

"A Guide to Understanding the Florida Land Use and Environmental Dispute Resolution Act"

presented by

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I. BACKGROUND

As a result of intense pressure from property owners, during the 1995 session, the Florida Legislature adopted both the Bert J. Harris, Jr. Private Property Rights Protection Act (the "Harris Act") and the Florida Land Use and Environmental Dispute Resolution Act (the "Dispute Resolution Act"), Chapter 95-181, Laws of Florida.

The focus of this 1995 legislation was on the Harris Act, which created a new statutory cause of action for private landowners to seek compensation or relief resulting from governmental laws or ordinances adopted or noticed to be adopted subsequent to May 11, 1995. The Harris Act's lesser publicized companion, the Dispute Resolution Act, does not, however, create a statutory cause of action and is intended to clarify and provide an avenue for private landowners to expedite the "ripeness" prerequisites to land use litigation. It applies to development orders issued, modified, or amended, or to enforcement actions issued on or after October 1, 1995. The Dispute Resolution Act provides for an optional expedited special magistrate mediation process as a hybrid mediation/noticed public hearing. The primary responsibility of the Special magistrate is to facilitate a resolution between the owner and the governmental entity, which results in a non-binding recommendation by the Special magistrate to the local government that issued a development order or enforcement action. However, the special magistrate process is optional and is not a condition precedent to the filing of a civil action. See *Scott v. Polk County*, 793 So. 2d 85 (Fla. 2d DCA 2001). In addition, the Dispute Resolution Act may only be invoked if all administrative appellate processes from the issuance of a development order that would take less than four (4) months have been exhausted. See Section 70.51(10)(a), *Fla. Stat.* (2005).

Standing to employ the Dispute Resolution Act is limited solely to the 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 the owner's real property. . . ." See Section 70.51(3), *Fla. Stat.* (2005). Notably, the property owner effectively controls the length of the process, as he/she may withdraw the petition at any point. In addition, the petitioner must have a legal or equitable interest in the property, and must have been the person who actually filed for a development permit resulting in a development order. See Section 70.51(2)(d), *Fla. Stat.* (2005). Neither of the key terms, "unreasonable" or "unfairly burdens," is defined by the statute and therefore provides great latitude for the Special magistrate to determine what governmental actions would rise to these levels. The Harris Act, however, offers some guidance by defining "inordinate burden" or "unfair burden," as opposed to the term "unfairly burdens," utilized in the Dispute Resolution

Act. See Section 70.001(3)(e), *Fla. Stat.* (2005). The Dispute Resolution Act does, however, provide criteria for the Special magistrate to consider when evaluating whether a local government's decision denying a development order was unreasonable or imposed an unfair burden in denying an order. See Section 70.51(18) *Fla. Stat.* (2005).

II. ISSUES TO BE CONSIDERED IN PREPARING YOUR CLIENT'S DISPUTE RESOLUTION CASE

A. Definition of Development Order

A development order is considered the end result of a property owner's filing of an application for a development permit, issued by a local, state, or regional government, which does not include any action by state or local governments relating to comprehensive plan amendments. See Section 70.51(2)(a) *Fla. Stat.* (2005). Therefore, the challenge of denial of a plan amendment cannot be expedited, and must conform to the established common law and judicial processes. Denial of a plan amendment by a city or county requires the filing of a declaratory or injunctive action, whereas denial by the State requires compliance with Section 163.184(9)(a). See *Hirt v. Polk County Board of County Commissioners*, 578 So. 2d 415 (Fla. 2d DCA 1991); *Martin County v. Yusem*, 690 So. 2d 1288 (Fla. 1997).

Notably, in one of the few reported appellate cases interpreting the Dispute Resolution Act, *Hanna v. Environmental Protection Commission*, 735 So. 2d 544 (Fla. 2d DCA 1999), the Second District Court of Appeal determined that a letter from Hillsborough County's Environmental Protection Commission to the property owner identifying the jurisdictional areas on the owner's property did not constitute a development order entitling the owner to invoke the Dispute Resolution Act.

B. Standing to Participate in the Special Magistrate Process

Participation in the special magistrate process is limited to the following:

1. The property owner, who is considered a party.
2. The governmental entity that issued the development order or took the enforcement action, which is considered a party.
3. Upon application by a party to the Special magistrate, any other governmental entities (when the complete resolution of all relevant issues relating to the development order would require their participation). Additional governmental entities would also have "party" status. See Section 70.51(11), *Fla. Stat.* (2005).
4. Any substantially affected party who submitted oral or written testimony of a substantive narrative wherein they stated with particularity, objections to or support for any development order or enforcement action at issue.

Who qualifies as a substantially affected party that is entitled to participate? The definition of what constitutes a "substantially affected party" is based on caselaw interpreting Section 120.68(1), *Fla. Stat.* (2005), which requires that in order to have standing, a person must

show that: 1) he was a party to the action which he seeks to appeal; and 2) he was adversely affected by the action. See Fox v. Smith, 508 So. 2d 1280 (Fla. 3d DCA 1987). However, as a common practice, many local governments improperly confer standing to participate in this process on individuals who simply qualified under local ordinances, such as participating at the hearing, participating by receiving direct notice of the hearing, or simply participating by letter or petition. See Sarasota County Board of County Comm'rs v. Sarasota County Board of Zoning Appeals, 761 So. 2d 1217 (Fla. 2d DCA 2000).

5. Third party participation is limited to either: 1) any owner of land contiguous to the owner's property, whether or not they submitted written or oral testimony in support of or opposition to a development order or enforcement action; or 2) any substantially affected person. Note however, that neither of these persons are provided party or intervenor status, and their participation is limited solely to addressing issues raised at the mediation concerning various alternatives which may impact their substantial interests. In addition, they may not participate in the process unless they previously indicated a desire to the governmental entity issuing the order or enforcement action to receive notice of any subsequent special magistrate proceedings, pursuant to Section 70.51(5)(b), *Fla. Stat.* (2005). As a general rule, most persons are unfamiliar with the special magistrate process and fail to request to receive notice of subsequent proceedings, and therefore are not entitled to participate in the process. (See St. Johns/St. Augustine Committee, etc. v. City of St. Augustine, 909 So. 2d 575 (Fla. 5th DCA 2005), wherein third party intervenors successfully obtained reversal of a Special magistrate's recommendation that was adopted by the City).

The aforementioned third parties must request to participate in the mediation within twenty-one (21) days after the filing of a request for relief. To avoid the repeat of a controversial public hearing, the practitioner may consider filing a motion with the Special magistrate to be heard prior to the mailing of the notice and request for relief in order to establish who has proper standing to participate. The downside to using this tactic, however, is that the opposition may feel left out and frustrated with the process, which may further encourage them to challenge a settlement before the governing body.

III. THE SPECIAL MAGISTRATE

The Special magistrate must be mutually agreed upon by the parties within ten (10) days after the filing of the owner's request for relief. The Special magistrate is not required to be a lawyer, although he or she will be interpreting and applying the law, and also has been supplied subpoena power. The Special magistrate must be a resident of the state, possess mediation experience, expertise in land use and governmental areas and the law governing same. Because most cases typically involve the allegation that the local government action was "unreasonable" in that it misapplied or mischaracterized the controlling law, the Special magistrate's recommendation is ultimately admissible as evidence in a plan amendment process or a judicial action. See Sections 70.51(20) and (26) Fla. Stat. (2005). Therefore, it is strongly recommended that an attorney experienced in the particular area of law relating to the case be selected.

The special magistrate process is provided strictly for the owner's benefit and the process does not toll any third party's obligation to timely file its appeal under other applicable laws or

ordinances for seeking appellate board or judicial action. Therefore, third party challenges to the underlying development order may be eliminated as a result of invoking the Dispute Resolution Act. In addition, if the underlying development order or enforcement action was not readily available through publication, or the underlying processes did not provide the opportunity for any third parties to submit oral or written testimony, these persons would not be entitled to participate in the special magistrate process.

IV. RIPENESS

Per Section 70.51(10)(a), *Fla. Stat.* (2005), the special magistrate process is available upon the earlier occurrence of the following: 1) the exhaustion of non-judicial local administrative appeals; or 2) within four (4) months after issuance of the development order, even if non-judicial appeals have not been exhausted.

What happens if a local government appeals board remands the case to the lower tribunal for rehearing, which is a common action taken by many boards and commissions? Is this rehearing considered a non-judicial local government administrative appeal or may the owner file a request for relief without a hearing on the remand? (See *Smull v. Town of Jupiter*, 854 So.2d 780 (Fla. 4th DCA 2003), wherein the court held that the time to seek appellate jurisdiction had not run as apparently an order was not considered rendered under Fla. R. App. P. 9.100(c) until the Town Council rendered its decision in writing after it determined to reconsider its prior ruling).

V. THE OWNER'S BURDEN

The owner's burden is to demonstrate to the Special magistrate that a development order or enforcement action is "unreasonable or unfairly burdens the use of the owner's real property." Because the Special magistrate is required to have expertise and knowledge of the "governing law" pursuant to Section 70.51(2)(c), *Fla. Stat.* (2005), the owner should make its legal argument under the controlling law relating to the case. For example, in the context of a special use permit denial, the owner's argument would be that it met its burden of proof established by *Irvine v. Duval County Planning Commission*, 495 So. 2d 167 (Fla. 1986). Under *Irvine*, an applicant is entitled to a permit if they present substantial competent evidence at the public hearing that all standards and criteria under the land development code have been met. Consequently, the burden then shifts to the local government, which would fail to meet its burden, unless it demonstrates that granting the permit would have an adverse effect on the public health, safety and welfare.

In addition, Section 70.51(17)(b), *Fla. Stat.* (2005), states that if an acceptable solution is not reached by the parties after the conclusion of the special magistrate mediation process, the Special magistrate shall consider the facts and circumstances set forth in the request for relief. Therefore, if the applicable law is set forth in the owner's request for relief and the local government has either not filed a counter legal argument, or presents a weak counter argument on the law, the Special magistrate's only legal guidance is that which was presented by the owner. Once again, because of the ultimate admissibility of the Special magistrate's recommendation in a subsequent administrative or legal action, this could provide valuable evidence in support of the owner's position.

VI. THE COSTS OF THE PROCEEDINGS

No filing fee is required pursuant to Section 70.51(4), *Fla. Stat.* (2005). However, Section 70.51(28), *Fla. Stat.* (2005), allows the governmental entity to establish procedures to govern the conduct of the proceedings, including payment of Special magistrate fees and expenses, including costs of notice, which are to be borne equally by the governmental entity and the owner. A tri-party contract should be entered into with the owner, governmental entity, and Special magistrate to define the scope of work and fees and costs, and to determine to what extent the Special magistrate's recommendation may be used in any administrative or legal proceedings.

VII. PREPARING YOUR CLIENT'S REQUEST FOR RELIEF

I. Jurisdictional Deadline

The owner must file its request for relief within thirty (30) days after receipt of the order or notice of governmental action. The Dispute Resolution Act contemplates that the owner will receive a written development order within thirty (30) days, but does not require that a development order or enforcement action actually culminate in written form. In many instances, publication of the development order by a governmental entity is often outside of the thirty (30) day timeframe for seeking judicial review, as many local government ordinances either do not require that their final action on a development order be reduced to writing in order to be considered "rendered," or allow in excess of thirty (30) days for publication. In addition, Florida caselaw unfortunately does not provide a "black letter" rule determining when a development order is considered rendered. In some cases, a verbal action by a governmental entity is considered the date of rendering, while other cases consider the date of rendering to be the date of issuance and transmittal of the development order, or the date of recording or filing the development order with the local government's records clerk. See, e.g., *Lewis v. Howanitz, et al.*, 378 So. 2d 310 (Fla. 3d DCA 1979); *Windley Key, Ltd. v. State of Florida, Department of Community Affairs*, 456 So. 2d 489 (Fla. 3d DCA 1984); and *Beach v. Village North Palm Beach City Council*, 682 So. 2d 164 (Fla. 4th DCA 1996). Therefore, suppose a zoning application is denied and a commission's resolution is not published by the local government within thirty (30) days of the local government's action; does this allow for a motion to dismiss the request for relief pursuant to Section 70.51(8), *Fla. Stat.* (2005), or is the time for filing tolled until the development order is published?

Section 70.51(10)(a), *Fla. Stat.* (2005), states that initiation of the special magistrate proceeding tolls the time for seeking judicial review of a local governmental development order. See also Section 70.51(24) *Fla. Stat.* (2005). The general timeframe for challenging a land use decision under Rule 9.020, Fla. R. App. P. is thirty (30) days from the rendering of an order. Under Rule 9.020, Fla. R. App. P., an order is considered to be "a decision, order, judgment, decree, or rule of a lower tribunal, excluding minutes and minute book entries" and is considered rendered when a signed written order is filed with the clerk of the lower tribunal, which includes a final agency action reviewable under the Administrative Procedures Act ("APA") (Chapter 120, *Florida Statutes*) and quasi-judicial decisions by boards, commissions and agencies not reviewable under the APA. Under Rule 9.020, Fla. R. App. P., the clerk is considered the person who maintains records of the proceedings.

In *Scott v. Polk County*, 793 So. 2d 85 (Fla. 2d DCA 2001), a property owner's PUD rezoning application was denied by the Board of County Commissioners. Thereafter, the petitioner timely filed a request for relief pursuant to Section 70.51. The petitioner then filed a lawsuit pursuant to 42 U.S.C. Section 1983, alleging deprivation of various constitutional rights relating to the rezoning process. The County then moved to dismiss the special magistrate proceeding, which motion was granted based on the court's reasoning that the special magistrate proceedings were solely intended as an alternative to judicial proceedings, and that by instituting a judicial proceeding, the right to a special magistrate proceeding was waived.

Upon review, the Second District Court of Appeal reversed the trial court's dismissal, holding that the court did not have jurisdiction to take such action. The court indicated that the Section 1983 action was a separate and distinct action apart from a court's review of the merits on an approval or denial of a rezoning request. Specifically, the court stated that "[n]o provision within Section 70.51 confers jurisdiction on any court of law or otherwise authorizes judicial intervention or involvement in a special master proceeding, because judicial review of a zoning decision is an entirely separate formal process that may be initiated," citing Section 70.51(10), *Fla. Stat.* (2005). *Scott*, 793 So. 2d 85 at 87.

What if a request for relief is filed on the twenty-ninth day after rendition of an order, and the recommendation of the Special magistrate to the local government is ultimately rejected, does the time for filing an appeal re-commence? Does the property owner have only one (1) day after termination of the special magistrate proceeding to file suit, or is the filing of a request for relief treated in the same manner as motions for a new trial, for rehearing, for clarification and the like under Rule 9.020, Fla. R. App. P., which if filed within thirty (30) days of the rendering of an order, deems the order not to be rendered thereby allowing an additional thirty (30) days to file an appeal once the motion is disposed of?

The Florida Constitution charges the Florida Supreme Court with exclusive authority to adopt rules for practice and procedure. Therefore, if the Dispute Resolution statute is considered "procedural" and not "substantive law," is there an argument that, by following the tolling procedure set forth in Section 70.51(10)(a), the owner has waived its right to seek judicial review after the thirty (30) day period has lapsed? *See, e.g., TGI Friday's, Inc. v. Dvorak*, 663 So. 2d 606 (Fla. 1995); *Knealing v. Puleo*, 675 So. 2d 593 (Fla. 1996); *CSR Partnership and Plan C, Inc. v. Dept. of Transportation*, 741 So. 2d 623 (Fla. 2d DCA 1999).

Although Section 70.51(29), *Fla. Stat.* (2005), requires a liberal construction of the Dispute Resolution Act to fully effect its obvious purposes and intent, in light of the above-described conflicting jurisdictional deadlines, the best course of action is to file the request for relief within thirty (30) days of the rendition of the verbal decision of the governmental authority, with a motion to supplement the record upon receipt of the published development order, or documentation relating to the enforcement action.

VIII. REQUIRED JURISDICTIONAL CONTENTS OF A REQUEST FOR RELIEF

The following are the minimal requirements for a request for relief:

1. A brief statement of the owner's proposed use of the property.

2. A summary of the development order or description of the enforcement action.
3. As an attachment, a copy of the development order or the documentation of an enforcement action at issue. As noted, if these documents are not available at the time of filing, a motion to supplement the record upon receipt of the published development order should be filed along with the request.
4. A brief statement of the impact of the development order or enforcement action on the ability of the owner to achieve the proposed use of the property.

The Dispute Resolution Act does not require that the request for relief actually describe why the owner considers the development order or enforcement action to be unreasonable or unfairly burden the use of the owner's property. However, an explanation of this should be clearly articulated in the request as these are the only issues to be determined by the Special magistrate pursuant to Section 70.51(17)(b), *Fla. Stat.* (2005).

5. A certificate of service listing the parties, including the governmental entity, that were served.

Because there is no required filing fee and the requirements for filing a request for relief are very minimal, the special magistrate process can be used as a delay tool which allows the owner the option to either utilize the special magistrate process or simply “buy more time” to prepare a legal action. However, as a practical rule, notwithstanding the statute's minimal requirements, in order to maximize the pressure on the local government, the request for relief should provide a thorough analysis of the facts and the applicable law to demonstrate how the local government's action was unreasonable and/or unfairly burdens the use of the owner's property. A thorough analysis will obviously impress upon the local government the seriousness of your client's position and provide the impression that a judicial action is imminent in the event the matter is not resolved. In addition, Section 70.51(16)(a), *Fla. Stat.* (2005), only provides the governmental entity fifteen (15) days to respond to the owner's detailed factual and legal argument. If a response is not timely filed by the governmental entity, the owner may file a motion to strike with the Special magistrate in the event the local government attempts a late filing, thereby limiting the legal argument in the process to that contained within your client's request, which the Special magistrate must rely on if the matter is not settled. See Section 70.51(17)(b), *Fla. Stat.* (2005).

IX. LEGALITY OF A SPECIAL MAGISTRATE RECOMMENDATION

Section 70.51(21)(a), *Fla. Stat.* (2005), provides that if the Special magistrate's recommendation consists of the granting of a modification, variance or special exception to laws or rules, then the property owner is not required to duplicate any previous process in which the owner had participated. Thus, if a variance denial was the basis for invoking the special magistrate process, then the case could be settled by the parties without requiring the owner to seek the same variance. However, if the Special magistrate's recommendation requires a quasi-judicial or administrative action not previously sought by the owner, then the owner would be required to obtain the recommended approval through the normal course and consistent with the rules and procedures of the governmental entity.

For example, if the special magistrate process involved the denial of a zoning variance, but the agreed-upon recommendation of the Special magistrate is for the local government to rezone the owner's property, settlement of the matter would be contingent upon the owner obtaining the necessary rezoning in front of the same governmental entity that entered into the settlement agreement. A settlement involving a scenario such as this may cause concerns and raise issues relating to *ex parte* communication, denial of due process, and unauthorized contract zoning. See, e.g., *Chung v. Sarasota*, 686 So. 2d 1358 (Fla. 2d DCA 1996); *Morgran Co. v. Orange County*, 818 So. 2d 640 (Fla. 5th DCA 2002); *County of Volusia v. City of Deltona*, 31 Fla. L. Weekly D 233 (Jan. 20, 2006).

In *St. Johns/St. Augustine Committee, etc. v. City of St. Augustine*, 909 So. 2d 575 (Fla. 5th DCA 2005), the court determined that a settlement reached as a result of the Dispute Resolution Act was not required to undergo the local government's regular land use process, which is authorized under the Act. In *St. Johns/St. Augustine*, a property owner's property was annexed into the City of St. Augustine. However, approximately two years after the annexation occurred, the City had not yet fulfilled its obligation under the pre-annexation agreement to amend its comprehensive plan to include the owner's mixed-use PUD project. The owner then filed a petition seeking to modify the project's PUD zoning that, if approved, would increase both the project's density and intensity, which several parties opposed. The City's Planning and Zoning Board approved the PUD amendment and the opponents appealed to the City Commission. The City Commission reversed the Planning and Zoning Board and denied the petition, and the owner sought alternative relief under the Dispute Resolution Act.

At the conclusion of the special magistrate proceedings, the special magistrate recommended conditionally approving the PUD, suggesting measures such as the addition of buffers, trees, and landscaping to minimize the project's impacts. The application of the City's comprehensive plan to the property was apparently not addressed through the special magistrate proceedings, and the property was still subject to the St. Johns County's comprehensive plan. In addition, the revised rezoning application that reflected the Special Master's recommendations was, contrary to the City's land use approval process, not forwarded to the City's Planning and Zoning Board for action, but presented directly back to the City Commission. In response, the City Commission reversed its prior decision to deny the PUD and approved the special master's recommendation through the dispute resolution process without the Planning and Zoning Board's input. The trial court noted that there was no existing statute that required the City Commission to remand the rezoning application back to the Planning and Zoning Board before making modifications to the PUD zoning. In addition, the trial court held that "to require the City to resubmit the Application to the Planning and Zoning Board would be a duplicative process, requiring the board to reconsider the same subject and the same arguments as it has already heard, and which the Commission has already approved." Thus, in accordance with the express provision of the Act that does not require an owner to duplicate a previous process to effectuate a recommended settlement, the owner was not required to repeat the same PUD rezoning process.

X. THE SPECIAL MAGISTRATE RECOMMENDATION AS EVIDENCE IN ADMINISTRATIVE AND JUDICIAL ACTIONS

The Special magistrate's recommendation is considered a public record pursuant to Chapter 119, *Fla. Stat.* (2005), and can carry great weight in any subsequent proceedings.

However, the actions or statements of all participants to the special magistrate proceeding are considered to be an offer to compromise, and are therefore inadmissible in any judicial or administrative proceeding. See Section 70.51(20), *Fla. Stat.* (2005).

A Special magistrate's recommendation concluding that a development order or enforcement action is unreasonable or unfairly burdens the property owner may serve as evidence in a subsequent administrative or judicial proceeding indicating sufficient hardship to support modification, variance or special exceptions to the application of statutes, rules, regulations, or ordinances relating to the subject property. See Section 70.51(25), *Fla. Stat.* (2005). In addition, the Special magistrate's recommendation is considered evidence and can serve as data in support of a comprehensive plan or amendment, although these actions are not considered "development orders" for purposes of the Dispute Resolution Act.

Whether the Special magistrate may be called as a witness in any subsequent judicial action to express his opinions is an interesting question. It appears that a Special magistrate could be called as a witness to validate his recommendation, or to opine on non-legal issues, assuming he or she had relevant testimony to offer on an area within their expertise.

XI. FORM OF SETTLEMENT

The ultimate form of the settlement between the government and the owner is not described in the Dispute Resolution Act. The only requirement is that an agreement for a permissible use must be incorporated in the Special magistrate's recommendation. See Section 70.51(19)(c), *Fla. Stat.* (2005). Settlement can therefore simply be in the form of a letter, formal developer's agreement, resolution, ordinance, or order. Notably, the Dispute Resolution Act pursuant to Section 70.51(24), *Fla. Stat.* (2005), states that the special magistrate procedure is not, nor does it create, a judicial cause of action. Therefore, it appears that there is no point of entry to challenge the procedure and its end result by any party or participant who may disagree with the outcome. (But see *St. Johns/St. Augustine Committee, etc. v. City of St. Augustine*, 909 So. 2d 575 (Fla. 5th DCA 2005), wherein the court quashed a special master's adopted rezoning recommendation as a result of a third party challenge).

XII. CONCLUSION

The special magistrate process can be a creative tool for the practitioner to provide the client a "second bite at the apple" with substantially less cost and less risk than litigation. However, because of the skeletal nature of the Dispute Resolution Act and its vague terms, due consideration should be given to issues such as those raised in this paper in order to maximize its effectiveness.