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DEVELOPMENTS IN THE LAW ON LOCAL GOVERNMENT CODE ENFORCEMENT PROCEEDINGS: QUASI-JUDICIAL PROCEEDINGS PURSUANT TO CHAPTER 162, FLORIDA STATUTES

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The growing use by local governments of quasi-judicial code enforcement proceedings—what some might call a tidal wave of proceedings—provides a quick and easy procedure to obtain compliance with local government codes.[1] The procedure has become commonplace,[2] making it necessary for private- and public-sector attorneys practicing in many different areas—real estate, commercial litigation, collection, local government law, eminent domain, urban and regional planning, among others—to have

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1. Fla. Stat. § 162.02 (2012).

2. *See e.g.* Charlotte Co. Gov't, *Community Development—Current Planning & Zoning, More Information about Code Compliance—Code Enforcement*, http://www .charlottecountyfl.com/BCS/codeviolations.asp (accessed Apr. 27, 2013) (providing an example of how Florida counties utilize a quasi-judicial process to assess and determine code violations).

familiarity with how these proceedings work. Based upon the legislative authority granted to local governments to enter final orders assessing per diem fines that can become liens and thereafter encumber real property,[3] it is essential for private- and public-sector attorneys to have an understanding of these proceedings in order to be able to determine the best course of action for landowners.

This trend in favor of code enforcement proceedings remains relatively inexpensive and economical for local governments for the following reasons: (1) each local government has the authority to enter final orders awarding fines and liens on real property in favor of local governments if violations are proven and not corrected by a time certain;[4] (2) if a final order imposing a lien is entered against the real property, a local government then has the authority to file a lien foreclosure action, similar to a mortgage foreclosure action against real property, where the owner fails to pay and the fine has accrued;[5] (3) if a local government files a foreclosure action to foreclose the lien that has attached to real property, the local government has a right to ask for and obtain attorney's fees and costs should it prevail;[6] (4) the rules of civil procedure and evidence do not apply in these proceedings, thereby granting the local government greater leeway pursuant to fundamental due process in obtaining a judgment against the real property that is oftentimes collectable and will subject the real property to a local government lien making the real property subject to a public sale;[7] (5) code violations on family households and business dwellings can affect owners and their neighborhoods' aesthetics, stability, and property values;[8] and (6) if code enforcement violations remain unchecked and uncorrected, a once solid neighborhood can turn into a collection of shabby and deteriorating dwellings that have unpaid liens against the owners and the foreclosure properties, resulting in declining real property

3. Fla. Stat. §§ 162.02, 162.06, 162.09, 162.10.

4. *Id.* at § 162.09.

5. *Id.* at § 162.10.

6. *Id.*

7. *Id.* at §§ 162.07(3), 162.09(3).

8. *See id.* at § 163.3177 (stating that the local governments' comprehensive plans should provide "strategies for the orderly and balanced future economic, social, physical, environmental, and fiscal development of the area that reflects community commitments to implement the plan and its elements").

values according to tax assessor values, and substantial reductions in tax revenue and spending for schools, non-school services, and local development services, threatening the local governments' maintenance of the quality of life and the public health, safety, and welfare of the community.[9]

Appellate court decisions continue to be decided in this evolving area of the law; therefore, it should be apparent that all public- and private-sector attorneys should be familiar with how these quasi-judicial code enforcement procedures work so that there is a fair determination before a local government special magistrate or code enforcement board when or if these proceedings are contested. The purpose of this Article is to discuss the development of code enforcement law as reported in appellate court decisions and as enacted by the legislature as it has evolved within the past several years so that private- and public-sector practitioners have a better understanding of how these proceedings work and where the law may be headed in the future.[10]

I. FLORIDA STATUTES CHAPTER 162, PARTS I AND II: QUASI-JUDICIAL ADMINISTRATIVE HEARINGS VERSUS COUNTY COURT CIVIL PROCEEDINGS

Florida Statutes Chapter 162 governs code enforcement procedures and is divided into two parts.[11] Part I can be found in Florida Statutes Sections 162.01–162.13 and establishes the pleading and proof requirements for a quasi-judicial proceeding.[12] Part II, Florida Statutes Sections 162.21–162.30, relates to the

9. *See Kelo v. City of New London, Conn.*, 545 U.S. 469, 488–490 (2005) (holding that when a local government, as part of a comprehensive economic plan of development, condemns private property to transfer it to another private party to enhance the local government's tax base and hopefully to provide jobs, such governmental action is a public purpose allowable under the United States Constitution). Florida has severely restricted *Kelo*, but the policy reasons behind blight reduction and disfiguring neighborhoods remain the same. Fla. Stat. § 163.335(1), (7); Harry M. Hipler, *Tax Increment Financing in Florida: A Tool for Local Government Revitalization, Renewal, and Redevelopment*, 81 Fla. B.J. 66, 66–67 (Aug. 2007); *see* Fla. Stat. § 73.013 (providing the limitations on and the conditions under which property taken by eminent domain may be conveyed).

10. *See generally* Harry M. Hipler, *Special Magistrates in Code Enforcement Proceedings: Local Government Agents or Arbiters of Fairness and Justice?* 38 Stetson L. Rev. 519 (2009) (discussing issues that arise in code enforcement proceedings and their defenses to provide guidance to public- and private-sector lawyers and special magistrates).

11. Fla. Stat. § 162.

12. *Id.* at §§ 162.01–162.13.

pleading and proof requirements for a civil court action.[13] In *Monroe County Code Enforcement v. Carter*,[14] a multi-count notice of violation was issued by a local government, which failed to provide the date and time when the civil infraction was committed.[15] The special magistrate found that the real property owner violated all counts contained in the notice and therefore entered a final order that provided a time certain when all counts in the notice had to be corrected.[16] Certiorari was filed in the circuit court, which dismissed all counts in the entire notice of violation because the county failed to comply with Florida Statutes Section 162.21(c)(3).[17] The district court reversed and found that the circuit court erroneously applied Part II of Florida Statutes Chapter 162, which requires that an infraction allege the date and time of a civil infraction in civil court actions, because the subject proceeding was an administrative, quasi-judicial proceeding before the special magistrate.[18] According to *Carter*, Part I applies to administrative, quasi-judicial proceedings by requiring that the notice of violation allege the date the inspector found the violation, not the date and time of a civil infraction that is required in a civil court action by Part II.[19] Accordingly, *Carter* sets forth the principle that in an administrative, quasi-judicial code enforcement proceeding, Part I applies, whereas Part II applies to a civil court infraction proceeding.[20] As such, it is error for a civil court to impose Part II pleading requirements to Part I administrative, quasi-judicial proceedings because they are separate proceedings that incorporate different rules and requirements.[21]

13. *Id.* at §§ 162.21–162.30.

14. 14 So. 3d 1019 (Fla. 3d Dist. App. 2009).

15. *Id.* at 1020.

16. *Id.*

17. *Id.*; *see also* Fla. Stat. § 162.21(c)(3) (requiring that a citation provide "[t]he date and time the civil infraction was committed"). This Section applies to Part II civil court infractions. Fla. Stat. § 162.21(c)(3).

18. *Carter*, 14 So. 3d at 1021.

19. *Id. Carter* also suggests that a circuit court on certiorari appeal from a quasi-judicial ruling cannot create an "additional non-required pleading and proof requirement." *Id.*

20. *Id.*

21. *Id.*

II. LOCAL GOVERNMENTS MAY PROCEED UNDER ANY NUMBER OF REMEDIES TO OBTAIN COMPLIANCE WITH LOCAL GOVERNMENT CODE ORDINANCES

Local governments have a number of options to proceed in attempting to obtain compliance with local government code provisions. There is nothing located in Florida Statutes Section 162 or elsewhere that prohibits a local government from enforcing its codes by any means. Florida Statutes Section 162.13 specifically provides that the provisions of Florida Statutes Chapter 162 are a supplemental procedure to obtain code compliance, and the legislative intent is "to provide an additional or supplemental means of obtaining compliance with local [government] codes."[22] Local governments use quasi-judicial code enforcement proceedings to assess civil infractions and per diem fines for code enforcement violations as a core procedure to obtain code compliance.[23] Should per diem fines prove to be inadequate in light of compelling circumstances, there are other means that remain available to correct and abate unsafe or unsanitary conditions; endangerment of the public health, safety, and welfare of the community; and public health concerns.[24] Some supplemental methods that have been used by a local government include requests for injunctive relief, quasi-judicial proceedings involving violations of unsafe buildings and structures that can require real property demolition, and any other alternative provisions provided under Florida law.[25]

22. Fla. Stat. § 162.13.

23. Raymond J. Burby et al., *Building Code Enforcement Burdens and Central City Decline*, 66 J. Am. Plan. Ass'n 143, 144 (2000); Hipler, *supra* n. 10, at 520, 537–538; Joseph Schilling, *Code Enforcement and Community Stabilization: The Forgotten First Responders to Vacant and Foreclosed Homes*, 2 Alb. Govt. L. Rev. 101, 103–105 (2009).

24. Fla. Stat. § 162.21(8).

25. *See e.g. City of Jacksonville v. Blue Stone Constr., Inc.*, 48 So. 3d 941, 942 (Fla. 1st Dist. App. 2010) (reversing the trial court's denial of injunctive relief and finding that the structure at issue violated a provision of the City of Jacksonville's code because it was unsafe and endangered "'the public health, welfare, or safety of the community'"); *Rudge v. City of Stuart*, 65 So. 3d 645, 646–647 (Fla. 4th Dist. App. 2011) (affirming the circuit court's decision granting the City of Stuart an injunction allowing entry onto the appellant's property to enforce the City's nuisance abatement ordinance).

III. DO THE FLORIDA RULES OF CIVIL PROCEDURE APPLY TO CODE ENFORCEMENT PROCEEDINGS?

There is no right to discovery in quasi-judicial code enforcement proceedings before special magistrates and local government boards.[26] On the other hand, when a party files a declaratory judgment action in the circuit court against a local government, then there is a right to request discovery in matters litigated in circuit court.[27] In *Towers v. City of Longwood*,[28] there was a circuit court action where the plaintiff filed a declaratory judgment action against the city with respect to development of certain properties located in the city.[29] The district court ruled that in the plaintiff's request to obtain discovery pursuant to Florida Rule of Civil Procedure 1.280(b)(1), discovery was permissible because the information requested was relevant to the matter litigated in circuit court.[30]

In *City of Key West, Tree Commission v. Havlicek*,[31] the City issued a notice alleging violations of the tree protection ordinance in a code enforcement proceeding.[32] Havlicek issued three subpoenas for depositions *duces tecum* that were directed to three members of the City's Tree Commission.[33] The Tree Commission filed a motion for protective order before the special magistrate, who granted the motion.[34] Havlicek filed a petition for writ of certiorari before the circuit court, which overruled the special magistrate's order.[35] The City further appealed the ruling to the district court, which held that code enforcement matters are not governed by the rules of civil procedure.[36] Thus, code enforcement proceedings are controlled by Part I, Florida Statutes Chapter

26. *City of Key West, Tree Comm'n v. Havlicek*, 57 So. 3d 900, 902 (Fla. 3d Dist. App. 2011).
27. Fla. R. Civ. P. 1.280(b)(1).
28. 960 So. 2d 845 (Fla. 5th Dist. App. 2007).
29. *Id.* at 847.
30. *Id.* at 848–849.
31. 57 So. 3d 900.
32. *Id.* at 901.
33. *Id.*
34. *Id.* at 901–902.
35. *Id.* at 902.
36. *Id.*

162, which does not contain provisions regarding pre-final hearing discovery.[37]

Florida law suggests that there is no right to discovery in administrative, quasi-judicial code enforcement proceedings pursuant to Part I and the rules of civil procedure do not apply to administrative, quasi-judicial code enforcement proceedings.[38] On the other hand, Part II applies to civil court code enforcement proceedings when the local government chooses to use Part II, and if a civil court action is filed, then the Florida Rules of Civil Procedure apply as they do in any civil court proceeding.[39]

Havlicek is consistent with Florida law insofar as it provides that, absent a specific statute or rule that requires pre-final hearing discovery or the taking of depositions, fundamental due process does not require that a local government permit pre-final hearing discovery in a quasi-judicial code enforcement proceeding.[40] What this means is that an alleged violator/owner is entitled to a notice of violation and an opportunity to be heard at a final hearing before entry of a dismissal or final order and nothing more.[41] The formal rules of evidence do not apply.[42] Accordingly, fundamental due process shall govern the proceedings,[43] which only requires that a real property owner be provided with a notice of a violation and an opportunity to be heard in code enforcement proceedings.[44] The special magistrate or board has the authority to subpoena alleged violators and any witnesses to

37. *Id.*; *see Carter*, 14 So. 3d at 1021 (explaining that Part I, Florida Statutes Sections 162.01–162.13, governs administrative proceedings, while Part II, Florida Statutes Sections 162.21–162.30, governs civil court proceedings).

38. *Havlicek*, 57 So. 3d at 902.

39. *See Carter*, 14 So. 3d at 1021 (providing that Part II, Florida Statutes Sections 162.21–162.30, "relates to the pleading and proof requirements for a civil court action"); *Towers*, 960 So. 2d at 849 (quashing the circuit court's order granting a city board member's motion for a protective order, and ruling that the circuit court should have considered the property developer's document requests).

40. 57 So. 3d at 902; *see e.g. Fla. Freedom Newsps., Inc. v. McCrary*, 520 So. 2d 32, 36 (Fla. 1988) (concluding that "there is no first amendment right of access to pretrial discovery material"); *State v. Pinder*, 678 So. 2d 410, 414 (Fla. 4th Dist. App. 1996) (stating that "[t]here is no general constitutional right to discovery in a criminal case").

41. *See Massey v. Charlotte Co.*, 842 So. 2d 142, 144–145, 147 (Fla. 2d Dist. App. 2003) (finding that the county code board violated due process by failing to provide notice and a hearing); *Carter*, 14 So. 3d at 1021 (finding that in an administrative proceeding, the county needed only to give the violator notice even if the notice did not include the precise date of every violation).

42. Fla. Stat. § 162.07(3).

43. *Id.*

44. *Id.* at §§ 162.06(3), 162.07, 162.08.

its final hearings, which would include those requested by the alleged violator and owner of the real property.[45] Currently, there is no caselaw or federal or state constitutional provision that has interpreted fundamental due process as requiring the local government to provide a landowner with pre-final hearing discovery and the taking of depositions of local government witnesses in a code enforcement proceeding if one has been filed under Part I.[46]

In analogous situations, the United States Supreme Court has held that there is no federal constitutional right for a defendant in a criminal case to have pretrial discovery in criminal proceedings against a defendant.[47] Florida Rule of Criminal Procedure 3.220(h)(1)(D) provides that there is no right to take depositions in cases where a criminal defendant is charged with a misdemeanor or criminal traffic offense.[48] There is at least one exception—if a criminal defendant may be imprisoned—but other than this exception, there is no right to take depositions in criminal cases where there is no fear of imprisonment.[49] A similar rule exists in federal criminal prosecutions according to Federal Rule of Criminal Procedure 15, which merely provides for the taking of pretrial depositions under "exceptional circumstances."[50] Thus, in federal criminal proceedings, there is no right to take pretrial depositions.

There is no right to discovery in administrative code enforcement proceedings pursuant to Part I, and the rules of civil procedure do not apply to administrative code enforcement proceedings.[51] There is no enabling legislation by means of state statutes or local governments' ordinances. *Havlicek* specifically provides that no right exists to take pre-final hearing depositions

45. *Id.* at §162.08.

46. *See Carter*, 14 So. 3d at 1021 (citing Fla. Stat. § 162.06) (explaining that in administrative proceedings governed by Part I, Florida Statutes Sections 162.01–162.13, code enforcement boards are only required to provide notice to the violator and afford reasonable time for him or her to correct the violation).

47. *E.g. Weatherford v. Bursey*, 429 U.S. 545, 559 (1977).

48. Fla. R. Crim. P. 3.220(h)(1)(D); *Raleigh v. State*, 46 So. 3d 1018, 1019–1020 (Fla. 2d Dist. App. 2010) (finding that the defendant needed to show good cause to take a deposition because he was charged with a "'criminal traffic offense'" as provided in Florida Rule of Criminal Procedure 3.220(h)(1)(D)).

49. *See* Fla. R. Crim. P. 3.220(h)(1)(D) (stating that there is no right to take pretrial depositions in criminal traffic offenses or misdemeanors unless good cause is shown and that the trial court will consider, among other things, the consequences to the defendant).

50. Fed. R. Crim. P. 15(a)(1).

51. *Havlicek*, 57 So. 3d at 902.

in code enforcement matters, and the rules of civil procedure do not apply to administrative, quasi-judicial code enforcement proceedings.[52] There is also no federal or state constitutional provision that guarantees a violator or landowner the right to take depositions or receive pre-final hearing discovery in code enforcement proceedings. Fundamental due process is the only constitutional provision that applies to these proceedings, and it does not include pre-final hearing discovery.[53] Of course, anyone is entitled to request and obtain public records pursuant to Florida public records law, which guarantees access to public records pursuant to Florida Constitution Article I, Section 24[54] and Florida Statutes Chapter 119.[55] But after the local government complies with any such request, nothing else is required by the local government insofar as discovery is concerned.[56]

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52. *Id.*

53. *See* Fla. Stat. § 162.07(3) (providing that the rules of evidence do not apply to code enforcement proceedings but that "fundamental due process shall be observed and shall govern the proceedings"); *supra* nn. 40–46. Florida law seems clear. The question is: should the legislature or the judiciary provide specific provisions for the exchange of discovery in code enforcement proceedings? Perhaps in more complicated code enforcement proceedings, there should be limited discovery exchanged on a reciprocal basis between the local government and owner. However, such a requirement would slow down the process and possible resolution of these proceedings, which is contrary to the legislative intent of Florida Statutes Chapter 162, and make them more contentious and time consuming, even though most of these cases are not very complicated. However, if a complicated case is prosecuted by a local government or the case involves bona fide claims of laches or estoppel by the owner of the real property, then reciprocal discovery could be rationalized in light of fundamental due process and fairness. If expert reports are involved, then an exchange of these may be helpful to a fair determination by the special magistrate. The exchange of information would have to be reciprocal, however, and not constitute a fishing expedition that sometimes exists in civil court litigation. It is impossible to specifically state precise criteria that might be applied in obtaining reciprocal discovery in code enforcement proceedings, but a starting point is to acknowledge that there are some cases in which fundamental due process and fairness may require an exchange of information in lieu of a quick determination by the special magistrate of the claims made by the parties. Perhaps some options might include allowing the special magistrate to decide when and if reciprocal discovery should be permitted and if expert reports are necessary to support or refute the local government's claims. The bottom line is that there may be cases that call for an exchange of discovery so long as they are complicated rather than the run-of-the-mill code enforcement case. With such limitations, accordingly, the intent of Florida Statutes Chapter 162 would not be infringed.

54. Fla. Const. art. I, § 24.

55. Fla. Stat. §§ 119.01(1), 119.07(1)(a).

56. *See Havlicek*, 57 So. 3d at 902 (providing that Florida Statutes Chapter 162 "contains no provision regarding discovery").

IV. SOVEREIGN AND JUDICIAL IMMUNITY OF LOCAL GOVERNMENT OFFICIALS, INCLUDING ADMINISTRATIVE HEARING OFFICERS AND SPECIAL MAGISTRATES

An important preliminary issue in any lawsuit against a governmental body is the application of sovereign immunity, which has historically been phrased as "the King can do no wrong."[57] Florida law has established that judicial immunity exists apart from the concept of sovereign immunity and includes persons who exercise judicial or quasi-judicial functions and responsibilities.[58] Although judges who perform judicial functions maintain judicial immunity for acts performed in the course of their judicial capacities, this doctrine has also been extended to quasi-judicial officers who perform judicial functions.[59] This doctrine should also apply to special magistrates on account of their quasi-judicial status and function in the fact-finding process in code enforcement proceedings in local governments. In *Fuller v. Truncale*,[60] the district court ruled that administrative officials who perform judicial functions have immunity from suit.[61] The court in *Fuller* went on to say that if the official's ruling falls within his or her duties, "even if the ruling in question was unwise, reckless, or malicious," the doctrine of judicial and quasi-judicial immunity applies; therefore, lawsuits against the official, including lawsuits for damages, injunctive, and equitable relief, are barred.[62]

The United States Supreme Court weighed in on immunity from lawsuits in *Filarsky v. Delia*.[63] In a unanimous decision, the Supreme Court drew a bright line and held that private individuals temporarily retained by the government to carry out law-

57. Erwin Chemerinsky, *Against Sovereign Immunity*, 53 Stanford L. Rev. 1201, 1201 (2001) (internal quotation marks omitted).

58. *Fuller v. Truncale*, 50 So. 3d 25, 27–28 (Fla. 1st Dist. App. 2010); *Andrews v. Fla. Parole Comm'n*, 768 So. 2d 1257, 1261 (Fla. 1st Dist. App. 2000); *Montejo v. Martin Mem'l Med. Ctr., Inc.*, 935 So. 2d 1266, 1270–1271 (Fla. 4th Dist. App. 2006) (citing *Turney v. O'Toole*, 898 F.2d 1470, 1472 (10th Cir. 1990)); *Kalmanson v. Lockett*, 848 So. 2d 374, 378 (Fla. 5th Dist. App. 2003).

59. *Dep't of Hwy. Safety & Motor Vehs. v. Marks*, 898 So. 2d 1063, 1064–1065 (Fla. 5th Dist. App. 2005) (citing *Off. of St. Att'y, Fourth Jud. Cir. of Fla. v. Parrotino*, 628 So. 2d 1097 (Fla. 1993)).

60. 50 So. 3d 25.

61. *Id.* at 27–28.

62. *Id.* at 28.

63. 132 S. Ct. 1657 (2012).

related work are entitled to seek qualified immunity from lawsuits on account of common law principles of immunity that were incorporated into Title 42 U.S.C. Section 1983.[64] The United States Supreme Court did not distinguish between full-time and part-time government public servants and private individuals that were employed by the local government in carrying out governmental responsibilities and functions.[65]

Although judicial immunity exists apart from the concept of sovereign immunity, the two concepts have similarities in that they both seek to protect government servants from lawsuits.[66] The public policy question is: how broadly do the courts want to extend immunity from lawsuits for judicial and quasi-judicial officers and other public servants who work for local governments on a part-time or full-time basis? Those who support immunity suggest that immunity protection from lawsuits exists for the following reasons: to avoid retaliatory suits that will be time consuming and waste public resources; to avoid discouraging individuals from seeking careers in public service; and to allow public officials to use their best judgment without fear of litigation.[67] On the other hand, arguments in opposition to immunity suggest that injustices will not be remedied; immunity discourages due care; and immunity exempts individuals or entities from the standards that apply to the remainder of society.[68]

There are additional forms of immunity from lawsuits that are not discussed here that can be divided into absolute and qual-

64. *Id.* at 1665 (citing 42 U.S.C. § 1983 (2012)).

65. *Id.* at 1667–1668.

66. *See id.* at 1661–1662 (quoting *Wasson v. Mitchell*, 18 Iowa 153, 155–156 (1864)) (stating that "government actors were afforded certain protections from liability, based on the reasoning that 'the public good can best be secured by allowing officers charged with the duty of deciding upon the rights of others, to act upon their own free, unbiased convictions, uninfluenced by any apprehensions'"); *Fuller*, 50 So. 3d at 28 (noting that the purpose of judicial immunity is to prevent judicial parties from becoming involved in lawsuits).

67. *See* Adam Schulman, *Sovereign Immunity as a Bastion of Individual Responsibility* (Working Paper, Dec. 7, 2010) (available at http://ssrn.com/abstract=1721610) (laying out the common critiques of sovereign immunity and refuting them by defending sovereign immunity "as a protection of the public treasury from undeserved intrusion").

68. *See* Kelley H. Armitage, *It's Good to Be King (At Least It Used to Be and Could Be Again): A Textualist View of Sovereign Immunity*, 29 Stetson L. Rev. 599, 601–603 (2000) (exploring the public policy rationales for sovereign immunity, but endorsing a textualist approach to sovereign immunity); Chemerinsky, *supra* n. 57, at 1201–1224 (considering the leading justifications for sovereign immunity, but arguing that the doctrine of sovereign immunity should be completely abolished from American law).

ified immunity. The present trend seems to be that the courts favor an increase and expansion of immunity from lawsuits in order to deter retaliatory, time-consuming lawsuits against officials so that public servants' are not detracted from exercising their best judgment for fear of litigation.[69] Special magistrates serve in quasi-judicial roles.[70] They are part-time and temporary independent contractors, and they carry out governmental functions and responsibilities in considering whether code violations exist at public hearings.[71] There is no better way to hinder and interfere with an efficient code enforcement proceeding than if a party files a lawsuit against a special magistrate or other public official during a quasi-judicial code enforcement proceeding.[72] Special magistrates share the same functions and responsibilities as do judges; they listen to the evidence and decide if code violations exist.[73] They should be immune from lawsuits under the same criteria as are judges.[74]

V. REVIEW OF NON-FINAL ORDERS: EXTRAORDINARY WRITS OF PROHIBITION AND CERTIORARI

The question of whether sovereign immunity is applicable to a party, and therefore can be raised before the entry of a final judgment, is a matter of great importance in any litigation. The issue can arise "in the context of the broader question of when appellate courts should use common law writs [of certiorari and prohibition] to review non-final orders involving claims of [sover-

69. *See* Chemerinsky, *supra* n. 57, at 1203 (conceding that the United States Supreme Court is not likely to eliminate the doctrine of sovereign immunity and stating that "[t]he trend, unquestionably, is in the opposite direction"); *see e.g. Filarsky*, 132 S. Ct. at 1667–1668 (holding that an attorney who was retained by a city to assist with official city business was entitled to the protection of qualified immunity).

70. Fla. Stat. § 162.03; *Verdi v. Metro. Dade Co.*, 684 So. 2d 870, 873–874 (Fla. 3d Dist. App. 1996).

71. Fla. Stat. § 162.03 (providing that special magistrates have "the authority to hold hearings and assess fines against violators of . . . ordinances").

72. *See Limehouse v. Whittemore*, 773 So. 2d 86, 87 (Fla. 2d Dist. App. 2000) (dismissing a complaint alleging judicial fraud when finding summary judgment in favor of an attorney in a malpractice suit); *Kalmanson*, 848 So. 2d at 381 (affirming that judicial immunity shielded a judge's judicial acts taken in a dissolution of marriage case).

73. M. Malissa Burnette, *The Role of U.S. Magistrate Judges in the Disposition of Civil Cases*, 20 S.C. Law. 16, 17 (July 2008) (discussing the role of magistrate judges and noting that they "have both criminal and civil jurisdiction set forth by statute").

74. *E.g. Fuller*, 50 So. 3d at 28; *Andrews*, 768 So. 2d at 1264; *Montejo*, 935 So. 2d at 1270; *Kalmanson*, 848 So. 2d at 381.

eign or judicial] immunity prior to the entry of a final judgment."[75] Does Florida law authorize an appellate court to review a denial of a motion to dismiss based upon a claim of immunity before the entry of a final judgment in the trial court? In *Citizens Property Insurance Corp. v. San Perdido Ass'n*,[76] the Florida Supreme Court considered whether an appellate court can issue a writ of prohibition upon a party's challenge of "a non-final order denying a motion to dismiss based on a claim of sovereign immunity where sovereign immunity has been partially waived."[77] The high Court ruled that where sovereign immunity has been partially waived, an appellate court cannot consider such a claim in a writ of prohibition and petition for writ of certiorari in a non-final appeal.[78] The Court, however, specifically refused to answer the broader question of when these extraordinary writs may apply under the many different types of claims of sovereign immunity.[79]

Judges who perform judicial functions maintain judicial immunity for acts performed in the course of their judicial capacities.[80] This doctrine has been extended to quasi-judicial officers who perform judicial functions and responsibilities.[81] Under such circumstances, the purpose of quasi-judicial immunity is to prevent a quasi-judicial officer from becoming involved in a civil lawsuit, because the lawsuit would be compromised and irreparably harmed simply by forcing a quasi-judicial officer to become involved in civil litigation regardless of its outcome.[82] If a special magistrate as a quasi-judicial officer waits to address the issue of quasi-judicial immunity until a final judgment is entered and appealed in a lawsuit, then any protection the immunity grants would be sacrificed, harmed, and surrendered.[83] If there is a denial of a motion to dismiss by a special magistrate who has been sued in a civil court on account of his or her duties as a

75. *Citizens Prop. Ins. Corp. v. San Perdido Ass'n*, 104 So. 3d 344, 345 (Fla. 2012).
76. 104 So. 3d 344.
77. *Id.* at 346.
78. *Id.*
79. *Id.*
80. *Fuller*, 50 So. 3d at 28; *Andrews*, 768 So. 2d at 1263; *Montejo*, 935 So. 2d at 1269–1270; *Kalmanson*, 848 So. 2d at 377.
81. *Fuller*, 50 So. 3d at 28.
82. *Id.* For an excellent discussion of what the Florida Supreme Court believes constitutes irreparable harm and material injury, see *Citizens Prop. Ins. Corp.*, 104 So. 3d at 351–353.
83. *Fuller*, 50 So. 3d at 28.

quasi-judicial officer in a quasi-judicial proceeding, a special magistrate should be in the same position as a member of the judiciary making writs of prohibition and certiorari viable avenues for relief before a final judgment is entered.[84]

VI. LOCAL GOVERNMENT CODE ENFORCEMENT NOTICES

Florida Statutes Section 162.12, as amended in 2012, sought to expand the required notice provisions for code enforcement activities.[85] This statute provides that all notices must be sent to an alleged violator by "[c]ertified mail to the address listed in the tax collector's office for tax notices, or to any other address provided . . . to the local government" by the property owner.[86] For real "property owned by a corporation, notices may be provided by certified mail to the registered agent of the corporation."[87] If "notice sent by certified mail is not signed as received within [thirty] days after the date of mailing, [the] notice may be provided by posting" under the procedures specified in Florida Statutes Section 162.12.[88] Under prior law, notice was required to be sent to both addresses, and if the notice was not signed for as received within the time stated in the statute, then posting or notice by publication under the procedures specified in Florida Statutes Section 162.12(2) was required.[89]

84. *See e.g. id.* at 27, 30 (holding that a clerk of court was entitled to assert an affirmative defense of judicial immunity); *Andrews*, 768 So. 2d at 1263 (finding that the defense of judicial immunity was available for a parole commission when it acted within its quasi-judicial role); *Montejo*, 935 So. 2d at 1267–1265, 1270 (holding that the defense of judicial immunity did not shield a hospital from a false imprisonment claim when it acted on a trial court's order and transported a patient to Guatemala); *Kalmanson*, 848 So. 2d at 376, 381 (holding that a sitting judge was protected by judicial immunity in a dissolution of marriage proceeding).

85. *See* Fla. Stat. § 162.12 (setting out the required notice that code enforcement boards must provide to alleged violators).

86. *Id.* at § 162.12(1)(a).

87. *Id.*

88. *Id.*

89. *Little v. D'Aloia*, 759 So. 2d 17, 19 (Fla. 2d Dist. App. 2000) (quoting Fla. Stat. § 162.12 (1997)) (demonstrating that under the notice requirements of the 1997 Florida Statutes Section 162.12, "[e]vidence that an attempt has been made to hand deliver or mail notice . . . , together with proof of publication or posting . . . shall be sufficient to show that the notice requirements . . . have been met").

VII. GRANDFATHERING CONTINUATION OF EXISTING NONCONFORMING USE AND FEDERALISM

Grandfathering an existing nonconforming use to permit its continuation requires a balance between the needs and goals of a local government and the owner. Yet local governments are in the business of eliminating nonconforming usage on account of changing times.[90] What this means is that a local government will consider the facts and circumstances of each individual case in determining if the same land use exists, and if so, whether this land use should be allowed to be continued by the same or a different party in light of the existing ordinance in a particular zoning district.[91] However, what happens if federalism enters into a local government's deliberation in determining if a nonconforming use should be permitted upon sale or transfer of the real property? In *United Real Estate Ventures, Inc. v. Village of Key Biscayne*,[92] the subject real property was used during the Nixon administration and thereafter as a helipad by the federal government.[93] The United States stopped its use of the helipad and conveyed the helipad to a private party, who then continued to use the real property's helipad.[94] The district court ruled that the Nixon administration's use of the helipad, and its subsequent use by the federal government, was immune from local government enforcement on account of the Supremacy Clause of the United States Constitution.[95] Accordingly, the helipad "was not converted into a legal nonconforming use for private individuals once the federal government ceased its use of the helipad" and conveyed it to a private party.[96]

All local governments and states must follow federal law when a conflict arises between federal law and a state constitu-

90. *See* Mark A. Rothenberg, *The Status of Nonconforming Use Law in Florida*, 79 Fla. B.J. 46, 46 (Mar. 2005) (explaining that owners of grandfathered nonconforming use properties often encounter conflict with local governments).

91. *See generally id.* (describing the four methods that Florida courts have recognized to eliminate a nonconforming use).

92. 26 So. 3d 48 (Fla. 3d Dist. App. 2009).

93. *Id.* at 48.

94. *Id.*

95. *Id.* Article VI, Clause 2 of the United States Constitution, known as the Supremacy Clause, establishes the United States Constitution, Federal Statutes, and United States Treaties as "the supreme Law of the Land." U.S. Const. art. VI.

96. *United Real Est. Ventures*, 26 So. 3d at 48.

tion, state statutes, or a local government ordinance.[97] While federal, state, and local governments have their own spheres of responsibility and authority pursuant to federalism, the United States Constitution limits the areas over which the federal government has authority, leaving certain areas to the states and local governments to govern exclusively.[98] In the areas where the federal government does have authority to govern, federal laws generally override state and local laws.[99] In *907 Whitehead Street, Inc. v. Secretary of the United States Department of Agriculture*,[100] the federal appellate court ruled that pursuant to the Interstate Commerce Clause,[101] the Animal Welfare Act of 1966[102] granted the federal government ultimate say and authority over the exhibition of Hemingway cats that are displayed to the public at the Hemingway Home and Museum.[103]

Existing nonconforming uses may be grandfathered by local governments to permit continuation of the property's use, but when real property is owned or controlled by the federal government; when federal law applies pursuant to the Federal Communications Commission, which is authorized to regulate "interstate and international communications by radio, television, wire, satellite[,] and cable in all [fifty] states, the District of Columbia[,] and U.S. territories";[104] or the treatment of animal exhibitions

97. *See English v. Gen. Elec. Co.*, 496 U.S. 72, 78–79 (1990) (discussing the circumstances under which federal law preempts state law, one of which is when state law conflicts with federal law).

98. U.S. Const. amend. X; *see also English*, 496 U.S. at 79 (quoting *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977)) (noting that when the field that is preempted includes "areas that have 'been traditionally occupied by the States,' congressional intent to supersede state laws must be 'clear and manifest'").

99. *English*, 496 U.S. at 78–79. State law must succumb to federal law in three circumstances under Article VI, Clause 2 of the United States Constitution: when explicit statutory language dictates preemption; when state law regulates conduct "in a field that Congress intended the Federal Government to occupy exclusively"; and when state law and federal law actually conflict. *Id.*

100. 701 F.3d 1345 (11th Cir. 2012).

101. Article I, Section 8, Clause 3 of the United States Constitution provides that Congress has the authority to regulate commerce among the states. U.S. Const. art. I, § 8; *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2578–2579 (2012).

102. Animal Welfare Act of 1966, 7 U.S.C. §§ 2131–2159 (1966). The Animal Welfare Act of 1966 was intended to regulate the transport, sale, and handling of specified animals, including dogs and cats, to use for research and other purposes. *Id.* at § 2131. The Act has been amended many times to expand the number and exhibitions of animals. *Id.* (amended in 1966, 1970, and 1976).

103. *907 Whitehead Street, Inc.*, 701 F.3d at 1350–1351.

104. *See* Fed. Commc'n Comm'n, *What We Do*, http://www.fcc.gov/what-we-do (accessed Apr. 27, 2013) (outlining the duties and structure of the Federal Communications Com-

and transportation come into play pursuant to federal regulations,[105] then nonconforming usage is not permitted or controlled by local government laws making the continued use by a successor owner of any purchased property unavailable on account of federalism.[106]

In grandfathering attempts by successor owners for a continuation of nonconforming use, local governments will carefully scrutinize the facts and circumstances;[107] therefore, it is best to purchase the subject real property in any sale subject to the local government's approval and acceptance of the status quo nonconforming use, and thereby obtain a determination if the nonconforming use was in fact ongoing, how long the use may have been dormant, and any other requirements of the local government's codes before closing on the real property. Otherwise, the buyer will purchase the real property subject to the applicable local government ordinance that could extinguish the nonconforming use.[108] As always, assume that the local government will look at any grandfathering claim carefully and strictly in determining if the facts and circumstances permit the owner to continue to use the subject real property in an existing nonconforming use. The best way to do this is to purchase the real property subject to a local government's grandfathering of a nonconforming use.

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mission); *id.* at http://www.fcc.gov/guides/over-air-reception-devices-rule (discussing the prohibitions against governmental restrictions enumerated in Section 207 of the Telecommunications Act of 1996).

105. *See* 7 U.S.C. §§ 2131–2159 (deeming the animals and activities discussed in the Act as either in interstate or foreign commerce or as having a substantial effect on commerce).

106. *See English*, 496 U.S. at 79 (providing that federal law preempts state law to the extent that the state law is in actual conflict with federal law).

107. *See Bd. of Co. Comm'rs of Brevard Co. v. Snyder*, 627 So. 2d 469, 476 (Fla. 1993) (establishing that there must be "competent substantial evidence" presented to the board or local government); Mark P. Barnebey & Bonnie Twardosky Polk, *Quasi-Judicial Land Use Hearings: Does Your Evidence Pass Muster?* 69 Fla. B.J. 42, 46–47 (Mar. 1995) (noting that the judge in a quasi-judicial hearing must carefully analyze the evidence and only rely on evidence which would be considered "substantial competent evidence").

108. *See e.g. United Real Est. Ventures*, 26 So. 3d at 48 (holding that the use of a helipad, which was not transformed into a lawful nonconforming use upon sale to a private party, was subject to local government ordinances).

VIII. CODE ENFORCEMENT OFFICERS AND SEARCH OF PREMISES: THE INTERACTION BETWEEN A SEARCH WARRANT, AN INSPECTION WARRANT, AND AN INJUNCTION

Local code enforcement officers are not authorized to enter onto any private commercial or residential real property to secure and assure compliance with code regulations without the consent of the owner, operator, or occupant of the premises absent a duly issued search warrant or an administrative inspection warrant.[109] If an initial inspection by a code enforcement officer and subsequent finding of a violation by the special magistrate or board have already occurred, and such inspection shows that there is a serious and irreparable threat to the health, safety, and welfare of the community, the special magistrate or board is authorized to enter an order notifying the governing body of the seriousness of the violation.[110] Upon a finding by a board or special magistrate that the violation continues to exist, and that reasonable repairs have not been made by the owner, the local government is authorized to make all reasonable repairs to bring the real property into compliance.[111] Still, the question remaining is: how far may a local government go without the owner's or occupant's consent to enforce a local government's order and make all reasonable repairs?

There are federal and state constitutional implications when gaining entry onto commercial or residential family premises to assure compliance without the issuance of a warrant or the consent of the occupant. In 1967, the United States Supreme Court held in two cases that administrative inspections to detect building code violations must be undertaken pursuant to the issuance of a search warrant if the occupant objects to a warrantless inspection.[112] This broad view has been diminished by subsequent

109. Fla. Att'y Gen. Op. 2009-37, 2009 WL 2733264 at *2 (Aug. 26, 2009); Fla. Att'y Gen. Op. 2002-27, 2002 WL 508796 at *1 (Apr. 4, 2002).

110. Fla. Stat. § 162.06(4).

111. *Id.* at § 162.09(1).

112. *See v. City of Seattle*, 387 U.S. 541, 544–545 (1967) (commercial warehouse); *Camera v. Mun. Ct. of the City & Co. of S.F.*, 387 U.S. 523, 534 (1967) (home). The United States Supreme Court reaffirmed these cases in *Marshall v. Barlow's, Inc.*, in which the Court held that administrative searches violated the Fourth Amendment as to provisions contained in the Occupational Safety and Health Act (OSHA), which authorized federal inspectors to inspect the work area of any employment facility covered by the Act for

United States Supreme Court decisions that have suggested that unannounced inspections pursuant to standards in specific industries are necessary if the safety laws are to be effectively enforced, because most businesses would not object to an inspection.[113] If a business does in fact object and refuse to consent, then a civil court proceeding can be filed asking the court to allow the local government official to gain entry, which will permit the business occupant or owner to further contest the search and argue why entry into the premises should not be permitted.[114]

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safety hazards and violations of regulations without a warrant or other legal process. 436 U.S. 307, 311–313 (1978).

113. Under this general set of rules and instructions, the United States Supreme Court has upheld warrantless searches by administrative authorities in public school searches, drug tests for students enrolled in extracurricular activities, drug tests for public and transportation employees, and searches of government offices, among others. In these instances, the warrant and probable cause requirements have been diffused in favor of a reasonableness approach that balances the government's regulatory interest against the individual's privacy interest. Under these circumstances, the government's interest has been found to outweigh the individual's expectation of privacy. The broad scope of the administrative search exception is demonstrated with a common ground between law enforcement objectives and administrative "special needs," which side with the warrantless search exception to the warrant requirement. *See Bd. of Educ. v. Earls*, 536 U.S. 822, 830–838 (2002) (permitting drug testing for all high school students who participate in extracurricular activities where there was some evidence of drug usage in the school and the student could elect not to participate in the activity rather than submit to the drug test, and noting that students have a lower expectation of privacy once they become enrolled in extracurricular activities); *Ferguson v. City of Charleston*, 532 U.S. 67, 84–86 (2001) (invalidating procedures used to identify and non-consensually test any maternity patient suspected of drug use who came to a public hospital where the policy was aimed at prosecuting drug-abusing mothers and forcing them into drug treatment programs); *N.Y. v. Burger*, 482 U.S. 691, 708–709 (1987) (finding that the state had a substantial interest in stemming the tide of automobile thefts and permitting regulation of vehicle dismantling to stem theft at automobile junkyards); *Donovan v. Dewey*, 452 U.S. 594, 596–597 (1981) (holding that, under the Federal Mine Safety and Health Act, federal officers are permitted to inspect underground mines without advance notice at least four times a year and inspect surface mines at least twice per year, pursuant to extensive regulations as to standards of safety, and if entry is refused, then injunctive relief is an option for the government agency); *Mich. v. Tyler*, 436 U.S. 499, 511 (1978) (holding that no warrant is required for entry by firefighters to fight a fire; once there, firefighters may remain for reasonable time to investigate the cause of the fire).

114. Absent consent by the owner or occupant or exigent circumstances, a search warrant or inspection warrant is required before administrative inspections can take place pursuant to code enforcement proceedings. Most citizens, however, allow inspection of their real property without a warrant because they believe that local governments have the authority to inspect their premises. Implicit in this procedure is that warrants will be sought only after entry is refused. The courts have also recognized a form of "implied" consent that is exclusively applicable to inspections of certain heavily regulated businesses, such as liquor distributors, firearm dealers, operations under the Mine Safety and Health Act, and automobile junkyards. Thus, a local government can argue that an individual's decision to enter into a business subject to heavy government regulation may amount to implied consent to a warrantless inspection authorized by existing statutes or

Florida Statutes Section 933.21 provides a mechanism to gain entry into a dwelling other than an owner-occupied family residence by means of an inspection warrant issued by a person competent to issue search warrants.[115] The inspection warrant must specifically direct local officials to conduct an inspection relating to local government "building, fire, safety, environmental, animal control, land use, plumbing, electrical, health, minimum housing, or zoning standards."[116] Attorney General Opinion 2009-37 suggests that final orders by a special magistrate, the Unsafe Structures Board, and a code enforcement board are ample authority to gain entry into premises other than an owner-occupied residence to make reasonable repairs without the owner's consent to abate a code violation when the violation presents a serious threat to the public health, safety, and welfare, and no further process is required to authorize the governing body to enter the dwelling in order to make the necessary repairs.[117] The Florida Statutes specifically provide that inspection warrants are required to gain entry into premises other than entry to an owner-occupied family residence pursuant to the provisions of Florida Statutes Sections 933.20–933.30.[118] Still, as related to local governments' "building, fire, safety, environmental, animal control, land use, plumbing, electrical, health, minimum housing, or zoning standards," all other places, dwellings, structures, or premises other than a family residence are subject to the provi-

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administrative regulations, or what may be called "special needs" to maintain the health, safety, and welfare of the community. Fla. Att'y Gen. Op. 2002-27, 2002 WL 508796 at *1.

115. Fla. Stat. § 933.21.

116. *Id.* at § 933.20. Florida Statutes Section 933.21 provides a mechanism to gain entry by obtaining an

> 'inspection warrant[,]' [which] means an order in writing, in the name of the people, signed by a person competent to issue search warrants pursuant to [Section] 933.01, and directed to a state or local official, commanding him or her to conduct an inspection required or authorized by state or local law or rule relating to municipal or county building, fire, safety, environmental, animal control, land use, plumbing, electrical, health, minimum housing, or zoning standards.

Id. Florida Statutes Section 933.21 specifically provides that "[o]wner-occupied family residences are exempt from the provisions of [Florida Statutes Sections 933.20–933.30]." *Id.* at § 933.21. As related to municipal or county "building, fire, safety, environmental, animal control, land use, plumbing, electrical, health, minimum housing, or zoning standards," all other places, dwellings, structures, or premises are subject to the provisions of Florida Statutes Sections 933.20–933.30. *Id.* at §§ 933.20–933.21.

117. Fla. Att'y Gen. Op. 2009-37, 2009 WL 2733264 at *2.

118. Fla. Stat. §§ 933.21–933.23.

sions of Florida Statutes Sections 933.20–933.30.[119] Florida law provides less sanctity to enter a business dwelling than entry into an owner-occupied family residence because there is a lesser expectation of privacy.[120]

If local governments' code enforcement officers follow Attorney General Opinion 2009-37 and gain entry without an inspection warrant, absent the exceptions listed below, the local government would run afoul of Florida Statutes Sections 933.20–933.30. The requirements for entry seem to be clear in compelling the issuance of a court order signed by a member of the judiciary before entry into premises is permitted.[121] Thus, a search inspection warrant or court order is required in the absence of the following four circumstances: (1) if the person in control of the property gives his or her permission to the official to enter onto the property; (2) if there are exigent or emergency circumstances that pose an imminent danger to the public's health, safety, and welfare that warrant entering onto the property; (3) if violations are observed in plain view during a lawful observation; and (4) if entry may be made into common areas of a residential building, such as the lobby and common hallways and stairs, because there is no reasonable expectation of privacy in those common areas and they are open to the general public.[122]

The method for gaining entry into a family residence or business premises may seem obtrusive and strict, but there must be a balance between a local government's right to enforce the public health, safety, and welfare, and an occupant's right to privacy in light of federal and state constitutional provisions. There is an acknowledgment by the state legislature and the courts that entry into a family residence must be curtailed according to Florida Statutes Section 933.21.[123] In the absence of the four circumstances stated above to gain entry without a warrant, local code enforcement officers can seek entry into premises through an

119. *Id.* at §§ 933.20–933.21.

120. *See* Fla. Att'y Gen. Op. 2002-27, 2002 WL 508796 at *2 (explaining that, despite the administrative warrant requirement, businesses may be searched without consent or a warrant if that business is such that there is "a legitimate public interest in close regulation" and there is statutory authority for the search).

121. Fla. Stat. §§ 933.20–933.24.

122. *See generally* Eve Brensike Primus, *Disentangling Administrative Searches*, 111 Colum. L. Rev. 254 (2011) (exploring the rules and limits governing administrative searches).

123. Fla. Stat. § 933.21.

inspection warrant that must be signed by a judge in accordance with Florida Statutes Sections 933.20–933.30;[124] or if that is not permissible, then a local government can seek a temporary injunction if it can be shown that the local government will be irreparably harmed if a temporary injunction is not granted, thereby allowing immediate access into the property to carry out and enforce its lawful power to abate a public nuisance that violates the community's health, safety, and welfare by cleaning up the property.[125]

A case on point concerning entry onto real property is *Brinkley v. County of Flagler*,[126] where an animal cruelty investigator and deputy observed animals living in deplorable and inhuman conditions pursuant to an initial inspection and observation prompted by a third-party call advising officers of the animal cruelty.[127] The investigator and deputy arrived with an intent only to conduct a preliminary inquiry after responding to a citi-

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124. Chapter 1, Administration, Section 104.6 (Right of Entry) of the Florida Building Code 2010 provides:

> Where it is necessary to make an inspection to enforce any of the provisions of this code, or where the building official has reasonable cause to believe that there exists in any building or upon any premises any condition or code violation which makes such building, structure, or premises, unsafe, dangerous[,] or hazardous, the building official is authorized to enter the building, structure[,] or premises at all reasonable times to inspect or to perform any duty imposed by this code, provided that if such building, structure[,] or premises are occupied, that credentials be presented to the occupant and entry requested. If such building, structure, or premises are unoccupied, the building official shall first make a reasonable effort to locate the owner or other persons having charge or control of the building, structure, or premises, and request entry. If entry is refused, the building official shall have recourse to every remed[y] provided by law to secure entry.

Loc. Amends. to the Fla. Bldg. Code 2010 (Fla.) § 104.6.1 (2012) (available at http://www.pbgfl.com/filestorage/74/120/2010_FBC_1_adpoted_16.pdf) (typeface altered). Further, Section 104.6.2 provides:

> When the building official shall have first obtained a proper inspection warrant in accordance with Chapter 933, [Florida Statutes] or other remedy provided by law to secure entry, no owner or occupant or any other persons having charge, care[,] or control of any building, structure, or premises shall fail or neglect, after proper request is made as herein provided, to promptly permit entry therein by the building official for the purpose of inspection and examination pursuant to this code.

Id. at § 104.6.2 (typeface altered).

125. *E.g. Manatee Co. v. 1187 Upper James of Fla., LLC*, 104 So. 3d 1118, 1121 (Fla. 2d Dist. App. 2012); *Rudge v. City of Stuart*, 65 So. 3d 645, 646–647 (Fla. 4th Dist. App. 2011).

126. 769 So. 2d 468 (Fla. 5th Dist. App. 2000).

127. *Id.* at 469.

zen's complaint.[128] The local government official and deputy gained access to the real property after hearing and observing horrible conditions existing on the premises that included dead animal carcasses, living and dead rats, vermin infestation, widespread animal waste, live dogs and caged birds in distress, and hordes of unremoved household garbage.[129] After being called by the investigator and the deputy, the county animal control supervisor arrived at the house with a veterinarian to assess the dogs' health, which ultimately resulted in removal of the animals to the Flagler County Human Society for their own welfare.[130] The County brought an action against the animal owner, seeking an injunction enjoining her from possessing animals, which was granted in the circuit court.[131] The case was appealed to the district court, which found that the situation was an emergency, thereby allowing the code enforcement/animal control personnel to gain access to the property, and ruled that the owner received due process pursuant to after-the-fact hearings in a civil court proceeding.[132] Although the district court did not rule on whether the existing animal abuse would carry over to a criminal context, based upon the facts surrounding the entry onto the premises, it would appear that if code enforcement officers lawfully entered onto the real property, there should be no reason why the fruits of the entry onto the real property should be excluded on account of United States Constitution Amendment IV or Florida Constitution Article I, Section 12.[133] The reason is that in an administra-

128. *Id.* at 471.
129. *Id.* at 470.
130. *Id.*
131. *Id.*
132. *Id.* at 472.
133. *See* U.S. Const. amend. IV (providing that people have the right "to be secure in their persons, houses, papers, and effects[ ] against unreasonable searches and seizures"); Fla. Const. art. I, § 12 (incorporating the same rights contained in Amendment VI of the United States Constitution with the addition of a protection "against the unreasonable interception of private communications by any means"). The presence of building code officers who seize non-contraband items unrelated to an occupant's criminal conduct from his or her residence after execution of a search warrant where deputy officers seized illegal drugs should not render the search conducted pursuant to the search warrant invalid. *State v. Marr*, 95 So. 3d 394, 395 (Fla. 3d Dist. App. 2012). Although *Marr* is one case that upheld the criminal search and seizure, as well as the code enforcement conduct, local governments, as well as criminal law enforcement agencies, should act with care and caution before entering households or business premises. *Marr* suggests, as always, that gaining entry into household premises is based on the unique facts and circumstances of each particular case. Had the code enforcement inspection occurred before the search

tive search, the warrant and probable cause showing are replaced by a requirement showing a neutral plan for execution, a compelling governmental need, the absence of less restrictive alternatives, and reduced privacy rights.[134] Still, a local government should proceed cautiously and seek to obtain an inspection warrant or court order from a duly authorized judge, absent one of the four exceptions, in order for a code enforcement officer to gain entry onto and into the premises.

IX. FUNDAMENTAL AND PROCEDURAL DUE PROCESS: OPPORTUNITY TO BE HEARD ON APPEAL

Fundamental due process requires reasonable notice and a fair and meaningful opportunity to be heard.[135] Florida courts have held that the quality of due process that must be afforded in a quasi-judicial hearing differs from that accorded at a full judicial hearing.[136] Florida law also mandates that quasi-judicial hearings be conducted in compliance with applicable open meetings and Sunshine laws.[137] Although quasi-judicial proceedings are not strictly controlled by the rules of evidence[138] and the rules of civil procedure,[139] certain standards of fundamental fairness must be followed in order to afford due process.[140] Florida courts emphasize that fundamental due process—notice of charges, an

warrant was executed by deputies or if contraband was seized by code enforcement officers, then the inspection or search and seizure may have been found to be unlawful and subject to suppression, although the local government could argue that it acted under the exceptions of a warrant requirement. *See supra* nn. 114–122 and accompanying text (highlighting the exceptions to the administrative search warrant process and the interplay with the criminal search warrant process). Although code enforcement officers do not act in a criminal context, if their conduct is tied to criminal law enforcement deputies, the search and seizure of premises where contraband is found during an inspection of premises may be unlawful and subject to suppression. *See supra* nn. 112–122 and accompanying text (explaining the distinctions and connections between criminal law searches and administrative code enforcement searches).

134. *See supra* nn. 113–122 and accompanying text (describing the warrant process for administrative proceedings and the applicable exceptions).

135. *Keys Citizens for Responsible Gov't, Inc. v. Fla. Keys Aqueduct Auth.*, 795 So. 2d 940, 948 (Fla. 2001).

136. *Lee Co. v. Sunbelt Eqs., II, Ltd. P'ship*, 619 So. 2d 996, 1002 (Fla. 2d Dist. App. 1993) (quoting *Jennings v. Dade Co.*, 589 So. 2d 1337, 1340 (Fla. 3d Dist. App. 1991)).

137. Fla. Stat. § 162.07(1).

138. *Id.* at § 162.07(3); *Seminole Entm't Inc. v. City of Casselberry*, 811 So. 2d 693, 696 (Fla. 5th Dist. App. 2001).

139. *Havlicek*, 57 So. 3d at 902.

140. Fla. Stat. § 162.07(3).

opportunity to dispute charges at an administrative hearing, and findings upon adjudication—is all that is required to a landowner in a quasi-judicial code enforcement proceeding.[141]

If an aggrieved party decides to appeal, however, a landowner retains his or her right to fundamental due process, which has required the appellate court to permit the appealing party to obtain an adequate record on appeal.[142] In *Kirrie v. Indian River County Code Enforcement Board*,[143] the administrative board found the owners in violation for maintaining a garage addition attached to the warehouse on the owners' real property, which was contrary to the approved site plan.[144] The code enforcement adjudication was appealed to the circuit court, where the owners requested an opportunity to supplement the record on appeal with the local government transcript of the hearing and an appendix pursuant to the applicable appellate rule.[145] The circuit court refused to grant the owner an extension of time to supplement the record with an appendix, and thereafter affirmed the appeal without opinion and rejected a motion for rehearing to supplement the record with an appendix.[146] The district court ruled that the circuit court had denied the owners due process when it affirmed the code violation without ruling on the owners' pending motion to supplement the record.[147] In its decision, the district court ruled that a summary disposition without allowing a party to obtain a complete record on appeal deprived the owners of procedural due process, thereby thwarting review of the owners' appeal on the merits.[148]

A real property owner's failure to appeal a special magistrate's administrative order finding him or her to be in violation of county codes as to a downstairs livable unit on his or her real property does not bar the owner from appealing subsequently

141. *Michael D. Jones, P.A. v. Seminole Co.*, 670 So. 2d 95, 96 (Fla. 5th Dist. App. 1996); *see also* Fla. Stat. §§ 162.06(2), 162.07(4) (stating that the violator must be given notice of the hearing and that the enforcement board will use evidence of record to issue findings of fact and a final order).

142. *See DSA Marine Sales & Serv., Inc. v. Co. of Manatee*, 661 So. 2d 907, 909 (Fla. 2d Dist. App. 1995) (holding that the failure to provide DSA with "a reasonable time to assemble a complete record deprived DSA of procedural due process").

143. 104 So. 3d 1177 (Fla. 4th Dist. App. 2012).

144. *Id.* at 1178.

145. *Id.* at 1178–1179.

146. *Id.* at 1179.

147. *Id.*

148. *Id.* at 1179–1180.

entered enforcement orders denying the motion to stay and imposing a fine and lien, even if the subsequent orders are based on an earlier un-appealed violation order.[149] In *Hardin v. Monroe County*,[150] the district court ruled that as long as the owner filed a timely appeal from a subsequently entered enforcement order, he or she was entitled to appeal those special magistrate enforcement rulings, even if no appeal was filed from entry of the initial special magistrate violation order.[151]

X. CONSTITUTIONAL CHALLENGE TO LOCAL GOVERNMENT ORDINANCE

Florida Rule of Civil Procedure 1.071, as amended, provides that a party who contests the constitutionality of a state statute or local government ordinance must "file a notice of constitutional question . . . [and] serve the notice and the pleading . . . on the Attorney General or the state attorney of the judicial circuit in which the action is pending."[152] Although the Attorney General and state attorney are not required to be joined as parties, these law enforcement agencies must be given an opportunity to participate in the pending litigation.[153]

May a special magistrate or code enforcement board determine the constitutionality of an ordinance that is being used as a basis to prosecute a code enforcement violation? Special magistrates and code enforcement boards are not authorized to determine the constitutionality of an ordinance.[154] Instead, their function is to determine if there is a violation of the local government ordinance that forms a basis to take action against the landowner.[155] To allow a special magistrate or code enforcement board to rule on the constitutionality of an ordinance would vio-

149. *Hardin v. Monroe Co.*, 64 So. 3d 707, 711 (Fla. 3d Dist. App. 2011).
150. 64 So. 3d 707.
151. *Id.* at 711.
152. Fla. R. Civ. P. 1.071.
153. *Id.*
154. *Key Haven Associated Enters., Inc. v. Bd. of Trustees of the Internal Improvement Trust Fund*, 427 So. 2d 153, 157 (Fla. 1982) (superseded by statute on other grounds as noted in *Bowen v. Fla. Dep't of Envt'l Reg.*, 448 So. 2d 566, 569 (Fla. 2d Dist. App. 1984)).
155. Fla. Stat. §§ 162.02, 162.03(2).

late the separation of powers doctrine as provided in Florida Constitution Article II, Section 3.[156]

Another reason why a special magistrate may not rule on the constitutionality of a local government ordinance exists in Florida Constitution Article V, Section 1, which provides that the judicial power of the state is exclusively vested in the Florida Supreme Court, the district courts of appeal, the circuit courts, and the county courts.[157] There are no other courts that may be established by the state, any political subdivision, or any municipality.[158] The constitutional provision permits that "[c]ommissions established by law, or administrative officers or bodies[,] may be granted quasi-judicial power in matters connected with the functions of their offices."[159] None of these administrative bodies, including a special magistrate or code enforcement board, can replace the functions and express authority of the courts.[160]

The forum that may be used to contest the facial and as applied constitutionality of an ordinance is the circuit court in a declaratory judgment action.[161] Should the constitutionality of the ordinance be challenged in a certiorari appellate proceeding, it will be necessary to raise the issue throughout the certiorari appeal, or else the appellate court may refuse to give consideration to an issue not raised below.[162] In so doing, the landowner cannot be accused of waiving a claim to the constitutionality of the ordinance if a certiorari appeal is taken to the circuit court from the local government's quasi-judicial ruling, or of failing to exhaust administrative remedies in a certiorari appellate court proceeding before challenging the ordinance in an original action

156. Fla. Const. art. II, § 3; *see also Key Haven Associated Enters., Inc.*, 427 So. 2d at 157 (stating that judicial intervention in the administrative process must be restrained to ensure proper separation from the executive branch).

157. Fla. Const. art. V, § 1.

158. *Id.*

159. *Id.*

160. *Id.*

161. *Miami-Dade Co. v. Omnipoint Holdings, Inc.*, 863 So. 2d 195, 199 (Fla. 2003) (citing *First Baptist Church of Perrine v. Miami-Dade Co.*, 768 So. 2d 1114, 1115 n. 1 (Fla. 3d Dist. App. 2000)).

162. *Id.* at 200. The Supreme Court suggested that in non-certiorari claims to challenge quasi-judicial decisions, the losing party may bring such claims either concurrently or separately in a petition for writ of certiorari and a separately filed lawsuit. *Id.* at 198–199. The high Court, however, did suggest that a duly filed circuit court action challenging the constitutionality of an ordinance should be filed against the local government. *Id.* (citing *First Baptist Church of Perrine*, 768 So. 2d at 1115 n. 1).

in circuit court.[163] Florida law appears to permit parties to bring claims challenging quasi-judicial actions either concurrently in a certiorari appeal to the circuit court or in a separately filed lawsuit.[164] Code enforcement boards and special magistrates are legislatively created and are provided with quasi-judicial powers.[165] If a special magistrate ruled upon the constitutionality of a legislative enactment by a local government commission, that conduct would violate the separation of powers doctrine as well as the right to be heard by a fair and impartial tribunal.[166]

XI. CIRCUIT COURTS CANNOT INVADE THE FACT-FINDINGS OF CODE ENFORCEMENT PROCEEDINGS

A circuit court cannot invade the fact-finding province of a special magistrate code enforcement proceeding in a certiorari review appellate proceeding.[167] In *Monroe County v. Carter*,[168] the circuit court reweighed the special magistrate's credibility assessments and findings that the owner did not prove that the code enforcement board had prior knowledge of the owner's land use that thereby precluded code enforcement from taking action to require removal of the offending use on account of the owner's claims of estoppel and laches against the local government.[169] The circuit court reweighed the evidence and concluded that the special magistrate should have imputed the Monroe County Property Appraiser records to the county code enforcement office and that the code enforcement office knew, or should have known, of the code violations; therefore, by knowing about the unlawful use of the subject real property, code enforcement refused to file charges

163. *See id.* at 199 (stating that the appellate court properly refused to exceed the scope of its second-tier certiorari review by considering a constitutional challenge to an ordinance when that issue was not raised in the circuit court).

164. *Id.* at 198–199.

165. Fla. Const. art. V, § 1; Fla. Stat. § 163.03; *supra* nn. 154–157 and accompanying text.

166. *See* Fla. Const. art. II, § 3 (mandating that no member of one branch of government shall encroach upon the powers of another branch of government).

167. *See Monroe Co. v. Carter*, 41 So. 3d 954, 957 (Fla. 3d Dist. App. 2010) (holding that the trial court should not have disturbed the special magistrate's findings of fact because they were supported by competent substantial evidence).

168. 41 So. 3d 954.

169. *Id.* at 956–957.

for years, thereby precluding it from taking action in the case.[170] The district court reversed the circuit court and concluded that as a matter of law, based on the special magistrate's findings, code enforcement did not know about the other government agency's records, because "mere notice to one independent office or agency of government is not imputed to another such office," and that the evidence suggested that code enforcement did not know what the Monroe County Property Appraiser knew.[171] Further, the special magistrate also found that the owner of the real property was an experienced real estate agent in the local area, and she knew or should have known that she could not reasonably rely on the non-enforcement of violations of the local code as found by the special magistrate, which the circuit court could not reweigh and re-determine.[172] The district court concluded that the "circuit court departed from the essential requirements of law by reweighing the evidence and substituting its judgment for that of the special magistrate"[173] and that enforcement of code violations here were not barred by the doctrines of equitable estoppel and laches.[174]

XII. PRIVATIZATION AND COLLECTION OF CODE ENFORCEMENT LIENS

In recent years, all levels of government, seeking to reduce costs, have begun focusing on the private sector to provide some of the services that are ordinarily provided by the government.[175] The spread of the privatization movement is grounded in the fundamental belief that market competition in the private sector is a more efficient and effective way to provide these services because it allows for greater citizen choice and competition.[176] Where the local government wishes to pursue methods to collect code

170. *Id.* at 956.

171. *Id.* at 957, 957 n. 5 (citing *State v. Smith*, 697 So. 2d 889, 891 (Fla. 4th Dist. App. 1997)).

172. *Id.* at 957.

173. *Id.* at 957–958.

174. *Id.* at 958.

175. Leonard Gilroy, *Local Government Privatization 101*, http://reason.org/news/show/local-government-privatization-101 (Mar. 16, 2010).

176. *Id.*; *see also* Chasity H. O'Steen & John R. Jenkins, *We Built It, and They Came! Now What? Public-Private Partnerships in the Replacement Era*, 41 Stetson L. Rev. 249 (2012) (discussing privatization of municipal infrastructure in Florida).

enforcement liens on its behalf, the local government has options available. For one, the local government can retain a collection agency or law firm to work for a percentage of the money collected on behalf of the city, while the local government remains responsible for making a determination that the lien has been paid and satisfied.[177] If the lien claim is settled, then the local government retains the power to issue a satisfaction or a release.[178]

Another option is that the local government may assign code enforcement liens to a third party pursuant to an arm's-length sale so that the third party is the legal owner, but the local government agrees to sign off on a release upon resolution of collection efforts.[179] In *Ismael v. Certain Lands upon Which Special Assessments Are Delinquent*,[180] an individual lienholder of municipal liens brought an in rem foreclosure action against the owner of the property and obtained a default final judgment.[181] The district court held that the buyer of the liens had standing to commence an in rem foreclosure action against the real property and its owner, even though the statute governing such actions required that they be brought in the name of the local government whose special assessments were being enforced.[182] Thus, according to *Ismael*, as long as the local government attorney strictly follows the local government ordinance granting him or her authority to assign the local government's right to collect special assessment liens, a private party can purchase the lien certificates from the local government on multiple properties upon which special assessments are outstanding.[183]

Ismael is not inconsistent with the expanding authority of local governments, which are not prohibited from selling and assigning liens to third parties for the right to collect local government liens in lieu of a local government's attempt to collect

177. Fla. Att'y Gen. Op. 2001-09, 2001 WL 175937 at *2 (Feb. 22, 2001); Fla. Att'y Gen. Op. 99-03, 1999 WL 20660 at *1 (Jan. 15, 1999).

178. Fla. Stat. § 169.02(3); Fla. Att'y Gen. Op. 2001-09, 2001 WL 175937 at *2; Fla. Att'y Gen. Op. 99-03, 1999 WL 20660 at *1.

179. Fla. Att'y Gen. Op. 2001-09, 2001 WL 175937 at *2; Fla. Att'y Gen. Op. 99-03, 1999 WL 20660 at *2.

180. 51 So. 3d 583 (Fla. 3d Dist. App. 2010).

181. *Id.* at 584–586.

182. *Id.* at 585.

183. *Id.*

liens on its own.[184] This expansion for collection purposes is also attributable to Florida law because statutory rights are freely assignable in the absence of an express statute or prohibition that is against public policy.[185] So, in essence, the question is why should a local government not assign or sell a statutory lien to a third party for collection if it is cost effective, efficient, and done at arm's length in lieu of attempting to collect the lien deficiency itself?

XIII. CODE ENFORCEMENT OFFICERS AND FIREARMS

A code inspector is authorized to initiate enforcement proceedings before a code enforcement officer or board,[186] and his or her power does not include the authority to arrest.[187] Assuming that there are violations, penalties imposed by the administrative hearing officer or board can only include noncriminal penalties.[188] While employees or agents who are designated as code enforcement officers may include law enforcement officers, Florida law does not grant a code enforcement officer with the power to arrest or subject the code enforcement officer to the provisions of Florida Statutes Sections 943.085–943.255.[189] In Attorney General Opinion 2012-14,[190] the question was whether a code enforcement officer was authorized to carry a firearm as part of his or her employment as a code enforcement officer.[191] The opinion stated that code enforcement officers were not law enforcement officers, because the state legislature preempted the field of firearms and ammunition regulation from local governments.[192] The opinion further provided that a law enforcement officer employed as a

184. Fla. Att'y Gen. Op. 2001-09, 2001 WL 175937 at *2; Fla. Att'y Gen. Op. 99-03, 1999 WL 20660 at *2.

185. *Ismael*, 51 So. 3d at 585 (citing *VOSR Indus., Inc. v. Martin Props., Inc.*, 919 So. 2d 554, 556 (Fla. 4th Dist. App. 2005)).

186. Fla. Stat. § 162.06(1).

187. *Id.* at § 162.21(2).

188. *Id.* at § 162.02.

189. *Id.* at § 162.21(2).

190. Fla. Att'y Gen. Op. 2012-14, 2012 WL 1495316 (Apr. 25, 2012).

191. *Id.* at *1.

192. *Id.* at *3; *see* Fla. Stat. § 790.33(1) (expressly providing that the legislature preempts the entire field relating to the regulation of firearms and ammunition); *Penelas v. Arms Tech., Inc.*, 778 So. 2d 1042, 1045 (Fla. 3d Dist. App. 2001) (affirming the trial court's dismissal of the county's complaint, determining that the county was trying to use the court's injunctive power as a roundabout way to directly regulate firearms, which is expressly preempted by the state legislature).

code enforcement officer does not act as a law enforcement officer when he or she carries out code enforcement officer duties in light of Florida Statutes Section 162.21(2),[193] which provides that designation of an employee as a code enforcement officer does not provide him or her with the powers extended to law enforcement officers under Florida law.[194] The Attorney General concluded that a code enforcement officer was not entitled to carry a firearm within the scope of his or her job as can a law enforcement officer.[195] However, a code enforcement officer duly certified as a law enforcement officer, and who is authorized to carry a firearm as part of his or her position as a law enforcement officer, is authorized to carry a firearm, but by doing so, the individual does not act as a code enforcement officer.[196]

XIV. CONCLUSION

When writing an article on existing or developing caselaw for a law journal, it is always best to aim for completeness. In many instances, it is not necessary to "start from scratch," but it is a good idea to provide background information about how any decision came about and how a court reached its conclusion. Rarely does any law review article end discussion about a topic. Instead, precedent and deviations from precedent continue to evolve as the law is developed by the courts, statutes are developed by the legislative process, and regulations are issued by administrative agencies. Code enforcement proceedings have become a potent and powerful arsenal in local governments' attempts to obtain compliance with local government codes.[197] Ever since 2008 when

193. Fla. Att'y Gen. Op. 2012-14, 2012 WL 1495316 at *3.

194. Fla. Stat. § 162.21(2). Florida Statutes Section 162.21(2) specifically provides:

> A county or municipality may designate certain of its employees or agents as code enforcement officers. The training and qualifications of the employees or agents for such designation shall be determined by the county or the municipality. Employees or agents who may be designated as code enforcement officers may include, but are not limited to, code inspectors, law enforcement officers, animal control officers, or firesafety inspectors. Designation as a code enforcement officer does not provide the code enforcement officer with the power of arrest or subject the code enforcement officer to the provisions of [Sections] 943.085–943.255.

Id.

195. Fla. Att'y Gen. Op. 2012-14, 2012 WL 1495316 at *3.

196. *Id.*

197. *See* Fla. Stat. § 162.02 (providing the legislative intent behind the creation of code enforcement boards); *see generally* Frank S. Alexander & Leslie A. Powell, *Neighborhood*

the economic crisis occurred in Florida and the United States, working the frontlines of the foreclosure crisis were local government code enforcement officials as they attempted to maintain order and stabilize neighborhoods from the increasing social and economic harm of vacant and abandoned properties coming from deteriorating neighborhoods and the foreclosures in the neighborhoods.

The purpose of this Article is to educate public- and private-sector attorneys in this important area of the law. Local government code enforcement officers have the legal responsibility to enforce a wide array of building, housing, and real property maintenance codes, and to administer special nuisance abatement processes in accordance with fundamental due process principles.[198] Although the current foreclosure and economic crisis has helped to drain local governments' resources and tested the limits of code enforcement's legal authority and policy directives, local governments' purpose has always been and continues to be to obtain compliance with code violations, not to augment their coffers with excessive fines that will be paid for by real property owners.[199] Local government code enforcement officers and real property owners are necessary participants in maintaining compliance with local government codes, and should violations occur, both have to serve in a public-private partnership to help maintain stability of the neighborhoods. Fundamental due process must be exercised by local governments in determining if violations exist. If there is no basis to support a violation, then code enforcement procedures should not begin, or if they are filed, then they should be dismissed. If violations do exist, however, then local governments should proceed to ensure that compliance occurs as expeditiously as possible with an understanding that compliance can be financially costly to the owner. There is no other way in which to make certain that local governments' neighborhoods maintain solidity and stability in lieu of losing their luster for preservation of the community's quality of life.

Stabilization Strategies for Vacant and Abandoned Properties, 34 Zoning & Plan. L. Rpt. 8-1 (Sept. 2011) (discussing community reforms needed to address the foreclosure crisis).

198. Fla. Stat. §§ 162.06(1), 162.21(3)(a).

199. *Id.* at § 162.02.