The Florida Senate

Issue Brief 2011-211 *October 2010*

Committee on Community Affairs

PENDING ORDINANCE DOCTRINE

Statement of the Issue

During the 2010 legislative session the issue of what local regulations should govern an application for a permit or development order arose. In many states, the law in effect at the time of the permit application governs the issuance of the permit. Local governments may not reject a building permit based on pending zoning restrictions. However, in Florida some courts and a number of local governments (by ordinance) have adopted the "pending ordinance doctrine."[1] The doctrine holds that a building permit or development order application established on or after the date when a local government has publicly declared its intent to change its zoning scheme may be denied or held until after the enactment of the new zoning ordinance.

In Florida, the rule was set out by the court in *Smith v. City of Clearwater* (*Smith*)[2] and has been explicitly adopted in a number of local government ordinances.[3] The *Smith* court developed the rule in an effort to clarify Florida case law.[4] The Supreme Court has yet to explicitly adopt the pending ordinance doctrine. The policy behind the doctrine is to prevent developers from entering into a "race of diligence" to try to obtain a permit before the local government can complete its zoning ordinance.[5] In addition, the doctrine avoids situations in which mandamus proceedings are instituted to compel issuance of a permit, only to be rendered moot by a zoning change.[6] This can occur because even after issuance of a permit, the local government can revoke the permit if a change in zoning has been effectuated that would conflict with the intended use.[7] The owner has no right to retain their permit absent a case for equitable estoppel or abuse of discretion on the part of the local government.

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[1] *Smith v. City of Clearwater*, 383 So. 2d 681 (Fla. 2d DCA 1980); *City of Pompano Beach v. Yardarm Restaurant, Inc*., 509 So. 2d 1295 (Fla. 4th DCA 1987).

[2] 383 So. 2d 681 (Fla. 2d DCA 1980) (upholding the permit denial against the landowners' claims that refusing their permit was a taking for a public purpose without just compensation and the claim that the government was equitably estopped from applying zoning ordinance amendments to the property owners in question).

[3] *See, e.g.*, Aventura, L.D.R., s. 31-77; Daytona Beach, L.D.C., Art. 1, s. 6.1; Cocoa Beach, L.D.C., Ch. VII, Art. II; Clearwater, Community Development Code, ss. 4-303, 4-407 (authorizing the community development director to consider whether an ordinance is pending that would significantly affect the project); DeBary, L.D.C. s. 1-4 (placing a moratorium in effect for developments that would be nonconforming if the pending land development code went into effect); Monroe County, Code of Ordinances, Part II, Ch. 102, Art. IV., Div. 3 (stating that landowners do not have "good faith" and thus their rights do not vest if there was notice or knowledge of an imminent or pending change in zoning); Lauderdale-By-The-Sea, Code of Ordinances, Part II, Ch. 30, Art. IX, s. 30-531.

[4] *Smith*, 383 So. 2d at 688 ("While the decided cases state that the rights of the parties are fixed at the time of the application for the building permit, that a municipality cannot suspend the operation of the existing law, and that the city may not take advantage of its own acts to prevent the acquisition of a vested right, so that no actual change of position is necessary to enforce the right to the building permit, nevertheless, the opposite conclusion is reached by logically applying the principles that no one has a vested right in the continuance of a law and that the ordinance applicable at the time of the decision governs.") (quoting *Phillips Petroleum Co. v. City of Park Ridge*, 16 Ill.App.2d 555, 565 (Ill.App. 1 Dist., 1958).

[5] Edward H. Ziegler, Jr., Minority view: At time of permit application—Good faith or pending ordinance exception, 4 Rathkopf's The Law of Zoning and Planning § 70:17 (4th ed. 2010).

[6] *Action Outdoor Advertising v. Destin*, 2005 WL 2338804 (N.D. Fla. 2005); 83 Am. Jur. 2d Zoning and Planning § 575 (2010).

[7] *Coral Springs Street Systems, Inc. v. City of Sunrise*, 371 F.3d 1320 (11th Cir. 2004); *Sakolsky v. City of Coral Gables*, 151 So. 2d 433 (Fla.1963); *City of Boynton Beach v. Carroll*, 272 So. 2d 171, 173 (Fla. 4th DCA 1973); *Villas of Lake Jackson, Ltd. v. Leon County*, 796 F.Supp. 1477 (N.D. Fla. 1992); *Marine One, Inc. v. Manatee County*, 877 F.2d 892 (11th Cir. 1989) (finding that revocation of a permit does not make the permit a species of property for due process or taking clause purposes); *Action Outdoor Advertising v. Destin*, 2005 WL 2338804 (N.D. Fla. 2005).

This issue brief surveys the case law in Florida related to the pending ordinance doctrine and the related doctrine of equitable estoppel. Although the cases differ in their interpretation of Florida law, the Second District Court of Appeal clearly adopted the pending ordinance doctrine and a number of local governments have incorporated this doctrine into their local ordinances.

Discussion

Florida Case Law

The state has the right to regulate land use using the inherent authority embodied in its police power.[8] "The possession and enjoyment of all rights and property are subject to the valid exercise of the police power which is an aspect of sovereignty and all persons and property are subject to restraints and burdens necessary to secure the comfort, welfare and safety of the public."[9] The Florida Constitution grants local governments broad authority. Specifically, non-charter county governments may exercise those powers of self-government that are provided by general or special law.[10] Those counties operating under a county charter have all powers of self-government not inconsistent with general law, or special law approved by the vote of the electors.[11] Likewise, municipalities have those governmental, corporate, and proprietary powers that enable them to conduct municipal government, perform its functions and provide services, and exercise any power for municipal purposes, except as otherwise provided by law.[12] Local governments use their police power and various statutory authorities to plan for growth and to enact zoning ordinances and permitting schemes. Local governments are free to change their land use schemes to protect the health, safety, and welfare of their citizens. Although the federal and state constitutions as well as the Florida Statutes have a number of provisions in place to protect private property rights,[13] the purchase of land does not, by itself, give the landowner a right to rely on existing zoning.[14]

Most courts hold that even if a landowner has obtained a permit, unless the permit holder's right to the permit has vested, the permit holder does not have a legally protectable right (generally referred to as a "vested right") to the permit against subsequent zoning changes.[15] "A change in circumstance or change in the law, such as repealing or amending a zoning ordinance can render a controversy moot"[16] where the requested relief is an injunction rather than damages. If the permit holder has not obtained a vested right to their permit then the case may be moot. If a case is "moot," this means that the court cannot hear it unless the court believes the ordinance is likely to change again giving rise to a recurring complaint.[17]

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[8] *Sharrow v. City of Dania*, 83 So. 2d 274 (Fla. 1955).
[9] *Id.*
[10] Art. VIII, 1(f), Fla. Const.
[11] Art. VIII, 1(g), Fla. Const.
[12] Art. VIII, 2(b), Fla. Const. *See also* s. 166.021, F.S.
[13] U.S. Const. amend. XIV; Art. I, 9, Fla. Const.; ch. 70, F.S.
[14] *See City of Miami Beach v. 8701 Collins Ave*., 77 So. 2d 428, 430 (Fla. 1954) ("All that one who plans to use his property in accordance with existing zoning regulations is entitled to assume is that such regulations will not be altered to his detriment unless the change bears a substantial relation to the health, morals, welfare or safety of the public."); *City of Pompano Beach v. Yardarm Restaurant, Inc*., 509 So. 2d 1295 (Fla. 4th DCA 1987); *City of Lauderdale Lakes v. Corn*, 427 So. 2d 239, 243 (Fla. 4th DCA 1983); *Walker v. Indian River County*, 319 So. 2d 596 (Fla. 4th DCA 1975).
[15] *Coral Springs Street Systems, Inc. v. City of Sunrise*, 371 F.3d 1320 (11th Cir. 2004); *Sakolsky v. City of Coral Gables*, 151 So. 2d 433 (Fla.1963); *City of Boynton Beach v. Carroll*, 272 So. 2d 171, 173 (Fla. 4th DCA 1973); *Villas of Lake Jackson, Ltd. v. Leon County*, 796 F.Supp. 1477 (N.D. Fla. 1992); *Marine One, Inc. v. Manatee County*, 877 F.2d 892 (11th Cir. 1989) (finding that revocation of a permit does not make the permit a species of property for due process or taking clause purposes); *Action Outdoor Advertising v. Destin*, 2005 WL 2338804 (N.D. Fla. 2005). *Contra A.A. Profiles, Inc. v. City of Ft. Lauderdale*, 850 F.2d 1483, 1488 (11th Cir.1988) (holding that a development permit duly issued by a Florida local government is a species of property for due process and taking clause purposes and that when a local government precludes the use of such a permit, it has taken property for which just compensation must be provided).
[16] *Action Outdoor Advertising v. Destin*, 2005 WL 2338804, *7 (N.D. Fla. 2005) (citing *National Advertising Co. v. City of Miami*, 402 F.3d 1329, 1332 (11th Cir. 2005) and *Coral Springs Street Systems, Inc. v. City of Sunrise*, 371 F.3d 1320, 1329 (11th Cir. 2004)).
[17] A case may be heard if the ordinance is reasonably likely to be reenacted/repealed or when it is replaced by another constitutionally suspect ordinance. *Coral Springs Street Systems, Inc. v. City of Sunrise*, 371 F.3d 1320, 1330 (11th Cir. 2004).

Equitable Estoppel

A permit holder or applicant can obtain a vested right to its permit if it can prove equitable estoppel.[18]

> The doctrine of equitable estoppel will limit a local government in the exercise of its zoning power when a property owner (1) relying in good faith (2) upon some act or omission of the government (3) has made such a substantial change in position or incurred such excessive obligations and expenses that it would be highly inequitable and unjust to destroy the rights he has acquired.[19]

An often quoted District Court of Appeal Case said, "the theory of estoppel amounts to nothing more than an application of the rules of fair play."[20] Equitable estoppel applies against a governmental entity "only in rare instances and exceptional circumstances;" the government's act must "go beyond mere negligence."[21] However, a number of cases have found that equitable estoppel protects a landowner's property interest upon rezoning. Land use cases often involve substantial investment of time and money by the developer in reliance on the existing zoning and permitting scheme. The courts are sympathetic to developers when the local government knew and encouraged the landowner to invest and develop only to change the rules after substantial investment has occurred.

In *Town of Largo v. Imperial Homes Corp*., the town knew that the property owner purchased the property contingent upon obtaining rezoning to multi-family and approved that rezoning request knowing that the property owner would rely on the rezoning.[22] The owner then expended $379,000 without knowledge that the town contemplated a zoning change to single-family. The court held that the developer relied in good faith upon the unchanged position of the town despite the fact that a number of persons protested the development at several town commission meetings. Therefore, the court found that the elements of equitable estoppel were satisfied, and the town was estopped from rezoning the land to bar high-rise development.[23]

In addition to the elements of equitable estoppel, the landowner's knowledge of future changes to a zoning ordinance is an important consideration in determining whether the landowner has obtained a vested right. A series of cases from the Florida Supreme Court have emphasized that the doctrine of equitable estoppel may not be invoked where "the party claiming to have been injured by relying upon an official determination had good reason to believe before or while acting to his detriment that the official mind would soon change."[24] *Sakolsky v. City of Coral Gables* (*Sakolsky*),[25] clarified the rule stating that "[n]otice or knowledge of mere equivocation independent of actual infirmities or pending official action cannot operate to negative or prevent reliance on the official act."[26]

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[18] *Smith v. City of Clearwater*, 383 So. 2d 681 (Fla. 2d DCA 1980); *Coral Springs Street Systems, Inc. v. City of Sunrise*, 371 F.3d 1320 (11th Cir. 2004).
[19] *Smith v. City of Clearwater*, 383 So. 2d 681, 686 (Fla. 2d DCA 1980).
[20] *Equity Resources Inc. v. County of Leon*, 643 So. 2d 1112, 1119-1120 (Fla. 1st DCA 1994); *Branca v. City of Miramar*, 634 So. 2d 604, 606 (Fla. 1994*); Town of Largo v. Imperial Homes Corp*., 309 So. 2d 571 (Fla. 2d DCA 1975).
[21] *Villas of Lake Jackson, Ltd. v. Leon County*, 884 F.Supp. 1544 (N.D. Fla. 1995) (citing *Council Bros., Inc. v. City of Tallahassee*, 634 So. 2d 264, 266 (Fla. 1st DCA 1994) and *Alachua County v. Cheshire*, 603 So. 2d 1334, 1337 (Fla. 1st DCA 1992) *aff'd*, 121 F.3d 610 (11th Cir. 1997) (finding that although fact questions existed on issue of equitable estoppel and vested property right, rational basis for rezoning precluded due process claims).
[22] 309 So. 2d 571 (Fla. 2d DCA 1975).
[23] *Id.*
[24] *Sharrow v. City of Dania*, 83 So. 2d 274 (Fla. 1955); *Gross v. City of Miami*, 62 So. 2d 418 (Fla.1953) ("It would appear childish to assert that the permittees were without knowledge of these undisputed facts and for the respondents to wholly disregard them and simultaneously incur financial obligations incidental to the construction of the building under the questioned permit, shows that they acted while red flags were flying and cannot complain of lack of notice."); *City of Ft. Lauderdale v. Lauderdale Industrial Sites*, 97 So. 2d 47 (Fla. 2d DCA 1957); *City of Miami v. State ex rel. Ergene, Inc.*, 132 So. 2d 474, 476 (Fla. 3d DCA 1961) (*per curiam*).
[25] 151 So. 2d 433 (Fla.1963).
[26] *Id.*

There are also Florida cases where the courts have protected the landowner's interest without finding the elements of equitable estoppel.[27] In addition, courts have reached different conclusions about what law applies to the permit: the law at the time of application[28] or the law at the time of the court's decision.[29] Courts reviewing these cases have struggled to articulate a clear doctrine reconciling these case decisions.[30]

The Pending Ordinance Doctrine

The Second District Court of Appeal in *Smith v. City of Clearwater* (*Smith*) attempted to clarify Florida case law by adopting the pending ordinance doctrine. In *Smith*, the court struggled to determine the rights of a permit applicant that applied for the permit after notice of a possible change in the zoning that would render their proposed use invalid.[31] The court explicitly determined that the landowner in the case could not make a case for equitable estoppel because the landowners had not "changed position or incurred large expenses in reliance upon an act or omission of the city."[32] In reviewing the case law the court stated,

> [T]here is a body of law, closely related to the doctrine of equitable estoppel, which deals with the question of whether a municipality may delay the issuance of a permit for an allowable use when it is lawfully applied for in order to gain the time necessary to enact an amendment to its zoning ordinance which would frustrate the applicant's plans for developing his property. While often acknowledging the fact that a city should have issued a building permit when requested to do so, many courts apply the zoning as it exists at the time of their decision in determining whether the city should then be required to do so.[33]

The court determined that in light of conflicting case law the "better rule" is as follows:

> [E]ven if [a permit applicant] has not made the substantial expenditures in reliance upon the city's position necessary to create an estoppel, he is still entitled to obtain a building permit which is within the provisions of existing zoning so long as the rezoning ordinance which would preclude the intended use is not pending at the time when a proper application is made.[34]

In so holding, the Second District Court of Appeal explicitly adopted the pending ordinance doctrine. The doctrine is distinct from the previous line of cases because the permit applicant need not have acted in reliance on the permit to gain a right to the permit if the applicant applied prior to notification of pending changes to the zoning ordinance. The doctrine also validates local governments' decisions to suspend permit applications where the applicant applied for the permit after the local government had begun the adoption of a new zoning ordinance. The court went on to clarify what would be a pending zoning change.

> For a zoning change to be pending within this rule, it does not have to be before the city council, provided the appropriate administrative department of the city is actively pursuing it. Of course, mere thoughts or comments by city employees concerning the desirability of a change are not enough.

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[27] *City of Margate v. Amoco Oil Co.*, 546 So. 2d 1091, 1092-94 (Fla. 4th DCA 1989); *Dade County v. Jason*, 278 So. 2d 311, 311-12 (Fla. 3d DCA 1973) (*per curiam*); *Broach v. Young*, 100 So. 2d 411 (Fla. 1958); *Aiken v. Davis*, 143 So. 658 (1932).
[28] *City of Margate v. Amoco Oil Co.*, 546 So. 2d 1091, 1092-94 (Fla. 4th DCA 1989) (noting that no zoning change was pending at the time of Amoco's application); *Southern Cooperative Development Fund v. Driggers*, 696 So. 2d 1347 (11th Cir. 1983) (finding that later enacted zoning ordinances could not be applied by a county commission to reject landowners' subdivision plat application which had complied with regulations in effect at the time it was filed; *however* the regulations at issue in this case grandfathered in applications that had already been made); *Broach v. Young*, 100 So. 2d 411 (Fla. 1958) (finding that the ordinance at the time of application was not sufficiently definite for guidance of Board in execution of discretionary power for the Board to reject the permit, notwithstanding the fact that the governing body of municipality had subsequently enacted a zoning ordinance amendment forbidding the use for which permit was sought).
[29] *City of Boynton Beach v. Carroll*, 272 So. 2d 171 (Fla. 4th DCA 1973).
[30] *Smith v. City of Clearwater*, 383 So. 2d 681 (Fla. 2d DCA 1980); *Coral Springs Street Systems, Inc. v. City of Sunrise*, 371 F.3d 1320 (11th Cir. 2004).
[31] *Smith v. City of Clearwater*, 383 So. 2d 681 (Fla. 2d DCA 1980).
[32] *Id.* at 686.
[33] *Id.*
[34] *Id.* at 689.

> There must be active and documented efforts on the part of those authorized to do the work which, in the normal course of municipal action, culminate in the requisite zoning change. The city council or the applicable city planning board must at least be aware that these efforts are going forward. For a zoning change to be pending, however, it is not essential that the property owner be advised of these activities, except that to the extent that he is unaware of them, he might justifiably continue to expend funds upon his project which, if the matter does not in due time become public, may result in the application of equitable estoppel.[35]

Although other courts have followed the *Smith* decision,[36] the Florida Supreme Court has never explicitly adopted the pending ordinance doctrine and the Eleventh Circuit Court of Appeals in surveying Florida case law has suggested that the *Smith* rule cannot provide a vested right to a permit.

Bad Faith Doctrine

In interpreting Florida case law, the Eleventh Circuit in the case of *Coral Springs Street Systems, Inc. v. City of Sunrise* decided that Florida cases that protected the property owner's interest despite the absence of equitable estoppel were determined in accordance with the "bad faith" doctrine.[37] The court did not acknowledge the pending ordinance doctrine. Rather the court had the following interpretation of *Smith*:

> [T]he *Smith* court did not say that vested rights are *always* created in applications for permits. Rather, *Smith* said that vested rights may be created in the absence of reliance only under very specific circumstances. 383 So.2d at 688. And in fact, the *Smith* court's attempt to delineate the circumstances in which injunctive relief should be granted itself fell short of fully explicating the state of Florida law, because it did not consider the clear and extensive pattern of Florida cases that have found vested rights or their equivalent in non-reliance cases only when there was evidence of bad faith by the municipality, and an arbitrary attempt to single out the applicant. We therefore reject the suggestion that vested rights may be created under Florida law in the absence of equitable estoppel, detrimental reliance, or bad faith. To the extent that some district court opinions have found otherwise, *see Fla. Outdoor Adver. LLC v. City of Boynton Beach*, 182 F.Supp.2d 1201, 1209 (S.D. Fla. 2001); *Wilton Manors St. Sys. V. City of Wilton Manors*, 2000 WL 33912332, at *5 (S.D. Fla. 2000), we conclude that they have misapprehended Florida law on this subject.[38]

The court in *Coral Springs Street Systems, Inc. v. City of Sunrise* stated that a review of Florida law establishes that "a party will be found to have a vested right in a permit or similar entitlement *only* if (1) it has incurred substantial expense in reasonable reliance on existing law; or (2) the city has passed a subsequent ordinance in a bad faith effort to prevent a property owner from obtaining a permit."[39] Under the bad faith doctrine, property rights may vest if the landowner shows bad faith on the part of the local government. In this type of case the local government will generally have "changed the law in a last-ditch effort to avoid granting a permit or license to a plaintiff."[40] Despite the Eleventh Circuit's effort to set out two clear equitable doctrines to explain Florida law, there are a number of cases that are inconsistent with this interpretation[41] and it is Florida courts, not the federal courts, that bear the primary responsibility for interpreting state law.[42]

For example *City of Pompano Beach v. Yardarm Restaurant, Inc.*, seems to follow the pending ordinance doctrine when it could have easily relied on the bad faith doctrine. The city granted Yardarm Restaurant a special

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[35] *Id.*
[36] *Bailey v. Islamorada*, 874 So. 2d 729 (Fla. 3d DCA 2004); *City of Pompano Beach v. Yardarm Restaurant, Inc*., 509 So. 2d 1295 (Fla. 4th DCA 1987).
[37] *Coral Springs Street Systems, Inc. v. City of Sunrise*, 371 F.3d 1320 (11th Cir. 2004).
[38] *Id.* at 1340 (emphasis in original).
[39] *Id.* at 1338 (emphasis in original).
[40] *Id.*
[41] *City of Pompano Beach v. Yardarm Restaurant, Inc.* 509 So. 2d 1295 (Fla. 4th DCA 1987).
[42] Lehman Bros. v. Schein, 416 U.S. 386 (1974) (finding that when the court is confronted with an unsettled issue of state law, certification of the issue to the state supreme court is appropriate).

exception to a height limitation.[43] Many years later, the city proposed the enactment of an ordinance repealing the height exception. Prior to adoption of the ordinance, Yardarm Restaurant applied for a building permit and filed suit to prohibit the city from revoking the special exception height limitation. The Fourth District Court of Appeal stated that in the absence of fraud or a gross abuse of discretion, a court should not enjoin administrative action such as the enactment of the ordinance repealing the special exception. The court found that the elements of equitable estoppel were not present and the city's "obstructionist tactics" and its refusal to issue the permit were insufficient basis for stopping the city from repealing the special exception. Moreover, it found that a municipality may properly delay the issuance of a building permit when a change in zoning was in progress.[44]

Summary of the Case Law on the Pending Ordinance Doctrine

In Florida it is clear that a permit applicant's knowledge of a pending zoning change can undermine the applicant's ability to obtain a vested right to their permit.[45] Additionally, the Second District Court of Appeal has clearly adopted the pending ordinance doctrine and this case has not been overturned. It seems the Florida courts may be adopting the pending ordinance doctrine, which is the minority view among the states.[46] The pending ordinance doctrine is designed to prevent developers from entering into a "race of diligence" to try to obtain a permit before the local government could complete its zoning ordinance.[47] Most jurisdictions not adhering to the pending ordinance doctrine require the permitting authority to issue permits based on the law in effect at the time of application. The rationale in those cases is usually that the proposed changes may not be enacted and that the permitting authority is an administrative officer under a duty to enforce the laws in effect at the time.[48]

Corollaries to the Pending Ordinance Doctrine

Comprehensive Planning

Although the Florida Statutes are largely silent on the pending ordinance doctrine, the statutes governing comprehensive planning may make the pending ordinance inapplicable to proposed changes to the local comprehensive plan. In *Gardens Country Club, Inc. v. Palm Beach County*, [49] a country club brought an action against the county to require the county to grant the application for rezoning and a special exception because the proposal was in compliance with the existing comprehensive plan.[50] The county had a policy in place prohibiting increases in density that would be inconsistent with planned changes to the county's comprehensive plan. The court held that the pending ordinance doctrine did not apply in this case because: (1) zoning and planning have different functions and (2) ss. 163.3194(1)(b) and 163.3197, F.S., explicitly state that the adopted plan has full force and effect until a new plan is put in place. Therefore, the county's failure to consider the country club's application was improper, since the county failed to pass either the amendment to comprehensive plan or a zoning ordinance that would preclude approval of the country club's application. However, the court did suggest that the

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[43] *Id*. Years later a trial court would describe the city's behavior as "egregious and deliberate acts orchestrated by members of the highest legislative body of the city, under extreme circumstances involving bad faith and institutional bias." *See City of Pompano Beach v. Yardarm Restaurant, Inc.*, 834 So. 2d 861 (Fla. 4th DCA 2003) (discussing the case history).

[44] *City of Pompano Beach v. Yardarm Restaurant, Inc.* 509 So. 2d 1295 (Fla. 4th DCA 1987).

[45] *Sharrow v. City of Dania*, 83 So. 2d 274 (Fla. 1955); *Gross v. City of Miami*, 62 So. 2d 418 (Fla. 1953) ("It would appear childish to assert that the permittees were without knowledge of these undisputed facts and for the respondents to wholly disregard them and simultaneously incur financial obligations incidental to the construction of the building under the questioned permit, shows that they acted while red flags were flying and cannot complain of lack of notice."); *City of Ft. Lauderdale v. Lauderdale Industrial Sites*, 97 So. 2d 47 (Fla. 2d DCA 1957); *City of Miami v. State ex rel. Ergene, Inc.*, 132 So. 2d 474, 476 (Fla. 3d DCA 1961) (*per curiam*).

[46] Douglas W. Kmiec, Legislative zone amendments—Pending ordinance doctrine, 1 Zoning & Plan. Deskbook § 6:15 (2d ed. 2009); Pending ordinances, 83 Am. Jur. 2d Zoning and Planning § 575 (2010); 50 A.L.R.3d (Originally published in 1973) (cited by *Smith v. City of Clearwater*, 383 So. 2d 681 (Fla. 2d DCA 1980).); Edward H. Ziegler, Jr., Existing ordinances control, 4 Rathkopf's The Law of Zoning and Planning § 69:14 (4th ed. 2010); Edward H. Ziegler, Jr., Minority view: At time of permit application—Good faith or pending ordinance exception, 4 Rathkopf's The Law of Zoning and Planning § 70:17 (4th ed. 2010).

[47] Edward H. Ziegler, Jr., Minority view: At time of permit application—Good faith or pending ordinance exception, 4 Rathkopf's The Law of Zoning and Planning § 70:17 (4th ed. 2010).

[48] Edward H. Ziegler, Jr., Existing ordinances control, 4 Rathkopf's The Law of Zoning and Planning § 69:14 (4th ed. 2010).

[49] 590 So. 2d 488 (Fla. 4th DCA 1991), *rehearing denied*, 712 So. 2d 398 (Fla. 4th DCA 1998).

[50] *Id.*

county could have "avoided this controversy had it enacted a moratorium ordinance pending its consideration of the comprehensive plan's revision."[51] Subsequent appellate history in this case found that while rejection of the application for rezoning was an interference with a vested right protected by the due process clause, the interference would not serve as a basis for a substantive due process challenge because there was a rational basis for adopting an ordinance forbidding development that would be inconsistent with the comprehensive plan.[52]

Local Ordinances

A number of Florida jurisdictions have incorporated the pending ordinance doctrine into their ordinances.[53] This, therefore, gives the local government the administrative authority to delay a permit application while a zoning ordinance is pending that would render the proposed development nonconforming. By clarifying the state of the law through local legislation the local governments have given themselves the authority to refuse to issue permits on a basis that is not arbitrary or capricious. By codifying this rule the local government may enact policies to protect the health, safety, and welfare of its citizens without allowing developments in the pipeline to obtain vested rights by spending money in reliance on existing zoning.

Conclusion

Be it through case law or through local ordinance, the pending ordinance doctrine is being applied in Florida. The Florida Legislature has the authority to adopt, revise, or repeal the doctrine. In making this decision, the Legislature should take into consideration how legislation in this area would affect the following: (1) clarity in the law; (2) preemption of local ordinances; (3) avoidance of a "race of diligence" where developers rush to acquire permits when zoning changes are pending; (4) providing local governments with the ability to suspend permit issuance in furtherance of the health, safety, and welfare of its citizens; or (5) providing more opportunities for developers to obtain a vested right against future zoning changes.

[51] *Id*. (citing *Franklin County v. Leisure Properties, Ltd*., 430 So. 2d 475 (Fla. 1st DCA 1983)).
[52] *Gardens Country Club, Inc. v. Palm Beach County*, 712 So. 2d 398 (Fla. 4th DCA 1998).
[53] *See, e.g*., Aventura, L.D.R., s. 31-77; Daytona Beach, L.D.C., Art. 1, s. 6.1; Cocoa Beach, L.D.C., Ch. VII, Art. II; Clearwater, Community Development Code, ss. 4-303, 4-407 (authorizing the community development director to consider whether an ordinance is pending that would significantly affect the project); DeBary, L.D.C. s. 1-4 (placing a moratorium in effect for developments that would be nonconforming if the pending land development code went into effect); Monroe County, Code of Ordinances, Part II, Ch. 102, Art. IV., Div. 3 (stating that landowners do not have "good faith" and thus their rights do not vest if there was notice or knowledge of an imminent or pending change in zoning); Lauderdale-By-The-Sea, Code of Ordinances, Part II, Ch. 30, Art. IX, s. 30-531.