a. Procedural Due Process

Procedural due process claims involve a review of the decision-making procedures to determine the fairness of the process and proceedings. To the extent that procedural due process issues are raised in land use cases, they usually arise in the context of a right

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to be noticed and a fair hearing. What constitutes proper notice and a fair hearing varies depending on the type of hearing and the nature of the interest being affected.

1) Notice and Hearing

a) For most ordinances, one public hearing is required by the adopting local government with a notice published at least ten days prior to adoption:

(i) in a newspaper published at least once a week, containing at least 25 percent of its words in English and available to the public generally for the publication of notices and customarily containing information of public character or interest to the residents of the county where published or of interest or value to the general public and has an audience of at least 10 percent of the households in the county or municipality and 25 percent of the print copies must be delivered to individuals homes or business; or

(ii) pursuant to Section 50.0311, Florida Statutes, publication in a publicly accessible website which is a county official website or a private website designated by the county if the cost is less than the cost of publishing advertisement in the newspaper.

See Sections 125.66 and 166.041, Florida Statutes

b) For land development regulations which change the actual use of permitted, conditional or prohibited uses in the zoning category or changes the actual zoning of a parcel or parcels of land of ten contiguous acres or more, an additional public notice and hearing is required. At least one of the hearings must be held after 5:00 p.m. on a weekday (unless the local governing body by a super majority vote elects to conduct that hearing at another time of day). Published notices are required before both hearings. Section 166.041, Florida Statutes.

- c) The adoption and amendment procedures for comprehensive plans are unique, as discussed above.

2) Failure to Give Notice

Failure to provide proper notice or hold hearings will result in the action taken being void ab initio, barring waiver or estoppel. Anderson v. City of St. Pete Beach, 161 So.3d 548, (Fla. 2d DCA 2014); David v. City of Dunedin, 473 So.2d 304 (Fla. 2d DCA 1985); Schumacher v. Town of Jupiter, 643 So.2d 8 (Fla. 4th DCA 1994), rev. den. 654 So.2d 919 (Fla. 1995). However, a person who appears at the hearing and fails to object to defective notice may waive any objection. Malley v. Clay County Zoning Comm'n, 225 So.2d 555 (Fla. 1st DCA 1969). Further, the Legislature has placed a five-year limitation on the initiation of an action to challenge the validity of an ordinance for the failure to strictly comply with the statutory requirements. Section 125.66, Florida Statutes, and 166.041, Florida Statutes. Challenges to the procedure for approving a development regulation may be challenged by any property owner or affected resident. Save Calusa, Inc., v. Miami-Dade County, ___ So. 3d ___, Fla. 3d DCA 2022) Citizens for Responsible Developments, Inc., et. al v. City of Danica Beach, et. al. ___ So.3d __ (Fla. 4th DCA 2022).

3) Emergency Enactments

Section 125.66(3), Florida Statutes, provides an expedited notice and hearing process for emergency matters. However, no emergency ordinance or resolution may be enacted which amends a zoning map or a list of permitted, conditional or prohibited uses with a zoning category.

4) Type of Hearing

As noted above, some land use hearings are legislative in nature and some are quasi-judicial, depending on the matter being considered. Quasi-judicial hearings must address additional procedural safeguards, such as the right to present evidence, right of cross-examination and the right to be informed as to what matters were considered when the decision maker made its decision. Jennings v. Dade County, 589 So.2d 1337 (Fla. 3d DCA 1991), rev. den. 598 So.2d 75 (Fla. 1992).

b. Substantive Due Process

1) Generally

The concepts of substantive due process and equal protection have been closely tied by the courts. Claims of violations of substantive due process under the 14th Amendment in land use often refer to either unequal treatment of similarly situated persons or property in an arbitrary manner or action that results in a deprivation of fundamental rights. Hillcrest Prop. LLP v. Pasco County, 915 F.3d 1292 (11th Cir. 2019).

2) The Issues

Substantive due process analysis involves two general questions:

- a) Does the government have any purpose for what it is doing?
- b) Is the action rationally related to the public purpose and not being applied arbitrarily?

In areas of land use and zoning law, courts have generally classified land use and zoning regulations as regulations relating to economic or social welfare, and have normally deferred to the government. In such cases, the courts traditionally have upheld the regulations so long as they were rationally related to a legitimate governmental interest. Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 59 (1978). A legislative act of the government shall not be considered arbitrary and capricious if it has a rational relationship with a legitimate general welfare concern. Restigouche, Inc. v. Town of Jupiter, 59 F.3d 1208 (11th Cir. 1995); Martin County v. Section 28 Partnership, Ltd., 772 So.2d 616 (Fla. 4th DCA 2000), rev. den. 794 So.2d 606 (Fla. 2001), cert. den. 534 U.S. 1114 (Fla. 2002). To withstand constitutional scrutiny, laws do not have to have determined standards or provide mathematical certainty. See Bennett v. Walton County, 174 So.3d 386 (Fla. 1st DCA 2015); Grayned v. City of Rockford, 408 U.S. 104 (1972). Laws must set out

standards in terms an ordinary person exercising ordinary common sense can sufficiently understand and comply. See Broadrick v. Oklahoma, 413 U.S. 601 (1973). However, an administrative agency or local government has the burden of proof of providing a reasonable explanation for inconsistent results based on inconsistent facts. Velez v. City of Coral Gables, 819 So.2d 895 (Fla. 3rd DCA 2002). A law which impairs a fundamental civil right or liberty or burdens a suspect class will receive heightened review by the courts and must be narrowly tailored to promote a compelling or overriding public interest.

c. Taking and Inverse Condemnation

Generally, the courts determine whether a regulatory taking has occurred by an ad hoc balancing of the Penn Central factors. The three factors, which have generally been applied, are: (1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the government actions. Penn Central Trans. Co. v. New York City, 438 U.S. 104 (1978); see also, Shands v. City of Marathon, 999 So.2d 718 (Fla. 3d DCA 2008); City of Venice v. Gwynn, 76 So.3d 401 (Fla. 2d DCA 2011). If the regulation is found to be a taking, then courts require compensation under the Fourteenth Amendment.

The courts have found two scenarios in which regulatory action will result in a *per se* taking under the Fifth Amendment. Those scenarios are discussed below, along with others taking issue.

1) Physical Invasion and Inverse Condemnation

Land use and zoning regulations by themselves rarely involve physical invasions of property by the government. In those cases where a physical invasion occurs, the government will be considered to have taken the property no matter the size of the area. Nollan v. California Coastal Commission, 483 U.S. 825 (1987). This is usually in the form of inverse condemnation where the government 1) enters upon private property for more than a momentary period; and 2) under the color of legal authority; 3) devotes it to a public use, or 4)

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otherwise appropriates or injuriously affects it in such a way as substantially to oust the owner and deprive the owner of all beneficial enjoyment thereof. Kendry v. Div. of Admin., 366 So.2d 391 (Fla. 1978); TLC Properties, Inc. v. Department of Transportation, 292 So.3d 10 (Fla. 2020).

2) Total Regulatory Takings

Regulatory takings claims generally involve regulations which prevent certain uses of the property and thus result in a diminished property value to the owner. However, the courts have found that where the regulation completely deprives an owner of “all economically beneficial use” of the property, a categorical taking has occurred. Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992). When considering the impact of the regulation on economic viability of the property, the Court must conduct a fact intensive analysis of allowable uses and value before and after the enactment of the regulation. Taylor v. Village of N. Palm Beach, 659 So.2d 1167 (Fla. 4th DCA 1995). Beyer v. City of Marathon, 197 So.3d 563 (Fla. 3d DCA 2013). Further lack of meaningful effects by a property owner to explore development options prior to purchase impact a property owner’s investment back expectations, particularly where permits could have been obtained for at least some period of time. Collins v. Monroe County, 118 So.3d 872 (Fla. 3d DCA 2013). Such taking can occur to the improvements on a piece of property even if the property itself is not taken. State of Florida v. Basford, 119 So.3d 478 (Fla. 1st DCA 2013).

3) Exactions

Where the government requires dedication, transfer, or relinquishment of a property right as a condition of development approval, there must be an essential nexus between the condition imposed and the original purpose of the restriction. Nollan v. California Coastal Commission, 483 U.S. 825 (1987). Further should be a "rough proportionality" between the benefit derived from a development

condition and the harm caused by the proposed land use. Dolan v. City of Tigard, 512 U.S. 374 (1994); but see, Parking Association of Georgia, Inc. v. City of Atlanta, 264 Ga. 764, 450 S.E.2d 200 (1994), cert. den 515 U.S. 1116 (1995). A requirement for a developer to dedicate land to the local government, either without compensation or without a determinable amount of compensation, would be an unconstitutional taking. Hillcrest Property, LLP v. Pasco County, 939 F. Supp. 2d 1240 (M. D. Fla. 2013). As the Supreme Court stated in City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687 (1999), the Dolan “rough proportionality” test is limited in applicability to exaction of private property for public use. Monetary exactions differ from land exactions in that “unlike real or personal property, land is fungible.” McClung v. City of Sumner, 548 F.3d 1219 (9th Cir. 2008).

In 2013, the Supreme Court of the United States revisited the requiring of exactions in the context of land use permitting. Koontz v. St. Johns Water Management District, 133 S.Ct. 2586 (2013). In 1994, Koontz had applied to the St. Johns Water Management District for two permits to develop 3.7 acres of his 14.9 acre tract. At the time, he proposed to place a conservation easement on the remaining 11.2 acres. The District felt that easement was inadequate. The District proposed that Koontz develop only 1 acre and place a conservation easement on the remaining 13.9 acres. Alternatively, Koontz could develop the 3.7 acres, deed the 11.2 acre conservation easement as proposed, but would also have to make improvements to District property several miles away. The District denied the permits when Koontz refused to accept either of the proposals by the District.

The Supreme Court of the United States found that “extortionate demands (by the District) for property in the land use permitting context ran afoul of the Takings Clause not because they take impermissibly burden the right not to have property taken without just compensation.” Thus, the demands by the

District ran afoul of the “unconstitutional conditions doctrine.”

Interestingly, the Court indicated it did not make a difference that the District might have been able to deny the application outright without providing the options to obtain the permit, because, in essence, that was not what happened in this case. (This has led to some local governments to be hesitant to suggest to an applicant what action could be done to obtain a permit, particularly if it involves the applicant giving up a property interest. Thus, turning the providing of government services on its head. The key appears to be for the government to be reasonable in its requests and to provide adequate compensation for such dedication in some form.)

4) Remedies

Because the federal, and most state courts, including Florida, provide just compensation remedies to property owners who have suffered a taking, equitable relief, such as injunction, is generally unavailable. Knick v. Township of Scott, Pennsylvania, 139 S. Ct. 2162 (2019)

5) Ripeness

Any analysis of an as-applied regulatory takings case begins with a determination whether the claim is ripe. Riviera Beach v. Schillingburg, 659 So. 2d 1174, 1180 (Fla. 4th DCA 1995); Alachua Land Investors, LLC v. City of Gainesville, 107 So.3d 1154, (Fla. 1st DCA 2013). The "ripeness doctrine" essentially requires that the property owners must avail themselves of all reasonable administrative remedies such that the government can obtain a conclusive determination as to whether it would allow the proposed development. Palazzolo v. Rhode Island, 533 U.S. 606 (2001); Suitum v. Tahoe Regional Planning Agency, 520 U.S. 725 (1997); but see, Temple B’Nai Zion, Inc. v. City of Sunny Isles Beach, 727 F.3d 1349 (11th Cir. 2013). However, a property owner has an actionable Fifth Amendment takings claim when the government takes the

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property without paying for it without having to pursue the procedures a state has provided for doing so. Knick v. Township of Scott, Pennsylvania, 39 S. Ct. 2162 (2019) There is not a need, however, to file a meaningless, futile application. City Riviera Beach v. Shillingburg, 659 So.2d 1174 (Fla. 4th DCA 1995). There is no bright line test as to how far the land owner must go in challenging the limits of allowable development. Alachua Land Investors, LLC v. City of Gainesville, 107 So.3d 1154 (Fla. 1st DCA 2013). Jamison v. Town of Fort Myers Beach, 292 So.3d 880 (Fla 2d DCA 2020). The local government has to have the opportunity, using its own reasonable procedures, to decide and explain the reach of a challenged regulation. Golfrock v. Lee County, 247 So.3d 37 (Fla. 2d DCA 2018).

However, once an agency lacks discretion to permit development or the permissible uses of the property are known to a reasonable degree of certainty, a takings claim is likely to have ripened. Palazzolo v. Rhode Island, 533 U.S. 606 (2001); Golfrock v. Lee County, 247 So.3d 37 (Fla. 2d DCA 2018). Further, a claim of regulatory taking caused by a plan adoption must be brought within the four year statute of limitations from the date property was determined to be unbuildable. Sutton v. Monroe County, 34 So.3d 22 (Fla. 3d DCA 2009); Shands v. City of Marathon, 999 So.2d 718 (Fla. 3d DCA 2008). In Florida, this raises the question of whether a claimant must have attempted to obtain just compensation under the Bert J. Harris process (discussed below) prior to bringing a takings claim.

6) Due Process vs. Takings

The Supreme Court has historically had difficulties distinguishing the proper roles of the Due Process and Takings Clauses in the area of government regulation. This has resulted in some mingling of the two standards over the years. For example, in the case of Agins v. City of Tiburon, 447 U.S. 255 (1980), the Court stated that a land use regulation does not effect a taking if it “substantially advances legitimate state interests.” This is a traditional due

process analysis akin to whether a regulation is rationally related to a legitimate government interest. However, the Court has come back now in Lingle v. Chevron U.S.A. Inc., 544 U.S. 528 (2005), and attempted to re-establish separate standards, by holding that whether a regulation “substantially advances legitimate state interests” is an inquiry for due process and is not proper for the takings analysis.

7) Public Use Doctrine

The only inquiry into the validity of a taking or the exercise of eminent domain is whether the property is taken for a public use. That standard has historically been very deferential to the local government, and, in 2005, the Supreme Court reaffirmed that standard by holding that a City could use their powers of eminent domain to affect an economic redevelopment project, even though the property would be taken from one private individual and transferred to another so long as the taking serves an overall public purpose. See Kelo v. City of New London, 545 U.S. 469 (2005), reh. den. 545 U.S. 1158 (2005). However, in Florida, this power has been significantly limited by a 2006 Amendment to the Florida Statutes which states that the taking of private property for the elimination of a nuisance does not constitute a “public purpose” as required by Article X of the Florida Constitution. Section 73.014, Florida Statutes.

2. Equal Protection

Fourteenth Amendment equal protection issues generally arise when a local government regulation or decision is alleged to have discriminated against a recognized suspect class, such as race, or a fundamental right, such as voting. In land use cases, equal protection issues have arisen where housing types or the density of housing developments has allegedly precluded a class of people from a community. Heightened scrutiny is given to a regulation which impinges on a suspect class or fundamental right, but otherwise the courts traditionally have been very deferential to the government and will uphold the regulation.

Property owners may raise an equal protection claim based on an application of land use regulations. City National Bank of Florida v. City

of Tampa, 67 So.3d 293 (Fla. 2d DCA 2011); see City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985). Courts have also recognized in recent years that one can allege that it constitutes a “class of one.” The courts have recognized a possible equal protection claim where a proposed land use project has been singled out and treated differently from other similar properties for no rational reason. City National Bank of Florida v. City of Tampa, 67 So.3d 293 (Fla. 2d DCA 2011). However, arbitrary administration of an ordinance withholds purposeful discrimination, does not violate the equal protection clause. See Bondar v. Town of Jupiter Inlet Colony, 321 So.3d 774 (Fla. 4th DCA 2021).

3. First Amendment

The First Amendment of the United States Constitution provides in relevant part as follows:

Congress shall make no law respecting an establishment of religion or prohibiting the exercise thereof; or breaching the freedom of speech or of the press; or the right of the people to peacefully to assemble and to petition the government for readdress of grievances.

The First Amendment has been applied to states under the Fourteenth Amendment of the Constitution of the United States, which provides that no state shall make or enforce any law which shall abridge the privileges or immunities of any citizen of the United States.

a. Freedom of Speech

Regulations which often raise freedom of speech concerns include those relating to signs, billboards, flags, and adult entertainment. Each method of communication is a “law unto itself” and that law must reflect the “differing natures, values, abuses and dangers” of each method. Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981).

It has long been held that freedom of speech may be subject to reasonable time, place and manner restrictions. City of Ladue v. Gilleo, 512 U.S. 43 (1994). Such restrictions are valid so long as they are justified without reference to the content of the speech, are narrowly tailored to serve the governmental interest and leave open ample alternative channels for communication. Perry Educ. Ass'n. v. Perry Local Educators' Ass'n., 460 U.S. 37 (1983); see also, City

of Ft. Lauderdale v. Chuanwen Wang, 115 So.3d 1060, (Fla. 4th DCA 2013).

In land use cases, often surround issues related to speech generally and commercial speech specifically. The courts have repeatedly found that the First Amendment provides a lesser protection to commercial speech than to other constitutionally guaranteed expression. Central Hudson Gas & Electric Corp. v. Public Service Comm'n, 447 U.S. 557 (1980). There is a four part test for determining the validity of governmental restrictions on commercial speech, which provides as follows: (1) First Amendment protection only exists if the speech concerns lawful activity and is not misleading; (2) the restriction implements a substantial governmental interest (such as traffic safety and appearance of the City); (3) the restriction directly advances that interest; and (4) it reaches no further than necessary to accomplish that interest. Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981). The third and fourth prongs of this test are the most difficult to adequately address for a local government.

For non-commercial signs, these standards are even more restrictive. Content based signage restrictions can stand only if they can withstand strict scrutiny which requires the local government to prove the restriction furthers a compelling state interest and is narrowly tailored to achieve that interest. Reed v Town of Gilbert, 135 S.Ct. 2218 (2015); See also, Citizens United v. Federal Election Comm'n, 558 U.S. 310 (2010); See also, Solantic, LLC v. City of Neptune Beach, 410 F.3d 1250 (11th Cir 2005). The Supreme Court overturned a temporary sign ordinance that had differing standards depending on the purpose of the sign stating that the Town of Gilbert's content based signage requirements did not further a compelling state interest and were not narrowly tailored to that end. See Reed.

Chapter 479, Florida Statutes, provides additional state sign regulation regarding outdoor advertising, but such regulation does not prevent local regulations. Section 479.155, Florida Statutes.

b. Freedom of Religion

Although rarely a concern with land use and zoning regulations, land development laws have not generally been volatile of The First Amendment. A law that is neutral and of general applicability need not be justified by a compelling governmental interest even if it has an incidental effect on burdening a particular religious practice.

Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993). The Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA) protects uses from zoning ordinances that impose a substantial burden on the exercise of religion. Where land development regulations treat religious organizations differently than social organizations, one may be in violation of the equal items violation under (RLUIPA). Konikov v. Orange County, Florida, 410 F.3d 1317 (11th Cir. 2005). A similar standard has been utilized in determining whether the zoning ordinance has violated Section 761.02-761.05, Florida Statutes, The Florida's Religious Freedom Restoration Act. See Warner v. City of Boca Raton, 887 So.2d 1023 (Fla. 2004), reh. den.; First Baptist of Perrine v. Miami-Dade County, 768 So.2d 1114 (Fla. 3rd DCA 2000), reh. den., rev. den. 790 So.2d 1103 (Fla. 2000). A substantial burden is one which places more than an inconvenience on religious exercise, but results in significant pressure which directly coerces the religious practitioner to conform his or her behavior accordingly. Midrash Sephardi v. Town of Surfside, 366 F.3d 1214 (11th Cir. 2004), reh. den. 116 Fed. App. 254 (11th Cir. 2004), cert. den. 543 U.S. 1146 (2005); Warner v. City of Boca Raton, 887 So.2d 1023 (Fla. 2004), reh. den. However, the standard does not require the complete surrender of religious beliefs, modified behavior may be adequate, if the result of the governmental coercion or pressure. Thai Mediation Assn. of Alabama, Inc. v. City of Mobile, Alabama, 980 F.3d 821 (11th Cir 2020).

B. Other Notable Federal Limitations

1. Section 1983

a. Generally.

Section 1983 of Title 42, United States Code, provides a remedy for the violation of one's rights under the federal constitution or statutes if the violation occurs under "color of state law." This law has permitted recovery of monetary damages for injury to one's property rights without having to proceed directly under the United States Constitution. Lynch v. Household Finance Corp., 405 U.S. 538 (1972), reh. den.. The defendant may be a local government under the landmark case of Monell v. Department of Social Services, 436 U.S. 658 (1978).

Federal Courts have acknowledged that a property owner may raise an equal protection claim based on land use regulation. City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985); Eide v.

Sarasota County, 908 F.2d 716 (11th Cir. 1990). To support a due process claim for damages under § 1983 based on a violation of substantive due process rights, a property owner must show (1) it has been deprived of a constitutionally recognizable interest and (2) the deprivation was the result of arbitrary and capricious action by the local government. Pinellas County v. The Richman Group, 253 So.3d 662, (Fla. 2d 2017). Additionally, Plaintiff may allege that it is a “class of one” where it has been intentionally treated differently from others similarly situated and there is no basis for that treatment. Village of Willowbrook v. Olech, 528 U.S. 562 (2000); City National Bank of Florida v. City of Tampa, 67 So.3d 293 (Fla. 2d DCA 2011).

b. Elements of a Claim.

A claim under Section 1983 will not be successful unless the following elements are established:

- (1) Deprivation of a federal right,
- (2) Deprivation occurred under color of state law,
- (3) Injury in fact has been sustained due to the deprivation
- (4) The defendant is not immune from suit, and
- (5) More than nominal damages have been sustained

See Monroe v. Pape, 365 U.S. 167 (1961); overruled in part by Monell v. Department of Social Services, 436 U.S. 658 (1978).

In the zoning context, the issue is whether the government’s action bore any substantial relationship to the public welfare. Executive 100, Inc. v. Martin County, 922 F.2d 1536 (11th Cir 1991). If the government action is fairly debatable, there is not a denial of substantive due process. Further, arbitrary conduct that might violate zoning regulations as a matter of state law is not sufficient to demonstrate conduct so outrageously arbitrary to constitute a gross abuse of authority that will offend the due process clause. Natale v. Town of Ridgefield, 170 F.3d 258 (2nd Cir 1999); Pinellas County v. Richmond Group of Florida, Inc., 253 So.3d 662 (Fla. 2d 2017). Resident opposition, provided by legitimate concerns can provide a national basis for a government’s land use decision. Pinellas County v. Richmond Group of Florida, Inc., 253 So.3d 662 (Fla. 2d 2017).

c. Immunity.

While acting in one's official capacities, regional and local officials appear to have qualified immunity under Section 1983, generally.

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Lake County Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391 (1979). Qualified immunity means that an official is immune if his conduct "does not violate clearly established statutory or constitutional right of which a reasonable person would have known. Harlow v. Fitzgerald, 457 U.S. 800 (1982). However, absolute immunity can be appropriate for governmental officials in a quasi-judicial function. Cleavinger v. Saxner, 474 U.S. 193 (1985); Butz v. Economou, 438 U.S. 478 (1978); see also, Berkos v. Village of Wellington, unreported decision 2003 WL 21383886 (S. D. Fla. 2003).

2. The 1996 Telecommunications Act

While the 1996 Telecommunications Act, 47 U.S.C. Section 332, states that local governments may regulate the placement, construction and modification of personal wireless service facilities, including cellular telephone towers, the Act does put some limitations on this authority. Such regulation cannot unreasonably discriminate among providers of functionally equivalent services and cannot prohibit personal wireless services. The adverse impact of a tower on property values and safety concerns can support a denial under the 1996 Telecommunications Act. Michael Linet, Inc. v. Village of Wellington, 408 F. 3d 757 (11th cir. 2005). Further, the Act places some requirements on the processing of applications to construct such facilities. However, the Act does not prohibit the establishment of a moratorium of a reasonable length in order to adopt or amend regulations. Sprint Spectrum v. City of Medina, 924 F.Supp. 1036 (W.D. Wash. 1996); but see Sprint Spectrum v. Jefferson County, 968 F.Supp. 1457 (N.D. Ala. 1997). This applies equally to amateur radio operator towers. City of Rancho Palos Verdes v. Abrams, 544 U.S. 113 (2005).

C. Other Notable Statutory Limitations

1. Comprehensive Planning Under Chapter 163

As discussed above, Chapter 163 provides certain minimum requirements, but generally allows significant leeway as to how an individual government will comply with the requirements.

2. Right to Farm Act, Agricultural Exemptions

Section 823.14 (6), Florida Statutes, provides that a local government may not adopt regulations which limit the activities of a farm operation on lands classified as agricultural and where such activity is regulated through best management practices. See also, Section 163.3162 (4), Florida Statutes. A

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local government may enforce regulations which predated the Right to Farm Act, and is not totally preempted from regulating agricultural uses. Wilson v. Palm Beach County, 62 So.3d 1247 (Fla. 4th DCA 2011). Non-residential farm buildings are exempt from any county or municipal code or fee. Section 604.50(1), Florida Statutes. See 14269 BT LLC v. Village of Wellington, Florida, 240 So.3d 1 (Fla. 4th DCA 2018).

3. Short Term Vacation Rentals

Section 509.032(7)(b), Florida Statutes, prohibits a local government from banning vacation rentals. The preemption does not apply to any local ordinance or regulation adopted on or before June 1, 2011.

4. Other Miscellaneous Statutory Limits

It should be noted that the Legislature has selectively limited or totally preempted local government control of certain uses. There is no consistent theme to those types of state limitations. For example, vacation rentals are largely preempted pursuant to Section 509.032(7), Florida Statutes, as are family daycare and community residential homes pursuant to Section 166.0445, Florida Statutes. Honeybee colonies and farm buildings, fences, and signs are largely preempted from local government regulation. See Sections 586.10, Florida Statutes and 604.50, Florida Statutes, respectively. Further, there is a limitation placed on regulation of other uses such as farm worker housing. See Section 381.00896, Florida Statutes. Regulation of hoisting equipment is preempted under Section 489.113(11), Florida Statutes, as are the off premises sale of malt beverages, pursuant to Section 563.02(1)(a), Florida Statutes. Agritourism is one of the most recent businesses protected from local regulation. Section 570.85, Florida Statutes. In short, one should carefully review Florida Statutes prior to regulating any particular use.

5. Property Rights, Dispute Resolution and Exactions.

In 1995, the Legislature adopted regulations which broaden the protection for individual property owners beyond that which had been traditionally recognized by the courts under the Constitution. These new protections are contained in the Bert J. Harris Private Property Rights Act (“Harris Act”) and the Florida Land Use and Environmental Dispute Resolution Act, now codified in Chapter 70, Florida Statutes. In 2015, the Legislature added statutory protection for property owners related to exactions. The Bert J. Harris Act was found constitutional in Brevard County v. Stack, 932 So.2d 1258 (Fla. 5th DCA 2006), rev. den. 949 So.2d 197 (Fla. 2007).

a. Bert J. Harris Private Property Rights Protection Act (Section 70.001, Florida Statutes)

1) Purpose

The intent of the legislation is to provide remedies for owners of real property where the existing use of the property has been inordinately burdened by state, regional or local governmental action. These actions or the effects of the actions are to be viewed as something which does not rise to the level of a taking of private property, as has been defined in current case law. Section 70.001(2), Florida Statutes.

2) The Heart of the Private Property Rights Protection Act

When a specific action of a governmental entity has inordinately burdened an existing use of real property or a vested right to a specific use of real property, the property owner of that real property is entitled to relief, which may include compensation for the actual loss to the fair market value of the real property caused by the action of government, as provided in this section. Section 70.001(2), Florida Statutes.

The Act protects against government action, not government inaction. Boca Center at Military, LLC v. City of Boca Raton, 312 So.3d 920 (Fla. 4th DCA 2021).

3) Exemptions

Pursuant to Section 70.001(30), Florida Statutes, the following claims are not eligible for Harris Act claims:

- a) Rules, regulations and ordinances adopted prior to May 11, 1995;
- b) Those related to the “operation, maintenance or expansion of transportation facilities”; Section 70.001(10)(a), Florida Statutes.
- c) Those related to eminent domain; and
- d) Those related to the adoption of Flood Insurance Rate Maps, unless they are incorrectly applied to

property. Section 70.001(10)(b), Florida Statutes. See Bair v. City of Clearwater, 196 So.3d 577 (Fla.2d DCA 2016).

4) Definitions

Definitions (or the lack thereof) are the key to this Act.

- a) “Property Owners” who can take advantage of the Harris Act are limited to those persons with legal title to the property and that are the “subject of and directly impacted” by the action of a governmental entity. Neighboring property owners cannot make a Harris Act claim. Vale v. Palm Beach County, 259 So.3d 951 (Fla. Dist. Ct. App. 2018). However, governmental entities may not be “property owners” under the Harris Act. Section 70.001(3)(f) and (g), Florida Statutes.
- b) An "existing use" is defined as not only an actual, present use but includes:

Such reasonable foreseeable, non-speculative land uses which are suitable for the subject real property and compatible with adjacent land uses and which have created a fair market value in the property greater than the fair market value of the actual, present use.

This definition is quite broad and may allow a property owner to bring action against the County if they had intended to establish a land use of sometime in the future, even if there were no current or past approvals. Section 70.001(3)(b), Florida Statutes. However, if the property has previously been approved as a conservation or preservation area as part of a larger development and development rights for the conservation or preservation area had been transferred to other parts of the development, no Harris Act claim will exist. See Palm Beach Polo, Inc. v. Village of Wellington, 918 So.2d 988, (Fla. 4th DCA 2006), rev. den 929 So.2d 1053 (Fla. 2006). Denial of a permit extension for a time limited conditional use does not constitute an inordinate

burden on property. Holmes v. Marion County, 960 So.2d 828 (Fla. 5th DCA 2007),.

- c) "Inordinate burden" is defined as any action by a government agency which directly restricts and limits the use of real property so that the property owner is permanently unable to obtain the reasonable, investment backed expectation of an existing use of the property or a vested right to a use, or that the property owner is left with uses which are unreasonable such that the property owner bears a disproportionate burden for the public good. Section 70.001(3)(e), Florida Statutes. However, a temporary impact that is in effect for more than one year may, "depending upon the circumstances", constitute an inordinate burden. Closure of a public road does not inordinately burden an existing use or vested property right. City of Jacksonville v. Coffield, 18 So.3d 589 (Fla. 1st DCA 2009), reh. den. 23 So.3d 711 (Fla. 2009).
- d) The term "disproportionate burden" is not defined and no minimum amount or percentage specified.

5) The Pre-Litigation Procedures

Section 70.001(11), Florida Statutes, has been the most litigated portion of the Harris Act. A property owner must file a claim within one year of the action which impacted the property. Failure of a local government to take action (such as failure to rezone a property) does not constitute grounds for a Harris Act claim. Boca Center at Military, et. al. v. City of Boca Raton, 312 So.3d 920 (Fla. 4th DCA 2021). A property owner may maintain an action pursuant to the Harris Act only after the property owner has sought a permit variance or other formal relief from the local government. See, GSK Hollywood Development Group, LLC v. City of Hollywood, 246 So.3d 501 (Fla. 4th DCA 2018); City of Jacksonville v. Smith, 159 So.3d 888 (Fla. 1st DCA 2015), but see, Citrus County v. Halls River Development, Inc., 8 So.3d 413 (Fla. 5th DCA 2009). This section provides that as of a statutory amendment in 2011, the law or regulation is considered applied if the impact of the law or regulation is clear or unequivocal and notice is provided to the property owner or the registered agent. Such notice has to be given

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after enactment of the law or regulation, inform the owner the law or regulation may impact the owner's property rights and the one-year time to pursue an action under this statute. If no written notice is provided, the property owner may notify the head of the government entity that the property owner deems the impact or law is a clear and unequivocal and this starts a 45 day clock for the local government to respond without the property owner having to file for a development order, permit or building permit. Section 70.011(11)(b), Florida Statutes. Otherwise, the law is applied upon a formal denial of a written decision or variance. A written claim must be presented to the head of the agency along with valid pre-regulation and post-regulation appraisals to support the claim and the loss in fair market value. Osceola County v. Best Diversified Inc., 936 So.2d 55 (Fla. 5th DCA 2006), rev. den. 945 So.2d 1289 (Fla. 2006). The appraisals must be limited to the claimant's property. Turkali v. City of Safety Harbor, 93 So.3d 493 (Fla. 2d DCA 2012).

6) Filing the Claim

This claim must be presented to the agency no fewer than 90 days prior to the filing of the action in circuit court. Section 70.001(4), Florida Statutes. All prerequisites to filing must be met. Sosa v. City of West Palm Beach, 762 So.2d 981 (Fla. 4th DCA 2000), reh. den. The government must provide written notice to all parties involved in the action as well as contiguous property owners. A local government receiving a pre-suit notice is not a party to pending litigation and therefore is not eligible to conduct a closed attorney-client meeting pursuant to Section 286.011(8), Florida Statutes; AGO 2009-25.

During the 90 day notice period, unless extended by the parties, the government must make a written statement offer to the property owner which does one of the following things:

- a) provides for an adjustment of the standards of the permit;
- b) increases or modifies the density;
- c) provides for a transfer of development rights;

- d) results in a land swap;
- e) provides for mitigation or payment in lieu of onsite mitigation;
- f) provides for location of development on the least sensitive portion of the site;
- g) conditions the amount of development;
- h) requires issues to be addressed on a more comprehensive basis;
- i) issues an order, variance or special exception;
- j) purchases some or all of the real property; or
- k) results in no changes.

If the property owner accepts the offer, the parties may implement the offer. Section 70.001(4)(c), Florida Statutes. Settlement offers are presumed to be in the public interest. Section 70.001(4)(D), Florida Statutes. If the terms of the offer would cause an order to be issued in violation of any existing rules or ordinances, such as the Land Development Code or Comprehensive Plan, the order must be the appropriate relief for the property owner while protecting the public interest served by the regulations. See, e.g. City of Miami Beach v. Chisolm Properties South Beach, Inc., 830 So.2d 842 (Fla. 3rd DCA 2002), reh. den.; Rainbow River Conservation, Inc. v. Rainbow River Ranch, LLC, 189 So.3d 312 (Fla 5th DCA 2016).

If the development order would be in violation of a statute, then the government and the property owner must jointly file an action in Circuit Court for approval of the settlement agreement. Section 70.001(4)(d), Florida Statutes. In this scenario, the judge must determine that the violation of the statute would still protect the public interest.

If a settlement agreement is not accepted, the government must issue a written report detailing the uses available to the property, known as the “statement of allowable uses”. This

is the last action required of the government prior to the property owner filing an action in Circuit Court.

Because of the complexities of land use regulations, there may be situations in which multiple agencies will be involved. In those instances, each agency shall have proportionate involvement in each phase of the process, dependent upon the extent of their involvement in the regulations.

It is not necessary to file suit against the local government to settle a case under Harris Act. Charlotte County Park of Commerce, LLC v. Charlotte County, 927 So.2d 236 (Fla. 2d DCA 2006). A settlement agreement under the Harris Act is a quasi-legislative act and thus, the proper method of attack is a suit in circuit court for declaratory or injunctive relief on the grounds the action is arbitrary capricious, confiscatory or violative or constitutional guarantees. City of Homestead v. United States of America, 346 So.3d 1205 (Fla. 3d DCA 2022).

7) The Litigation Process

In instances where a settlement agreement and statement of allowable uses are not accepted, the matter may proceed to trial. A property owner's action under the Harris Act is subject to the four year statute of limitations. Russo Associates, Inc. v. City of Dania Beach Code Enforcement Board, 920 So.2d 716 (Fla. 4th DCA 2006). The status of limitations begins running from the date of denial of the permit. Wendler v. City of St. Augustine, 108 So.3d 1141 (Fla. 5th DCA 2013). The Circuit Court judge shall determine whether an existing use or a vested right existed on the property. The settlement offer and the ripeness decision will be considered and determine if the government has inordinately burdened the property. If this includes the action of more than one agency, the court will also decide the percentage of responsibility for each agency. Non-final orders of a Circuit Court finding a local government and state agency liable under the Harris Act are not appealable despite Section 70.001(6)(c), as the constitution does not allow the Legislature to provide for interlocutory appeals. Osceola County v. Best Diversified, Inc., 830 So.2d 139 (Fla. 5th DCA 2002), reh. den. The court will impanel a jury to determine the total amount of compensation, unless the

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property owner elects to forego a jury and have the court determine the award of compensation. Section 70.001(^)(b), Florida Statutes. The award shall include reasonable costs and attorney's fees, and prejudgment interest to the prevailing party.

8) Limitations

The Harris Act waives sovereign immunity of government but only to the extent specifically provided under Section 70.001 (13), Florida Statutes.

9) Constitutionally

The Harris Act has been found by the Courts to not violate due process, not violate the separation of powers doctrine and not unconstitutionally delegate legislative powers to the Court. Brevard County v. Stack, 932 So.2d 1258 (Fla. 5th DCA 2006), rev. den. 949 So.2d 197 (Fla. 2007).

b. Exactions

In 2015, the Legislature enacted Section 70.45, Florida Statutes, which places statutory limits on exactions. A prohibited exaction is any condition imposed on a property owner's use of real property that lacks an essential nexus to a legitimate public purpose and is not roughly proportionate to the impacts of the proposed use that the government entity seeks to avoid or mitigate. Section 70.45(1), Florida Statutes.

1) Damages.

The property owner can bring an action to recover damages caused by the prohibited exaction. Impact fees adopted under 163.31801, Florida Statutes and non-ad valorem assessments cannot be subject to an action under this section. See Section 70.45(2), Florida Statutes.

2) Burdens.

The governmental entity has the burden of proving the exaction has the required nexus to bring the claim. The property owner has the burden of proving damages. See Section 70.45(4), Florida Statutes.

- c. Florida Land Use and Environmental Dispute Resolution Act, Section 70.51, Florida Statutes.

This section deals with all existing regulations as well as any which may be adopted in the future.

- 1) Purpose

This Act requires government agencies to enter into a form of mediation with property owners and deals not only with laws and ordinances but also with "Development Permits." Development permits are defined as building permits, subdivisions approvals, special permits, variances or other similar action. Generally, the only land use and zoning applications specifically exempted are comprehensive plan amendments. Filing under this Act is not a required precedent to the filing of a judicial action, and does not create a new cause of action.

The legislation requires the appointment of Special Magistrates who will oversee the proceedings. The government may adopt procedures to govern the conduct of these proceedings including the payment of the Special Magistrate's fees and expenses and the cost of providing notice. The cost is to be borne equally by the property owner and the government.

- 2) The Heart of the Dispute Resolution Act

Any owner who believes that a development order, either separately or in conjunction with other development orders, or an enforcement action of a governmental entity, is unreasonable or unfairly burdens the use of his real property, may apply within 30 days after receipt of the order or notice of the governmental action for relief under this section. Section 70.51(3), Florida Statutes.

- 3) General Description of Process

- a) A property owner must exhaust all local non-judicial remedies prior to filing a request under this section if those requests take no longer than 4 months. The time for bringing a judicial action or, in the case of an order issued by a state or regional agency, the time for challenging action is tolled until the Special

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Magistrate decision is final. Peninsular Properties Braden River, LLC v. City of Bradenton, 965 So.2d 160 (Fla. 2d DCA 2007), reh. den., rev. den. 974 So.2d 386 (Fla. 2008). However, election of the owner to file judicial action or action challenging the agency action will result in the owner waiving the right to Special Magistrate proceeding.

- b) To initiate a proceeding a property owner must file a request for relief with the head of the governmental entity. The government must file a copy of the request with the mutually agreed upon Special Magistrate within ten days of receipt. The government must also send a copy to contiguous property owners and any party that provided substantive testimony if they indicated a desire to receive notification of the proceedings. This will require that the case file contain a mailing list of persons who presented oral or written testimony and who have requested notice.

Pursuant to Section 70.51(6), Florida Statutes, the request for relief must contain:

- i) A brief statement of the owner's proposed use of the property;
 - ii) A summary of the development order with a copy attached;
 - iii) A brief statement of the impact to the proposed use of the property; and
 - iv) Proof that all parties have been served notice.
- c) The Special Magistrate may hold a hearing to determine if adequate information has been provided and may dismiss a request if the owner fails to provide the necessary information within a prescribed time period. Section 70.51(8), Florida Statutes.
 - d) The Special Magistrate will hold the hearing within 45 days of this receipt of the request for relief and the hearing must be held in the County in which the

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property is located. Section 70.51(15), Florida Statutes.

- e) Fifteen days after filing the request, the government entity shall file a response to the request with the Special Magistrate and a copy to the owner. The response should include an explanation of the public purpose of the regulation or action. Section 70.51(16), Florida Statutes.
- f) Pursuant to Section 70.51(17), Florida Statutes, the hearing is to be informal and open to the public and should not require the use of an attorney. Any owner of contiguous property who is substantially affected may request to participate in the proceeding, however, are not to be considered a party to the action. The responsibility of the Special Magistrate is to facilitate a resolution to the conflict. If the parties cannot reach a solution then the Special Magistrate shall consider all the facts and circumstances and make a determination about the reasonableness of the action. Pursuant to Section 70.51(18), the Special Magistrate shall consider the following:
 - i) the history of the property;
 - ii) the history of the development and use of the property;
 - iii) the history of environment protection and other land use controls affecting the property;
 - iv) the present nature and extent of the real property, including natural and altered characteristics;
 - v) the reasonable expectations of the owner;
 - vi) the public purpose sought to be achieved by the development order and whether the development order of action is necessary to achieve the public purpose; and

- vii) uses authorized for and restrictions placed on similar properties and any other relevant information.
- g) Pursuant to Section 70.51(19), Florida Statutes, within 14 days of the conclusion of the hearing, the Special Magistrate shall prepare and file a written recommendation. If the Special Magistrate finds that the local government order was not unreasonable, then the development order or the enforcement action will stand and the proceeding will end. If the Special Magistrate finds that the action was unreasonable or unfairly burdened the property, the Special Magistrate may recommend one or more alternative to the order which may include:
 - i) an adjustment of the land development or permit standards or other provisions controlling the development or use of land;
 - ii) an increase or modification of the density, intensity or use;
 - iii) a transfer of development rights;
 - iv) a land swap and exchanges;
 - v) a mitigation, including payments, in lieu of onsite mitigation;
 - vi) the location of development on least sensitive portion of the site;
 - vii) conditioning of the amount of development;
 - viii) the requirement that issues be addressed on a more comprehensive basis;
 - ix) issuance of an order, variance or special exception; and
 - x) the purchase of real property.
- h) After receipt of the Special Magistrate's recommendation, the governmental entity must

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accept the recommendation, modify the recommendation or reject the recommendation. Section 70.51(21), Florida Statutes. If the government accepts or modifies the recommendation and the owner rejects it or the government rejects the Special Magistrate's recommendation, the government must issue written findings outlining the use or uses available to the subject real property. Section 70.51(22), Florida Statutes.

This procedure may not continue for more than 165 days unless extended by agreement by both parties. Section 70.51(23), Florida Statutes. A decision describing the available uses constitutes the last prerequisite to judicial action and the matter is ripe for final proceedings. This section applies only to development orders issued, modified or amended or to enforcement actions issued on or after October 1, 1995. Section 70.51(30), Florida Statutes.

LAND USE¹
MULTIPLE CHOICE QUESTIONS

1. Under Chapter 163, all Comprehensive Plans must contain all but which of the following elements:
 - A. Future Land Use Element
 - B. Recreation and Open Space Element
 - C. Public Schools Facilities Element
 - D. Housing Element
2. Once the Comprehensive Plan is adopted, project approvals are reviewed based on which standard for compliance with the Comprehensive Plan?
 - A. Fairly Debatable
 - B. Substantial competent evidence
 - C. Strict scrutiny
 - D. Preponderance of the evidence
3. If a Plan Amendment reviewed under the Expedited State Review Process is found to be not in compliance with Chapter 163 by the Office of Economic Opportunity, the Administrative Law Judge must find the Plan Amendment to be in compliance with Chapter 163 unless:
 - A. The state land planning agency shows that the Amendment is not in compliance by a preponderance of the evidence.
 - B. The state land planning agency shows that it is fairly debatable whether the Amendment is not in compliance with Chapter 163.
 - C. The state land planning agency shows that the evidence presented at the hearing was incorrect or misleading.
 - D. The state land planning agency shows the Planning Director is insane.
4. Which of these are not required to be in the Land Development Regulations?
 - A. Signage regulations.
 - B. Vehicular parking provisions.
 - C. Subdivision regulations.
 - D. A zoning map.

¹ All multiple choice and essay questions are simply designed to make one think. The author has no knowledge of what may be on the actual test.

5. What is the term for a use which was a lawful use under the regulations in effect at the time it was approved or built, but which no longer conforms to the regulations is:
- A. An illegal use.
 - B. A nonconforming use.
 - C. A variance use.
 - D. An equitable right use.
6. The decision by a local government to approve a Comprehensive Plan amendment would be made at:
- A. An Administrative Hearing.
 - B. A Quasi-Judicial Hearing.
 - C. A Legislative Hearing.
 - D. A Judicial Hearing.
7. Which of the following due process requirements are necessary for a Quasi-Judicial hearing, but not a Legislative hearing?
- A. The ability to cross examine witnesses by the parties.
 - B. The ability for all participants to cross-examine witnesses.
 - C. The ability to question the decision makers.
 - D. All of the above.
8. Ex parte communications regarding an upcoming Quasi-Judicial hearing are:
- A. Presumptively prejudicial.
 - B. May violate the rights of third parties.
 - C. May be cause for the decision made at the hearing to be overturned.
 - D. All of the above.
9. Substantial competent evidence for a Quasi-Judicial matter probably would not include:
- A. Testimony of planning staff on the compatibility of a project on the neighborhood.
 - B. Testimony of an adjoining property owner on the potential noise impact on the neighborhood.
 - C. Testimony by the applicant's traffic consultant on the anticipated direction of the project traffic after it leaves the project.
 - D. The recommendation of the planning commission.

10. Which of the following types of land use proceedings are likely to be considered a quasi-judicial proceeding?
- A. County-wide zoning atlas amendments.
 - B. Variances.
 - C. Small area Comprehensive Plan Amendments.
 - D. B and C.
11. Failure to give proper notice of a required public hearing will result in the action taken on the matter considered to be void ab initio unless the following is found to exist:
- A. The objecting person received a written notice 48 hours prior to the hearing by certified mail, return receipt requested.
 - B. The objecting person has waived the objection or is estopped from objecting to notice through participation in the hearing.
 - C. The objecting person is provided an opportunity to ask the governing body to reconsider its action.
 - D. There is no situation where failure to give proper notice will result in the action not being void ab initio.
12. A local government's ability to regulate speech is greatest in a:
- A. Public forum.
 - B. Quasi public forum.
 - C. Non public forum.
 - D. A local government may never regulate speech pursuant to the First Amendment of the U.S. Constitution.
13. The 1996 Telecommunications Act prohibits:
- A. The regulation of the placement of personal wireless service facilities.
 - B. Moratoria on the regulation of personal wireless service facilities.
 - C. Regulation which prohibits personal wireless service facilities.
 - D. All of the above.
14. The "Bert J. Harris" Private Property Rights Act (Harris Act) allows an order issued pursuant to a settlement offer to violate a state statute upon approval of:
- A. The neighboring property owners.
 - B. The Florida Legislature.
 - C. A circuit court judge.
 - D. The Governor and Cabinet

15. Quasi-judicial decisions which are appealed to Circuit Court are reviewed:
- A. Based solely on the record before the deciding body below.
 - B. Based on the record before the deciding body below supplemented by the testimony of expert witnesses.
 - C. In a de novo proceeding.
 - D. Based on the briefs of the parties.
16. Section 1983 of Title 42 of the United States Code provides a remedy for the violation of one's rights if the violation occurs under "color of state laws." A lawsuit under this Section may be brought against:
- A. A local government official.
 - B. A local government.
 - C. Both A and B.
 - D. Neither A nor B.
17. Under the Florida Constitution, a government which has "such powers of self-government as is provided by general or special law" is a:
- A. Township
 - B. Municipality
 - C. Charter county
 - D. Non-charter county.
18. The Capital Improvement Element of a Comprehensive Plan does not have to address which of the following:
- A. A level of service for local government facilities.
 - B. A means to correct existing public facility deficiencies.
 - C. The assured funding of all identified projects to fund facilities in the five year construction program.
 - D. The level of priority of funding for any project.
19. Which of the following elements need not be established to obtain vested rights?
- A. That the property owner acted in good faith.
 - B. That special conditions exist which are peculiar to the land.
 - C. That the local government committed an act or omission.
 - D. That the property owner made a substantial change in position or incurred such extensive obligations or expenses that it would be unjust to destroy any rights acquired.

20. Under Section 162.09, Florida Statutes, a code enforcement board, upon a finding of a repeat violation of an ordinance and without further action by a County or City governing body, may impose the following:
- A. A fine not to exceed \$500.00 unless the violation is irreparable or irrevocable, then the fine may be up to \$5,000.00 per day. In either case, it may include all costs of repairs.
 - B. Either a fine not to exceed \$500.00 or by imprisonment in the county jail not to exceed 60 days, but not both.
 - C. A fine not to exceed \$250.00, but no imprisonment in jail as the Code Enforcement Board may not impose criminal sanctions.
 - D. Death.

BONUS: Who said the following: “The right to be heard does not automatically include the right to be taken seriously.”

- A. Philosopher Will Rogers
- B. Former Vice President Hubert Humphrey
- C. Faux Newsman Jon Stewart
- D. Former President George W. Bush

LAND USE¹
ESSAY
QUESTION 1

Rich deVeloper, first cousin of the Chairman of the five-member City Commission, requests approval of a rezoning and site plan for a new 600-acre theme park, Ditsyland. Mr. deVeloper meets with each Commissioner before the hearing to show the site plan and answer questions. Any member of the public could attend the meetings and notices of the individual meetings were posted on the Commission office door.

The Commission hearing was held at 5:00 p.m. After a lengthy slide presentation by deVeloper's attorney, one neighbor presented arguments in opposition to the application. Lulu Nimby, a real estate agent, stated the project would create serious traffic problems as the road to Ditsyland was already functioning below the City's adopted level of service. Although the development was in the City, the road was a County road. She also indicated she had seen an endangered species, Greenbilled Money Suckers, just last week. Lastly, Lulu stated the project was not compatible with her single-family residential neighborhood, where she had lived for the past ten years. Lulu used to be the Chairman's fiancé, but left him at the altar 15 years ago. Lulu left the hearing after testifying to check on her car, but when she returned the doors were locked for safety reasons and she could not return to the meeting to hear rebuttal by deVeloper's attorney or discussion prior to the Board's vote.

The Commission approved Ditsyland, but placed several conditions on the approval, including a requirement to add two (2) miles of two (2) additional lanes to the road running both to and from the proposed development and construction of a new dam on the local river, to ensure an adequate water supply for the project. Developer is also required to pay transportation impact fees in addition to the improvements. As City Attorney, what issues raise potential concern?

¹ All multiple choice and essay questions are simply designed to make one think. The speaker/author has no knowledge of what may be on the actual test.

QUESTION 2

In 1970, George and Gracie bought 400 acre parcel on Moccasin Wallow Road and a two lane shell road in rural Mosquito County (population 500). The property is located across the canal from the incorporated town of Hooterville. Moccasin Wallow Road is best known for the adjoining pig farms and, of course, the tendency for giant snakes to rest in the road on sunny days.

After 40 years, George and Gracie are set to retire and want to develop their property. They applied for and received a rezoning from Agricultural zoning to Mega Use zoning with approval of a site plan for 2,000 residential homes. After the five commissioners met one Sunday evening in George and Gracie's home (and enjoyed some of Gracie's prize winning apple pie), the Mosquito County Commission held a single public hearing and approved this request within 15 days of submittal to help spur economic development. As part of this request, the County agreed to fund the six laning of Moccasin Wallow Road. The six laning was needed to meet concurrency but the Comprehensive Plan did not indicate the project or any proposed funding for these improvements.

A homeowners group from a rural subdivision 1500 feet to the west on Moccasin Wallow Road filed a Section 163.3215, Florida Statutes, challenge to the approval alleging incompatibility of the project and potential traffic issues. The national "Save Our Snakes" Society has also filed a petition for writ of certiorari in circuit court alleging the approval will eliminate habitat for the protected Ruby-Backed Rattlesnake.

Six months after approvals were granted, the County discovered that the economy had shifted and the anticipated tax revenues were not going to occur. After the meeting, George and Gracie erected a sign 4 feet by 8 feet sign in their yard asking for people to pray for the Commissioners, but then adding that if the Commission revokes their zoning approval, then the scallywag Commissioners should be kicked out of office. The sign code does not address such signs, although it restricts the size of residential signs to real estate signs measuring 2 feet by 2 feet. However, Hooterville maintains a 6 foot by 8 foot electronic informational sign at the entrance to the City. The County Commission held an emergency meeting and at least two members want to eliminate the funding for the roadway improvements and revoke the zoning approval.

You are the newly appointed County Attorney attending your first County Commission meeting. What is your advice to the Mosquito County Commission?

QUESTION 3

The three (3)-story St. Nowhere Hospital is planning to build a new ten story, twenty (120) bed wing. The Planning Director for Medical Center City has raised three items that must be addressed before issuance of a building permit. Hospital uses are permitted uses under the city land development code.

- A. The hospital is located within an old 20-lot residential subdivision with each lot being 50 feet by 100 feet. St. Nowhere wants to build its new wing on the property line in part because it will provide improved visibility from travelers on Hawkeye Pierce Boulevard.
- B. The Planning Director notes the landfill has reached its capacity and that to approve the new wing of the hospital, St. Nowhere must construct a new recycling plant for Medical Center City. The level of service requirement under the Medical Center City Comprehensive Plan states as follows:

100 cubic yards of landfill space for each resident.

The city currently has a population of 1,000 residents. The landfill has a design capacity of 60,000 cubic yards, but has 10,000 cubic yards of capacity remaining in the landfill.

- C. Eighteen months ago, the city passed a new height ordinance which prohibits any construction in excess of three stories because “such construction blocks the public’s view of the natural beauty of the sun and the sky.”

St. Nowhere, being a generous hospital, has already agreed to give neighboring residents and the City Council free medical care for life if they will support the project. The neighbors are in full support of the project, except one neighbor who opposes the expansion “on principal.”

St. Nowhere approaches you to submit an application for a variance as its attorney and asks whether it is required to build the landfill. It also wishes your opinion as to the new height ordinance. What is your advice?

QUESTION 4

The Town Council of Just Green, Florida, is concerned about all the clutter on its highways and byways. The council has indicated that church and boy scout meeting temporary signs are always acceptable, but political signs should only be out for sixty days prior to the election and real estate and sandwich board signs are an abomination and should never be allowed. Additionally, the council is debating whether to ban offsite signs altogether, including billboards, but is worried about prohibiting political signs or those expressing political speech. However, roadway information signs are to be exempt from regulation.

You have been hired recently as city attorney. What is your advice to the Town Council?

LAND USE SAMPLE TEST KEY
(No peeking ahead)

Answers:

1. C; 2. C; 3. A; 4. D; 5. B; 6. C; 7. A; 8. D; 9. B; 10. B; 11. B; 12. C; 13. C;
14. C; 15. A; 16. C; 17. D; 18. C & D; 19. B; 20. A; Bonus: B

Essay Question 1 Issues

Does Chairman have a conflict of interest prohibiting his voting caused by

- First Cousin of developer?
- Former Fiancé Nimby?

Can developer meet with Commissioners ex-parte?

Is developer's attorney's presentation substantial competent evidence?

Is Nimby's testimony substantial competent evidence

- as to traffic?
- as to endangered species sighting?
- compatibility with neighborhood?

Do the locked doors constitute a due process violation?

What is the proper vehicle to challenge the Commission's decision?

- Section 163.3215 challenge?
- Petition for Writ of Certiorari?
- Declaratory Judgment action?

Are the required improvements appropriate?

Can the road improvements be required or only payments of the proportionate share of the cost of improvements? Should impact fee credits be granted for the moneys paid?

Can the exactions comply with the requirements of Section 70.45?

Essay Question 2 Issues

Is the rezoning quasi-judicial or legislative in nature?

Was the meeting at George and Gracie's a violation of the Sunshine Law?

Did it create Ex Parte issues?

Was the offer of pie a violation of ethical rules?

Was the hearing properly noticed?

Can the County approve the funding of the road improvements without the inclusion of Comprehensive Plan?

Does the subdivision of homeowners group have standing to file a Petition for Writ of Certiorari?

Does the Save Our Snakes Society have standing to file a Petition for Writ of Certiorari?

Would the removal of the approved improvements result in a taking? A Harris Act claim?

Can the funding removal be done by an emergency ordinance?

Can the zoning be revoked by an emergency ordinance?

Does the revoking of the zoning approval result in a taking? A Harris Act claim?
Should the County provide a written notice to the property owner if the rezoning approval is revoked?
Are the sign regulations content based?

Essay Question 3 Issues

Is the variance for a reduced setback proper?
Can the hospital give free medical care to neighbors? Is it relevant in the hearing?
Is the condition to construct a new recycling plant a relevant concurrency requirement? Does it meet the rational nexus test?
Is the new height ordinance a proper zoning regulation?
Does the new height ordinance create a taking? A Harris Act claim?

Essay Question 4 Issues

Are the sign regulations content based?
Can they stand up to the strict scrutiny standard?
Can the town prohibit signage outright?
If so, can it prohibit signs expressing political expression if it prohibits all such signage?
If not, are these content based distinctions that will withstand strict scrutiny?

2023 LAND USE AND ZONING
CITY, COUNTY AND LOCAL GOVERNMENT
LAW
CERTIFICATION REVIEW COURSE

1

1

PRESENTER

MARK P. BARNEBEY, ESQ.
BLALOCK WALTERS, P.A.



2

2

PRESENTER

MARK P. BARNEBEY, ESQ.
BLALOCK WALTERS, P.A.



3

3

THREE PART PRESENTATION

- Land Use Foundation
 - Quasi-Judicial v. Legislative
 - Other Constitutional and statutory considerations to keep you awake at night
- Bonus: Highlight Recent Cases

4

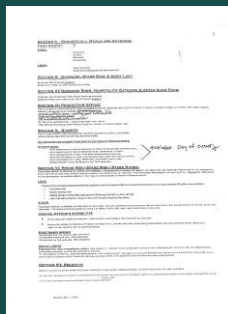
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WHY I LOVE LOCAL GOVERNMENT LAW

ALWAYS READ THE FINE PRINT

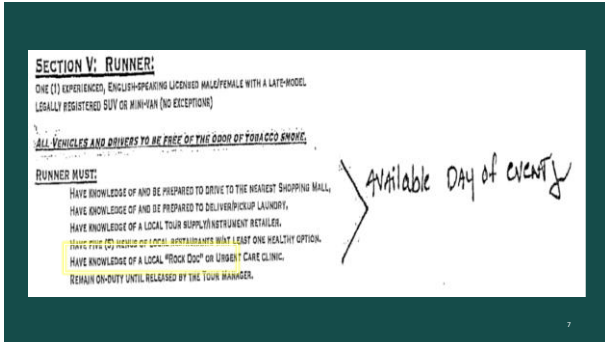
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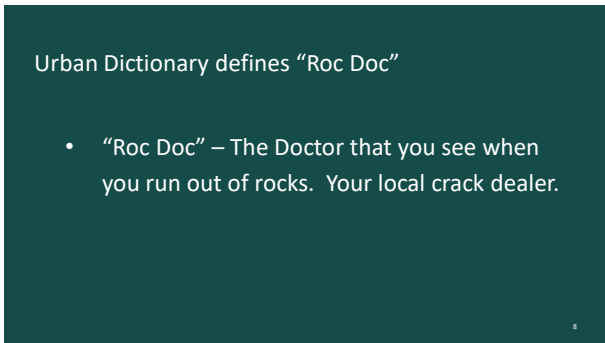


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8



9

*"If you do not know where you are going,
you'll end up somewhere else."*

Yogi Berra



10

FLORIDA STATUTORY AUTHORITY

- 1975: Legislature placed the first framework for comprehensive planning, but comprehensive planning was voluntary.
- 1985: Legislature felt there was a lack of planning by the cities and counties in the state.



11

FLORIDA STATUTORY AUTHORITY

The Local Government Comprehensive Planning and Land Development Regulation Act (1985) as modified by the Community Planning Act (2011).

- Specific Comprehensive Planning Authority.
- Section 163.3167, Florida Statutes, provides very specific authority for the adoption of comprehensive plans and management of growth.

12

Subsection (1) of the Act provides as follows:

The municipalities and counties shall have the responsibility:

- To plan for their future development and growth.
- To adopt and amend comprehensive plans to guide their future development and growth.
- To adopt appropriate land development regulations.

13

13

CAPITAL IMPROVEMENT ELEMENT

Capital Improvement Element



- Somewhat unique to Florida.
- Sets forth principles for construction, extension, or an increase in the capacity of public facilities.
- Covers a 5 year period.
- Help plan that public infrastructure is in place concurrent with development impacts or requires contributions to aid in addressing deficiencies.

14

CONCURRENCY

Must adopt Level Of Service Standards for:

- Potable Water
- Wastewater
- Drainage

15

15

CONCURRENCY

- By 2011, concurrency was optional for:
 - Transportation
 - Mass Transit
 - Parks
 - Schools (Although an interlocal agreement is still needed for schools.)
- (If one adopts LOS standards for transportation and schools, the statutes have some requirements for those standards.)

16

16

CONCURRENCY

- Statute no longer requires funding to be in place for projected levels of service.
- Projects needed to assure LOS compliance must be identified as:
 - Funded
 - or
 - Unfunded
- If unfunded, then must be prioritized in the plan.



17

17

FUTURE LAND USE ELEMENT

- Future Land Use Element to include a Future Land Use Map
 - Long range planning tool (usually a 20 year time horizon)
 - Must include distribution of uses for residential, commercial, industrial, agricultural and other key uses
 - Must provide a balance of use to foster vibrant viable communities and economic development opportunities
 - Must address compatibility
 - Encourage recreational and commercial waterfronts
 - Encourage schools near residences
 - Protect historic resources



18

18

OTHER REQUIRED ELEMENTS

- Transportation – focus on mobility (autos, transit, bicycles and pedestrians)
- Sanitary sewer, solid waste, drainage, potable water and groundwater aquifer recharge
- Conservation
- Recreation and open space
- Housing
- Intergovernmental Coordination
- Coastal (for coastal counties) – including high tide event, storm surge and sea level rise

19

19



COMPREHENSIVE PLAN ADOPTION AND AMENDMENT PROCESS

Unique from standard ordinance adoption.

Three different processes for Comprehensive Plan Amendment and Adoption:

- Expedited State Review Process
- State Coordinated Review Process (Certain areas of the state)
- Small Scale Review Process

20

20

EXPEDITED STATE REVIEW AND STATE COORDINATED REVIEW

- Unlike any other ordinances, Expedited State Review and State Coordinated Review involve state and agency review of ordinances before adoption.
- Requires at least two public hearings before the governing body with the second occurring after state and agency review and comment.

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SMALL AREA PLAN REVIEW PROCESS

- Generally, 50 acres or less
- Review does not require a transmittal hearing
- One public hearing
- Affected parties may file a petition with DOAH – State may not intervene
- DOAH required to expedite hearing

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ALSO UNIQUE

All three types of Comprehensive Plan adoption processes require challenge through a Chapter 120 Administrative Law challenge which is ultimately reviewable by the Governor and Cabinet sitting as the Administration Commission.



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SECTOR PLANS

- Optional
- Areas of at least 5,000 acres
- Plan shall:
 - Emphasize urban form
 - Protect regional resources and provide for public facilities



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SECTOR PLANS

- Regional Planning Council has a scoping meeting and makes recommendations on issues requested by the local government.
- Sector plans include:
 - Long term master plan
 - Two or more detailed plans

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EFFECT OF AN ADOPTED COMPREHENSIVE PLAN

Requirements of the comprehensive plan and all of its elements are strictly applied and compliance of other land use and zoning regulations and project approvals are reviewed on a basis of strict scrutiny.

However, the local government has the discretion to decide the maximum development density should not be allowed if the proposed use is not consistent with other comprehensive plan policies and the local government's decision is supported by substantial competent evidence.

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LAND DEVELOPMENT REGULATIONS (LDRS)

LDRs are required under Sections 163.3202 and 163.3194, Florida Statutes. LDRs are to be consistent with and implement the comprehensive plan. At a minimum, LDRs are required to include among other items:

- Regulate the subdivision of land;
- Regulate the use of land;
- Regulate drainage and stormwater management; and
- Protect environmentally sensitive lands.

A local government cannot make exceptions to LDRs unless the code specifically provides for it.

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ZONING CODE

Zoning is optional in the LDRs, but inclusionary zoning, planned-unit developments, impact fees and performance zoning are encouraged.

Zoning identifies current uses allowed, while Comprehensive Plans are longer range uses.

However, compliance of a Development Order with the Comprehensive Plan is based on the terms of the Comprehensive Plan, not the terms of the implementing LDRs or zoning.

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ZONING AND OTHER UNIQUE APPROVALS

- Standard Zoning
- Planned Development Zoning
- Overlay Zoning
- Conditional Use or Special Exception Approval
- Administrative Permits



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STANDARD ZONING

- Allows wide range of uses
- Cannot conditionally approve
- No binding site plan
- Once zoning is approved, any permitted use in that zoning category is allowed without additional public hearing

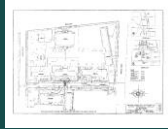


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PLANNED DEVELOPMENT ZONING

- Usually, a binding site plan
- Approval can be conditioned to ensure compliance with review criteria



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OVERLAY ZONING

- Unique conditions apply to a limited area
- Additional conditions to develop within that overlay area



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CONDITIONAL USES AND SPECIAL EXCEPTIONS

- Certain uses require additional criteria
- Significant enough to require public hearing
- Usually a binding site plan
- Applicant must establish it meets the criteria for approval, but if successful, burden shifts to local government to deny for inconsistency with the Comprehensive Plan.

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EXCEPTIONS TO CODES

- Non-conformities
- Vested rights
- Variances

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NON-CONFORMITIES

- Uses or structures in existence before code provisions
- Usually allowed to continue as long as not significantly intensified or changed



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VESTED RIGHTS

- Generally allows applications or construction in process to proceed
- Vested rights will exist if Developer:
 - Relied in good faith
 - On an act or omission of the governmental entity, and
 - Made a substantial expenditure or change in position



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VARIANCES

- Allows variation from code requirements
- Usually only allowed for dimensional variations (for example, setbacks)
- Traditionally limited to situations where:
 - Owner did not create need for variance
 - No reasonable use of the property can occur without the variance
 - Variance does not create unfair benefit for one property over another
- Communities are beginning to examine whether less stringent standards are appropriate in some situations

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RECENT CASE

Can a local government act outside of provisions of land development regulations?

No.

Plymouth Land Owners' League, Inc. v. Lake County, 279 So.3d 1284 (Fla 5th DCA 2019)

- County Commission cannot grant waivers or exceptions if the LDRs do not permit it.

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Braden Woods Homeowners Association, Inc. v. Mavard Trading, LTD., 277 So.3d 664 (Fla 2d DCA 2019) .

- County Development Director administratively approved freestanding emergency room in zoning category which allowed clinics, but not a hospital. Court ruled this was not consistent with the Code. Also, the County argued the association had an ability to appeal the Administrative Determination which association failed to pursue, but the Court said an ultra vires act does require exhaustion of administrative appeals.

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PROCESSING APPLICATIONS FOR DEVELOPMENT ORDERS OR DEVELOPMENT PERMITS

There are time restrictions on permitting:

- Thirty days for local government to determine completeness of application;
- Thirty days for applicant to respond;
- Local government must approve, deny or approve the application with conditions within 180 days after determining an application is complete for quasi-judicial matters and 120 days for other applications.

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DEVELOPMENTS OF REGIONAL IMPACT (DRI)

Section 380.06, Florida Statutes, required a special review for a project which may significantly affect more than one jurisdiction called a DRI

- Large Projects
- Unique Projects

Slowly being phased out

Not required for new development

Existing DRI development orders remain in effect unless abandoned



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LAND USE/ZONING & PRACTICE & PROCEDURES BEFORE LOCAL GOVERNMENT LEGISLATIVE AND QUASI- JUDICIAL BODIES

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QUASI-JUDICIAL DEFINED



The action, discretion, etc., of public administrative officers or bodies, who are required to investigate facts, or ascertain the existence of facts, hold hearings, weigh evidence, and draw conclusions from them, as a basis for their official action, and to exercise discretion of a judicial nature.

Black's Law Dictionary 1245 (6th ed., West 1990)

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HISTORICAL PATH TO SNYDER

Until 1993

- zoning and rezoning decisions by local governing boards were legislative acts
- subject to the highly deferential "fairly debatable" standard of judicial review
- "Fairly debatable" rule is a rule of reasonableness

As a result, local zoning decisions tended to occur in a "markedly inconsistent manner."

However, this general rule was not destined to last...

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THE ROLE OF ZONING CHANGED AND SO DID THE REVIEW STANDARD

In 1993, after conflicting results among the various DCA's, Florida Supreme Court cleared all of this up for rezoning decisions in the *Brevard County v. Snyder* decision.

Florida Supreme Court held that a rezoning which entails application of a general rule or policy to specific individuals, interests or activities, is quasi-judicial in nature and subject to strict scrutiny on certiorari review. *Snyder*, 627 So. 2d 469.

"Root" case was a case from Oregon, *Fasano v. Board of County Commissioners*, 264 Or. 574, 506 P.2d 23 (Or. 1973).

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ZONING ORDINANCE HEARING REQUIREMENTS

Legislative (Pre-Snyder)	Quasi-Judicial (Post-Snyder)
1. Notice	1. Notice
2. Hearing	2. Hearing
	3. Shifting Burden of Proof
	4. No Ex Parte Communication
	5. Cross Examination by Parties
	6. Decision supported by competent substantial evidence.
	7. Review based on the record

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BURDEN OF PROOF

Legislative –

Burden of proof is on challenger that the government action is arbitrary and capricious

Quasi-Judicial –

Burden of proof is initially on the property owner to demonstrate the requested action is consistent with the Comprehensive Plan...

then shifts to the local government to prove the existing zoning conditions accomplish a legitimate public purpose

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EX PARTE COMMUNICATION

Legislative –

Decision makers can communicate with any and all people.

Quasi-judicial –

Do not require the same quality of due process as would a true court proceeding, though certain minimum standards of due process are required.

In a quasi-judicial hearing, the parties are to be *"informed of all of the facts upon which the commission acts."*

Jennings v. Dade County, 589 So.2d 1337, 1340 (Fla. 3d DCA 1991), *rev. den.* 598 So. 2d 75 (Fla. 1992) (emphasis supplied).

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CONSEQUENCES OF EX PARTE COMMUNICATION

If it is determined, either before a hearing or thereafter, that off-the-record communication, either verbal or written, has been made with board members, can this matter be cured in advance or re-reviewed by the same board?

If such a matter is presented for the first time during a court challenge, what is the consequence of the ex parte communication?

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CONSEQUENCES OF EX PARTE COMMUNICATION

In *Jennings*, the Court stated:

"[U]pon remand [the applicant] shall be afforded an opportunity to amend his complaint. Upon such an amendment [the applicant] shall be provided an evidentiary hearing to present his prima facie case that ex parte contacts occurred. Upon such proof, **prejudice shall be presumed**. The burden will then switch to the respondents to rebut the presumption that prejudice occurred to the claimant. Should the respondents produce enough evidence to dispel the presumption, then it will become the duty of the trial judge to determine the claim in light of all of the evidence in the case."

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STATUTORY REMEDY

Section 286.0115, in part, provides:

- A county or municipality may adopt an ordinance or resolution removing the presumption of prejudice from ex parte communications with local public officials
- Disclosure of ex parte communications with such officials or by adopting an alternative process for such disclosure
- This section does not require a county or municipality to adopt any ordinance or resolution establishing a disclosure process
- Disclosure requires the identity of the person, group, or entity with whom the communication took place
- A local public official may read a written communication from any person

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STATUTORY REMEDY

Section 286.0115, continues in part, to provide:

- Local public officials may conduct investigations and site visits
- Expert opinions may be reviewed
- Disclosure made of all ex parte communications must be made before or during the public meeting

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CROSS EXAMINATION

Legislative –

No cross-examination is required (or generally allowed)

Quasi-Judicial –

Parties are allowed to cross-exam witnesses (often done through questions through the presiding officer).

Participants are not entitled to cross-examination of witnesses.

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COMPETENT SUBSTANTIAL EVIDENCE

That which is "sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached"

Evidence should specifically address the rezoning standards from the code.

Competent substantial evidence includes:

- Expert testimony;
- Comments & opinions of professional staff; and
- Fact-based testimony of neighbors & lay persons.

Not surmise, conjecture, speculation, or generalized statements that merely support or oppose a project

Generally, attorney testimony is not competent substantial evidence unless the attorney has some expertise.



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SUPPLEMENTING THE RECORD AT TRIAL

Legislative -

at trial, the parties can supplement the record and reasoning for decision with more data, additional expert opinion.

Quasi-Judicial –

at trial, no additional evidence is allowed. It is important for attorney and staff to monitor what is in the record at the local government hearing.

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APPEAL AND CHALLENGE OF A DEVELOPMENT ORDER FOR CONSISTENCY WITH THE COMPREHENSIVE PLAN

- Must be by an aggrieved or affected party
- Must be filed within 30 days of order rendition
- De Novo Review

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SCOPE OF REVIEW BY CIRCUIT COURT

Quasi-judicial land use proceedings are properly reviewable by petition for certiorari

Scope of review for circuit court consists of 3 elements:

- Whether procedural due process was afforded;
- Whether the essential requirements of the law were observed; and
- Whether the administrative findings and judgment were supported by competent substantial evidence. Court does not re-weigh the evidence.

Circuit court performs a review, but does not sit as a trial court to consider new evidence or make additional findings.

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RECENT CASES

Miami-Dade County v. Publix Supermarkets, Inc., 305 So.3d 668 (Fla. 3rd DCA 2020)

May a circuit court review and re-weigh the evidence to determine if there was substantial competent evidence in support of the local government decision?

Yes, Review

No, Re-weigh

Circuit Court shall review the record to determine whether local government's decision was supported by substantial competent evidence.

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DISTRICT COURT REVIEW OF THE TRIAL COURT DECISION

Several recent appellate cases address this point.

In its review of the circuit court's judgment, the District Court applies a two-pronged standard of review:

- (1) whether procedural due process was accorded; and
- (2) whether the correct law was applied by the trial court.

District Court "may *not* review the record to determine whether the agency decision is supported by competent substantial evidence."

Second-tier review is "extraordinarily limited" and not a second appeal.

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OTHER TYPES OF LOCAL GOVERNMENT DECISIONS LEGISLATIVE VS. QUASI-JUDICIAL?

Legislative acts generally broad-ranging and apply to larger segments of society

"It is the character of the hearing that determines whether or not board action is legislative or quasi-judicial. Generally speaking, legislative action results in the *formulation* of a general rule of policy, whereas judicial action results in the *application* of a general rule of policy." *Snyder*, 627 So. 2d at 474

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COMPREHENSIVE PLAN AMENDMENTS

Fourth DCA certified this question: "Can a rezoning decision which has limited impact under *Snyder*, but does require an amendment to the comprehensive land use plan, still be a quasi-judicial decision subject to strict scrutiny review?"

Florida Supreme Court said no: "We expressly conclude that amendments to comprehensive land use plans are legislative decisions. This conclusion is not affected by the fact that the amendments to comprehensive plans are being sought as part of a rezoning application in respect to one piece of property."

Martin County v. Yusem, 690 So. 2d 1288, 1293 (Fla. 1997).



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Second DCA held that a "corridor plan" adopted for a 5.5-mile parkway extension was a legislative act. The corridor plan, which affected 179 acres (including 48 separate parcels), was the formulation of general policy rather than the application of a previously determined policy. Also, the number of parcels affected was "fairly substantial."



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SMALL SCALE AMENDMENTS

Small scale development amendments to a comprehensive plan are also legislative decisions subject to the fairly debatable standard of review. *Coastal Development of North Florida, Inc. v. City of Jacksonville Beach*, 788 So. 2d 204 (Fla. 2001).

1. The original adoption of the comprehensive plan was a legislative act, thus it would follow that a proposed modification to the comprehensive plan was likewise a legislative act.
2. The integrated review process by several levels of government indicated that the action was a policy decision.

Basically, if the action involves something involving a government "plan" in its title, it is probably legislative.

The rest are largely quasi-judicial.

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QUASI-LEGISLATIVE

Settlement Agreements are challenged through declaratory action or injunction.

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QUASI-JUDICIAL ACTIONS

1. Rezoning;
2. Site Plans;
3. Special exception or permits;
4. Variances;
5. Vested rights hearings;
6. Denials of permits to operate adult oriented businesses;
7. Code enforcement.

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EXECUTIVE VERSUS QUASI-JUDICIAL

The Second DCA held that a city official's issuance of a building permit was an executive decision, not quasi-judicial. A local government decision is quasi-judicial, as distinguished from executive, "when notice and hearing are required and the judgment of the administrative agency is contingent on the showing made at the hearing."

If no hearing is conducted and there is no record to review, then it is an executive decision. *City of St. Pete Beach v. Sowa*, 4 So. 3d 1245 (Fla. 2d DCA 2009).

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DENIAL OF A DEVELOPMENT ORDER OR DEVELOPMENT PERMIT

When a local government denies an application of a Development Order or Development Permit, the local government must give written notice to the applicant and identify the applicable portions of ordinance, rule, statute or other legal authority for the denial. Sections 125.022 and 166.033, Florida Statutes.

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RENDITION OF THE FINAL ORDER

Rendition of the final order is the triggering event for beginning the appeal period – which can be extended by the local government rules

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SPECIAL MASTERS

In 2002, the Florida Legislature made a number of changes to Part II of Chapter 163, Florida Statutes (the Local Government Comprehensive Planning and Land Development Act)

Section 163.3215(4), Fla. Stat. authorizes a local government to establish a “special master process” to address quasi-judicial proceedings associated with development order challenges. Special master or quasi-judicial process would afford more deference to the local government’s decision if the decision is challenged.

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CONSTITUTIONAL CHALLENGES OF LAND DEVELOPMENT REGULATIONS

Recent Case

Manatee County v. Mandarin Development, Inc., 301 So.3d 372 (Fla. 2d DCA 2020)

- Challenge that requirement of a wetland conservation easement was facially unconstitutional
- Statute of Limitations
 - Facial Constitutional Challenge – Begins at the point of enactment or adoption. Four year statute of limitations.
 - As Applied Constitutional Challenge – Begins at point of adoption or at property acquisition if acquired after adoption.



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CONSTITUTIONAL CHALLENGES OF LAND DEVELOPMENT REGULATIONS

Recent Case

Evans Rowing Club, LLC v. City of Jacksonville, 300 So.3d 1249 (Fla. 1st DCA 2020)

- Article V, Section 21
 - In interpreting state statute, Courts may not defer to the administrative agency's interpretation - shall consider it de novo
 - Does not apply to local government matters – deference remains



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CODE ENFORCEMENT

RECENT CASE

Can neighbor sue to require city to enforce zoning ordinance?

No

In *City of West Palm Beach v. Havers*, 298 So.3d 647 (Fla. 2021)

- Havers lived in a single family zoned neighborhood
- Neighbor had noisy Christmas display and modified house to allow two unrelated persons to also reside there
- City decided not to enforce its code
- Haver sued to enjoin the City to enforce its code
- Neighbor can sue neighbor, but cannot sue the City to enjoin it to enforce its code (However, City can be enjoined from approving permits in violation of its code.)



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OTHER LEGAL LIMITATIONS ON LAND USE AND ZONING REGULATIONS

Constitutional Limitations

There are a number of constitutional concerns regarding any type of regulation which should be examined prior to adoption of any such regulations

Procedural Due Process

- Right to be noticed
- Fair hearing
- Proper notice and fair hearing depends on the matter at issue
 - Legislative v. Quasi-Judicial
 - Comprehensive Plan v. other land use matters



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NOTICE AND HEARING

For most ordinances:

- One public hearing
- Notice published in at least a weekly newspaper of interest to the residents of the jurisdiction or publication on a county or county approved website.
- At least 10 days

Not required by statute:

- Mailed notice
- Posted signs

(But if additional notices are required, the additional requirements must be met)



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NOTICE AND HEARING

For land development regulations which change the actual use of permitted, conditional or prohibited uses in the zoning category or changes the actual zoning of a parcel or parcels of land of ten contiguous acres or more, an additional public notice and hearing is required.



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LOCAL GOVERNMENT INITIATED REZONES OR CHANGES TO SPECIFIC USE ALLOWED IN A ZONING CATEGORY

Notice and Hearing

- At least one of the hearings must be held after 5:00 p.m. on a weekday (unless the local governing body by a super majority vote elects to conduct that hearing at another time of day).
- Large published notices with maps are required before both hearings unless individual notices are mailed to all affected property owners.

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FAILURE TO GIVE PROPER NOTICE

NOTICE AND HEARING

- Failure to Give Notice
 - Failure to provide proper notice or hold hearings will result in the action taken being void ab initio, barring waiver or estoppel.

VOID

- However, a person who appears at the hearing and fails to object to defective notice may waive any objection.

VOID

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SUBSTANTIVE DUE PROCESS

- Unequal treatment of similarly situated persons or property
- The concepts of substantive due process and equal protection have been closely tied by the courts.

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The Issues. Substantive due process analysis involves two general questions:

- Does the government have any purpose for the regulation?
- Is the regulation rationally related to the public purpose and not being applied arbitrarily?



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- Upheld if they were rationally related to a legitimate governmental interest.
- Local government has the burden of proof of providing a reasonable explanation for inconsistent results based on inconsistent facts.
- A regulation which impairs a fundamental civil right or liberty or burdens a suspect class will receive heightened review by the courts and must be narrowly tailored to promote a compelling or overriding public interest.



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TAKING AND INVERSE CONDEMNATION

The courts have found two scenarios in which action will result in a taking under the Fifth Amendment.

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2020 CASE

TLC Properties, Inc. v. Department of Transportation, 292 So.3d 10 (Fla. 2020)

- Inverse Condemnation Occurs
- Government enters or takes control of property for more than a momentary period
- Under the Color of Law
- Devotes Property to a Public Use
- Substantially Ousts Owner or Deprives Owner of All Beneficial Use

83

PHYSICAL INVASION

Limits on Physical Taking in Florida

- Under the U.S. Supreme Court *Kelo* case, a local government could use its powers of eminent domain to affect an economic redevelopment project, even though the property would be taken from one private individual and transferred to another.
- In Florida, power significantly limited by a 2006 Amendment to the Florida Statutes which states that the taking of private property for the elimination of a nuisance or redevelopment by a private entity does not constitute a "public purpose" as required by Article X of the Florida Constitution, Section 73.014, Florida Statutes, with a few exceptions.
- If no legitimate public use, then the government action can be stopped.

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REGULATORY TAKINGS

Involve regulations which:

- Prevent certain uses of the property or
- Prevent total use of the parts of property
- If the regulation completely deprives an owner of “all economically viable use” of the property, a taking has occurred

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TAKING AND INVERSE CONDEMNATION

Generally, the courts determine whether a taking has occurred by an ad hoc balancing of the *Penn Central* factors.

The three *Penn Central* factors which have generally been applied are:

1. the economic impact of the regulation on the claimant;
2. the extent to which the regulation has interfered with distinct investment-backed expectations; and
3. the character of the government actions.



If the regulation is found to be a taking, then courts require compensation under the Fourteenth Amendment.

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FIRST ANALYSIS IN TAKINGS CASES:

- Is the property taken for a legitimate public use?
- Courts have a very deferential standard for determining a legitimate public use, but burden is on the local government.

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SECOND ANALYSIS

Has all economically viable use of the property been taken?

Agins v. City of Tiburon, 447 U.S. 255 (1980)

One does not examine each part of the property separately in determining whether a taking has occurred. If there remains an economically viable use for the property as whole, there is no taking. See, *Graham v. Estuary Properties, Inc.*, 399 So.2d 1374 (Fla. 1981)

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EXACTIONS



Where the government requires dedication, transfer, or relinquishment of a property right as a condition of development approval, courts have employed a dual rational nexus test.

The "dual rational nexus" test requires:

1. A reasonable connection between the required exaction and the anticipated needs of the community due to the impacts of the new development.

and

2. A reasonable connection between the impacts of the new development and the capital improvements being funded by the exaction.

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STATUTORY LIMITATIONS IMPOSED ON EXACTIONS BEGINNING IN 2016

- Section 70.45, Florida Statutes.
- Largely parallels case law and prohibits any condition imposed by a government which does not have the requisite public purpose and is not roughly proportional to the impacts of the proposed use.
- Section 70.45, Florida Statutes, actions cannot be brought until the exaction is imposed or required in writing as a final condition of approval.

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RIPENESS

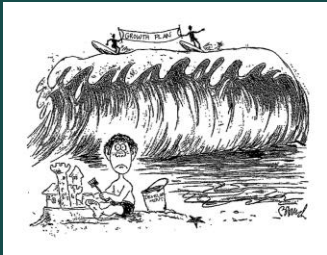
A local government has to have the opportunity, using its own reasonable procedures, to decide and explain the reach of the regulation that is subject of the taking claim

However, once the permissible uses are known, a taking claim is likely to have ripened

Golfrock v. Lee County, 247 So.3d 37 (Fla. 2d DCA 2017)

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STATUTORY LIMITATIONS

Chapter 70: Bert J. Harris Private Property Rights Act

- Not applied to ordinances that predate May 11, 1995.
- Protection for individual property owners beyond that which had been traditionally recognized under the Constitution.
- Requires compensation if the existing use of the property has been inordinately burdened by state, regional or local governmental action and no acceptable settlement remedy is proposed by the government.
- Provides a variety of potential remedies for owners of real property.
- Designed to address impacts which do not rise to the level of a taking of private property.
- Designed to look at restrictions imposed by multiple agencies.



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RECENT CASE

IF AN ORDINANCE DESIGNATES A HOME AS HISTORICAL BY A 2012 RESOLUTION BASED ON A 1984 ORDINANCE, IS A HARRIS ACT CLAIM BARRED?

YES –

CASCAR, LLC v. City of Coral Gables, 274 So.3d 1231 (Fla. 3d DCA 2019)

- City adopted Historical Preservation Ordinance in 1984
- In 2012, home is designated as an historic landmark by City resolution
- New owner applied to demolish residence and the City refused
- New owner files a Harris Act Claim
- Harris Act precludes claims for application of an ordinance if the ordinance is adopted prior to May 11, 1995.



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THE HEART OF THE PRIVATE PROPERTY RIGHTS PROTECTION ACT

- Specific action (no inaction) of a governmental entity
- Failure to rezone property does not give rise to a Harris Act claim. *Boca Center of Military, et al v. City of Boca Raton*, 312 So.3d 920 (Fla. 4th DCA 2021)
- Inordinately burdened
- Existing use of real property or a vested right
- Property owner is entitled to relief
- Relief may include:
 - Compensation
 - Variances
 - Variety of other options

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WHO CAN MAKE A CLAIM?



- Property owners with legal title to the land and who are the “subject of and directly impacted” by the governmental action.
- Not neighboring property owners. *Vale v. Palm Beach County*, 259 So.3d 951 (Fla 5th DCA 2018).

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DEFINITIONS (OR THE LACK THEREOF) ARE THE KEY TO THIS ACT

Existing use is:

- Not only an actual, present use but includes:
 - Reasonably foreseeable, non-speculative land uses which
 - 1) are suitable for the subject real property and compatible with adjacent land uses; and
 - 2) which have created a fair market value in the property greater than the fair market value of the actual, present use

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2018 CASE

OCEAN CONCRETE, INC. V. INDIAN RIVER COUNTY, 241 SO.3D 181 (FLA. 4TH DCA 2018)

In Harris Act cases,

“The Key inquiry is whether a concrete batch plant, as a land use, was foreseeable and non-speculative at the time of amending its code”

- If use is expressly provided for in the zoning code, there is “no need for a speculation analysis.”
- Physical aspects of the property can be considered.
- No looking to other issues such as financial capability of the owner, compatibility, or likelihood for development of the use.

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DEFINITIONS (OR THE LACK THEREOF) ARE THE KEY TO THIS ACT

Inordinate burden is:

- any action by a government agency which directly restricts and limits the use of real property
- such that the property owner is permanently unable to obtain the reasonable, investment backed expectation of
- an existing use of the property or
- a vested right to a use, or that the property owner is left with uses which are unreasonable such that the property owner bears a disproportionate burden for the public good

“Disproportionate Burden” is not defined and no minimum amount or percentage specified.

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PROCESS

Pre-litigation

- Property owner should have sought a permit variance or other formal relief prior to filing, unless it is clear the ordinance impacts the property.
- Property owner must file a claim within one year of the action which impacted the property. Filing is tied to when impact of government action is "readily ascertainable" to property owner.
- Can start that time clock with a notice to each affected property owner.
- Can be a temporary impact that is in effect for more than one year.
- Claim must include an appraisal to support claim and loss of fair market value.
- Government must provide a written "settlement offer" to the property owner (wide range of options to "settle," including doing nothing.)

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PROCESS

Pre-litigation

- It proposes a violation of an ordinance or rule, then order must be the appropriate relief for the property owner while protecting the public interest.
- If it violates a state statute, then the parties must file an action for approval of the settlement agreement and judge must determine that the agreement will protect the public interest.

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PROCESS

If no settlement:

- The Circuit Court will then determine if the government action has inordinately burdened the property.
- If so, a jury will be impaneled to determine the total amount of compensation.
- Harris Act waives sovereign immunity, but only to the extent provided under Section 70.001.

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CONSTITUTIONALITY

The Harris Act has been found to be constitutional.

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The Heart of the Dispute Resolution Act

Any owner who believes that a development order, either separately or in conjunction with other development orders, or an enforcement action of a governmental entity, is unreasonable or unfairly burdens the use of his real property, may apply within 30 days after receipt of the order or notice of the governmental action for relief under this section. Section 70.51(3), Florida Statutes.

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Weird Roles for the Special Magistrate

1. Mediator, then

2. Recommender of Action

(but the recommendation is not binding on the local government)

Section 70.51, Florida Statutes



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Section 70.51, Florida Statutes

But if the local government cannot reach a settlement or rejects the special magistrate's recommendation, then the local government must identify possible uses available to the owner.

106

The Act involves whether the local government was:

- Unreasonable or
- Unfairly burdened the property

Not whether the action was supported by substantial competent evidence

Section 70.51(3), Florida Statutes

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EQUAL PROTECTION

- Fourteenth Amendment
- Arise when a local government regulation or decision is alleged to have discriminated against a recognized suspect class, such as race, or a fundamental right, such a voting.
- Heightened scrutiny is given to a regulation which impinges on a suspect class or fundamental right. If no suspect class or fundamental right involved, the courts traditionally have been very deferential to the government.

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EQUAL PROTECTION

Courts in recent years have allowed equal protection claims where the plaintiff can show that that entity or person is being treated uniquely as compared to other similarly situated entities or persons for no rational reason. *City National Bank of Florida v. City of Tampa*, 67 So. 3d 293 (Fla. 2d DCA 2011)

However, even arbitrary administration of an ordinance without purposeful discrimination does not violate the equal protection clause. *Bondar v. Town of Jupiter Inlet Colony*, 321 So.3d 774 (Fla. 4th DCA 2021)

Similar standard as substantive due process.

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WHAT DO THESE HAVE IN COMMON?



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REGULATION OF THESE TYPES OF USES HAVE THE
POTENTIAL
TO CREATE 1ST AMENDMENT ISSUES

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FIRST AMENDMENT

Freedom of Speech

Regulations which often raise freedom of speech concerns include those relating to signs, billboards, flags, and adult entertainment.

Commercial Speech

There is a four part test for evaluating governmental restrictions on commercial speech:

1. Commercial speech only has protection if the speech concerns lawful activity.
2. The restriction furthers a substantial governmental interest.
3. The restriction directly advances that governmental interest.
4. It reaches no further than necessary.

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RESTRICTIONS ON COMMERCIAL SPEECH ARE UPHOLD IF:

- 1) they are justified without reference to the content of the speech,
- 2) are narrowly tailored to serve the governmental interest, and
- 3) leave open ample alternative channels for communication.

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NON-COMMERCIAL SPEECH

- Content based restrictions (for example, signs) will receive heightened scrutiny
- Local government faces a heavy burden to justify treatment of similar types of communication with different requirements
- Standard reinforced in the *Reed v. City of Gilbert* case where differing standards for temporary signage based on content of the sign were held unconstitutional

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FREEDOM OF RELIGION



- Land Use laws have not been found to violate the First Amendment, if they are:
 - Neutral
 - Of general applicability
 - Have only an incidental effect on burdening a particular religious practice.
- Land Development Regulations cannot treat religious organizations differently than other similar types of organizations, a similar standard in the Federal and Florida's Religious Freedom Restoration Act.

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2020 CASE

Thai Meditation Assn. of Alabama, Inc. v. City of Mobile, Ala., 980 F.3d 821 (11th Cir 2020)

- Rezoning request denied for a Buddhist meditation and retreat center
- Heavy public opposition
- Illegal coercion does not require the complete surrender of religious beliefs
- Modified behavior will be adequate if the result of government coercion or pressure



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OTHER NOTABLE FEDERAL CODE LIMITATIONS

Section 1983 of Title 42 United States Code provides a remedy for the violation of one's rights under the federal constitution or code if the violation occurs under "color of state law."

- Permits recovery of monetary damages for injury to one's property rights without having to proceed directly under the United States Constitution
- Defendant may be both an individual and/or a local government

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SECTION 1983

- Immunity
- While acting in one's official capacities, regional and local officials have qualified immunity under Section 1983, generally.
- Qualified immunity exists if the official's conduct "does not violate clearly established statutory or constitutional right of which a reasonable person would have known."

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STATUTORY LIMITATIONS

- Comprehensive Planning Under Chapter 163
- Chapter 163 provides certain minimum requirements, but generally allows significant leeway as to how an individual government will comply with the requirements.
- ALWAYS check statutes to determine if the state has limitations on that topic.

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STATUTORY LIMITATIONS

- Legislature has put statutory limitations on the ability to regulate in other areas, such as:
 - Vacation Rentals
 - Tree Removal
 - Anything gun related
 - Farmworker Housing
 - Wetlands
 - Group Care Homes
 - Agriculture
 - Stray Shopping Carts
 - Medical Marijuana Manufacturing and Distribution

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CITY OF DUNEDIN V. PIRATE'S TREASURE INC., ET. AL., 255 SO.3D 902 (FLA.2D DCA 2018)

Even when the local government provides an incorrect information as to its code requirements, it is not liable for this negligent conduct and damages. Why?

Because the local government bears no statutory or common law duty to provide information regarding its own code.



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A COUPLE OF THOUGHTS ABOUT THE EXAM



All exam questions/essays are simply designed to make you think. The speaker/author has no knowledge of what may be on the actual test.

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