



Interoffice Memorandum

AGENDA ITEM

October 22, 2021

TO: Mayor Jerry L. Demings
-AND-
County Commissioners

FROM: Jon V. Weiss, P.E., Director
Planning, Environmental, and Development Services Department

CONTACT: **Alberto A. Vargas, MArch., Manager, Planning Division**

SUBJECT: November 9, 2021 - Work Session Item
Small Scale Amendment Process and Property Rights Element

At the September 14, 2021 Transmittal Public Hearing, the Board requested a work session to discuss two staff-initiated Comprehensive Plan policy amendments. The first amendment (2021-2-C-FLUE-1) addressed the County's review procedures for comprehensive plan future land use map amendments in light of a recent change to State law allowing properties of up to 50 acres to be treated as small scale development, in lieu of a full regular-cycle review. The second amendment (2021-2-C-PRE-1) addressed a property rights element resulting from new requirements imposed by House Bill 59 passed during the 2021 Florida Legislative Session. Specific to this second policy amendment, the Board requested further discussion regarding staff's recommendations and a model property rights element offered by the 1000 Friends of Florida advocacy organization, which also included broader public participation and engagement practices.

While these policy amendments were approved by the Board for Transmittal, any direction resulting from this work session may facilitate staff's refinements of these policies prior to the adoption hearings, which are tentatively scheduled for adoption by the Local Planning Agency on November 18, 2021, and the Board on November 30, 2021.

The staff reports for the amendments noted above are available under the September 14, 2021, listing of the Amendment Cycle section of the County's Comprehensive Planning webpage. Please see: <http://www.orangecountyfl.net/PlanningDevelopment/ComprehensivePlanning.aspx>.

This item is for informational purposes only; no action is required by the Board.

AAV/gg

Attachment

c: Christopher R. Testerman, AICP, Deputy County Administrator
Joel Prinsell, Deputy County Attorney
Whitney Evers, Assistant County Attorney
Roberta Alfonso, Assistant County Attorney
Gregory Golgowski, AICP, Chief Planner, Planning Division
Olan D. Hill, AICP, Assistant Manager, Planning Division
Eric P. Raasch, AICP, Planning Administrator, Planning Division



Model Property Rights Element

**Developed in Compliance
with the Requirements of**

**Fla. Stat. § 163.3177 (6)(i)1
(2021)**

September 30, 2021



Dear Florida local government leader,

We are pleased to share with you our updated model property rights element. You may recall that this summer, Florida amended the Community Planning Act to require every city and county “to include in its comprehensive plan a property rights element.” FLA. STAT. § 163.3177(6)(i)1. (2021). Your city or county must adopt this new element “by the earlier of the date of its adoption its next proposed plan amendment that is initiated after July 1, 2021, or the date of the next scheduled evaluation and appraisal of its comprehensive plan.” FLA. STAT. § 163.3177(6)(i)2. (2021).

In response to this new requirement, 1000 Friends of Florida authored the enclosed model property rights element for Florida comprehensive plans in collaboration with faculty at the University of Florida so that you can underscore your commitment to property rights and public participation. This model property rights element meets the applicable standards of the Community Planning Act. But it does more. With this element, your city or county can affirm its support for the rights of all people to participate in the planning decisions you make that affect their lives and property.

Since the requirement went into effect on July 1, 2021, the Department of Economic Opportunity (DEO) provided clarification for all the local governments and plan amendment applicants. The first clarifying guidance rolled out on July 23, 2021. Shortly thereafter on August 5, 2021, the agency provided further clarification to assist local governments in the adoption process.

We are pleased to provide feedback from DEO by encouraging all local governments to submit their private property rights element as a stand-alone element. This is important for the agency in its review of all the incoming plan amendments. We also made a slight text change to the model, highlighted in yellow on page 2, at the request of DEO.

While local governments are only required to follow their comprehensive plan when making land use and planning decisions, 1000 Friends of Florida believes that open and transparent decision-making is the best protection for property rights for all local decision making. Our updated property rights model below further expands the consideration of private property rights to all local government decision making rather than just limiting it to land use and planning decisions. If submitting a small-scale plan amendment, please be advised that recent legislation modified the acreage thresholds of what constitutes a small-scale plan amendment under Section 163.3187(1)(a), Florida Statutes.

We look forward to working with the public and local governments on understanding the impacts of these new laws. We are dedicated to providing you the most up-to-date, accurate information. For your ease of reference, you can easily track the changes to the model element because we high-lighted the changes. All deletions are reflected with a strike-through and all added language is underlined. If you have further questions about this proposed element, please contact 1000 Friends of Florida Policy & Planning Director Jane West at jwest@1000fof.org. A downloadable version of updated document is available at 1000fof.org/property-rights.

Sincerely,

A handwritten signature in cursive script that reads 'Paul Owens'.

Paul Owens, President

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Adoption Guide

We all rely on local government plans in different ways.

- *Residents* of any community have chosen to live there—and often have bought a home, the most significant financial decision many people make—because of things local governments address, like the condition of streets and parks, the proximity to daily needs, and community safety.
- *Businesses* locate in a community for its resources. They care about human assets, like customers and workers. And they care about physical assets like public infrastructure and the environment. From farmers to tech companies, businesses rely on local government plans so they can count on these resources being available.
- Finally, *real estate investors* study local government rules so they can make financial plans and accurately evaluate investment opportunities. For investments in real estate to have low risk, local governments need to protect and improve the quality of a community over time.

Land values reflect how desirable a community is in many ways. Regulating land use and protecting property rights are not conflicting goals. Rather, local government rules generally create value in property and bring stability to real estate markets. Rules that benefit the public also protect property rights.

Still, *a local government's process for regulating land* greatly impacts real estate markets and property rights. Transparency, predictability, and reliability are three strategies for implementing land use rules in a way that benefits people and respects property rights.

- *Transparency* means people can see and participate in processes for developing rules.
- *Predictability* means a local government follows rules that are clear and unambiguous. Real estate investors should be able to read rules and know whether local government will permit a development proposal. Residents should be able to read rules and then know what kind of development will occur in their community.
- *Reliability* means a local government follows through on its commitments. Cities and counties should make realistic plans and should follow them. And local governments should only change their plans after thorough consideration leads to strong support. When a government is reliable, people can make long-term investments in the community—one key to a successful local economy.

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The property rights element

The property rights element attached includes three objectives addressing property rights.

- **Objective 1** identifies specific property rights and states that local government will respect them.
- **Objective 2** identifies the rights of people to participate in decisions that affect their lives and property. The objective provides standards for local government decisions to be *transparent* in respect for this right.
- **Objective 3** provides standards for local government decision-making to be *reliable* and *predictable* to promote sound, long-term investments in a community.

The following paragraphs explain each of these objectives, and their policies, in more detail.

Objective 1—Respect property rights

Florida Statutes provide the language of objective 1 and of policies 1.1 through 1.4 as possible language local governments can adopt to meet the statutory requirement to have a property rights element. See Fla. Stat. § 163.3177(6)(i) (2021). Adopting objective 1 alone would meet the minimum statutory standard of having a property rights element in a comprehensive plan.

Objective 2—Transparency

Florida law recognizes the due process rights of people who are parties to many local government land use decisions. See *Brevard Cnty. v. Snyder*, 627 So. 2d 469 (Fla. 1993) and *Jennings v. Dade Cnty.*, 589 So. 2d 1337 (Fla. 3d DCA 1991). Due process rights are rights to have government make decisions in a certain way when those decisions affect other rights, like the right to property.

Courts have recognized due process rights in Florida land use hearings including the right to receive notice, the right to be heard, the right to present or rebut evidence, and the right to be informed of all facts on which a local government bases its decision. *Jennings* at 1340. Objective 2 includes four policies that clearly identify what decisions a local government will make in a hearing, who will get to participate in that hearing, and what process the local government will use to protect the rights of participants.

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Adoption Guide *continued*

State law does not require a local government to adopt objective 2 and a local government could adopt this property rights element with or without objective 2 and its comprehensive plan could still comply with state law. Adopting objective 2, however, establishes clear standards to make planning and development decisions more *transparent*.

Here are summaries of and notes on each of the four policies in objective 2.

- **Policy 2.1** identifies those decisions a local government will make according to objective 2. The decisions are: comprehensive plan amendments, rezonings, and development approvals of a certain size or requiring a variance or an exception. A variance is permission to not follow land use rules a government may grant when following those rules would create a hardship. *Josephson v. Autrey*, 96 So. 2d 784 (Fla. 1957). An exception is permission to not follow a general land use rule when a development proposal meets certain predetermined standards. 7 Fla. Jur. 2d *Building, Zoning, and Land Controls* § 245 (2020).

The threshold sizes that Policy 2.1 provides for development to be subject to objective 2 should vary depending on the needs of each city or county. Policy 2.1 presents these thresholds in brackets so a local government can easily identify them and change them to match local needs.

- Policy 2.2 includes two subparagraphs. Subparagraph A identifies who may participate in a hearing. Subparagraph A calls a person who may participate an “affected person.” The explanation of who is an affected person generally follows the definition of “aggrieved or adversely affected party” in the Community Planning Act. FLA. STAT. § 163.3215(2). The explanation of who is an affected person also includes associations representing the interests of their members. This inclusion of associations generally follows the Florida Supreme Court standard for associational standing. *Fla. Home Builders Ass’n v. Dep’t of Lab. & Emp. Sec.*, 412 So. 2d 351, 353-54 (Fla. 1982).

Subparagraph B identifies some of the procedural due process rights that Florida courts have recognized parties to some land use hearings have. See *Jennings v. Dade Cnty.*, 589 So. 2d 1337, 1340 (Fla. 3d DCA 1991).

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Model Property Rights Element

Adoption Guide *continued*

- **Policy 2.3** requires a local government to mail notice of hearings when those hearings relate to a specific property.

Policy 2.3 sets a threshold distance from the specific property that the local government will use to identify the residents and property owners to whom the local government will mail notice. This threshold distance should vary depending on the needs of each city or county that adopts the property rights element. Policy 2.3 presents this threshold in brackets so a local government can easily identify it and change it to match local needs.

- **Policy 2.4** requires an applicant to hold a public pre-application meeting. State law does not require public pre-application meetings for planning and development decisions. However, informing the public early about planned changes to their community is a best practice that many recognize.

For example, the 1000 Friends of Florida Citizen Planning Bill of Rights calls for applicants to “conduct workshops with citizens to identify all issues of concern prior to any public hearing.” Citizen Planning Bill of Rights, 1000 Friends of Florida, 1000fof.org/citizens/bill/ (last visited July 11, 2021).

Also, the American Institute of Certified Planners requires planners to “provide timely, adequate, clear, and accurate information on planning issues to all affected persons” and to “give people the opportunity to have a meaningful impact on the development of plans and programs that may affect them.” AICP Code of Ethics and Professional Conduct, American Institute of Certified Planners (April 1, 2016).

Policy 2.4 sets a threshold distance from the specific property that the applicant will use to identify the residents and property owners the applicant will invite to the public pre-application meeting. This threshold distance should vary depending on the needs of each community that adopts the property rights element. Policy 2.4 presents this threshold in brackets so a local government can easily identify it and change it to match local needs.

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Adoption Guide *continued*

Objective 3

Objective 3 includes three policies that provide special procedural standards for certain local government decisions. State law does not require a local government to adopt objective 3 and a local government could adopt this property rights element with or without objective 3 and its comprehensive plan could still comply with state law. Adopting objective 3, however, establishes clear standards to make planning and development decisions more *predictable* and *reliable*. The 1000 Friends of Florida Citizen Planning Bill of Rights recommends the standards included in objective 3.

Here are summaries of and notes on each for the three policies in objective 3.

- **Policy 3.1** identifies those decisions a local government will make according to objective 3. The decisions are comprehensive plan amendments and rezonings.
- **Policy 3.2** requires a local government to make some decisions by a majority-plus-one vote. The 1000 Friends of Florida Citizen Planning Bill of Rights says, “In order to protect the integrity of the comprehensive plan, a ‘super majority’ vote should be required for proposed changes that directly affect the community’s unique sense of place. ... Changes to such important policies should have the highest level of support and require the consent of more than a simple majority of elected officials.” Citizen Planning Bill of Rights, 1000 Friends of Florida, 1000fof.org/citizens/bill/ (last visited July 11, 2021).
- **Policy 3.3** requires a local government to make some decisions only after the proposed decision, and information supporting it, have been available to the public for ten days. The 1000 Friends of Florida Citizen Planning Bill of Rights says publishing information regarding important decisions well before a hearing “allows citizens, commissioners, and others to fairly evaluate the document with data and analysis and not be subject to an endless ‘shell game’ of last-minute changes.” *Id.*



Model Property Rights Element

Model Element

Ordinance No. < Ordinance Number >
An Ordinance Of The <Local Government Name >
Amending the Comprehensive Plan by Adding a
New Property Rights Element.

WHEREAS, Section 163.3167, Florida Statutes, requires <local government name > to maintain a comprehensive plan to guide its future development and growth; and

WHEREAS, Section 163.3177(6)(i)1., Florida Statutes, requires the <local government name > comprehensive plan to include a property rights element; and

WHEREAS, <local government name > respects judicially acknowledged and constitutionally protected private property rights; and

WHEREAS, <local government name > respects the rights of all people to participate in land use planning processes; and

WHEREAS, this ordinance will amend the comprehensive plan by adding a property rights element;

NOW, THEREFORE, BE IT ORDAINED BY THE <GOVERNING BODY NAME>:

SECTION 1. The <local government name > comprehensive plan is amended by adding the property rights element attached as EXHIBIT A and made a part of this ordinance as if set forth in full.

PASSED AND ADOPTED this _____ day of _____, _____.

<Appropriate official name and title >

Attest:

<Appropriate official name and title >

Approved as to form and legality:

<Appropriate official name and title >

This ordinance passed on transmittal (first) reading this _____ day of _____, _____.

This ordinance passed on adoption (second) this _____ day of _____, _____.



Model Property Rights Element

Exhibit A

Goal <Local government name> will ~~making planning and development~~ make decisions with respect for property rights and with respect for people's rights to participate in decisions that affect their lives and property.

Objective 1 < Local government name> will respect judicially acknowledged and constitutionally protected private property rights.

Policy 1.1 < Local government name> will consider in its decision-making the right of a property owner to physically possess and control his or her interests in the property, including easements, leases, or mineral rights.

Policy 1.2 < Local government name> will consider in its decision-making the right of a property owner to use, maintain, develop, and improve his or her property for personal use or for the use of any other person, subject to state law and local ordinances.

Policy 1.3 < Local government name> will consider in its decision-making the right of the property owner to privacy and to exclude others from the property to protect the owner's possessions and property.

Policy 1.4 < Local government name> will consider in its decision-making the right of a property owner to dispose of his or her property through sale or gift.

Objective 2 People have the right to participate in planning and development decisions that affect their lives and property. <Local government name> decision-making will be transparent so that all people may participate in decisions that affect their lives and property. Policies 2.1 through 2.4 provide minimum standards for some planning and development decisions. Land development regulations may provide for additional processes and standards.

Policy 2.1 Decisions for which <local government name> must follow policies 2.2 through 2.4. <Local government name> must follow the procedures in policies 2.2 through 2.4 when <local government name>: amends this comprehensive plan; changes the zoning designation of property; or approves a development order for more than [9] residential dwelling units, for more than [9,999] square feet of non-residential development, governing more than [5] acres of land, requiring a variance, or requiring an exception.

Policy 2.2 Public hearing necessary. A decision policy 2.1 identifies must occur in a public hearing meeting the standards of this policy.

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Exhibit A *continued*

A. Any affected person may participate. <Local government name> recognizes that planning and development decisions affect complex systems and have impacts that occur beyond the site of development. Any affected person may participate in and be a party to a hearing on a decision this policy governs. An affected person is any person or local government that will suffer an adverse effect to an interest protected or furthered by this comprehensive plan, including interests related to health and safety, police and fire protection service systems, densities or intensities of development, transportation facilities, health care facilities, equipment or services, and environmental or natural resources. The alleged adverse interest may be shared in common with other members of the community at large. An owner, developer, or applicant for a development order is an affected person. An association representing the interest of one or more members when the interest is within the association's general scope of interest and activity is an affected person.

B. An affected person's right to be heard. <Local government name> recognizes that it should make planning and development decisions in response to true and accurate information. In all decisions this policy governs, <local government name> will provide every affected person an equal opportunity to be heard, to present and rebut evidence, and to be informed of all information on which <local government name> bases its decision. <Local government name> will not grant any affected person a greater opportunity to be heard than another affected person. For example, no affected person, including an applicant for a development order, may present in a hearing for more time than <local government name> makes available to any other affected person.

Policy 2.3 <Local government name> must mail notice. <Local government name> recognizes that a person cannot participate in decisions about which they are unaware. In addition to providing notice as other laws require, when <local government name> makes a decision policy 2.1 identifies that relates to a piece or to pieces of real property that <local government name> can specifically identify, <local government name> will, at least 30 days before the hearing, mail notice of the hearing to the owners of real property and to residents within [1,320] feet of the real property to which the decision relates.

Policy 2.4 Public pre-application meeting. <Local government name> recognizes that planning and development decisions raise issues which <local government name> may not be capable of adequately addressing in a single hearing and that <local government name> will make the best decisions when every affected person has the opportunity to participate early and throughout the decision-making process. The applicant for a decision policy 2.1 identifies (or <local government name> if <local government name> initiates the decision-making process) must hold a public

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Model Property Rights Element

Exhibit A *continued*

pre-application meeting prior to applying for or initiating the decision-making process. The party holding the meeting must request, at least 30 days before the meeting, that <local government name> provide notice of the meeting in the normal manner that <local government name> provides notice of public meetings and <local government name> will comply with this request. In addition, if a proposal relates to a piece or to pieces of real property that the party holding the meeting can specifically identify, then the party holding the meeting must, at least 30 days before the meeting, mail notice of the meeting to residents and to owners of real property within [1,320] feet of the real property to which the proposal relates. In the meeting, the party holding the meeting must: present its proposal, provide time for all people attending to ask questions and share their perspectives, and record notes which it will provide to <local government name> and which <local government name> will make a part of the record related to its decision on the proposal.

Objective 3 People rely on this comprehensive plan and on the zoning designations of properties when deciding how to use property. <Local government name> decision-making will be reliable and predictable to promote sound, long-term investments in the community. Policies 3.1 through 3.3 provide minimum standards for some planning and development decisions. Land development regulations may provide for additional processes and standards.

Policy 3.1 Decisions for which <local government name> must follow policies 3.2 and 3.3. <Local government name> must follow the procedures in policies 3.2 and 3.3 when <local government name> amends this comprehensive plan or changes the zoning designation of property.

Policy 3.2 Majority-plus-one vote required. <Local government name> may only make a decision policy 3.1 identifies by the affirmative vote of a majority plus one of the <local government governing body name (e.g. city commission or county commission)>.

Policy 3.3 Right to evaluate proposed decisions. <Local government name> respects the right of people, including elected officials, to fairly evaluate proposed decisions this objective governs. The <local government governing body name> may only make a decision policy 3.1 identifies ten or more days after <local government name> has made available to the public the specific decision the <local government governing body name> will consider and the written record which will support the <local government governing body name> decision. If <local government name> adds information to the written record, or if the <local government governing body name> revises a proposed decision within ten days of a planned public hearing, the <local government governing body name> must postpone its decision until enough time has passed to satisfy this policy.

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building better communities · saving special places

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