

**Eleventh Circuit Holds Property Owners Do Not Have Substantive Due Process Protection  
From a Local Government's Application of a Land Use Ordinance**

In *Hillcrest Property, LLP v. Pasco County*, Pasco County ("the County") passed an ordinance ("the Ordinance") to "preserve, protect, and provide for the dedication and/or acquisition of right-of-way and transportation corridors" from encroachment by structures or other development. Hillcrest Property, LLP ("Hillcrest") owned an undeveloped, commercially-zoned property in the County. When Hillcrest applied to develop its property in December 2006, the County notified Hillcrest of a 50-foot dedication requirement for the future development of State Road 52. That 50-foot dedication later turned into a 140-foot dedication from a proposed shift in State Road 52, and the County agreed to compensate Hillcrest for the additional 90 feet.

In 2010, unable to obtain a satisfactory agreement for compensation, Hillcrest filed a complaint in the Middle District of Florida. The complaint included federal claims under the Takings Clause of the Fifth Amendment and as-applied and facial substantive due process claims under the Fourteenth Amendment. The takings and facial substantive due process claims were settled, but Hillcrest reserved its right to appeal the as-applied due process claim.

The Due Process Clause protects fundamental rights "deeply rooted" in U.S. legal tradition. Land use rights are not fundamental rights, but rather are state-created rights not protected under the Fourteenth Amendment. Hillcrest argued that their state-created right was an alleged unenumerated right to "new property"<sup>1</sup> under the Substantive Due Process Clause. The court rejected this argument, citing decades of Supreme Court precedent that courts rarely recognize unenumerated rights because they are not codified in the Constitution. Examples of previously-recognized unenumerated rights include the right to privacy and to marriage.

Hillcrest's next argument was that substantive due process protects property owners from arbitrary and irrational legislative acts infringing on state-created rights. The court did not find this argument persuasive because it found the application of the legislative act (the application of the Ordinance) was an executive decision, not legislative. In the claim at issue, Hillcrest did not challenge the validity of the Ordinance, it only challenged the Ordinance's effect on their property. The application of this Ordinance is an executive action because the executive branch is responsible for applying and enforcing the law. Relying on precedent, the court held that a land use decision is a classic executive, rather than legislative, action that does not warrant substantive due process protection.

Nine years later, after multiple opinions by the Middle District of Florida and the Eleventh Circuit, the Eleventh Circuit found in favor of the County, leaving property owners without a substantive due process remedy to local government ordinances affecting their property.

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<sup>1</sup> New property is the concept that society is "built around entitlements." Charles A. Reich, *The New Property*, 73 YALE L.J. 733 (1964).