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Reply to: Venice

August 16, 2016

The Honorable John W. Holic, Mayor
and Members of the City Council
401 West Venice Avenue
Venice, Florida 34285

Re: City's Ability to Address Development

Dear Mayor Holic and Council Members:

Before the summer hiatus, I was asked by Council to outline both what the City could do to control growth as well as the law regarding the City's regulatory ability and responsibility with respect to property rights. Since these topics are inter-related, I thought it best to attempt to address them together. Moreover, since there's a lot to be said on these topics, I thought it best to start with a very general outline and then discuss it with you to see if you would like further elaboration on any portion of it. With that understanding, I offer the following.

The City has two basic powers that apply to land and land use: the police powers which are founded upon regulations that the City determines are necessary to protect the health, safety and welfare of its citizenry ("regulation") and ownership. The exercise by the City of its regulatory powers is heavily controlled by federal and state constitutions, codes, statutes and case law. Ownership is more controlled by perceived need, budgetary constraints and public support.

How regulation works is basically as follows: In compliance with state law, the City enacts a comprehensive plan which describes how the City is intended to develop. The plan articulates what the City intends to be. It establishes, usually in general terms, what uses, how dense and how intense, various areas of the City shall be. The Future Land Use Element is the critical provision of

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the comprehensive plan but other elements, particularly Transportation and Infrastructure, also play critical roles in determining what the City will look like and how it will develop when development is complete.

The comprehensive planning process requires multiple public hearings and state review prior to final adoption. Once adopted, the land development regulations (the ordinances passed to implement the comprehensive plan) as well as all development orders must be in compliance with the comprehensive plan. The comprehensive plan is the single most important document to articulate the City's view of its future and how growth will be addressed.

The land development regulations must implement the comprehensive plan. Unless specifically stated in the comprehensive plan to the contrary, the land development regulations may be more restrictive, but not less, than the comprehensive plan. A property owner should be able to examine a copy of the land development regulations and understand generally what can be done on his or her property.

What can be done with the property is subject to several levels of approval that generally fall into two categories: things that can be built by right and things that require a higher level of review. The additional levels of review are several and include, for example: "conditional use" (does this requested use meet a set of additional criteria), special exception use (the use is normally allowed absent certain adverse impacts to this area) and variance (based upon a higher set of intentionally difficult criteria as the granting of a variance makes legal things that would otherwise be illegal).

When the City establishes its comprehensive plan and land development regulations, it is "setting policy". When it is setting policy, it is a legislative function, meaning that the City has wider authority to establish what the policy should be. You and citizens have the unfettered right to discuss this individually just as a constituent may discuss a proposed law with a state or federal legislator. If the regulation is challenged, courts look to see if there is a "rational basis" for it. If there is, then it will leave it undisturbed unless it impacts other laws including those protecting property rights and values.

The Harris Act was enacted in 1995 by the State of Florida. Prior to the Harris Act, governments could regulate and would not be exposed to damages unless there was a "taking". A taking occurred when the property owner was deprived of all economically productive or beneficial use of the property. This is a very high standard for the property owner to meet to obtain compensation. The State legislature added a new way for land owners to be compensated by local government regulations. This law is known as the Harris Act. The Harris Act exposes the City to

damages if the property owner can show that the actions of the City “inordinately burdened” the “reasonable investment-backed expectation” for the existing use of the property owner. This standard is much easier to meet than a “takings” claim. Thus, since the Harris Act was passed, it has been very difficult for any local government, without paying compensation, to take away rights that a property owner previously enjoyed unless the removal of rights was coupled with additional rights that would protect the value of the property.

When a property owner applies to use his or her property and that application requires board or council approval, the approval process is quasi-judicial and not legislative. In this instance, the City is not setting policy; it is implementing policy on a site-specific application. Florida courts require that process to resemble a court proceeding in order to protect the rights of both the property owner and people affected by the application. The quasi-judicial process requires notice, application of the correct law and competent substantial evidence to support the City's decision. Discussion with citizens of a quasi-judicial application outside a public hearing should be avoided, or at least disclosed, prior to the hearing. Think of the propriety of a judge speaking with a witness for one side without the other side present.

Requiring developers to pay for certain things in connection with a proposed development is also constrained. Federal law makes it clear that any economic requirements imposed upon a development must have a "rational nexus" with the development and be "roughly proportional" to the development's impact upon the City and City services. A recent state law allows a developer to challenge an imposition by the City of an economic requirement several months after the approvals are given by the City, even if the developer promises otherwise at the hearing.

I make this last point to emphasize how much the state has reduced the local government's ability to constrain development using the methods traditionally used by local government.

The second power of local government is property ownership. Here, the City's powers are much stronger as the City is not regulating a private property owner. It is acquiring its own land rights. The City is replete with examples of this (its park system, for example). Thus, if the City wished to establish a use for a property beyond that which it could do through its regulatory powers, it could acquire all or a portion of that property for the intended purpose.

Depending upon its purpose, property acquisition by the City does not need to be full ownership. State law provides for conservation easements and restrictions. The City can also acquire development rights through an easement process.

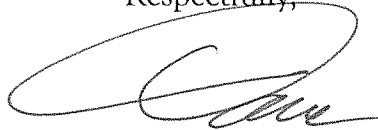
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Acquisition of rights (whether full ownership or easement) may be by purchase, donation or a combination of both. I am not a tax lawyer but I have seen transactions where the property owner donated a portion of the property, was paid for a portion and deducted the value of the donation made to the local government. Acquisition of these rights may be done by agreement with the landowner or through the use of the eminent domain powers of a local government. Eminent domain powers are restricted under state law and are rarely used for acquisitions other than those required for an obvious and immediate public purpose. Road takings are a prime example.

Private non-profits can be established for land acquisition and management. These can, but are not required to, work in partnership with a local government.

This is a very general outline to provide you with a framework for discussion. I will be glad to discuss this with you at a regular meeting or in the meantime individually.

Respectfully,

A handwritten signature in black ink, appearing to read 'D. Persson', with a large, sweeping loop at the beginning.

David P. Persson

DPP/dgb

cc: Edward Lavallee
Lori Stelzer
Jeff Shrum