Legal Opinion : Does changing land use constitute a taking of property rights?

April 11, 2003

The following opinion concerns elimination of golf courses as a permitted use in the agricultural use category but is generally applicable to changes in permitted uses.

Summary

Elimination of golf courses as a permitted use in a land use category would not be a "taking" of private property under the constitutions of the U.S. or Florida, or under Florida's Private Property Rights law unless the disallowance of golf courses leaves any particular landowner with "no economically viable use" of his or her land or truly constitutes an "inordinate burden."

An owner of undeveloped land that is currently in productive use, or which can be put to some other productive use, has neither a Constitutional nor a statutory right to build a golf course on the land. In most, if not all, cases the disallowance of golf courses would not affect the existing use of the land because the land will continue to be allowed to be used for its current use. Second, there is not likely to be a vested right to use the land as a golf course unless there were specific and concrete financial reliance on the provision that is sought to be changed, namely the allowance of golf courses. In short, the proposal to eliminate golf courses in an area would not constitute a violation of property rights unless some extraordinary set of facts existed on any particular parcel. If any such situations were to exist, they could easily be handled by the issuance of a hardship valiance.

Our legal opinion is explained further below.

Down-Zonings Are Not Takings Unless They Leave Almost Nothing

Unless the change in the allowable uses is so drastic as to preclude any economically viable use, local governments may "down-zone" property, or reduce the type, number and intensity of uses allowed without being liable for a "taking" of the property. Smith v. City of Clearwater, 383 So.2d 681 (Fla. 2d DCA 1980) (no taking resulted from the rezoning of a substantial portion of a landowner's property into a restrictive "Aquatic Lands" zone). In Kirby Forest Industries v. United States, 467 U.S. 1, 104 S.Ct. 2187, 81 L.Ed.2d 1 (1984), the U.S. Supreme Court ruled that landowners were clearly subject to changes in the law, stating that a "taking" occurs only when regulatory burdens are "so substantial and unforeseeable...that justice and fairness require that they be borne by the public as a whole." Id. at 14. In Graham v. Estuary Properties, (399 So. 2d 1374 (Fla. 1981), the leading Florida takings case, the Florida Supreme Court found no taking where a wetlands regulation precluded the use of approximately one-half of the

plaintiff's property. Given the legitimate public purpose, the question was "whether the regulation precludes *all* economically reasonable use of the property." Id. at 1380 (there is a taking only when a plaintiff has been deprived of *all* beneficial uses).

To answer directly the question of whether disallowing golf courses would violate property rights, Florida law is clear and unambiguous. Local government may absolutely prohibit a use previously allowed. In Florida, there is no property right to continuation of existing zoning. A land owner has no vested right in a particular zoning classification and must actually have expended monies or have made improvements based on such zoning in order to acquire vested rights. Smith v. City of Clearwater, 383 So.2d 681 (Fla. 2nd DCA 1980).

Florida's First and Second District Court of Appeals, in Glisson v. Alachua County, (558 So.2d 1030 (Fla. 1st DCA 1990) rev. denied, 577 So.2d 1304 (Fla. 1990) and Lee County v. Morales, (557 So.2d 652 (Fla. 2d DCA 1990) rev. denied, 564 So.2d 1086 (Fla. 1990), respectively, have held that local land use decisions which are based on comprehensive plans which are supported by scientific data and analysis substantially advance legitimate state interests and are not arbitrary and capricious. Both cases involved substantial reductions in property values resulting from reductions in the type of land uses and intensities allowed under the zoning code or land use plan, and in neither case was a taking found.

Contrary to what is often claimed, a change in allowable uses is not a taking simply because the fair market value of affected lands is reduced. Zoning regulations and comprehensive plans may be amended so as to increase the restrictions on the use of property, even though the restrictions result in serious financial loss to the owner. There is no taking as long as property owner retains more than a nominal value in the land. Andrus v. Allard, 444 U.S. 51, 66, 100 S.Ct. 318, 62 L.Ed.2d 212 (1979).

Under the Harris Act Government Actions Are Not Takings Unless They are Inordinately Burdensome

In 1985 the Florida Legislature enacted the "Harris Act" as a response to the concern that state or local laws could restrict or limit private real property owner's right at a level below the threshold of a taking under the Florida or United States Constitutions. *The Harris Act: What Relief from Government Regulation Does It Provide for Private Property Owners?* Vivien J. Monaco, 26 Stetson L. Rev. The Harris Act gives somewhat greater rights to landowners by requiring compensation for "inordinate burdens" on the use of land. So, in order to constitute a violation of a landowner's statutory property rights, a newly - enacted prohibition on golf courses in agriculturally - designated land must constitute an "inordinate burden" on a particular landowner. This is defined as a direct restriction or limitation on "the land owner's existing use of the real property, or a vested right to the use of the real property with

respect to the real property as a whole or is left with uses that are unreasonable to the extent that the property is going to have to sustain the brunt of the burden for an ordinance that was enacted for the public at large." Section 70.001(3)(e), Fla. Stat. (2002). In other words, unless the owner was already using the land as a golf course, had spent considerable sums of money trying to develop a golf course in reliance on the existing rules, or owned land which could only be used productively if developed as a golf course, there is no protected right to build a golf course.