No. _____

In The
Supreme Court of the United States

HILLCREST PROPERTY, LLP,

Petitioner,

v.

PASCO COUNTY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

DAVID SMOLKER
Counsel of Record
JESSICA S. SWANN
JACOB T. CREMER
SMOLKER BARTLETT SCHLOSSER
LOEB & HINDS, P.A.
500 E. Kennedy Blvd.
Suite 200
Tampa, Florida 33602
(813) 223-3888
Davids@smolkerbartlett.com
Counsel for Petitioner

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTIONS PRESENTED

1. Whether a state statute of limitations should apply to a claim brought pursuant to 42 U.S.C. § 1983 seeking to enjoin enforcement of a county ordinance that, on its face, and in violation of the Fifth Amendment's Due Process Clause, extortionately leverages the police power every time it is applied to coerce landowners into dedicating road right-of-way the county would otherwise have to pay for.

2. If there is a statute of limitations, whether the federal Continuing Violation Doctrine applies, such that a landowner whose property is subject to the ordinance may elect to bring a facial Due Process claim either upon enactment of the ordinance or later, within the limitations period following application of the ordinance to that landowner.

PARTIES TO THE PROCEEDING

Hillcrest Property, LLP ("Hillcrest"), is the petitioner here and was the plaintiff-appellee below.

Pasco County, Florida (the "County"), is the respondent here and was the defendant-appellant below.

CORPORATE DISCLOSURE STATEMENT

Hillcrest has no parent corporation. It is privately held, and no publicly-held company owns 10% or more.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF CONTENTS – Continued

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

UNITED STATES CONSTITUTION

TABLE OF AUTHORITIES – Continued

PETITION FOR WRIT OF CERTIORARI

Hillcrest respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the Eleventh Circuit, reported at 754 F.3d 1279, is reprinted in the Appendix (App.) at 1-9. The district court's order permanently enjoining the Respondent is not reported but is reprinted at App. 10. The district court's summary judgment order, reported at 939 F. Supp. 2d 1240, is reprinted at App. 11-71. The report and recommendation of the magistrate judge, adopted in part by the district court, is not reported but is reprinted at App. 72-110.

JURISDICTION

The Eleventh Circuit entered its judgment on June 18, 2014 and denied a petition for rehearing or rehearing en banc on September 2, 2014. App. 111-12. On November 11, 2014, this Court granted Hillcrest's application for extension of time to file a petition for writ of certiorari, extending the time for filing to January 15, 2015. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

The Due Process Clause of the Fifth Amendment to the United States Constitution provides:

> No person shall be . . . deprived of life, liberty, or property, without due process of law. . . .

42 U.S.C. § 1983 provides in material part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

42 U.S.C. § 1988(a) provides:

> The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of titles 13, 24, and 70 of the Revised Statutes for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions

> necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

Section 95.11(3)(p), Florida Statutes, provides in material part:

> Actions other than for recovery of real property shall be commenced as follows:
>
> * * *
>
> (3) WITHIN FOUR YEARS
>
> * * *
>
> (p) Any action not specifically provided for in these statutes.

Pasco County Ordinance Number 05-39 (the "Ordinance") is reproduced in the Appendix at App. 113-74.

INTRODUCTION

In *Koontz v. St. Johns River Water Management District*, 133 S. Ct. 2586, 2596 (2013), this Court held that governments cannot make extortionate demands for land because they "impermissibly burden the right not to have property taken without just compensation." This Court explained the "reality" that "land-use permit applicants are especially vulnerable to the type of coercion that the unconstitutional conditions doctrine prohibits because the government often has broad discretion to deny a permit that is worth far more than property it would like to take." *Id.* at 2595.

Pasco County enacted and enforced an Ordinance that, in every application, violates *Koontz*, while depriving affected property owners of the substantive and procedural protections of eminent domain. Hillcrest attacked the Ordinance as violating Due Process both on its face and as-applied under 42 U.S.C. § 1983. On summary judgment, the district court held the Ordinance facially unconstitutional, finding that it leveraged the police power to exact land that the County would otherwise have to pay for in violation of the Due Process Clause. Characterizing the Ordinance is as "an unmistakable, abusive and coercive misapplication of government power, perpetrated to cynically evade the Constitution," App. 69, the district court then enjoined the County from prospectively enforcing the Ordinance.

On appeal, the Court of Appeals for the Eleventh Circuit held that Hillcrest's facial claim was barred by Florida's four-year personal injury statute of

limitations. Without analyzing the propriety under 42 U.S.C. § 1988 of applying a statute of limitations to a law that is facially void ab initio, and therefore not law at all, the Eleventh Circuit assumed that Florida's four-year statute of limitations applied. By so doing, the Eleventh Circuit decided an important federal question that has not been settled by this Court: namely, whether a state statute of limitations can bar a federal court from prospectively enjoining enforcement of an unconstitutional law.

Even assuming that a statute of limitations can be applied to a claim that a law is facially unconstitutional (and therefore void ab initio), the Eleventh Circuit ignored the federal rules of accrual and the Continuing Violation Doctrine. First, the Eleventh Circuit conflated the remedial distinction between facial and as-applied challenges with the unrelated jurisdictional question of statutes of limitations, creating different and unworkable accrual rules for facial and as-applied Due Process claims. Second, the Eleventh Circuit barred Hillcrest's facial Due Process claim, despite the fact that the injury upon which Hillcrest's facial claim was based was not fully effectuated and complete until, as the district court found, the County first applied the Ordinance to Hillcrest, well within the statutory period after the Ordinance was enacted. Third, even if Hillcrest's facial Due Process claim accrued upon enactment of the Ordinance, the Eleventh Circuit ignored the Continuing Violation Doctrine, which prevented the enforcement of the County's facially unconstitutional ordinance from being insulated by a statute of

limitations. The Ordinance subjected Hillcrest to the continuing and ongoing threat of extortionate leveraging of the police power. While this Court has clearly held that the doctrine is applicable to suits under § 1983, the courts of appeals are now intolerably split on whether the doctrine must be applied to facial Due Process challenges under § 1983.

In sum, the Eleventh Circuit has forever immunized from facial challenge a regulatory scheme that cannot ever be applied constitutionally. This enables the County to continue to extortionately leverage its police power every time it applies the Ordinance, enabling it to continue to coerce landowners into dedicating land for free the County would otherwise have to pay for. This should not be the law. The Due Process Clause prohibits government from extortionately leveraging its police power to evade the substantive and procedural protections of eminent domain. A law purposefully designed to evade this prohibition cannot stand.[1]

[1] For more information about the relationship between the Ordinance and *Koontz*, *see* Brief for Amicus Curiae Hillcrest Property, LLP in Support of Petitioner, *Koontz*, 133 S. Ct. 2586 (No. 11-1447).

STATEMENT OF THE CASE

A. Pasco County Adopts an Ordinance Mandating Dedication of Land for Road Right-of-Way Without Payment of Compensation and Without Regard to the Traffic Impact of Proposed Development.

On November 22, 2005, the Board of County Commissioners of Pasco County, Florida (the "County") adopted the Right-of-Way Corridor Preservation Ordinance (the "Ordinance"), the express purpose of which is to plan for growth by "provid[ing] for the dedication and/or acquisition of right-of-way and transportation corridors." *See* App. 113-174;[2] *see also* Doc. 112-2 at 3. County officials candidly acknowledge that the Ordinance "saves the County millions of dollars each year in right of way acquisition costs, business damages and severance damages." App. 13.

The Ordinance accomplishes these savings by first designating new Transportation Corridors[3]

---

[2] The Ordinance adopted Pasco County Land Development Code ("LDC") section 319. During this action, the County moved the Ordinance without material amendment to section 901.2. *See* App. 15 at n.1. For simplicity, this petition cites to the original.

[3] Under the Ordinance, the term "Transportation Corridors" means:

> All land occupied or used or intended to be occupied or used as a street or roadway and shown on the Pasco County Comprehensive Plan Transportation Element Transportation Corridor Preservation Map and Table, as amended, which may include areas for medians, shoulders, frontage roads, drainage, buffers, landscaping,

(Continued on following page)

("Corridors") – lands earmarked along existing and future roadways the County projects it will need to acquire to expand or construct roadways to accommodate future population growth anticipated by build-out of the County in 2050. Doc. 112-3 at 40, 104-06. Because the Corridors encroach on privately owned land, the Ordinance then requires any landowner seeking to develop their property to dedicate – convey in fee simple to the County at no cost to the County – as a condition of development approval, the portion of their property lying within a corridor. LDC §§ 319.3.A, 319.6, 319.8.A (App. 143, 146-55). Thus, on its face, the Ordinance enables the County to acquire rights-of-way for free without having to resort to eminent domain and without having to provide landowners with the substantive and procedural protections of eminent domain. LDC § 319.1.B (App. 139-40).

The dedication is not required unless and until the landowner submits and receives approval of a development plan. Landowners with no plans to develop their property are not required to dedicate any property; they may await eminent domain proceedings.

The exact dimensions of the Corridors are subject to future modification either by amendment of the table set forth in the Transportation Element of the County's Comprehensive Plan or by the design and

---

sidewalks, bike paths, utilities and other roadway related improvements.

LDC § 201-1.3 (App. 117); *see* Doc. 36-2; Doc. 36-3.

engineering plans prepared by the transportation authority having jurisdiction over the roadway anticipated to be widened. *See* LDC § 201-1.3 (App. 117); *see also* App. 22.

The lands required to be dedicated under the Ordinance are not limited to lands within a corridor located on the proposed development site. They also include additional lands that: (1) are owned by the same landowner within a Corridor that are adjacent to, but not a part of, a development site; (2) are for the construction of new arterial and collector roadways for which the County has not yet designated Corridors; and (3) are needed for drainage, retention, wetland mitigation, floodplain compensation, frontage roads, sidewalks, bike paths, and other roadway-related improvements. LDC § 319.8.A (App. 153).

The Ordinance requires dedication of land regardless of: (1) the magnitude or traffic-related impact of the proposed development; (2) the level of traffic congestion on the adjacent road network; (3) whether there is a present need to widen the road; (4) whether widening of the road is required to accommodate the traffic impacts of the proposed development; (5) whether the road is scheduled for widening; (6) whether the roadway is ever even built; (7) whether adequate capacity exists on the roadway to accommodate the proposed development; and (8) regardless of the amount of generally applicable transportation impact fees or development specific fair share transportation impact mitigation fees which the development is assessed. *See id.*

Under the Ordinance, the County does not determine the ultimate amount of land to be dedicated until development plan review. Once a development plan is approved, the landowner must deed the land to the County before commencing development. *Id.* The land is exacted without the County having first made any individualized determination that the required dedication is reasonably related both in nature and extent to the traffic impact of the proposed development. *Id*.

In an attempt to cure the constitutional infirmity that the district court adeptly labeled "coerced conveyance," App. 13, the County provides landowners who believe that such dedication is not "roughly proportionate" to the traffic impacts of his or her proposed development, and who wish to be compensated for any such excessive dedication requirement, with a discretionary "dedication waiver" procedure before the County's Development Review Committee ("DRC"). LDC § 319.9 (App. 155-63). Through the waiver procedure, a landowner may present his case before the DRC, which is the same governmental body that imposes the dedication condition in the first instance, and seek "compensation" from the County. *Id.* This so-called "remedy" is unfair, costly, time consuming and unduly burdensome. Its remedial protections are illusory. *See* App. 18 n.2; 108 n.31.

B. Pasco County Applies the Ordinance to Hillcrest.

The Ordinance was enacted on November 25, 2005. The County first applied it to Hillcrest in December 2006, when Hillcrest applied for development plan approval for a commercial shopping center. The County demanded that Hillcrest dedicate a fifty-foot deep swath of its property's one-thousand four hundred feet of frontage along State Road ("S.R.") 52 as future right-of-way for the widening of S.R. 52. App. 22.

Shortly thereafter, in February 2007, the Florida Department of Transportation, which maintains S.R. 52, revised its plan to widen S.R. 52 so that all additional land needed for right-of-way would be taken from the north side of the road. App. 24-27. As a result, the County demanded that Hillcrest set aside and dedicate an additional ninety-foot deep swath of land. All told, the County demanded that Hillcrest dedicate a one-hundred forty foot deep swath of its property's S.R. 52 frontage, which represented 4.23 acres or twenty-eight percent (28%) of its commercially zoned property. *Id.*; Doc. 50 ¶¶ 13-14, Ex. F; Doc. 104 ¶ 3. The dedication was required even though S.R. 52 had adequate capacity to accommodate the traffic impact of Hillcrest's proposed commercial development. Doc. 77-1 at 2 ¶¶ 4-6; Doc. 77-3 at 1-4.

C. Hillcrest Attacks the Ordinance on Its Face as Violating the Due Process Clause.

The County ultimately approved the shopping center plans, but only after Hillcrest agreed under a reservation of rights to dedicate the land if it would be fairly compensated for it. After unsuccessfully attempting for two years to negotiate payment of compensation for the required dedication, Hillcrest filed suit in the Middle District of Florida, alleging various constitutional wrongs under 42 U.S.C. § 1983. App. 27-28.

Count VII of Hillcrest's Amended Complaint sought injunctive relief and damages on the ground that the Ordinance on its face violated the Due Process Clause of the United States Constitution. Doc. 36 at 31. Hillcrest moved for partial summary judgment on liability under Count VII. Among other things, Hillcrest argued that the Ordinance violated the Due Process Clause by permitting the County to extortionately leverage its police powers: (1) without regard to the relative traffic impact of the proposed development, (2) without the County having first made the individualized determination required by this Court's exactions case law, and (3) without providing a meaningful substitute for the substantive and procedural protections of eminent domain. Doc. 112 at 19-21. *See Dolan v. Tigard*, 512 U.S. 374 (1994); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987); *see also Koontz*, 133 S. Ct. at 2586.

D. The District Court and the Magistrate Judge Hold the Ordinance Facially Unconstitutional.

The district court referred Hillcrest's motion to the magistrate judge, who recommended granting it in part. The magistrate found that "the County has purposefully devised a land-use scheme which sanctions, indeed commands, in all instances within its purview and without individualized consideration, the dedication of . . . property without compensation as a condition of development approval or permit." He further found that the "County cannot, consistent with the Fifth and Fourteenth Amendment . . . employ its police power to extort property from private landowners and avoid the obligations inherent in these constitutional provisions." App. 106-07. Moreover, he found that the administrative remedies built in to the Ordinance "do not assure just compensation as required by the state and federal constitutions," and that "a plain reading of the [Ordinance] reveals that the remedies may well be illusory." App. 108 n.31. Consequently, the magistrate recommended that sections 319.8-319.10 be declared unconstitutional and that the compulsory dedication condition to Hillcrest's development approval and construction permit be stricken. App. 108.

The district court adopted the magistrate's recommendation in large part. It found that "the Ordinance improperly uses the police power and fails to advance a legitimate public purpose (taking by eminent domain is a legitimate governmental purpose;

extorting land owners is not).” App. 63. It further concluded that the “County’s wielding the police power to avoid eminent domain stands athwart established principles of due process,” because, “[a]lthough the thrifty accomplishment of a legitimate objective is a proper governmental purpose, thrifty accomplishment of a legitimate objective by the circumvention of the constitutional guarantees attendant to eminent domain is neither a legitimate objective nor a proper public purpose. . . .” App. 56, 60.

E. As a Remedy, the District Court Permanently Enjoins Enforcement of the Ordinance.

In fashioning a remedy, the district court reasoned that, because the Ordinance shifted burdens that the Constitution places on the government, it must invalidate the Ordinance:

> Without invalidation of the Ordinance as an impermissible use of the police power, each landowner must proceed in inverse condemnation, without the procedural protections of condemnation, without the appointment of an appraiser, without the submission of testimony, without the right to attorney’s fees, and without the government’s depositing in the court registry . . . the property’s appraised value.

App. 60-61. After invalidating sections 319.8-319.10 of the Ordinance, the district court permanently enjoined the County from enforcing it. App. 10.

The County argued before the district court that Hillcrest's facial due process claim accrued upon enactment of the Ordinance on November 25, 2005, and therefore, was barred by Florida's four-year statute of limitations.[4] The district court rejected the County's argument:

> This theory condones the government's delaying enforcement of a new law until expiration of the applicable limitation and forever insulating the unconstitutional law. Instead, a claim for relief accrues and the applicable limitation begins at the occurrence of the last element of the legal claim – usually, once an injury occurs. Hillcrest's injury occurred the moment Pasco County subjected Hillcrest to the Ordinance. At the earliest, Hillcrest's claim accrued in December, 2006, when Hillcrest applied for site plan approval. (The claim probably accrued in February, 2007, when Pasco County first denied the site plan based on Hillcrest's failure to comply with the Ordinance.). Hillcrest sued on April 7, 2010, within the four-year limitation of a Section 1983 claim in Florida.

App. 37-38 (omitting footnote).

[4] The County proffered no evidence of any injury suffered by Hillcrest as a result of mere enactment of the Ordinance. *See* Doc. 116 at 4-5; Doc. 66 at 15-16.

F. The Eleventh Circuit Holds that Facial Substantive Due Process Claims Accrue When a Law is Enacted.

The County appealed to the Eleventh Circuit. On appeal, the panel vacated the permanent injunction and the summary judgment on Hillcrest's facial challenge, holding that Hillcrest's claim accrued upon enactment of the Ordinance, and therefore that Hillcrest's claim was barred by Florida's four-year statute of limitations. App. 9. The panel reasoned that Hillcrest's injury was a reduction in the value of its property (presumably due to the prospect of having to deed part of the land without payment of compensation at some indefinite point in the future). The panel held that this injury necessarily occurred at the time the Ordinance was enacted and that this "should have been apparent to Hillcrest." App. 9.

The panel apparently decided the accrual issue as a matter of law because it did not cite to any record evidence of any injury to Hillcrest resulting from mere enactment of the Ordinance.[5] App. 8-9. Instead, the panel pointed to decisions from the Sixth and Ninth Circuits, both of which involved due process challenges to statutes where the injury was fixed and complete upon enactment. App. 5-6 (citing *Action Apartment Ass'n v. Santa Monica Rent Control Bd.*, 509 F.3d 1020, 1027 (9th Cir. 2007), and *Kuhnle Bros., Inc. v. Cnty. of Geauga*, 103 F.3d 516, 520-21 (6th Cir. 1997)).

---

[5] There is no record evidence supporting this finding.

As the panel observed, these cases "relied heavily on prior precedent holding that a facial taking claim accrues upon enactment," App. 5, where "the basis of a facial [takings] challenge is that the very enactment of the statute has reduced the value of the property or has effected a transfer of a property interest. This is a single harm, measurable and compensable when the statute is passed." *Kuhnle*, 103 F.3d at 521 (citing *Levald Inc. v. Palm Desert*, 998 F.2d 680, 688 (9th Cir. 1993) and *Nat'l Adver. Co. v. Raleigh*, 947 F.2d 1158, 1163-66 (4th Cir. 1991)).

REASONS FOR GRANTING THE WRIT

I. THE ELEVENTH CIRCUIT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

Section 1983 provides a federal cause of action in favor of persons deprived of their federal civil rights – a legal sword to victims of unconstitutional conduct perpetrated by those wielding state authority. *See Felder v. Casey*, 487 U.S. 131, 138-39 (1988) (quoting *Mitchum v. Foster*, 407 U.S. 225, 239 (1972) (§ 1983 provides "a uniquely federal remedy against incursions . . . upon rights secured by the Constitution and laws of the Nation.")). As this Court has emphasized, "the central objective of the Reconstruction-Era civil rights statutes . . . is to ensure that individuals whose federal constitutional or statutory rights are abridged may recover damages or secure injunctive relief," and

it is to be accorded "a sweep as broad as its language." *Id.* (quoting *Burnett v. Grattan*, 468 U.S. 42, 55 (1984) and *United States v. Price*, 383 U.S. 787, 801 (1966)).

Through § 1983, federal courts are empowered to enforce the Constitution's imperative injunction by denying legal effect to facially unconstitutional laws enacted by political subdivision of a state. Congress elected not to provide a specific statute of limitations to govern § 1983 actions. However, relying upon 42 U.S.C. § 1988, this Court has urged lower courts to "ordinarily" borrow the most "analogous" and "appropriate" state statute of limitations but only "if consistent with federal law and policy." *See Owens v. U.U. Okure*, 488 U.S. 235, 239 (1989). However, neither § 1988 nor this Court's decisions authorize or sanction wholesale import of state procedural law without consideration of potential conflict with federal policy considerations. Nevertheless, without discussing either the threshold propriety of applying, through § 1988, an outcome-determinative procedural rule to bar a facial due process claim, or this Court's governing precedent, the Eleventh Circuit assumed that Florida's general four-year personal injury statute of limitations applied to Hillcrest's facial Due Process claim. App. 8-9.

The Eleventh Circuit's decision has broad implications. It strikes a severe blow to the remedial purposes of § 1983 by allowing an outcome-determinative procedural rule to overcome the federal interests that are at the heart of § 1983. Under the Eleventh Circuit's opinion, a statute of limitations, through mere

passage of time, can forever immunize from facial challenge an ordinance that, on its face, violates the Constitution every time it is applied. The decision will force aggrieved parties to bring suit long before the offending ordinance is either applied to them or such application is imminent, and long before such party has a practical need to bring such a suit. The decision also enables a local government to continue enforcing its unconstitutional practices, safe in the knowledge that it need only rarely account for such practices on a case-by-case basis where the plaintiff has the time and resources, and it makes practical sense to bring an as-applied challenge. As a result, the Constitution's protection of both property and liberty as well as the remedial purposes of § 1983 are effectively thwarted. This should not be the law.

This Court has not squarely addressed the threshold question of whether a state statute of limitations can appropriately be applied to a facial challenge seeking injunctive relief under § 1983.

Nevertheless, this Court has not hesitated to hold that longstanding statutes were facially unconstitutional, implying that statutes of limitations do not bar their invalidation and injunction against their enforcement. *See, e.g., Roe v. Wade*, 410 U.S. 113 (1973) (holding unconstitutional a 1954 Texas statute); *Harper v. Va. State Bd. of Elections*, 383 U.S. 663 (1966) (holding poll taxes, first imposed by the Virginia Constitution of 1902, unconstitutional); *Brown v. Bd. of Education*, 347 U.S. 483 (1954) (holding various state statutes mandating segregated

schools unconstitutional, including a Virginia statute dating back to 1870 as described in *Davis v. County School Bd.*, 103 F. Supp. 337, 339 (E.D. Va. 1952)).

This Court previously denied certiorari in a similar case to this in 1996, where plaintiff association attacked a 35-year-old ordinance as unconstitutional on its face for enacting an exactions system that failed to comply with *Dolan*. *See* Petition for Writ of Certiorari No. 97-427, *cert. denied*, *Nat'l Ass'n of Home Builders v. Los Angeles*, 522 U.S. 967 (1997). Now that this Court has clarified its exactions jurisprudence with *Koontz*, the time has come to ensure that local governments cannot systematically evade it through unconstitutional ordinances, as the Eleventh Circuit has allowed here.

A. The Eleventh Circuit's Borrowing of a State Statute of Limitations to Bar Hillcrest's Facial Substantive Due Process Claim is not Consistent with 42 U.S.C. § 1988 or this Court's Prior Precedent.

Both the plain language of § 1988 and this Court's jurisprudence make clear that the borrowing of a state statute of limitations in § 1983 cases must be: (1) consistent with "the common law, as modified by the constitution and statutes of the state wherein the court having jurisdiction is held"; and (2) "not inconsistent with the Constitution and laws of the United States." *Owens*, 488 U.S. at 239. "Simply stated, we must determine whether the national

policy considerations favoring the continued availability of the . . . cause of action outweigh the interests protected by the State's statute of limitations." *Johnson v. Ry. Exp. Agency, Inc.*, 421 U.S. 454, 470 (1975).

The Eleventh Circuit's opinion runs afoul of § 1988's mandate. The notion that the mere passage of time can forever insulate from facial attack an ordinance that can never be applied in a constitutional manner is inconsistent with the fundamental principles underlying the Constitution. The federal Constitution is the supreme law of the land. It is "an express grant of power *coupled with an imperative injunction for its exercise*." *Wilson v. Garcia*, 471 U.S. 261, 279, n.40 (1985) (emphasis supplied). Thus, this Court holds that "a legislative act contrary to the constitution is not law. . . ." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 180 (1803). Such law is "as inoperative as if it had never been passed . . . and can neither confer a right or immunity nor operate to supersede any existing valid law." *Chicago, Indianapolis & Louisville Ry. Co. v. Hackett*, 228 U.S. 559, 566 (1913). Such a law is "void ab initio, and it is as though Congress had not acted at all." *Med. Ctr. Pharmacy v. Mukasey*, 536 F.2d 383, 401 (5th Cir. 2008). If an unconstitutional law is void ab initio and does not exist, it necessarily follows that no legal wrong can arise from its mere enactment. Thus, no cause of action can accrue upon its mere enactment, and a statute of limitations is simply inapplicable. The cause of action arises when officials seek to *enforce* the unconstitutional law. Here, the Eleventh Circuit assumed, without an analysis of 42 U.S.C.

§ 1988 or this Court's decisions interpreting that statute, that Hillcrest's facial challenge was subject to a statute of limitations.

In so doing, it ignored well-established precedent holding that when presented with a facially unconstitutional ordinance or statute, it is the duty of a federal court to deny it effect in *all* cases. *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 759-60 (1995) ("In fact, what a court does with regard to an unconstitutional law is simply to *ignore* it. It decides the case *disregarding the unconstitutional law* because a law repugnant to the Constitution is void, and is as no law.") (emphasis in original; citations, internal edits, and quotations omitted) (Scalia and Thomas, JJ., concurring); *Hurtado v. California*, 110 U.S. 516, 532 (1884) ("[I]n every instance, laws that violated express and specific injunctions and prohibitions might without embarrassment be judicially declared to be void."); Federalist No. 78 (1788) (Alexander Hamilton) ("[W]henever a particular statute contravenes the Constitution, it will be the duty of the judicial tribunals to adhere to the latter and disregard the former."); *see also* Rosenkranz, *The Subjects of the Constitution*, 62 Stan. L. Rev. 1209, 1248 (2010); Dorf, *Facial Challenges to State and Federal Statutes*, 46 Stan. L. Rev. 235, 242 (1994).

This Court's decisions reflect a strong policy rooted in the Supremacy Clause of prohibiting states from erecting obstacles to the full purposes and remedial objectives of federal laws, including § 1983. *Felder*, 487 U.S. at 138-39 (quoting *Brown v. W. Ry.*

Co., 338 U.S. 294, 296 (1949) (the "federal right cannot be defeated by the forms of local practice"); *Perez v. Campbell*, 402 U.S. 637, 649 (1971); and *Free v. Bland*, 369 U.S. 663, 666 (1962)).

In summarily deciding such an important issue of federal law as a matter of first impression without considering § 1988 and the broader implications of such a decision, the Eleventh Circuit's opinion stands at odds with both § 1988 and precedent of this Court. As the district court correctly observed, to apply a state's statute of limitations to bar a claim that an ordinance is facially unconstitutional enables a local government to delay enforcement of a new law until expiration of the applicable limitation and forever insulate the unconstitutional law from facial challenge under § 1983. This concern is heightened by the fact that typically, as in Florida, the only notice given to affected persons of the enactment of a local ordinance is constructive notice by publication of the title of the ordinance prior to its enactment. *See* §§ 125.66, 163.3181(11), Fla. Stat.

By allowing a County to invoke a statute of limitations to bar Hillcrest's facial due process claim, the Eleventh Circuit not only enables the continued enforcement of an ordinance that is a nullity, but also allows the County to continue to extortionately leverage its police power to coerce landowners into dedicating land the County would otherwise have to pay for. Essentially, the Eleventh Circuit has created a new form of state government immunity from both the imperative injunction of the Constitution and the remedial purposes of § 1983.

B. It is Consistent with § 1988 not to Borrow a State Statute of Limitations in the Case of Facial Substantive Due Process Claims Seeking to Invalidate and Enjoin Enforcement of a Local Ordinance under § 1983.

In determining that § 1988 requires federal courts to borrow the most analogous statute of limitations of the forum state, this Court in *Wilson* emphasized the "federal interest in uniformity, certainty, and the minimization of unnecessary litigation." 471 U.S. at 770.

A simple rule that § 1983 claims seeking to invalidate and enjoin the enforcement of a facially unconstitutional ordinance are not subject to statutes of limitation promotes this interest in various ways. First, it provides uniformity where it would not otherwise exist due to differences under state law as to whether facial claims are subject to statutes of limitation. Second, it provides certainty by avoiding the otherwise vexing problem faced by courts of identifying and classifying with sufficient certainty the precise nature and extent of injuries suffered as a result of the mere enactment of local ordinances. Third, it will avoid premature unnecessary litigation by allowing prospective litigants, who are either unaware of, or have no practical reason to bring suit upon, the ordinance's initial enactment, to wait to bring their facial challenge until the ordinance is actually enforced (i.e., applied) or its enforcement is imminent. It will also allow for the possibility that

the ordinance might be repealed in the interim or that the forces of time will resolve the controversy without litigation.

Further, statutory limitation periods are "designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them." *Order of R.R. Telegraphers v. Ry. Express Agency*, 321 U.S. 342, 348-49 (1944). The theory makes sense in the case of claims that an otherwise constitutional ordinance is being *applied* in an unconstitutional manner. It also makes sense in the case of a facial taking claim where the injury is fully effectuated, and which presupposes the constitutional validity of the ordinance or statute, and instead seeks compensation for an otherwise valid exercise of the police power. However, in the case of a facial attack on the underlying constitutional *validity* of an ordinance, these reasons for repose are either not present, or are weak at best.

Given that the County itself enacted the ordinance, it can hardly claim surprise. Because a facial challenge is limited to the four corners of the ordinance, there is no risk of loss of evidence, failed memories or disappearance of witnesses. There is a risk that the local government might rely upon a

facially unconstitutional ordinance in making decisions and shaping its conduct such that it would be inequitable to reach back and void its past actions. On balance, however, when weighed against the risk of proliferation of unnecessary and premature litigation and continued enforcement of unconstitutional statutes, this consideration does not justify a rule that insulates from facial attack and thereby enables a local government to continue to enforce against its citizens facially unconstitutional ordinances. Any inequity to the government can be addressed under this Court's retroactivity doctrine on a case-by-case basis. *See James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 534 (1991) (discussing retroactivity considerations).

In short, the bright line rule announced by the Eleventh Circuit is simply not justified by the theory of repose underlying statutes of limitations. The Eleventh Circuit's application of a state statute of limitations to render potentially enforceable a facially unconstitutional ordinance that is void ab initio conflicts with the basic overarching principles of federal constitutional law and policy. In absence of guidance from this Court, the Eleventh Circuit has decided an important issue of federal law, and in so doing, struck a blow to the heart of both the Due Process Clause and the remedial purposes of § 1983.

II. THE ELEVENTH CIRCUIT HAS DECIDED AN IMPORTANT FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH A DECISION OF THE FLORIDA SUPREME COURT.

Here, the Eleventh Circuit applied Florida's four-year personal injury statute of limitations to bar Hillcrest's facial claim. However, the Florida Supreme Court, interpreting its statutes of repose, has held that there is no statute of limitations on void acts, *Lake Worth Towers, Inc. v. Gerstung*, 262 So. 2d 1, 4 (Fla. 1972), and that relief from void acts is mandatory, not discretionary. *See Pass v. State*, 922 So. 2d 279, 281 (Fla. 2d DCA 2006). In line with Florida precedent, other state and federal courts have similarly held that a statute of limitations is not applicable to bar a facial challenge of an ordinance that is accordingly void ab initio. *See Frye v. Kannapolis*, 109 F. Supp. 2d 436, 439 (M.D.N.C. 1999); *Lavey v. Two Rivers*, 994 F. Supp. 1019, 1023 (E.D. Wis. 1998); *Edwards v. Allen*, 216 S.W.3d 278, 293 (Tenn. 2007) (statute of limitations could not be a defense to an ordinance that was void ab initio); *Glen-Gery Corp. v. Zoning Hearing Bd.*, 907 A.2d 1033, 1035 n.3 (Pa. 2006) (admittedly untimely procedural due process claim could proceed where, if successful, claim would render ordinance void ab initio because doctrine is "rooted in due process concerns"); *Lamar Whiteco Outdoor Corp. v. W. Chicago*, 823 N.E.2d 610, 620 (Ill. 2d Dist. App. 2005); *Kole v. Chesapeake*, 439 S.E.2d 405, 408 (Va. 1994) (statute of limitations inapplicable

to question of whether ordinance violated federal due process rights).

Under § 1988, decisions of Florida state courts interpreting their own statutes "shall be extended to and govern" the question of whether to apply a statute of limitations to claims of facial unconstitutionality, and compel the conclusion that there should be no statute of limitations applied to claims, such as Hillcrest's, that an ordinance is void ab initio because it facially violates the Due Process Clause. Thus, in failing to even consider the law of the forum state to guide its application of the borrowed procedural rule, the Eleventh Circuit has created a different rule for § 1983 cases in federal courts than in Florida courts.

III. THE ELEVENTH CIRCUIT'S DECISION CALLS FOR THIS COURT'S SUPERVISION BECAUSE IT RUNS CONTRARY TO THIS COURT'S WELL-ESTABLISHED RULES OF ACCRUAL AND THE CONTINUING VIOLATION DOCTRINE

A. The Eleventh Circuit Conflates the Facial/As-Applied Distinction with the Unrelated Jurisdictional Issue of Statutes of Limitations, Creating Two Different Accrual Rules.

The Eleventh Circuit's decision conflates the remedial distinction between facial and as-applied challenges with the unrelated jurisdictional issue of accrual of a cause of action for statute of limitations

purposes. *See also Harris v. Mexican Specialty Foods, Inc.*, 564 F.3d 1301, 1308 (11th Cir. 2009) (making same mistake). These two issues are unrelated. *See* Sandefur, *The Timing of Facial Challenges*, 43 Akron L. Rev. 51, 53-58 (2010); *accord Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 331 (2010) ("[T]he distinction between facial and as-applied . . . goes to the breadth of the remedy employed by the Court."). In *Travis v. County of Santa Cruz*, the California Supreme Court explained:

> This is not a case in which the plaintiff complains of injury solely from the law's enactment. . . . Travis complains of injury arising from . . . the County's imposition on his second unit permit of conditions required by the Ordinance. Having brought this action in a timely way after application of the Ordinance to him, Travis may raise in that action a facial attack on the Ordinance.

33 Cal. 4th 757, 768-69 (Cal. 2004); *accord Lindner v. Kindig*, 826 N.W.2d 868, 873 (Neb. 2013) (quoting Sandefur, 43 Akron L. Rev. at 61); *Gilmor v. Summitt Cnty.*, 246 P.3d 102, 111 (Utah. 2010) ("[A] law may be facially attacked whenever it causes injury to a particular plaintiff as long as the plaintiff asserts her challenge in a timely manner.") (same).

Here it is undisputed, and the district court found, that Hillcrest timely filed its facial claim after the Ordinance was first applied to it. Hillcrest should then be able to argue that the law is facially invalid.

There is no basis in logic justifying establishment of different accrual rules for facial and as-applied Due Process claims, as the Eleventh Circuit has done. This will "tend to produce an illogical, unjust, and potentially unconstitutional result," *Gilmor*, 246 P.3d at 111, calling for this Court's supervision of the relationship between the facial/as-applied distinction and jurisdictional issues.

B. The Eleventh Circuit's Reliance on Other Courts of Appeals is Misplaced in Determining When a Facial Due Process Claim Accrues.

The Eleventh Circuit misplaces its reliance upon the Ninth and Sixth Circuit's *Action Apartment* and *Kuhnle* decisions. This Court has made clear that the standard rule that a claim accrues when a plaintiff's cause of action is "complete and present" is subject to "refinement" depending on the specific nature of the claim. *Wallace v. Kato*, 549 U.S. 384, 387 (2007) (determining accrual rule for § 1983 false imprisonment claim) (citing *Heck v. Humphrey*, 512 U.S. 477, 490 (1994) (determining accrual rule for § 1983 malicious prosecution claim)).

A facial taking claim presupposes the underlying validity of the statute and seeks just compensation for the otherwise valid statute. The injury is complete upon enactment. On the other hand, a facial due process claim generally seeks to invalidate the statute and its effects and to enjoin its enforcement. The

injury is not complete until the process that is due is denied, when the statute is applied. *Eide v. Sarasota Cnty.*, 908 F.2d 716, 722 (11th Cir. 1990) (citing *Pennell v. San Jose,* 485 U.S. 1, 10-12 (1988)). The Eleventh Circuit adopted the accrual rules of substantive due process for deprivations of property in *Action Apartment* and *Kuhnle*, which should not be applied to a claim seeking to enjoin the sort of extortionate leveraging of the police power that this Court's decisions expressly prohibited in *Nollan*, *Dolan*, and *Koontz*.

Here, the Ordinance upon enactment authorized the *future* exaction of land without compensation and without the procedural and substantive protections of eminent domain and this Court's decisions in *Nollan*, *Dolan*, and *Koontz*. The exaction does not occur upon enactment of the Ordinance. It only occurs at the time of development plan approval, and only if and when a landowner applies for such approval. Moreover, the amount of land to be exacted is not fixed upon enactment. Rather, the width and location of the corridor are subject to subsequent modification, and the Ordinance authorizes the exaction of additional rights-of-way for roads and roadway related facilities outside of a Corridor. Furthermore, the record establishes that the County has granted administrative variances in some cases. Doc. 106-2 at 2. Therefore, the injury upon which a facial claim may be brought is not fully effectuated and complete for statute of limitations purposes until, as the district court held, the landowner actually applies for development

approval and the County demands the dedication as a condition of development approval.

The Eleventh Circuit ignored the district court's findings, concluding instead that Hillcrest should have known that its property had been diminished in value as a result of enactment of the Ordinance. In so doing, the panel ultimately relied upon the rationale for applying statute of limitations to facial taking claims, which is that the very enactment of the statute has reduced the value of the property or has effected a transfer of a property interest, and that this is a single harm, measurable and compensable when the statute is passed.

Thus, the Eleventh Circuit erred in several ways. First, there is no record support for the Eleventh Circuit's substituted findings – it neither cited such support nor attempted to explain how or why mere enactment of the Ordinance caused the diminution in value of Hillcrest's property. Indeed, the County proffered no evidence of any such diminution in value below. Second, the injury upon which Hillcrest's substantive due process claim was based was not based on a transfer of a property interest or a reduction in the value of its land that occurred upon enactment of the Ordinance. It was based on the right to be free of the extortionate leveraging of the police power that occurs under the Ordinance when a landowner *applies* for development plan approval. This claim implicates both liberty and property interests under the Due Process Clause. Third, it misunderstands that a facial Taking claim is materially different

than a facial Due Process because upon enactment a facial Taking claim ripens, is self-executing, takes property, and effectuates a full and complete injury.

C. The Eleventh Circuit Ignores This Court's Continuing Violation Doctrine, Conflicting with Other Courts of Appeals, and Calling for This Court's Supervision.

Even if a cause of action were to accrue upon the enactment of the Ordinance, the Eleventh Circuit decision still ignores this Court's well-established Continuing Violation Doctrine. Under this doctrine, where an injured plaintiff might have filed suit upon initial indication that a defendant will perform a harmful act at some point in the future, "it is seems reasonable to allow an option to the injured party, either to sue immediately, or to wait till the time when the act was to be done . . . which may be advantageous to the innocent party." *Roehm v. Horst*, 178 U.S. 1, 13 (1900).

The doctrine is a well-established principle of federal common law that reflects federal courts' concerns with: (1) ratifying and forever immunizing from facial attack the continued enforcement of unconstitutional laws; (2) providing access to the courts to remedy continuing and accumulating harms resulting from such unconstitutional laws; (3) avoiding the proliferation of premature litigation when litigants would otherwise have no practical reason to challenge such laws at the time of their initial adoption; and (4) other

practical considerations, including not rewarding wrongdoers by shielding them from their own wrongful acts, not penalizing innocent parties and not distorting well-established pre-existing legal principles. *See Franconia Assocs. v. United States*, 536 U.S. 129 (2002).

This Court and the courts of appeals have applied the doctrine many times. For example, in *Hanover Shoe, Inc. v. United Shoe Machine Corp.*, this Court held that the mere passage of time should not bar claims that a custom and practice begun in 1912 was unconstitutional:

> We are not dealing with a violation which, if it occurs at all, must occur within some specific and limited time span. . . . Rather, we are dealing with conduct which constituted a continuing violation of the Sherman Act and which inflicted continuing and accumulating harm on Hanover. Although Hanover could have sued in 1912 for the injury then being inflicted, it was equally entitled to sue in 1955.

392 U.S. 481, 502 n.15 (1968).

This Court has applied the doctrine frequently in a variety of settings. This includes employment cases. *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, 550 U.S. 618, 649 (2007); *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 121 (2002); *Bazemore v. Friday*, 478 U.S. 385, 395 (1986) (finding ongoing pattern of discriminatory pay under Title VII required remedy). It includes the Fair Housing Act context.

Havens Realty Corp. v. Coleman, 455 U.S. 363, 380 (1982) (applying doctrine where the plaintiffs alleged an "unlawful practice that continues into the limitations period" and considering that claims were "plainly" based on application of the policy to others beyond plaintiffs). And a similar concept has arisen in contractual settings. *Franconia Assocs.*, 536 U.S. at 142 (statute of limitations not a bar because plaintiff could elect to bring suit either upon enactment of statute repudiating right to prepay loan or upon government's rejection of tendered prepayment years later); *Roehm*, 178 U.S. at 13 (party who renounces a contract cannot complain of other contractual party's advantage to sue immediately or wait until the breaching act actually occurs).

The doctrine was succinctly summarized by the Sixth Circuit:

> A law that works an ongoing violation of constitutional rights does not become immunized from legal challenge for all time merely because no one challenges it within two years of its enactment. The continued enforcement of an unconstitutional statute cannot be insulated by the statute of limitations.

Kuhnle, 103 F.3d at 522 (internal edits omitted) (citing *Nat'l Adver. Co.*, 947 F.2d at 1158 and *Va. Hosp. Ass'n v. Baliles*, 868 F.2d 653, 653 (4th Cir. 1989), *aff'd in part on other grounds sub nom. Wilder v. Va. Hosp. Ass'n*, 496 U.S. 498 (1990)).

The Courts of Appeals have recognized the doctrine's application in still other cases, foremost among them the facial constitutional challenge under § 1983 to racially discriminatory policies that Virginia had adopted in 1870 in *Brown v. Board of Education*, 347 U.S. at 483. Judge Easterbrook explained that *Brown* could not have been decided on the merits if the continuing violations doctrine had not been at least implicitly applied. *See Palmer v. Bd. of Educ.*, 46 F.3d 682, 684 (7th Cir. 1995) ("A series of wrongful acts . . . creates a series of claims."). As Judge Posner explained, the doctrine is "a general principle of federal common law; it is not anything special to section 1983." *Heard v. Sheahan*, 253 F.3d 316, 318 (7th Cir. 2001) (applying doctrine to § 1983 claim for violation of Eighth Amendment because each day represented a "fresh infliction of punishment" where the defendants had the power to do something about it). He further explained that one purpose of the doctrine is limit a proliferation of lawsuits upon the same or very similar conduct. *Id.* at 319. The First Circuit has pointed to another equitable purpose: "to permit suit on later wrongs where a wrongdoer would otherwise be able to repeat a wrongful act indefinitely merely because the first instance of wrongdoing was not timely challenged." *Thomas v. Eastman Kodak Co.*, 183 F.3d 38, 54 (1st Cir. 1999) (citing *Hanover Shoe*, 392 U.S. at 481).

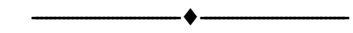
Here, under the Ordinance, the County subjects landowners to the continuing ongoing threat of extortionate leveraging of the police power by the County

to obtain property it would otherwise have to pay for. By ignoring the Continuing Violation Doctrine, the Eleventh Circuit's decision compels an aggrieved party, faced with the looming limitations period, to forego the usual option of waiting to bring suit until the ordinance is enforced, or its enforcement is imminent and before the full extent of the injury can be accurately ascertained. This not only allows the government to invoke its own wrongdoing to avoid otherwise timely claims, but it penalizes the innocent plaintiff who has no immediate development plans, or who would prefer to wait until he or she applies for development approval to see if the government modifies, adds to, or grants waivers or variances from, the Ordinance's dedication requirements.

In the facial context, in most instances, until the ordinance is enforced, or its enforcement is imminent, there is technically no legal wrong upon which a claim can be based. *See Commonwealth of Mass. v. Mellon*, 262 U.S. 447, 488-89 (1923). This is because, as previously discussed, a law repugnant to the Constitution is "void and is no law." *Ex parte Siebold*, 100 U.S. 371, 376 (1880). "If a case for preventative relief be presented, the court enjoins, in effect, not the execution of the statute, but the acts of the official, the statute notwithstanding." *Mellon*, 267 U.S. at 488-89. Thus, until the official enforces or threatens to enforce the ordinance, plaintiffs are without standing to bring a facial claim. The Eleventh Circuit's decision distorts this law by requiring that suit be brought before the unconstitutional law is enforced or

its enforcement is imminent, not only resulting in proliferation of potentially unnecessary and premature litigation, but also a potential legal Catch-22 whereby the statute of limitations begins running before the plaintiff has standing to bring a facial claim under Article III.

An ordinance that on its face violates *Koontz* harms landowners by codifying the impermissible burdening of property, and by infringing upon their rights to be free of regulation that requires them to give up their constitutional rights to reasonable use of property and to be compensated for a taking of their property. These harms are inflicted anew each day the County continues to enforce the Ordinance. Each and every person to whose property the ordinance can be applied faces a continuing unconstitutional threat that they will be extortionately leveraged when they apply for development approval, and that they will be separately forced to either acquiesce in the extortionate leveraging and dedicate the land for free, or bring suit on an as-applied basis, all the while being forced to indulge in the completely unwarranted legal fiction that the Ordinance is facially constitutional and valid. By not applying the Continuing Violation Doctrine, the Eleventh Circuit has ignored this Court's precedent, conflicting with decisions of other Courts of Appeals that have applied it in similar scenarios. This Court should exercise its supervisory powers to clarify this area of federal law.



CONCLUSION

This Court should grant Hillcrest's petition. The Eleventh Circuit's decision forever immunizes from challenge a local government ordinance characterized by the district court as "an unmistakable, abusive and coercive misapplication of government power, perpetrated to cynically evade the Constitution." This should not be the law. Future generations should be able to challenge facially unconstitutional laws. Moreover, the practical implications of the panel's decision are far-reaching, potentially affecting any federally protected constitutional right that may be curtailed by ordinance or statute, usually with little or no notice of enactment to affected persons and well before either the full extent of the injury can be ascertained or there is a practical need to challenge the Ordinance or statute.

DATED: January 15, 2015

Respectfully submitted,

DAVID SMOLKER
Counsel of Record
JESSICA S. SWANN
JACOB T. CREMER
SMOLKER BARTLETT SCHLOSSER
LOEB & HINDS, P.A.
500 E. Kennedy Blvd.
Suite 200
Tampa, Florida 33602
(813) 223-3888
Davids@smolkerbartlett.com
Counsel for Petitioner

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 13-12383

D. C. Docket No. 8:10-cv-00819-SDM-TBM

HILLCREST PROPERTY, LLC,

Plaintiff-Appellee,

versus

PASCO COUNTY,

Defendant-Appellant.

Appeal from the United States District Court
for the Middle District of Florida

(June 18, 2014)

Before TJOFLAT, FAY and ALARCÓN,* Circuit Judges.

ALARCÓN, Circuit Judge:

In this civil rights action, brought by Hillcrest Property, LLC ("Hillcrest") pursuant to 42 U.S.C.

---

* Honorable Arthur L. Alarcón, United States Circuit Judge for the Ninth Circuit, sitting by designation.

§ 1983, Pasco County appeals from the District Court's decision granting a partial summary judgment on Hillcrest's motion and issuing a permanent injunction against enforcement of the Right-of-Way Preservation Ordinance ("Ordinance"). The District Court held that the Ordinance facially violates substantive due process under the Fourteenth Amendment, and that this claim was not barred by the statute of limitations. It also denied Pasco County's motion for summary judgment on Hillcrest's as-applied substantive due process claim. No final judgment has been entered in this matter because Hillcrest's as-applied claim is still pending before the District Court. We have jurisdiction over the District Court's interlocutory order granting a permanent injunction pursuant to 28 U.S.C. § 1292(a)(1). We also have pendent jurisdiction over the District Court's order granting Hillcrest's motion for partial summary judgment based on its claim that the Ordinance is a facial substantive due process violation. *See Bayshore Ford Trucks Sales, Inc. v. Ford Motor Co.* (*In re Bayshore Ford Trucks Sales, Inc.*), 471 F.3d 1233, 1260 (11th Cir. 2006) (holding that federal courts have pendent appellate jurisdiction over an "otherwise nonappealable interlocutory order" if it is "'inextricably intertwined' with or 'necessary to ensure the meaningful review' of an injunctive order." (quoting *Hudson v. Hall,* 231 F.3d 1289, 1294 (11th Cir. 2000))). We vacate the permanent injunction and summary judgment on Hillcrest's facial challenge because we are persuaded that the statute of limitations began running on the date the Ordinance was enacted.

I

The Pasco County Board of County Commissioners ("Commissioners") enacted the Right-of-Way Preservation Ordinance on November 22, 2005. It is part of a comprehensive plan to expand public highways in the county by 2025. (Doc. No. 36, Exh. E.) One of the highways set for expansion within this plan is State Road 52 ("SR 52"). (Doc. No. 36, Exhs. B-D.) The Ordinance requires landowners whose property encroaches on SR 52 to convey in fee simple a portion of their property as a condition for receiving a development permit from the County. (ER 125; Pasco County Land Development Code § 901.2(H).) The Ordinance also contains a provision allowing developers to seek a dedication waiver upon a showing that the "amount of land required to be dedicated to the County . . . exceeds the amount of land that is roughly proportional to the transportation impacts of the proposed development site." (ER 126-30; Pasco County Land Development Code § 901.2(I).)

Hillcrest, a property development company, has owned property encroaching on SR 52 since April 2001. (Doc. No. 36, Exh. A.) On October 21, 2003, the Commissioners approved Hillcrest's request to modify the property's zoning conditions to allow for its commercial development. (ER 28; Doc. No. 96 at 2; Doc. No. 77-2 at 1.) On December 18, 2006, Hillcrest submitted a preliminary site plan seeking a development permit from Pasco County to build a commercial retail shopping center. (ER 34; Doc. No. 96 at 4; Doc. 77-4 at 1.) Pasco County informed Hillcrest on February

3, 2007, that it would be required to dedicate a portion of its property fronting SR 52 as a condition for approval of the permit. (ER 35; Doc. No. 77-1 at 3; Doc. 77-4 at 1-2.) Negotiations between the parties to reach a settlement agreement failed. (Doc. No. 36 at 12-16.) Hillcrest filed suit in the District Court on April 7, 2010. (Doc. No. 1.)

II

Pasco County contends that the District Court erred in holding that Hillcrest's facial due process claim did not accrue on November 22, 2005, the date the Ordinance was enacted. Instead, the District Court held that Hillcrest's facial claim was timely filed within the four-year statute of limitations because it did not begin to run until Pasco County subjected Hillcrest to the Ordinance, either on December 18, 2006, when Hillcrest applied for site plan approval, or on February 3, 2007, when Pasco County denied the site plan. (ER 186.)

"The decision to grant or deny an injunction is reviewed for clear abuse of discretion, but underlying questions of law are reviewed de novo." *FEC v. Reform Party of the U.S.,* 479 F.3d 1302, 1306 (11th Cir. 2007). This Court reviews de novo a district court's grant of summary judgment. *Reserve, Ltd. v. Town of Longboat Key,* 17 F.3d 1374, 1377 (11th Cir. 1994).

Section 1983 claims are subject to a forum state's statute of limitations for personal injury claims. *Burton v. City of Belle Glade,* 178 F.3d 1175, 1188

(11th Cir. 1999). In Florida, a personal injury claim must be filed within four years. *Id.* This Court has held that a cause of action under § 1983 does not accrue until "the plaintiffs know or should know . . . that they have suffered [an] injury that forms the basis of their complaint." *Chappell v. Rich,* 340 F.3d 1279, 1283 (11th Cir. 2003) (citing *Mullinax v. McElhenney,* 817 F.2d 711, 716 (11th Cir. 1987)). This Court has yet to determine whether this "know or should know of an injury" accrual rule applies to a facial constitutional challenge to an ordinance or a statute pursuant to § 1983.

Some of our sister circuits, however, have applied this rule to facial substantive due process claims alleging property deprivations. *See Action Apartment Ass'n v. Santa Monica Rent Control Bd.,* 509 F.3d 1020, 1027 (9th Cir. 2007) (applying this accrual rule to a facial substantive due process claim challenging a rent control ordinance); *Kuhnle Bros., Inc. v. Cnty. of Geauga,* 103 F.3d 516, 520-21 (6th Cir. 1997) (applying rule to a facial substantive due process claim challenging a county ordinance that barred through-truck traffic on certain roads). In doing so, both the Sixth and the Ninth Circuit relied heavily upon prior precedent holding that a facial takings claim accrues upon enactment of the statute. We also find this to be an appropriate starting point in our analysis.

The Ninth Circuit distinguished between facial takings claims and other types of facial challenges in *Levald, Inc. v. City of Palm Desert,* 998 F.2d 680, 688 (9th Cir. 1993). The owner of a mobile-home park

filed a facial takings claim long after the challenged city ordinance was enacted. *Id.* He argued that he "should be allowed to bring an action challenging the enactment of a statute as a taking without just compensation at any point." *Id.* In rejecting his contention, the Ninth Circuit explained:

> This argument misapprehends the differences between a statute that effects a taking and a statute that inflicts some other kind of harm. In other contexts, the harm inflicted by the statute is continuing, or does not occur until the statute is enforced – in other words, until it is applied. In the takings context, the basis of a facial challenge is that the very enactment of the statute has reduced the value of the property or has effected a transfer of a property interest. This is a single harm, measurable and compensable when the statute is passed. Thus, it is not inconsistent to say that different rules adhere in the facial takings context and other contexts.

Id. The Ninth Circuit reasoned in *Levald* that in the context of a facial takings claim, the harm occurs immediately upon, and because of, the statute's enactment: the property value depreciates and a taking occurs as soon as the statute goes into effect. *Id.* Thus, the injury necessarily occurs upon the statute's enactment. *Id.*

The Sixth Circuit subsequently relied upon *Levald* in determining when the appellant's facial takings and facial substantive due process claims accrued.

Kuhnle Bros., Inc., 103 F.3d at 521. In holding that the appellant's facial takings claim was time-barred, it adopted *Levald*'s reasoning that the injury in a facial takings claim occurs upon the statute's enactment because the enactment of the statute either "'has reduced the value of the property or has effected a transfer of a property interest.'" *Id.* (quoting *Levald, Inc.,* 103 F.3d at 688). The Sixth Circuit concluded that the appellant's "substantive Due Process claim for deprivation of property is time-barred for the same reason." *Id.* It reasoned that "[a]ny deprivation of property that [the appellant] suffered was fully effectuated when [the county ordinance] was enacted, and the statute of limitations began to run at that time." *Id.* (citing *Ocean Acres Ltd. P'ship v. Dare Cnty. Bd. of Health,* 707 F.2d 103 (4th Cir. 1983)).

The Ninth Circuit has also applied the accrual rule it developed in the facial takings context to substantive due process claims alleging property deprivations. In *Action Apartment Association,* an association of landlords filed suit in 2004 against the city of Santa Monica, alleging that a rent control ordinance, which was first enacted in 1979, was a facial violation of substantive due process. 509 F.3d at 1022. In holding that the facial substantive due process claim was time-barred, the Ninth Circuit applied the accrual rule it adopted for facial takings claims:

> [T]he logic for the accrual rules in the takings context applies with equal force in the

> substantive due process context. Given the general rule that "the statute of limitations begins to run when a potential plaintiff knows or has reason to know of the asserted injury," it stands to reason that any facial injury to any right should be apparent upon passage and enactment of a statute.

Id. at 1027 (quoting *De Anza Props. X, Ltd. v. Cnty. of Santa Cruz,* 936 F.2d 1084, 1086 (9th Cir. 1981)).

Extending the accrual rules for facial takings claims to facial substantive due process claims was logical under the facts of *Action Apartment Association,* where, as in *Levald,* the value of the property at issue depreciated when it became subject to the rent control ordinance. The injury occurred at the time the ordinance was enacted and would have been apparent to the current landowner upon the ordinance's passage and enactment. Any future owners could not arguably have suffered an injury because the "price they paid for the [property] doubtless reflected the burden of rent control they would have to suffer." *Guggenheim v. City of Goleta,* 638 F.3d 1111, 1120 (9th Cir. 2010).

We are persuaded by the reasoning expressed by our sister circuits in *Kuhnle* and *Action Apartment Association.* Hillcrest's land became encumbered immediately upon the Ordinance's enactment in 2005. Its property would have decreased in value at that time because any current or future development plans would have been subject to the Ordinance's requirement that, in exchange for granting a commercial

development permit, Hillcrest would have to deed part of the land to the county without payment for the acquisition. This injury should have been apparent to Hillcrest upon the Ordinance's passage and enactment because it had been the owner of the property since 2001 and had been actively engaged in developing the property since at least 2003. *See Asociación De Suscripción Conjunta Del Seguro De Responsibilidad Obligatorio v. Juarbe-Jiménez,* 659 F.3d 42, 50 (1st Cir. 2011) ("[A] plaintiff is deemed to know or have reason to know at the time of the act itself and not at the point that the harmful consequences are felt.").

Conclusion

We are persuaded that Hillcrest's facial substantive due process claim accrued when the Ordinance was enacted on November 22, 2005, and was time-barred when Hillcrest filed this action more than five years later on April 7, 2010.

Accordingly, we vacate the District Court's order to the extent that it granted summary judgment and a permanent injunction in favor of Hillcrest on its facial substantive due process claim. We express no view as to the merits of Hillcrest's pending as-applied substantive due process claim.

VACATED; and REMANDED.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

HILLCREST PROPERTY, LLP,
Plaintiff,

v.

PASCO COUNTY,
Defendant.
/

CASE NO.:
8:10-cv-819-T-23TBM

ORDER

In accord with the April 12, 2013, order (Doc. 196) granting Hillcrest's motion for summary judgment on Count VII, Pasco County is **PERMANENTLY ENJOINED** from enforcing Section 901.2(H) (formerly Section 319.8) and Section 901.2(I) (formerly Section 319.9) of the Pasco County Land Development Code. Each section violates the Due Process Clause of the United States Constitution.

Jurisdiction is retained to construe, modify, and enforce this injunction.

ORDERED in Tampa, Florida, on May 21, 2013.

/s/ Steven D. Merryday
STEVEN D. MERRYDAY
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

HILLCREST PROPERTY, LLP,

Plaintiff,

v.

PASCO COUNTY,

Defendant. /

CASE NO.: 8:10-cv-819-T-23TBM

ORDER

Before 2025 Pasco County must build more and larger roads to accommodate the inevitable increase in automobile traffic. Preferring to avoid the payment of "just compensation" after acquiring the necessary land by eminent domain, Pasco County has hatched a novel and effective but constitutionally problematic idea, a most uncommon regulatory regime that is crowned by Pasco County's "Right of Way Preservation Ordinance."

The unremarkable part of the regime designates new "transportation corridors," which expand certain Pasco County highways. The specific instance contested in this action designates a new transportation corridor that widens State Road 52, an arterial east-west highway in Pasco County, and identifies the boundaries of State Road 52's future right-of-way. For most landowners, whose land is encroached by the transportation corridor but who have no plans to

develop the land adjacent to the encroached land, no immediate consequence (and no constitutional jeopardy) occurs; Pasco County will take the expanded right-of-way – when needed – by eminent domain and will pay "just compensation" as determined by a jury in a Pasco County circuit court.

The remarkable part of the regime and the constitutional mischief appear in the instance of a landowner whose land is encroached by the new transportation corridor but who plans to develop the remaining land, which adjoins the encroachment. The Ordinance requires Pasco County to deny the landowner's development permit and to forbid development of the land adjoining the new transportation corridor unless the landowner "dedicates" (conveys in fee simple) to Pasco County – for free – the land within the new transportation corridor. In other words, to avoid the nettlesome payment of "just compensation," the Ordinance empowers Pasco County to purposefully leverage the permitting power to compel a landowner to dedicate land encroached by a transportation corridor. In Pasco County, if there is no free dedication, there is no permit.

As the Pasco County Attorney proudly declares, "The right of way preservation ordinance [] drafted and defended by this office (which is one of only a few in the state) saves the County millions of dollars each year in right of way acquisition costs, business damages and severance damages." (Doc. 112-2 at 3) This bully result is effected by threatening to deny every proposed new use of private land, from medical clinic

to beauty parlor, from restaurant to bait shop, and by coercing everyone, great and small, rich and poor, popular and unpopular, unless the landowner completes the mandatory "voluntary" dedication of real estate.

This action asks whether a county ordinance can deny the issuance of a development permit pending a landowner's coerced conveyance to the county – for free – of the fee simple title to real estate both within a designated right-of-way and otherwise subject to eminent domain. Asserting an array of federal and state constitutional grounds, Hillcrest challenges the Ordinance. Guarding the multimillion-dollar, past and future trove from the Ordinance, Pasco County defends.

Because the Ordinance's *modus operandi* is not yet common, neither party cites legal authority directly deciding the constitutionality of an identical ordinance. Nonetheless, the features of the Ordinance are striking (and, as the Pasco County Attorney confirms, startlingly effective) and constitutional examination is essential. If constitutional, the Ordinance undoubtedly will become quickly fashionable, as counties seize a singular opportunity to procure land for public use by the thrifty expedient of coerced conveyance rather than by the historically and constitutionally prescribed mechanism of eminent domain (which is, viewed from a county's vantage, encumbered by the strictures of "due process" and "just compensation" and burdened by both the supervision of an

independent judge and the informed discretion of a disinterested jury).

In a compelling report, the magistrate judge recommends finding the Ordinance unconstitutional and enjoining the Ordinance's enforcement. Agreeing with the magistrate judge's recommendation, this order largely adopts the report and the recommendation and adds analysis that, although viewing the law from a slightly different vantage, finds the Ordinance both coercive and confiscatory in nature and constitutionally offensive in both content and operation.

1. Background

1.1. The Ordinance

In accord with Florida's Local Government Comprehensive Planning and Land Development Regulation Act, Pasco County adopted a "comprehensive plan" to ensure adequate roadway to support development through 2025. Pasco County implements the comprehensive plan through maps, tables, and policies that identify the right-of-way necessary to build Pasco County's future transportation corridors, predominantly on privately owned land.

Pasco County adopted the Right of Way Preservation Ordinance in November, 2005.[1] The Ordinance

[1] Pasco County codified the Ordinance at Section 319 of the Pasco County Land Development Code. During this action, Pasco County adopted Ordinance 11-15, which moved the Ordinance

(Continued on following page)

targets landowners who own property encroached by the corridor and who aspire to build on the property adjoining the corridor. In exchange for a development permit, the Ordinance requires those landowners to agree to dedicate the corridor in fee simple to Pasco County. Under the Ordinance, Pasco County withholds the construction permit until the landowner dedicates the property "by recordation on the face of the plat, deed, grant of easement, or other method acceptable to the County." Code § 319.8(A); Code § 901.2(H). If the property owner declines the dedication, Pasco County declines the construction permit.

Once a landowner dedicates the land to Pasco County, the landowner may apply to Pasco County's Development Review Committee for permission to use his former land until Pasco County needs to build the road. The Ordinance provides a list of specific and temporary "interim uses," such as a produce stand or a bridal path for a residential zone or a boat storage yard or a ground to host "festivals, carnivals, community fairs, and the like" for a commercial zone. Code § 319.6(C)(1); Code § 901.2(F)(3). When and if Pasco County needs the land, the former landowner must remove any permitted, temporary use (for example, a lemonade stand, a Tilt-A-Whirl, or a putt-putt course).

---

without material amendment to Section 901.2 of the Code. For clarity, both the old and the new numbers are cited in this order.

1.1.1. The Waiver

If expecting compensation for the conveyance, the landowner must apply to the Review Committee for a "waiver":

> Where the property owner believes that the amount of land required to be dedicated to the county under the [right-of-way dedication provision] exceeds the amount of land that is roughly proportional to the transportation impacts of the proposed development site and expanded development site, or believes that any other county transportation-related exaction, dedication, condition or requirement . . . is not roughly proportional to the transportation impacts of the proposed development site and expanded development site, the property owner may apply to the development review committee for a dedication waiver.

Code § 319.9(A); Code § 901.2(I)(1). The waiver application must contain the following:

> a. Appraised value of the development site and expanded development site before the section 306 development approval or other development permit/order, with and without the land to be dedicated pursuant to section 318.8, taking into account any interim uses and density transfers.
>
> b. Appraised value of the development site and expanded development site after the section 306 development approval or other development permit/order, with and without

> the land to be dedicated pursuant to section 318.8, taking into account any interim uses and density transfers.
>
> c. Traffic impact study (TIS) showing the transportation impacts of the proposed development.
>
> d. List of transportation mitigation provided or required to be provided by the development, including:
>
> > 1) The appraised value of any land dedicated or to be dedicated in accordance with a. and b. above;
> >
> > 2) Certified cost estimates for all transportation improvements provided or required to be provided by the development;
> >
> > 3) Estimated transportation impact fees paid or due for the development pursuant to Ordinance No. 04-05, as amended; and
> >
> > 4) Any transportation mitigation or proportionate share payments required pursuant to section 402 of the land development code.

Code § 319.9(B)(2) (quotation consistent with the "old" numbering); Code § 901.2(I)(2)(b). The applicant must hire each expert and pay for each study, appraisal, report, and estimate required by the Ordinance.

The Review Committee reviews the application to:

> [D]etermine[ ] [whether] any portion of the land required to be dedicated . . . exceeds the amount of land that is roughly proportional to the transportation impacts of the proposed development site . . . [and to] determine[ ] [whether] the transportation requirement is not roughly proportional to the transportation impacts of the proposed development site or expanded development site (the "excess dedication amount.")

Code § 319.9(C); Code § 901.2(I)(4). If the landowner, who exclusively bears the burden of proof, has proven to the Review Committee an "excess dedication," the Ordinance requires the Review Committee either to provide partial "compensation" or to waive the "excess dedication."[2] The Ordinance permits the Review Committee to compensate the owner (1) by paying what Pasco County's property appraiser considers 115% of the value of "the excess land required to be dedicated," (2) by granting impact fee credits, (3) by designing or constructing certain required transportation improvements, (4) by providing credit "for any transportation mitigation or proportionate share

[2] The Ordinance suggests that the Review Committee could "waive" the dedication and allow the landowner to keep the land, but the prospect of waiving the "excess dedication" appears, at least, doubtful and, more likely, entirely illusory. Across a local expanse of right-of-way, highway boundaries are typically smooth and parallel.

payments," or (5) by combining the above. Code § 319.9(D); Code § 901.2(I)(5). The landowner may appeal an unfavorable result to the Pasco County Board of County Commissioners but must exhaust the waiver provision before "filing any civil claim, action, or request challenging or seeking compensation for a dedication required by [the Ordinance]." Code § 319.9(F)(2); Code § 901.2(I)(7)(b).

1.1.2. The Variance

Also, the landowner may apply to the Review Committee for a variance from "the strict requirements" of the waiver provision. Code § 316; Code § 901.2(J)(3). Stated simply, with a variance Pasco County can waive a waiver applicant's waiver requirement, such as the applicant's providing a traffic study at the applicant's expense. If the waiver requirement "causes a hardship," a landowner "shall be entitled to apply for a variance." Code § 319.10(B); Code § 901.2(J)(2). The Review Committee can grant a variance if the landowner, again bearing the burden of proof, proves that the "strict application" of the waiver provision causes (1) an "unreasonable or unfair non-economic hardship[ ] or an inordinate burden not created by the variance applicant" or (2) a conflict with an "important" goal, objective, or policy of Pasco County's comprehensive plan or other land development regulation. Also, the Review Committee can grant a variance (1) if the variance provides a net economic benefit to Pasco County, (2) if the variance achieves "an innovative site or building design" that

furthers the goals of Pasco County's comprehensive plan, or (3) the variance is necessary to comply with state or federal law. Code § 316.1(A); Code § 901.2(J)(3). If "the development review committee finds, based on the application submitted, and the substantial competent evidence presented, that the variance requested is the minimum necessary to alleviate or address" one of the following, the Review Committee "shall grant" the variance:

> 1. The strict application of the land development regulation creates an unreasonable or unfair non-economic hardship, or an inordinate burden, that was not created by the variance applicant;
>
> 2. The specific application of the land development regulation conflicts with an important goal, objective or policy of the comprehensive plan, or with the intent and purpose of another recently adopted land development regulation, that serves a greater public purpose;
>
> 3. The granting of the variance will provide a net economic benefit to the taxpayers of Pasco County, and is not in conflict with important goals, objectives and policies of the comprehensive plan;
>
> 4. The granting of the variance is necessary to achieve an innovative site or building design that furthers the goals, objectives and policies of the comprehensive plan;

> 5. The intent and purpose of the land development regulation, and related land development regulations and comprehensive plan provisions, is met or exceeded through an improved or alternate technology or design;
>
> 6. The granting of the variance is necessary to protect the public health, safety or welfare;
>
> 7. The variance is necessary to comply with state or federal law; or
>
> 8. The variance satisfies variance criteria set forth in the specific county land development regulation that is the basis for the variance request.[3]

Code § 316.1(A); Code § 901.2(J)(3).

---

[3] The Ordinance is no model of clarity, but a complete, guided excursion into the Ordinance's compositional mystery would expand this order unacceptably. Some highlights include:

> The Ordinance's primary operative provision, Section 319.8(A), requiring dedication when the County approves the construction plan:
>
> > . . . Dedication shall be by recordation on the face of the plat, deed, grant of easement, or other method acceptable to the county. All dedications shall occur at record plat, construction plan approval where a record plat is not required, or within 90 days of the county's request, whichever occurs first. . . .

(Continued on following page)

1.2. Hillcrest's Land

In April, 2001, Hillcrest purchased sixteen-and-a-half acres of undeveloped property zoned "commercial" and located northwest of the Old Pasco Road and State Road 52 intersection, just west of Interstate 75. In November, 2005, Pasco County enacted the Ordinance, which in conjunction with the maps and tables establishes a transportation corridor protruding fifty-feet into Hillcrest's property along the property's 1,400-foot, southern border with State Road 52.

The interim use definition, Section 319.4(D), describing "dedication" as a means of "conveyance" and allowing an interim use until "conveyance":

> Interim use shall mean a use of the land in the transportation corridor prior to the date of conveyance of such land to the county for right-of-way, whether such conveyance is by dedication, acquisition, or other means.

Another interim use provision, Section 319.6(A), stating that a property owner may (if approved by the Review Committee) employ an interim use until "dedicat[ion]":

> . . . The purpose of this section is to allow certain uses for a limited period of time within portions of a development site that are located within a transportation corridor in order to permit the property owner to make economic use of the property until such time as the land within the transportation corridor is to be dedicated to or acquired by the county. . . .

And another interim use provision, Section 319.6(B)(2)(a), identifying when a property owner must remove an "interim use" – at the "termination date" not at "dedication":

(Continued on following page)

> The applicant agrees to discontinue and remove, at the applicant's sole expense, the interim uses no later than the beginning of the first fiscal year in which monies for acquisition of right-of-way within the affected transportation corridor are first programmed by either the county, in the county's five-year capital improvement plan or capital improvement element, or the state department of transportation in the state department of transportation's five-year transportation improvement program (the 'termination date'). This agreement shall be evidenced by an affidavit which shall state that the interim uses shall be discontinued no later than the termination date. Such affidavit shall be recorded against the development site in the public records of the clerk of the circuit court of the county, and a copy of the recorded affidavit shall be provided to the county prior to the issuance of the first building permit within the development site. . . .

And this one, Section 319.10(B), just for fun:

> Where the provisions of this section 319 cause a hardship, a property owner shall be entitled to apply for a variance in accordance with the provisions of section 316 of this Code. Notwithstanding the foregoing, the procedures set forth in 319.9 shall be the county's exclusive administrative remedy for challenging a dedication required by 319.8 or other transportation requirement as not being roughly proportional to the transportation impacts of a development; provided, however, the procedures and appeal provisions set forth in the TIS resolution shall continue to apply to disputes or challenges relating to TIS or mitigation

(Continued on following page)

Undertaking to develop a grocery-store-anchored shopping center, with the grocery store on the north side of the property and several smaller parcels on the south side of the property, Hillcrest in December, 2006, applied to the Review Committee for preliminary site-plan approval. The proposed plan failed to depict the corridor. In February, 2007, the Review Committee rejected Hillcrest's proposal and demanded that Hillcrest dedicate the fifty-foot corridor for future right-of-way. In March, 2007, Hillcrest revised the site plan and removed improvements within the fifty-foot corridor.

> requirements of the TIS resolution, including the modifications to the TIS resolution for dedication waivers set forth in this Code, unless the development review committee or board of county commissioners determine that the procedures set forth in section 319.9 are a more appropriate remedy. In addition, all remedies, rights, and obligations set forth in F.S. chs. 163.380; Rules 9J-2 and 9J-5, Florida Administrative Code; sections 402 and 618 of the land development code, and the county Transportation Impact Fee Ordinance (Ordinance No. 04-05 as amended) shall continue to apply, unless the development review committee or board of county commissioners determine that the procedures set forth in section 319.9 are a more appropriate remedy.

The report and recommendation construes (Doc. 168 at 10) the Ordinance as requiring removal of the interim use at the "termination date" not at "recordation." No party objects to the magistrate judge's interpretation, and Hillcrest asserts no "vagueness" challenge.

During a meeting the following month, Pasco County, Florida's Department of Transportation (FDOT), and Hillcrest discussed the second proposed site plan. According to Pasco County, the parties discussed an FDOT plan to widen State Road 52 to a point 140-feet north of the existing right-of-way. In total, Pasco County required a fifty-foot dedication from Hillcrest, and the FDOT required an additional ninety-foot setback on which Hillcrest could not build. Because the second proposed site plan depicted improvements inside the FDOT's desired ninety feet, the Review Committee rejected Hillcrest's second proposal.

Negotiation continued. In July, 2007, Hillcrest submitted a third proposed site plan with no improvement depicted inside the 140-foot future right-of-way. Hillcrest accompanied the proposed site plan with a written reservation of rights objecting to the dedication:

> [Hillcrest] has redesigned the site accordingly in this submission pursuant to an understanding that such redesign neither represents the applicant's willingness to provide such right of way without compensation or that any such condition requiring such right of way donation will not be subject to challenge should the county and [Hillcrest] fail to reach agreement on the acquisition of such right of way by Pasco County or others.

(Doc. 119-1, ¶ 13) During an August 23 meeting convened to discuss the third proposed site plan, Hillcrest's counsel stated that Hillcrest was "okay," "fine,"

and "in agreement" with a forty-foot dedication.[4] However, Hillcrest denies any agreement to surrender property at no cost and claims an expectation of compensation for the entire 140 feet. The managing member of Hillcrest explains:

> At the August 23, 2007, [ ]Committee hearing, the County approved Hillcrest's preliminary site plans showing the 140[-]foot dedication. As of August 23, 2007, it was still my understanding that the County was going to compensate Hillcrest based on the additional 140 feet, including severance damages, pursuant to the standing agreement between Hillcrest and the County, and that the County would deny the preliminary site plans if Hillcrest objected to the dedication requirement.

(Doc. 118-1, ¶ 13) The Review Committee approved the third proposed site plan. The Review Committee's development order, which Hillcrest signed on October 17, 2007, provides that "the developer shall convey at no cost to Pasco County 110 feet of right-of-way from the centerline of [State Road] 52." (Doc. 114-7 at 3-4) Although the development order permits a landowner to object within thirty days and to request an administrative appeal, Hillcrest requested no appeal.

---

[4] Pasco County suggests (Doc. 111 at 10 n. 11) that Hillcrest's counsel's math "was off" and that counsel meant fifty feet.

During the next eight months, Pasco County denied at least three Hillcrest construction plans. In June, 2008, Pasco County conditionally approved a Hillcrest construction plan but demanded the dedication. Hillcrest executed the approval but stated, "Please be advised that our . . . acceptance of these conditions is subject to . . . reservation of any and all rights with respect to any and all exactions imposed under the conditions of approval." (Doc. 118-6 at 1) Before filing this action, Hillcrest neither applied for a dedication waiver or a variance nor pursued an administrative appeal or inverse condemnation action.[5] Pasco County commenced no condemnation proceeding. Hillcrest's property remains undeveloped.[6]

1.3. The Report and Recommendation

Hillcrest sues and asserts federal and state claims for relief, including violations of the right to due process, to equal protection, to access to the courts, and to a jury trial and other state claims for relief, including an illegal taking and a violation of

---

[5] On August 22, 2011, Hillcrest sued the FDOT for inverse condemnation. On December 14, 2012, the Circuit Court for Pasco County stayed the action in favor of this action. *Hillcrest Property v. Florida,* 51-2011-A-003825.

[6] According to Hillcrest, for two-and-a-half years the government agencies and Hillcrest negotiated compensation and severance damages and exchanged several oral offers for compensation. According to Hillcrest, a cash shortage rendered Pasco County unable to provide compensation consistent with the estimate of Pasco County's appraisers.

"separation of powers." Hillcrest asserts no federal takings claim. Hillcrest's core argument invokes two United States Supreme Court cases, *Nollan v. California Coastal Commission,* 483 U.S. 825 (1987), and *Dolan v. City of Tigard,* 512 U.S. 374 (1994), that consider whether a government's requiring land in exchange for development approval violates the Fifth Amendment's Takings Clause, applied to the states through the Fourteenth Amendment. Aspiring to invalidate the Ordinance, Hillcrest argues that Pasco County uses the permit authority as leverage to compel a landowner's relinquishing the right to just compensation.

Although the summary judgment motions present for resolution fifteen claims for relief, the magistrate judge correctly recognizes that the Ordinance proves most susceptible to challenge as a substantive due process violation. Accordingly, the report and recommendation (Doc. 168) analyzes predominantly substantive due process. The magistrate judge concludes that the Ordinance fails the applicable substantive due process standard, a "rational relation to a legitimate government purpose." Despite the legitimate goal of accommodating future land use and traffic, the "means adopted by the County to accomplish the goal are an abuse of the County's police powers." (Doc. 168 at 26) The report states:

> In every instance brought within the purview of sections 319.8 and 319.10 of the Ordinance, landowners are compelled to surrender private property without compensation

as a condition of development approval or permitting. The dedication provision is no mere regulation of land use but rather a calculated measure by the County to avoid the burdens and costs of eminent domain and take private property without just compensation. As constructed, the dedication requirement permits the County to leverage its police powers to extract private property without any individualized consideration of need and wholly without consideration of the matter of compensation when such works a taking. . . . [T]he scheme impermissibly tilts the playing field in favor of the County to the end that the County has saved millions of dollars since the scheme was implement[ed]. . . . Here, the County has purposefully devised a land-use scheme which sanctions, indeed commands, in all instances within its purview and without individualized consideration, the dedication of such private property without compensation as a condition of development approval or permit. In doing so, the Ordinance commands that [certain] landowners be forced "to bear the public burdens which, in all fairness and justice, should be borne by the public as a whole," the very thing the Takings Clause of the United States Constitution and the equivalent provision of the Florida Constitution are intended to prevent. By my consideration, such a scheme, being inconsistent with the Fifth and Fourteenth Amendments, violates due process. . . . The County cannot . . . employ its police power to extort property

> from private landowners and avoid the obligations inherent in these constitutional provisions.

(Doc. 168 at 26-27) Explaining the Ordinance's aggressive method of "accommodating future land use and traffic," the report observes that *Nollan v. California Coastal Commission,* 483 U.S. 825 (1987), and *Dolan v. City of Tigard,* 512 U.S. 374, 385 (1994), "inform the due process analysis" but "do not set forth the applicable standard." (Doc. 168 at 25) The magistrate judge details the exaction process described in *Nollan* and *Dolan* and highlights the Ordinance's purposeful circumvention of eminent domain. Among other recommendations, the report endorses granting Hillcrest's motion for summary judgment on the alleged "facial" violations of due process.[7]

---

[7] In particular, the report recommends:

- Denying Pasco County's motion for summary judgment on Count I (taking; as-applied; Florida Constitution);
- Granting Pasco County's motion for summary judgment on Count II (due process; as-applied; United States Constitution);
- Denying Pasco County's motion for summary judgment on Count III (equal protection; as-applied; United States Constitution);
- Granting Pasco County's motion for summary judgment on Count IV (due process; as-applied; Florida Constitution);
- Granting Pasco County's motion for summary judgment on Count V (equal protection; as-applied; Florida Constitution);

(Continued on following page)

- Denying Pasco County's motion for summary judgment on Count VI (temporary taking; as-applied; Florida Constitution);
- Granting Hillcrest's motion for summary judgment on Count VII (due process; facial; United States Constitution);
- Denying Hillcrest's motion for summary judgment and granting Pasco County's motion for summary judgment on Count VIII (equal protection; facial; United States Constitution);
- Granting Hillcrest's motion for summary judgment on Count IX (due process; facial; Florida Constitution);
- Denying Hillcrest's motion for summary judgment and granting Pasco County's motion for summary judgment on Count X (equal protection; facial; Florida Constitution);
- Denying Hillcrest's motion for summary judgment and granting Pasco County's motion for summary judgment on Count XII (access to courts; facial; Florida Constitution);
- Denying Hillcrest's motion for summary judgment and granting Pasco County's motion for summary judgment on Count XIII (separation of powers; facial and as-applied; Florida Constitution);
- Denying Hillcrest's motion for summary judgment and granting Pasco County's motion for summary judgment Count XIV (right to a jury trial; facial; Florida Constitution);
- Denying Hillcrest's motion for summary judgment and granting Pasco County's motion for summary judgment on Count XV (access to courts; facial; United States Constitution);
- Denying Hillcrest's motion for summary judgment and granting Pasco County's motion for

(Continued on following page)

Each party objects (Docs. 170 and 171) to each adverse recommendation. In response to the adverse ruling of a "facial" violation of due process, Pasco County argues (1) that, in some conceivable application, the Ordinance applies constitutionally, (2) that *Nollan* and *Dolan* "were 'taking' cases . . . , not due process cases," (3) that *Nollan* and *Dolan* "were as-applied cases, not facial cases," (4) that *Nollan* and *Dolan* "involved *ad hoc* adjudicative exactions, rather than legislative generally-applicable exactions, such as the Ordinance here," (5) that *Dolan* "expressly declined to shift the burden to the government for legislative exactions, such as the Ordinance here," (6) that the waiver and variance procedure insulates the Ordinance from a successful facial challenge, (7) that the report's recommending summary judgment for Pasco County on the as-applied claim precludes summary judgment for Hillcrest on the facial claim, (8) that the applicable limitation bars the claim, and (9) that, even if the Ordinance facially violates due process, Eleventh Circuit law and Hillcrest's pre-trial statement preclude damages. Although some of the arguments require an elaboration of the report and recommendation and further explanation of the applicable law, none saves the Ordinance.

---

summary judgment on Count XVI (right to a jury trial; facial; United States Constitution).

2. Discussion

2.1. Substantive Due Process[8]

2.1.1. The Ordinance "Applies"

Although a facial due-process challenge ripens upon the enactment of the Ordinance, an as-applied challenge ripens once the Ordinance has been finally applied to the property.[9] *Eide v. Sarasota County,* 908 F.2d 716, 725 & n.14 (11th Cir. 1990); *Pennell v. City of San Jose,* 485 U.S. 1 (1988) (adjudicating a facial due-process and a facial equal-protection challenge while refusing to consider an as-applied due process and an as-applied equal protection challenge). Pasco County argues that the as-applied substantive due process claim fails as "unripe." Pasco County relies on *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City,* 473 U.S. 172 (1985), an opinion by Justice Blackmun that announced a stringent "ripeness" test (1) for a just compensation claim and (2) for a claim that a "regulation goes too far." *Williamson County* held that before either claim ripened (1) "the government entity charged with implementing the regulations [must] reach[ ] a final decision regarding the application of the regulations to the property at issue" and (2) the plaintiff must

---

[8] Count II (as-applied substantive due process claim under the U.S. Constitution); Count VII (facial substantive due process claim under the United States Constitution).

[9] The "ripeness" analysis governs the equal protection challenge also. *Eide v. Sarasota County,* 908 F.2d 716, 724-25 (11th Cir. 1990).

"seek compensation through the procedures the state has provided for doing so." 473 U.S. at 186, 194. Pasco County argues with considerable support that *Williamson County* requires Hillcrest to pursue a waiver or a variance, each of which Hillcrest declined.

Williamson County's "regulatory takings" claim originates from Justice Holmes's often quoted statement, "'[I]f regulation goes too far it will be recognized as a taking.'" 473 U.S. at 198 (quoting *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 415 (1922)). But, *Williamson County* never "clarif[ied] whether 'regulatory takings' claims were properly cognizable under the Takings Clause or the Due Process Clause." *Lingle v. Chevron U.S.A.,* 544 U.S. 528, 541-42 (2005).

After quoting the "goes too far" language, *Lingle* observes that "the rub, of course, has been – and remains – how to discern how far is 'too far.'" 544 U.S. at 538. *Lingle* identifies four, distinct, takings claims arising if the government (1) permanently and physically invades private property, (2) deprives an owner of all economically beneficial use of the private property, (3) fails to comply with the "regulatory taking factors" announced in *Penn Central Transp. v. New York City,* 438 U.S. 104 (1978), or (4) takes land in exchange for development approval, as discussed in *Nollan* and *Dolan.* As *Lingle* confirms, the *Williamson County* "regulatory takings" claim – the claim that a "regulation goes too far" – raises a takings claim, not a due process claim. As the Eleventh Circuit recognizes in *Eide*:

> [T]he court cannot ascertain whether the regulation has gone "too far" until it can analyze the effect that the zoning decision has had on the value of the property. Thus, in *Williamson County,* the Supreme Court applied the finality prong of the ripeness analysis, just as it had for the just compensation claim. This rationale is not applicable to an as applied arbitrary and capricious due process claim. Such a claim does not have to establish that the regulation has gone "too far"; rather, a property owner's rights have been violated the moment the government acts in an arbitrary manner and (in an as applied challenge) that arbitrary action is applied to the owner's property. . . . This court in *Greenbriar* erroneously assumed it was controlled by *Williamson County,* and thus erroneously used the *Williamson County* analysis.

908 F.2d at 724 n.13. Although finding that *Williamson County* does not apply to an "arbitrary and capricious" due process claim, *Eide* confirms a requirement similar to *Williamson County*'s "finality" requirement, that is, "the particular zoning decision being challenged must be finally applied to the property at issue." *Eide,* 908 F.2d at 725. "If the authority has not reached a final decision with regard to the application of the regulation to the landowner's property, the landowner cannot assert an as applied challenge to the decision because, in effect, a decision has not yet been made." 908 F.2d at 725. The point at which a "final decision" occurs depends on the remedy sought:

> We can conceive of an arbitrary and capricious due process claim in which the final decision requirement would be satisfied with a single arbitrary act. For example, if a landowner's initial application for commercial zoning had been rejected at a preliminary stage simply because the landowner was a redhead, the landowner's arbitrary and capricious due process claim challenging that action would be ripe. That decision can be immediately challenged because the arbitrary and capricious act has been applied to him. However, the remedy for the mere rejection of the redheaded landowner's application would not be an injunction requiring a grant of commercial zoning, but rather would be the overturning of the arbitrary decision, possibly an injunction against similar irrational decisions, and other remedies depending on the situation. The landowner could not prove the damages that Eide seeks – *i.e.* commercial zoning – without first claiming and proving a final decision by the local authority denying commercial zoning.

Eide, 908 F.2d at 726. Hillcrest's as-applied due process claims seek, aside from the Ordinance's invalidation and attorneys' fees and costs, only damages "for having violated Hillcrest's due process rights." (Doc. 36 at 23) The as-applied due process claims seek neither an award of damages (other than nominal) nor an injunction ordering Pasco County to approve the construction plan. Neither a waiver nor a variance, each a procedure within the Ordinance, will

exempt Hillcrest from the Ordinance (although a waiver or variance might exempt Hillcrest from the dedication requirement or another part of the Ordinance). Thus, Pasco County has reached an effectively final decision that the Ordinance applies to Hillcrest. For the successful as-applied due process claim, nominal damages are available.

2.1.2. A Timely Challenge

Pasco County argues that the applicable four-year limitation for a facial due process challenge begins when the law is enacted. This theory condones the government's delaying enforcement of a new law until expiration of the applicable limitation and forever insulating the unconstitutional law. Instead, a claim for relief accrues and the applicable limitation begins at the occurrence of the last element of the legal claim – usually, once an injury occurs.[10] Hillcrest's injury occurred the moment Pasco County subjected Hillcrest to the Ordinance. At the earliest, Hillcrest's claim accrued in December, 2006, when Hillcrest applied for site plan approval. (The claim probably accrued in February, 2007, when Pasco County first denied the site plan based on Hillcrest's failure to comply with the Ordinance.). Hillcrest sued

[10] However, in a facial takings challenge, the actionable injury occurs, the claim accrues, and the limitation period begins immediately upon the effectiveness of the statute or ordinance. Hillcrest neither pursues a federal just compensation claim nor argues that the passage of the Ordinance caused an injury.

on April 7, 2010, within the four-year limitation for a Section 1983 claim in Florida. *Chappell v. Rich,* 340 F.3d 1279, 1283 (11th Cir. 2003) (citing *City of Hialeah v. Rojas,* 311 F.3d 1096, 1102 n.2 (11th Cir. 2002) ("Section 1983 claims are governed by the forum state's residual personal injury statute of limitation, which in Florida is four years.")). Hillcrest's substantive due process claims and Hillcrest's equal protection claims are neither premature nor barred.

2.1.3. "Informing" Due Process

Citing opinions from nearly every jurisdiction in the country, each party consistently conflates the Takings Clause with the Due Process Clause. The parties' conflation warrants a clarifying account of the pertinent constitutional first principles. *Lingle v. Chevron U.S.A.,* 544 U.S. 528 (2005), affirms a jurisprudential divide between the Takings Clause and the Due Process Clause. *Lingle* addresses *Agins v. City of Tiburon,* 447 U.S. 255 (1980), which held that government regulation of private property "'effects a taking if [such regulation] does not substantially advance legitimate state interests." The *Agins* formulation, Justice O'Connor writes for a unanimous Court, "[H]as been [improperly] ensconced in . . . Fifth Amendment takings jurisprudence" rather than properly limited to substantive due process jurisprudence. *Lingle,* 544 U.S. at 531-32. Unlike a takings inquiry, the substantive due process inquiry provides a "means-end" analysis and asks "whether a regulation of private property is effective in achieving some legitimate

government purpose." 544 U.S. at 542. The substantive aspect of due process thus protects a citizen from an arbitrary, capricious, or irrational regulation that fails to serve a legitimate governmental objective. *Lingle,* 544 U.S. at 542; *County of Sacramento v. Lewis,* 523 U.S. 833, 846 (1998) (observing that the Due Process Clause protects a citizen against "the exercise of power without any reasonable justification in the service of a legitimate governmental objective").

Rather than evaluating the effectiveness of a regulation in achieving a legitimate objective, the Takings Clause asks whether the government forces "'some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'" *Lingle,* 544 U.S. at 542 (quoting *Armstrong v. United States,* 364 U.S. 40, 49 (1960)). The Takings Clause "does not bar government from interfering with property rights, but rather requires compensation 'in the event of otherwise proper interference amounting to a taking.'" 544 U.S. at 543 (quoting *First English Evangelical Lutheran Church v. Los Angeles County,* 482 U.S. 304, 314 (1987)). If a land use decision serves a "public use," an interference with or seizure of real property may be constitutionally rectified by paying "just compensation." Conversely, if a land use decision either fails the "public use" requirement of the Takings Clause or is "so arbitrary as to violate due process," the constitutional injury is irremediable. *Lingle,* 544 U.S. at 543.

Lingle censures the "commingling of due process and takings" law, 544 U.S. at 541, and Pasco County (although consistently committing the "commingling" error) accuses the magistrate judge of violating *Lingle*'s command. Consequently, Pasco County objects to the magistrate judge's holding that the Takings Clause, as construed by *Nollan* and *Dolan,* "inform[s] the due process analysis" but "do[es] not set forth the applicable standard." (Doc. 168 at 25) Pasco County's objection misunderstands the magistrate judge's finding. Instead of finding that the Ordinance deprives a landowner of property without paying just compensation, the magistrate judge finds that the Ordinance leverages the police power to compel a landowner to relinquish rights guaranteed by the Takings Clause – a finding that the Ordinance fails to advance a legitimate governmental purpose. Although not "set[ting] forth the applicable standard," *Nollan* and *Dolan* are central to understanding the Ordinance's perverse scheme and *Nollan* and *Dolan* "inform the due process analysis."

2.1.4. Pasco County Wields the Police Power to Compel a Landowner's Surrendering Rights Guaranteed by the Takings Clause

Nollan and *Dolan* consider "unconstitutional conditions," a constitutional prohibition against government's employing the government's power in order to secure the relinquishment of a citizen's constitutional rights. In other words, even if enjoying absolute discretion to grant or deny a citizen a governmental

accommodation, such as a development permit, a government cannot condition the receipt of the governmental accommodation on the relinquishment of a constitutional right. *Dolan v. City of Tigard,* 512 U.S. 374, 385 (1994); *Perry v. Sindermann,* 408 U.S. 593 (1972); *Pickering v. Bd. of Ed. of Township High Sch. Dist. 205,* 391 U.S. 563 (1968); *Speiser v. Randall,* 357 U.S. 513 (1958); *Bourgeois v. Peters,* 387 F.3d 1303, 1324 (11th Cir. 2004). The rule appears most often in decisions addressing rights guaranteed by the Free Speech Clause, *City of Lakewood v. Plain Dealer Pub. Co.,* 486 U.S. 750 (1988), and the Free Exercise Clause, *Hobbie v. Unemployment Appeals Commission of Fla.,* 480 U.S. 136 (1987), but the rule appears also in decisions addressing rights guaranteed by the Search and Seizure Clause, *Bourgeois,* 387 F.3d at 1324, the Takings Clause, *Dolan,* 512 U.S. at 385, *Nollan,* 483 U.S. at 834, and the Due Process Clause. *Frost v. Railroad Commission,* 271 U.S. 583 (1926).

For certain "exactions," certain "land-use decisions conditioning approval of development on the dedication of property to public use," *City of Monterey v. Del Monte Dunes at Monterey,* 526 U.S. 687, 702 (1999), a limited exception applies to the general rule of unconstitutional conditions. *Lingle,* 544 U.S. at 547; *Dolan,* 512 U.S. at 385; *Nollan,* 483 U.S. at 834. The limited exception for exactions in accord with *Nollan* and *Dolan* recognizes that state and local government, exercising the police power, possess the authority to impose certain, limited conditions on land use.

In *Nollan v. California Coastal Commission,* 483 U.S. 825 (1987), the California Coastal Commission established a "comprehensive program" to secure continuous public access laterally along Faria Beach "as the lots undergo development or redevelopment." A quarter of a mile south of Faria County Park and 1,800 feet north of another public beach, the Nollans leased – with an option to buy – a beachfront lot on which sat a 504-square-foot bungalow that the Nollans rented to travelers. The Nollans' westerly property line was the mean high water mark on the beach, and an eight-foot-high seawall separated the Nollans' beach property from the remainder of the Nollans' property.

The bungalow had fallen into disrepair, and the Nollans' option to purchase was conditioned on the Nollans' demolishing and replacing the bungalow. Attempting to build a three-bedroom home consistent with development in the beach-side neighborhood, the Nollans applied for a permit. The Coastal Commission staff recommended granting the permit on the condition that the Nollans dedicate an easement to enable the public to walk parallel to the ocean and pass laterally across the Nollans' beach property. The Nollans contested the dedication, but the Coastal Commission overruled the objection and granted the permit subject to the Nollans' recording the easement.

The Nollans appealed to the Ventura County Superior Court, which agreed with the Nollans that, absent evidence that the proposed development would have a direct adverse impact on public access to the

beach, the Coastal Commission could not impose the condition. The superior court remanded to the Coastal Commission for an evidentiary hearing. After the hearing, the Coastal Commission affirmed the dedication and found that the new house would "increase blockage of the view of the ocean, thus contributing to the development of 'a wall of residential structures' that would prevent the public 'psychologically . . . from realizing [that] a stretch of coastline exists nearby that they have every right to visit.'" 483 U.S. at 828-29. Additionally, the new house "would increase private use of the shorefront," which increase, along with neighboring development, "would cumulatively 'burden the public's ability to traverse to and along the shorefront.'" 483 U.S. at 829. The Coastal Commission required the Nollans to offset the burden by dedicating beach property to provide access from the northern public beaches to the southern public beach. The action reached the California Court of Appeal, which agreed with the Coastal Commission, and the Nollans appealed to the U.S. Supreme Court.

A government is generally prohibited from enforcing an "unconstitutional condition," that is, from conditioning a governmental accommodation on a citizen's relinquishing a constitutional right. For example, the Fourth Amendment prevents a state's conditioning the issuance of a driver's license on a citizen's waiving the prohibition against unreasonable search and seizure of the citizen's automobile. The first step in identifying an "unconstitutional

condition" is determining whether the target of the government's required relinquishment is a constitutional right. Thus, *Nollan* begins with the elemental premise that:

> Had California simply required the Nollans to make an easement across their beachfront available to the public on a permanent basis in order to increase public access to the beach, rather than conditioning their permit to rebuild their house on their agreeing to do so, we have no doubt there would have been a taking.

483 U.S. at 831. But also, *Nollan* recognizes that, because "[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law," *Pennsylvania Coal,* 260 U.S. at 413, a limited exception to the general rule of "unconstitutional conditions" applies to certain land use conditions. Thus, *Nollan* asks whether California's conditioning a development permit on the establishment of an easement triggers the limited land use exception or violates the Takings Clause.[11]

---

[11] Justice Brennan's dissent (in which Justice Marshall joined) and most opinions and academic articles published after *Nollan,* use the term "governmental benefit" or "governmental privilege" to describe a building permit (or the item or action the government "permits" the citizen to accomplish in exchange for confiscating the property). The phrase is subtly misleading and pernicious. As *Nollan* observes: "[T]he right to build on one's own property – even though its exercise can be subjected to legitimate

(Continued on following page)

California argued that a "permit condition that serves the same legitimate police power purpose as a refusal to issue the permit should not be found to be a taking if the refusal to issue the permit would not constitute a taking." *Nollan,* 483 U.S. at 836. The Supreme Court agrees but notes that the dedication of an easement to allow the public to stroll along a private beach from a public beach to another public beach "utterly fails" to decrease "blockage of the view of the ocean" from the street. In other words, "the condition substituted for the prohibition utterly fails to further the end advanced as the justification for the prohibition." 483 U.S. at 837. If failing to help mitigate the purported public hardship caused by the development, the permit condition becomes leverage and the purpose of the permit condition becomes "the obtaining of an easement to serve some valid governmental purpose, but without payment of compensation, [in other words,] 'an out-and-out plan of extortion.'" 483 U.S. at 837 (quoting *J.E.D. Associates v. Atkinson,* 432 A.2d 12, 14-15 (1981)). Because the acquisition of necessary right-of-way along State Road 52 directly assists 2025 transportation in Pasco County, Hillcrest's claim is not a *Nollan* claim (although *Nollan* establishes a generally applicable constitutional baseline).

Seven years later in *Dolan v. City of Tigard,* 512 U.S. 374 (1994), the Supreme Court considered

---

permitting requirements – cannot remotely be described as a 'governmental benefit.'" 483 U.S. at 833 n.2.

another challenge to an exaction. Oregon enacted a "comprehensive land use management program" that required each municipality to adopt new "comprehensive land use plans" to accomplish statewide planning goals. The City of Tigard adopted a "Community Development Code," which required landowners within the central business district to comply with a 15% open-space and landscaping requirement. After a transportation study identified traffic congestion as a problem in the central business district, the city adopted a plan for a bicycle pathway. Designed to encourage alternatives to a short automobile trip, the plan required a landowner to dedicate land "where provided for in the [bicycle] pathway plan." 512 U.S. at 378. The city adopted a "Master Drainage Plan" that suggested channel excavation and other improvements to the Fanno Creek Basin area next to Dolan's property.

Dolan owned a 1.67-acre parcel accommodating a 9,700 square-foot plumbing and electrical supply store and a gravel parking lot. The creek flowed through the southwestern corner of the parcel and along the western border, and a part of Dolan's property sat within a part of the city's "greenway system." Seeking to double the size of the store and to pave a thirty-nine-space parking lot, Dolan applied for a permit. The city granted the permit on condition that Dolan dedicate "sufficient open land area for greenway adjoining and within the floodplain. This area shall include portions at a suitable elevation for the construction of a [bicycle] pathway within the

floodplain in accordance with the adopted [bicycle] plan." 512 U.S. at 379-80. The city required Dolan to dedicate roughly 10% of the property but permitted Dolan to use the dedicated property to satisfy the 15% open space and landscaping requirement.

Dolan requested a variance, for which the city required Dolan to prove to the city that "the literal interpretation of the applicable zoning provisions would cause 'an undue or unnecessary hardship' unless the variance is granted." 512 U.S. at 380. Dolan argued that her redevelopment would not conflict with the policy underlying the comprehensive plan. The city denied the variance and (1) found that "[i]t is reasonable to assume that customers and employees of the future uses of this site could utilize a [bicycle] pathway adjacent to this development for their transportation and recreational needs," (2) observed that "the site plan has provided for bicycle parking in a rack in front of the proposed building and '[i]t is reasonable to expect that some of the users of the bicycle parking provided for by the site plan will use the pathway adjacent to Fanno Creek if it is constructed,'" and (3) concluded that the bicycle pathway "'could offset some of the traffic demand on [nearby] streets and lessen the increase in traffic congestion.'" 512 U.S. at 381-82. The city noted also that the floodplain dedication would be "reasonably related" to Dolan's request to increase the impervious surface on the site. After the Land Use Board of Appeals denied the appeal and the Oregon Court of Appeals affirmed,

Dolan appealed to the Oregon Supreme Court, which affirmed.

Dolan begins with the premise that, had the city taken private property without paying just compensation, the taking would violate the Takings Clause. "Without question, had the city simply required petitioner to dedicate a strip of land along Fanno Creek for public use, rather than conditioning the grant of her permit to redevelop her property on such a dedication, a taking would have occurred." 512 U.S. at 384. Dolan explains that, if a *Nollan* "essential nexus" exists, the Supreme Court "must decide the required degree of connection between the exactions and the projected impact of the proposed development," a question not considered in *Nollan* because "the connection [did] not meet even the loosest standards." *Dolan,* 512 U.S. at 386. *Dolan* agrees with the city (1) that limiting development of impervious surface along Fanno Creek helps prevent flooding along Fanno Creek and (2) that building a bicycle pathway in the central business district mitigates traffic congestion. The city in *Dolan,* like Pasco County in the present instance, faced no *Nollan* problem.

Dolan next turns to whether the extent of the exaction bears the "required relationship to the projected impact of [Dolan's] proposed development." 512 U.S. at 388. After surveying cases from several states that employ a different standard to determine the "required relationship," *Dolan* settles on "rough proportionality" and emphasizes that the burden of proof necessarily rests on the government:

> We think a term such as "rough proportionality" best encapsulates what we hold to be the requirement of the Fifth Amendment. No precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development.

512 U.S. at 391. *Dolan* observes that, even without the dedication, the city already required 15% open space and that, even without the dedication, the undeveloped floodplain would nearly satisfy the 15% requirement. "But the city demanded more," *Dolan* says, "[the city] not only wanted petitioner not to build in the floodplain, but it also wanted petitioner's property along Fanno Creek for its greenway system" and "has never said why a public greenway, as opposed to a private one, was required in the interest of flood control." 512 U.S. at 393. As opposed to a simple use restriction, the dedication, "eviscerate[s]" Dolan's right to exclude others from her property, and the city never explains how "recreational visitors trampling along the floodplain easement are sufficiently related to the city's legitimate interest in reducing flooding problems along Fanno Creek." 512 U.S. at 393.

Turning to the bicycle path, *Dolan* agrees that the redevelopment will increase traffic in the central business district and that dedications for public avenues, such as streets and sidewalks, "are generally reasonable exactions to avoid excessive congestion from a proposed property use." 512 U.S. at 395.

Fatally, however, the city offered no specific facts to demonstrate "that the additional number of vehicle and bicycle trips generated by petitioner's development reasonably relate to the city's requirement for a dedication of the [bicycle] pathway easement." 512 U.S. at 395. *Dolan* emphasizes that "no precise mathematical calculation is required, but the city must make some effort to quantify its findings." 512 U.S. at 395. *Dolan* reverses the Oregon Supreme Court.

Maintaining the entire burden of proof on the government, *Nollan* and *Dolan* confirm that, rather than conferring a power on the government, the Takings Clause confirms a right in the citizen. A government's power to effect a limited exaction is a necessary but limited exception to the constitutional directive that no private property shall "be taken for public use, without paying just compensation." *Nollan* ensures that land taken by an exaction mitigates a public hardship to which the development contributes. *Nollan* never reaches the issue of the amount of land exacted. *Nollan* finds that an easement along the beach behind the Nollans' house fails to advance the public's viewing the beach from the street in front of the Nollans' house, regardless of how much or how little beach California exacts from the Nollans. *Dolan* ensures that a government can exact no more land than necessary to mitigate the development's contribution to the public hardship. The government – and not the landowner – bears the burden of both proving a "rough proportionality" and "quantify[ing] its findings." The government's failure

to satisfy each of these requirements violates the Takings Clause. If taking an amount of land in excess of the amount that the government has proven necessary to mitigate the development's contribution to the public hardship, the government must proceed as it always has – through condemnation, in which the government bears the burden of proof and a disinterested fact-finder determines "just compensation."

> In rejecting petitioner's request for a variance from the pathway dedication condition, the city stated that omitting the planned section of the pathway across petitioner's property would conflict with its adopted policy of providing a continuous pathway system. But the Takings Clause requires the city to implement its policy by condemnation unless the required relationship between petitioner's development and added traffic is shown.

Dolan, 512 U.S. at 395 n.10.

Under the Takings Clause the infirmity of the Ordinance is clear. As the report and recommendation details, the Ordinance's scheme to require the landowner to prove the absence of a "rough proportionality" – rather than Pasco County's bearing the burden to prove a "rough proportionality" – conflicts irreconcilably with *Dolan.* Without Pasco County's "quantify[ing] the findings," the permit condition – an uncompensated, fee simple dedication of property – will never comply with the Takings Clause.

The Ordinance empowers Pasco County to take an amount of land in excess of the amount that Pasco

County, "but for" the Ordinance, would bear the burden of proving necessary to mitigate Hillcrest's addition to traffic congestion. Instead of proceeding through eminent domain, in which the government proves a public need and a disinterested fact-finder determines "just compensation," the Ordinance requires Pasco County to prove nothing and empowers Pasco County to determine the "just compensation," if any, Pasco County will pay. *Nollan,* 483 U.S. at 841-42 ("California is free to advance its 'comprehensive program,' if it wishes, by using its power of eminent domain for this 'public purpose,' see U.S. Const., Amdt. 5; but if it wants an easement across the Nollans' property, it must pay for it.").

As *Nollan* observes, an exaction that fails to strictly comply with the requirements of the Takings Clause abets the state's holding for ransom a citizen's right to build on his own property. Unless the landowner conveys to the government valuable land for free, the property remains forever undeveloped. As *Nollan* observes, a perverse exaction accomplishes an "out-and-out plan of extortion."[12] 483 U.S. at 837. Consequently, if a landowner refuses the Ordinance's

[12] Reifying this uncomfortable analogy, the Hobbs Act, 18 U.S.C. § 1951, defines "extortion" as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." *Black's Law Dictionary* 623 (8th ed. 2004) defines "extortion" as "[t]he offense committed by a public official who illegally obtains property under the color of office; esp., an official's collection of an unlawful fee."

demand for a dedication, the property remains undeveloped; if a landowner yields to the Ordinance's demand, the extortion succeeds.[13]

As Pasco County argues and as *Lingle* confirms, an exaction athwart *Nollan* and *Dolan* results in an uncompensated taking and not a deprivation of due process. But the Ordinance presents a different situation: by legislative fiat, Pasco County uses a development permit to compel a landowner either to convey valuable land for free or to submit to a regime castigated by *Dolan*. In other words, Pasco County wields the police power to compel a landowner's abandoning rights guaranteed by the Takings Clause.

The magistrate judge correctly finds that *Nollan* and *Dolan* "inform the due process analysis" but "do not set forth the applicable standard" (Doc. 168 at 25); the magistrate judge correctly finds that Pasco County improperly uses the police power; and the magistrate judge correctly finds that the Ordinance fails to rationally relate to a legitimate governmental purpose. But the Ordinance affronts substantive due process for additional reasons.

---

[13] This point defeats Pasco County's brazen argument that Hillcrest "waived" a legal challenge by at one point "agreeing" to the dedication.

2.1.5. Pasco County Wields the Police Power to Avoid Eminent Domain

Since the 1985 amendment of the Local Government Comprehensive Planning and Land Development Regulation Act, Florida courts have adjudicated the constitutional propriety of "thoroughfare maps." The Supreme Court of Florida invalidated the statutorily prescribed execution of a thoroughfare map in *Joint Ventures, Inc. v. Dep't of Transportation,* 563 So. 2d 622 (Fla. 1990), and upheld a thoroughfare map in *Palm Beach County v. Wright,* 641 So. 2d 50 (Fla. 1994).

In *Joint Ventures,* the plaintiff owned 8.3 acres of vacant land adjacent to Dale Mabry Highway in Tampa. The plaintiff contracted to sell the property contingent on the buyer's obtaining the necessary development permit. The FDOT determined that expansion of the highway required 6.49 acres of the plaintiff's land for storm water drainage. Accordingly, under Section 337.241, Florida Statutes, the FDOT recorded a map of reservation that prevented the issuance of a development permit. The statute required that a development permit "shall not be issued for a period of 5 years from the date of recording such map. The 5-year period may be extended for an additional 5-year period [by the same recording method]." 563 So. 2d at 623.

In the district court of appeal, the plaintiff had argued that the statute's moratorium "amounted to a taking because the statute deprived [the owner of a]

substantial beneficial use of [the] property." 563 So. 2d at 624. The FDOT responded that, in a valid exercise of the police power, the statute "regulates" rather than "takes." The district court of appeal upheld the statute because the plaintiff possessed a remedy in inverse condemnation.[14] The district court of appeal certified the question "whether [the statute's subsections] are unconstitutional in that they provide for an impermissible taking of property without just compensation and deny equal protection and due process in failing to provide an adequate remedy." 563 So. 2d at 623. The Supreme Court of Florida clarified:

> [W]e do not deal with a claim for compensation, but with a constitutional challenge to the statutory mechanism. Our inquiry requires that we determine whether the statute is an appropriate regulation under the police power, as DOT asserts, or whether the statute is merely an attempt to circumvent the constitutional and statutory protections afforded private property ownership under the principles of eminent domain.

563 So. 2d at 625.

---

[14] "Inverse condemnation is 'a cause of action against a governmental defendant to recover the value of property which has been taken in fact by the governmental defendant, even though no formal exercise of the power of eminent domain has been attempted by the taking agency.'" *United States v. Clarke,* 445 U.S. 253, 257 (1980) (Rehnquist, J.) (quoting D. Hagman, *Urban Planning and Land Development Control Law* 328 (1971)).

The FDOT argued that the statute "is a permissible regulatory exercise of the state's police power because it was necessary for various economic reasons." 563 So. 2d at 625. During discovery, the legislative staff admitted that the statute sought to reduce the cost of a prospective property acquisition (rather than to prevent an injurious use of private property). Although the thrifty accomplishment of a legitimate objective is a proper governmental purpose, thrifty accomplishment of a legitimate objective by the circumvention of the constitutional guarantees attendant to eminent domain is neither a legitimate objective nor a proper governmental purpose:

> For example, without a development moratorium, land acquisition costs could become financially infeasible. If landowners were permitted to build in a transportation corridor during the period of FDOT's pre-acquisition planning, the cost of acquisition might be increased. Rather than supporting a "regulatory" characterization, these circumstances expose the statutory scheme as a thinly veiled attempt to "acquire" land by avoiding the legislatively mandated procedural and substantive [eminent domain] protections of chapters 73 and 74.

563 So. 2d at 625. *Joint Ventures* characterizes the purpose and effect of the statute as "freezing" property and compares the "freezing" to Florida's "consistently prohibited" and deliberate depressing of land value in anticipation of eminent domain. 563 So. 2d at 626 (citing cases). *Joint Ventures* holds that each map of

reservation violates due process, and *Joint Ventures* "effectively eliminat[es] the development restrictions created by the maps." *Tampa-Hillsborough County Expressway Authority v. A.G.W.S. Corp.,* 640 So. 2d 54 (1994) (confirming *Joint Ventures'* due process holding and concluding that each landowner with property inside the boundary of an invalidated map of reservation must prove *ad hoc* that the map effected an inverse condemnation).

On a certified question from the district court of appeal, *Palm Beach County v. Wright,* 641 So. 2d 50 (Fla. 1994), considers the "facial" propriety of a county thoroughfare map both designating corridors for future roadway and forbidding land use that would impede future construction of the road. Palm Beach County's Comprehensive Plan forbade "land use activity . . . within any roadway designated on the thoroughfare map that would impede future construction of the roadway." 641 So. 2d at 51. The plaintiffs argued that, by forbidding land use within the corridor, Palm Beach County's thoroughfare map operates identically to the map in *Joint Ventures.* Palm Beach County responded by arguing that, unlike the map of reservation in *Joint Ventures,* Palm Beach County's map "is an unrecorded long-range planning tool tied to a comprehensive plan that outlines general roadway corridors and does not on its face delineate the exact routes of future roadways." 641 So. 2d at 52.

Wright equates the map with a set-back requirement, a valid exercise of the police power accomplished without providing just compensation. *Wright*

finds (1) that the map is not recorded, like the maps of reservation in *Joint Ventures,* (2) that the road locations shown on the map are subject to change, and (3) that, unlike the FDOT in *Joint Ventures,* Palm Beach County "is a permitting authority which has the flexibility to ameliorate some of the hardships." 641 So. 2d at 53. *Wright* emphasizes that the map in *Joint Ventures* served the sole purpose of "freez[ing] property so as to depress land values in anticipation of eminent domain proceedings" and, by contrast, the Palm Beach map "serves as an invaluable tool for planning purposes." *Wright,* 641 So. 2d at 53-54.

In *Joint Ventures* and *Wright,* the property remains the landowner's. In *Joint Ventures* and *Wright,* the challenged provisions halt development on property targeted for prospective condemnation. In *Joint Ventures* and *Wright,* the government acquires the property through eminent domain if the government needs the property and if the parties or a jury determines just compensation. But in *Joint Ventures,* the legislature imposed the moratorium and recorded the encumbrance on the property in order to depress the value in anticipation of eminent domain. By intentionally depressing the land value, the government impermissibly used the police power to impair the constitutional right to "just compensation."

Pasco County's misuse of the police power in the Ordinance exceeds the misuse in *Wright* and even the misuse in *Joint Ventures.* Rather than imposing a mere development moratorium, the Ordinance requires the corridor's immediate conveyance at no cost. Rather than unconstitutionally depressing land value

in anticipation of eminent domain, the Pasco County Ordinance avoids eminent domain altogether and diverts any rebellious landowner to an in-house review in which the landowner bears the burden of proof.

Pasco County leverages permit approval not only to build a low-cost (or no cost), comfortable, and bulging land bank but to accumulate land that may never be used. Nothing in the Ordinance requires Pasco County to build a road on the confiscated property, nothing in the Ordinance prevents Pasco County's use of the confiscated property for some other purpose, and nothing in the Ordinance requires Pasco County to return to the landowner any unused property. If the present corridor plans collapse or change, Pasco County might sell Hillcrest's property (in which case Pasco County undoubtedly would demand from the buyer at least "just compensation").

Each of the Ordinance's several purported objectives – including "to coordinate the full development of roads," "to promote orderly growth," "to maintain the integrity of the corridor for transportation," to ensure "an adequate transportation network," and "to aid in the harmonious, orderly, and beneficial development of the county" – is a bona fide, legitimate governmental objective.[15] But the legitimate aims of

[15] Pasco County lifts each objective directly from the enabling statute:

> "Transportation corridor management" means the coordination of the planning of designated future transportation corridors with land use planning within and adjacent to the corridor to promote orderly growth, to

(Continued on following page)

government are readily and properly subject to accomplishment within the present constitutional and statutory arrangement, detailed in Chapters 73 and 74, Florida Statutes, and in the thoroughfare maps such as those in *Wright,* as well as set-back lines and reasonable permit restrictions.[16] Pasco County's wielding the police power to avoid eminent domain stands athwart established principles of due process.

2.1.6. Pasco County Wields the Police Power to Obtain a Bulk Discount

An inverse condemnation remedy exists for each landowner subjected to the Ordinance. But a "property owner who must resort to inverse condemnation is not on equal footing with an owner whose land is 'taken' through formal condemnation proceedings." *Joint Ventures,* 563 So. 2d at 627; *accord United States v. Clarke,* 445 U.S. 253, 255-59 (1980) (Rehnquist, J.) (highlighting procedural and economic distinctions between a condemnation and an inverse condemnation). Without invalidation of the Ordinance as an impermissible use of the police power, each landowner

---

> meet the concurrency requirements of this chapter, and to maintain the integrity of the corridor for transportation purposes.

Fla. Stat. § 163.3164(47).

[16] Pasco County has never said why an immediate public "dead zone" (as opposed to a future, private "dead zone") is required to ensure "an adequate transportation network," when and if Pasco County one day expands the road.

defying the Ordinance must proceed in inverse condemnation, without the procedural protection of condemnation, without the appointment of an appraiser, without the submission of testimony, without the right to attorneys' fees, and without the government's depositing in the court registry twice the property's appraised value. *Joint Ventures,* 563 So. 2d at 627 (citing *State Road Department v. Forehand,* 56 So. 2d 901 (Fla. 1952)); *see also Clarke,* 445 U.S. at 255-59.

So long as the Ordinance persists, Pasco County methodically undercuts constitutional "just compensation" and realizes a steep discount below "just compensation" in the cost of acquiring right-of-way for a transportation corridor. Pasco County's method is plain. If a landowner never aspires to develop land adjoining a transportation corridor, Pasco County pays just compensation through eminent domain instituted when the land is needed. But, to landowners who aspire to develop land adjoining a corridor and who submit to the Ordinance – those who yield to the Ordinance's demand for a dedication of land for free – Pasco County pays nothing. The Pasco County Attorney reports reliably and publicly that for Pasco County's right-of-way acquisition after enactment of the Ordinance the aggregate discount below just compensation is already measurable in millions of dollars

– millions of dollars below constitutionally guaranteed just compensation.[17]

In sum, the Ordinance discriminates based on economic aspiration. Against the class of landowners who never attempt to develop, Pasco County will acquire land by eminent domain, beginning when and if Pasco County needs the land. A landowner without

---

[17] Pasco County unpersuasively argues that the waiver and variance procedures save the Ordinance from a facial challenge because in some conceivable application – for example, if Pasco County grants a waiver or variance – the Ordinance can apply constitutionally. But as explained above, neither the waiver nor the variance rectifies the aggregate discount achieved by the Ordinance, neither the waiver nor the variance properly places the burden on Pasco County, and neither the waiver nor the variance contains a cognizable and enforceable standard that removes the decision from the caprice of Pasco County.

Dolan recognizes that "roughly proportional" suggests an amorphous, imprecise standard. 512 U.S. at 391 ("No precise mathematical calculation is required."). Therefore, *Dolan* places the burden on the government to establish "rough proportionality" to an impartial jury or judge. Instead, the waiver procedure requires the landowner to establish the absence of "rough proportionality" and to prove the absence to the partial and land-starved County.

Requiring the landowner's establishing that the "variance requested is the minimum necessary to alleviate or address" one of the enumerated criteria quoted above, the variance procedure permits the Review Committee nearly unlimited discretion to grant or deny a variance. The Ordinance nowhere requires the Review Committee to modify the variance but instead requires denial if the Review Committee can perceive a hypothetical variance less burdensome on Pasco County. The "minimum necessary" standard leaves the variance decision, like the waiver decision, to the whim of the Review Committee.

need of a permit enjoys the protection of condemnation and receives the "just compensation" guaranteed by the Constitution. A landowner who aspires to develop property and who aspires to a permit for a grocery store, a doctor's office, an apartment building, or the like faces an immediate confiscation of land. For these landowners, a last but forlorn hope for just compensation is in Pasco County's prolix, opaque, and overbearing Ordinance. Further, these landowners' just compensation is an elusive contingency, held for ransom by a committee methodically acquiring property at a steep, aggregate discount. "[M]erely an attempt to circumvent the constitutional and statutory protections afforded private property ownership under the principles of eminent domain," *Joint Ventures,* 563 So. 2d at 625, the Ordinance improperly uses the police power and fails to advance a legitimate governmental purpose (taking by eminent domain is a legitimate governmental purpose; extorting landowners is not).

2.2. A Rational Classification[18]

Because neither the complaint nor the papers include allegations or facts that Hillcrest was treated differently owing to membership in a suspect class or owing to exercise of a fundamental right, rational

[18] Count III (as-applied equal protection claim under the U.S. Constitution); Count VIII (facial equal protection claim under the U.S. Constitution).

basis review applies. Under the highly deferential standard, "the burden is upon the challenging party to negative any reasonably conceivable state of facts that could provide a rational basis for the classification." *Bd. of Trustees the of Univ. of Ala. v. Garrett,* 531 U.S. 356, 367 (2001). Thus, a classification fails rational basis review only if "the facts preclude[ ] any plausible inference" that a legitimate basis underlies the difference in treatment. *Nordlinger v. Hahn,* 505 U.S. 1, 16 (1992).

Hillcrest accuses the Ordinance of arbitrarily treating differently a landowner whose property is overlapped by a corridor from a landowner whose property is not overlapped by a corridor. According to the complaint, the discrimination is irrational because "development of [the latter] properties may contribute equally or more to the traffic problems necessitating the widening of the roads [as the development of the former properties]." (Doc. 36, ¶ 111) But a development along State Road 52 causes more traffic congestion on State Road 52 than an identically sized development not along State Road 52.[19] Hillcrest identifies no equal protection violation.

---

[19] Although advancing other arguments, Hillcrest alleges in the complaint no other discriminatory classification. Pasco County properly and successfully objects. (Doc. 116 at 8) Even absent an objection, the other equal protection arguments would fail.

2.3. A Few Perfunctory Objections[20]

The magistrate judge recommends denying Hillcrest's motion for summary judgment and granting Pasco County's motion for summary judgment on the federal "access to courts" claim. Hillcrest objects; cites a footnote in *Christopher v. Harbury,* 536 U.S. 403, 415 n.12 (2002); and argues that the Ordinance impairs the "right of access to courts . . . guaranteed under the United States Constitution by an amalgam of the Article IV Privileges and Immunities Clause, the First Amendment Petition Clause, the Fifth Amendment Due Process Clause and the Fourteenth Amendment Equal Protection and Due Process Clauses." (Doc. 112 at 35) Whatever the merits of the "amalgam" in the usual instance (or under state law), such as a prison-litigation action, *Bounds v. Smith,* 430 U.S. 817 (1977), or an action challenging a filing fee, *Boddie v. Connecticut,* 401 U.S. 371 (1971), Hillcrest fails to articulate an impediment created by the Ordinance that frustrates Hillcrest's access to federal court.

Next, the magistrate judge recommends denying Hillcrest's motion for summary judgment and granting Pasco County's motion for summary judgment on the claim that the Ordinance violates Hillcrest's right to a jury trial. Hillcrest asserts that the Ordinance

---

[20] Count XV (facial "access to courts" claim under the U.S. Constitution); Count XVI (facial "right to a jury trial" claim under the U.S. Constitution).

violates the federal right to a jury trial by "effectively suspend[ing] the right to jury trial in federal court for as long as it takes to complete the dedication waiver process." (Doc. 112 at 38) Again failing to articulate the merits of the claim to a level susceptible of understanding (most administrative procedures "effectively suspend" a jury trial), Hillcrest relies on *Armster v. U.S. Dist. Ct. for the C.D. Cal.,* 792 F.2d 1423 (9th Cir. 1986), a decision addressing the Central District of California's suspending all civil jury-trials for three-and-a-half months. *Armster* is unhelpful.

2.4. Other Claims for Relief[21]

Section 1367(c) of Title 28 of the United States Code grants the district court discretion to decline to exercise supplemental jurisdiction if "(1) the claim raises a novel or complex issue of state law . . . [or] (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction." *See Utopia Provider Sys. v. Pro-Med Clinical Sys.,* 596 F.3d 1313,

[21] Count I (as-applied "taking" claim under the Florida Constitution); Count IV (as-applied due process claim under the Florida Constitution); Count V (as-applied equal protection claim under the Florida Constitution); Count VI (as-applied "temporary taking" claim under the Florida Constitution); Count IX (facial due process claim under the Florida Constitution); Count X (facial equal protection claim under the Florida Constitution); Count XII (facial "access to courts" claim under the Florida Constitution); Count XIII (facial "separation of powers" claim under the Florida Constitution); Count XIV (facial "right to a jury trial" claim under the Florida Constitution).

1328-29 (11th Cir. 2010); *Parker v. Scrap Metal Processors,* 468 F.3d 733, 742-44 (11th Cir. 2006). The remaining claims include (1) in Count I an as-applied "takings" claim under the Florida Constitution, (2) in Count IV an as-applied due process claim under the Florida Constitution, (3) in Count V an as-applied equal protection claim under the Florida Constitution, (4) in Count VI an as-applied "temporary takings" claim under the Florida Constitution, (5) in Count IX a facial due process claim under the Florida Constitution, (6) in Count X a facial equal protection claim under the Florida Constitution, (7) in Count XII a facial "access to courts" claim under the Florida Constitution, (8) in Count XIII a facial "separation of powers" claim under the Florida Constitution, and (9) in Count XIV a facial "right to a jury trial" claim under the Florida Constitution. Resolution of the remaining claims would require a federal court's uncomfortable and unnecessary examination of the Florida Constitution and the structure of Florida's government. Additionally, on August 22, 2011, Hillcrest sued the FDOT in state court for inverse condemnation. *Hillcrest Property v. Florida,* 51-2011-A-003825 (staying action in favor of this action on December 14, 2012). With Hillcrest's property disputed in each action, the jurisdictional splitting of claims invites a duplication of judicial effort, an affront to comity, and an inconsistent result.

3. Conclusion

Pasco County has enacted an ordinance that effects what, in more plain-spoken times, an informed observer would call a "land grab," the manifest purpose of which is to evade the constitutional requirement for "just compensation," that is, to grab land for free. Viewed more microscopically, Pasco County's Ordinance designs to accost a citizen as the citizen approaches the government to apply for a development permit, designs to withhold from a citizen the development permit unless the citizen yields to an extortionate demand to relinquish the constitutional right of "just compensation," and designs first and foremost to accumulate – for free – land for which a citizen would otherwise receive just compensation.

Aware undoubtedly of the brazenness of the Ordinance, Pasco County has garnished the Ordinance, has disguised the Ordinance, has planted in the Ordinance a distraction, using the familiar phrase "roughly proportional" or "rough proportionality," words intended to evoke the soothing reassurance of the Supreme Court's decision in *Dolan,* words intended to deploy aggressively the foggy notion that if the words "roughly proportional" appear in a scheme to regulate land, the scheme is constitutional. Not so.

The parties laboriously briefed in this action an array of theories. Both the magistrate judge and I have examined, exhaustively and exhaustingly, the contending theories, briefed and unbriefed. The

magistrate judge has opined formidably. Accepting the magistrate judge's report for the most part but viewing the law in part from a slightly different vantage, I contribute some additional analysis and accept the magistrate judge's conclusion. Another judge might find the magistrate judge's opinion or this opinion inexact in this or that particular of constitutional law. Nonetheless, this Ordinance is an unmistakable, abusive, and coercive misapplication of governmental power, perpetrated to cynically evade the Constitution. The Ordinance cannot stand, whether for the precise reasons stated here or for a related reason.

The report and recommendation (Doc. 168) is **ADOPTED IN PART**. To the extent inconsistent with this order, the parties' objections (Docs. 170 and 171) are **OVERRULED**. Under 28 U.S.C. § 1367(c)(1) and (4), supplemental jurisdiction is **DECLINED** over Counts I, IV, V, VI, IX, X, XII, XIII, and XIV. Section 1367(d) tolls any applicable limitation for thirty days. *Jinks v. Richland County,* 538 U.S. 456, 459 (2003). Pasco County's motion for summary judgment (Doc. 111) and Hillcrest's motion for summary judgment (Doc. 112) are **GRANTED IN PART AND DENIED IN PART** as follows:

- Count II (due process; as-applied; United States Constitution): Pasco County's motion for summary judgment is **DENIED**.
- Count III (equal protection; as-applied; United States Constitution): Pasco County's

motion for summary judgment is **GRANTED**.

- Count VII (due process; facial; United States Constitution): Hillcrest's motion for summary judgment is **GRANTED**. Pasco County's motion for summary judgment is **DENIED**.
- Count VIII (equal protection; facial; United States Constitution): Hillcrest's motion for summary judgment is **DENIED**. Pasco County's motion for summary judgment is **GRANTED**.
- Count XV (access to courts; facial; United States Constitution): Hillcrest's motion for summary judgment is **DENIED**. Pasco County's motion for summary judgment is **GRANTED**.
- Count XVI (right to a jury trial; facial; United States Constitution): Hillcrest's motion for summary judgment is **DENIED**. Pasco County's motion for summary judgment is **GRANTED**.

To discuss the form of the forthcoming judgment and to discuss other current issues, a hearing and a status conference will occur on **APRIL 25, 2013, at 2 p.m.**, in Courtroom 15A of the United States Courthouse in Tampa, Florida.

ORDERED in Tampa, Florida, on April 12, 2013.

/s/ Steven D. Merryday
STEVEN D. MERRYDAY
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

HILLCREST PROPERTY, LLP,

Plaintiff,

v. **Case No. 8:10-cv-819-T-23TBM**

PASCO COUNTY,

Defendant. /

REPORT AND RECOMMENDATION

THIS MATTER is before the court on referral by the Honorable Steven D. Merryday for a report and recommendation on **Pasco County's Motion for Summary Judgment** (Doc. 111) and Plaintiff's response (Doc. 117), and **Plaintiff's Dispositive Motion for Partial Summary Judgment as to Pasco County's Liability Under Counts VII, VIII, IX, XII, XIII, XV and XVI** (Doc. 112) and Defendant's response (Doc. 116).[1] The parties have filed affidavits, depositions, and other documentary evidence

[1] Plaintiff has also filed a Request for Judicial Notice of Legislative History and Matters on Pasco County's Official Website (Doc. 150) and a Request for Judicial Notice of Ordinance 11-15 (Doc. 161). Copies of the Right-of-Way Corridor Preservation Ordinance No. 05-39, as amended by Ordinance No. 06-36, have been filed previously. (Docs. 39, 50). The Ordinance, as amended, is codified at section 319 of the Pasco County Land Development Code.

in support of their positions (Docs. 102-10, 113-14, 118-22, 124), as well as supplemental authority (Docs. 126-27, 151, 153, 159, 162, 166-67).[2] Oral arguments on the motions were conducted on December 15, 2011.

For the reasons set forth herein, it is recommended that both motions be granted in part and denied in part.

I.

A.

Hillcrest Property, LLP ("Hillcrest") sues Pasco County, Florida ("the County"), claiming that the County's Comprehensive Plan, Right-of-Way Corridor Preservation Ordinance, and unwritten policies and customs with respect to exaction and/or dedication requirements run afoul of the United States Constitution and the Florida Constitution, both facially and as applied to Hillcrest. As the record reflects, a

[2] Also before the court are **Plaintiff's Motion to Strike the Affidavit of David Goldstein** (Doc. 128) and Defendant's response in opposition (Doc. 133), and **Pasco County's Motion to Strike Noto's Appraisal Reports Dated August 24, 2011, and Supplemental Report Dated August 29, 2011, and to Preclude Noto from Testifying to Any Opinions Beyond Those Outlined in His Earlier Expert Reports and Deposition Testimony** (Doc. 134) and Plaintiff's response in opposition (Doc. 139). In connection with the court's consideration of these cross-motions for summary judgment, the motions are **DENIED**.

number of claims were resolved on a motion to dismiss. *See* (Docs. 91, 93). Remaining are six federal counts and nine state counts:

Count I	as-applied claim for a permanent taking of private property in violation of the *Florida Constitution*
Count II	alternative as applied claim for a due process violation under the *United States Constitution*
Count III	alternative as applied claim for an equal protection violation under the *United States Constitution*
Count IV	alternative as applied claim for a due process violation under the *Florida Constitution*
Count V	alternative as applied claim for an equal protection violation under the *Florida Constitution*
Count VI	alternative as-applied claim for a temporary taking of private property in violation of the *Florida Constitution*
Count VII[3]	alternative facial due process claim under the *United States Constitution*

[3] Counts VII through X allege violations by reason of specified provisions in the County's Comprehensive Plan, the Right-of-Way Corridor Preservation Ordinance, and alleged unwritten exaction policies and customs.

Count VIII	alternative facial equal protection claim under the *United States Constitution*
Count IX	alternative facial due process claim under the *Florida Constitution*
Count X	alternative facial equal protection claim under the *Florida Constitution*
Count XII	facial claim that the ordinance violates the access to courts guarantee under the *Florida Constitution*
Count XIII	facial AND as applied claims that the ordinance violates separation of powers under the *Florida Constitution*
Count XIV	facial claim that the ordinance violates the right to jury trial under the *Florida Constitution*
Count XV	facial claim that the ordinance violates the access to courts guarantee under the *United States Constitution*
Count XVI	facial claim that the ordinance violates the right to jury trial under the *United States Constitution*

Hillcrest seeks a determination of a taking or at least a temporary taking and just compensation therefor. Alternatively, it seeks declaratory and injunctive relief and, where permitted, damages. Each of the as-applied claims arise from the alleged imposition of a right-of-way exaction by the County. The facial claims each assert a constitutional violation by reason of the County's Comprehensive Plan Policy FLU 1.1.5, Table

7-42, Map 7-35, Map 7-36, the County's Right-of-Way Preservation Ordinance, and the County's unwritten exaction customs and policies.

B.

Here, Hillcrest seeks partial summary judgment on its facial challenges that portions of the Pasco County Comprehensive Plan, its Right-of-Way Preservation Ordinance ("the Ordinance"), and its unwritten customs, policies, and practices violate the takings, due process, and equal protection clauses of the Fifth and Fourteenth Amendments (Counts VII and VIII) and the takings and due process clauses of the Florida Constitution (Count IX). It also seeks partial summary judgment on its facial challenges that Sections 319.9 and 319.10 of the Ordinance violate the constitutional guarantees of access to courts under the Florida and United States Constitutions (Counts XII and XV), the doctrine of separation of powers under the Florida Constitution (Count XIII); and the right to trial by jury under the Florida and United States Constitutions (Counts XIV and XVI). In short, in connection with a development application and construction permit, Hillcrest was required to dedicate a portion of its property fronting State Road 52 ("SR 52")to the County free of charge. While contending that such constitutes a "taking," it alternatively argues that the land-use scheme itself is facially unconstitutional. The following from Hillcrest's brief neatly sums up its argument:

Unquestionably, if Pasco County simply adopts an ordinance requiring all landowners whose properties front the major road network to dedicate right-of-way upon demand at no cost to the County, the ordinance would violate the due process, equal protection and takings clauses. The question for this Court is whether the County's Right-of-Way Corridor Preservation Ordinance's requirement that such dedication be made as a condition of development plan approval changes that result. It does not for the simple reason that the dedication requirement is completely untethered from the traffic impact of the proposed development. The Ordinance requires dedication regardless of the magnitude of a proposed development's traffic impact and without the County having made any individualized determination that the dedication is related in nature and scope to the traffic impact of the proposed development. Dedication is required simply because a landowner happens to own property within a corridor and applies for development approval. The Ordinance effectively forces landowners seeking development approval to choose between that approval and the right to be compensated for the taking of their property.

The Ordinance purports to "cure" its obvious constitutional infirmity by providing landowners, who believe a dedication requirement is not "roughly proportionate" to the traffic impact of their proposed development, an administrative remedy known as a

> "dedication waiver," pursuant to which the landowner can seek "compensation" from the County. This so-called "remedy" is unfair, costly, time consuming and unduly burdensome. It's remedial protections are illusory and reveal the remedy as nothing more than a regulatory artifice whose so-called "cure" is in fact worse than the Ordinance's constitutional "disease." Simply put, the Ordinance is an outright plan of extortion, attempting to masquerade as a legitimate exercise of the police power. It is a thinly veiled attempt to take private property while evading the substantive and procedural safeguard afforded private property ownership.

(Doc. 112 at 1-2).

The County seeks summary judgment on Hillcrest's six federal claims and requests the court to refuse to exercise supplemental jurisdiction over the remaining state claims. It asserts that the as-applied due process and equal protection claims (Counts II and III) are not ripe and, in any event, fail on the merits. It asserts further that the facial due process (Count VII) and equal protection (Count VIII) claims, as well as the facial challenges based on the right to access to the courts (Count XV) and the right to jury trial (Count XVI), all fail because Hillcrest cannot meet the heavy burden of showing that the County's Ordinance can never be applied in a constitutional manner. If any federal claim survives and/or the court decides to exercise it supplemental jurisdiction, the County urges that the state law as-applied claims for

a permanent and temporary taking and for violations of due process, equal protection, and separation of powers (Counts I, IV. V. VI, and XIII) are not ripe. Further, it contends that principles of acquiescence, consent, no objection, waiver, contract, and/or estoppel bar the claims in Counts I-VI. As for the state law equal protection claims (Counts V and X), it urges that the state constitutional guarantee applies only to natural persons and not entities such as an LLP. Lastly, it urges that the facial state law claims for due process (Count IX), equal protection (Count X), access to courts (Counts XII), separation of powers (Count XIII), and right to trial by jury (Count XIV) all fail on the merits.

C.

Summary judgment or partial summary judgment is properly granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The moving party bears the initial burden of informing the court of the basis for its motion and identifying the pleadings, depositions, and/or other evidence that it believes demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986); *Hairston v. Gainesville Sun Publ'g Co.,* 9 F.3d 913, 918 (11th Cir. 1993). Once the moving party satisfies its burden, the burden shifts to the nonmoving party to designate specific facts, beyond mere allegations, demonstrating a genuine issue of material fact to avoid summary

judgment. *Celotex Corp.,* 477 U.S. at 324; *Howard v. BP Oil Co.,* 32 F.3d 520, 524 (11th Cir. 1994); *Perkins v. Sch. Bd. of Pinellas Cnty.,* 902 F. Supp. 1503, 1505 (M.D. Fla. 1995).

When deciding a motion for summary judgment, "Mt is not part of the court's function . . . to decide issues of material fact, but rather determine whether such issues exist to be tried . . . " and "[t]he court must avoid weighing conflicting evidence or making credibility determinations." *Hairston,* 9 F.3d at 919 (citing *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242 (1986)). The only determination for the court in a summary judgment proceeding is whether there exists genuine and material issues of fact to be tried. *Hairston,* 9 F.3d at 921; *see also Little v. United Techs., Carrier Transicold Div.,* 103 F.3d 956, 959 (11th Cir. 1997). All the evidence and inferences from the underlying facts must be viewed in the light most favorable to the nonmoving party. *Combs v. Plantation Patterns,* 106 F.3d 1519, 1526 (11th Cir. 1997).

II.

The undisputed facts establish that Hillcrest is the record owner of sixteen and a half acres of undeveloped, commercially zoned land located on the northwest quadrant of the intersection of SR 52 and Old Pasco Road in Pasco County, Florida. George Karpay is the president of Hillcrest. Dale Lewis is the vice president. In excess of fourteen-hundred feet of this parcel front on SR 52. The property was part of a

much larger parcel that was rezoned to a Master Planned Unit Development in 2000. Approval of that rezoning was conditioned on the landowner deeding a ten-foot wide strip of land bordering SR 52 to increase its right-of-way. Hillcrest purchased its parcel in 2001. As set forth below, Hillcrest eventually sought to develop a retail shopping center with out parcels on this property.

Pasco County's Comprehensive Plan includes a Future Land Use ("FLU") Element and a Transportation ("TRA") Element by which the County has identified and established future right-of-way corridors and created policies for the preservation and management of transportation corridors. Maps and tables created thereunder are used as the basis for acquisition and dedication of right-of-ways and for review of all development proposals and subdivision plats. The FLU policy in effect at all pertinent times prescribed that, "all new development supports the appropriate development of roads needed for county growth by requiring all development to comply with the Right-of-Way Preservation Ordinance." *See* (Doc. 36-2 through 36-6). In November 2005, the County amended its Land Development Code ("LDC") by adopting the "Pasco County Right-of-Way Preservation Ordinance" ("the Ordinance"). *See* (Doc. 39). By its terms, adoption of the Ordinance was intended to implement the goals and objectives of the County's Comprehensive Plan, including policies and objectives of the TRA Element and policies and objectives of the FLU Element of the Plan. Among the Ordinance's

premises was the need to protect future traffic corridors and right-of-ways from permanent encroachment to assure availability consistent with the County's long-range development plans. *Id.* at 31. The Ordinance defined "Transportation Corridor" to include land used as a street and shown on the County's Comprehensive Plan Transportation Element Transportation Corridor Preservation Map and Table. One such Transportation Corridor was SR 52 between CR 581 and Old Pasco Road. Additionally, the Ordinance sought to "establish procedures for developers to request waivers of, or compensation for, right-of-way dedications . . . where such requirements are not roughly proportional to the transportation impacts of the proposed development." *Id.* at 32

Pertinent to this suit, the Ordinance established new procedures for the submission and review of Class II development site plans. *See* (Doc. 39 at 33-39). It also created a new Article 319 entitled Transportation Corridor Management. *See id.* at 44-59. By its terms, Article 319 is "intended to coordinate the full development of roads within transportation corridors and the planning of future transportation corridors and roads with land use planning within and adjacent to the corridors to promote orderly growth to meet concurrency requirements and to maintain the integrity of the corridor for transportation purposes." *Id.* at 44. Purportedly, the adoption of Article 319 was "necessary in order to preserve, protect and provide for the dedication and/or acquisition of right-of-way and transportation corridors that

are necessary to provide future transportation facilities and facility improvements to meet the needs of growth projected in the County comprehensive plan and to coordinate land use and transportation planning." *Id.* at 45. Ostensibly, the Ordinance is intended to "foster and preserve public health, safety, comfort, and welfare and to aid in the harmonious, orderly, and beneficial development of the County in accordance with the Comprehensive Plan. *Id.* To that end, it imposes "special development regulations and procedures on all land located within Transportation Corridors . . . " and applies "to all development on land where any portion of the development site is within the jurisdiction of the County and shown on the County Transportation Corridor Preservation Map and table." *Id* at 45-46.

Section 319.8 of the Ordinance provides that "as a condition of approval" of a development permit/order, all applicants for the same, "where any portion of the development site is located within a Transportation Corridor, shall enter into an agreement with the County, . . . which shall provide for the dedication to the County of lands within the development site . . . which are within the Transportation Corridor," subject to a dedication waiver under Section 319.9.B. *Id.* at 52. Further, "where the property owner believes that the amount of land required to be dedicated exceeds the amount of land that is roughly proportional to the transportation impacts to be generated by the proposed development site . . . , the landowner shall be entitled to apply for a Dedication Waiver. . . ."

Id. at 53. This provision further provides that where development of the pertinent Transportation Corridor is not shown in the County's five-year Capital Improvement Plan or Element or the Florida Department of Transportation's five-year Transportation Improvement Program, and development of the road in the Transportation Corridor is not necessary to mitigate the transportation impacts of the proposed development, the landowner is entitled to interim use of the property consistent with Section 319.6 of the Ordinance. *Id.*

The County's Development Review Committee ("DRC") is the sole decision-maker on applications for development permits such as the one sought by Hillcrest. The DRC has the authority to approve preliminary site plans, place conditions on such approval, and to exact right-of-ways.

In December 2006, Hillcrest submitted to the County staff its first preliminary site plan ("PSP") to develop the property with a retail shopping center with commercial outparcels. The PSP did not reflect the Transportation Corridor or any dedication of land bordering SR 52. In or about February 2006, Hillcrest was notified by County staff that the PSP needed to be revised. The notice included that, per the Transportation Corridor Preservation Map, Hillcrest had to convey, at no cost to the County, 110 feet from the centerline of SR 52. It was directed to show the centerline and corridor and to complete any corridor variance studies under the Ordinance prior to resubmittal of the PSP.

In March 2007, Hillcrest submitted a revised PSP that showed the corridor preservation line extending 110 feet from the centerline of SR 52. In May 2007, County staff notified Hillcrest that it should revise the PSP to show a 150 foot right-of-way to accommodate a new study by the Florida Department of Transportation ("FDOT"), which indicated that SR 52, when expanded, would expand 140 feet to the north on various properties including Hillcrest's. Hillcrest was directed to remove any improvements from within this area and again complete any corridor variance studies under the Ordinance prior to resubmittal.

In July 2007, Hillcrest submitted its second revised PSP identifying the 220-foot Pasco Transportation Corridor and the FDOT right-of-way and removing all improvements from a 140-foot clear zone dictated by the FDOT study.[4] Hillcrest expressly indicated in its submission that its redesign did not represent its willingness to provide such right-of-way without compensation or that the condition requiring such right-of-way donation would not be challenged if an agreement on the acquisition could not be reached. County staff thereafter drafted right-of-way conditions of approval and recommended approval of the

[4] Hillcrest proffers that it had communications with the FDOT and the County during March and April 2007 that ultimately led to the County insisting that the site plan not reflect any improvements within a 140-foot clear zone to accommodate the FDOT proposed right-of-way.

PSP by the DRC. Among the conditions of approval was one requiring that Hillcrest convey, at no cost to the County, 110 feet of right-of-way from the centerline of SR 52.

On August 23, 2007, the DRC met to consider the PSP. By the County's claim, Hillcrest evidenced no objection to, and in fact agreed to, the conditions of approval including the dedication based on a 110-foot right-of-way at no cost to the County. By way of Mr. Karpay's testimony, Hillcrest asserts that it participated in the meeting with the understanding that it would be compensated based on the dedication of the 140-foot clear zone. In any event, the revised PSP was approved by the DRC.

In October 2007, County staff submitted a revised Development Order to Hillcrest for review and signing. Among the conditions of approval again noted was the condition that, "subject to the provisions of the Right-of-Way Preservation Ordinance, the developer shall convey at no cost to Pasco County 110 feet of right-of-way from the centerline of SR 52 . . . " (Doc. 114-7). The order also notified Hillcrest that if it objected to any condition of approval, a written notice of rebuttal or request for administrative appeal should be submitted within 30 days. *Id.* On October 18, 2007, Mr. Karpay signed Hillcrest's acknowledgment to the Development Order without indicating any protest or reservation.

Hillcrest submitted its first set of construction plans for approval in September 2007. After several

denials, the construction plan was finally approved by the County in June 2008. The approval contained a condition that stated, "subject to the right-of-way preservation ordinance, the developer shall convey at no cost to [the County] 140 feet from the centerline of S.R. 52. . . ." The County claims the reference to the dedication of 140 feet was in error and unenforceable in any event given that only the DRC could order an exaction. Hillcrest maintains that there was no error as the County had consistently demanded it convey the 140-foot clear space necessary under the FDOT study.[5] It urges that any claim of mistake should be submitted to the jury.

The parties engaged in numerous discussions, obtained appraisals, and exchanged offers in an effort to resolve the matter of compensating Hillcrest for its dedication or set aside of land. The negotiations were unsuccessful.

At no time did Hillcrest pursue a variance or dedication waiver under the Ordinance; nor did it seek an administrative appeal under the Ordinance or Florida law. As set forth above, the Ordinance has provisions for a dedication waiver and for waiver/variances. Regarding dedication waivers, the Ordinance provides in pertinent part:

---

[5] Suffice it to say that the parties disagree on the extent of the dedication required as a condition to the development approval and permit.

> Where the property owner believes that the amount of land required to be dedicated to the County under the provisions of Section 319.8 exceeds the amount of land that is roughly proportional to the transportation impacts of the proposed development site . . . , the property owner may apply to the Development Review Committee for a Dedication Waiver. . . .

Section 319.9.A. *See* (Doc. 39 at 53-54). The rather considerable requirements on the landowner for submission of an application for a dedication waiver are set forth in detail in Section 319.9.B. Thus, in the absence of a hardship waiver, the application for dedication waiver requires, among other submissions, appraisals and a detailed traffic impact study all at the landowners expense. Under Section 319.C., upon such application and where the DRC determines that any portion of the land required to be dedicated exceeds the amount of land that is roughly proportional to the transportation impacts of the proposed development site . . . , the DRC may either authorize compensation or deny compensation in accordance with other terms in this Section. *Id.* at 56. Compensation for the dedication may be made by monetary payment to the landowner, by providing transportation impact fee credits, by designing and/or constructing the site's transportation improvements of equivalent value, or by some combination of these remedies. Section 319.9.D, *Id.* at 56-57. If no compensation is authorized by the DRC, the property owner is not required to dedicate any land and may use the sites

subject to applicable provisions of the LDC and Compensation Plan. Section 319.9.E., *Id.* at 57. Under Section 319.9.F.2., the procedures for dedication waiver "must be exhausted prior to filing any civil claim, action or request challenging, or seeking compensation for, a dedication required by 319.8 or other Transportation Requirement." *Id.* at 58. "[T]he procedures set forth in 319.9 shall be the County's exclusive administrative remedy for challenging a dedication required by 319.8 or other Transportation Requirement as not being roughly proportional to the transportation impacts of a development." Section 319.10, *Id.* at 58.

Hillcrest maintained that the dedication requirement resulted in an unconstitutional taking of its property and that it should be compensated for the 140-foot clear space it is required to dedicate to the County in exchange for its development permit/order. When the parties failed to resolve the dispute over compensation, this suit was filed.[6]

III.

Because I conclude that Sections 319.8 and 319.10 of the Ordinance facially violate due process under both the federal and state constitutions and

[6] From arguments, it appears that Hillcrest also now has pending an inverse condemnation claim against the FDOT for its alleged taking of a portion of Hillcrest's property.

that Hillcrest is entitled to relief as a matter of law, I address only Counts VII and IX in detail.

As alternatives to its takings claims, Hillcrest seeks to invalidate and enjoin enforcement of the Comprehensive Plan Policy FLU 1.1.5, Table 7-42, Map 7-35, Map 7-36, the Ordinance, and the County's unwritten exaction customs, policies, and practices because such deprive Pasco County landowners of property without due process of law. Thus, in Count VII, Hillcrest urges violation of the Due Process Clause of the Fifth and Fourteenth Amendments because the County's land use and development scheme authorizes, indeed compels, imposition of right-of-way dedication and set-aside requirements on landowners as a condition to development of their property that are not reasonably related in nature and extent to the traffic impacts of the proposed development and, in doing so, shifts to the landowner the County's constitutionally mandated burden to demonstrate that the dedication or set-aside is related both in nature and extent to the traffic impact of the proposed development. As argued by Hillcrest, the County has created an unconstitutional scheme or mechanism by which it circumvents constitutional and statutory protections afforded private property owners to the extent that it may take property without just compensation. The argument under federal law is largely dependent on the Supreme Court's decisions in *Nollan v. California Coastal Commission,*

483 U.S. 825 (1987), and *Dolan v. City of Tigard,* 512 U.S. 374 (1994). (Doc. 112 at 16-25).[7]

In Count IX, brought under the Florida Constitution, Article I, sections 2 and 9, and Article X, section 6,[8] the argument is much the same and supported by a Florida Supreme Court decision striking down an analogous statutory scheme as violative of due process because it sanctioned the taking and land-banking of private property by avoiding the protections afforded landowners under Florida's eminent domain laws.[9] (Doc. 112 at 12-16).

---

[7] At Count VIII, Hillcrest urges that this overreaching regulatory scheme, on its face, similarly violates the Equal Protection Clause to the United States Constitution because it permits the County to place a disproportionate burden on landowners whose property lies within a Transportation Corridor. In Count X, the same claim is raised pursuant to the Florida Constitution. Hillcrest does not seek summary judgment on Count X. It appears that claim is without merit under Florida law, which holds that Article I, section 2 of the Florida Constitution is limited by its terms to "natural person." *See e.g. Fla. Real Estate Comm'n v. McGregor,* 336 So.2d 1156, 1160 n. 5 (Fla. 1976).

[8] Article I, section 2 provides that, 101 natural persons, . . . , are equal before the law and have inalienable rights, among which are the right to . . . , acquire, possess, and protect property; . . . ." Section 9 provides that, "[n]o person shall be deprived of life, liberty or property without due process of law, . . . " Article X, section 6 provides that, "[n]o private property shall be taken except for a public purpose and with full compensation thereof . . . "

[9] *See Joint Ventures, Inc. v. Dep't of Transp.,* 563 So. 2d 622 (Fla. 1990). Plaintiff also cites *Lee County v. New Testament*

(Continued on following page)

By its cross-motion and in response, the County argues that the facial challenge in Count VII is barred by the statute of limitations,[10] and, in any event, is not ripe because Hillcrest failed to pursue compensation in state court.[11] Further, to the extent that this purports to be a substantive due process *takings* claim, it urges that no such claim exists in the Eleventh Circuit.[12] Similarly, it argues that there is not an arbitrary and capricious due process claim in this circuit for claims based on state-created rights such as property rights.[13] Finally, the County urges that *Nollan* and *Dolan* are inapposite to the claim in Count VII (and VIII) and the facial challenge fails because its plan for future roadway development is a legitimate government purpose and its means of preserving the right-of-way thereunder are appropriate

---

Baptist Church of Ft. Myers, Florida, Inc., 507 So.2d 626 (Fla. Dist Ct. App. 1987).

[10] *See* collected cases at (Doc. 116 at 4 n.4 and n.5).

[11] Here, the County cites cases from several circuits which hold that the *Williamson* just compensation prong applies both to takings claims and to due-process claims that are related to, or concomitant with, the facial takings claim. *See* (Doc. 111 at 29 n. 38 and Doc. 116 at 11 n. 14).

[12] Citing *Villas of Lake Jackson, Ltd. v. Leon County,* 121 F.3d 610, 612 (11th Cir. 1997).

[13] Citing *Busse v. Lee County, Florida,* No. 08-13170, 2009 WL 549782 (11th Cir. 2009).

to satisfy the rational basis test applicable to such claims.[14] (Docs. 111 at 29-30, 116 at 10-12).

As for the state law claim in Count IX, in its motion the County urges that Hillcrest cannot meet the high burden of a facial challenge to establish that the scheme is invalid beyond a reasonable doubt and unconstitutional under every conceivable basis.[15] In its response to Hillcrest's motion, the County argues that the facial challenges to the Ordinance are barred by the statute of limitations. In any event, it argues that Hillcrest does not demonstrate, consistent with Florida law, that the Ordinance is not reasonably related to a permissible legislative purpose and is arbitrary or oppressive.[16] It also argues that Hillcrest cannot otherwise meet the heavy burden of showing the Ordinance unconstitutional in all its application. (Doc. 116 at 18-19).

Facial challenges assert that "a law 'always operates unconstitutionally.'" *Harris v. Mexican Specialty Foods, Inc.,* 564 F.3d 1301, 1308 (11th Cir. 2009)

---

[14] Citing *Bannum, Inc. v. City of Fort Lauderdale,* 157 F.3d 819, 822 (11th Cir. 1998); also collected cases at (Doc. 116 at 11 n.15).

[15] S*ee* collected cases at (Doc. 111 at 38).

[16] The County cites *Warren v. State Farm Mut. Auto. Ins. Co.,* 899 So.2d 1090, 1096 (Fla. 2005) and *Lasky v. State Farm Ins. Co.,* 296 So.2d 9, 15 (Fla. 1974) ("the test to determine whether a statute violates due process 'is whether the statute bears a reasonable relation to a permissible legislative objective and is not discriminatory, arbitrary or oppressive.").

(quoting Black's Law Dictionary at 223 (7th ed.1999)). "In contrast with an as-applied challenge, '[a] facial challenge . . . seeks to invalidate a statute or regulation itself.'" *Doe v. Fla. Bar,* 630 F.3d 1336, 1341-42 (11th Cir. 2011) (quoting *United States v. Frandsen,* 212 F.3d 1231, 1235 (11th Cir. 2000)). Consequently, only if the statute "could never be applied in a constitutional manner" will a facial challenge succeed. *DA Mortg., Inc. v. City of Miami Beach,* 486 F.3d 1254, 1262 (11th Cir. 2007) (citing *Jacobs v. The Fla. Bar,* 50 F.3d 901, 906 n.20 (1995)). A plaintiff mounting a facial challenge bears the burden of proving that the law could never be applied in a constitutional manner. *Id.*

As an initial matter, I find that Hillcrest's facial due process challenges to the County's land use and development scheme are distinct and separate claims from the takings claims. In pertinent part, the Fifth Amendment includes two distinct clauses, both at play in this suit. First, along with the Fourteenth Amendment, it provides that no person shall "be deprived of life, liberty, or property, without due process of law." Second, it prescribes, "nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V. Each clause serves a distinct purpose. *See Lingle v. Chevron U.S.A., Inc.,* 544 U.S. 528 (2005). While the Due Process Clause serves to protect an individual against arbitrary or irrational government action directed toward his person or property, the Takings Clause "is designed not to limit the governmental interference

with property rights *per se,* but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking." *Id.* at 537 (emphasis in original) (quoting *First English Evangelical Lutheran Church of Glendale v. Cnty. of Los Angeles,* 482 U.S. 304, 315 (1987)). Even in the absence of a taking, a regulation directed toward property may be so arbitrary or irrational as to violate due process. *Id.* at 548 (Kennedy concurring) (citing *E. Enters. v. Apfel,* 524 U.S. 498, 539 (1998)).

As fashioned by Hillcrest, these counts are brought not to obtain compensation for the exaction but to strike down an allegedly unconstitutional land-use scheme that arbitrarily and without a rational basis allows for the outright taking and/or land banking of property without compensation. By my consideration, these claims are distinct from those seeking compensation for any taking that has occurred and are ripe for the court's consideration regardless of the *Williamson County* requirement that compensation first be pursued. *See Restigouche, Inc., v. Town of Jupiter,* 59 F.3d 1208, 1212 (11th Cir. 1995); *Exec. 100, Inc. v. Martin Cnty.,* 922 F.2d 1536, 1541 (11th Cir. 1991); *Eide v. Sarasota Cnty.,* 908 F.2d 716, 725 n. 16 (1990); *McKenzie v. City of White Hall,* 112 F.3d 313, 317 (8th Cir. 1997). While these cases each address an as-applied challenge, I find no reason to employ a different rule in regards to the facial challenges.

As for the County's claim that each facial challenge is barred by a four-year statute of limitations, it

maintains that the facial claims accrued and the statute of limitations began to run when the Ordinance was enacted.[17] The County notes that the Ordinance was adopted on November 20, 2005, and suit was filed April 7, 2010, outside of the four year limitations period. Further, the County argues that Hillcrest may not claim any equitable tolling of the statute as it was not mislead or lulled into inaction in this matter.[18]

In response, Hillcrest urges that an ordinance repugnant to the Constitution is void and of no effect and therefore at least until it is actually applied, no cause of action can accrue. Thus, it notes that in the case of a facial takings claim seeking compensation which presupposes the validity of the enactment, the statute of limitations runs from the date of enactment because that is when the cause of action (the taking) actually occurs. (Doc. 112 at 3, n. 1). However, Hillcrest urges that facial claims challenging the underlying constitutionality are different because the cause of action does not accrue until the unconstitutional statute is actually applied in a particular case. *Id.* In support, Hillcrest cites *Gillmor v. Summit County,*

---

[17] Among other cases, the County cites *Florida Keys Citizens Coalition v. West,* 996 F. Supp. 1254, 1256 (S.D. Fla. 1998); *Beyer v. Marathon,* 37 So.3d 932 (Fla. Dist. Ct. App. 2010); and *Collins v. Monroe County,* 999 So.2d 709 (Fla. Dist. Ct. App. 2008).

[18] The County cites *Environmental Resource Associates of Florida, Inc., v. Florida Department of General Services,* 624 So.2d 330 (Fla. Dist. Ct. App. 1993).

246 P.3d 102 (Utah 2010); Timothy Sandefur, *The Timing of Facial Challenges,* 43 Akron L. Rev. 51 (2010). On this basis, since the Ordinance was first applied to to Hillcrest's property in February 2007 and suit was brought in April 2010, the four-year statute of limitations does not bar the claims. It further urges that here, the parties engaged in protracted discussions concerning the acquisition of the right-of-way which mislead and lulled Hillcrest into inaction and thus a tolling would be appropriate in any event.

Constitutional claims brought under § 1983 are subject to the statute of limitations governing personal injuries in the state where the claims have been brought. *Owens v. Okure,* 488 U.S. 235, 239-41 (1989); *McNair v. Allen,* 515 F.3d 1168, 1173 (11th Cir. 2008). In Florida this is four years. *City of Hialeah, Fla. v. Rojas,* 311 F.3d 1096, 1103 n.2 (11th Cir. 2002); Fla. Stat. § 95.11(3)(a). The issue of tolling is also governed by state law. *Mullinax v. McElhenney,* 817 F.2d 711, 716 (11th Cir. 1987). However, the accrual date of a cause of action is a question of federal law. *Wallace v. Kato,* 549 U.S. 384, 388 (2007); *Mullinax,* 817 F.2 Fd at 716. A cause of action under § 1983 generally does not accrue until the plaintiff knows or should know of the injury that forms the basis for the claim and the identify of the person who inflicted it. *Chappell v. Rich,* 340 F.3d 1279, 1283 (11th Cir. 2003).

As noted by the parties, there is a debate over when the limitations period accrues for a facial due process challenge. Neither position is without some

merit. On the instant motions, however, the court need not decide this issue given Hillcrest's claim for equitable tolling.[19] Here, I am obliged to again find that this defense may not be resolved as a matter of law given the circumstances of the case which indicate that, over an extended period of time, the County negotiated with Hillcrest concerning the matter of compensating Hillcrest for the property exacted as a condition of the development.[20] While the County apparently withdrew its offer of compensation because of a purported lack of funds,[21] the circumstances, in a light favorable to Hillcrest, permit it to claim that it was lulled or was misled into inaction.[22] As the County admits in its response, equitable tolling is particularly ill-suited for resolution on summary

---

[19] As noted by the County, the Ordinance was approved on November 22, 2005, and took effect within ten days thereafter upon the filing of the same with the Department of State. (Doc. 39 at 63). Thus, absent a basis to toll the limitations period, Hillcrest had until November or December 2009 to file suit.

[20] Hillcrest proffers testimony that negotiations ran through December 2009. *See* Third Aff. Lewis (Doc. 105). Hillcrest filed this suit four months later.

[21] *See* Third Aff. Lewis (Doc. 105-1, ¶ 13).

[22] Under Florida law, "[t]he doctrine of equitable tolling has generally been applied in three circumstances: (1) when a party 'has been misled or lulled into inaction,' (2) when a party 'has in some extraordinary way been prevented from asserting his rights,' or (3) when a party 'has timely asserted his rights mistakenly in the wrong forum.'" *Riverwood Nursing Ctr., LLC v. Agency For Health Care Admin.,* 58 So.3d 907, 910 (Fla. Dist. Ct. App. 2011) (quoting *Machules v. Dep't of Admin.,* 523 So.2d 1132 (Fla. 1988)).

judgment because it is generally a fact question. *See* (Doc. 116 at 5). At a minimum, there exists a question of fact on the issue of equitable tolling.

As for the County's argument that there is no longer a substantive due process *takings* claim or a substantive due process claim under Eleventh Circuit law, it is partially correct. Thus, this Circuit no longer recognizes a substantive due process takings claim. *See Villas of Lake Jackson,* 121 F.3d at 612. However, as for substantive due process challenges of this sort, the County otherwise overstates the law. While it is correct that substantive rights created only by state law are not subject to substantive due process protection under the Due Process Clause because substantive due process rights are created only by the Constitution,[23] where an individual's state-created rights are infringed by a "legislative act," the substantive component of the Due Process Clause protects him from arbitrary and irrational action of the

[23] Substantive due process is only available as a remedy to protect those rights that are "fundamental," that is, those rights "implicit in the concept of ordered liberty" and created by the United States Constitution and not state granted and defined property rights. *See Greenbriar Village, L.L.C. v. Mountain Brook, City,* 345 F.3d 1258, 1262 (11th Cir. 2003) (quoting *McKinney,* 20 F.3d at 1550). Here, Hillcrest urges that the land-use scheme here challenged implicates the Takings Clause of the Fifth Amendment and thus a fundamental right is at stake. The County cites case law which holds that property interests created or defined not by the Constitution but rather by some independent source such as state law, including those related to land-use regulation, are not fundamental.

government. *Lewis v. Brown,* 409 F.3d 1271, 1273 (11th Cir. 2005) (citing *McKinney,* 20 F.3d at 1557 n. 9).[24] Since the adoption of this Ordinance to implement the land-use and traffic plans and policies in accordance with the County's Comprehensive Plan is an act of broad-ranging regulation applicable to all landowners and developers within the County, it appears a legislative rather than executive act. Thus, whether the rights at stake are "fundamental" or merely state-created, a substantive due process challenge to the Ordinance is still available to Hillcrest.

On my determination that the facial due process claim is a separate and distinct claim independent of the takings claims, I also reject the County's argument that the facial challenge is not ripe because it is "ancillary to," "related to," "dependent upon," "coextensive with," or "resting upon the same factual foundation" as the takings claims and because Plaintiff did not pursue the administrative remedies under the Ordinance (which are the subject of the facial attack) or an action for compensation in state court (which is alleged in Count I). (Doc. 111 at 14-18, 29).

---

[24] In this context, "legislative" acts "generally apply to a larger segment of – if not all of society; laws and broad-ranging executive regulations are the most common examples." *McKinney,* 20 F.3d at 1557 n.9. "Where an individual's state-created rights are infringed by "legislative act," the substantive component of the Due Process Clause generally protects him from arbitrary and irrational action by the government." *Lewis.* 409 F.3d at 1273 (citing *McKinney,* 20 F.3d at 1557 n.9).

The claim that the Ordinance is an invalid exercise of the police power, arbitrary, capricious, and oppressive, is one that ripened upon the adoption of the Ordinance. *See Hillcrest Property, LLP v. Pasco Cnty.,* 731 F. Supp. 2d 1288, 1295 (M.D. Fla. 2010). I find no basis to revisit that ruling on these motions.

Before addressing the merits of Hillcrest's due process argument, there remains the question of the applicable standard. Hillcrest proposes some vaguely specified heightened standard of review because the land-use scheme at issue implicates its fundamental right to just compensation for the taking of its property. The argument relies heavily on the decisions in *Nollan* and *Dolan.* At a minimum, Hillcrest argues that the due process analysis is at least informed by the Supreme Court's decisions in *Nollan* and *Dolan,* if not controlled by the same.[25] The County urges that

[25] In *Nollan* and *Dolan,* the Supreme Court considered whether the state could constitutionally require landowners to convey easements across their property as a condition to granting development permits. In *Nollan,* the Supreme Court held that the California Costal Commission could not condition a building permit on the granting of a public easement across the Nollan's beachfront property because there was no "essential nexus" between the legitimate state interest (defined by the city as maintaining the public's visual access to the ocean) and the condition imposed (requiring lateral public access across a private lot). 483 U.S. at 837. In *Dolan,* the Supreme Court held that, while an "essential nexus" existed between the legitimate state interest (flood and traffic control) and the condition imposed (the dedication of property for flood control and a pedestrian/bicycle path), the exaction nevertheless failed to pass constitutional muster because there was no "rough proportionality"

(Continued on following page)

Nollan and *Dolan* are inapplicable and that the matter is governed by the traditional rational basis standard found applicable by a number of courts to land-use disputes. Absent finding any case law to support a heightened scrutiny standard in the area of land-use regulation, I am obliged to conclude that the matter is governed by the rational basis analysis urged by the County. *See Eide,* 908 F.2d at 721 (citations omitted); *see also Bannum, Inc.,* 157 F.3d at 822 (providing that where the ordinance neither targets a protected class nor implicates fundamental right, the rational basis test applies to equal protection and due process claims.) While *Nollan* and *Dolan* do not set forth the applicable standard, I agree with Hillcrest that they do help inform the due process analysis.[26]

"[A] plaintiff may argue that the regulation is arbitrary and capricious, does not bear a substantial relation to the public health, safety, morals or general welfare, and is therefore an invalid exercise of the

---

between the condition and the projected impact of the proposed development. 512 U.S. at 391. Thus, under *Nollan* and *Dolan,* a two-part test is used when analyzing the constitutionality of a land-use condition imposed by executive action: (1) is there an "essential nexus" between the condition imposed and a legitimate government purpose? and, if so, (2) is there a "rough proportionality" between the required dedication and the impact of the proposed development such that they are related both in nature and extent.

[26] This should hardly be contested by the County as the Ordinance itself is so informed and pays lip-service to the standard set forth by *Nollan* and *Dolan* and Florida's own "dual rational nexus test."

police power." *Eide,* 908 F.2d at 721 (citations omitted). Whether the claim is viewed as a substantive challenge or a procedural challenge the general analysis is the same:

> When courts analyze a procedural due process claim or its analytically related cousin – substantive due process (it arises when a government egregiously or arbitrarily deprives one of his property) – they variously examine three things: (1) whether there is enough of a property interest at stake to be deemed protectable, (2) the amount of process that should be due for that protectable right; and (3) the process actually provided, be it before or after the deprivation.

Greenbriar Village, L.L.C., 345 F.3d at 1264 (citations and quotations omitted). Here, it is not seriously disputed that the landowners affected by this Ordinance have a protectable interest in their private property, and on its face, the Ordinance provides a process by which the landowner may challenge the deprivation. What is claimed is that dedication scheme legislated by sections 319.8 and 319.10 of the Ordinance are an abuse of government power by whatever label: arbitrary, capricious or oppressive. I agree.

Under the rational basis test, which applies equally to due process and equal protection challenges, the County must prevail if the Ordinance is

rationally related to some legitimate government purpose.[27] *See Bannum, Inc.,* 157 F.3d at 822. On its face, the Ordinance, which purports to implement the County's plan for preservation and maintenance of its Transportation Corridors to accommodate future land-use and traffic needs, would appear to satisfy the first prong of the standard. However, by my consideration, the means adopted by the County to accomplish the goal are an abuse of the County's police powers and an affront to the Fifth and Fourteenth Amendments of the United States Constitution and Article X, section 6 of the Florida Constitution. In every instance brought within the purview of sections 319.8 and 319.10 of the Ordinance, landowners are compelled to surrender private property without compensation as a condition of development approval or permitting. The dedication provision is no mere regulation of land use but rather a calculated measure by the County to avoid the burdens and costs of eminent domain and take private property without just compensation.[28] As constructed, the dedication

---

[27] The rational basis test involves a two-prong inquiry: the first step is to identify a legitimate government purpose or goal which the County could have been pursuing; the second step asks whether a rational basis exists for the County to believe that the Ordinance would conceivably further the purpose. *See Ga. Manufactured Hous. Ass'n, Inc. v. Spalding Cnty. Ga.,* 148 F.3d 1304, 1307 (11th Cir. 1998) (citing *Haves v. City of Miami,* 52 F.3d 918, 921-22 (11th Cir. 1995)).

[28] Insofar as Hillcrest broadly asserts the unconstitutionality of those certain elements of the County's Comprehensive Plan identified in the Amended Complaint and the maps and tables

(Continued on following page)

requirement permits the County to leverage its police powers to extract private property without any individualized consideration of need and wholly without consideration of the matter of compensation when such works a taking. As in *Joint Ventures,* the scheme impermissibly tilts the playing field in favor of the County to the end that the County has saved millions of dollars since the scheme was implement. (Doc. 112-2 at 3, ¶ 1).

The Fifth Amendment exists to prevent the government from "forcing some people alone to bear the public burdens which, in all fairness and justice, should be borne by the public as a whole." *Nollan,* 483 U.S. at 835 n. 4 (quoting *Armstrong v. United States,* 364 U.S. 40, 49 (1960). To avoid such unfairness and injustice, the Fifth and Fourteenth Amendments (as well as Article X, section 6 of the Florida Constitution) dictate that the government compensate landowners when it confiscates private property for public use under the power of eminent domain and when it regulates private property under its police power in a manner that effectively deprives the owner of the economically viable use of his property. Here, the County has purposefully devised a land-use scheme which sanctions, indeed commands, in all instances within its purview and without individualized consideration, the dedication of such private property

---

associated therewith that identify the corridors and otherwise set forth its policies in regards to the same, the due process and equal protection challenges are without merit.

without compensation as a condition of development approval or permit. In doing so, the Ordinance commands that ceratin landowners be forced "to bear the public burdens which, in all fairness and justice, should be borne by the public as a whole," the very thing the Takings Clause of the United States Constitution and the equivalent provision of the Florida Constitution are intended to prevent. By my consideration, such a scheme, being inconsistent with the Fifth and Fourteenth Amendments, violates due process. The Florida Supreme Court has determined as much in *Joint Ventures,*[29] and I conclude no different result should follow under federal law. The County cannot, consistent with the Fifth and Fourteenth Amendment and Article X, section 6 of the Florida Constitution, employ its police power to extort property from private landowners and avoid the obligations inherent in these constitutional provisions.

---

[29] In its subsequent decision in *Tampa-Hillsborough County Expressway Authority v. A.G.W.S. Corp.,* 640 So.2d 54, 58 (Fla. 1994), the Florida Supreme Court explained that its decision to declare a portion of the statute at issue in *Joint Ventures* unconstitutional was based on the conclusion that the offending provisions "sanctioned situations which would permit the state to take private property without just compensation." It explained further that, while the state's goal of conserving public funds was a legitimate purpose, " 'the means [used were] not consistent with the constitution and the "freezing" of property as permitted under the statute was an improper exercise of the state's police power. *Id.* at 58 (quoting *Joint Ventures,* 563 So.2d at 626).

As for the County's claim that this land-use scheme is saved by the fact that the landowner may pursue a claim for inverse condemnation and because the Ordinance itself allows the landowner to pursue a dedication waiver or a variance and, in the absence of such, the possibility of compensation for an unconstitutional exaction, I disagree. Federal and state courts alike recognize that inverse condemnation is not a substitute for the protections afforded landowners under principles of eminent domain. And, the availability of such a claim does not insulate the Ordinance from constitutional challenge. *See Joint Ventures,* 563 So.2d at 627; *see also City of Monterey v. Del Monte Dunes at Monterey, Ltd.,* 526 U.S. 687, 735-36 (1999). As for the remedial provisions under the Ordinance, sections 319.9 and 319.10 do provide for an adjudicative process before the DRC by which the compulsory dedication may be challenged and variances of a sort may be obtained. However, under these provisions, the County bears no obligation to establish the propriety of its compulsory dedication and the whole of the burden and costs of proving the dedication improper falls on the landowner.[30] Thus, the remedial

[30] *Nollan* and *Dolan* make clear that such compulsory dedications are akin to a takings in contemplation of the Fifth and Fourteenth Amendments. *See Dolan,* 512 U.S. at 383-85; *Nollan,* 483 U.S. at 831. At least in cases where the exaction is made under an executive land-use decision, the Supreme Court makes clear that the burden of justifying the required dedication under a city's adjudicatory process is on the government. *See Dolan,* 512 U.S. at 391 n. 8. Here, the whole of the burden under these remedial provisions is placed on the landowner.

scheme also serves to relieve the County of the burdens of eminent domain in all such instances, even when the compulsory dedication works a takings. That such provisions may in practice allow for a waiver of dedication, and perhaps even some compensation[31] in a given case, is not a defense to the facial challenge that the scheme itself violates due process because it is inconsistent with, and permits the County to avoid its obligations under, the Takings Clause of the Fifth and Fourteenth Amendments of the United States Constitution and Article X, Section 6 of the Florida Constitution.

In sum, I recommend that the court grant Hillcrest's motion for partial summary judgment on its claims at Counts VII and IX. The provisions of the Ordinance at Sections 319.8 – 319.10 should be declared unconstitutional; the County enjoined from further enforcement of the provisions; and the compulsory dedication condition to Hillcrest's development approval and construction permit stricken.[32] On this ruling, the temporary takings claim at Count VI should proceed to trial.[33]

---

[31] The remedies provided under Section 319.9D do not assure just compensation as required by the state and federal constitutions. Further, a plain reading of the section reveals that the remedies may well be illusory. *See* Section 319.9D.

[32] By its allegations, Hillcrest also seeks damages on Count VII. If such is the case, a trial on damages may be necessary.

[33] The County challenges the takings claims at Counts I and VI on grounds of ripeness and on a claim that Hillcrest consented

(Continued on following page)

On these conclusions, it is unnecessary to address the remaining disputes in detail. By my consideration and essentially for the reasons set forth by the County, Hillcrest's motion as to the remaining facial challenges at Counts VIII, X, XII, XIII, XIV. XV. XVI should be denied,[34] and the County's motion for summary judgment as to these facial challenges granted. On these conclusions, the court need not reach the issues on the as-applied challenges. However, should it be appropriate to do so, then I recommend that the County's challenge to Hillcrest's as-applied claims at Counts II, IV, and V be granted. Because, I find that the as-applied equal protection claim at Count III marginally survives each of the legal challenges raised by the County and involves disputed questions of material fact, the County's motion as to that count should be denied.

---

to, failed to object to, waived and/or is estopped to complain of the dedication as a condition of the development approval and construction permit. I find the ripeness argument without merit. Resolution of the County's claim that Hillcrest consented, waived and/or is estopped from asserting the claims in Counts I and VI involves consideration of wholly disputed facts and thus is inappropriate on this motion.

[34] While the separation of powers claim under the Florida Constitution has certain appeal, I find the claim foreclosed in light of the Florida Supreme Court's decision in *Department of Agriculture & Consumer Servs. v. Bonanno,* 568 So.2d 24, 28-30 (Fla. 1990). Likewise, for reasons also discussed in *Bonanno,* the facial right to jury trial claim is foreclosed as well. *See id.* at 28. As for the access to courts claim, the prisoner access cases relied upon by Hillcrest are inapposite to the circumstances here and that challenge likewise fails.

IV.

For the reasons set forth above, it is **RECOMMENDED** that **Pasco County's Motion for Summary Judgment** (Doc. 111) and **Plaintiff's Dispositive Motion for Partial Summary Judgment as to Pasco County's Liability Under Counts VII, VIII, IX, XII, XIII, XV and XVI** (Doc. 112) be **GRANTED in part** and **DENIED in part** as set forth herein.

Respectfully submitted on
this 9th day of March 2012.

/s/ Thomas B. McCoun III
THOMAS B. McCOUN III
UNITED STATES
MAGISTRATE JUDGE

NOTICE TO PARTIES

Failure to file written objections to the proposed findings and recommendations contained in this report within fourteen (14) days from the date of its service shall bar an aggrieved party from attacking the factual findings on appeal and a *de novo* determination by a district judge. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72; M.D. Fla. R. 6.02; *see also* Fed. R. Civ. P. 6; M.D. Fla. R. 4.20.

Copies to:

United States District Judge
Counsel of Record

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 13-12383-EE

HILLCREST PROPERTY, LLP,

Plaintiff-Appellee,

versus

PASCO COUNTY,

Defendant-Appellant.

FLORIDA DEPARTMENT OF TRANSPORTATION,

Defendant.

Appeal from the United States District Court
for the Middle District of Florida

(Filed Sep. 2, 2014)

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

BEFORE: TJOFLAT, FAY and ALARCON,* Circuit Judges.

PER CURIAM:

---

* Honorable Arthur L. Alarcon, United States Circuit Judge for the Ninth Circuit, sitting by designation.

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Gerald B. Tjoflat
UNITED STATES CIRCUIT JUDGE

BY BOARD OF COUNTY COMMISSIONERS

ORDINANCE NO. 05-39

AN ACT TO BE ENTITLED

AN ORDINANCE AMENDING THE PASCO COUNTY LAND DEVELOPMENT CODE, SECTIONS 201, 306 AND 610, REPEALING ARTICLE 607, AND CREATING A NEW ARTICLE 319 FOR TRANSPORTATION CORRIDOR MANAGEMENT; PROVIDING PROCEDURES AND REQUIREMENTS FOR DENSITY TRANSFERS AND INTERIM USES IN TRANSPORTATION CORRIDORS; PROVIDING REQUIREMENTS FOR RIGHT-OF-WAY DEDICATION; PROVIDING PROCEDURES, REQUIREMENTS, AND DEADLINES TO REQUEST WAIVER OF, OR COMPENSATION FOR, RIGHT-OF-WAY DEDICATION AND OTHER TRANSPORTATION REQUIREMENTS; PROVIDING SPACING, RIGHT-OF-WAY, AND DESIGN STANDARDS FOR NEW COLLECTOR AND ARTERIAL ROADWAYS; AMENDING SUBMITTAL REQUIREMENTS AND TECHNICAL REVIEW AND PUBLIC HEARING PROCEDURES FOR SECTION 306 DEVELOPMENT APPROVALS; PROVIDING FOR NEW AND AMENDED DEFINITIONS; PROVIDING FOR REPEALER, MODIFICATION, SEVERABILITY, INCLUSION IN CODE, APPLICABILITY, EFFECTIVE DATE AND RELATIONSHIP TO COMPREHENSIVE PLAN.

WHEREAS, Pasco County has studied the transportation needs of the County; and

WHEREAS, Pasco County has adopted a 2025 Long Range Transportation Plan, and a Transportation Corridor Preservation Map and Table in the Comprehensive Plan Transportation Element pursuant to Section 337.273, Florida Statutes to assure county-wide continuity of the transportation system;

WHEREAS, it is in the best interests of the public and citizens of the County to anticipate future needs in areas where right of way does not exist, where roads have not yet been constructed or where roads have not been developed to the full proposed extent as shown in the Transportation Corridor Preservation Map and Table in order to establish harmonious, orderly, efficient development of the County and ensure a safe and efficient transportation system;

WHEREAS, the preservation, protection, or acquisition of right-of-way and transportation corridors, and the establishment of right-of-way, design and spacing standards for new collector and arterial roadways, are necessary to implement coordinated land use and transportation planning, to provide for future planned growth, to ensure that the County transportation system is adequate to meet future needs, and to ensure that concurrency requirements of the County for transportation are satisfied;

WHEREAS, the interim use of land in future right-of-way provides means for economic use of land until that land is needed for transportation purposes;

WHEREAS, future corridors and right-of-way must be protected from permanent encroachment to ensure availability consistent with long-range plans for the development of the County;

WHEREAS, owners of land which is located in or adjacent to right-of-way or future rights of way are entitled to certainty in the process of land development;

WHEREAS, right-of-way dedicated as a condition of development approval serves to ensure an adequate transportation system for proposed development and satisfy concurrency requirements;

WHEREAS, Pasco County desires to establish procedures for developers to request waivers of, or compensation for, right-of-way dedications and other transportation requirements where such requirements are not roughly proportional to the transportation impacts of the proposed development;

WHEREAS, it is necessary to modify submittal requirements and technical review and public hearing procedures for Section 306 development approvals to accommodate dedication waiver/compensation requests and adequately review the transportation impacts and transportation system of proposed development;

WHEREAS, adoption of this Ordinance implements the goals, objectives and policies of the Pasco County Comprehensive Plan, including Policies 2.1.3.e, 2.3.1, 2.3.2, 2.3.3 and 2.3.4 and Objectives 2.1 and 2.3 of the Transportation Element and Policies 1.2.19 and 3.2.3 and Objectives 1.2 and 3.2 of the Future Land Use Element;

WHEREAS, the management of the County's transportation corridors ensures that land use development in the County is planned and coordinated in consideration of the needs of the County for the development of future roads.

NOW, THEREFORE, the Board of County Commissioners hereby adopts the following amendments to the Pasco County Land Development Code which shall be collectively referred to as the "Pasco County Right-of-Way Preservation Ordinance".

SECTION 1. AMENDMENTS TO SECTION 201 OF THE LAND DEVELOPMENT CODE.

1.1 The definition of "Density, Gross" in Section 201 shall be amended to read as follows:

Density, Gross

As a general rule, the total number of dwelling units divided by the total number of acres on the site equals gross density. This calculation includes within it all internal roadways, parks, right-of-way, *transportation corridors,* substations, drainage easements, and environmental areas, etc. Consult the text for

policies applicable to the computation of gross density.

1.3 A new definition, "Transportation Corridors", shall be added to Section 201, Definitions, to read as follows:

Transportation Corridors

All land occupied or used or intended to be occupied or used as a street or roadway and shown on the Pasco County Comprehensive Plan Transportation Element Transportation Corridor Preservation Map and Table, as amended, which may include areas for medians, shoulders, frontage roads, drainage, buffers, landscaping, sidewalks, bike paths, utilities and other roadway related improvements.

SECTION 2. AMENDMENTS TO SECTION 306 OF THE LAND DEVELOPMENT CODE.

2.1 Section 306.3.0., Preliminary Site Plan (Class I and II Developments), shall be amended to add the following sections:

27. All land within the proposed development which is located in a Transportation Corridor.

28. All existing and planned arterials and collectors within the proposed development and within one (1) mile of the proposed development.

29. Traffic Impact Study (TIS)

a. Application.

b. TIS Review Fee, if applicable.

c. Approved TIS if approved after June 8, 1999, including list of mitigation requirements.

d. Comparison of land use assumptions and build-out date in the TIS with the land uses and build-out date in the project submitted.

30. Substandard Roads (as defined in the TIS Guidelines)

a. Application.

b. Review Fee, if applicable.

c. Approved substandard road study, if completed, including list of mitigation requirements.

d. Comparison of land use assumptions in the substandard road study with the land uses in the project submitted.

31. Access-Management Application.

32. U.S. 19 Concurrency study, if applicable.

2.2 Section 306.3.D.1. Class IIIE, shall be amended to add the following sections:

e. The plan or survey shall identify all land within the proposed development which is located in a Transportation Corridor.

f. The plan or survey shall identify all existing and planned arterials and collectors within

the proposed development and within one (1) mile of the proposed development.

g. Access Management Application.

2.3 Section 306.3.D.2. Class IIIR shall be amended to add the following sections:

(12) All land within the proposed development which is located In a Transportation Corridor.

(13) All existing and planned arterials and collectors within the proposed development and within one (1) mile of the proposed development,

(14) Traffic Impact Study (TIS)

a. Application.

b. TIS Review Fee, if applicable.

c. Approved TIS if approved after June 8, 1999, including list of mitigation requirements.

d. Comparison of land use assumptions and build-out date In the TIS with the land uses and build-out date in the project submitted.

(15) Substandard Roads (as defined in the TIS Guidelines)

a. Application.

b. Review Fee, if applicable.

c. Approved substandard road study, if completed, including list of mitigation requirements.

d. Comparison of land use assumptions in the substandard road study with the land uses in the projected submitted.

(16) Access-Management Application.

(17) U.S. 19 Concurrency study, if applicable.

2.4 Section 306.3.D.3. Class IIIU, shall be amended to add the following sections:

aa. All land within the proposed development which is located in a Transportation Corridor.

bb. All existing and planned arterials and collectors within the proposed development and within one (1) mile of the proposed development.

cc. Traffic Impact Study (TIS)

(i) Application.

(ii) TIS Review Fee, if applicable.

(iii) Approved TIS if approved after June 8, 1999, including list of mitigation requirements.

(iv) Comparison of land use assumptions and build-out date in the TIS with the land uses and build-out date in the project submitted.

dd. Substandard Roads (as defined in the TIS Guidelines)

(i) Application.

(ii) Review Fee, if applicable.

(iii) Approved substandard road study, if completed, including list of mitigation requirements.

(iv) Comparison of land use assumptions in the substandard road study with the land uses in the project submitted.

ee. Access-Management Application.

ff. U.S. 19 Concurrency study, if applicable.

2.5 Section 306.3.E.2. Technical Review, is amended to read as follows:

2. Technical Review

a. Prior to any final determination regarding any preliminary Class II and Class IIIU developments, the Development Review Committee shall hold a separate public meeting on the proposed development *no later than fifty (50) days following completion of the* ~~no later than forty-five (45) days after an application for a class II development has been accepted for technical review and no later than sixty (60) days after an application for a class IIIU development has been accepted for~~ technical review *set forth below.* Public notice shall be given prior to the said hearings.

The public notice shall consist of publication in a newspaper of general circulation in the County: the project name; developer; scope; location; and notice of the date, time, and location of the Development Review Committee meeting at which the proposed development will be considered. The said notice shall be published at least fourteen (14) days prior to the Development Review Committee meeting at which the proposed development will be considered and shall include notice of the provisions of appeal of the development approval/ disapproval established in this code. All determinations for Class II and Class IIIU developments shall then, upon proof of appropriate public notice, be referred to the Development Review Committee for final action at the date, time, and location established by the public notice.

In addition to the above-noticed requirements, a sign shall be posted on the land which is the subject of the hearing, at least fourteen (14) days prior to that date of the Development Review Committee meeting at which the proposed development plan will be considered. The sign shall be erected on the property in such a manner as to allow the public to view the same from one or more streets. In the case of property not readily accessible, the sign shall be erected on the nearest street right-of-way, with an attached notation indicating the general distance and direction to the property for which development approval is sought. In all cases, the number of signs to be used shall be left to the

discretion of the County Administrator, or his designee; provided that the numbers shall be reasonably calculated to adequately inform the public of the consideration of the proposed development plan.

Notice of the time, place, and purpose of the Development Review Committee meeting shall also be mailed to owners of property directly affected by the proposed development. For the purposes of this code, persons or property owners directly affected by the proposed development shall be presumed to be those who own property immediately abutting the property lines of the land for which the development approval is sought, or who own property immediately across a street or other easement from such land. For the purposes of this code, names and addresses of property owners shall be deemed those appearing on the latest ad valorem tax rolls of Pasco County.

Proof of publication, mailing, and posting of the notice required above shall be presented, by affidavit, at the Development Review Committee meeting.

The applicant shall be entitled to one (1) continuance of the scheduled public meeting at their request. Other continuances of the scheduled public meeting may be granted at the discretion of the Development Review Committee.

b. Once accepted for technical review, the County Administrator, or his designee, shall have *twenty-one* ~~fourteen~~ *(21*~~14~~) days for all Class IIIE

developments, *thirty-five* ~~twenty-eight~~ (*35*~~28~~) days for all Class I and IIIR developments, *forty-five* ~~thirty~~ (*45*~~30~~) days for all Class II developments, and *forty-five* ~~forty~~ (*45*~~40~~) days for all Class IIIU developments to formulate technical review comments on the development application. The developer shall be notified immediately thereafter of the technical review comments.

c. The developer shall have 180 days ~~for Class I, IIIE, and IIIR developments~~ to respond to the technical review comments, submit the requested additional or revised information, *and, where applicable, complete (including all appeals) Traffic Impact Studies required by Section 402.10, Section 618.3 or Resolution No. 04-203* as *amended, and Dedication Waiver requests pursuant to Section 319.9.* ~~Response to the technical review comments and resubmittal of revised plans for Class II and IIIU developments shall be submitted a minimum of ten (10) days prior to the scheduled public meeting of the development Review Committee~~. Upon request by the developer, an extension of time may be granted by the County Administrator, or his designee, upon a showing by the developer that a good faith effort is being made to provide the additional or revised information, *or complete the Traffic Impact Studies or Dedication Waiver request,* and that additional time is required. In the event a response is not received or an extension obtained, the application shall be considered withdrawn.

d. Upon receipt of the additional or revised information, the County Administrator, or his designee, shall have ~~seven~~ (~~7~~) *fifteen (15)* days for all Class IIIE developments and ~~fourteen~~ (~~14~~) *fifteen (15) days* for all Class *I, II, IIIU* and IIIR developments *to review the additional or revised information.* At the end of the time frame, the County Administrator, or his designee, shall either finalize their determination or request additional information concerning the response to the technical review comments. *If additional information is requested, the developer shall have thirty (30) days to respond to the request for additional information. Upon request by the developer an extension of time may be granted by the County Administrator, or his designee, upon a showing by the developer that a good faith effort is being made to provide the additional or revised information. In the event a response is not received or an extension obtained, the application shall be considered withdrawn. Each submission of additional information shall be reviewed by the County in accordance with this paragraph; provided, however, the developer may, at its option, declare technical review to be complete when the developer has responded to the initial technical review comments or anytime thereafter when responding to additional technical review comments. If the developer makes such a declaration in writing, the County Administrator, or his designee, shall finalize his determination no later than thirty-five (35) days after receipt of the written declaration for Class I, IIIE, and IIIR developments, and no later than forty (40) days after receipt of the written declaration for*

Class II and Class IIIU developments. For Class II and Class IIIU developments, the Development Review Committee shall hold the public meeting on the proposed development no later than fifty (50) days following receipt of the written declaration.

e. Upon finalization of determinations for Class I, IIIE, and IIIR developments, notification of the development approval or disapproval action shall be provided by publication of the project name, developer, scope, location, and date of approval or disapproval in a newspaper of general circulation in the County. The said notice shall be published within fourteen (14) days of the final determination and shall include notice of the provisions for appeal of the development approval or disapproval established in this code. If a determination has not been made within the required time by the County Administrator, or his designee, the plans shall be automatically submitted to the next available meeting of the Development Review Committee for action.

Notice of the development plan determination shall also be mailed to owners of property directly affected by the determination. For the purposes of this code, persons or property owners directly affected by the determination shall be presumed to be those who own property immediately abutting the property lines of the land for which the determination was made, or who owns property immediately across a street or other easement from such land. For the purposes of this code, names and addresses of property owners shall be deemed those

appearing on the latest ad valorem tax rolls of Pasco County.

Proof of publication, *and* mailing, ~~and posting~~ of the notice required above shall be placed in the project file.

The County Administrator, or his designee, shall be responsible for approving or disapproving all Class I, IIIE, and IIIR developments. The Development Review Committee shall be responsible for approving or disapproving all Class II and Class IIIU developments. Neither the Development Review Committee nor the County Administrator, or his designee, shall approve or recommend approval of any preliminary site plan or preliminary plan until the said plans satisfactorily comply with this code and the Comprehensive Plan.

2.6 Section 306.4.B.2. Technical Review, is amended to read as follows:

2. Technical Review

a. Once accepted for technical review, the County Administrator, or his designee, shall have ~~twenty-eight~~ (~~28~~) *thirty-five (35)* days for all Class I and IIIR developments, ~~thirty-five~~ (~~35~~) *forty-five (45)* days for all Class II developments, and ~~thirty-five~~ (~~35~~) *forty-five (45)* days for all Class IIIU developments to formulate technical review comments on the development application. The developer shall be notified immediately thereafter of the technical review comments.

~~c.~~ *b.* The developer shall have 180 days to respond to the technical review comments, submit the requested additional or revised information, *and, where applicable, complete (including all appeals) Dedication Waiver requests pursuant to Section 319.9.* Upon request by the developer, an extension of time may be granted by the County Administrator, or his designee, upon a showing by the developer that a good faith effort is being made to provide the additional or revised information, *or complete the Dedication Waver request,* and that additional time is required. In the event a response is not received or an extension obtained, the application shall be considered withdrawn.

c. Upon receipt of the additional or revised information, the County Administrator, or his designee, shall have ~~thirty~~ (~~30~~) *twenty-one (21)* days ~~for all Class I and IIIR developments, twenty eight (28) days for all Class II developments and twenty-eight (28) days for all Class IIIU developments~~ to review the additional or revised information. At the end of the time frame, the County Administrator, or his designee, shall either finalize their determination or request additional information concerning the response to the technical review comments. *If additional information is requested, the developer shall have thirty (30) days to respond to the request for additional information. Upon request by the developer, an extension of time may be granted by the County Administrator, or his designee, upon a showing by the developer that good faith effort is being made to*

provide the additional or revised information. In the event a response is not received or an extension obtained, the application shall be considered withdrawn. Each new submission of additional information shall be reviewed by the County in accordance with this paragraph; provided, however, the developer may, at its option, declare technical review to be complete when the developer has responded to the initial technical review comments or anytime thereafter when responding to additional technical review comments. If the developer makes such a declaration in writing, the County Administrator, or his designee shall finalize his determination no later than thirty-five (35) days after receipt of the written declaration for Class I and IIIR developments, and no later than forty (40) days after receipt of the written declaration for Class II and Class IIIU developments. For Class II and Class IIIU developments, the Development Review Committee shall hold the public meeting on the proposed development no later than fifty (50) days following receipt of the written declaration.

3. The County Administrator, or his designee, shall be responsible for approving or disapproving all stormwater management plans and reports involving Class I, IIIR, and IIIU developments. The County Administrator, or his designee, shall not approve or recommend approval of any stormwater management plans and reports until the said plans and reports satisfactorily comply with this code and the Comprehensive Plan.

2.7 Section 306.6.B.2. Technical Review is amended to read as follows:

2. Technical Review

a. Once accepted for technical review, the County Administrator, or his designee, shall have ~~twenty-eight~~ (~~28~~) *thirty-five (35)* days for all Class I and IIIR developments, *forty-five* ~~twenty-eight~~ (*45*~~28~~) days for all Class II developments, and ~~thirty five~~ (~~35~~) *forty-five (45)* days for all Class IIIU developments to formulate technical review comments on the development application. The developer shall be notified immediately thereafter of the technical review comments.

b. The developer shall have 180 days to respond to the technical review comments, ~~and~~ submit the requested additional or revised information, *and, where applicable, complete (including all appeals) Traffic Impact Studies required by Section 402.10, Section 618.3 or Resolution No. 04-203, as amended, and Dedication Waiver requests pursuant to 319.9.* Upon request by the developer, an extension of time may be granted by the County Administrator, or his designee, upon a showing by the developer that a good faith effort is being made to provide the additional or revised information, *or complete the Traffic Impact Studies or Dedication Waiver request,* and that additional time is required. In the event a response is not received or an extension obtained, the application shall be considered withdrawn.

c. Upon receipt of the additional or revised information, the County Administrator, or his designee, shall have twenty-one (21) days ~~for all Class I and IIR developments, twenty-one (21) days for all Class II developments, and twenty-eight (28) days for all Class IIIU developments~~ to review the additional or revised information. At the end of the time frame, the County Administrator, or his designee, shall either finalize their determination or request additional information concerning the response to the technical review comments. *If additional information is requested, the developer shall have thirty (30) days to respond to the request for additional information. Upon request by the developer, an extension of time may be granted by the County Administrator, or his designee, upon a showing by the developer that good faith effort is being made to provide the additional or revised information. In the event a response is not received or an extension obtained, the application shall be considered withdrawn. Each new submission of additional information shall be reviewed by the County accordance with this paragraph; provided, however, the developer may, at its option, declare technical review to be complete when the developer has responded to the initial technical review comments or anytime thereafter when responding to additional technical review comments. If the developer makes such a declaration in writing, the County Administrator, or his designee shall finalize his determination no later than thirty-five (35) days after receipt of the written declaration.*

4. The County Administrator, or his designee, shall be responsible for approving or disapproving all Class I, II, IIIR, and IIIU developments. The County Administrator, or his designee, shall not approve or recommend approval of any construction plans until the said plans and specifications satisfactorily comply with this code and the Comprehensive Plan.

2.8 Section 306.8.B.2 Technical Review is amended to read as follows;

2. Technical Review

a. Prior to any final determination regarding any simultaneous submittal of any Class II and Class IIIU developments, the Development Review Committee shall hold a separate public meeting on the proposed development *no later than fifty (50) days following completion* of the technical review *set forth below.* Public notice shall be given prior to the said hearings.

The public notice shall consist of publication in a newspaper of general circulation in the County: of the project name; developer; scope; location; and notice of the date, time, and location of the Development Review Committee meeting at which the proposed development will be considered. The said notice shall be published at least fourteen (14) days prior to the Development Review Committee meeting at which the proposed development will be considered and shall include notice of the provisions of appeal of the development approval/

disapproval established in this code. All determinations for Class II and Class IIIU developments shall then, upon proof of appropriate public notice, be referred to the Development Review Committee for final action at the date, time, and location established by the public notice.

In addition to the above-noticed requirements, a sign shall be posted on the land which is the subject of the hearing, at least fourteen (14) days prior to that date of the Development Review Committee meeting at which the proposed development plan will be considered. The sign shall be erected on the property in such a manner as to allow the public to view the same from one or more streets. In the case of property not readily accessible, the sign shall be erected on the nearest street right-of-way, with an attached notation indicating the general distance and direction to the property for which development approval is sought. In all cases, the number of signs to be used shall be left to the discretion of the County Administrator, or his designee; provided that the numbers shall be reasonably calculated to adequately inform the public of the consideration of the proposed development plan.

Notice of the time, place, and purpose of the Development Review Committee meeting shall also be mailed to owners of property directly affected by the proposed development. For the purposes of this code, persons or property owners directly affected by the proposed development shall be presumed to be those who own property immediately

abutting the property lines of the land for which the development approval is sought, or who own property immediately across a street or other easement from such land. For the purposes of this code, names and addresses of property owners shall be deemed those appearing on the latest ad valorem tax rolls of Pasco County.

Proof of publication, mailing, and posting of the notice required above shall be presented, by affidavit, at the Development Review Committee meeting.

The applicant shall be entitled to one (1) continuance of the scheduled public meeting at their request. Other continuances of the scheduled public meeting may be granted at the discretion of the Development Review Committee.

b. Once accepted for technical review, the County Administrator, or his designee, shall have ~~thirty-five~~ (~~35~~) *forty-five (45)* days for all Class I and IIIR developments, *forty-five* ~~forty~~ *(45~~40~~)* days for all Class II developments, and ~~forty-five~~ (~~45~~) *forty-five (45)* days for all Class IIIU developments to formulate technical review comments on the development application. The developer shall be notified immediately thereafter of the technical review comments.

c. The developer shall have 180 days ~~for Class I and IIIR developments~~ to respond to the technical review comments, ~~and~~ submit the requested additional or revised information, *and, where applicable, complete (including all appeals) Traffic Impact*

Studies required by Section 402.10, Section 618.3 or Resolution No. 04-203 as *amended, and Dedication Waiver requests pursuant to Section 319.9.* ~~Response to the technical review comments and resubmittal of revised plans for Class II and IIIU developments shall be submitted a minimum of ten (10) days prior to the schedule public meeting of the Development Review Committee~~. Upon request by the developer, an extension of time may be granted by the County Administrator, or his designee, upon a showing by the developer that a good faith effort is being made to provide the additional or revised information, *or complete the Traffic Impact Studies or Dedication Waiver request* and that additional time is required. In the event a response is not received or an extension obtained, the application shall be considered withdrawn.

d. Upon receipt of the additional or revised information, the County Administrator, or his designee, shall have ~~fourteen (14)~~ *twenty-one (21)* days ~~for all Class I and IIIR developments~~ to review the additional or revised information. At the end of the time frame, the County Administrator, or his designee, shall either finalize their determination or request additional information concerning the response to the technical review comments. *If additional information is requested, the developer shall have thirty (30) days to respond to the request for additional information. Upon request by the developer, an extension of time may be granted by the County Administrator, or his designee, upon a showing by the*

developer that good faith effort is being made to provide the additional or revised information. In the event a response is not received or an extension obtained, the application shall be considered withdrawn. Each new submission of additional information shall be reviewed by the County in accordance with this paragraph; provided, however, the developer may, at its option, declare technical review to be complete when the developer has responded to the initial technical review comments or anytime thereafter when responding to additional technical review comments. If the developer makes such a declaration in writing, the County Administrator, or his designee shall finalize his determination no later than thirty-five (35) days after receipt of the written declaration for Class I and IIIR developments, and no later than forty (40) days after receipt of the written declaration for Class II and Class IIIU developments. For Class II and Class IIIU developments, the Development Review Committee shall hold the public meeting on the proposed development no later than fifty (50) days following receipt of the written declaration.

e. Upon finalization of determinations for Class I and IIIR developments, notification of the development approval or disapproval action shall be provided by publication of the project name, developer, scope, location, and date of approval in a newspaper of general circulation in the County. The said notice shall be published within fourteen (14) days of the final determination and shall include notice of the provisions for appeal of the development approval

established in this code. If a determination has not been made within the required time by the County Administrator, or his designee, the plan shall be automatically submitted to the next available meeting of the Development Review Committee for action.

Notice of the development plan determination shall also be mailed to owners of property directly affected by the determination. For the purposes of this code, persons or property owners directly affected by the determination shall be presumed to be those who own property immediately abutting the property lines of the land for which the determination was made, or who owns property immediately across a street or other easement from such land. For the purposes of this code, names and addresses of property owners shall be deemed those appearing on the latest ad valorem tax rolls of Pasco County.

Proof of publication, *and* mailing, ~~and posting~~ of the notice required above shall be placed in the project file.

No consideration in the review shall be given to the costs or difficulties in amending either the preliminary or stormwater management, or construction plans. Construction plans will be approved only after the preliminary plans and stormwater management plans have been formally approved.

The County Administrator, or his designee, shall be responsible for approving or disapproving all Class I and Class IIIR developments. The Development Review Committee shall be responsible for approving or disapproving all Class II and Class IIIU developments. Neither the Development Review Committee nor the County Administrator, nor his designee, shall approve or recommend approval of any simultaneous submittal unless the said plans satisfactorily comply with this code and the Comprehensive Plan.

2.9 Section 306.10.C. is amended to read as follows:

C. Within fourteen (14) working days following receipt of the check prints above, the County Administrator, or his designee, will then notify the developer and/or his surveyor in writing of all deficiencies in the final record plat, if any. All field reinspections shall be charged a fee pursuant to the current fee schedule, and the said fees shall become payable prior to record platting. The developer shall cause the correction of all deficiencies, *and, where applicable. complete (including all appeals) Traffic impact Studies required by Section 402.10, Section 618.3 or Resolution No. 04-203, as amended and Dedication Waiver requests pursuant Section 319.9,* and submit a correct original plat together with nine (9) paper prints, one (1) white opaque canvas, and four (4) reproducible mylar copies within ninety (90) days. Upon request by the developer, an extension of time may be granted by the County Administrator, or his designee, upon a showing by the developer that a good faith effort is

being made to provide the additional or revised Information, *or complete the Traffic Impact Studies or Dedication Waiver request,* and that additional time is required. In the event a response is not received or an extension obtained, the application shall be considered withdrawn. Once properly corrected, the plat shall be submitted to the County Administrator or his designee, within ten (10) working days, to the Board together with his recommendations for its consideration.

SECTION 3. ADOPTION OF ARTICLE 319 OF THE LAND DEVELOPMENT CODE.

A new Article 319, entitled Transportation Corridor Management, shall be adopted to read as follows:

319. TRANSPORTATION CORRIDOR MANAGEMENT

319.1 Intent and Purpose

A. The intent of this Section is to coordinate the full development of roads within transportation corridors and the planning of future transportation corridors and roads with land use planning within and adjacent to the corridors to promote orderly growth to meet concurrency requirements and to maintain the integrity of the corridor for transportation purposes.

B. The adoption of this Article is necessary in order to preserve, protect, and provide for the dedication and/or acquisition of right-of-way and transportation

corridors that are necessary to provide future transportation facilities and facility improvements to meet the needs of growth projected in the County comprehensive plan and to coordinate land use and transportation planning. These corridors are part of a network of transportation facilities and systems which provide mobility between and access to businesses, homes, and other land uses throughout the jurisdiction, the region, and the state. The Board of County Commissioners recognizes that the provision of an adequate transportation network is an essential public service. The plan for that transportation network is described in the County Comprehensive Plan, and the Transportation Corridor Preservation Map and Table, and implemented through a capital improvements program, other policies and procedures, and through regulations on land use and development as well as regulations to preserve and protect the corridors and right-of-way for the transportation network. The purpose of this Article is to foster and preserve public health, safety, comfort, and welfare and to aid in the harmonious, orderly, and beneficial development of the County in accordance with the Comprehensive Plan.

C. Ensuring that arterial, collector and other roads and related facilities are safe and efficient, in coordination with a plan for the control of traffic, is the recognized responsibility of the County, in accordance with Sections 125.01(1)(m) and (w), Florida Statutes, and is in the best interest of the public health, safety, welfare, and convenience.

D. Implementing methods of ensuring adequate transportation facilities to accommodate the citizenry of Pasco County now and in the future is the responsibility of the County in order to carry out the Transportation Element of its Comprehensive Plan, under Section 163.3161, Florida Statutes, and is in the best interest of public health, safety, welfare, and convenience.

E. This Section imposes special development regulations and procedures on all land located within Transportation Corridors in order to ensure the availability of land within the Transportation Corridors to meet the transportation needs of the County as shown in the Comprehensive Plan and the Transportation Corridor Preservation Map and Table, and to promote the public health, safety, welfare and convenience of the County and its citizens.

F. This Section is intended to protect Transportation Corridors from encroachment by structures or other development except under special conditions.

319.2 Applicability

For purposes of jurisdictional applicability, this Article 319 shall apply to all development on land where any portion of the development site is within the jurisdiction of the County and is shown on the County Transportation Corridor Preservation Map and Table. This Article shall apply in a municipality within Pasco County only upon Pasco County and the municipality entering into an interlocal agreement

providing for the application of this Article, or portions thereof, within the municipality.

For purposes of geographic applicability, if all or any portion of a proposed development site or expanded development site for which a Section 306 development approval or development permit/order is required, is located within a Transportation Corridor, the provisions of this Article 319 shall apply. In addition, the County may apply Article 319 to other development permits/orders if all or any portion of the proposed development site or expanded development site is located within a Transportation Corridor.

For purposes of timing applicability, Article 319 shall apply to Section 306 development approvals, or substantial modification thereof, for which a complete application has been filed or for which a Section 306 development approval has expired or been denied, after the effective date of this Article, unless the County and the applicant agree to an earlier application date. In addition, the County may apply Section 319 to other development permits/orders, or substantial modification thereof, for which a complete application has been filed, or for which the development permit or order has expired or been denied, after the effective date of this Article, unless the County and applicant agree to an earlier application date. For Section 306 development approvals, this Article shall govern in the event of a conflict between this Article and prior development permits/orders.

319.3 Procedures

A. As part of the development review process described In Section 306, all applications for development approvals shall show the location of any Transportation Corridor which is located on any portion of the development site or expanded development site or on any portion of the land which is the subject of the application. All such applications shall he reviewed by the County Administrator or his designee to determine whether any portion of the proposed project is within a Transportation Corridor.

B. All Section 306 development approvals shall include findings or conditions addressing the consistency of the proposed project with the Transportation Corridor.

319.4 Definitions

A. The words or phrases used herein shall have the meaning prescribed in Section 200 except as otherwise specifically set forth herein.

B. *Development site* shall mean the total area of the lot, tract or parcel which is the subject of an application for a development permit.

C. *Expanded development site* shall mean all development, parcels of land, lots and tracts, including development, parcels of land, lots and tracts contiguous to, or nearby, the development site that are (1) developed by the same or a related developer or landowner, or (2) developed as part of the same zoning plan, preliminary plan, preliminary site plan,

plat or other unified or common plan or development, as determined by the County Administrator or his designee consistent with the purposes of this Article. For the purposes of this definition, a related developer or landowner shall include a partnership in which any of the same persons or entities are partners; and a corporation in which any of the same persons are officers or directors.

D. *Interim use* shall mean a use of the land in the Transportation Corridor prior to the date of conveyance of such land to the County for right of way, whether such conveyance is by dedication, acquisition or other means.

319.5 Density and Intensity of Development

A. The gross density and intensity of development of a development site, any portion of which is within a Transportation Corridor, shall be the gross density permitted in accordance with the underlying zoning district or Comprehensive Plan future land use classification, whichever is more restrictive. However, such density and Intensity may be transferred from the portion of the development site or expanded development site within a Transportation Corridor to portions of the development site or expanded development site that are located outside of the Transportation Corridor, either through clustering, density transfer, or through credit for the portion of the site in the Transportation Corridor in maximum permitted density or Intensity calculations (collectively referred to herein as “Density Transfer”).

Subject to limitations in the Comprehensive Plan, Density Transfers may result in a greater net density on the portion of the development site or expanded development site that is not located within the Transportation Corridor than would be permitted by the underlying zoning district, but the total gross density of the project site shall in no event exceed the density that would be allowed on the development site or expanded development site had no portion of the development site been located within a Transportation Corridor. This section is not intended to grant approval to the location of development in environmentally sensitive or otherwise protected lands within the development site or expanded development site. It is intended to allow the density to be used within the development site or expanded development site, without additional review procedures beyond the development review that would be required for a development not located in a Transportation Corridor. All Density Transfers to an expanded development site that is not part of the Section 306 development permit/order under review shall be evidenced by a recorded document acceptable to the Pasco County Attorney's office that is binding upon the transferor property and transferee property.

B. Density Transfers, unless permitted by another provision of this Code, shall be limited to the amount of density which would otherwise be permitted to be developed in the Transportation Corridor. In reviewing an application for development in which Density Transfers are shown, the Development Review

Committee, as part of its review of the Section 306 development approval, may require that the configuration of the proposed Density Transfer be amended if it would further the public interest, protect the environment or provide a better design.

C. If the Density Transfer would require modification of any other provision of this Land Development Code, including buffers, parking, landscaping, yards and setbacks between buildings, then, except as set forth in Section 319.10.A, a variance from the Development Review Committee shall be required in accordance with the provisions of Section 316, except that in the case of a variance necessitated by the requirements of Article 319, the conditions of Section 316.1.A.1.a shall be deemed to exist.

319.6 Uses

A. The uses of land within a Transportation Corridor shall be only those uses listed in sections B or C, below, provided that such use would be permitted on the development site by the underlying zoning district or the Comprehensive Plan, whichever is more restrictive. The purpose of this section is to allow certain uses for a limited period of time within portions of a development site that are located within a Transportation Corridor in order to permit the property owner to make economic use of the property until such time as the land within the Transportation Corridor is to be dedicated to or acquired by the County. Interim uses shall be permitted in any zoning district upon obtaining approval from the Development

Review Committee as part of the Section 306 development approval.

B. The uses designated in this Section 319.6.B, which are directly related to the primary use of the development, may be allowed on an interim basis.

1. Permitted Interim Uses:

(a) Stormwater retention or detention facilities, to serve the development,

(b) Parking areas to serve the development that cannot be reasonably located elsewhere on the development site.

(c) Entry features for the development such as signage, architectural features, fountains, walls, and the like,

(d) Temporary sales or lease offices for the development.

(e) Landscaping in residential zones, if permitted by the Development Review Committee as an alternative standard, provided that a minimum of ten (10) feet of required landscape buffers shall be located outside the transportation corridor.

2. The following conditions shall apply to the approval of interim uses specified in Section 319.6.B:

(a) The applicant agrees to discontinue and remove or relocate, at applicant's sole expense, the interim uses no later than the beginning of the first fiscal year in which

monies for acquisition of right-of-way within the affected transportation corridor are first programmed by either the County, in the County's 5-year Capital Improvement Plan or Capital Improvement Element, or FDOT in FDOT's 5-year Transportation Improvement Program (the "Termination Date"). This agreement shall be evidenced by an affidavit which shall state that the interim uses shall be discontinued no later than the Termination Date. Such affidavit shall be recorded against the development site in the public records office of the Clerk of the Circuit Court of Pasco County, and a copy of the recorded affidavit shall be provided to Pasco County prior to issuance of the first building permit within the development site. The Termination Date may be extended by written correspondence from the County or FDOT, as applicable, for a time period not to exceed one (1) year for each extension.

(b) Areas for relocation shall be identified on the development plans submitted with the application for development approval under Section 306 and shall be reserved for that purpose. If the relocation would require modification of any other provision of this Land Development Code, including buffers, parking, landscaping, yards and setbacks, then, except as set forth in Section 319.10.A, a variance from the Development Review Committee shall be required in accordance with the provisions of Section 316, except that in the case of a variance necessitated by the requirements of Article 319,

the conditions of Section 316.1.A.1.a shall be deemed to exist.

(c) The stormwater retention/detention facility and/or landscaping may, at the discretion of the County or FDOT, be incorporated into the design of the future transportation facility. Should this option be agreed to by the County or FDOT, the developer need not relocate the stormwater retention/detention facility and/or landscaping, as applicable.

C. The following interim uses, not necessarily directly related to the principal use of the site, may be allowed within the Transportation Corridor on an interim basis prior to the dedication or acquisition of land.

1. Other Permitted Interim Uses.

(a) In residential zones:

1. Recreational facilities such as playgrounds, ball fields, outdoor courts, exercise trails, walking paths, bridal paths, and similar outdoor recreational uses, but shall not include any required parks, buffers or other required open space;

2. Produce stands, produce markets, farmers markets, and the like;

3. Agricultural uses, such as pasture, crop lands, tree farms, orchards, and the like, but not including stables,

dairy barns, poultry houses, and the like; and

(b) In commercial zones:

1. Uses such as boat shows, automobile shows, RV shows, 'tent.' sales, and the like;

2. Periodic events such as festivals, carnivals, community fairs, and the like;

3. Plant nurseries and landscape materials yards, excluding permanent structures;

4. Storage yards for equipment, machinery, and supplies for building and trade contractors, and similar outdoor storage;

5. Golf driving ranges;

6. RV or boat storage yards; and

(c) Interim uses permitted under this subsection C. 1 shall only be permitted in a specified district if such use is permitted by the underlying zoning district or Comprehensive Plan future land use classification, whichever is more restrictive.

2. The following conditions shall apply to interim uses specified in Section 319.6.C.

(a) The applicant agrees to discontinue and remove, at applicant's sole expense, the

Interim uses no later than the beginning of the first fiscal year in which monies for acquisition of right-of-way within the affected transportation Corridor are first programmed by either the County, in the County's 5-year Capital Improvement Plan or Capital Improvement Element, or FDOT in FDOT's 5-year Transportation Improvement Program (the "Termination Date"). This agreement shall be evidenced by an affidavit which shall state that the interim uses shall be discontinued no later than the Termination Date. Such affidavit shall be recorded against the development site in the public records office of the Clerk of the Circuit Court of Pasco County, and a copy of the recorded affidavit shall be provided to Pasco County prior to issuance of the first building permit within the development site. The Termination Date may be extended by written correspondence from the County or FDOT, as applicable, for a time period not to exceed one (1) year for each extension.

(b) Buffer yards may be required in order to ensure compatibility of interim uses with other uses adjacent or nearby.

(c) Interim uses shall meet site design requirements for setbacks for the district.

(d) Interim uses shall comply with all other applicable provisions of this Code as may be required at the time of approval.

D. If the Termination Date set forth above has already occurred at the time of the Section 306

development approval or development permit/order, and the County or FDOT has not extended the Termination Date, the property owner shall not be entitled to the interim uses set forth in Section 319.6., unless the Development Review Committee or Board of County Commissioners, or FDOT for state roadways, determine that the Interim use(s) can coexist with the County's or FDOT's planned improvements in the Transportation Corridor. If the Termination Date has already occurred, and not been extended by the County or FDOT, the provisions of 319.5, 319.8 and 319.9 shall continue to apply.

E. Interim uses set forth in this Section 319.6 shall not be assessed transportation impact fees pursuant to the Pasco County Transportation Impact Fee Ordinance (Ordinance No. 04-05, as amended).

F. Interim uses set forth in this section 319.6 shall, where applicable, be required to obtain Right-of-way Use Permits in accordance with Article 311 and enter into a license and maintenance agreement with the County for such uses.

319.7 Site Design Requirements

To protect the full width of the future right of way, setbacks on property which abuts or is located adjacent to a Transportation Corridor shall be calculated from the edge of the Transportation Corridor. The size of the setback shall be the setback required by the underlying zoning district.

319.8 Right of Way Dedication

A. As a condition of approval of a Section 306 development approval or development permit/order, and in order to ensure adequate roads for the proposed development so as to meet concurrency requirements, and to protect the County's transportation system, all applicants for a Section 306 development approval or development permit/order, where any portion of the development site or expanded development site is located within a Transportation Corridor, shall enter into an agreement with the County, either in the form of a development agreement or as a condition of the Section 306 development approval or development permit/order, which shall provide for the dedication to the County of lands within the development site or expanded development site which are within the Transportation Corridor, subject to the provision of Section 319.9.B. Dedication shall be by recordation on the face of the plat, deed, grant of easement or other method acceptable to Pasco County. All dedications shall occur at record plat, construction plan approval where a record plat is not required, or within 90 days of the County's request, whichever occurs first. All conveyances shall be in accordance with Pasco County Real Estate Division requirements, and free and clear of all liens and encumbrances. Land to be dedicated shall be limited to the amount of land needed for the planned transportation improvements (as determined by the MPO and Comprehensive Plan Transportation Element plans in effect at the time of dedication, or by the County approved traffic study and collector/arterial spacing and design standards for the

development approval or development permit/ order if no such plans exist); including, where applicable, land for drainage/retention, wetland and floodplain mitigation, shoulders, frontage roads, sidewalks, bike paths, medians and other roadway related improvements, If the drainage, wetland or floodplain mitigation facilities for the roadway or appurtenances will be commingled or combined with drainage, wetland or floodplain facilities of the developer's project, the developer, or another maintenance entity acceptable to the County, shall be responsible for operation and maintenance of such facilities; provided, however, the developer or maintenance entity shall convey an easement giving the County and FDOT the right, but not the obligation, to enter onto developer's property and maintain the facilities. If the drainage, wetland or floodplain mitigation facilities for the roadway will not be commingled or combined with drainage, wetland or floodplain facilities of the developer's project, the developer shall convey such facilities and access easements to the County, or FDOT, as applicable, and the County or FDOT, as applicable, shall own operate and maintain such facilities subsequent to the expiration of any applicable maintenance guarantee period. Where the property owner believes that the amount of land required to be dedicated exceeds the amount of land that is roughly proportional to the transportation impacts to be generated by the proposed development site or expanded development site, including all development resulting from any Density Transfers, the landowner shall be entitled to apply for a

Dedication Waiver in accordance with the provisions of Section 319.9.

B. Where development of the Transportation Corridor which is the subject of the development application is not shown in the County's 5-year Capital Improvement Plan or Capital Improvement Element or FDOT's 5-year Transportation Improvement Program, and development of the road in all or any portion of such Transportation Corridor is not necessary to mitigate the transportation impacts of the proposed development, the property owner shall be entitled to use the portion of the development site in the Transportation Corridor in accordance with the provisions of Section 319.6.

319.9 Dedication Waiver

A. Where the property owner believes that the amount of land required to be dedicated to the County under the provisions of Section 319.8 exceeds the amount of land that is roughly proportional to the transportation impacts of the proposed development site and expanded development site, or believes that any other Pasco County transportation-related exaction, dedication, condition or requirement ("Transportation Requirement") is not roughly proportional to the transportation impacts of the proposed development site and expanded development site, the property owner may apply to the Development Review Committee for a Dedication Waiver in accordance with the provisions of this Section 319.9.

B. Application for Dedication Waiver

1. Dedication Waivers shall be determined by the Development Review Committee. The procedure for Dedication Waivers shall be the same as the notice, public hearing and procedural requirements set forth in Section 316 in connection with a variance, except as provided in this section. Development Review Committee decisions on Dedication Waivers may be appealed to the Board of County Commissioners in accordance with Section 317 of the Land Development Code. In the event of such an appeal, the Board of County Commissioners shall have, in addition to the powers set forth in Section 317, the same options as the Development Review Committee set forth in Section 310.9.C., 319.9.D, and 319.9.E. below.

2. The application for Dedication Waiver shall include the following information:

(a) Appraised value of the development site and expanded development site before the Section 306 development approval or other development permit/order, with and without the land to be dedicated pursuant to Section 318.8, taking into account any interim uses and Density Transfers.

(b) Appraised value of the development site and expanded development site after the Section 306 development approval or other development permit/

order, with and without the land to be dedicated pursuant to Section 318.8, taking into account any interim uses and Density Transfers.

(c) Traffic impact study showing the transportation impacts of the proposed development.

(d) List of transportation mitigation provided or required to be provided by the development, including: (1) the appraised value of any land dedicated or to be dedicated in accordance with (a) and (b) above, (2) certified cost estimates for all transportation improvements provided or required to be provided by the development, and (3) estimated transportation impact fees paid or due for the development pursuant to Ordinance No. 04-05, as amended.

3. All appraisals shall be at the applicant's sole expense, prepared by an appraiser licensed in the State of Florida and in accordance with all applicable standards, and include the value of the land required to be dedicated as determined by the Pasco County Property Appraiser in the most recent appraisal prior to any Section 306 development approval or development permit/order for the property. The traffic impact study shall be undertaken by a professional engineer with experience in transportation impact analysis and in accordance with Pasco County's Guidelines and Review Fees for Traffic

Impact Studies ("TIS") and Substandard Roads set forth in Resolution No. 04-203, as amended (the "TIS Resolution"); provided, however, the following modifications to the TIS Resolution shall be required for a TIS prepared to support a Dedication Waiver application:

a. A traffic impact study and substandard road analysis will be required for the Dedication Waiver application notwithstanding the applicability and exemption provisions of the TIS Resolution.

b. All analysis and impacted roadways shall be based on the existing network only, without taking into account capacity created by the committed network or committed improvements.

c. In Section 2.a. of the TIS Resolution, the phrase "equal to or greater than five percent" shall be replaced with "greater than zero percent".

d. In Section 4.a. of the TIS Resolution, the phrase "the first major impacted intersection from the site-access driveways not exceeding one mile" shall be replaced with "all impacted intersections".

e. In Section 13 of the TIS Resolution, all impacts, mitigation, and proportionate-share calculations shall be based on traffic generation at the cumulative development (including traffic from previously developed

or approved phases). In addition, for redevelopment, all impacts, mitigation, and proportionate-share calculations shall be based on traffic generation of the new use, without considering traffic generation of the prior use.

f. In Section 14 of the TIS Resolution, an analysis of traffic impacts on interstates/freeways shall be required.

g. In Section 15 of the TIS Resolution, no percentage of project traffic or trips shall be allowed to travel on substandard roads without mitigating impacts.

h. A proportionate share calculation in accordance with Section 17 shall be required, including a proportionate share calculation for all improvements needed to achieve minimum roadway and maintenance standards for impacted substandard roads.

C. Development Review Committee Action on Dedication Waiver Request

If the Development Review Committee determines that any portion of the land required to be dedicated for construction of the County transportation improvements exceeds the amount of land that is roughly proportional to the transportation impacts of the proposed development site or expanded development site, or determines that the Transportation Requirement is not roughly proportional to the transportation impacts of the proposed development site or expanded development site (the "Excess Dedication Amount"), the

Development Review Committee shall either: (1) authorize compensation for the Excess Dedication Amount in accordance with 319.9.D. or (2) decline to authorize compensation for the Excess Dedication Amount, in which case the provisions of 315.9.E. shall apply. In either event, if the dedication waiver applicant has proven an Excess Dedication Amount, the Development Review Committee, subject to Board of County Commissioner approval where required, may authorize reimbursement of some or all of the dedication wavier applicant's required costs of preparing the dedication waiver application. In considering whether any portion of the land required to be dedicated exceeds the amount of land that is roughly proportional to the proposed impacts of the project, the Development Review Committee may consider any Density Transfers. Any Section 306 development approval or other development permit/order for the development site shall not be considered in determining the value of the land for purposes of determining the Excess Dedication Amount or compensation amount.

D. Compensation

If the Development Review Committee authorizes compensation for the Excess Dedication Amount, the County, subject to Board of County Commissioner approval where required, shall compensate the land owner or development site (or any Excess Dedication Amount by: (1) paying for the Excess Dedication Amount, which in the case of an excess land dedication shall be an amount equal to 115% of the value of the excess

land required to be dedicated as determined by the Pasco County property appraiser in the most recent appraisal prior to any Section 306 development approval or development permit/order for the property which is being dedicated to the County, and less the value of any density which has been transferred to any other portion of the development site or expanded development site, unless the County and property owner agree to another valuation, (2) providing transportation impact fee credits for the Excess Dedication Amount, subject to the eligibility, timing and other requirements of the Pasco County Transportation Impact Fee Ordinance (Ordinance No. 04-05), as amended, (3) designing and/or constructing any of the property owner's or development site's required transportation improvements that have a value equivalent to or greater than the Excess Dedication Amount, or (4) some combination of (1), (2) or (3) that compensates the property owner or development site for the Excess Dedication Amount.

E. No Compensation

If the Development Review Committee elects to not authorize compensation to the property owner for the Excess Dedication Amount, the property owner shall not be required to dedicate such excess land to the County, or comply with any excess Transportation Requirement, and may utilize any excess land subject to applicable provisions of the Land Development Code and Comprehensive Plan.

F. Dedication Waiver Deadlines

1. If a property owner chooses to file a Dedication Waiver application, final action on the Dedication Waiver application, including any applicable appeals, shall be complete prior to the first deadline for the applicant to resubmit and respond to technical review comments for a Section 306 development approval, or thirty (30) days prior to the first Development Review Committee, Planning Commission or Board of County Commissioner public hearing for other development permits/orders. A Dedication Waiver request filed or completed after the foregoing deadlines shall automatically recommence all County review, comment and public hearing deadlines for the Section 306 development approval, development permit/order and/or TIS set forth in the Land Development Code and TIS Resolution, unless the application for such approval(s) have been withdrawn or denied.

2. If a Dedication Waiver application is filed after the County has taken final action on the Section 306 development approval or development permit/order containing the requirement or condition which is the subject of the Dedication Waiver request, all Section 306 development approval(s) or development permit(s)/order(s) containing the requirement or condition which is the subject of the Dedication Waiver request shall be referred to the final County decision-making body, and all advisory bodies, for a new Land Development Code and Comprehensive Plan consistency determination. In such event, the referred Section 306 development approval(s) and/

or development permit(s)/order(s) will be subject to all review, comment, and public hearing deadlines of the Land Development Code and TIS Resolution applicable to a new Section 306 development approval or development permit/order, including the deadlines set forth in subsection F.1. above. In addition, the referred Section 306 development approval(s) and/or development permit(s)/order(s) may not be used as a basis for further development or development approvals unless and until the final County decisionmaking body has found the referred approvals consistent with the Land Development Code and Comprehensive Plan. In any event, no Dedication Waiver application may be filed more than four (4) years after the final approval date of the first development permit/order containing the dedication required by 319.8 or Transportation Requirement unless the Florida Legislature or a court of competent jurisdiction determine that a civil claim, action or request challenging, or seeking compensation for, the same dedication required by 319.8 or Transportation Requirement can be filed after that date. The procedures set forth in Section 319.9 must be exhausted prior to filing any civil claim, action or request challenging, or seeking compensation for, a dedication required by 319.8 or other Transportation Requirement.

319.10 Waivers/Variances

A. Any property owner whose land is located within a Transportation Corridor may obtain a waiver of the minimum lot size, yard buffers, yards, lot coverage or setbacks required by the underlying zoning district, provided that such

waiver does not exceed 10% of the minimum requirement. Such waiver may be approved by the County Administrator or his designee utilizing the administrative variance procedures set forth in 316.4.C. and 316.4.D. of the Land Development Code. The decision of the County Administrator or his designee may be appealed to the Development Review Committee in accordance with the procedural provisions of Section 317.5 of the Land Development Code.

B. Where the provisions of this Article 319 cause a hardship, a property owner shall be entitled to apply for a variance in accordance with the provisions of Article 316 of this Code. Notwithstanding the foregoing, the procedures set forth in 319.9 shall be the County's exclusive administrative remedy for challenging a dedication required by 319.8 or other Transportation Requirement as not being roughly proportional to the transportation impacts of a development. Provided, however, the procedures and appeal provisions set forth in the TIS Resolution shall continue to apply to disputes or challenges relating to traffic impact study or mitigation requirements of the TIS Resolution, including the modifications to the TIS Resolution for Dedication Waivers set forth in this Ordinance, unless the Development Review Committee or Board of County Commissioners determine that the procedures set forth in Section 319.9 are a more appropriate remedy. In addition, all remedies, rights and obligations set forth in Chapters 163 and 380, Florida Statutes, Rules 9J-2 and 9J-5, F.A.C., Articles 402 and 618 of the Land Development Code, and the Pasco County Transportation impact Fee

Ordinance (Ordinance No. 04-05, as amended) shall continue to apply, unless the Development Review Committee or Board of County Commissioners determine that the procedures set forth in Section 319.9 are a more appropriate remedy.

SECTION 4. REPEAL OF ARTICLE 607 OF THE LAND DEVELOPMENT CODE.

Article 607 of the Land Development Code is hereby repealed in its entirety.

SECTION 5. AMENDMENTS TO ARTICLE 610 OF THE LAND DEVELOPMENT CODE.

5.1 Subsection 610.1A shall be amended to read as follows:

A. Conformance with County Policy.

The subdivision and development of any area subject to this Code shall conform to the adopted goals, objectives, and policies of the Board including:

1. The Pasco County Comprehensive Plan.

2. Water supply, waste disposal, street lighting, and other essential utilities plans.

3. *Pasco County Transportation Corridor Preservation Map and Table.*

4. Development policies, regulations and ordinances.

5.2 Section 610.3 shall be amended to read as follows:

610.3 Streets – General

Streets in the County shall be classified and mapped according to function served in order to allow for regulation of access, street and right-of-way widths, circulations patterns, design speed, and construction standards.

All *existing* streets functionally classified as arterial and collector are shown in the Pasco County Comprehensive Plan Future Roadway Network, *County Vision Plan Map or the County Transportation Corridor Preservation Map and Table.* All other *existing* streets are classified as local streets *or subdivision collectors (Type 1B and 1A).*

Local streets, both private and those to be dedicated to the County, are classified in a street hierarchy system with design tailored to function. Streets within the subdivision shall be classified at the time of *rezoning or* preliminary plan approval if said streets have not been previously classified by the County.

Unless otherwise approved by the Development Review Committee as an alternative standard, all new and expanded streets functionally classified as subdivision collectors, collectors and arterials shall conform to the following spacing and design standards:

Arterial Minimum Spacing/Design Standard[1]	*As Depicted on the Highway Vision Map*[2]
Public County Collector Minimum Spacing/ Design Standard[1]	*A. As depicted on Highway vision Map*[2]*; or* *B. For Res-3 and higher future land use – 1 mile*[3]
Subdivision Collector Minimum Design Standard	*For Res-3 and higher future land use – Type 1B and Type 1A roadways required by Section 610.3.A. of the Land Development Code shall be public roadways and connected to all surrounding existing and potential future*[4] *arterial, collector, and subdivision collector (Type 1B and 1A) roadways at locations determined by the County consistent with applicable access management regulations, environmental constraints, and existing development approvals.*

[1] *Requires compliance with Standard Typical Sections for Collector and Arterial Roadways adopted by the County pursuant to Resolution 04-212, as amended.*

[2] *In addition to the Comprehensive Plan Highway Vision Map, the Board of County Commissioners may adopt by Ordinance or Resolution, Special Area*

Highway Vision Maps for specific areas of the County. Upon adoption, the Special Area Highway Vision Map(s) shall supersede the Highway Vision Map and Arterial and County Collector Spacing Standards set forth above. However, adoption of such a map shall not affect the subdivision collector minimum design standards, and subdivision collector roads shall not be included in the Special Area Highway Vision Map(s).

[3] *Not required if an Arterial already satisfies this standard.*

[4] *"Potential future" arterial collector, and subdivision collector roadways shall be determined based on the following factors: (a) the adopted MPO and Comprehensive Plan Transportation Element plans, (b) Highway Vision Map, (c) applicable Special Area Highway Vision Map(s); (d) County collector and subdivision collector spacing and design standards, (e) the requirements of Section 610.3 of the Land Development Code, (f) County approved traffic studies, and (g) reasonably foreseeable future land uses surrounding the development containing the roadway subject to the design standard.*

> When a street continues an existing street that previously terminated outside the subdivision, or is a street that will be continued beyond the subdivision or development at some future time, the classification of the street will be based on the street in its entirety, both within and outside of the subdivision or development. *Any of such streets classified as subdivision collector,*

collector or arterial shall comply with the above spacing and design standards. The developer shall be required to dedicate the right-of-way for the ultimate classification of the street and shall be required to construct the appropriate number of lanes required by their subdivision or development, *including all drainage/retention, wetland and floodplain mitigation, shoulders, frontage roads, sidewalks, bike paths, medians and other roadway related improvements necessary for the ultimate classification of the roadway. The ultimate classification of the street or roadway shall be as determined based on the factors set forth in footnote 4 of the spacing and design standards.*

If a proposed subdivision contains or abuts the alignment of a roadway functionally classified as a collector or arterial in the Pasco County Comprehensive Plan Future Roadway Network, *County Vision Plan Map or the County Transportation Corridor Preservation Map and Table,* then the subdivision shall accommodate the alignment. The developer shall *dedicate the right-of-way for the ultimate classification of the roadway and* construct at least two (2) lanes of the future network facility, *including all drainage/retention, wetland arid floodplain mitigation, shoulders, frontage roads, sidewalks, bike paths, median and other roadway related improvements necessary for the ultimate classification of the roadway, unless specifically approved otherwise at the time of preliminary plan approval. The ultimate or future classification of the street or roadway shall be as determined based on the factors set forth in footnote 4 of the spacing and design standards.*

All subdivision proposals containing new streets or utilizing access from existing streets shall conform to the standards and criteria contained in this Code,

SECTION 6. REPEALER.

All provisions of the Land Development Code of Pasco County, as amended, and ordinances or parts of ordinances in conflict herewith are hereby repealed to the extent of any conflict. Specifically, this Ordinance repeals article 607 of the Pasco County Land Development Code. This Ordinance does not invalidate any condition or requirement based on Article 607; however, this Ordinance shall govern in the event of a conflict between this Ordinance and conditions or requirements based on Article 607.

SECTION 7. MODIFICATION.

It is the intent of the Board of County Commissioners that the provisions of this ordinance may be modified as a result of considerations that may arise during public hearings. Such modifications shall be incorporated into the final version of the ordinance adopted by the Board and filed by the Clerk to the Board pursuant to Section 11.

SECTION 8. SEVERABILITY.

It is declared to be the intent of the Board of County Commissioners of Pasco County, Florida, that if any section, subsection, sentence, clause, or provision of

this Ordinance shall be declared invalid, the remainder of this Ordinance shall be construed as not having contained said section, subsection, sentence, clause, or provisions and shall not be affected by such holding.

SECTION 9. INCLUSION IN CODE.

It is the intent of the Board of County Commissioners that the provisions of this Ordinance shall become and be made a part of the Pasco County Land Development Code, and that the sections of this Ordinance may be renumbered or relettered and the word "ordinance" may be changed to "section," "article," "regulation," or such other appropriate word or phrase in order to accomplish such intentions.

SECTION 10. APPLICABILITY.

For purposes of jurisdictional applicability, this Ordinance shall apply to all development on land where any portion of the development is within the jurisdiction of the County and shown on the County Transportation Corridor Preservation Map and Table or within an area subject to the arterial and collector spacing standards of Section 610.3. This Ordinance shall apply in a municipality within Pasco County only upon Pasco County and the municipality entering into an interlocal agreement providing for the application of this Ordinance, or portions thereof, within the municipality.

For purposes of geographic applicability, if all or any portion of a proposed development site or expanded development site for which a Section 306 development approval or development permit/order is required, is located within a Transportation Corridor or within an area subject to arterial and collector spacing standards of Section 610.3, the provisions of this Ordinance shall apply. In addition, the County may apply this Ordinance to other development permits/orders if all or any portion of the proposed development site or expanded development site is located within a Transportation Corridor or within an area subject to the collector and arterial spacing standards of Section 610.3.

For purposes of timing applicability, this Ordinance shall apply to Section 306 development approvals, or substantial modification thereof, for which a complete application has been filed or for which a Section 306 development approval has expired or been denied, after the effective date of this Ordinance, unless the County and the applicant agree to an earlier application date. In addition, the County may apply this Ordinance to other development permits/orders, or substantial modification thereof, for which a complete application has been filed, or for which the development permit or order has expired or been denied, after the effective date of this Ordinance, unless the County and applicant agree to an earlier application date. For Section 306 development approvals, this ordinance shall govern in the event of

a conflict between this Ordinance and prior development permits/orders.

SECTION 11. EFFECTIVE DATE.

A certified copy of this Ordinance shall be filed with the Department of State by the Clerk to the Board within ten (10) days after adoption of this Ordinance, and this Ordinance shall take effect upon filing with the Department of State. Notwithstanding the foregoing, for purposes of the applicability section of this Ordinance, the effective date of all sections of this Ordinance other than Section 5 shall be August 23, 2005.

SECTION 12. RELATIONSHIP TO COMPREHENSIVE PLAN.

Pursuant to Section 163.3194(1), Florida Statutes, to the extent any portion of this Ordinance is deemed by the Board of County Commissioners or a court of competent jurisdiction to be inconsistent with the most recently adopted Comprehensive Plan, the provisions of the most recently adopted Comprehensive Plan shall govern any action taken in regard to an application for a development permit/order until such time that the Comprehensive Plan and the inconsistent portion(s) of this Ordinance are brought into conformity.

ADOPTED this 22nd day of November, 2005.

[SEAL]

BOARD OF COUNTY COMMISSIONERS OF PASCO COUNTY, FLORIDA

BY /s/ [Illegible]
JED PITTMAN, CLERK

BY /s/ [Illegible]
PAT MULIERI, Ed.D., CHAIRMAN

APPROVED AS TO LEGAL FORM AND SUFFICIENCY OFFICE OF THE COUNTY ATTORNEY

BY: [Illegible]
COUNTY ATTORNEY