Local Ordinances Act (Ch. 2023-309) and Live Local Act (Ch. 2023-17) Implementation

Florida Local Environmental Resource Agencies (FLERA) Webinar

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Ch. 2023-17 LOF, The Live Local Act

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Legislative History

- 1/25/23 – SB 102 Filed.
- Legislative priority for Senate President Passidomo.
- Bi-Partisan Support. Passed Senate 40-0, House 103-6. Signed by Governor less than 30 days into session.
- Act became effective July 1, 2023. Sunsets in 2033.

The Intent

- Streamline and incentivize affordable housing developments within the State:
  - Increase available funding for affordable housing (recurring and non-recurring appropriations). Almost doubles the amount of funding for affordable housing compared to 2022.
  - Creates new tax credits and tax refunds designed to encourage affordable housing developments
  - Creates new ad valorem tax exemptions for affordable housing developments
  - Rent control ordinances prohibited.
  - Local govs must inventory all property it owns that is suitable for affordable housing.
  - Local Preemptions*

Affordable Housing and Qualifying Development Defined

- What is “affordable housing?”
  - Section 420.0004, Florida Statutes - “Affordable” means that monthly rents or monthly mortgage payments in taxes, insurance, and utilities **do not exceed 30 percent** of that amount which represents the percentage of the median adjusted gross annual income for the households considered extremely low income (30% of area median income (“AMI”)), very low income (50% of AMI), low income (80% of AMI), or moderate income (120% of AMI).
- What is a “Qualifying Development” – NOT explicitly defined in Act.
  - (1) a multifamily residential development consisting of multifamily dwelling units offered for rent located in a commercial, industrial, or mixed use zoning district in which at least 40 percent of the residential units are, for a period of at least 30 years, affordable as defined in Section 420.0004, Florida Statutes; or (2) a mixed use development located in a commercial, industrial, or mixed use zoning district where at least 65% of the square footage is used for residential purposes, and of which 40% are multifamily dwelling units offered for rent and considered affordable as defined in Section 420.0004, Florida Statutes.
- What is “mixed use”?
  - Not explicitly defined in statute. Generally refers to zoning districts that allow multiple types of uses. For mixed use Qualifying Developments, at least 65% of total square footage must be used for residential purposes.

Local Impacts

- Sections 3 (Counties) and 5 (Cities) of the Act contain significant land use/zoning preemptions designed to expand areas where affordable housing developments can be located and require administrative approval of "Qualifying Developments."
- Preempts certain use, density, and height regulations for Qualifying Developments that provide for the development of affordable multi-family rental housing in commercial, industrial, and mixed-use zoning districts.
- The Act requires that cities and counties administratively approve Qualifying Developments, without any action by the Board of County Commissioners/City Council, if the development satisfies the jurisdiction's Land Development regulations for multifamily developments in areas zoned for such use and is otherwise consistent with the Comprehensive Plan, with the exception of provisions establishing allowable densities, height, and land use.

  *No land use change, zoning change, conditional use, variance required for the height, zoning, and densities allowed under the Act.

Preemptions

- Use – Qualifying Developments permitted in commercial, industrial, and mixed use zoning districts where multi-family might not otherwise be allowed.

  *No impacts to residential zoning districts.

- Density – Maximum density for Qualifying Development = highest density within City/County where residential development is allowed.
- Height – Maximum height for Qualifying Development = highest currently allowed height for a commercial or residential development located within City/County within 1 mile of the proposed development, or 3 stories, whichever is higher.

  *Does not include illegal or nonconforming structures.

- Special rules for jurisdictions with less than 20 percent of land designated for commercial or industrial use. Qualified Developments must be mixed use residential.

Issues to Haunt Your Dreams

- How to ensure Qualifying Developments remain Qualifying Developments for 30 years. Monitoring/Reporting requirements? Restrictive Covenant?
- Enforcement options? Code enforcement? Injunctive relief? Other?
- Compatibility issues? Require disclaimer for potential tenants to warn of safety/nuisance impacts related to industrial/commercial uses?
- What if jurisdiction has multiple multi-family zoning districts? What standards apply to Qualifying Developments?
- Do multi-family regulations apply to commercial elements of Qualifying Developments?
- Definition of "Mixed Use?"
- Notice issues, given lack of public hearings and administrative approval requirement.
- Determining maximum density. Treatment of Planned Unit Developments?
- Moratoriums?

Strategies for Effective Implementation

- Live Local Act is silent on many important issues related to its implementation.
- Local Ordinance/Regulation can fill the gaps.
- Address:
  - Procedures for submission, processing, approval of applications.
  - Define undefined terms.
  - Establish "Qualifying Zoning Districts," zoned for commercial, industrial, or mixed use where Qualifying Developments can locate.
  - Establish maximum density – Review zoning of properties within jurisdiction to determine highest allowable density.
  - Establish land use restrictions, monitoring/reporting requirements
  - Enforcement mechanisms/remedies
  - Review
- Inventory existing LDC regulations and modify where appropriate

Local Ordinances (Ch. 2023-309, LOF)

Legislative History

- **1.24.2023** - SB 170 Local Ordinances Filed
  - Companion Bill HB 1515 (laid on table)
- **2.9.2023** and **2.22.2023** - replaced by Committee (Community Affairs and Rules) substitutes
- **3.8.2023** Amendment adopted – public meeting continuations
  - Note: 14 proposed amendments failed
- **5.3.2023** – Approved by House and Senate and Engrossed
- **6.29.2023** – Signed by Governor
- Now, **Chapter 2023-309, Laws of Florida**
- **Effective October 1, 2023**

Summary

1. Expansion of Ability to Recover Attorney Fees When Challenging Ordinances Under Sec. 57.112, F.S.
2. Addresses 2023 Second DCA Case *Testa v. Town of Jupiter Island* That Required Re-Noticing of Ordinances Continued to a Subsequent Meeting
3. Requires Business Impact Statements Prior to Enactment of Proposed Ordinances
4. Requires Suspension of Enforcement of Ordinances Challenged on Grounds that they are Expressly Preempted or Arbitrary/Unreasonable

Expansion of Sec. 57.112, F.S. – Attorney's Fees

- Courts may award attorney fees to a prevailing plaintiff who challenges an ordinance for being arbitrary or unreasonable.
- Fees capped at $50,000.
- Only applies to ordinances adopted after October 1, 2023.
- Amendments to existing ordinances are subject to award of attorney fess only to the extent the amendatory language gives rise to the claim
- What is "arbitrary or unreasonable?" Courts apply "fairly debatable test."
- Safe Harbor provisions in statute.
- Not applicable to ordinances adopted pursuant to Chapter 163, Part II (Growth Management).

Ordinance Notice Requirement Clarification

- *Testa v. Town of Jupiter Island*, 360 So. 3d 722 (Fla. 4th DCA 2023), Court found that statutes for cities and counties governing notice requirements for ordinances requires notice of the Ordinance to be advertised for 10 days before every public hearing, including continued public hearings, to consider the adoption of the Ordinance.
- Local Government attorneys freak out.
- Act Amends s. 125.66, Fla. Stat. and 166.041, Fla. Stat. to add:
- (7) Consideration of the proposed county ordinance or county resolution at a properly noticed meeting may be continued to a subsequent meeting if at the scheduled meeting, the date, time, and place of the subsequent meeting is publicly stated. No further publication, mailing, or posted notice as required under this section is required, except that the continued consideration must be listed in an agenda or similar communication produced for the subsequent meeting. This subsection is remedial in nature, is intended to clarify existing law, and shall apply retroactively.

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Business Impact Estimate

- Changes to Sec. 125.66 and 166.041, F.S.
- Before the enactment of a proposed ordinance, the local government shall prepare or cause to be prepared a business impact estimate.
- Must include:
  - a summary of the ordinance (including a statement of public purpose)
  - an estimate of direct compliance costs that businesses may reasonably incur
  - identification of any new charges or fees on businesses
  - an estimate of the county's regulatory costs
  - a good faith estimate of the number of businesses impacted by the ordinance
  - any additional information determined to be useful
- Business impact estimate must be posted on the county's/city's website no later than the date notice of the ordinance is advertised
- Local government is not required to procure accountant/other financial consultant to prepare business impact estimates.
- Preparation of business impact estimate should be treated as mandatory procedural requirement, essential to validity of the ordinance.

Business Impact Estimate Exceptions

- Exceptions for the following Ordinances:
- Issuance or refinancing of debt;
- Adoption of budgets or budget amendments;
- Emergency ordinances;
- Ordinances related to procurements;
- *Ordinances implementing chapter 163, part II, Florida Statutes relating to growth policy, planning, and land development regulation, including zoning, development orders, development agreements, and development permits;
- Implementing the building or fire prevention codes;
- Establishing community development districts;
- Ordinances required to implement a contract, agreement or grant.

Challenges to Ordinances and Suspension of Enforcement

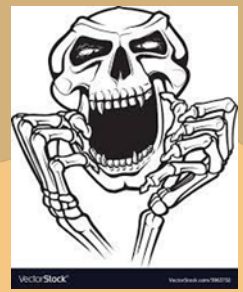
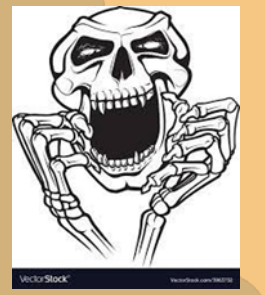
- Chapter 2023 – 309, Section 4 (counties), 7 (cities) Laws of Florida
- Enforcement of an ordinance must be suspended if the ordinance is subject of an action challenging the validity on the grounds that it is expressly preempted by the State Constitution or by state law or is arbitrary or unreasonable and:

1. if the action was filed in court no later than 90 days after the adoption of the ordinance;
2. plaintiff requests suspension in the initial complaint or petition citing the section of law; and
3. the county/city has been served with a copy of the complaint or petition.

Challenges Continued…

- If the challenged ordinance is found valid and enforceable, may enforce the ordinance 45 days after the entry of the order unless the plaintiff obtains a stay of the lower court's order.
- These cases take priority over other pending cases with the court.
- Exceptions that mirror exceptions from business impact estimates.

Sinister Scenario

- County adopts a new Ordinance within its land development code that regulates location, installation, and performance of septic tanks.
- County did perform a business impact estimate.
- County begins enforcement immediately after ordinance becomes effective (upon filing with Dept. of State, occurs 3 days after adoption). County issues several notices of violation.
- On day 92 after adoption of the Ordinance, citizen files a lawsuit against the County arguing Ordinance is arbitrary/unreasonable, requests suspension of enforcement.

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Citations to the newly created or amended statutes

- s. 57.112, Fla. Stat.
- s. 125.66, Fla. Stat.
- s. 166.041, Fla. Stat.
- s. 163.2517, Fla. Stat.
- s. 163.3181, Fla. Stat.
- s. 163.3215, Fla. Stat.
- s. 376.80, Fla. Stat.
- s. 497.270, Fla. Stat.
- s. 562.45, Fla. Stat.
- s. 847.0134, Fla. Stat.

Questions?

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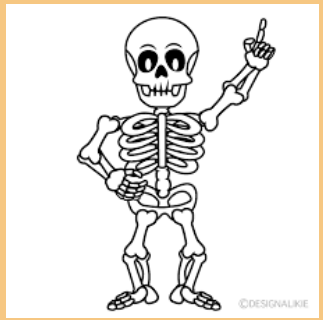

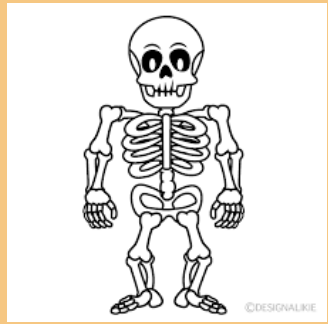

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