

Navigating Affordable Housing Law

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AFFORDABLE HOUSING CATALYST PROGRAM

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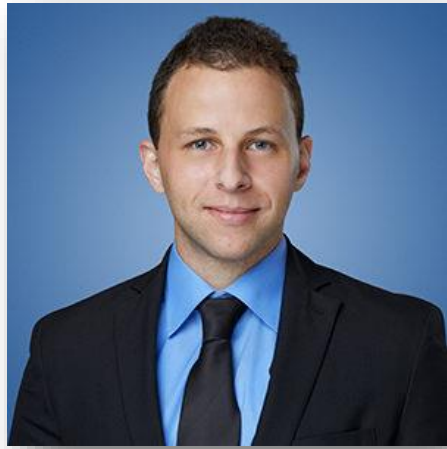


About the Florida Housing Coalition

- Statewide nonprofit organization that is primarily a training and technical assistance provider to local governments and nonprofits on all things affordable housing
- Our work covers:
 - Compliance with local, state, and federal affordable housing programs
 - Affordable housing program design
 - Capacity building for nonprofit housing providers
 - Land use planning for affordable housing
 - Research & data gathering
- We can provide free training & technical assistance to you under the Catalyst Program



FHC Presenter



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Webinar Logistics

- All participants are on mute
- Please type in your questions and comments into the question box on the side panel
- We will not identify who has asked a question
- Webinar is recorded
- PPT is provided as a handout
- For follow-up information or problems downloading handouts, please contact glazer@flhousing.org



Goal of today's training

- The goal is not for you to be able to memorize all the laws relating to affordable housing.
- The goal is to give you tools for how to approach the laws affecting affordable housing policy.
- Key themes:
 - Enforcement
 - Themes & patterns in the law
 - Policy design
 - Knowing where to look



Topics covered

- What exactly is affordable housing law?
- Common legal principles applied to AH
- Defining affordable housing
- Affordable housing funding
- Zoning & land use laws
- Using publicly-owned land for housing
- Tenant protections & fair housing





I. What exactly is
affordable housing
law?



Types of law practiced in the affordable housing world

Real property

Zoning & land
use

Landlord/tenant

Statutory &
regulatory
interpretation

Constitutional
law

Administrative
law

Trusts & estates

Corporate law

Procurement
law

Environmental
law

Contract law

Privacy law



So, what exactly is affordable housing law?

The application of many different areas of the law for the purpose of helping people live in a home they can afford.



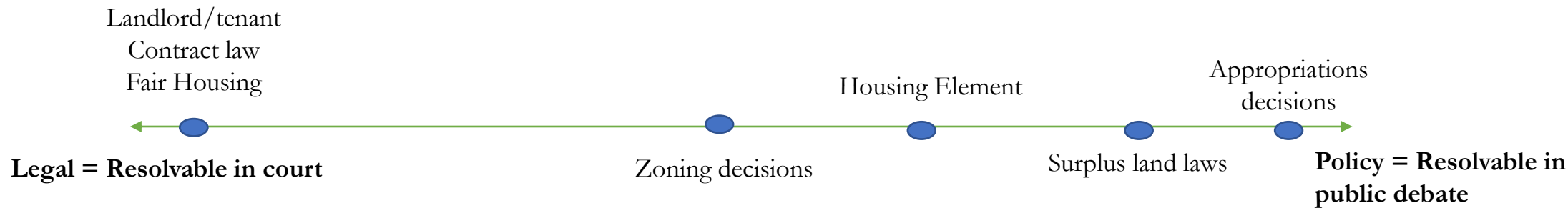


II. Common legal principles applied to AH law



It's not about going to court . . .

- 99% of affordable housing law happens outside of the courtroom
- A large part of AH law is knowing where to fight your battles (court, agency, City/County Commission, etc...)
- Separation of powers: The Judicial Branch does not want to tell the Executive or Legislative branch how to do their jobs
- Just because there is a statute on the books, it does not mean it can be enforced in court.



Know your legal sources

Federal

- U.S. Constitution
- U.S. Code
- Code of Federal Regulations
- Agency opinions/memoranda

State

- Florida Constitution
- Florida Statutes
- Florida Administrative Code
- Attorney General Advisory Legal Opinions

Local

- Code of Ordinances
- Land Development Code
- Comprehensive Plan
- County or City charter



Home rule authority

- The Florida Constitution grants county and municipal governments what is called “Home Rule” authority
- Two forms of county government. Article VIII, section 1(f-g), Fla. Const.:
 - 1) Charter county – granted broad power of self-government unless power conflicts with state law
 - 2) Non-charter county – must derive authority from state law
- Municipal home rule authority. Article VIII, section 2(b), Fla. Const.:
 - Cities have all governmental, corporate and proprietary powers to enable them to conduct municipal government except as otherwise provided by law.
- State preemption: occurs when the Legislature passes a law that prevents a local government from carrying out a function authorized by home rule authority



Common interpretation tools in AH

- Spirit of the law v. the letter of the law
- Presumption against preemption: Courts do not like to assume preemption - statute must have "clear language" preempting local authority or overriding intent to preempt
- Plain meaning rule: if language is unambiguous, its terms must be applied unless doing so would bring an absurd result
- Statutory canons. Where two statutes conflict:
 - Specific controls the general
 - More recently enacted statute controls the earlier
 - Cannot be construed to render other statutes meaningless or absurd
 - Related provisions must be construed as a cohesive whole



Individual rights have to be enforced . . .

Legal rights, such as tenant protections and anti-discrimination protections, are not automatically enforced – **enforcement requires a lawsuit or administrative action.**

You could have the best tenants' right ordinance ever made but without adequate enforcement, the ordinance will be ineffective.

When creating new rights or looking to enforce existing ones, ask:

- 1) Who is there to enforce said rights; and
- 2) How can the people we serve be made aware of their rights?



Not all statutes have a private cause of action

Certain statutes can only be enforced by administrative action over private litigation.

Ask:

- Who would have standing to challenge an action?
- Does the text allow a private cause of action?
- Does a government agency have sole jurisdiction?



Applying the law as risk management

- Most AH attorneys are actively trying to avoid litigation
- Good to think about certain legal gray areas like *risk management*:
 - 1) To avoid litigation altogether
 - 2) To lower chance of litigation to greatest degree possible
 - 3) If litigation ensued, have the supporting documentation to justify actions
- Politics can always outshine risk management





III. Defining affordable housing

Defining affordable housing

- “Affordable” or “workforce” or “attainable” or “attainable workforce” housing are political terms when setting policy
- The definition of what is “affordable housing” or “workforce housing” largely depends on the funding source or policy initiative
- Generally, “affordable” means that monthly housing payments do not exceed 30 percent of the gross income (pre-tax income) for extremely-low (0-30% AMI) to moderate-income households (120% AMI)
- Area median income (AMI): established annually by HUD; tiered based on household size



Orlando, FL Area Median Income(s)

- If following HUD data, AMI for Orlando is based on the Orlando-Kissimmee-Sanford Metropolitan Statistical Area (MSA)
- This means Orlando, Orange County, Osceola County, Seminole County, and Lake County have the same income limits through HUD
- When using local funds (or depending on the funding source), local governments can set own income limits based on localized data

	2022 Income Limit by Household Size				
AMI	1	2	3	4	5
30%	17,400	19,900	23,030	27,750	32,470
50%	29,050	33,200	37,350	41,450	44,800
80%	46,450	53,050	59,700	66,300	71,650
120%	69,720	79,680	89,640	99,480	107,520
140%	81,340	92,960	104,580	116,060	125,440



Check the funding source or policy initiative

- State Housing Initiatives Partnership (SHIP) – up to 140% AMI
- Community Development Block Grant (CDBG) – primarily serves up to 80% AMI
- HOME Investment Partnerships Program (HOME) – up to 80% AMI
- Emergency Solutions Grant (ESG)- up to 50% AMI
- State surplus lands law – up to 120% AMI
- Homeownership Pool Program (HOP) – up to 80% AMI
- Local affordable housing program? Check your local definition.



Fla. Stat., § 420.0004(3) definition of affordable housing

- This section is often cited as the prevailing definition for affordable housing in Florida
- Technically, this 420.0004 definition only applies to Part 1 of CH 420 of the Florida Statutes
- A number of statutes cite to this 420.0004 definition including:
 - Surplus Lands Law: F.S. 125.379/166.0451
 - Affordable housing property exemption: F.S. 196.1978
 - HB 1339 zoning flexibility for affordable housing: F.S. 125.01055/166.04151
 - Brownfields site rehabilitation tax credit: F.S. 220.1845
- F.S. 420.0004 does not preempt local governments from adopting their own definition of affordable housing for locally-sourced funding programs or policy initiatives



Review: Definition of affordable housing

- Always check the funding source or controlling state statute
- Terms like “affordable,” “attainable,” and “workforce,” are largely political terms when setting policy
- F.S. 420.0004 definition is used widely but does not preempt local governments from adopting their own definition





IV. Affordable housing funding laws

Three “layers” of affordable housing funding sources/authorizing legislation

Federal

- Community Development Block Grant (CDBG)
- HOME Investments Partnership Program (HOME)
- Low-Income Housing Tax Credit (LIHTC)
- Emergency Solutions Grant (ESG)

State (state-funded programs or governing legislation)

- State Housing Initiatives Partnership (SHIP)
- Infrastructure surtax
- Community redevelopment agencies (CRAs)
- Linkage fees
- Ad valorem tax exemptions

Local (Home Rule Authority)

- General revenue



State Housing Initiatives Partnership (SHIP) program

- F.S. 420.907 – 420.9079
- Example for how funding sources can be dictated by statute and how a locally-funded program can be structured
- Key provisions
 - Income levels served with income set-asides (30% for low-income; 30% for very-low-income)
 - Eligible uses w/set-aside requirements (65% for homeownership; 75% for construction)
 - Affordability periods
 - Producing a plan for how funds are spent
 - Annual reporting requirements
 - Loan, grant, & recapture standards



Impact fee waivers

- Florida Impact Fee Act (F.S. 163.31801) allows local governments to waive or provide exceptions to impact fees for affordable housing without having to “use any revenues to offset the impact”
- Even though the statute technically allows this, there is conflicting case law on the issue
- Example of when to consult your City/County Attorney on their position for waiving impact fees for affordable housing



Property tax incentives for affordable housing?

- Common question: Can my local government provide property tax exemptions/incentives for affordable housing development?
- Short answer: Not unless the Florida Constitution or Florida Statutes authorizes it.
- Why?
 - Article VII, section 3(a), Florida Constitution: grants the Legislature the exclusive authority to create ad valorem tax exemptions for properties used predominantly for “educational, literary, scientific, religious or charitable purposes.”
- Examples of state authorized tax exemptions:
 - 196.1978: Affordable housing property exemption
 - 196.031/196.041: Homestead exemption
 - 196.075: Additional elderly tax exemptions



Examples: Statutorily authorized local funding sources for AH

- Linkage fee (F.S. 125.01055/166.04151)
 - Akin to a housing impact fee - local government tool to raise revenue for affordable housing programs typically charged on new office, commercial, or industrial development
 - “Links” a new development with the workforce housing needs generated by that development
 - Florida examples: Winter Park, Coconut Creek, Jupiter
- Infrastructure surtax (F.S. 212.055(2))
 - Discretionary surtax – commonly called a “Penny Sales Tax” or “Half-cent Sales Tax”
 - F.S. 212.055(2)(d): allows counties to use this surtax for land acquisition for AH
 - Examples: Pinellas County, Collier County, Palm Beach County
- Community redevelopment agencies
 - F.S. 163.387: authorizes CRAs to use revenue for the development of affordable housing
- Legal aid funding with court fees
 - F.S. 939.185: authorizes county commissions to adopt additional court costs for certain cases – 25% of total must go to legal aid



Review: Affordable housing funding sources

- The SHIP program is a great model for elements that can be included in a locally-sourced affordable housing program
- Check constitutional & statutory limitations for how to use various funding sources





V. Zoning & land use
laws for AH

Legality/politics of zoning

Two general types of land use decisions: 1) Legislative; and 2) Quasi-judicial

Legislative	Actions when the local government is formulating policy.	“Fairly debatable” standard of review. Generally, gives LGs broad discretion on policy-making unless policy is made arbitrarily or violates anti-discrimination laws.	Ex) Creating or amending zoning districts, adopting comprehensive plans
Quasi-judicial	Actions where the local government applies a policy to a specific development application.	Treated more like a court hearing – LG must have substantial, competent evidence to support a decision.	Ex) site-specific rezonings, conditional use permits



Specific zoning & land use tools for AH

- Expedited permitting
- Zoning and land use override for affordable housing (House Bill 1339 (2020))
- Mandatory inclusionary zoning
- Density bonuses + other incentives
- Regulatory reform – allowing more housing types & densities as-of-right
- Florida Fair Housing Act section 760.26, F.S- unlawful to discriminate against affordable housing



Expedited permitting requirement under SHIP

- Each local government that receives SHIP funds must expedite permits for affordable housing projects “to a greater degree than other projects.” 420.9071(18).
- Enforceability? Because this requirement is tied to the SHIP program, only FHFC would likely have standing to enforce these SHIP requirements.
- Is there a private cause of action? Probably not.



Land Use Flexibility for Affordable Housing

- House Bill 1339 (2020), amended by Senate Bill 962 (2022), provided tremendous flexibility to local governments to approve affordable housing developments without needing a rezoning or comprehensive plan amendment.
- S. 125.01055(6) for counties and S. 166.04151(6) for cities:

“Notwithstanding any other law or local ordinance or regulation to the contrary, the governing body of a [city or county] may approve the development of housing that is affordable, as defined in s. 420.0004, on any parcel zoned for residential, commercial, or industrial use. . .

. . . If a parcel is zoned for commercial or industrial use, an approval pursuant to this subsection may include any residential development project, including a mixed-use residential development project, so long as at least 10 percent of the units included in the project are for housing that is affordable and the developer of the project agrees not to apply for or receive funding under s. 420.5087.



How to implement F.S. §§ 125.01055(6)/166.04151(6)

- State law does not provide a method for how to implement this land use flexibility
- Can be done through an implementing ordinance (St. Petersburg) or on a case-by-case basis at the staff level (Jacksonville)
- Although these statutes could allow the waiver of all development standards, there will be development standards the local government will still need to regulate:
 - Density
 - Parking
 - Setbacks
 - Compatibility with surrounding structures
 - Environmental considerations



It's all a matter of priority . . .

- If a local government has the **motivation** to approve a particular affordable housing development in a residential, commercial, or industrial zone, it can use § 125.01055(6) or § 166.04151(6) to do so regardless of the underlying zoning
- Use this land use flexibility to condition fast-tracked development approval on the provision of long-term affordable units
- Ex) if a residential zone only allows 60 units to be built, this provision can be used to allow a developer to build 100 units if affordable housing is provided
- Ex) a local government could use this provision to allow an affordable triplex to be built in a single-family zone



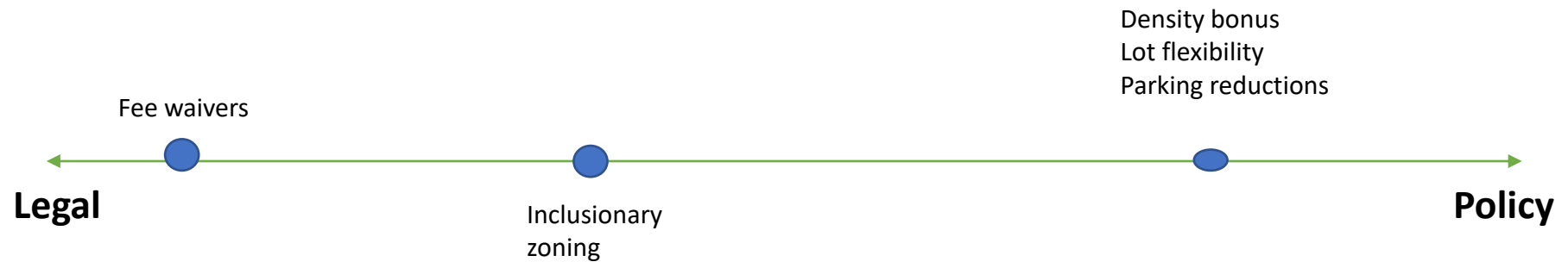
Mandatory Inclusionary Zoning

- Authorized at F.S. 125.01055/166.04151
- Mandatory IZ requires market rate developers to include a percentage or number of affordable units within a market rate development
- State law: if a local government adopts mandatory IZ, it must “fully offset all costs” to the developer through incentives/regulatory relief
- Density bonuses can more than “fully offset all costs” – important to have a way to calculate the value of incentives
- Implementing IZ as risk management:
 - To prevent litigation altogether
 - Or if litigation ensues, have all the proper documentation to justify decision



Other land use strategies for affordable housing

- Density bonuses
- Lot flexibility
- Parking reductions
- Financial subsidy
- Fee waivers (impact, building, site plan review, etc.)



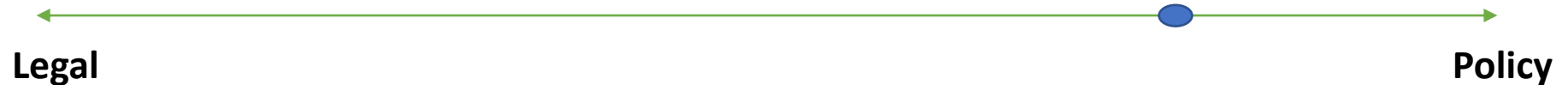


VI. Using publicly-owned land



Inventory of lands appropriate for affordable housing

- F.S. 125.379 (counties)/166.0451 (cities) – commonly referred to as the “Surplus land laws”
- These statutes require local governments to produce an inventory list every 3 years of all lands it owns in fee simple which are “appropriate for use as affordable housing”
- Common issue: claims that the LG did not truly put all parcels that are “appropriate” for affordable housing on the inventory list



The surplus land law

166.0451 Disposition of municipal property for affordable housing.—

- (1) By July 1, 2007, and every 3 years thereafter, **each municipality shall prepare an inventory list of all real property within its jurisdiction to which the municipality holds fee simple title that is appropriate for use as affordable housing.** The inventory list must include the address and legal description of each such property and specify whether the property is vacant or improved. The governing body of the municipality must review the inventory list at a public hearing and may revise it at the conclusion of the public hearing. Following the public hearing, the governing body of the municipality shall adopt a resolution that includes an inventory list of such property.
- (2) The properties identified as appropriate for use as affordable housing on the inventory list adopted by the municipality may be offered for sale and the proceeds may be used to purchase land for the development of affordable housing or to increase the local government fund earmarked for affordable housing, or may be sold with a restriction that requires the development of the property as permanent affordable housing, or may be donated to a nonprofit housing organization for the construction of permanent affordable housing. Alternatively, the municipality may otherwise make the property available for use for the production and preservation of permanent affordable housing. For purposes of this section, the term “affordable” has the same meaning as in s. 420.0004(3).



The surplus land statutes are a great example of a law that is more political than legal

- Issues with the statutes:
 - Florida law does not clearly define what “appropriate for use as affordable housing” means in the context of the surplus land statutes
 - Subsection (2) uses “may” instead of “shall”
 - Unclear who would have standing to enforce these laws
- Because of this, identifying “appropriate” parcels to place on the affordable housing inventory is largely left up to the discretion of the local government (remember: courts do not take local preemption lightly without clear language in the statute)
- Exception – if the decisions are made in violation of anti-discrimination or other laws
- If the statute is difficult to enforce, what is the recourse for a LG violating the intent of the laws? **Hold your elected officials accountable to use as much publicly-owned land as possible for permanently affordable housing.**





VII. Tenant protections & fair housing

Fair Housing & other Anti-Discrimination Laws

Statutory

- Fair Housing Act (federal, state, & local)
- Title VI of Civil Rights Act (federal)
- Age Discrimination Act of 1975 (federal)
- Funding source-specific laws and regulations

Constitutional

- Equal Protection Clause of the 14th amendment of the U.S. Constitution
- Basic Rights provision of Article 1, section 2 of the Florida Constitution



Fair Housing Act(s)

- Three “levels” of Fair Housing laws:
 - Federal Fair Housing Act – Title VIII of Civil Rights Act. 42 U.S.C. § 3601 *et seq.*
 - Florida Fair Housing Act – Part II of Ch. 760, Florida Statutes
 - Local ordinances
- Prohibits discrimination on the basis of a protected class for a broad range of housing activities, including:

Sale, rental, or financing terms	Advertising	Falsely deny that housing is available for inspection
Access in any multiple listing services	Privileges, services, or facilities associated with a dwelling	Qualification criteria for a dwelling
Steering	Harassment	Eviction



Protected classes under Fair Housing Act

Federal Fair Housing Act

- Race
- Color
- National Origin
- Religion
- Sex
- Familial Status
- Disability

Florida Fair Housing Act

- Race
- Color
- National Origin
- Religion
- Sex
- Familial Status
- Disability
- Source of financing (for land use decisions)

Additional Protected Classes in Local Ordinances

- Age
- Sexual Orientation
- Source of Income
- Gender Identity
- Marital Status
- Pregnancy
- Veteran Status
- Domestic Violence Victim Status



Two ways to violate FHA

1. Disparate treatment
 - Finding that a party had a discriminatory intent against or for a protected class
2. Disparate impact
 - Party can violate FHA if it is found that a policy or practice creates unjustified disproportionate effects on members of a protected class *even if* no evidence of discriminatory intent
 - Examples of policies that may create discriminatory effects:
 - Only using publicly-owned land for affordable housing in certain neighborhoods (race)
 - Charging higher broker fees for certain neighborhoods (race, national origin, religion)
 - Residency preferences if the area in question heavily skews towards a protected class

Enforcement of the FHA

- Private lawsuits
 - Led by legal aid or other private attorneys
 - Fair Housing Initiatives Program (FHIP) – federal funding program for local fair housing enforcement
- Administrative actions
 - Federal: Department of Housing & Urban Development; Department of Justice
 - State: Florida Commission on Human Relations
 - Local: Local departments as authorized by local fair housing ordinances (may be Code Enforcement, Tenant Advocacy Office, Housing Department, etc.)



Fair Housing & Tenant Protections

- More local governments are adding “source of income” protections to local fair housing ordinances as a protected class
- “Source of income” protections make it illegal to discriminate against a tenant’s lawful source of income, including housing vouchers, emergency rental assistance, Social Security, and other lawful, verifiable income streams
- Examples of LGs with source of income protections
 - Hillsborough County
 - Miami-Dade County
 - St. Petersburg
 - Gainesville



Tenant Protections

- In light of the COVID-pandemic and accelerating rental housing crisis, local governments in Florida are passing additional tenant protections
- Types of tenant protections:
 - 1) Increased notice provisions
 - Additional notices for increased rents
 - Expanded notice for lease non-renewals
 - Notice of tenants' rights
 - 2) “Just cause” eviction protections
 - Housing provider only allowed to evict or not renew a lease for stated reasons
 - 3) Source of income protections
 - 4) Relocation & rental assistance



Hillsborough County: Tenants' Bill of Rights

- Passed in 2021
- Prohibits source of income discrimination
- Requires landlords to provide a copy of the Notice of Rights to the tenant
- Prohibits late fees without providing written notice to the tenant
- Authorizes Code Enforcement Department to investigate violations of tenants' rights



Miami-Dade County: Tenant Protections

- Requires 60 days' written notice when a landlord:
 - 1) Increases rent by more than 5%
 - 2) Terminates a month-to-month rental agreement
- Tenants' Bill of Rights:
 - Clear standards for when a tenant can deduct cost of reasonable repairs from their rent payment
 - Prohibits landlords from asking prospective or current tenants about past eviction history until the applicant has been deemed qualified
 - Landlords must provide a Notice of Tenant Rights
 - Creates new Office of Housing Advocacy





FLORIDA HOUSING COALITION PUBLICATIONS

Access these valuable resources and more under the Publications tab at Flhousing.org

Housing News Network Journal

Florida Home Matters Report

Accessory Dwelling Unit (ADU) Guidebook

Adaptive Reuse of Vacant Rentals

Affordable Housing Resource Guide

Affordable Housing Incentive Strategies

CLT (Community Land Trust) Primer

CLT Homebuyer Education – Teacher’s Guide

CLT Homebuyer Education – Buyer’s Guide

Community Allies Guide to Opportunity Zones

Community-Based Planning Guide

Creating a Local Housing Disaster Recovery

Creating Inclusive Communities in Florida

**Credit Underwriting Guide for Multi-Family
Affordable Housing in Florida**

**Developing & Operating Small Scale Rental
Properties**

**Disaster Management Guide for Housing
Landlord Collaboration Guidebook**

PSH Property Management Guidebook

Residential Rehabilitation Guide

SHIP Administrators Guidebook

Surplus Lands Guidebook

**Supporting Households Moving Out of
Homelessness**

Using SHIP For Rental Housing



Contact Information



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