Counties--landowner consent for zoning changes

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Date: September 20, 2012

Subject:
Counties--landowner consent for zoning changes

Mr. Mark H. Scruby
Clay County Attorney
Post Office Box 1366
Green Cove Springs, Florida 32043-1366

RE: COUNTIES--ZONING--PLANNED DEVELOPMENTS--COMMUNITY PLANNING ACT--CONSENT REQUIREMENTS--authority of county to adopt ordinance containing other landowner consent requirement for applications for zoning changes. Part II, Ch. 163, Fla. Stat.; Art. VIII, s. 1(f), Fla. Const.; Part II, Ch. 125, Fla. Stat.; s. 125.66(4), Fla. Stat.

Dear Mr. Scruby:

On behalf of the Board of County Commissioners of Clay County, you have requested my opinion on substantially the following questions:

1. In the case of an application to revise the zoning for a portion of a planned development by the owner of said portion, do the provisions of the Community Planning Act, as codified in Part II of Chapter 163, Florida Statutes, authorize a local government to require in its zoning code the consent to the application by some or all of the other individual property owners within the planned development, or by an association of property owners governed under Chapters 718, 719, or 720, Florida Statutes, and operating within the planned development, before the application can be considered for approval?

2. If the answer to Question 1 is in the negative, then in the case of an application to revise the zoning for a portion of a planned development by the owner of said portion, does the common law or any other statutory law authorize a local government to require in its zoning code the consent to the application by some or all of the other individual property owners within the planned development, or by an association of property owners governed under Chapters 718, 719, or 720, Florida Statutes, and operating within the planned development before the application can be considered for approval?

3. In the case of an application to revise the zoning for a portion of a planned development by the owner of said portion, where the planned development is also subject to recorded covenants and restrictions (i) that are private in nature, (ii) that govern use rights and limitations and development standards for all lands within the planned development, and (iii) that give the individual owners of land within the planned development the right to vote on amendments to the covenants and restrictions, does the common law or any other statutory law authorize a local government to require such application to include the favorable outcome of a vote to approve the

filing of the application by all or some fixed percentage of such individual members casting ballots?

In sum:

1. and 2. I am not aware of nor have you drawn my attention to any provision of the "Community Planning Act" which would authorize a local governmental agency to delegate its legislative zoning authority to other land owners by requiring their consent prior to the acceptance of a request for rezoning. In the absence of concern for a particular statutory provision, however, this office will not undertake a broad review of multiple chapters of the Florida Statutes in an attempt to justify what the courts have clearly identified as a suspect practice. Finally, there is no common law right of local governments to impose a consent requirement such as the one you propose on applications for rezoning. Rather, the extent of the zoning power is circumscribed by the grant of power from the Legislature to local governments and contained in Chapters 125 and 166, Florida Statutes.

3. This office will not comment on the terms of private contracts or their enforcement. As addressed more fully herein, consent requirements such as the one you have proposed may constitute an unconstitutional delegation of legislative authority and are not favored in the law and may implicate a number of constitutional rights.

According to your letter, the zoning article of Clay County's land development code provides for planned developments in addition to conventional use categories. The code requires that an application to rezone a tract of land into a planned development must be joined by all owners of the property within the boundaries of the proposed tract. Occasionally, a party owning a portion of a planned development may wish to modify some aspect of the plan as it was previously approved. In order for such party to apply for the modification, the code requires that the application be joined by all of the other owners of property within the boundaries of the planned development, not just the owners of the parcel for which the modification is sought. Without the joinder of all these owners, an application for modification will not be accepted.

The Board of County Commissioners has realized the difficulty of acquiring such third party joinder, especially as a development approaches build-out and hundreds or thousands of individual parcels have already been conveyed to third parties. In light of these concerns, the board is considering the adoption of an ordinance amending the joinder provision by reducing the percentage of joining owners from one hundred to some lesser figure or by eliminating it entirely.

As the county attorney, you have advised the board that the submission of an application to amend a portion of an approved planned development cannot lawfully be conditioned on the joinder or consent of third parties who have no ownership interest in the particular parcel, even if the third parties own other property within the planned development. However, community concerns with the reduction or elimination of these restrictions has led to the Clay County Board of County Commissioners requesting that an Attorney General Opinion be sought on these issues.

Initially, I must advise you that this office has no authority to comment on validly adopted

provisions of the current zoning code of Clay County. This office, like the courts, must assume that a validly adopted statute or ordinance is lawful and effective until it is challenged and declared invalid in an appropriate court case.[1] Thus, my comments are provided to you for use by the commission in considering proposed legislation.

Questions One and Two

Zoning is generally understood to be the regulation of land according to its nature and uses.[2] The power to restrict the use of land through zoning is delegated to local governments by the Legislature and is limited by the terms of the grant.[3] The classification, regulation, prohibition, restriction, permitting, and determination of uses within districts constitutes an exercise of local governmental zoning and police power, possessed by counties and municipalities generally under zoning statutes.[4] Thus, zoning enactments cannot validly be extended beyond the accomplishment of those purposes within their scope.[5]

In order to be valid, any zoning regulations that are adopted must be reasonable and nondiscriminatory and they must tend to promote the public health, safety, morals, or general welfare.[6] As the Florida Supreme Court stated in *Griffin v. Sharpe*,[7] an ordinance enacted under a theory of general police powers must not infringe on constitutional guarantees by invading personal or property rights unnecessarily or unreasonably, denying due process of law or equal protection of laws, or impairing obligations of contract. In addition, such an ordinance must not be inconsistent with the general laws of the state, must not discriminate unreasonably, arbitrarily or oppressively, and must not constitute a delegation of legislative or executive or administrative power.[8]

You have asked whether some statutory provision may authorize a local government to require in its zoning code that consent to an application for rezoning by some or all of the other individual property owners within a planned development is required before the application can be considered for approval. As a general proposition this office has previously concluded that such a requirement might, if enacted, result in an illegal delegation or abdication of legislative power.

In Attorney General Opinion 83-31, this office was asked by the Board of County Commissioners of Santa Rosa County whether an ordinance could be validly enacted which required the written consent of a majority of landowners and homeowners within a designated distance of proposed landing strips or runways of an airport facility prior to the construction of any additional airport facility in the county. A statutory provision, section 330.36, Florida Statutes, provided that no county or municipality could license airports or control their location except by zoning requirements. The statute made no exception for any other type of county ordinance other than regulation by a zoning ordinance. Thus, the opinion concluded that such an ordinance could not be validly enacted or enforced. The opinion goes on to caution against a possible illegal delegation or abdication of legislative power by the adoption of such an ordinance:

"Additionally, the proposed ordinance, if enacted, might well result in an illegal delegation or abdication of legislative power. An airport or landing field constructed and operated in a proper manner is not a nuisance per se.[9] Thus, the construction or maintenance and operation of an airport facility are not susceptible to regulation or proscription as a public nuisance by county

legislative enactment.[10] The proposed ordinance does not zone any lands or prohibit the use of designated or specific lands at specific locations for airport purposes or establish any safety regulations or standards in the interest of and to protect the public health, safety or welfare. It simply requires the airport owner or developer to obtain the written consent of the majority of the specified landowners and homeowners prior to commencing construction of any additional airport facility in the county, and the only limitation upon such property owners in exercising their power to consent or withhold their consent to 'the construction of any additional airport facility' is their own free will and choice or their own whims or unbridled discretion. It permits the adjoining landowners to regulate property rights and deny a landowner his right to use his property, not otherwise restricted or regulated by law, for a lawful use or purpose. In effect, the affected landowners and homeowners are delegated the legislative power vested in the county commission to determine the public policy and regulate property rights and whether an airport facility may be located, maintained and operated at any particular location. The governmental powers of the legislative and governing body of a county cannot be delegated."[11]

While consideration generally must be given to the rights of the individual landowner of the property involved as well as the interests of adjoining landowners and others in the adoption of zoning changes,[12] I must caution that an ordinance which delegates the legislative power vested in the county commission to determine the public policy and regulate property rights based on the written consent of all or a majority of the specified landowners and homeowners prior to accepting an application for rezoning might well be seen by a court as an invalid delegation of the legislative power of the county.[13]

Further, under Florida law generally, a property owner acquires no vested rights to the continuation of existing zoning.[14] There is no general constitutional right to be free from all changes in land use laws.[15] A landowner who plans to use his property in accordance with existing zoning regulations is entitled to assume only that such regulations will not be altered to his detriment, unless the change bears a substantial relation to the health, morals, welfare or safety of the public.[16] As discussed above, an ordinance enacted under a theory of general police powers must not infringe on constitutional guarantees by invading personal or property rights unnecessarily or unreasonably, denying due process of law or equal protection of laws, or impairing obligations of contract. Nor may such an ordinance be inconsistent with the general laws of the state, discriminate unreasonably, arbitrarily or oppressively, or constitute a delegation of legislative or executive or administrative power.[17] The adoption of an ordinance which includes a consent requirement as a condition precedent to the application process for rezoning could be seen to interject an element of arbitrariness into that application process.[18] Again, the opinions of residents are not factual evidence and have been determined by the courts to not constitute a sound basis for denial of a zoning change application.[19]

You have specifically directed my attention to the Community Planning Act, sections 163.3164 - 163.3217, Florida Statutes, and associations of property owners governed under Chapters 718, 719, or 720, Florida Statutes, and operating within the planned development as potential sources of statutory authority for adopting an ordinance imposing a consent requirement to an application for rezoning.

The "Community Planning Act," codified in Part II, Chapter 163, Florida Statutes, was enacted to

"utilize and strengthen the existing role, processes, and powers of local governments in the establishment and implementation of comprehensive planning programs to guide and manage future development consistent with the proper role of local government."[20]

The act specifically provides that "no public or private development shall be permitted except in conformity with comprehensive plans, or elements or portions thereof, prepared and adopted in conformity with this act."[21] The comprehensive plan must provide

"the principles, guidelines, standards, and 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. These principles and strategies shall guide future decisions in a consistent manner and shall contain programs and activities to ensure comprehensive plans are implemented. The sections of the comprehensive plan containing the principles and strategies, generally provided as goals, objectives, and policies, shall describe how the local government's programs, activities, and land development regulations will be initiated, modified, or continued to implement the comprehensive plan in a consistent manner. It is not the intent of this part to require the inclusion of implementing regulations in the comprehensive plan but rather to require identification of those programs, activities, and land development regulations that will be part of the strategy for implementing the comprehensive plan and the principles that describe how the programs, activities, and land development regulations will be carried out. The plan shall establish meaningful and predictable standards for the use and development of land and provide meaningful guidelines for the content of more detailed land development and use regulations."[22]

The act provides that it is the will of the Legislature that the public be involved in community planning:

"It is the intent of the Legislature that the public participate in the comprehensive planning process to the fullest extent possible. Towards this end, local planning agencies and local governmental units are directed to adopt procedures designed to provide effective public participation in the comprehensive planning process and to provide real property owners with notice of all official actions which will regulate the use of their property. The provisions and procedures required in this act are set out as the minimum requirements towards this end."[23]

To facilitate this public participation the act requires public hearings, the opportunity for written comments, and other public information opportunities.[24] As Florida courts have noted with regard to zoning decisions:

"The role of the governmental entity is to arrive at sound decisions affecting the use of property within its domain. This includes receiving citizen input regarding the effect of the proposed use on the neighborhood, especially where the input is fact-based."[25]

However, no provision of the "Community Planning Act" of which I am aware or to which you have drawn my attention would authorize a local governmental agency to delegate its legislative zoning authority to other land owners by requiring their consent prior to the acceptance of a request for rezoning.[26]

You have also asked whether associations of property owners governed under Chapters 718, 719, or 720, Florida Statutes, and operating within the planned development may be potential sources of statutory authority for adopting an ordinance imposing a consent requirement to an application for rezoning. You are aware of no provisions in these laws which would bear directly on the validity of consent requirements prior to accepting a request for rezoning. Rather, these references, and your previous reference to Part II, Chapter 163, Florida Statutes, are intended to reflect more recent land development regulation and property owner rights laws. In the absence of concern for a particular statutory provision, this office will not undertake a broad review of multiple chapters of the Florida Statutes in an attempt to justify what the courts have clearly identified as a suspect practice.

Finally, the zoning power of Florida counties is statutory, not a common law power.[27] Local governments have no inherent right to restrict the use of land through zoning; such right is limited by the statute or ordinance creating the same.[28] The adoption of zoning ordinances and zoning maps is a legislative act[29] and zoning ordinances must find their justification in some aspect of the police power, asserted for the public welfare.[30] I am aware of, and you have brought to my attention, no common law right of local governments to impose a consent requirement such as the one you propose on applications for rezoning. Rather, the extent of the zoning power is circumscribed by the grant of power from the Legislature to local governments and contained in Chapters 125 and 166, Florida Statutes.

Question Three

You have asked whether a local government may require an application for rezoning to include the favorable outcome of a vote to approve the filing of the application by all or some of the individual members voting on the matter when private recorded covenants and restrictions call for such a vote. This office will not comment on the terms of private contracts or their enforcement. As addressed more fully herein, consent requirements such as the one you have proposed may constitute an unconstitutional delegation of legislative authority and are not favored in the law and may implicate a number of constitutional rights.[31]

Sincerely,

Pam Bondi
Attorney General

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[1] *See Evans v. Hillsborough County*, 186 So. 193 (Fla. 1938) (a statute found on statute books must be presumed to be valid and must be given effect until it is judicially declared unconstitutional); *White v. Crandon*, 156 So. 303 (Fla. 1934) (county commissioners must obey statutes until in proper proceedings they are passed upon by the courts and declared invalid); *State ex rel. Gillespie v. Thursby*, 139 So. 372 (Fla. 1932), *rehearing denied*, 140 So. 775 (Fla. 1932); *Falco v. State*, 407 So. 2d 203 (Fla. 1981) (court has duty, if reasonably possible, and consistent with constitutional rights, to resolve all doubts as to validity of statute in favor of its constitutionality); *State v. Jefferson*, 758 So. 2d 661 (Fla. 2000); Ops. Att'y Gen. Fla. 92-02

(1992) (statutes are presumptively valid and must be given effect until determined otherwise by a court of competent jurisdiction in an appropriate judicial proceeding; 88-09 (1989); 87-36 (1987); *cf.* 90-47 (1990) (presumptive validity of municipal ordinance).

[2] *See* 7 Fla. Jur. 2d *Building, Zoning, and Land Controls* s. 53; *and see Barefield v. Davis*, 251 So. 2d 699 (Fla. 1st DCA 1971).

[3] As a charter county, the zoning power of Clay County is derived from Art. VIII, s. 1(f), Fla. Const., and Part II, Ch. 125, Fla. Stat., particularly s. 125.66(4), Fla. Stat. *Cf. State ex rel. Henry v. Miami*, 158 So. 82 (Fla. 1934) (no such thing as a general legislative power on the part of municipal authorities to control and direct how the private properties of municipal inhabitants shall be held or enjoyed).

[4] *See* Inf. Op. to Chiaro, dated January 24, 1997.

[5] *See Davis v. Sails*, 318 So. 2d 214 (Fla. 1st DCA 1975); *Prescott v. Charlotte County*, 263 So. 2d 623 (Fla. 2d DCA 1972), *cert. denied*, 267 So. 2d 834 (Fla. 1972).

[6] *See City of Jacksonville v. Sohn*, 616 So. 2d 1173 (Fla. 1st DCA 1993); *Carter v. Town of Palm Beach*, 237 So. 2d 130 (Fla. 1970); Op. Att'y Gen. Fla. 79-71 (1979); 62 C.J.S. *Municipal Corporations* ss. 128, 132-135 (1949); 7 Fla. Jur. 2d *Building, Zoning, and Land Controls* s. 102.

[7] 65 So. 2d 751 (Fla. 1953), *and see City of Port Orange v. Leechase Corp.*, 430 So. 2d 534 (Fla. 5th DCA 1983).

[8] *And see Miami Shores Village v. William N. Brockway Post No. 124 of American Legion*, 24 So. 2d 33 (Fla. 1945); *Wallace v. Town of Palm Beach*, 624 F.Supp. 864 (S.D. Fla. 1985); Inf. Op. to Dellagloria, dated January 5, 2001.

[9] *See generally* 2A C.J.S. *Aeronautics and Aerospace* s. 70 (1972); *Brooks v. Patterson*, 31 So. 2d 472, 474 (Fla. 1947); *cf. Corbett v. Eastern Air Lines, Inc.*, 166 So. 2d 196 (Fla. 1st DCA 1964).

[10] *See Brooks v. Patterson, supra*, and *S.H. Kress and Co. v. City of Miami*, 82 So. 775 (Fla. 1919).

[11] *Crandon v. Hazlett*, 26 So. 2d 638, 642 (Fla. 1946); *State v. City of Tallahassee*, 177 So. 719 (Fla. 1937); *Dade County v. State*, 116 So. 72 (Fla. 1928); *see also Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116 (1928); *and see generally* 16 C.J.S. *Constitutional Law* ss. 133, 137 (1956); 62 C.J.S. *Municipal Corporations* ss. 154, 226(10), 227(9) (1949); 101A C.J.S. *Zoning and Land Planning* s. 30 (1979). *See also City of Miami Beach v. Forte Towers*, Inc., 305 So .2d 764 (Fla. 1974); *Cassady v. Consolidated Naval Stores Company*, 119 So. 2d 35 (Fla. 1960); *Richey v. Wells*, 166 So. 817 (Fla. 1936); *Bailey v. Van Pelt*, 82 So. 789 (Fla. 1919). *Cf. Cusack Co. v. City of Chicago*, 242 U.S. 526 (1917); *Eubank v. City of Richmond*, 226 U.S. 137 (1912); *Grova v. Baran*, 134 So. 2d 25 (Fla. 2d DCA 1961), *appeal dismissed*, 145 So. 2d 489 (Fla. 1962); *Miller v. Ryan*, 54 So. 2d 60 (Fla. 1951).

[12] *See* 101A C.J.S. *Zoning and Land Planning* s. 71; *and see infra* n.25 providing citations to Florida statutory provisions providing for the consideration of "affected person[s]" during the development process who may include owners of abutting real property.

[13] *See Pollard v. Palm Beach County*, 560 So. 2d 1358 (Fla. 4th DCA 1990) (opinions of residents are not factual evidence and not sound basis for denial of zoning change application); *City of Apopka v. Orange County*, 299 So. 2d 657, 659-660 (Fla. 4th DCA 1974); and *Town of Ponce Inlet v. Rancourt*, 627 So. 2d 586 (Fla. 5th DCA 1993); *Marell v. Hardy*, 450 So. 2d 1207 (Fla. 4th DCA 1984) (it is the function of the legislative body charged with responsibility for protecting and enhancing the health, welfare, and safety of public to weigh the advantages and disadvantages of rezoning property).

[14] *See Villas of Lake Jackson, Ltd. v. Leon County*, 884 F.Supp. 1544 (N.D. Fla. 1995), *opinion modified on reconsideration*, 906 F.Supp. 1509 (N.D. Fla. 1995), *affirmed*, 121 F.3d 610 (C.A. 11 Fla. 1997).

[15] *New Port Largo, Inc. v. Monroe County*, 95 F.3d 1084 (C.A. 11 (Fla.) 1996), *cert. denied*, 117 S.Ct. 2514, 521 U.S. 1121, 138 L.Ed.2d 1016 (1997).

[16] *City of Miami Beach v. 8701 Collins. Ave., Inc.*, 77 So. 2d 428 (Fla. 1954).

[17] *And see Miami Shores Village v. William N. Brockway Post No. 124 of American Legion*, 24 So. 2d 33 (Fla. 1945); *Wallace v. Town of Palm Beach*, 624 F.Supp. 864 (S.D. Fla. 1985); Inf. Op. to Dellagloria, dated January 5, 2001.

[18] *See, e.g, Corn v. City of Lauderdale Lakes*, 997 F.2d 1369 (C.A. 11 Fla. 1993), *cert. denied*, 114 S.Ct. 1400, 511 U.S. 1018, 128 L.Ed.2d 73, *appeal after remand*, 95 F.3d 1066, cert. denied, 118 S.Ct. 441, 522 U.S. 981, 139 L.Ed.2d 378 (restrictions government imposes on land must be substantially related to general welfare; if not, governmental action is arbitrary and capricious in violation of substantive due process); *Eide v. Sarasota County*, 908 F.2d 716 (C.A. 11 Fla. 1990), *cert. denied*, 111 S.Ct. 1073, 498 U.S. 1120, 112 L.Ed.2d 1179 (property owner may challenge zoning regulation by arguing that regulation is arbitrary and capricious, does not bear substantial relation to public health, safety, morals, or general welfare, and is therefore invalid exercise of police power; owner need only prove that government acted arbitrarily and capriciously either facially or as applied).

[19] *Pollard v. Palm Beach County*, *supra .*

[20] Section 163.3161(2), Fla. Stat.

[21] Section 163.3161(6), Fla. Stat.

[22] Section 163.3177(1), Fla. Stat., *and see* the remainder of this statute for the required and optional elements of a comprehensive plan.

[23] Section 163.3181(1), Fla. Stat.

[24] *See e.g.,* s. 163.3181(2), Fla. Stat.; s. 163.3174(1) and (4), Fla. Stat., requiring that the local planning agency prepare the comprehensive plan or amendment after public hearings; s. 163.3184(11), Fla. Stat., providing for public hearings during the process for adoption of comprehensive plans or plan amendments. However, I would also note that s. 163.3167(8), Fla. Stat., specifically prohibits "[a]n initiative or referendum process in regard to any development order or in regard to any local comprehensive plan amendment or map amendment[.]"

[25] *See City of Dania v. Florida Power and Light*, 718 So. 2d 813 at 816 (Fla. 4th DCA 1998), citing *Grefkowicz v. Metropolitan Dade County*, 389 So. 2d 1041 (Fla. 3d DCA 1980); *Metropolitan Dade County v. Blumenthal*, 675 So. 2d 598 (Fla. 3d DCA 1995).

[26] *Cf.* s. 163.3184, Fla. Stat., which defines "[a]ffected person" to include "owners of real property abutting real property that is the subject of a proposed change to a future land use map" and authorizing any affected person to file a petition with the Division of Administrative Hearings to challenge whether the plan is in compliance with the statute; s. 163.3187(5)(a), Fla. Stat., providing a similar procedure for any "affected person" to challenge the compliance of a small scale development amendment; and s. 163.3215, Fla. Stat., providing standing for aggrieved or adversely affected parties to enforce local comprehensive plans through development orders. *And cf. Preserve Palm Beach Political Action Committee v. Town of Palm Beach*, 50 So. 3d 1176, 1179 (Fla. 4th DCA 2010) ("The right of the people to vote on issues they are entitled to vote on is one of utmost importance in our democratic system of government. But there are issues – such as the right of a small landowner to use his property subject only to government regulations – which should not be determined by popular vote. Section 163.3167(12) rightfully protects the small landowner from having to submit her development plans to the general public and ensures that those plans will be approved or not, instead, by the elected officials of the municipality in a quasi-judicial process.").

[27] *See Penthouse, Inc. v. Saba*, 399 So. 2d 456 (Fla. 2d DCA 1981), *review denied*, 408 So. 2d 1095 (Fla. 1981).

[28] *See Florida Tallow Corp. v. Bryan*, 237 So. 2d 308 (Fla. 4th DCA 1970).

[29] *Pasco County v. J. Dico, Inc.*, 343 So. 2d 83 (Fla. 2d DCA 1977); *and see Starkey v. Okaloosa County*, 512 So. 2d 1040 (Fla. 1st DCA 1987) (rezoning is a legislative prerogative).

[30] *Flava Works, Inc. v. City of Miami, Fla.*, 800 F.Supp. 2d 1182 (S.D. Fla. 2011); *and see County of Volusia v. City of Deltona*, 925 So. 2d 340 (Fla. 5th DCA 2006), *rehearing denied* (2006), (because the zoning power is an aspect of the police power, a municipality may not enter into a private contract with a property owner for the amendment of a zoning ordinance subject to restrictions in an agreement to be executed between the city and the owner).

[31] *See Villas of Lake Jackson, Ltd. v. Leon County*, 121 F.3d 610 (C.A. 11 Fla. 1997) (any constitutional right based upon zoning regulation governing specific use of real property, to extent claim is based upon deprivation of right to use property itself for that specific purpose is protectable, if it is right for which Constitution gives protection at all, only by procedural due process claim challenging procedures by which regulation was adopted, substantive due process claim based upon arbitrary and capricious action of government in adopting regulation,

Takings Clause claim, or under some other constitutional provision that gives landowner protectable right, not specifically involved with real property right itself).