



## AGENDA MEMO

MEETING DATE: November 10, 2021

FROM: Wendy Sapp, City Manager

SUBJECT: CPA 21-01 (Private Property Rights Element)

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**Staff Recommendation:** Recommend approval.

**Background:**

The following is an explanation of the state requirement for each local government to prepare a Private Property Rights Element to its comprehensive plan. Items underlined and bolded are for emphasis. **The following synopsis is a verbatim explanation provided by the Florida Department of Economic Opportunity.**

Section 163.3177(6)(i)2, Florida Statutes (Chapter 2021-195, Laws of Florida), **requires a local government to adopt and include the property rights element in its comprehensive plan for any proposed plan amendment initiated after July 1, 2021.** A proposed comprehensive plan amendment is initiated on the date the amendment is first considered at a public hearing, as outlined in Section 163.3174(4), Florida Statutes, held by the local planning agency.

If the local government's local planning agency conducted a hearing on a comprehensive plan amendment on or before July 1, 2021, the local government may complete the adoption process for that comprehensive plan amendment package in accordance with the process set forth in Chapter 163, Florida Statutes. **If the comprehensive plan amendment had been first considered at a local planning agency's hearing on or after July 2, 2021, then Section 163.3177(6)(i), Florida Statutes, requires the local government to also adopt the property rights element into its comprehensive plan on the date of adoption of that next proposed amendment.**

As listed in Section 163.3177(6)(i), Florida Statutes, a local government may adopt its own property rights element or use the following statement of rights:

The following rights shall be considered in local decision making:

1. The right of a property owner to physically possess and control his or her interests in the property, including easements, leases, or mineral rights.
2. The right of a property owner to use, maintain, develop, and improve his or her property for personal use or for the use of any other person, subject to state law and local ordinances.
3. The right of the property owner to privacy and to exclude others from the property to protect the owner's possessions and property.
4. The right of a property owner to dispose of his or her property through sale or gift.

Additionally, the Department has received questions around the adoption of small-scale amendments, which are 50 acres or less according to Section 163.3187(1)(a), Florida Statutes, and if the property rights element needs to be submitted for state coordinated review. The Department does not review small scale amendments; however, we encourage you to consult your legal department regarding actions that you may need to take prior to the adoption of a small-scale amendment. Property rights element related amendments may be submitted for state expedited review unless the local government is partially or entirely located within an area of critical state concern, or the amendment is proposed as part of the local government's evaluation and appraisal review amendments.

**Options: The Planning and Zoning Board is empowered to conduct a public hearing on the amendment and afterward to make a recommendation to the City Commission considering the following motions.**

- 1. Recommend adoption of the amendment as presented.**
- 2. Continue the amendment to the next Planning and Zoning Board meeting.**
- 3. Recommend adoption of the amendment with changes; or**
- 4. Recommend denial of the amendment to the City Commission.**

**Fiscal Analysis: none**

**ORDINANCE NO. 2021-**

**AN ORDINANCE OF THE CITY OF HAWTHORNE, ALACHUA COUNTY, FLORIDA, PROVIDING FOR A TEXT AMENDMENT TO THE CITY OF HAWTHORNE COMPREHENSIVE PLAN, AS AMENDED, PURSUANT TO CHAPTER 163.3177 (6)(i)1, FLORIDA STATUTES (2021), TO ADOPT A PRIVATE PROPERTY RIGHTS ELEMENT TO BE INCLUDED INTO THE CITY OF HAWTHORNE, FLORIDA COMPREHENSIVE PLAN UNDER THE AMENDMENT PROCEDURES ESTABLISHED IN SECTIONS 163.3161 THROUGH 163.3215, FLORIDA STATUTES, AS AMENDED; PROVIDING SEVERABILITY; REPEALING ALL ORDINANCES IN CONFLICT; AND PROVIDING AN EFFECTIVE DATE.**

**WHEREAS**, Sections 163.3161 through 163.3215, Florida Statutes, as amended, empowers and requires the City Commission to prepare, adopt and implement a comprehensive plan; and

**WHEREAS**, the Florida Legislature requires local governments to adopt a Private Property Rights Element to the Comprehensive Plan in compliance with Chapter 163.3177(6)(i)1, said element is attached to this Ordinance and made a part hereof; and

**WHEREAS**, the Planning and Zoning Board, serving also as the Local Planning Agency, held the required public hearing, with public notice having been provided, on said amendment, as described below, and at said public hearing the Planning and Zoning Board reviewed and considered comments and recommended to the City Commission approval of said amendment, as described below; and

**WHEREAS**, the City Commission held a public hearing, with public notice having been provided, and reviewed and considered all comments and the recommendation of the Planning and Zoning Board; and

**WHEREAS**, the City Commission has determined and found said amendment, as described below, to be compatible with the Future Land Use Element objectives and policies and those of other affected elements of the Comprehensive Plan; and

**WHEREAS**, the City Commission has determined and found that approval of said amendment, as described below, would promote the public health, safety, morals, order, comfort, convenience, appearance, prosperity, or general welfare.

NOW, THEREFORE, BE IT ORDAINED BY THE CITY COMMISSION OF THE CITY OF HAWTHORNE, FLORIDA, AS FOLLOWS:

**SECTION 1.** The City Commission hereby adopts a Private Property Rights Element to be included within the City of Hawthorne Comprehensive Plan, which is attached hereto as Attachment "A" and made a part hereof.

**SECTION 2. REPEAL OF CONFLICTING ORDINANCES.** All ordinances or parts of ordinances in conflict with this Ordinance, or inconsistent with the provisions of this Ordinance, are hereby repealed to the extent necessary to give this Ordinance full force and effect.

**SECTION 3. SEVERABILITY.** If any clause, section, or provision of this Ordinance shall be declared unconstitutional or invalid for any reason or cause, the remaining portion of said Ordinance shall be in full force and effect and be valid as if such invalid portion thereof had not been incorporated herein.

**SECTION 4. EFFECTIVE DATE.**

The effective date of this plan amendment shall be thirty-one (31) days following the date of adoption of this plan amendment. However, if any affected person files a petition with the Florida Division of Administrative Hearings pursuant to Section 120.57, Florida Statutes, to request a hearing to challenge the compliance of this plan amendment with Sections 163.3161 through 163.3215, Florida Statutes, within thirty (30) days following the date of adoption of this plan amendment, this plan amendment shall not become effective until the Florida Department of Economic Opportunity or the Florida Administration Commission, respectively, issues a final order determining this plan amendment is in compliance. No development orders, development permits, or land uses dependent on this plan amendment may be issued or commence before it has become effective.

PASSED AND ADOPTED on First Reading this \_\_\_\_ day of \_\_\_\_\_, 2021, on first reading on a motion by Commissioner \_\_\_\_\_ and second by Commissioner \_\_\_\_\_ with a vote of \_\_\_\_ to \_\_\_\_.

PASSED AND ADOPTED on Second Reading this \_\_\_\_ day of \_\_\_\_\_, 2020, on second reading on a motion by Commissioner \_\_\_\_\_ and second by Commissioner \_\_\_\_\_ with a vote of \_\_\_\_ to \_\_\_\_.

\_\_\_\_\_  
Mayor Jacquelyn Randall

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City Manager Wendy Sapp

**ATTACHMENT "A"**  
**CITY OF HAWTHORNE**  
**PRIVATE PROPERTY RIGHTS ELEMENT**  
**OF THE CITY OF HAWTHORNE COMPREHENSIVE PLAN**

**Supporting Documentation for the Private Property Rights Element**

The Fifth Amendment to the Constitution of the United States protects the right to private property in two ways. First, it states that a person may not be deprived of property by the government without "due process of Law," or fair procedures. In addition, it sets limits on the traditional practice of eminent domain, such as when the government takes private property to build a public road. Under the Fifth Amendment, such taking must be for a public use and require just compensation at market value for the property seized. In *Kelo v. City of New London* (2005), the Supreme Court interpreted public use broadly to include a public purpose of economic development that might directly benefit private parties. Land use and zoning regulations have been a part of this nation earlier than the Declaration of Independence. As the United States became more urbanized there was a need for government to regulate and control land use and property markets to ensure complementary uses. To avoid slum conditions that were occurring due to incompatible uses being located together (i.e., industrial, and residential), which in turn caused a devaluation of private property. The Supreme Court recognized the validity of land use and zoning regulations to address these incompatible situations. The key is the balance between the regulation of private property and the complete deprivation of the rights of the property owner to use property. The total deprivation of the private property rights of use is called a taking.

The Supreme Court has recognized regulatory takings in two situations: (1) when a regulation leaves the landowner with no economically viable use of the land, known as a categorical taking; and (2) based on the balancing test established in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978). With respect to the first category, a categorical taking only occurs when a regulation "denies all economically beneficial or productive

use of land.” For example, the Supreme Court held that a law prohibiting the owner of beach front property from erecting any permanent structures on the property rendered the property valueless, and therefore constituted a categorical taking under the Fifth Amendment.

If the regulation does not deprive the property of all economic value, courts will analyze the regulation under the *Penn Central* balancing test. *Penn Central* involved a challenge to New York City’s Landmark Preservations Law, which prevented the Penn Central Transportation Company from constructing a skyscraper on top of Grand Central Station. The Court held that the application of the law did not constitute a taking based on a three-part balancing test. This test requires courts to consider (1) the character of the state action; (2) the economic impact of the regulation; and (3) the extent to which the regulation has interfered with a distinct investment-backed expectation. *Penn Central* has been interpreted to place a high burden of proof on landowners challenging a regulation under the takings clause.

### **Introduction**

In 2021 the Florida Legislature adopted Section 163.3177(6)(i), Florida Statutes, to require local governments to adopt their own property rights element which is tailored to identify that the following rights be considered in local decision making:

1. The right of a property owner to physically possess and control his or her interests in the property, including easements, leases, or mineral rights.
2. The right of a property owner to use, maintain, develop, and improve his or her property for personal use or for the use of any other person subject to state law and local ordinances.
3. The right of the property owner to privacy and to exclude others from the property to protect the owner's possessions and property.
4. The right of a property owner to dispose of his or her property through sale or gift.

Each of the four identified provisions of Section 163.3177(6)(i) are the objectives identified to be accomplished as stated within this element. These objectives will be implemented by the following

policies pertaining to each objective.

## **GOAL OF PRIVATE PROPERTY RIGHTS (PPR) ELEMENT**

*The inclusion of this property rights element is intended to protect private property rights and to ensure they are considered in local decision-making.*

**PPR Objective 1.** *Planning and zoning deliberations will consider the protection of the right of a property owner to physically possess and control his or her interests in the property, including easements, leases, or mineral rights.*

**PPR Policy 1.1** *Vested rights provisions shall be included within the Land Development Regulations to consider common law, statutory and prescriptive vesting standards.*

**PPR Policy 1.2** *The provisions of Lucas v. South Carolina Coastal Council (1992) shall be the measure of land use regulation related to a taking, whereby owners are entitled to compensation only if regulations restrict uses to a point where all value is lost.*

**PPR Objective 2.** *Establish policies to protect the right of a property owner to use, maintain, develop, and improve his or her property for personal use or for the use of any other person subject to state law and local ordinances.*

**PPR Policy 2.1** *Property owner's rights under Article 5 and 14 of the United States Constitution shall not be abridged by regulations that are not supported by statute or case law.*

**PPR Policy 2.2** *Prohibit the requiring of notices, applications, approvals, permits, fees, or mitigation for pruning, trimming, or removal of trees on residential property.*

**PPR Objective 3.** *The following policies are established to protect the right of the property owner to privacy and to exclude others from the property to protect the owner's possessions and property.*

**PPR Policy 3.1** *Recognize during the establishment of land use regulation the property owners right to exclude others, a right against trespass, or a right of quiet enjoyment, which all can be exercised equally at the same time and in the same respect — and the right of active use, at least to the point where such use violates the rights of others to quiet enjoyment (i.e., protection against nuisance and risk)*



**Objective 4.** *Ensure that City regulations will protect the right of a property owner to dispose of his or her property through sale or gift.*

**PPR Policy 4.1** *The Land Development Regulations shall exempt the transfer of property through testate succession from the definition of a subdivision and therefore exempt from the requirements of the subdivision regulations.*

**PPR Policy 4.2** *The provisions of future land use and zoning shall be attached to the land and not the property owner. This provision does not preclude sunset provisions to be required for the establishment of conditional uses.*