

What's New and Interesting in Land Use Law

by
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I. The Future of Growth Management

A. 2000 Legislative Activities—

1. Study Commission- Endorsed by Governor Bush and DCA; House and Senate bills to create study commission of 19-25 members

2. Minor Substantive Changes- Senate interim study for streamlining;

DCA suggestions:

- * Streamlining the Plan Amendment Process
- * Publication of Notice of Intent, mailed notice, legal ad
- * Small scale amendment- Increase threshold to 20 acres in urban infill areas,
- * DRI changes- biennial reporting, substantial deviation, two mile rule, DRI's in approved sector plans; Petroleum facilities in ports exemption (originally suggested exemptions for airports and marinas)
- * Rule Authorizing Bill- (SB 1268) Legislative authorization for existing rule 9J-5.002(2)(h), F.A.C., allowing flexibility for application of standards for amendments to existing plans if amendment makes "substantial progress."

3. Major Changes- House bill evolution- started with elimination of DCA review role over local plans, elimination of DRI process (HB 139)

House Bill CS/2335 (As passed the House on SB CS/758):

- * Creation of Study Commission
- * Judicial Review of Local Development Orders- Cure of split process created by Board of County Commissioners v. Snyder, 627 So.2d 469 (Fla. 1993); Parker v. Leon County, 627 So.2d 476 (Fla. 1993); Poulos v. Martin County, 700 So.2d 163 (Fla. 4th DCA 1997) wherein property owners are limited to certiorari review of a denial of a local development order, and 3rd parties are permitted *de novo* review in circuit court.
- * Marina DRI Exemption- Required adoption of marina siting plans in high manatee mortality counties
- * Airport DRI exemption- Required adoption of master plan into the local comprehensive plan
- * Ex Parte Communications- No citizen denied right to petition elected officials
- * Rural Lands Study- DACS/DCA study reported to Study Commission, Legislature, and Governor

* Small Scale Amendments- Cumulative total up to 150 acres per jurisdiction/per year (200 acres in Jax/Duval)

* Vesting and development order amendment language for exempted DRIs

4. Other Legislation

Right to Farm- (SB 1114) Limits local government regulations where such activity is regulated through implemented BMPs or interim measures developed by DEP, DACS, or WMDs

Mobility 2000- (SB 772) A historic transportation package that advances over \$4 billion of road and bridge improvements over a 10-year period to help relieve urban congestion, expand hurricane evacuation routes, and provide corridors of commerce.

School Impact Fees- (HB 2179) (vetoed) Continued prohibition on new school impact fees and substituted state funding for up to 2/3 of funds generated by impact fees levied before May 1, 1999. Allowed local government to increase fee if state funding dropped.

Brownfield Redevelopment- (CS/CS/CS/SB 1406) Amends existing law regarding brownfield redevelopment to streamline the designation process, update cleanup definitions, provide cleanup liability protection for adjacent properties, expedited permitting. Also directs DEP to map and register contaminated sites within a brownfield site.

SLAPP Suits- (HB 135) Prohibits local, regional and state government from filing SLAPP suits

Legislation which did not pass:

Sovereign Submerged Lands- HB 1807; SB 1824

APA (Ch. 120) and s. 403.412 changes- HB 2023; SB 2556

Burt Harris Act presumptions- (HB 659; SB 2476) Created a rebuttable presumption of a taking under s.70.001, Fla. Stat. if a local government reduced a agricultural land use below a density of 1 unit/5 acres.

B. Growth Management Study Commission- Executive Order

Copy to be provided at Conference if available

C. Issues for the Future of Growth Management-

1. Role and Focus of reviewing Regional and State agencies- DCA, RPCs, MPOs, other state agencies; review existing pilot programs such as sector planning, sustainable communities; market and financial incentives rather than regulatory programs

2. Coordination of Multiple Jurisdictions including school boards

3. The Future of DRI's- Integration into local comprehensive plans; vesting of

development orders; process to modify development orders; addressing multi-jurisdictional impacts

4. Process for Judicial Review of Local Development Orders
5. State Rural Lands Policy
6. Role of Citizens in development, adoption, review and enforcement of local plans

plans

7. State Comprehensive Plan, growth management sections
8. Content of Local Comprehensive Plans- Community based, reflective of differences in jurisdictions

differences in jurisdictions

9. Property Rights- Examine current protections

II. New Appellate and Administrative Decisions

A. School Impact Fees- *Volusia County, et al. v. Aberdeen at Ormond Beach, L.P.*, Case No. SC95345 (Fla. Sup. Ct. May 18, 2000)

Volusia County has established a countywide school impact fee system. This system imposes a fee, calculated to be the cost per dwelling unit of providing new public school facilities, on all new residential construction in the County. Aberdeen at Ormond Beach Manufactured Housing Community is a mobile home park in Ormond Beach which, by covenants and restrictions, provides housing only to persons fifty-five years of age or older. Aberdeen challenged the constitutionality of the County school impact fee ordinance as applied to its development on the basis that its deed restrictions would prohibit school-age children from living on the property.

The Florida Supreme Court agreed with Aberdeen, and found the County impact fee unconstitutional as applied. The Court found the fee to violate both prongs of the Adual rational nexus test,⁶ which requires the local government to demonstrate a reasonable connection between any impact fee and both (1) the additional capital facilities needed to accommodate the new development and (2) the benefits accruing to the development as a result of capital expenditures. The Court reasoned that because Aberdeen would house no school-age children, the development would not generate a need for more public school facilities and would not benefit from the construction of such facilities. The Court expressly rejected the County's contention that a limited application of the school impact fee ordinance to those developments proven to generate a need for additional public schools would make the extraction a user fee in violation of the Florida Constitution's guarantee of a free public education.

B. School Concurrency- *Economic Development Council of Broward, Inc., et al v. Dept. of Community Affairs, Broward County, and the School Board of Broward County*, (Case No. 98-989) Fla. 1st DCA (1999)

The First District Court of Appeal affirmed the Administration Commission's Final Order that held the County's optional public school concurrency amendments to be not "in compliance." The Administration Commission had found the amendments were not "in compliance" because they did not include a financially feasible plan which would ensure sufficient capacity, and were not

supported by adequate data and analysis. Subsequent to the First DCA's opinion, the County adopted remedial amendments to its public schools facilities and capital elements as remedial actions to the Final Order. The Department found the remedial amendments to be not "in compliance" because they did not adequately show how adopted levels of service would be maintained in a financially feasible plan and were not supported by data and analysis. After the Department filed its petition challenging the remedial amendments, the Economic Development Council and the Florida Home Builders Association intervened to challenge the amendments. The final hearing is set for September 18-22.

C. Small Scale Amendments

The issue of whether local government decisions regarding small scale amendments to local government comprehensive plans are legislative or quasi-judicial acts has been certified in the last year and a half by four different District Court of Appeals, all of which ruled that they are legislative in nature. The question is currently pending before the Florida Supreme Court in two cases. City of Jacksonville Beach v. Coastal Development of North Florida, Inc., 730 So.2d 792 (Fla. 1st DCA 1999) has been fully briefed and is set for oral argument on October 6. In the lower case, the First DCA reversed the trial court's ruling that small scale amendments were quasi-judicial acts. In the appeal of the Fourth DCA's decision in Minnaugh v. Broward County, 752 So.2d 1263 (Fla. 4th DCA, 2000), briefs have not been filed yet. The appeal of the Fifth DCA's decision in Fleeman v. St. Augustine Beach, 728 So.2d 1178 (Fla. 5th DCA 1998) has been withdrawn by the property owner. The petitioner in the Third DCA case of Palm Springs General Hospital v. Hialeah Gardens, 740 So.2d 596 (Fla. 3d DCA 1999) did not pursue its opportunity to appeal to the Florida Supreme Court by filing the appropriate notice.

In Wiley v. Sumter County, DOAH Case No. 99-3444GM (Jan. 10, 2000), the Administrative Law Judge ruled that a 10.1 acre tract of land exceeded the 10 acre ceiling threshold of the small scale statute and could not be the subject of the expedited small scale procedure. Under the plain language of Subsection 163.3187(1)(c)(1), F.S., the procedure is applicable only to parcels of land that are "ten acres or fewer." After the Recommended Order was forwarded to the Administration Commission for entry of a final order, Sumter County repealed the amendment ordinance and filed a Suggestion of Mootness with the Administration Commission. The Administration Commission entered a Final Order of Dismissal on May 22, 2000.

D. Area of Critical State Concern-

1. *Rathkamp, et al. v. Department of Community Affairs & DCA*, 740 So.2d 1209 (Fla. 3rd DCA, Aug. 4, 1999).

The Monroe County vacation rental ordinance was challenged by 1 property owner, Monroe County Vacation Rental Managers (various realty companies), Lower Keys Chamber of Commerce, and Marathon Chamber of Commerce. The ordinance prohibits vacation rentals (28 days or less) in most land use districts unless the communities are gated and vote to have them. The prohibition includes Improved Subdivision (IS) land use districts, which are where all or most vacation rentals were located. IS subdivisions are the traditional single-family subdivisions in the Keys, with lots of 50 x 50, 50 x 75. The purpose of the ordinance is to protect traditional residential neighborhoods.

The 3rd DCA decided the case on 2 of 4 issues raised by Petitioners/Appellants: (1) There is competent substantial evidence to support the DCA's finding in its final order that the ordinance is consistent with the Principles for Guiding Development for the Florida Keys Area of Critical State Concern, and (2) Section 380.0552(7), F.S. (the Principles) is not an unconstitutional delegation of legislative authority to DCA "where the legislature has set forth twelve specific guidelines for guiding development and has directed that such guidelines are to be reviewed by the FDCA as a whole in its determination of whether a proposed land development regulation is consistent with the guidelines."

The Principles in then s.380.0552(7), Fla. Stat. were invalidated in Askew v. Cross Key Waterways, 372 So.2d 913 (Fla. 1978), as an unconstitutional delegation of legislative authority because they authorized the Governor and Cabinet to designate Areas of Critical State Concern and determine what resources warranted protection instead of the Legislature making those determinations. The current 380.0552(7) was designed to and did remedy that problem. Rehearing and rehearing en banc denied. Florida Supreme Court declined jurisdiction.

2. Ambrose, et al. v. Monroe County, the Village of Islamorada, and the Florida Administration Commission, 16th Judicial Circuit Case No. 97-20-636-CA-18

A large number of Plaintiffs, owners of lots platted prior to the 1979 designation of the Florida Keys as an ACSC, filed a complaint for declaratory judgment, seeking a declaration that their development rights are vested under §380.05(18), F.S. and they are therefore not subject to downzonings that occurred under the County's 1986 Comprehensive Plan and the provisions of the current 2010 Comprehensive Plan, including the County's dwelling unit allocation system (known as ROGO, "rate of growth ordinance") and environmental regulations that would prohibit development. (Monroe County's comprehensive plan and land development regulations are the plan and LDRs for the Village of Islamorada until the Village adopts its own plan and regulations.) DCA intervened.

By summary judgment entered on May 27, 2000, the Monroe County circuit court determined that, under §380.05(18), F.S., owners of single-family lots in the Florida Keys that were platted prior to the 1979 designation of the Florida Keys as an area of critical state concern are vested from all comp. plans, LDRs, and administrative rules, including the current comprehensive plan and land development regulations, adopted after the day in 1979 when the critical area designation became effective, to the extent that they would impair Plaintiffs' abilities to develop single-family homes on those lots. The Court found that no showing of reliance and change of position is required. Defendants were ordered to develop a plan for either issuing permits for development of single-family homes, or for purchasing the lots at the fair market value they would have if unencumbered by the comprehensive plan, LDRs, and administrative rules (which includes the County's rate of growth ordinance). Defendants have filed an interlocutory appeal to the Third District Court of Appeal.

Specifically, the judgment says: "Those Monroe County ordinances, and those state agency rules, adopted or promulgated, in whole or in part, under the authority of Chapter 380, Fla. Stat.,

after the day in 1979 when the Florida Keys Area of Critical State Concern designation became effective, and which ordinances or rules in any way affect the abilities of these Plaintiffs to construct a single-family home on a lot platted and recorded in the public records of Monroe County, are invalid as to these Plaintiffs and their successors in title.” One difficulty with the Court’s order is that the County plan and LDRs were approved under both Ch. 163 and Ch. 380, and the judge has asked the parties to somehow identify which requirements are 380 requirements that would not apply under his order, and which are 163 requirements that still do apply. There are over 15,000 vacant lots in Monroe County.

E. Standing to Challenge Comprehensive Plan Amendment- *Starr et al v. Charlotte County and DCA*, DOAH Case Nos. 98-0449GM et al.

The County rewrote their comp plan and several residents challenged DCA's in compliance finding. Specifically, one of the petitioners challenged the plan on the grounds that the portion of the plan dealing with the historical resources was not supported by adequate data and analysis.

As a threshold issue, the County and DCA asserted that Petitioner Plummer lacked standing since he did not offer objections, recommendations or comments to the County Commission or County Planning Board between the time the plan amendments were transmitted to DCA and the time they were adopted by the County as required by s. 163.3184 (1)(a), Fla. Stat. The ALJ found that the Petitioner’s comments to the County Code Enforcement Board regarding the demolition of a historical building he owned prior to the transmittal of the plan were sufficient to establish standing to challenge the comprehensive plan. The ALJ concluded that because the Code Enforcement Board was an arm or instrumentality of the County, and that Petitioner’s comments were sufficiently close enough to the time period, that Petitioner had standing under s. 163.3184(1)(a), Fla. Stat.

On complete review of the record, DCA reversed holding that the Petitioner did not have standing. DCA concluded that in order for a person to be an "affected person" for purposes of s. 163.3184(1)(a), the person must make comments, recommendations or objections directly to the 'local governing body' [defined in s. 163.3164(9)] or the 'local planning agency' [also a defined term in s. 163.3164(14)]; the remarks must relate or pertain to the plan amendments at issue in order to be sufficient; and the remarks must be made between the time the local government conducts the transmittal hearing (to send the plan to DCA) and time the local government adopts the amendments.

DCA's Final Order was filed May 16, 2000. The parties have 30 days from that date in which to file a Notice of Appeal, to wit, on or before June 15, 2000. As of May 31, no appeal has been filed with the Agency Clerk.

F. Right to Request Declaratory Statements- *1000 Friends of Florida, Inc., et al. v. State of Florida, Department of Community Affairs*, 25 Fla. L. W. D283 (Fla. 1st DCA, April 20, 2000)

FDOT obtained a DEP permit to construct sewer and water line with lift stations along U.S. 1, west to I-95, then south on I-95 to two rest stops maintained by FDOT. St. Johns County agreed to reimburse FDOT for the cost of installing the water and sewer lift stations and force mains. These

public facilities are not included in the County's comprehensive plan. The Petitioners' concerns were that the water and sewer lines would be extended through rural, undeveloped lands, would accommodate the needs of thousands of people, and would therefore cause the premature conversion of rural lands to residential or commercial development and would fail to discourage urban sprawl.

1000 Friends of Florida and others sought a declaratory statement from DCA that the Growth Management Act (Chapter 163, Part II) requires that the installation of public facilities be included in a county's comprehensive plan in order to allow the public a voice in the planning process. DCA dismissed the petition on the ground that the petition sought a declaration concerning the application of a statute or rule to the circumstances of St. Johns County and FDOT and not to Petitioners' particular set of circumstances as required by §120.565.

Relying on its holding in St. Johns River Water Management District v. Consolidated-Tomoka, 717 So.2d 72 (Fla. 1st DCA 1998) and the Florida Supreme Court's decision in Florida Department of Business & Professional Regulation, Division of Pari-Mutual Wagering v. Investment Corp. of Palm Beach, 727 So.2d 904 (Fla. 1999), the First DCA reversed the final order of the Department of Community Affairs denying the petition for declaratory statement that the extension of public facilities must be included in a county's comprehensive plan, on the ground that the petition was not limited to petitioners' particular circumstances but sought a declaration regarding the circumstances of St. Johns County and FDOT. Under "the more liberal language of the amended declaratory judgment statute," a declaratory statement must include but does not have to be confined to petitioner's particular circumstances; it may also provide guidance to others who may find themselves in the same or similar situations. The case was remanded to the Department for consideration of the merits of the petition, including whether the petitioners are "substantially affected persons" under §120.565, F.S.

G. Standing and Remedies to Enforce Comprehensive Plan Consistency- *Charles Brooks et al. v. Martin County, Pinecrest Lakes, Inc. and the Villas at Pinecrest Lakes, Ltd.*, (19th Circuit Court, Martin County, Case No. 96-126CA, July 6, 1999).

After determining that Martin County's approval of a development order was inconsistent with the County's comprehensive plan, Circuit Judge Larry Schack ordered that construction be halted, that the County rescind the development order, and that the apartment buildings constructed under the development order and during the pendency of the challenge be either removed or demolished by February 4, 2000.

The Circuit Court's action came after a remand from the Fourth District Court of Appeal, Poulos v. Martin County, 700 So.2d 163 (Fla. 4th DCA 1997), where the panel decided that the citizens were entitled to a trial de novo to challenge the development order instead of a review based upon the record established before the County Commission. The landowner has appealed to the Fourth District Court of Appeal as have the citizens group which was denied standing. The oral argument has been set for June 13, 2000.

