



Preparing for the aftermath: The evidentiary challenge



Background and Scope of Session

- > Murky area of law
- > Reasons you want to win below
- > Litigation options
- > Testifying and non-testifying experts
- > Discovery
- > Protecting yourself

Litigation Options

- > Administrative remedies
 - Must be exhausted or must be futile
 - Local level
 - Administrative Procedure Act
 - Land development regulation (Fla. Stat. § 163.3213)
- > De novo review in trial court
 - Constitutional claims
 - Vested rights
 - Regulatory takings
 - Fla. Stat. § 163.3215 (materially altering use, density, or intensity, and inconsistent with comprehensive plan)
- > Petition for writ of certiorari (review on the record)
 - Most common

Quasi-judicial

- > What is it?
 - Judicial type proceeding
 - Applies a general rule or policy
 - Not formulation (legislative)
 - Different standard
 - Evidence
 - Right to cross-examine
 - Might be hard to tell sometimes
 - Nature of challenge
 - Interpretation or application of an ordinance versus validity of an ordinance
 - Disclosure of ex parte communications
 - Public Records Act; Sunshine Law

Quasi-judicial

- > Many quasi-judicial hearings you will attend in the land use context will be reviewed on the record—certiorari (no new evidence or argument)
 - Rezoning
 - Special use exceptions
 - Variances

Quasi-judicial

- > Others will be *de novo* (new evidence and argument)
 - Consistency of development order with Comprehensive Plan (*Pinecrest v. Shidel*, 795 So.2d 191) (Poor man's stay)
 - Declaratory judgment actions
 - Administrative challenges
 - Legislative actions subject to fairly debatable standard
 - Deferential standard
 - Reasonable persons could differ as to its propriety

Preparing for your hearing

- > Know the rules (know the policies, procedures, and practices)
 - Procedural rules
 - Forum
 - Rehearing/administrative appeal process
 - Land development code
 - Procedural publications
 - Exhaust administrative remedies
 - Customs
 - Understand your due process rights
 - Don't forget the Florida Constitution
 - Robert's Rules of Order

Preparing for your hearing

- > Get your arguments and evidence in the record
 - Fact witnesses
 - Expert witnesses
 - Make sure you qualify them
 - Challenge may be on the record
 - Make sure what you need is in the record
 - Arguments not made could be waived
 - Supplement with written materials
 - Know when to submit

Preparing for your hearing

- > Know your burden of proof
 - Burden of proof
 - Common-law
 - Ordinances
 - Preponderance of evidence

Preparing for your hearing

- > Know your burden of proof
 - Rezoning
 - Burden on applicant
 - Consistent with comprehensive plan
 - Met all procedural requirements of the zoning ordinance
 - Burden on government
 - The existing zoning accomplishes a legitimate public purpose
 - Refusal to rezone is not arbitrary, discriminatory, or unreasonable

Preparing for your hearing

- > Know your burden of proof
 - Special use/exception
 - Burden on applicant
 - Consistent with comprehensive plan
 - Use is authorized as a special use
 - Met all statutory criteria for the exception
 - Burden on government
 - Criteria was not met
 - Adverse to the public interest

Preparing for your hearing

- > Know your burden of proof
 - Variances
 - Burden on applicant
 - Demonstrate an exceptional and unique hardship on the individual land owner not shared by other property owners in the area
 - Meet local ordinance requirements

Putting on your case

- > Things you want at the hearing
 - Checklist or outline covering all required proofs
 - Witnesses
 - Fact
 - Expert
 - Consulting
 - Documents
 - CV's for expert qualification
 - Any law on which you are relying
 - Court reporter

Putting on your case

- > Expert witnesses
 - Qualify
 - Treat all experts like testifying experts
 - Treat all experts like testifying experts until you decide whether they will testify or not (will determine discoverability later on)
 - Subject matter must be beyond the common understanding of the average layman
 - Show a discernable, factually-based chain of underlying reason
 - Certain, not conjectural
 - Subject to cross-examination

Putting on your case

- > Expert witnesses
 - Florida's adoption of *Daubert*

90.702 TESTIMONY BY EXPERTS

If scientific, technical, or other specialized knowledge will assist the trier of fact in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify about it in the form of an opinion or otherwise, if:

- (1) The testimony is based upon sufficient facts or data;
- (2) The testimony is the product of reliable principles and methods; and
- (3) The witness has applied the principles and methods reliably to the facts of the case.

Putting on your case

Frye	Daubert
Applies to new or novel theories	Applies to all expert testimony
Standard is whether proffered testimony is generally accepted in the scientific community	Standard is whether proffered testimony is based on a reliable methodology
Pure opinion exception (if an expert's opinion relies only on the expert's personal experience and training, the testimony is admissible without being subject to <i>Frye</i>)	<i>Ipse dixit</i> is insufficient (an expert must explain how experience leads to conclusion, why experience is a sufficient basis for opinion, and how that experience is reliably applied to the facts)
Jury or adjudicators determines validity of science	Court or adjudicators act a "gatekeeper" charged with evaluating all proffered expert testimony before it is presented to a jury
	Courts will test the reliability of principles and methods, supporting facts or data, and the application of the principles and methods to the facts of the case

Putting on your case

- > Lay witnesses
 - Can testify on facts
 - Must be fact based
 - Generalized statements in opposition are not proper
 - Opinions are not relevant
 - Do not constitute substantial competent evidence
 - Does not matter how many opinions are provided
 - Cannot provide expert testimony
 - *E.g.*, traffic

Putting on your case

> Presentation

- Present proofs through testimony and documents (create the record)
 - Attorney (testimony may not be evidence unless attorney is sworn, subject to cross-examination, and has proper knowledge of the facts)
 - Client
 - Other fact witnesses
 - Testifying experts
- Build the record
 - Written arguments
 - Documents and visuals

Putting on your case

- > Importance of the record
 - Court reporter (transcript)
 - Establish standing
 - Failure to appear and object means no standing
 - Failure to raise arguments below results in waiver of those arguments
 - Under common law certiorari, the circuit court is restricted to the record and cannot receive for review material not submitted for the lower tribunal's consideration

Review on the record

- > Certiorari review standard
 - Accorded due process of law
 - Complied with the essential requirements of the law
 - Decision is supported by competent substantial evidence
- > Tough review standard
- > Tipsy coachman rule
 - Right result by the wrong reasoning
 - Will be upheld

Review on the record

- > Due process of law (no single test to determine if met)
 - Meaningful opportunity to be heard when a deprivation of rights occurs
 - Must be a deprivation of rights
 - Not the same as that of a full judicial hearing
 - Certain standards of fairness must be adhered to
 - Notice of hearing and issues
 - Complies with Sunshine and Open Meeting laws
 - Government attorney cannot put on case and advise tribunal at the same time
 - *Cherry Communications, Inc. v. Deason*, 652 So. 2d 803 (Fla. 1995)

Review on the record

- > Due process of law (no single test to determine if met)
 - Right to present evidence and call witnesses
 - Right to cross-examine witnesses
 - Right to be informed of the facts on which the tribunal acts
 - Right to consistent treatment (equal protection)
 - Right to have established procedures followed
 - Right to a fair and unbiased hearing
 - No improper questioning or interference by decision-makers

Review on the record

- > Due process of law (no single test to determine if met)
 - Right to a fair application of law
 - Cannot be arbitrary or unfettered
 - Right to challenge ex parte communications
 - Right to rebut presumptions
 - Right to a record
 - Right to an order with findings of fact and applications of law on which to allow judicial review
- > Object to any violations of due process at the hearing

Review on the record

- > Essential requirements of law
 - Application of the right law
 - Right interpretation of law
 - Constitutional interpretation of law
 - Right burden of proof

Review on the record

- > Essential requirements of law
 - Deference to agency interpretation (presumption of correctness)
 - Rule of statutory construction that should be relied on only when a statute or ordinance is ambiguous and reference to extrinsic sources are necessary
 - Upheld unless clearly erroneous or not within range of possible and reasonable interpretation
 - Countervailing rule of construction
 - Interpretation should be in favor of property owner because of a derogation of rights
 - Plain language (clear and unambiguous)

Review on the record

> Competent substantial evidence

“We have used the term ‘competent substantial evidence’ advisedly. Substantial evidence has been described as such evidence as will establish a substantial basis of fact from which the fact at issue can be reasonably inferred. We have stated it to be such relevant evidence as a reasonable mind would accept as adequate to support a conclusion.”

DeGroot v. Sheffield, 95 So.2d 912, 916 (Fla. 1957)

Review on the record

- > Competent substantial evidence
 - Findings of fact must be supported by competent substantial evidence
 - Hearsay evidence may be considered, but cannot be the sole basis for a finding of fact
 - Testimony
 - Authenticated documents

Review on the record

- > Competent substantial evidence
 - Staff recommendations and reports are competent substantial evidence
 - Opinion testimony is not competent substantial evidence
 - Fact-based testimony is competent substantial evidence
 - Testimony by non-experts on expert matters is not competent substantial evidence

Review on the record

- > Competent substantial evidence
 - Competent substantial evidence cannot be reweighed or ignored
 - Quantum of evidence is *any* competent substantial evidence
 - Presence of opposing evidence is irrelevant
 - As long as a tribunal's decision is supported by competent substantial evidence it is presumed lawful

Review on the record

- > Why it's so tough to win after you've lost
 - Due process not the same as a full judicial hearing
 - Notion that there is a presumption of correctness in the decision
 - Any competent substantial evidence requires upholding the decision
 - Courts are not inclined to overturn the rulings of local government officials
 - Limited expertise over a murky area of law

Other litigation options

- > Constitutional challenge
 - Void for vagueness
 - Capable of more than one interpretation
 - Unbridled discretion
 - Substantive due process
 - Pretextual
 - Arbitrary and capricious
 - No police power (not substantially related to legitimate health, safety, or welfare concerns)
 - Equal protection
 - Federal Civil Rights
 - A Constitutional or federally protected right is violated

Other litigation options

- > Vested rights (Declaratory judgment and Writ of mandamus)
 - Equitable estoppel
 - In good faith
 - Relied on an act or omission of the government
 - Made a substantial change in position or has incurred such extensive obligations that it would be inequitable or unjust to destroy the right acquired
 - Bad faith denials
- > Regulatory takings and Bert Harris Act claims

Other litigation options

- > Land Use Dispute Resolution Act/Mediation of challenges (70.51, F.S.)
 - Unreasonable or unfairly burdening development orders or enforcement actions
 - 30 days to apply
 - Statement of impact
 - File with elected or appointed head of governmental entity
 - Special magistrate
 - Tolls time for judicial review
 - Magistrate has subpoena power
 - Hearing w/in 45 days

Other litigation options

- > Land Use Dispute Resolution Act/Mediation of challenges (70.51, F.S.)
 - Informal hearing open to public
 - Magistrate acts as facilitator of mediator
 - Magistrate prepares a written recommendation if no resolution
 - Recommendation subject to Public Records Act
 - Statements are offers to compromise
 - Recommendation submitted to governing body
 - Government accepts, modifies, or rejects
 - 165 day limit (unless parties agree otherwise)
 - If dissatisfied may elect to file suit

What court?

- > Circuit Court
 - Certiorari
 - Other options (concurrent jurisdiction)
 - Declaratory and injunctive relief
 - Writ of mandamus
 - Fla. Stat. § 163.3215

What court?

- > Federal Court
 - *Pullman* abstention
 - Fed courts should not adjudicate the constitutionality of state enactments that are fairly open to interpretation until the state court has had an opportunity to pass on them
 - *Burford* abstention
 - Fed courts sitting in diversity should abstain where state courts have greater expertise in a complex area of state law
 - Pendant jurisdiction
 - Federal question

De novo review discovery issues

- > Federal and Florida Rules of Civil Procedure
 - Can discover any matter
 - relevant to any party's claim or defense
 - that is not privileged
 - Requests only need to be reasonably calculated to lead to the discovery of admissible evidence
- > Florida Rules of Administrative Procedure
 - Same standard

De novo review discovery issues

- > Privilege is an evidentiary rule that gives a party or witness the option not to disclose something even though it is relevant
- > Privileges can apply to, among other things,
 - Communications
 - Documents

De novo review discovery issues

- > Attorney-client privilege
 - Communication made with an attorney or his/her agent
 - Could include a non-testifying expert
 - Intended to be confidential
 - For the purpose of seeking legal advice or service
 - The privilege must be protected and asserted
 - Applies provided that the privilege is not waived
 - Disclosure to a third party is a waiver
 - Consulting expert becomes a testifying expert

De novo review discovery issues

- > Attorney-client privilege
 - Does not automatically apply to communications with corporate (in-house) counsel
 - Legal capacity – privilege applies
 - Business capacity – privilege does not apply
 - Mixed communications are problematic

De novo review discovery issues

- > Attorney work product doctrine
 - Tangible materials prepared by an attorney (or agent) in anticipation of, or preparation for, litigation
 - Unless party seeking discovery demonstrates
 - Need for the materials to prepare its case; and
 - It is unable to obtain the substantial equivalent of the materials by other means without undue hardship
 - Qualified protection (fact vs. opinion)
 - The protection must be guarded and asserted
 - Protection applies provided it is not waived
 - Creates a duty to preserve

De novo review discovery issues

- > Attorney work product doctrine
 - Materials prepared by an attorney or his/her agent
 - In anticipation of litigation
 - In preparation for litigation
 - Information to be introduced at trial will not be protected
 - Applies to tangible items that are not privileged
 - Documents
 - Reports
 - Electronic data

De novo review discovery issues

- > Attorney work product doctrine
 - Two types of work product materials
 - Fact work product
 - Facts (*e.g.*, data, photos, etc.)
 - Documents
 - Statements
 - Opinion work product
 - Mental impressions
 - Opinions
 - Conclusions
 - Theories

De novo review discovery issues

- > Attorney work product doctrine
 - Fact work product
 - Limited protection
 - Subject to production if requesting party demonstrates
 - Need for the materials to prepare the party's case
 - It is unable to obtain the substantial equivalent of the materials by other means without undue hardship
 - Opinion work product
 - Almost always protected

De novo review discovery issues

- > Attorney work product doctrine
 - Work product has been applied to
 - Witness statements
 - Notes made by a client at the attorney's direction
 - Research reports assembled to assist in the defense of a case
 - Investigative photographs

De novo review discovery issues

- > Confidential business information or trade secrets
 - Information used in the operation of a business that provides an advantage over those who do not know it
 - Scientific, technical, or commercial information
 - Must be
 - Secret
 - Valuable
 - Used in business
 - Of advantage to the business
 - Take care when submitting CBI and TS to government agencies

De novo review discovery issues

- > Asserting privilege
 - Duty of asserting privilege is claimant's
 - For testimony
 - By objection at deposition, hearing, or trial
 - For documents
 - Assert privilege
 - Withhold document
 - Serve a privilege log
 - Must contain information sufficient to assert privilege

De novo review discovery issues

- > No privilege for testifying experts in discovery
- > Testifying experts are subject to discovery
 - Any information considered by the testifying expert in forming an opinion
 - Notes
 - Calculations
 - Draft reports
 - Any materials intended for use at trial
 - Communications with counsel
 - Inadvertently produced work product (split of authority)
 - Federal rules protect drafts

De novo review discovery issues

- > Suggestions for communications with testifying experts
 - Be careful, they may be discoverable
 - Do not reveal case strategies or any other confidential business information
 - Limit written communications
 - Keep in mind what a written communication may look like to opposing counsel
 - Treat all experts like testifying experts unless or until they are retained solely as a consulting experts
 - Have attorney retain the consulting expert

De novo review discovery issues

- > Communications with non-testifying (consulting) experts
 - Not discoverable
 - Generally protected (see work product analysis)
 - Must take special precautions to ensure the protection
 - Outside counsel should retain non-testifying expert
 - Agreement should reflect retention to assist counsel in providing legal advice in litigation
 - Retention agreement should state consultant's duties
 - Mixed roles are problematic
 - Changed roles require extra precautions
 - Case law supports use of ethical walls

De novo review discovery issues

- > Communications with non-testifying (consulting) experts
 - Best practices (include in retention agreement)
 - Limit written work product and communications to matters covered in retention agreement
 - Limit number of consulting professionals
 - Maintain all communications and work product confidential
 - Communicate with client through counsel or with counsel in attendance

De novo review discovery issues

- > Communications with non-testifying (consulting) experts
 - Best practices
 - Prevent disclosure of confidential information
 - Avoid creating unnecessary documents
 - Provide written work product through counsel
 - Mark communications and work product privileged and confidential
 - Segregate factual documents from analytical documents, work product, or legal analysis
 - Segregate all documents, work product, and work performed from all other consultant files

De novo review discovery issues

- > What is subject to records preservation
 - What company knows or reasonably should know is
 - Unique, relevant evidence that might be useful to an adversary
 - Relevant in the action
 - Reasonably calculated to lead to the discovery of admissible evidence
 - Reasonably likely to be requested during discovery
 - The subject of a pending discovery request
 - Attorney work product claim tension

De novo review discovery issues

> Public Records Act

- "all documents ... regardless of the physical form, characteristics, or means of transmission, made or received pursuant to law or ... in connection with the transaction of official business by any agency" is a public record
- Internally -- Records used to perpetuate, communicate, or formalize knowledge
 - Drafts
 - Personal notes

De novo review discovery issues

- > Public Records Act
 - Public records can be paper or electronic
 - Computer records
 - E-mails
 - Attorney-client communications
 - Anyone can request
 - Requestor does not need a reason to request public records
 - Easy and fast
 - Often used as a form of free discovery

De novo review discovery issues

- > No protection from Public Records Act unless there is a specific exemption
 - Trade secret information
 - Secret
 - Valuable
 - Used in business
 - Advantageous to the business
 - Active criminal investigations
 - Complaints (until investigation is complete)

De novo review discovery issues

- > No protection from Public Records Act unless there is a specific exemption
 - Attorney work product
 - Records prepared exclusively for or in anticipation of litigation or adversarial administrative proceedings
 - Mental impression, conclusion, litigation strategy, or legal theory of the attorney or the agency
 - Exempt until conclusion of proceeding

De novo review discovery issues

- > Public Records Act
 - Externally -- Everything submitted to the State is accessible to the public
 - Unless exempted by the Constitution or statute

De novo review discovery issues

- > Protect documents submitted to the government
 - Provide only what is absolutely necessary
 - See if what you provide can qualify as trade secret
 - Take proactive efforts to protect trade secret documents
 - Mark it
 - Seal it
 - Demand it be kept confidential and state basis (i.e., trade secret)
 - Demand that it not be copied unless necessary

De novo review discovery issues

- > e-Discovery happens
 - Discovery of electronically stored information (ESI)
 - Computer files
 - Native file format
 - Metadata
 - Email
 - Not optional

De novo review discovery issues

- > Protecting yourself from violating represented party rule
 - Lawyer cannot communicate with
 - Officers
 - Directors
 - Managers
 - Employees directly involved in the matter
 - Employees whose acts or omissions can be imputed to the agency
 - About the subject matter of a specific controversy or matter on which a lawyer knows or has reason to know that a governmental lawyer is providing representation
 - Application of the no contact rule to government

De novo review discovery issues

- > Protecting yourself from violating represented party rule
 - Protects against the uncounseled disclosure of information
 - Rule applies to
 - Matters on which litigation has not begun
 - Controversies
 - Specific transactional or non-litigation matters where representation is being provided
 - Attorney should inquire whether you are being represented in the matter
 - Attorney should identify himself as lawyer representing a client
 - You can ask

Conclusion

- > What this all means
 - Lawyers need to win below
 - They want your support
 - Be careful with your communications
 - Written
 - Spoken
 - Ask questions
 - Be prepared for discovery
- > Questions