



December 13, 2019

## Memo

**To:** Split Oak Committee Members

**From:** Patrick Brackins

**CC:** Katie Smith

**Re:** Research Questions

Committee Members-

At the December 6, 2019, meeting of the Split Oak Committee, general counsel was tasked with researching and answering three questions, which are as follows:

1) Is the State of Florida permitted to take conservation land via eminent domain?

**ANSWER:** No. However, that prohibition is not applicable to traffic corridors, linear facilities, and telecommunications facilities.

A conservation easement, similar to the Grant Award Agreement for Split Oaks, is “a right or interest in real property which is appropriate to retaining land or water areas predominately in their natural, scenic, open, agricultural, or wooded condition; retaining such areas as suitable habitat for fish, plants, or wildlife; retaining the structural integrity or physical appearance of sites or properties of historical, architectural, archaeological, or cultural significance; or maintaining existing land uses; and which prohibits or limits” a number of activities and development on the land as set forth in FLA. STAT. 704.06(1)(a)-(h). Pursuant to FLA. STAT. § 704.06(2), conservation easements generally may not be acquired “**by condemnation or by other exercise of the power of eminent domain.**” A copy of Fla. Stat. 704.06 is attached hereto as **Exhibit A.**

2300 Maitland Center Parkway, Suite 100, Maitland, FL 32751  
T: (407) 622-1772 W: [WWW.SHEPARDFIRM.COM](http://WWW.SHEPARDFIRM.COM)

However, the conservation easement statute permits owners of land burdened with a conservation easement to negotiate for the sale or utilization of the encumbered land “for the construction and operation of linear facilities, including electric transmission and distribution facilities, telecommunication transmission and distribution facilities, pipeline transmission and distribution facilities, public transportation corridors, and related appurtenances.” Fla. Stat. § 704.06(11). Furthermore, the statute expressly excepts the above activities, purposes, and uses from its eminent domain prohibition. *Id.* Accordingly, while conservation easements are generally not subject to eminent domain, they do not prohibit the Department from taking lands burdened by easements for the purpose of constructing transportation corridors. On the other hand, commercial development would not be excluded from prohibition on eminent domain.

- 2) Is it possible to draft language in the charter amendment that would allow the County to settle eminent domain cases without weakening the protections provided?

ANSWER: Yes, because of the protections afforded by the conservation easement statute, the property is only subject to eminent domain for limited public purposes. Therefore, any eminent domain action on the property by the state or federal government should be limited to those public purposes provided in Fla. Stat. 704.06(11).

- 3) Can we include a provision that requires two successful, successive referendums before allowing the Split Oaks charter protections to be removed from the Charter (assuming they pass)?

ANSWER: No.

Our research has not located any county or municipal charters in Florida which contain double referendum requirements - holding two elections - before a charter may be amended. To the contrary, Florida’s Constitution, Statutes, and case law indicate that only a single referendum is required to amend a charter and such referendum may only be held when provided for by act of the Legislature. Article VI § 5(a) of the Florida Constitution provides that “special elections and referenda shall be held as provided by law.” *Id.* (emphasis added). “As provided by law” means an enactment by the Legislature – not any act of a county or city. *Grapeland Heights Civic Ass’n v. Miami*, 267 So. 2d 321, 324 (Fla. 1972); *see also* AGO 2009-22 (opining that the “term ‘law’ or ‘by law’ means an enactment of the State Legislature, not a municipality, county, or any other political body.”). Thus, the Florida Constitution asks the Legislature to decide when referendums may be exercised. The Legislature provides that county charters must be

adopted by referendum and then may only be amended by referendum. “Such charter, once adopted by the electors, may be amended only by the electors of the county.” FLA. STAT. § 125.64(2). **Accordingly, as the Florida Constitution permits referenda only as provided by the Legislature, and the Legislature has determined that a county charter may be amended by a referendum, a charter amendment requiring *two referendums* before an amendment is effective would appear to violate the Florida Constitution and the authority given to the County to amend its charter under FLA. STAT. 125.64(2).**

## *Fla. Stat. § 704.06*

Current through the 2019 Session of the Florida Legislature.

*LexisNexis® Florida Annotated Statutes > Title XL. Real and Personal Property. (Chs. 689 — 723) > Chapter 704. Easements (§§ 704.01 — 704.08)*

### § 704.06. Conservation easements; creation; acquisition; enforcement.

(1) As used in this section, “conservation easement” means a right or interest in real property which is appropriate to retaining land or water areas predominantly in their natural, scenic, open, agricultural, or wooded condition; retaining such areas as suitable habitat for fish, plants, or wildlife; retaining the structural integrity or physical appearance of sites or properties of historical, architectural, archaeological, or cultural significance; or maintaining existing land uses and which prohibits or limits any or all of the following:

- (a) Construction or placing of buildings, roads, signs, billboards or other advertising, utilities, or other structures on or above the ground.
- (b) Dumping or placing of soil or other substance or material as landfill or dumping or placing of trash, waste, or unsightly or offensive materials.
- (c) Removal or destruction of trees, shrubs, or other vegetation.
- (d) Excavation, dredging, or removal of loam, peat, gravel, soil, rock, or other material substance in such manner as to affect the surface.
- (e) Surface use except for purposes that permit the land or water area to remain predominantly in its natural condition.
- (f) Activities detrimental to drainage, flood control, water conservation, erosion control, soil conservation, or fish and wildlife habitat preservation.
- (g) Acts or uses detrimental to such retention of land or water areas.
- (h) Acts or uses detrimental to the preservation of the structural integrity or physical appearance of sites or properties of historical, architectural, archaeological, or cultural significance.

(2) Conservation easements are perpetual, undivided interests in property and may be created or stated in the form of a restriction, easement, covenant, or condition in any deed, will, or other instrument executed by or on behalf of the owner of the property, or in any order of taking. Such easements may be acquired in the same manner as other interests in property are acquired, **except by condemnation or by other exercise of the power of eminent domain**, and shall not be unassignable to other governmental bodies or agencies, charitable organizations, or trusts authorized to acquire such easements, for lack of benefit to a dominant estate.

(3) Conservation easements may be acquired by any governmental body or agency or by a charitable corporation or trust whose purposes include protecting natural, scenic, or open space values of real property, assuring its availability for agricultural, forest, recreational, or open space use, protecting natural resources, maintaining or enhancing air or water quality, or preserving sites or properties of historical, architectural, archaeological, or cultural significance.

(4) **Conservation easements shall run with the land and be binding on all subsequent owners of the servient estate. Notwithstanding the provisions of s. 197.552, all provisions of a conservation easement shall survive and are enforceable after the issuance of a tax deed. No conservation easement shall be unenforceable on account of lack of privity of contract or lack of benefit to particular land or on account of the benefit being assignable. Conservation easements may be enforced by injunction or proceeding in equity or at law, and shall entitle the holder to enter the**

land in a reasonable manner and at reasonable times to assure compliance. A conservation easement may be released by the holder of the easement to the holder of the fee even though the holder of the fee may not be a governmental body or a charitable corporation or trust.

(5) All conservation easements shall be recorded and indexed in the same manner as any other instrument affecting the title to real property.

(6) The provisions of this section shall not be construed to imply that any restriction, easement, covenant, or condition which does not have the benefit of this section shall, on account of any provision hereof, be unenforceable.

(7) Recording of the conservation easement shall be notice to the property appraiser and tax collector of the county of the conveyance of the conservation easement.

(8) Conservation easements may provide for a third-party right of enforcement. As used in this section, third-party right of enforcement means a right provided in a conservation easement to enforce any of its terms granted to a governmental body, or charitable corporation or trust as described in subsection (3), which although eligible to be a holder, is not a holder.

(9) An action affecting a conservation easement may be brought by:

- (a) An owner of an interest in the real property burdened by the easement;
- (b) A holder of the easement;
- (c) A person having a third-party right of enforcement; or
- (d) A person authorized by another law.

(10) The ownership or attempted enforcement of rights held by the holder of an easement does not subject the holder to any liability for any damage or injury that may be suffered by any person on the property or as a result of the condition of the property encumbered by a conservation easement.

(11) Nothing in this section or other provisions of law shall be construed to prohibit or limit the owner of land, or the owner of a conservation easement over land, to voluntarily negotiate the sale or utilization of such lands or easement for the construction and operation of linear facilities, including electric transmission and distribution facilities, telecommunications transmission and distribution facilities, pipeline transmission and distribution facilities, public transportation corridors, and related appurtenances, nor shall this section prohibit the use of eminent domain for said purposes as established by law. In any legal proceeding to condemn land for the purpose of construction and operation of a linear facility as described above, the court shall consider the public benefit provided by the conservation easement and linear facilities in determining which lands may be taken and the compensation paid.

(12) An owner of property encumbered by a conservation easement must abide by the requirements of chapter 712 or any other similar law or rule to preserve the conservation easement in perpetuity.

(13) A conservation easement agreement may include provisions which allow agricultural activities, including, but not limited to, silviculture, forestry management, and livestock grazing, if such activity is a current or historic use of the land placed under easement. If such agricultural activities are allowed under the terms of the agreement, such activities must be conducted in accordance with applicable best management practices adopted by the Department of Agriculture and Consumer Services. This subsection does not restrict or diminish the authority granted in a previous conservation easement agreement for forest management and livestock grazing as a compatible use on lands subject to a conservation easement.

## History

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S. 1, ch. 76-169; s. 1, ch. 86-44; s. 74, [ch. 93-206](#); s. 17, [ch. 97-164](#); s. 7, [ch. 2007-204](#), eff. July 1, 2007; s. 3, [ch. 2009-157](#), eff. June 10, 2009; s. 5, \_\_\_\_\_, eff. July 1, 2016.