The Land Use and Environmental Dispute Resolution Act:

A Diamond in the Rough?

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Introductory Thoughts

Local government attorneys must frequently apply and enforce imperfect ordinances and laws. Sometimes those laws are outdated local ordinances crafted during the time of the horse and buggy or state laws that are the product of the complex and mysterious legislative process. Yet such laws can be the basis to do good things for local government and citizens.

It is against this backdrop that we introduce you to the Land Use and Environmental Dispute Resolution Act of Chapter 70 (hereafter "The Act" which is attached hereto in its entirety as Exhibit "A"). With its imperfections the Act seems at first to be a lump of coal. But, but with a little ingenuity, it can be polished into a diamond that can be used to rescue governments and private property owners with cost effective relief short of litigation and/or time-consuming, mind-numbing appeals. Perhaps, even what may be perceived as the Act's imperfections are rather opportunities for flexibility on issues such as matters the special magistrate can hear and parameters of the hearing process. What follows is our interpretation of the Act, what we see when we peer at it through a creative lens.

Who are the parties to a special magistrate proceeding under §70.51?

Any legal or equitable property owner who believes a development order or an enforcement action of a governmental entity is unreasonable or unfairly burdens the use of the owner's property, may apply within 30 days after receipt of the order or notice of the governmental action for relief.[1] This request for relief must be filed with the elected or appointed head of the governmental entity that issued the development order or that initiated the enforcement action.[2] It is this application for relief which initiates the Chapter 70 phased special magistrate proceedings.

The other mandatory party to the special magistrate proceeding is the governmental entity that issued the development order or that is taking the enforcement action.[3]

The Act recognizes the importance of public participation by allowing contiguous landowners to testify during the special magistrate proceedings.[4] The Act gives an additional nod to the importance of public participation by allowing "substantially affected" persons to participate in the special magistrate proceeding if they participated to some extent at the initial proceeding which resulted in the development order or enforcement action at issue.[5]

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[1] Fla. Stat. §70.51(3).
[2] Id. at §70.51(4).
[3] Id. at §70.51(11).
[4] Id. at §70.51(12).
[5] Id.

Furthermore, the Act specifically provides that the special magistrate process must be open to the public at large although public input from one not a contiguous property owner or "substantially affected" person can be limited by the special magistrate.[6]

Obviously, the potential for public participation of this magnitude can be complicated. However, if properly managed by the special magistrate it is precisely this level of public input which allows the public to feel heard, valued and vested in the resolution or outcome. Flexible interpretation of who may participate or testify at the proceeding can be problematic but will best serve to satisfy the public's desire to hear and be heard, thus addressing head-on any issues concerning the fairness of the proceeding.

The final component of the special magistrate proceeding is the special magistrate. The parties are expected to mutually agree upon the special magistrate within 10 days of the owner filing the request for relief under the Act.[7] The special magistrate need not be a Supreme Court certified mediator but must be a Florida resident and possess experience and expertise in mediation and at least one of the following disciplines: "land use and environmental permitting, land planning, land economics, local and state government organization and powers, and the law governing the same."[8]

What are the components of the special magistrate hearing process?

The Act contemplates a facilitation phase followed by a fact-finding, information-gathering phase.[9] Although not specified in the Act, common sense dictates that these phases be scheduled for different dates. "Logically, if mediation is the goal, the parties should not be required to prepare for an adversarial hearing by bringing all of their witnesses and evidence. Preparation for a hearing that may not occur not only results in unnecessary costs but also creates an adversarial setting that is counterproductive to the spirit and intent of the Act."[10]

Unless the parties agree to a later date, the special magistrate must first convene a facilitation/mediation within 45 days of receipt of the request for relief.[11] It is likely that this hearing will be a hybrid of the mediation process most attorneys are familiar with due to the fact that the session must be open to the public.[12] The management level employee(s) most familiar with the issue should staff this negotiation session with the knowledge that the outcome, if any, will need to be taken before the public body for final approval.

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[6] Id. at §70.51(17).
[7] Id. at §70.51(4).
[8] Id. at §70.51(2)(c).
[9] Id. at §70.51(17)(a) and (b).
[10] Mark S. Bentley, *Understanding the Florida Land Use and Environmental Dispute Resolution Act*, 37 Stetson Law Review 381, 431 (Winter 2008).
[11] Fla. Stat. §70.51(15)(a).
[12] Id. at. §70.51(17).

If relatively few members of the public choose to attend it may be possible to have an opening session with private caucuses to follow with members of the public instructed that they may select which party's caucuses to attend. Certainly, members of the public should not be permitted to attend the caucuses of both parties but rather must choose to caucus with only one. If large numbers of citizens appear to either watch as spectators or participate because they are contiguous landowners or are "substantially affected" persons, the typical mediation process must give way to one large joint session of all the parties, participants and spectators where the special magistrate imparts to all present the importance of active listening, cooperative participation and creative resolution. If properly managed, this joint session can work as a productive brainstorming conference with the parties and participants hearing each other's perspectives and result in a negotiated settlement that addresses in some respect everyone's needs.

If the facilitation/mediation phase is successful and an acceptable resolution is reached, the settlement agreement should specifically express that it is subject to the approval of the local government's commission/council. Approval of the settlement agreement should be expedited at the next available commission/council meeting or perhaps scheduled for a special meeting. Regardless of which sort of meeting is chosen, scheduling of phase two of the special magistrate process (fact-finding and information gathering) should proceed so that hearing dates are secured and preparations begun in the event the local governmental entity does not approve the negotiated settlement. The resulting negotiated settlement agreement is a bit of an anomaly as it is not admissible in court but it is nevertheless a public record because it is subject to the requisite formal approval process before the governing body.

If the facilitation/mediation phase reaches impasse for any reason (ie: public opposition cannot be overcome or the parties are too entrenched in their positions) that phase is to be adjourned and the fact-finding, information-gathering phase should be scheduled for hearing. Similar to what is suggested at the mediation phase, the management level employee(s) most familiar with the issue should staff this hearing session with the knowledge that the resulting special master recommendation will need to be taken before the public body for final approval.

The second phase of the hearing process should be scheduled to allow each party sufficient time to prepare for what really amounts to an adversarial hearing but at the same time recognizing the fact that the entire process must be completed within 165 days unless the period is extended by agreement of the parties.[13] This fact-finding, information-gathering phase looks like the courtroom hearings we are all familiar with except that the formal rules of evidence do not apply and the mediator/facilitator sitting as "judge" can only issue a non-binding recommendation.

[13] Id. at §70..51(23).

The special magistrate can find that the development order or enforcement action at issue is not unreasonable or does not unfairly burden the use of the owner's property and recommend that the order or action remain undisturbed in which event the proceedings ends.[14] Or, the special magistrate can find that the development order or enforcement action is unreasonable or does unfairly burden use of the owner's property in which event, with the owner's consent, the special magistrate can proceed to suggest alternatives to the subject order or enforcement action.[15] Either way, the magistrate's actions serve to encourage the parties' careful thinking about their approach.

The special magistrate's recommendation must be issued within "14 days of the conclusion of the hearing."[16] Within 45 days after receipt of the recommendation the governmental entity must accept, modify or reject the recommendation.[17] Clearly, this acceptance, modification or rejection must be a decision made by the governing body at a public meeting and logistics will dictate whether this meeting can be a regularly scheduled meeting or will necessitate a special meeting. Acceptance and modification must subsequently be approved by the property owner.

Should the governing body choose to accept the recommendation, a property owner will not be required to duplicate the previous processes in which the owner has participated in order to effectuate the recommendation.[18] If a denial were the subject of the special magistrate proceeding and the special magistrate finds the denial unreasonable or unfairly burdensome to the use of the property and recommends approval, the recommendation is presented to the governing body for acceptance of the recommendation and a formally adopted reversal of the previous decision. However, if the special magistrate recommendation were to contemplate a separate and distinct administrative approval process, one which was not previously sought or undertaken, the special magistrate may only recommend that the alternative approval process be initiated. The special magistrate cannot mandate the outcome of that administrative process. The special magistrate's recommendation must recognize the inherent police powers of the governmental entity and not encroach upon those powers and the due process associated with them.

If the government entity chooses to reject the recommendation it must thereafter issue a written decision within 30 days that describes the use or uses available to the subject property.[19] And, rejection is assumed if the government entity fails to act upon the recommendation within 45 days unless that time period is extended by mutual agreement of the parties.[20]

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[14] Id. at §70.51(19).
[15] Id.
[16] Id.
[17] Id. at §70.51(21).
[18] Id. at §70.51(21(a).
[19] Id. at §70.51(22).
[20] Id. at §70.51(21)(c).

Much ado has been made about the fact that the special magistrate's recommendation is non-binding therefore of little value. However, the special magistrate's recommendation serves an important purpose. Because the special magistrate's recommendation is a public record, it, unlike a negotiated settlement agreement between the parties or the testimony offered at the special magistrate proceeding, is admissible in subsequent proceedings.[21] Surely a written recommendation from a special master deemed an expert in the field by the parties and indeed chosen for their expertise and reputation will serve as very persuasive authority in those subsequent proceedings. And, surely that written recommendation serves as a strong signal of a likely final outcome should the matter be further litigated or taken up on appeal. It would seem that a property owner or governmental entity unsatisfied with the recommendation should very carefully evaluate whether further pursuit of the matter will be productive and whether a negotiation of some sort may be in order.

Why should a dissatisfied property owner choose to participate in the special magistrate process and why would a governmental entity elect to bind itself to a special magistrate recommendation?

1) The ability to choose a neutral/arbiter experienced in local government law.

Most important is the parties' ability to select a neutral/arbiter experienced in the specific area of law being brought into question. Very rarely do litigants have the good fortune of being assigned to a judge or panel of judges with expertise in the exact area of the law at issue. This can lead to doubt or misgivings regarding the forthcoming result and oftentimes is one of the factors considered when deciding whether to settle a case before trial. Another important consideration is that relatively few are the number of attorneys now sitting as judges who have specific experience in what can sometimes be the convoluted world of local government law, such as, land use, rezonings, building permits, code enforcement actions, development orders and the like. The Act allows the parties the opportunity to choose a respected neutral to serve two roles, first as facilitator of a compromised resolution, and then, if necessary, as arbiter with authority to issue a recommended order based upon the evidence and drawing upon his or her personal experiences and understanding of the applicable case law.

With a special magistrate the parties' time is efficiently spent exploring resolution options and, failing resolution, presenting the facts of the case to the special magistrate. If chosen wisely, the special magistrate's knowledge of the law and a basic understanding of the administrative and political concerns local governments face are foregone conclusions therefore no time is spent bringing the arbiter "up to speed." The knowledge that the decision-maker is someone of your choice and well-respected in your field, even if the decision is non-binding, is intended to give parties confidence in the fairness and even-handedness of the recommendation.

2) The ability to participate in a negotiation with a finite time line.

[21] Id. at §70.51(20).

As we all have experienced, actions such as petitions for writs of certiorari and requests for declaratory and injunctive relief seem to drag on forever. The files gather dust on our desks and these periods of stagnancy are interspersed with frantic flurries of activity as briefs are being composed, extensions of time are requested, answer briefs are prepared and the applicable appellate rules are debated. The special magistrate process is intended to last 165 days unless the parties agree to extend the applicable time frames. This 165 day period is intended to allow the parties a finite time frame within which to work out their issues before resorting to judicial intervention, a preemptive effort that the judiciary surely appreciates. Moreover, if the parties fail to work out a compromise or reject the special master's recommendation, no significant delay has occurred and subsequent litigation/appeals can timely proceed with the parties moving to the next stage more aware of the strengths and weaknesses of both parties' position.

3) The opportunity to control costs.

It is no secret that state and local governments are now officially facing a budget crisis. Local government attorneys' office budgets are being scrutinized just as all departmental budgets are being examined with a fine tooth comb. Each and every opportunity that local governments have to control costs is being considered (ie: shortening work weeks, eliminating unnecessary phone lines, reducing electrical usage, exploring bulk purchasing options, etc…). Until now many governments have simply accepted that litigation costs by their very nature are unpredictable.

However, our economy is forcing local governments and local government attorney's offices to abandon this reactive approach and pursue more proactive options such as selecting outside counsel with more affordable hourly rates and considering settlements rather than risk the costs of trial and all that is associated with it. One option to add to this list is to more aggressively pursue dispute resolution alternatives. Under the Act's special magistrate procedure, the local government attorneys can prepare for the mediation phase of the process with the cooperation of management staff and likely without the need of outside counsel. Likewise, the adversarial hearing phase, if necessary, may be handled by in-house attorneys which surely represents a cost savings. However, the most obvious cost-saving feature is the avoidance of the uncertainties of litigation such as the expense of discovery, the expense of trial/appeal preparation and the trial/oral argument itself and ultimately, the expense of an unfavorable outcome either in dollars or in precedent. And significantly, the process will facilitate a better informed public in these complex and controversial issues.

There seem to be so many gaps in The Act, how can I best protect my client from these uncertainties?

Admittedly there are uncertainties within The Act such as the owner's burden of proof, the special magistrate's standard of review, fee-splitting, and cost-sharing, just to name a few. A well-drafted tri-party agreement between the special magistrate, government entity and property

owner should serve to resolve each of these uncertainties. The special magistrate can play an instrumental role in proposing this agreement and drafting it.

Concluding Thoughts

The Act has not enjoyed the widespread use which was anticipated upon its adoption in 1995.[22] Although the Act is not the perfect solution to land use disputes, it nevertheless is a cost-effective option. Yet, it remains a buried treasure. Unless and until governments begin noting in development orders and enforcement actions the landowner's right to invoke the Act, its provisions will likely remain undiscovered, and its cost-saving potential will remain unexplored and unknown. Arguably it is the responsibility and duty of governments to notify landowners of their right to invoke the Act. If nothing else, given the state of our economy, it would certainly be in the best interest of governmental entities to point landowners in the direction of the Act rather than toward the courthouse steps.

This offering of the highlights of the Act for the local government practitioner is not intended to be an all-inclusive treatise regarding all aspects of the Land Use and Environmental Dispute Resolution Act. Such treatises do exist and were helpful research tools in the preparation of this summary.[23] It is the purpose of this article to focus on the benefits of the provisions of the Act and the flexibility and creativity, intentional or not, that its barebones framework allows. Given the condition of our national, state and local economies and the tightening of all government budgets, the local government practitioner will soon be mandated by their governing bodies to discover and invent measures to reduce costs. For attorneys the most natural way to control costs is to avoid litigation and the unknown costs associated therewith. The Land Use and Environmental Dispute Resolution Act may well be an undiscovered gem. We suggest you polish it off and see if it is worth adding to your collection of budget-cutting alternatives and approaches in these challenging financial times.

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[22] At or about the time of adoption of Fla. Stat. §70.51, the Florida Conflict Resolution Consortium (hereafter "FCRC") optimistically developed "A Guide to the Use of the Property Rights Special Master Process" (attached hereto as Exhibit "B") and "Model Procedural Guidelines for Special Master Proceedings" (attached hereto as Exhibit "C") to demystify the special magistrate process and encourage its use. Despite those efforts the Act remains woefully underutilized throughout the State.

[23] Bentley, *supra* n. 10.; Mark S. Bentley, *A Guide to Understanding the Florida Land Use and Environmental Dispute Resolution Act;* Martin R. Dix, Richard P. Lee & Alicia M. Santana*, Land Use and Environmental Dispute Resolution: The Special Master, 69 Fla. B.J. 63 (Nov. 1995);* David L. Powell*, An Introduction to Florida's Landmark Law Protecting Private Property Rights;* John N. Conrad and William B. Smith, *Special Master Proceedings for Regulatory Disputes – Pitfalls and Practical Considerations*, Environmental and Land Use Law Section Reporter (April 2002).

EXHIBIT “A”

EXHIBIT “B”

EXHIBIT “C”