Commonly Asked Questions Regarding Zoning Hearings

The following are intended to convey complex legal issues in a simplified manner. They are not intended to provide legal advice to individuals. Please retain private counsel to answer your legal needs.

What is the difference between "Zoning" and "Land Use"? Land Use refers to the city's Future Land Use Map (FLUM) which is a colored map adopted as part of our Comprehensive Plan. The colors on this map correspond to broad categories of uses. There are only a few Land Use categories on the FLUM map. The Zoning Map includes much more detailed sub-categories. Zoning refers to all the sub-categories allowed below each Land Use. Think of it as a pyramid: the top of the pyramid is the Land Use, and below it is a wider portion that includes multiple possible Zoning districts that fit under that Land Use. Every piece of property in the city is assigned both a Land Use (big category of uses) and a Zoning (smaller, more specific sub-category).

Can the City add conditions to a traditional or "straight" zoning category (CM-1, CL-2, etc.)? The Florida Supreme Court in the 1956 case of Hartnett v. Austin found that this would amount to bargaining away the discretionary power to grant development approval, and disallowed it. This is why we say that "contract zoning" is not allowed under Florida law.

Then why are PUDs legal? Over time, urban planners began to see that traditional straight zoning categories (CM-1, CL-2, etc.) sometimes were too rigid, and did not allow for innovation or unusual circumstances. Traditional zoning categories are essentially an all or nothing proposition; the property owner is allowed all listed uses found in their zoning category, but cannot do any use that is not in their zoning category. In response to this modern zoning need, local governments amended their regulations to provide for a new flexible zoning category: the Planned Unit Development or Planned Urban Development. The PUD zoning category typically requires a whole series of findings that the application meets the PUD criteria in the code. In applying for this customizable zoning, the process may appear as a negotiation of requested uses and design elements. Government cannot force a property owner into a PUD zoning category; the property owner must choose to voluntarily enter into this process. All the specific rights, obligations and conditions of the PUD are therefore out in the open and voluntarily entered into at the time of the approval of the rezoning. If approved by ordinance, the PUD text and site plan then becomes the new code for that particular property.

Do "public rights" trump "private property rights"? United States constitutional law is premised on private property rights (life, liberty and property), which is a difference with some other industrial nations that may have a more communal sense of property. Historically in this country a private property owner had a right to all uses of their property, without any government or public interference. The only remedy available was to file suit under nuisance laws. The first case to support even the legality of applying some zoning regulation to private property was the 1926 U.S. Supreme Court decision in Village of Euclid v. Ambler Realty. The planning term "Euclidean zoning" comes from this case. Contemporary zoning identifies a list of uses that are allowed by right on a particular property. However, if government removes or restricts some of those existing uses, government must compensate the affected property owner. For instance, government cannot physically seize private land without a court finding of a public purpose and compensation for the taking; this is called condemnation or eminent domain. When a regulation or government action takes away all economic uses of private property it is called "inverse condemnation" and is also compensable. In 1995, Florida enacted the Bert J. Harris, Jr. Private Property Rights Protection Act that created an even more generous standard of taking for property owners. If a regulation or decision "inordinately burdens the reasonable, investment-backed expectation" of a property owner, government can potentially be held liable to pay them damages.

Can the government demand something for the public good in exchange for the approval of a development permit? In order for government to impose a condition to a development permit, the condition has to meet what is called the "dual rational nexus" test. This test came about from two

separate U.S. Supreme Court cases, called Nollan v. California Coastal Com. (1987) and Dolan v. City of Tigard (1994). The test requires that the demand be "rationally related" and "proportionate" to the impact of the requested development permit. In the Nollan case, the government agency demanded that the property owner give the public access to get to the beach from their property in order to get a permit to demolish their existing house and rebuild a bigger home. The court found that this involuntary demand, or "exaction" did not meet the legal test. In Dolan, the city demanded that the property owner give access to its waterfront for a city-wide greenway project, in order to approve paving the parking lot and expanding their plumbing supply store. The court also found this an illegal exaction.

Can the government apply new requirements on a case-by-case basis to an applicant? Local boards, such as the Planning and Zoning Board, have to apply the law as it is at the time of hearing the application. That means that the board members are limited to the existing criteria found in our regulations and cannot make up new rules on the spot and try to apply them to a particular applicant. The concept of "due process" implies that everyone applying for a permit will have the same rules apply to them as to everyone else, and those rules will be properly enacted ahead of time. Some enacted rules do allow conditions to be placed on an application, and the enacted rules explain what those conditions can be. The application of these conditions by the board cannot be "arbitrary or capricious", meaning the conditions must be based on evidence presented and linked to an existing criteria in the rules.

Can the board just vote to deny a project that the neighbors don't want? Zoning hearings are called "quasi-judicial hearings". Even though the strict rules of evidence don't apply, they are similar to court hearings, where evidence is presented and testimony is taken under oath. The board has to apply the evidence presented to the existing rules and make a decision based on that "competent, substantial evidence". The board cannot decide a case based on the "clamor of the crowd". However, citizen testimony that is fact-based and relevant to the criteria in the code can be used to determine whether or not the application should be granted or denied.

Why does the applicant/property owner get extra time to make a presentation, cross-examine witnesses and rebut opposing testimony, and why is their lawyer not under oath? The Florida courts in a series of decisions have created certain procedural rights that must be provided to the applicant property owner in a "quasi-judicial hearing", which includes rezonings and variances. The courts have also held that the applicant property owner has standing (a procedural right to appeal) whereas members of the public do not have automatic standing but must prove they have been harmed more than the general public (the "special injury" legal test). Our appellate court in Carillon v. Seminole County found that members of the public did not have a right to cross-examine witnesses as they are not legally a party to the quasi-judicial hearing. Lawyers, both in court and in quasi-judicial hearings, merely provide legal argument, they are not testifying.

Why does the City Attorney not present a case against the applicant? The City Attorney is prohibited by law to advocate against an applicant at a hearing or tell the board or commission how to decide a case. The board deciding a case has to remain impartial and neutral, like a judge in court, and therefore its legal counsel must also remain neutral until a final vote. Remember that the City Attorney cannot jeopardize the case by assuming the city will vote one way or the other. The City Attorney is available during the hearing to answer the board's legal or procedural questions. Once the city decides a case either to grant or deny the application, then the City Attorney's role completely changes, and the City Attorney vigorously defends the final decision of the city, whatever that may be. The City Attorney does not represent individual residents, public interest groups, or private developers. The City Attorney only has one client: the City of St. Augustine as a municipal corporation.