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# Interview With A Robot



If you thought artificial intelligence was only the stuff of science fiction movies such as “2001: A Space Odyssey,” “The Terminator,” or “I, Robot,” think again. In November 2022, OpenAI released ChatGPT, a computer program that can self-generate responses to questions with no human editing.<sup>1</sup> Indeed, ChatGPT responds in a way that is so human-like that it has even fooled some scientists. If you are curious to see how ChatGPT performs, you can try it out yourself on its free online platform.

A recent article by Andrew Perlman, the Dean of the Suffolk Law School, posed several questions, also known as “prompts,” to ChatGPT to see what kind of answers it would provide.<sup>2</sup> Those questions and resulting answers were published verbatim in the article and illustrated not only how far artificial

intelligence has come in the past few years but also how good the responses are—albeit with sometimes imperfect and problematic answers to the various questions.

So, as Dean Perlman did in his article, I decided to try out ChatGPT for myself and posed my own questions to test its responses.<sup>3</sup> For your reference, only the prompts indicated below were written by a person. ChatGPT generated the rest of the text with no human editing, and its answers are provided below in their entirety with no corrections made to any incorrect answers or errors. I hope you will find them as enlightening as I did, not only regarding the technological advances on display but also with the insights provided by this non-sentient information source.

***Prompt: If you were human and could be anything or anyone in the world, who or what would you be?***

As an AI language model created by OpenAI, I do not have personal opinions or desires like a human. I am designed to assist with generating text and providing information to the best of my ability based on my training data and the inputs I receive.

***Prompt: How will ChatGPT change the way law is practiced?***

As a language model created by OpenAI, ChatGPT has the potential to impact the practice of law in several ways:

1. Legal Research: ChatGPT can be used as a tool for legal research, assisting lawyers and legal professionals in quickly accessing relevant legal information and providing answers to complex legal questions.
2. Contract Review: ChatGPT can be used to assist with contract review, helping lawyers to identify potential risks, conflicts, and ambiguities in contracts, thereby improving the accuracy and efficiency of the contract review process.
3. Legal Writing: ChatGPT can also be used to assist with legal writing, providing suggestions and recommendations for legal writing, including legal citation and formatting, thereby improving the quality of legal documents.
4. Case Law Analysis: ChatGPT can assist lawyers in analyzing case law and summarizing complex legal arguments. This can be useful in preparing legal briefs and other legal documents, and can help lawyers to be more effective advocates in court.

However, it is important to note that while ChatGPT and other AI technologies have the potential to improve the practice of law, they are not intended to replace human lawyers. Rather, they are meant to assist lawyers in their work and to provide a complementary tool that can help to improve the quality and efficiency of legal services.

In conclusion, ChatGPT has the potential to be a valuable tool for the legal profession, and it is likely that its use will continue to grow and evolve in the coming years.

***Prompt: Write a 30-minute speech to be delivered by a judge on the importance of the rule of law.***

Your Honor, distinguished guests, and fellow citizens, it is an honor to stand before you today to

speak on the importance of the rule of law.

The rule of law is a principle that has been cherished and upheld for centuries, and it is the foundation upon which our justice system is built. It ensures that all individuals, regardless of their status or position, are equal under the law and subject to the same laws and regulations.

The rule of law provides stability and security for individuals and society as a whole. It protects our rights and freedoms and ensures that justice is done. It also provides a level of certainty, allowing individuals and businesses to make informed decisions and to plan for the future.

However, the rule of law is not just a set of principles and laws. It also requires the existence of a strong and independent judiciary, which is tasked with interpreting and enforcing the law. The judiciary must remain impartial and independent, and its decisions must be based on the law and the evidence presented in court. This ensures that the rule of law is applied fairly and consistently.

Furthermore, the rule of law is essential for the protection of human rights and dignity. It ensures that the most vulnerable members of society are protected, and that the powerful are held accountable for their actions. The rule of law is also critical in the fight against corruption and other forms of wrongdoing, as it provides a mechanism for holding those who break the law accountable.

In conclusion, the rule of law is a cornerstone of our society, and it is essential for the preservation of our rights, freedoms, and values. As judges, we are tasked with upholding the rule of law, and it is a responsibility that we take very seriously. We must continue to work to ensure that the rule of law is upheld and that justice is done.

Thank you.

***Prompt: Why do Florida appellate judges issue per curiam affirmed opinions?***

*Per curiam* opinions are issued by appellate judges when the outcome of a case is deemed to be clear and not in need of extensive written explanation. A *per curiam* opinion simply affirms (*i.e.*, upholds) the decision of the lower court without providing a detailed explanation of the reasoning behind the affirmance. This type of opinion is often used when the law or the facts of the case are well established, and the outcome is considered to be obvious.

In Florida, *per curiam* affirmed opinions are used for a variety of reasons, including to conserve the resources of the appellate court, to provide a quicker resolution for litigants, and to provide clear

and concise guidance for lower courts on how to handle similar cases in the future.

It's important to note that *per curiam* opinions are not binding precedents and do not have the same legal authority as a full written opinion. They are generally used to provide a quick resolution to a case that is not expected to have any significant impact on the development of the law.

**Prompt: Did O.J. Simpson kill his ex-wife?**

The question of whether O.J. Simpson killed his ex-wife, Nicole Brown Simpson, and her friend, Ronald Goldman, is a matter of significant controversy and has been the subject of much debate and legal proceedings.

In 1995, O.J. Simpson was acquitted of the murder charges in a criminal trial. However, in 1997, he was found liable for the deaths in a civil trial and was ordered to pay damages to the families of the victims.

It is important to note that the standard of proof in a criminal trial is "beyond a reasonable doubt," while the standard of proof in a civil trial is "preponderance of the evidence." This means that it is possible for a person to be acquitted of a crime in a criminal trial and still be found responsible for the same event in a civil trial.

In conclusion, the question of whether O.J. Simpson killed Nicole Brown Simpson and Ronald Goldman remains unresolved, and different individuals and legal proceedings have come to different conclusions.

**Prompt: Are judges smart?**

Judges are highly educated and experienced legal professionals who are selected for their positions based on a combination of merit, merit-based exams, and political appointments. They typically have extensive knowledge of the law, including the constitution, statutes, and case law, as well as a

deep understanding of legal procedures and the court system.

In general, judges are considered to be knowledgeable, intelligent, and well-informed individuals who have demonstrated their abilities and commitment to the law and the justice system.

However, it is important to note that intelligence and knowledge are not the only factors that contribute to a judge's ability to perform their duties effectively. Judges must also possess strong analytical skills, sound judgment, impartiality, and the ability to make difficult decisions based on the law and the facts of the case.

In conclusion, while intelligence is certainly an important factor in being a successful judge, it is not the only factor, and there is no one definition of "smart" that applies to all judges or legal professionals.

## ENDNOTES

<sup>1</sup>ChatGPT: Optimizing Language Models for Dialogue, OPENAI (Nov. 30, 2022), <https://openai.com/blog/chatgpt>.

<sup>2</sup>Andrew Perlman & ChatGPT, Open AI's Assistant, *The Implications of ChatGPT for Legal Services and Society*, SSRN (Dec. 5, 2022), <https://ssrn.com/abstract=4294197>.

<sup>3</sup>ChatGPT, Open AI's Assistant, Inquiry performed on February 1, 2023. <https://chat.openai.com/chat>.

*The Honorable Mark W. Klingensmith received his J.D. in 1985, from the University of Florida and his LL.M., in 2016 from Duke University. Judge Klingensmith is the Chief Judge of Florida's Fourth District Court of Appeal, previously serving as a Circuit Court Judge in the Nineteenth Judicial Circuit.*

## THE REAL ID ACT—DEADLINE EXTENDED TO MAY 7, 2025

**Is your driver license REAL ID compliant?** Congress enacted the REAL ID Act in 2005, upon recommendation of the 9/11 Commission. The Act "set[s] standards for the issuance of sources of identification" and provides minimum security requirements for state-issued driver licenses and identification cards. Federal agencies,

such as the Department of Homeland Security and the Transportation Security Administration, may not accept REAL ID non-compliant driver licenses and identification cards for access to certain federal facilities and boarding federally regulated commercial aircraft. Florida has been issuing REAL ID compliant credentials since January

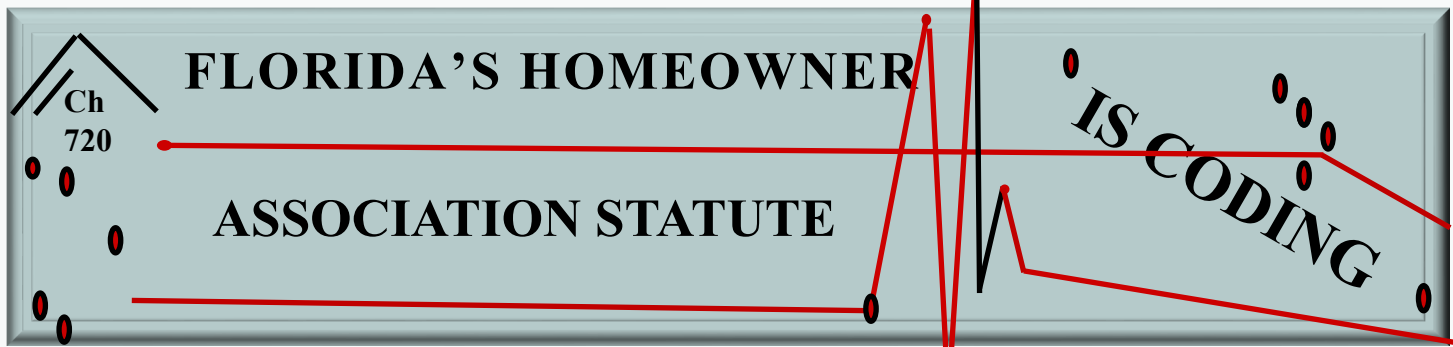
2010. Florida-compliant REAL IDs depict a star on the right corner of the card.

For more information on REAL ID, visit:

<https://www.dhs.gov/real-id/real-id-faqs>

<https://www.flhsmv.gov/driver-licenses-id-cards/real-id/>





## INTRODUCTION

The concept of ownership of a single-family detached home on its "own plot of land has largely been transformed into a concept of cluster development that generally signifies a tighter grouping of housing and use of the saved land for common areas or facilities."<sup>1</sup> To accomplish the task of shared benefits, homeowners associations ("HOA" or "HOAs" as the context may imply) generally execute the responsibilities for providing services, maintaining improvements, and overseeing compliance with the declaration of covenants, conditions, and restrictions that bind and run with the land even when ownership of the land transfers to a new owner.

Originally organized under the Florida Not for Profit Corporation Act, codification for the operation of mandatory HOAs began in the 1990s.<sup>2</sup> The law evolved into what we now know as Chapter 720, Florida Statutes, the Homeowners Association Act (the "Act").<sup>3</sup> The stated purpose of the Act is "to give statutory recognition to corporations not for profit that operate residential communities in this state, to provide procedures for operating homeowners' associations, and to protect the rights of association members without unduly impairing the ability of such associations to perform their functions."<sup>4</sup>

The Act's framework seeks to provide the owners of real property, who must be members of the HOA,<sup>5</sup> the benefits of shared ownership, use, and administration of common areas. While the concept is practical, and if properly administered advantageous, the statute contains provisions that adversely affect the lives of the beneficiaries, *i.e.*, the members. These effects reach beyond those on property values. They intertwine into the depths of members' lives: their finances, their relationships with other property owners, their constitutional rights of property ownership, and even into their physical and mental well-being, often to the members' detriment.<sup>6</sup>

Premised on the concept that the executive branch employs experts in their particular fields and can perform their duties without the expense and lengthy process endemic to courts, implementation of laws generally rests with administrative agencies. However, "[t]he Legislature recognizes that it is not in the best interest of homeowners' associations or the individual association members thereof to create or impose a bureau or other agency of state government to regulate the affairs of homeowners' associations."<sup>7</sup> Notwithstanding the foregoing, the Legislature empowered the Division of Condominiums, Timeshares, and Mobile Homes (the "Division") to execute two of the Act's functions: election and recall dispute arbitration.<sup>8</sup>

The Division is an arm of the Department of Business and Professional Regulation (the "DBPR"; this work uses the terms Division and DBPR interchangeably), the agency that Florida's executive branch charges with licensing and regulating businesses and professionals.<sup>9</sup> On its website, the DBPR publishes prominently its mission statement as "License Efficiently, Regulate Fairly." Arbitration falls under neither of those categories.

When crafting statutory language that gives rule-making

authority to administrative agencies, legislators often lose sight of the "mismatch between the regulatory objective and the technique chosen to achieve it."<sup>10</sup> If the statute provides broad powers without accountability, misapplication of procedures will likely follow, as will unfettered abuse of discretion, inefficiency, rigidity, and ineffectiveness. Differently put, the result is harm to the ones the Act is to protect.

Because the intent of the Act and how the Division applies its mandates are in conflict, the need for remedial action is imminent. Notwithstanding the comprehensive reach of the Act in relation to board powers in the administration of HOAs, this work will limit its analysis to the infirmities that arise from the Act vesting arbitration of election and recall disputes on the Division and will illustrate how the agency facilitates the improper administration of shared benefits and even interferes with constitutionally protected property rights. First, this work will identify the numerous inequities that lie within the binding arbitration process that until July 1, 2021, placed exclusive jurisdiction within the Division. Second, this writing will analyze the pervasive malady that the Act exponentially exacerbated when, effective July 1, 2021, it expanded jurisdiction of election and recall disputes to include the overtaxed dockets of the "court[s] of competent jurisdiction."<sup>11</sup> Last, armed with the cause and effect of these fundamental flaws in the Act and the Administrative Code Rules promulgated thereof, the author will offer changes to the statute that will reverse the potential for the harm that for so long has plagued members and boards, and that if adopted, will bring overdue equity and fairness to the homeowner association concept.

## I. BINDING, MANDATORY ARBITRATION: HOW DO YOU SPELL PAIN?

In 2014, pursuant to an action that resulted from a mediated settlement agreement, a board of five directors of a 1,049 member HOA held an election for all five board seats, re-establishing staggered terms. Valid elections ensued for the next two years, in 2015 and 2016. By 2019, the five members of the board were "holdovers" from expired terms and appointments (the "Holdover Board").

The Holdover Board noticed an annual meeting for October 2019. The management company representative (the "CAM")<sup>12</sup> declared a quorum present at the October annual meeting, but the board refused to call the meeting to order.

As is to be expected, the members had no guidance from the HOA attorney or the CAM. Both serve at the pleasure of the board. The Division is equally a source of frustration for the members and serves to provide confusion through its governance in what members perceive as shameful apathy. The Division's website provides a link to Chapter 720, Florida Statutes, under the Homeowner Association section. Even though numerous important changes to the Act became effective July 1, 2021, the Division links viewers to the 2018 version of the Act.<sup>13</sup> The Division's disconnect is so significant that it does not even publish on its website the arbitration orders on which it relies as precedent to perpetuate its own rulings. In fact, these orders are

difficult to find for the unsuspecting homeowner and sometimes for the legal community. Unless you subscribe to and pay for a research database, such as Westlaw, you are unable to research the Division's orders post 2008. However, you will not learn that information from the Division's website, which merely states:

As of 10/1/08, the arbitration section's final order indexes will no longer be updated. All orders entered after 10/1/08 will be added to the online search database. The links to the online database searches are listed below. Past subject matter indexes will remain available below.

All condominium, cooperative and homeowner's association arbitration orders are combined into two separated databases: 1. Orders involving general, election and recall disputes, and, 2. Attorney's fees and costs orders. Each database may be separately searched by word or phrase. *New orders will be added on a weekly basis.*<sup>14</sup> (Emphasis added).

Beyond frustrated with the lack of available assistance from the Division and the manner in which the Holdover Board was handling the affairs of the HOA, a group of members, using their own funds, armed themselves with a professional parliamentarian and an attorney that they had hired to help them effectuate a proper election. Relying on the advice of professionals, an hour after the noticed start time for the annual meeting, the members voted to remove the meeting chair, appointed a chair *pro tempore*, conducted an election for all five board seats, and seated five new board members. Or so they thought.

The following day, the CAM and the members of the Holdover Board declared the prior evening's election invalid and refused to acknowledge the newly elected directors. Therefore, on December 10, 2019, the members filed for election arbitration with the Division in accordance with the controlling statute, section 720.306(9)(c), Florida Statutes, and Rule 61B-80.103, Florida Administrative Code. And thus, the administrative nightmare began.

The Division-promulgated Rule 61B-80, Florida Administrative Code, governs the scope, organization, procedure, and forms for HOA arbitration. The party filing for binding arbitration must file the Division mandated form, DBPR FORM HOA 6000-3, with a \$200.00 fee within sixty days after the election results are announced. The filing may be by mail to the Division, or by facsimile.<sup>15</sup> In addition, prior to filing a petition to commence a challenge of an HOA election or a petition challenging the board's failure to certify a recall, the filer must abide by section 718.1255(4)(b), Florida Statutes (2019), which is titled "Nonbinding Arbitration and Mediation of Disputes." That is not a typo; the HOA statute directs the filer to the condominium statute's non-binding arbitration procedures for HOA binding arbitration. The condominium statute states that to avoid dismissal of the petition the filer must ensure that:

- The petition must recite, and have attached thereto, supporting proof that the petitioner gave the respondents:
1. Advance written notice of the specific nature of the dispute;
  2. A demand for relief, and a reasonable opportunity to comply or to provide the relief; and
  3. Notice of the intention to file an arbitration petition or other legal action in the absence of a resolution of the dispute.

On December 17, 2019, in response to the petition for binding arbitration, the Division's arbitrator issued an order requiring

the Holdover Board to respond. Such a response (the "Answer") must also be on a specific Division-mandated form, DBPR FORM HOA 6000-9.<sup>16</sup>

Prior to filing the Answer, the Holdover Board filed a motion to dismiss the members' petition for arbitration on January 3, 2020, which the Division denied approximately forty-five days later, on February 18, 2020. Finally, on March 9, 2020, the Holdover Board filed its Answer to the petition for election dispute arbitration. Then, on May 15, 2020, approximately five months after the date of the petition's filing, the arbitrator issued the Division's Summary Final Order (the "SFO") ordering the Holdover Board to notice and hold an election for all five seats, re-establishing three (3) year staggered terms no later than May 26, 2020.

### **A. MANDATORY BINDING ARBITRATION: THE ORDER THAT DOES NOT BIND**



The Holdover Board ignored the SFO and on May 29, 2020, filed a motion for rehearing. On June 5, 2020, the Division denied the Holdover Board's motion, and, of his own volition, the arbitrator extended the date for the Holdover Board to comply with the SFO to June 17, 2020. In the interim, the Holdover Board continued to administer the HOA's affairs.

Again, the Holdover Board ignored the SFO and on June 17, 2020, filed a motion requesting a stay. The arbitrator called for a case management hearing on June 24, 2020, and then stayed the SFO until July 6, 2020.

The SFO is binding and not appealable.<sup>17</sup> Notwithstanding that the only relief from the SFO was a trial *de novo* in circuit court,<sup>18</sup> that did not stop the Holdover Directors from ignoring the mandates of law when they filed an appeal to the Fifth District Court of Appeal on July 7, 2020. The Court treated the filing as a petition for writ of certiorari. The Division, without motion for stay from any party, again of its own volition, abated the SFO during the pendency of the appeal.

The members who filed the arbitration dispute defended the writ at their own expense. They prevailed when on November 9, 2020, just about one month shy of a year from the time that they had filed the petition for arbitration, the appellate court dismissed the writ, quoting *State v. Pettis*, 520 So. 2d 250, 252 (Fla.1988) (citing *State v. Wilson*, 483 So. 2nd 23 (Fla. 2nd DCA) (1985): "If there is no statutory right to appeal [a final order], then certiorari cannot be used to supply the right."

Upon petition from the members' counsel, the district court granted the members attorneys' fees and costs on the failed writ and remanded the case to the Division to determine the amount of the fees. The Division ordered the HOA to pay the members the attorneys' fees and costs to defend the appellate case. As of this writing, the members' attorney is awaiting enforcement of the fees case before the circuit court.

The members then followed up with their remaining option and on January 25, 2021, again at their own expense, filed a petition for enforcement of the SFO in circuit court. Motions for summary judgment and the numerous other sundry procedures that are akin to court proceedings have come and gone. More than two years after the filing for the enforcement of the SFO has passed, and the trial date is not yet in sight. The Holdover Board remains in control of the affairs of the HOA. Yes, the members could probably initiate another lawsuit to seek an injunction. Of course, that means more hurdles as they would have to bear the expense of the litigation and for posting a bond while paying for the Holdover Board's defense, which the Holdover Board bills as a common expense.

In the interim, the Holdover Board, which continues to



administer the affairs of the HOA, has attempted elections that do not comply with the SFO. On November 11, 2020, the Association had the CAM send a second notice of Annual Meeting and Election to be held December 1, 2020, then sent an updated notice changing the date to December 9, 2020. The notice was for an election to fill two board seats, in direct violation of the SFO, which, as you may recall, mandated a five-seat election with staggered terms. However, the Holdover Board, using email communication and providing no rationale for its action, unexpectedly cancelled the election less than five hours before the designated meeting time on the date it was to take place. Hence, there was no election in 2020.



Upon consulting with another attorney, a group of members learned that section 720.303(10)(a)1., Florida Statutes, provides that the majority of the voting interests may remove and replace the directors of an HOA by vote at a meeting or by written ballot. According to the *Recall Guide for Homeowners Seeking to Recall Members of Their Board of Directors* that the Division publishes on its website,<sup>19</sup> the homeowners simply have to follow the procedures of the statute and applicable administrative rules to effectuate the recall. A LIGHT AT THE END OF THE TUNNEL!

A recall is a simple, clear, definitive action. The Florida statutory rules for recall are simple: was the recall petition served properly and were there sufficient ballots to certify the recall. The controlling statutes and administrative rules do not provide for any consideration other than the two aforementioned rules for arbitrating an HOA recall petition. Further, the DBPR advances that the purpose of recall proceedings is to provide relief on an expedited basis.<sup>20</sup>

Knowing that if they were successful in achieving the recall, the new board would have to abide by the SFO (*i.e.*, hold a five-seat election and reset staggered terms), the members enthusiastically began collecting the ballots to undertake a written recall of all five board seats on December 4, 2020. Shortly thereafter, on January 15, 2021, the members served the Holdover Board with the recall ballots of fifty-eight percent of the voting interest, 612 ballots.

Chapters 61B-80 through 81 of the Florida Administrative Code require that the board hold a meeting “within five business days after its receipt . . . of the written recall ballots” to determine whether to certify the recall. *See Rule 61B-80.102(6), Florida Administrative Code.* If at the recall meeting the board certifies the recall, then the recalled members of the board are replaced by those named on the ballots. If the board does not certify the recall, then “the board must within 5 full business days of the board meeting, file a petition for recall arbitration.” *See id.* Note that effective July 1, 2021, section 720.303(10)(d), Florida Statutes, states that if the board determines not to certify the recall, “the board shall, within 5 full business days after the meeting, file an action with a court of competent jurisdiction or file with the department a petition for binding arbitration under the applicable procedures in ss. 718.112(2)(l) and 718.1255 and the rules adopted thereunder.” (Emphasis added.)

The Holdover Board noticed and held the recall meeting on January 25, 2021, at 5:02 p.m. At the meeting, the Holdover Board objected to twenty-seven ballots. However, this objection did not affect the validity of the recall because the Holdover Board could not overcome the remaining 585 ballots, an amount

greater than the threshold requirement to effect the recall, and which represented a number greater than the majority of the voting interests. While the board certified the recall as to one board member, it disputed the recall of the other four directors, announcing for the first time that two of its members had resigned prior to the service of the recall ballots and, also for the first time, that the seats of the other two sitting board members were up for election on March 16, 2021.

It is notable that although since 2004 the HOA had held elections in the autumn, this spring election was announced for the first time at the recall meeting. Possibly this was because section 720.303(10)(l), Florida Statutes (2021), states that:

The division or a court of competent jurisdiction may not accept for filing a recall petition or action . . . regardless of whether the recall was certified, when there are 60 or fewer days until the scheduled reelection of the board member sought to be recalled or when 60 or fewer days have not elapsed since the election of the board member sought to be recalled.

Section 720.303(10), Florida Statutes, also provides:

If the board fails to duly notice and hold a board meeting within five full business days after service of an agreement in writing or within 5 full business days after the adjournment of the member recall meeting, the recall shall be deemed effective and the board directors so recalled shall immediately turn over to the board all records and property of the association.

Rule 61B-80.102(6), *Florida Administrative Code*, states:

[W]here the board fails to timely comply with these rules relating to the calling and holding of a meeting on whether to certify a recall, or fails to comply with these rules relating to the filing of a petition for recall arbitration, the board must provide justification and must demonstrate that its actions or inactions were taken or based in good faith. The board’s claims of excusable neglect or the inability to identify defects in the recall effort within the time provided will not be considered as proper defenses.

The Holdover Board filed its petition for arbitration on February 2, 2021, one day after the expiration of the period for the board to file for recall arbitration. On February 10, 2021, the Division ordered the members voting for recall to file a response in defense of the recall. Just two days later, on February 12, 2021, citing no legal support, the Division suspended the order requiring answer and, in conclusory fashion, abated the recall petition, stating that the case seeking enforcement of the SFO in circuit court case was dispositive of the matter.

With the Division’s request for answer, the members voting for recall received a copy of the Holdover Board’s petition for recall arbitration. There, they noticed that the Division had stamped the Holdover Board’s petition as received on February 2, 2021, at 2:22 p.m. The Holdover Board had not only failed to timely hold the required meeting within five full business days, it had failed to timely file a petition for arbitration within five full business days from the recall meeting. The Holdover Board had fatally failed to comply with the mandates of section 720.303(10), Florida Statutes (2021). At last, relief in sight?

However, the DBPR is inconsistent in its handling of recalls and unilaterally waives its own rules. Moreover, the agency does not consistently facilitate expedient resolutions. In ignoring the laws that govern its conduct, it in fact arbitrarily disenfranchises those whom it is supposed to be protecting, the homeowners. In support of the foregoing, the author relies on an email to one of the members, in which the Chief Attorney, of the Division of Condominiums, Timeshares and Mobile Homes, states, “no statute requires abatement” and says that it is the agency’s practice to abate recall cases when the parties are litigating the enforcement of an earlier election arbitration order in court. It follows that the DBPR is conflating its executive branch authority with legislative powers, violating the separation of powers doctrine, which prohibits one branch of government from infringing on the powers of another branch.<sup>21</sup> Clearly, the DBPR does not abide by any possible definition of the “expedient resolution” rule and arbitrarily frustrates and disenfranchises HOA members with delays and abuse of its powers.

And so, on February 16, 2021, the members filed a motion to request reconsideration. The DBPR denied the motion, again providing no legal basis for its decision. Hence, on March 5, 2021, the members filed their own petition for recall arbitration to put before the arbitrator the stark contrast of facts regarding the recall and in hopes that at the very least he would call for a hearing. Without so much as a case management conference to confirm or deny the facts in the petition, on March 26, 2021, the DBPR abated the members’ petition pending the outcome of the 2019 election arbitration case before the circuit court. The result: the DBPR arbitrarily denied the members their statutory right to recall board members.

It is important to note that in 2020, immediately following the SFO, the Holdover Board amended the bylaws. The amendment restricted anyone in litigation with the association from running for a seat on the board. In addition, the Holdover Board eliminated the members’ right to nominate candidates from the floor at annual elections. And again, on January 29, 2021, immediately following receipt of service of the January 15, 2021 recall petition, the Holdover Board amended the bylaws to read that any member “in litigation or any administrative complaint with the association is not eligible for board membership or to serve on a committee in any capacity at any time.”

In the interim, the Holdover Board scheduled elections that do not comply with the SFO and proceeded with an election for March 16, 2021, outdoors on the tennis courts, where no seating was provided for members in attendance. Four members, two of whom were currently seated board members, submitted the association-required candidacy forms and were on the ballot. Midway through the counting of proxies and ballots, the Holdover Board-hired parliamentarian announced that the County Sheriff asked him to leave at the request of the board. The Holdover Board abruptly cancelled the meeting. Therefore, as in 2020, there was no election in 2021.

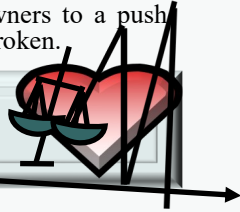
Next, on April 6, 2022, the Division ordered the HOA to provide information on the “last annual election.” Clearly, as of the date of the Division’s request, the last annual election had occurred in 2019. It is, therefore, clear error for the Division to have accepted the Holdover Board’s report of an election that allegedly took place on April 13, 2022, subsequent to the Division’s order requesting report. The Division’s action is especially troubling because at that time the last election held was in 2019 and the subject of the SFO that is still awaiting enforcement in civil court, as well as the reason why the Division abated the recall.

Then, again, of its own volition, on April 28, 2022, the Division ordered both parties to show cause as to why the two recall petitions should not be dismissed as moot by the April 13, 2022 “intervening” election. Both parties filed their responses on May 13, 2022.

Without a hearing, on July 6, 2022, the DBPR arbitrator found that because there had been an intervening election the recall was moot and advised that if the membership wanted to dispute the propriety of the April 13, 2022, election, it could file for election arbitration, just as it had done in 2019, for which the enforcement action is still in civil court.

The members performed the recall in accordance with the guidelines and used the DBPR supplied forms. Was the recall vote not an election by the membership? Why was the April 13, 2022 election that the board held post-recall more valid than the recall election? Why did the DBPR not rule on the propriety of the recall arbitration when it had two recall arbitration petitions before the agency? It is not clear to the membership voting for recall why the DBPR held that the enforcement order pending in civil court was sufficient to abate the recall but not sufficient to abate the election that the Holdover Board held. The DBPR gave the Holdover Board a zero-turn, high-powered mower to continue its mission while limiting the homeowners to a push reel mower as a defense weapon. The DBPR is broken.

## II. COURT’S CONCURRENT JURISDICTION: TO WHAT END?



Then, the Legislature provided a state-of-the-art turbo boost for the zero-turn, high-powered mower, exponentially increasing the power of association boards over the membership. Arbitration, which is touted as an efficient and cost-effective option to mediation and litigation in a court of law, is no longer a mandate. Effective July 1, 2021, “[a]ll HOA election and recall disputes must be filed with the Division of Florida Condominiums, Timeshares, and Mobile Homes for binding arbitration or filed in a court of competent jurisdiction.”<sup>22</sup>

This change exacerbates rather than resolves HOA conflicts. An example of its flawed reasoning is the enforcement of the “binding arbitration” order, *i.e.*, the SFO, resulting from the Division’s 2019 election arbitration order in which the members prevailed. That order has been awaiting court enforcement before a circuit court since June 17, 2020, soon to be three years. Yet, both the Senate and the House adopted unanimously the amendment to provide the option of court jurisdiction in lieu of arbitration. The Legislature did so even though vested with the warning that the new law would provide that:

[w]hen the parties do not both elect arbitration, the first to file with either the [Division of Condominiums, Timeshares, and Mobile Homes] arbitration unit or with circuit court would determine the course of action for both parties. The proposal appears to contradict the legislative findings in s. 718.1255(3)(a), F.S., which provides that the Legislature finds that unit owners are frequently at a disadvantage when litigating against an association as the association is better able to bear the costs and expenses of litigation than a unit owner who must rely on their own financial resources.<sup>23</sup>

Does the new statute provide opportunity for expedient resolution of election and recall disputes? Indisputably no! Regardless of who is ultimately right or wrong, under the herein circumstances, as is the case in many HOAs, both the membership and the board are in limbo. This cannot stand because the approximate 9.65 million people in Florida and roughly 48,940 homeowner associations<sup>24</sup> deserve better from its government.

Does the new law reduce the financial burdens endemic to the homeowners who rarely have access to unlimited funds for litigation in courts of law? Or is the new law an avenue that

facilitates HOA board action against the members while using association funds to fight any homeowner seeking accountability from the board or even the opportunity to elect those board members instead of providing the opportunity for them to re-appoint themselves year after year? What happened to the Act's stated purpose "to protect the rights of association members without unduly impairing the ability of such associations to perform their functions"? The Act has coded, completely flatlined, and there is no CPR in sight.

### III. PROPOSED SOLUTIONS

Chapter 720 of the Florida Statutes is long overdue for practical dialogue and honest reasoning to overcome the Act's impaired vision. It is time to recalibrate the law so that its application alleviates rather than exacerbates the conflicts that inevitably arise in homeowner association deeded communities.

The Legislature should begin its path to reviving the Act by immediately repealing the July 1, 2021, statutory provision that grants the courts concurrent jurisdiction over recall and election disputes. Even the DBPR agrees that this mandate empowers boards to the detriment of the members.<sup>25</sup> Such a provision indisputably serves to empower boards and increase litigation exponentially, further burdening an overloaded judicial system.

The Act should provide the administrative agency with authority to enforce its orders unless the non-prevailing party appeals to circuit court as a trial *de novo* within thirty days of the order. Homeowners' association boards should not be permitted to hold intervening elections during the pendency of an appeal nor during the pendency of resolution of an election or a recall dispute. The Legislature should revamp the Act to provide reasonable deadlines with clear guidelines for time computation in the handling of disputes, even if this means including illustrations of the statutory intent. Finally, equally as or more important, the Act should impose consequences on the parties and the administrative agency for failure to comply with statutory mandates. The foregoing should be set forth in a manner that denies the administrative agency wiggle room for arbitrary regulation and enforcement and require them to color inside the lines.

### CONCLUSION

In conclusion, the Act has been dysfunctional since its enactment. The harm it is causing to the more than 9.65 million residents who live in Florida's HOA<sup>26</sup> communities and to those who cannot avail themselves of the courts because of the sheer number of HOA lawsuits merits the Legislature's shepherding with a clear and concise law that brings sanity to the shared ownership concept in residential housing.

<sup>1</sup> William P. Sklar, *The Concept of Condominium Ownership, Florida Condominium Law and Practice*, The Florida Bar, Third Edition (Interim Update 2004).

<sup>2</sup> *The Residential Planned Development Study Commission, "Report of the Florida Legislature"*, at 1 (Jan. 24, 1985) (on file at the Florida Legislative Library).

<sup>3</sup> For a history of the development of HOA law through 2003, see Peter M. Dunbar, Esq. and Charles F. Dudley, Esq., *The Law of Homeowners' Associations*, 12th Edition.

<sup>4</sup> FLA. STAT. §720.302(1)(2022).

<sup>5</sup> FLA. STAT. §720.301(9)(2022).

<sup>6</sup> David J. Kennedy, *Residential Associations as State Actors: Regulating the Impact of Gated Communities on Nonmembers*, 105 YALE L.J. 761, note 38 (1995) ("As the number of residential associations has increased, the consequent litigation has arisen largely in the context of disputes between residential

associations and their members over the content of frequently intrusive rules and regulations"); see also, James L. Winokur, *Mixed Blessings of Promissory Servitudes: Toward Optimizing Economic Utility, Individual Liberty, and Personal Identity*, 1989 WIS. L. REV. 1, 63-64 (1989).

<sup>7</sup> FLA. STAT. §720.302(2) (2022).

<sup>8</sup> FLA. STAT. §720.306(9)(c) (2021).

<sup>9</sup> FLA. STAT. §20.165 (2022).

<sup>10</sup> ERNEST GELLHORN AND RONALD M. LEVIN, *ADMINISTRATIVE LAW AND PROCESS* 1 (3rd. ed. 1990).

<sup>11</sup> FLA. STAT. §718.303(10)3. (2021).

<sup>12</sup> See Ch. 468, Part VIII, Florida Statutes (2022).

<sup>13</sup> <http://www.myfloridalicense.com/DBPR/condos-timeshares-mobile-homes/homeowners-associations/> (visited Feb. 14, 2023). The author has on file a screenshot of the website and will provide it upon request.

<sup>14</sup> <http://www.myfloridalicense.com/DBPR/condos-timeshares-mobile-homes/arbitration/#1594130258980-29a33e38-4ba6> (visited Feb. 4, 2020).

<sup>15</sup> Division of Florida Condominiums, Timeshares and Mobile Homes, Arbitration/Mediation Section. 2601 Blair Stone Road, Tallahassee, Florida 32399-1030.

<sup>16</sup> <http://www.myfloridalicense.com/DBPR/condominiums-and-cooperatives/ctmh-forms-and-publications/#1588260402361-a138762f-3116> (visited Aug. 1, 2022).

<sup>17</sup> Fla. Admin. Code R. 61B80-121(5) states that the SFO "does not constitute final agency action and is not appealable to the district courts of appeal in the manner provided by section 120.68, F.S.", and that the only relief is a trial *de novo* in circuit court.

<sup>18</sup> FLA. STAT. §720.311(2)(c) (2020).

<sup>19</sup> <http://www.myfloridalicense.com/dbpr/lsc/documents/CorrectedRecallGuideHOA.pdf>

<sup>20</sup> See FLA. STAT. §718.12554(6) (2021) ("Every arbitration petition received by the division and required to be filed under this section challenging the legality of the election of any director of the board of administration must be handled on an expedited basis in the manner provided by the division's rules for recall arbitration disputes.").

<sup>21</sup> Article II, s. 3, Florida Constitution.

<sup>22</sup> <http://www.myfloridalicense.com/DBPR/condos-timeshares-mobile-homes/homeowners-associations/>; see also, FLA. STAT. §720.303(10)(b) (2021).

<sup>23</sup> Dep't. of Business and Professional Regulation, *2021 Agency Legislative Bill Analysis for SB 630*, at page 8, (Feb. 4, 2021).

<sup>24</sup> <https://ipropertymanagement.com/research/hoastatistics#:~:text=There%20are%2048%2C940%20HOAs%20in,residents%20live%20in%20HOA%20communities> (visited Feb. 2, 2023).

<sup>25</sup> Department of Business & Professional Regulation, *2021 Agency Legislative Bill Analysis for SB 630*, at page 8, (Feb. 4, 2021).

<sup>26</sup> <https://ipropertymanagement.com/research/hoa-statistics#:~:text=There%20are%2048%2C940%20HOAs%20in,residents%20live%20in%20HOA%20communities> (visited Feb. 2, 2023).

#### Author:

**Phyllis Ripley** is a longtime resident of an HOA. Her career path includes municipal, state, and federal government work. She has been actively involved in her HOA, serving on various committees and the board. Although she holds a full-time job, she works with equal diligence when standing up for what is right for the community, mandating compliance by the board, the members, and the government.



# Law Day Art Contest

**Presented by the Friends of the Rupert J. Smith Law Library**

**Theme: Cornerstones of Democracy: Civics, Civility, and Collaboration  
Awards Ceremony**

Join the Friends of the Rupert J. Smith Law Library for light refreshments and music starting at 5:30pm

**DATE: MAY 2, 2023**      **Paula A. Lewis Branch Library**  
**TIME: 6:00pm to 7:30pm**      **2950 SW Rosser Boulevard, Port St. Lucie**

Open to all St. Lucie County Public and Private Schools  
Grades K-12 are invited to participate

In 1961 Congress enshrined Law Day to symbolize commitment to  
**“EQUALITY AND JUSTICE UNDER LAW”**

**KEYNOTE SPEAKER:**

**The Honorable  
US Magistrate Judge  
Shaniek Maynard**

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| Categories  | High School       | Middle School    | Grades 3-5      | Grades K-2      |
|-------------|-------------------|------------------|-----------------|-----------------|
| POSTERBOARD | \$200/\$150/\$100 | \$150/\$100/\$75 | \$100/\$75/\$50 | \$100/\$75/\$50 |
| PHOTOGRAPHY | \$200/\$150       | \$150/\$100      | N/A             | N/A             |
| VIDEO       | \$250/\$150       | \$150/\$100      | N/A             | N/A             |

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# OFFICIAL LAW DAY ART CONTEST RULES AND GUIDELINES

## THEME:

### Cornerstones of Democracy: Civics, Civility, and Collaboration

[https://www.americanbar.org/groups/public\\_education/law-day/](https://www.americanbar.org/groups/public_education/law-day/)

**W**e invite all the people of the United States of America to join us in rebuilding trust in our institutions, respect for one another, and our willingness to collaborate to address the challenges that face our nation. In recent years, tensions in our democratic system have revealed deep divisions in American society. These divisions are aggravated by incivility in public discourse and insufficient understanding among many people about the Constitution and the way American government works. Together, however, we can collaborate to overcome our differences, resolve our disputes, and preserve our democracy and republic. To that end, we call on members of the legal profession to lead the way in promoting civics, civility, and collaboration—the cornerstones of our democracy.

**A**rtwork shall be on colored construction paper or white/colored poster board no larger than 22 x 28 inches. Only original artwork from individual students will be considered. **Cutouts from news or media publications are not permitted and will disqualify the entry!** Artwork is to be done individually not in collaboration with another.

**P**hotographs must be taken by the student and may not be larger than

11 x 14 inches and may be enhanced, edited or Photoshopped. Please attach all photos to colored construction paper or white/colored poster board, no larger than 22 x 28 inches and with a typed summary in a large print font attached to the front of the poster board. Please also attach an unedited 4 inch by 6 inch reference copy of the original unedited photograph to the front or back. While the student is free to decorate the poster board, it should not be the primary focus of the submission.

**V**ideos must be between 30 and 120 seconds in length about the Law Day theme with copy of the video on either a CD/DVD or thumb drive.

**A**ll entries will remain the property of the Friends of the Rupert J. Smith Law Library. Entries will not be returned. Judging will be on originality, creativity, technical use of the materials chosen, and presentation of theme. Please include your full name, school grade, and name of school on your entry or it may be disqualified. For video entries, please include this information within your presentation.

“The clearest way to show what the rule of law means to us in everyday life is to recall what has happened when there is no rule of law.”  
~Dwight D. Eisenhower

# HOUSING FOR ALL OR BETRAYAL OF THE AMERICAN DREAM?

## A CASE STUDY— PART II:

### REMOVE REGULATORY BARRIERS

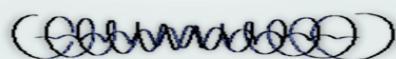
range County, Florida, adopted a housing initiative known as “Housing for All 10-Year Action Plan” in November 2019 (the “Plan”).<sup>1</sup> The Plan proposes four recommendations to achieve its goal of conquering the “affordable housing crisis”: (1) Remove Regulatory Barriers, (2) Create New Financial Resources, (3) Target Areas of Access and Opportunity, and (4) Engage the Community and Industry.<sup>2</sup>

In Part I of this case study, the author identified one of the County’s targeted sites for affordable housing, a multi-family rental project that the County has partially subsidized and approved for development, and examined its effect on the surrounding community.<sup>3</sup>

#### Link to Part I:

<https://www.rjslawlibrary.org/friends>

In Part II, the study will question the soundness of the County’s quest to “Remove Regulatory Barriers” and the effect that its application will have on the community’s existing infrastructure and quality of life. More specifically, this article proposes that without fair and balanced regulation that provides for the protection of property rights for all, the Plan is in conflict with the goal of housing for all that propagates a never-ending and non-productive, cycle of mismanagement that falls short of the goal.



### FLORIDA’S FUTURE IN NUMBERS

The Florida Chamber of Commerce released the *Florida 2030 Blueprint* (the “*Blueprint*”), in 2018. This two-year research program, which included community leaders from Florida’s sixty-seven counties, predicts that Florida’s population will increase by more than three and one-half million residents and reach twenty-six million by 2030. The *Blueprint* endeavors to identify key trends and factors that drive Florida’s regional economies. In addition to estimating that Florida will need an additional 1.6 million jobs by 2030; the *Blueprint* proposes that there will be an increase of more than three million vehicles on Florida’s roads.<sup>4</sup>

The *Blueprint* also calls on local governments, businesses, and private organizations to address targets ranging from job training to environmental protection, infrastructure, and growth leadership. Success in this endeavor requires meaningful and clear identification of interests that would justify deviation from established regulations. This is so because “[o]ur quality of life is enhanced, our environment is protected, and our communities are strengthened when local government planning respects the rights of everyone.” However, that simply is not the case when the creation of new housing, built with the promise of affordability, deviates from building code and other regulations, and provides merely temporary shelter for target

beneficiaries while fading the American Dream as it reduces the quality of life of the adjacent communities.

1000 *Friends of Florida* also issued an outlook, painting the horizon of 2070.<sup>6</sup> In addition to the paving of one-third of the state, this organization predicts other problems such as poor water quality and flooding. However, the organization’s president, Paul Owens, assures us that “[i]f properly planned, we could certainly reduce the impact of 3.5 million more Floridians.”<sup>7</sup> Does proper planning require regulation?

In the context of the *Plan*, affordable housing connotes rental housing or income properties. More specifically, private developers relying primarily on “a combination of programs including federal tax credits, state housing trust funds, local zoning decisions, and public land contributions” develop multi-family rental communities in the name of affordable housing. “To close the gap for affordable housing, especially for the lowest-income households, there almost always has to be assistance for both development and rental income over time.”<sup>8</sup>

In Florida, the “housing credit agency,” or as it is formally known, the Florida Housing Finance Corporation, allocates and distributes Low Income Housing Tax Credits to developer applicants in accordance with a Qualified Allocation Plan.<sup>9</sup>



Chapters 67-21, 67-48 and 67-60, Florida Administrative Code, provide the allocation criteria and solicitation processes. Pursuant to section 42 of the Internal Revenue Code, the state's allocating agency must adopt an allocation plan that includes identified priorities, selection criteria, and requires the agency to monitor and report noncompliance in accordance with the Code's provisions by performing regular site visits.

Wendover Housing Partners, LLC, headquartered in Seminole County, Florida, built a multi-family-affordable housing complex in Sanford called Monroe Landings on the site of a former affordable housing community that the United States Department of Housing and Urban Development deemed uninhabitable in 2013. "[T]here are three different funding sources for that \$16.5 million project: \$11.5 million in tax credit equity, \$1.26 million from the Orlando Housing Authority, and a \$2.8 million permanent loan through Neighborhood Lending Partners."<sup>10</sup> Wendover is able to build more affordable housing developments with assistance from local programs such as Orange County's Housing for All Task Force, creating the Orange County Housing Trust Fund which invests \$10 million each year for these types of projects.<sup>11</sup> "It is a never-ending need," states Wendover's managing director, Ryan Von Weller, who is also quoted as adding: "We are *always* going to be in need of more affordable housing."<sup>12</sup> (Emphasis added).

If we build our communities in appropriate locations following sound and sustainable planning principles, fewer people, buildings, and infrastructure will be in harm's way. Saving special places—including natural and agricultural lands—will allow the protection of floodplains and wetlands that can store and cleanse floodwaters and better protect our communities. And connecting people with planning ensures greater citizen input and accountability in public decision making.

### **1000 Friends of Florida**

Responsible spending and land use and zoning reform are necessary to increase safe and affordable housing supply, enhance existing homeownership, ensure the safety, health, and welfare of our citizenry, and promote the American Dream of Home Ownership. However, simply dispensing with time-tested and well-planned regulations for the sake of increasing quantity without evaluating the short-and long-term effects on what has been and that which is to be developed is a strategy that promotes waste, defies sustainability, and results in chaos.

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## **REVERSION TO CHAOS IS NOT AN OPTION: WE ARE A CIVILIZED SOCIETY AND MUST ACT LIKE IT**

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What is chaos? It is confusion, anarchy, turmoil, bedlam, and other forms of disorder. *Genesis 1:2* describes the primeval chaos in the following italicized words: "The earth was *without form* and *void*, and *darkness* was over the face of the *deep*. And the Spirit of God was hovering over the face of the *waters*."<sup>13</sup> Greek mythology describes chaos as "a chasm without shape or light".<sup>14</sup> Viking/Norse mythology tell us that in the beginning there was an "endless space" and an "abyss of emptiness".<sup>15</sup> We could name countless other versions of emergences from chaos. It is a theme that belies original creation throughout the accounts of cosmology that have passed from generation to generation in many diverse and contrasting cultures of the world.

Those inexhaustible and rich accounts of how the world progressed from chaos to social order over the centuries document that civility demands organized societies. The system of dividing land into blocks,<sup>16</sup> building aqueducts to transport water from remote sources to enhance existence, practicing safety and hygiene,<sup>17</sup> and searching for comfort and peace transcend location and culture; they are innate desires that appropriate human behavior and determine well-being. Reversion to chaos is not an option: we are a civilized society and must act like it. Enduring is not enough; we must continue to progress.

"No greater contribution could be made to the stability of the nation and the advancement of its ideals than to make it a nation of homeownership families." ~Calvin Coolidge

**R**ental housing is not homeownership. "Opening the door to homeownership assists families in finding security and stability. It gives families a place to call their own and builds strong communities," declared Christina Pappas, 2022 president of the Florida Realtors and vice president of the Keyes Family of Companies. "Our homes offer a sense of place and community—it's where we share our lives, build our futures together and make priceless memories."<sup>18</sup> Rental housing is not homeownership. Home Ownership Does Not Mean Pay the Landowner Rent for Ever and Ever. Promotion of investor ownership rather than home ownership frustrates the purpose and serves more to entrap the low-income community into rental/

temporary housing cycles while producing revenue for the investor-landowner.

It does not follow, therefore, that the *Plan's* recommendation to remove regulatory barriers in the quest for development of multi-family affordable housing projects has merit. In well-settled society, where cohesive family structures provide well-being, we should not use public resources to create rental housing-at-any-cost policies, inclusive of arbitrary removal of order and regulation. We must escape, not embrace, the endless cycle of doing the same thing over and over again and expecting different results.

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### SHOULD THE LONG-TERM BE AHEAD OF THE SHORT-TERM?

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The *2030 Blueprint* poignantly asks: “Are You Ready to Put the Long-Term Ahead of the Short-Term?”<sup>19</sup> Responsible reform requires vision and strategic planning for realistic and implementable goals that include synergy with the land. The endeavor must provide for accountability, reliability, predictability, and sustainability. To accomplish the foregoing, there must be genuine transparency and collaboration between the private and public sectors.

Planning connotes structure; structure requires boundaries or regulations. Urban communities are usually of dense population with mixed housing in large buildings within a city or town where the hustle and bustle of businesses are the backdrop of daily life. Unlike the city life, suburban areas are primarily residential, located in the outskirts of cities or towns, and are less densely populated. Each has unique benefits and drawbacks. For example, while most urban dwellers work, shop, and enjoy other services such as entertainment where they reside, suburbanites commute to avail themselves of such services. The housing interests and needs differ in significant respects such as design standards and requirements for adequate public facilities. While the standards and regulations may differ in some respects, both the urban and the suburban communities share the need for regulation to ensure the safety, health, and welfare of the residents.

Recognizing the need for regulation and planning, on May 19, 2009, the Board of County Commissioners adopted the *Orange County Comprehensive Plan 2010-2030 Goals, Objectives & Policies* (the “CP”), which became effective on August 28, 2020. The Orange County Planning, Environmental and Development Services Department, Orange County Planning Division, prepared the 411-page document, which includes a history of Florida’s comprehensive planning.

At page 271, the County sets out its Housing Element Goals, Objectives, and Policies and states:

**GOAL H1** Orange County's goal is to promote and assist in the provision of an ample housing supply, within a broad range of types and price levels, to meet current and anticipated housing needs so that all our residents have the opportunity to purchase or rent standard housing.

The County then identifies certain policies that it will institute to achieve its goal, among which it proposes: “H1.1.5 The County shall continue annual review of ordinances, codes, regulations and the permitting process *to eliminate excessive requirements, and amend or add others in order to increase appropriate private sector housing production*” (emphasis added).

Indeed, annual review and elimination of excessive and ineffective regulation is laudable. This would be especially desirable if for the purpose of eliminating, amending, or adding improvements to housing whether by the public or the private sector. However, as the policy clearly states, the review’s sole purpose is “to increase appropriate private sector housing production.” Not only is the intent solely to increase production, it is to increase “appropriate” housing production. Notably, there are no parameters for what is or is not appropriate. In fact, there is no discernible criteria indicating what is or is not “standard housing.” Equally as important, only rental housing appears to have been built or proposed for development.

The CP’s second Goal provides: “**OBJ H1.1** The County will continue to support private sector housing production capacity sufficient to meet the housing needs of existing and future residents.” However, what does “housing needs of existing residents” mean? For example, when constructing the target project, the Orange County Board of County Commissioners approved a highly contested increase in height variance to allow for three-story buildings that overlook the directly adjacent established single-family home community to the east, eradicating privacy, and imputing diminution of value on the



*Our backyards now abut an elevated road.*

*Picture courtesy of Sandra P. Chandler*



existing residences. Therefore, the question: Is the target project standard housing?

## CONSTRUCTION CHAOS--THE EFFECTS ON THE EXISTING RESIDENTS

June 2022 marked the 20<sup>th</sup> anniversary of National Homeownership Month in the United States of America. Across the country, this special day symbolizes the celebration of the American Dream. The day celebrates “the importance of owning a home and the impact it has on the lives of American families, local communities and the nation’s economic health”.<sup>20</sup> Homeownership is a major milestone in a person’s life.

Nearly 3 in 4 homeowners say they would still buy their current home if they had it to do all over again. . . . Paying down debt, building savings, and knowing the limits of what you can afford all provide the stable financial foundation on which “no regrets” homeownership is built.<sup>21</sup>

Owning a home is still very much a part of the “American Dream,” as cited by 74% of U.S. adults. This is more than those who point to being able to retire (66%), having a successful career (60%), owning a car, truck, or other automobile (50%), having children (40%), and getting a college degree (35%).<sup>22</sup>

The construction in the target project started more than a year ago. The developer has yet to provide for ingress and egress for the very heavy construction vehicles incessantly making their way in and out of the construction site via the existing infrastructure. This is so because even though the short- and long-term effects from the removal of relevant regulations were foreseeable, the County Commissioners failed to ensure that the proper strictures were in place to protect the adjacent community during construction. Ironically, on January 24, 2023, the Board of County Commissioner enacted The Tenant’s Bill of Rights Ordinance, which became effective March 1, 2023.<sup>23</sup> Not only does the ordinance establish the Orange County Office of Tenant Services, with a dedicated phone line for the purpose of “increasing tenant awareness of their rights,” the County staff will “provide guidance to tenants regarding available community resources,” which the County subsidizes with the property taxes it collects from homeowners.<sup>24</sup>

As the construction of the target project lingers month after month, the chaos continues. The dust, noise, uncertainty, traffic issues, and other unmanaged stress has led to numerous problems, and in some cases, to irreparable harm to the existing residents. The neighboring homeowners, many of whom have struggled to buy and maintain their homes, their American Dream, are plagued with nuisances that adversely affect their daily lives and

property values. Hence, the overwhelming din from convoys of large trucks bringing and removing materials, large construction equipment, and dirt to and from the site without regard to the time of day or



night is exceeded only by abuse of existing roads, dust bowls, and traffic congestion in a residential area. The trucks’ failure to abide by speed and weight limits, causing the death of pets and safety concerns to pedestrians and bike riders, factors into the inevitable harm that continues as an assault of daily life in the quiet neighborhood of Lake Jessamine Shores, disrupting the well-being of this long-standing Orange County community.

We must come to the realization that to advance we must evaluate what we have in place and effectively and efficiently endeavor to mitigate the affordable housing crisis humanely and with the purpose of improving through home ownership the lives of those in need of housing without destroying the lives of the housed. Can this be accomplished without regulatory boundaries, oversight, and accountability? Of course not. There is a reason why we learn at an early age to color inside the lines.

### AUTHORS

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**Constance E. Sobol** was born in Southeastern, North Dakota. After graduating high school, she moved to Orlando, Florida, where she has lived ever since. She holds a Bachelor of Science degree in Marketing and Finance from Florida Southern College. After 35 years, she retired from the medical distribution industry in 2014. She has been an active member of Trinity Lutheran downtown since moving to Orlando and enjoys swimming and gardening.

*Endnotes follow on page 16*



# The Judicial Bard

The purpose of this column is to celebrate those judicial writers whose opinions break through the rigid bounds of stodgy legal writing, to express the full power of the English language by taking flight into the limitless bounds of poesy and thus achieve the full potential of readability for which their readers often long. A great favorite of this columnist was the late Gavin Letts, Judge of the Fourth District Court of Appeal, who energized his writing with pithy resort to such tools as analogy, simile, comparison, and contrast. But even Judge Letts found no cause to go beyond mere prose.

A judge who did, however, was the Honorable Randall Evans, Jr. In *Brown v. State*, 134 Ga.App 771, 216 SE.2d 356 (1975), he explained his reason

in footnote 3 to the opinion.

Defendant Brown faced criminal charges. He appeared in court for trial. Unfortunately, his witness did not. Defendant asked for a brief continuance. The trial court denied the request. After the jury returned a verdict of guilt, the court sentenced Mr. Brown to seven years of hard labor.

The issue on appeal was whether the trial judge had abused his discretion in denying the requested postponement. Robert J. Erb, for appellant and Andrew J. Ryan, Jr., District Attorney, for appellee, argued the case on April 30, 1975, in Chatham Superior Court. On May 9, 1975, Judge Evans wrote the opinion for the panel, as follows:

The D.A. was ready  
His case was red-hot.  
Defendant was present,  
His witness was not. [FN1]

He prayed one day's delay  
From His honor the judge.  
But his plea was not granted  
The Court would not budge. [FN2]

So the jury was empaneled  
All twelve good and true  
But without his main witness  
What could the twelve do? [FN3]

The jury went out  
To consider his case  
And then they returned  
The defendant to face.

"What verdict, Mr. Foreman?"  
The learned judge inquired.  
"Guilty, your honor."  
On Brown's face—no smile.

"Stand up" said the judge,  
Then quickly announced  
"Seven years at hard labor"  
Thus his sentence pronounced.

"This trial was not fair,"  
The defendant then sobbed.  
"With my main witness absent  
I've simply been robbed."

"I want a new trial—  
State has not fairly won."  
"New trial denied,"  
Said Judge Dunbar Harrison.

"If you still say I'm wrong,"  
The able judge did then say  
"Why not appeal to Atlanta?"  
Let those Appeals Judges earn part  
of their pay."

"I will appeal, sir"—  
Which he proceeded to do—  
"They can't treat me worse  
Than I've been treated by you."

So the case has reached us—  
And now we must decide  
Was the guilty verdict legal—  
Or should we set it aside?

Justice and fairness  
Must prevail at all times;  
This is ably discussed  
In a case without rhyme. [FN4]

The law of this State  
Does guard every right  
Of those charged with crime  
Fairness always in sight.

To continue civil cases  
The judge holds all aces.  
But it's a different ball-game  
In criminal cases. [FN5]

Was one day's delay  
Too much to expect?  
Could the State refuse it  
With all due respect?

Did Justice applaud  
Or shed bitter tears  
When this news from Savannah  
First fell on her ears?

We've considered this case  
Through the night-through the day.  
As Judge Harrison said,  
"We must earn our pay."

*This case was once tried—  
But should now be rehearsed  
And tried one more time.*  
**This case is reversed!**

*Judgment reversed. Deen, P.J. and  
Stolz, J. concur.*

[fn1] See *Wheat v. Fraker*, 107 Ga. App. 318 (130 S.E.2d 251), for precedent in writing an opinion in rhyme.

[fn2] I profoundly apologize to Judge Sol Clark, of this court, for invading the field of innovation and departure from normalcy in writing opinions; especially in the copious use of footnotes.

## *The Judicial Bard cont'd from page 15*

[fn3] This opinion is placed in rhyme because approximately one year ago, in Savannah at a very convivial celebration, the distinguished Judge Dunbar Harrison, Senior Judge of Chatham Superior Courts, arose and addressed those assembled, and demanded that if Judge Randall Evans, Jr. ever again was so presumptuous as to reverse one of his decisions, that the opinion be written in poetry. I readily admit I am unable to comply, because I am not a poet, and the language used, at best, is mere doggerel. I have done my best, but my limited ability just did not permit the writing of a great poem. It was no easy task to write the opinion in rhyme.

[fn4] See *Murphy v. State*, 132 Ga. App. 654-658 (209 S.E.2d 101), wherein a well-written and well-reasoned opinion discusses the reasons why a denial of motion to continue in a criminal case was erroneous and subject to reversal.

[fn5] See *Hobbs v. State*, 8 Ga. App. 53, 54 (68 SE 515), where it is demonstrated that a motion to continue in a criminal case must not be judged with the same meticulous severity as in civil cases.

**James T. Walker** is a graduate of the University of Florida College of Law. He served twice non-consecutively as President of the St. Lucie County Bar Association, and has likewise served since 1982 (or thereabouts) as a Trustee of the RJS Law Library of St. Lucie County. He has been a principal in the firm of Hayskar, Walker, Schwerer, Dundas & McCain, PA since 1979 and was Assistant City Attorney of Fort Pierce from 1979 through 2016. He is blessed with a beautiful wife and two beautiful daughters, each of whom is a deep source of pride.



**Author:** *The Judicial Bard*

## *Continued from page 14. Endnotes to:*

### *Housing for All or Betrayal of the American Dream, A Case Study Part II: Remove Regulatory Barriers*

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<sup>1</sup> *Orange County Housing for All 10-Year Action Plan*, November 2019, Florida; <https://www.orangecountyfl.net/NeighborsHousing.aspx#.Yc9ggWjMKcE> (visited Dec. 31, 2023).

<sup>2</sup> See *id.*

<sup>3</sup> Davenport, Jaqueline L., and Sobol, Constance E., *Friendly Passages, Housing for All Or Betrayal of the American Dream? A Case Study: Part I*, Winter 2022, <https://www.rjlawlibrary.org/friends>

<sup>4</sup> Florida Chamber of Commerce, *The Florida 2030 Blueprint* (June 2018), <https://www.flchamber.com/florida-2030/> (visited Nov. 30, 2022).

<sup>5</sup> *Planning for a Better Tomorrow*; 1000 Friends of Florida, 308 North Monroe Street, Tallahassee, FL 32301; PO Box 5948, Tallahassee, FL 32314 • Phone: 850-222-6277 <https://1000fof.org/property-rights/> (visited Nov. 11, 2022).

<sup>6</sup> 1000 Friends of Florida is a nonprofit, smart-growth advocacy organization; <https://1000fof.org/about/> (visited Nov. 30, 2022).

<sup>7</sup> Orlando Sentinel (Apr. 12, 2022) Fraser, Trevor

<sup>8</sup> Rebekah King and Ethan Handelman, *The Cost of Affordable Housing: Does It Pencil Out?* NATIONAL HOUSING CONFERENCE AND URBAN INSTITUTE (July 2016) Available at <https://apps.urban.org/features/cost-of-affordable-housing/>

<sup>9</sup> FLA. STAT. §420.5099 (2022).

<sup>10</sup> Nadeen Yanes, Reporter (July 30, 2021) *Here's How Affordable Housing Is Built in Central Florida* (quoting Ryan Von Weller, Wendover's managing director), <https://www.clickorlando.com/news/local/2021/07/29/heres-how-affordable-housing-is-built-in-central-florida/>

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> Sidney Greidanus, *10 Things You Should Know about Chaos and Cosmos in God's Creation* (Nov. 05, 2018).

<sup>14</sup> *The Encyclopedia of Ancient Myths and Culture*, Quantum Publishing, Ltd., pg. 14 (2003).

<sup>15</sup> *Id.* at pg 413

<sup>16</sup> *Id.* at pp. 643 and 655.

<sup>17</sup> *Id.* at 220, (describing the fundamental concepts of Shintoism, within the Oriental Mythology, as purity or clarity and uncleanness, or filth).

<sup>18</sup> 2022 Florida Realtors® June 2, 2022 [https://www.floridarealtors.org/news-media/news-articles/2022/06/florida-realtors-june-national-homeownership-month?utm\\_campaign=6-02-22+Florida+Realtors+News&utm\\_source=iPost&utm\\_medium=email](https://www.floridarealtors.org/news-media/news-articles/2022/06/florida-realtors-june-national-homeownership-month?utm_campaign=6-02-22+Florida+Realtors+News&utm_source=iPost&utm_medium=email)

<sup>19</sup> Florida Chamber of Commerce, *The Florida 2030 Blueprint* (June 2018) <https://www.flchamber.com/florida-2030/> (visited Nov. 27, 2022).

<sup>20</sup> 2022 Florida Realtors® June 1, 2022, Marla Martin, *Florida Realtors: June Is National Homeownership Month*.

<sup>21</sup> Bankrate, <https://www.bankrate.com/pdfs/pr/20220330-march-fsp.pdf> (Mar. 30, 2022) (visited Jan. 14, 2023) (quoting Bankrate.com chief financial analyst Greg McBride, CFA).

<sup>22</sup> *Id.*

<sup>23</sup> Chapter 25, Article XIII, Division 3 of the Orange County Code (2023).

<sup>24</sup> *Orange County Tenant's Bill of Rights*, Pine Castle Preservation Press, a publication of the Orange County Government Neighborhood Services Division, PO Box 1393, Orlando, Florida, ORANGE COUNTY, FLORIDA, QUARTERLY NEWSLETTER (Spring 2023).

# *The Rupert J. Smith Law Library*



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