ESSAY

COMPREHENSIVE PLANS IN THE TWENTY-FIRST CENTURY: SUGGESTIONS TO IMPROVE A VALUABLE PROCESS

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It has been fifteen years since the Florida legislature ushered in a new growth management era by enacting major amendments to Florida's Local Government Comprehensive Planning Act (Planning Act).[1] The 1985 Planning Act amendments restructured and revised the methods whereby local governments manage the unremitting growth pressures created by an expanding population. They also updated the requirements for the content of local government comprehensive plans.[2] The state land planning agency, the Florida Department of Community Affairs (FLDCA), was directed to flesh out the content requirements through an administrative rule[3] that the legislature subsequently reviewed. For the first time, local governments were required to implement their plans through land development regulations.[4] The experience gained from the application of this new law has led the Author to conclude that major changes, outlined in later sections of this Essay, are necessary for the full potential of comprehensive planning to be achieved.

The 1985 amendments placed major emphasis on local planning processes and state oversight. Over 450 of Florida's local governments were required to update their comprehensive plans and to submit their updated plans to the FLDCA for a mandatory compli-

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1. 1985 Fla. Laws ch. 85-55, 207, 210–235 (codified, as amended, in Fla. Stat. §§ 163.3161–163.3215 (2000)). The Planning Act was renamed the Local Government Comprehensive Planning and Land Development Regulation Act. Fla. Stat. § 163.3161(1).

2. Fla. Stat. § 163.3177.

3. Fla. Admin. Code Ann. r. 9J-5 (2000) (establishing the criteria by which the FLDCA reviews local government comprehensive plans).

4. Fla. Stat. § 163.3202.

ance review.[5] To accomplish the compliance review, the Planning Act established a detailed procedure for interagency review of plans and plan amendments at the state and regional levels.[6] The process requires two state reviews, the first when the plan amendments are transmitted to the state and the second after the amendments are adopted by the local government.[7] The second review concludes with a finding by the FLDCA that the adopted plan amendment is "in compliance" or "not in compliance."[8] The finding, called a "Notice of Intent," is published in a local newspaper and is the point of entry for the administrative challenges described below.[9]

In addition to intergovernmental review, the amendments added strong public participation requirements.[10] The Planning Act requires two advertised public hearings — one at the transmittal stage and one at the adoption stage of the amendments.[11] Plan amendments can be considered only twice in a calendar year.[12] As a result, plan amendment "cycles" attract a good deal of press coverage and public attention in most jurisdictions. However, there is an exception for certain specified amendments.[13] These exempt amendments include small-scale development amendments, amendments for emergencies, and amendments relating to a development of regional impact.[14]

The Planning Act created a complex scheme of administrative remedies, including quasi-judicial hearings before a state administrative law judge for challenges to plan amendments.[15] The Planning Act provides two means to initiate the hearing.[16] First, if the state planning agency initially determines that a local comprehensive plan amendment is "in compliance" with the Planning Act, any

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5. *Id.* § 163.3167(2). The initial amendment and review required by the Planning Act for all local plans is complete. *Id.* (stating that the deadline for these requirements was July 1, 1991).
6. *Id.* § 163.3184(3)–(6).
7. *Id.* § 163.3184(4)–(7).
8. *Id.* § 163.3184(8).
9. *Id.* § 163.3184(8)–(9).
10. *Id.* § 163.3181(1).
11. *Id.* § 163.3184(15).
12. *Id.* § 163.3187(1).
13. *Id.* § 163.3187(1)(a)–(c).
14. *Id.* § 163.3187.
15. *Id.* § 163.3184(9)–(11).
16. *Id.* § 163.3184(9), (10) (giving the procedures for local plans or amendments depending on whether the plan is in compliance or not).

"affected person" may petition the agency for a hearing.[17] The agency is required to transmit petitions to the Division of Administrative Hearings for a formal administrative proceeding before an administrative law judge.[18] Second, if the agency initially determines that the proposed amendment is "not in compliance" with state criteria, the agency is required to initiate a formal administrative hearing in the same manner as if a petition had been filed.[19]

If the plan amendment was initially found "in compliance," the administrative law judge's recommended order is filed with the secretary of the FLDCA.[20] However, if the plan amendment was initially found "not in compliance," the Administration Commission, which is composed of the governor and his cabinet, enters a final order.[21] The Commission has the authority to specify corrective action and to levy financial penalties if the local government refuses to bring its plan into compliance.[22] In the great majority of cases, the local government complies with the Commission's directives. However, the local government also has the option of accepting the penalty and making the amendment effective over state objections.[23]

Perhaps the most far-reaching planning requirement — requiring local governments to coordinate public infrastructure development with private sector development to insure that the public facilities necessary to serve development will be available concurrently with development impacts — attracted very little attention when it was adopted.[24] The public facility planning requirement, which quickly became known as "concurrency,"[25] is addressed in two ways in the statute.[26] First, local governments are required to include a capital improvements element in their comprehensive plans to address projected needs, costs, and timing

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17. *Id.* § 163.3184(9)(a). The term "affected person" includes any person "owning property, residing, or owning or operating a business within the boundaries of the local government whose plan is the subject of the review." *Id.* § 163.3184(1)(a).

18. *Id.* § 163.3184(9)(b). The Secretary of the FLDCA must forward the case to the Administration Commission if he or she determines that the plan amendment is not in compliance. *Id.*

19. *Id.* § 163.3184(10).

20. *Id.* § 163.3184(9)(b).

21. *Id.* § 163.3184(10)(b), (11).

22. *Id.* §§ 163.3184(11)(a)–(d), 163.3189(2)(b).

23. *Id.* § 163.3189(2)(b).

24. *Id.* § 163.3202(2)(g).

25. H. Glenn Boggs, II & Robert C. Apgar, *Concurrency and Growth Management: Lawyer's Primer*, 7 J. Land Use & Envtl. L. 1, 1 (1991) (describing the development and implementation of "concurrency" as a land use regulation).

26. *Id.* at 4.

"to ensure the availability of public facilities and the adequacy of those facilities including acceptable levels of service."[27] Second, the Planning Act requires that concurrency be addressed project-by-project by mandating that "a local government shall not issue a development order or permit which results in a reduction in the level of services for the affected public facilities below the level of services provided in the comprehensive plan of the local government."[28] Interestingly, this is the only planning requirement for which the Planning Act prescribes a permitting standard.

Overall, Florida's Planning Act is a success. Indeed, it is hard to imagine a return to the piecemeal, zoning code driven system of earlier years. Local government comprehensive plans have become useful, direction-setting documents that have earned a permanent place in Florida's state and local law. Public participation in planning decisions and public attention to growth management issues on a continuing basis are much greater now than at any time in the past. Florida courts have embraced the concept of comprehensive planning as a means to increase local governments' accountability for land use decisions and as an answer to what one noted commentator described as "'neighborhoodism'" and "rank political influence on the local decision-making process."[29] After reviewing the Planning Act in detail, the Florida Supreme Court gave strong support to the Act, holding that a landowner who sought to rezone property had the burden of proving that the proposal strictly complied with the comprehensive plan.[30] However, as with any comprehensive legislative program, experience reveals areas for improvement. This Essay deals with the following problem areas, which are ripe for further study and constructive change: the expense and time required for a hearing, the inadequacy of the judicial process as applied to compliance challenges, and the unforeseen consequences of case-by-case transportation concurrency review.

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27. Fla. Stat. § 163.3177(3)(a)(3).

28. *Id.* § 163.3202(2)(g).

29. *Bd. of County Commrs. of Brevard County v. Snyder*, 627 S.2d 469, 472–473 (Fla. 1993) (quoting Richard F. Babcock, *The Zoning Game: Municipal Practices and Policies* (U. of Wis. Press 1966)).

30. *Id.* at 475 (citing *Lee County v. Sunbelt Equities, II, Ltd. Partn.*, 619 S.2d 996, 1003 (Fla. Dist. App. 2d 1993) (holding that the term "strict scrutiny" arises from the necessity of strict compliance with a comprehensive plan)).

THE PROCESS FOR REVIEWING LOCAL PLAN AMENDMENTS FOR COMPLIANCE WITH STATE LAW IS OVER-JUDICIALIZED

Experience has shown that the quasi-judicial process is ill-suited for determining whether comprehensive plans are "in compliance" with state law. In 1985 the legislature selected the Administrative Procedure Act[31] as the vehicle for reviewing comprehensive plan compliance determinations.[32] While this formal, trial-like proceeding may have been necessary to guide local governments through the trial and error of their initial planning experiences, its negative effects now outweigh the benefits of its complex and lengthy process.

As described earlier in this Essay, the Planning Act provides for a formal administrative hearing following the adoption of any proposed plan amendments to address objections to the amendments. The proceedings are conducted like civil trials.[33] The process commences with discovery, which is conducted pursuant to the Florida Rules of Civil Procedure. Typical discovery includes written interrogatories, requests for production of documents, and depositions of witnesses. The hearing is conducted in the same manner as a nonjury civil trial, although more informally. Witnesses testify under oath and are subject to cross-examination. Exhibits are subject to the Florida evidence code, although the hearsay rule is substantially relaxed.[34] After the hearing, the parties have the opportunity to submit proposed orders and written legal arguments. The administrative law judge issues a recommended order, which is submitted to the secretary of the FLDCA or to the Administration Commission for a final order and a consideration of penalties.[35]

This process has a number of drawbacks. The first drawback is the expense and time required to complete the hearing process. The steps in administrative litigation are much the same as in civil litigation. There is typical motion practice and prehearing discovery, followed by a formal evidentiary hearing, posthearing submissions, and, if the matter is directed to the Administration Commission, a

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31. *Administrative Procedure Act*, Fla. Stat. ch. 120 (2000).

32. *Id.* § 120.545.

33. *Id.* ch. 120.

34. *Id.* § 120.57(1)(c) (stating that hearsay evidence is not sufficient as the sole proof to support a finding).

35. *Id.* § 163.3184(9)(b), (10)(b), (11).

posthearing appearance for oral argument before the Commission. Challenges typically draw a number of parties or intervenors, each of whom may be represented by attorneys. Expert planning witnesses are frequently needed. As in a civil trial, time frames are frequently extended due to conflicts on the administrative law judge's or attorneys' calendars. A typical plan amendment challenge will consume at least one year from initiation to entry of a final order. Appeals to a district court of appeal are frequent.

In the meantime, the challenged plan amendments are stayed, because challenged amendments do not take effect until a final order is entered.[36] Related plan amendments may be rendered ineffective.

If the challenged amendments are comprehensive, the effectiveness of the entire comprehensive plan is compromised. The delay that results from a challenge can create serious difficulty for property owners seeking to sell property or to obtain financing for development. The expense of an administrative hearing can be a significant burden, especially to smaller local governments, property owners, and citizens' groups.

The second drawback arises from the nature of the administrative hearing. The judicial process on which the administrative hearing is modeled is best suited to cases in which the resolution depends on resolving factual disputes. However, the typical compliance challenge turns on questions of how proposed policies and objectives effectively will achieve desired goals and which goals and policies should be given priority. There are few disputed facts, except for questions of ultimate fact that require expert testimony.

A typical challenge, for example, alleges that particular objectives or policies tend either to cause urban sprawl, allow development that would be incompatible with existing neighborhoods, or lead to pollution of rivers or lakes. Similarly, a challenger might allege that particular policies are not supported by "sufficient data and analysis" or that new objectives promoting economic development create internal inconsistencies with policies promoting conservation. Parties call on planning experts to give opinions on whether particular polices go far enough to prevent sprawl, to avoid incompatible land uses, or to prevent harmful pollution. The answers to these questions are matters of degree — is there "sufficient data and analysis" to support an increase in density, or how significant is the internal inconsistency? In the final analysis,

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36. *Id.* § 163.3189(2)(a).

the outcome turns on a balancing of competing, mostly legitimate, public interests. These are questions of public policy for which a trial-like process is not well suited and for which an administrative law judge is not the best decision-maker.

The third drawback arises from the adversarial nature of the judicial model from which the administrative hearing process is drawn. When the hearing process begins, cooperative problem-solving ends. The parties prepare to defend their positions and to attack the positions of their opponents. The need for confidentiality makes communication all but impossible. In turn, this subtly imposed silence breeds isolation and suspicion. Hostility quickly replaces collegiality. Aggressive advocacy during the hearing generates anger and resentment. In sum, the adversarial process exacts a high price to produce a decision between competing interests. Experience has shown that it is difficult to return to a cooperative, consensus-building planning process at the conclusion of a hotly contested hearing.

This is not to say that administrative hearings have not produced good results or that statutory standards are not needed. Certainly, plans should be internally consistent, and it only makes sense that a plan should be based on professionally acceptable analysis of the best available data. Unfortunately, it is also true that elected officials make arbitrary and unreasonable public policy decisions from time to time. Overall, administrative law judges have done an outstanding job of sifting through complex arguments and applying difficult statutory standards. The problem is that the current administrative hearing process prevents plan implementation for an inordinate amount of time and ultimately requires administrative law judges to substitute their judgment for that of locally elected officials on public policy issues. Moreover, the administrative hearing process can have a lasting negative impact on what ought to be a cooperative, creative planning effort.

In the Author's opinion, the problems described above justify major revisions to the Planning Act. Quasi-judicial review of plan amendments should be replaced by a three-person review panel. Review by the FLDCA or the Administration Commission should be eliminated. Review panel members could be selected from a pool of experienced public and private sector planners, public officials, and other persons with relevant expertise who are appointed by the governor. The panel would conduct an informal public hearing within sixty days after a challenge is filed and submit a written advisory opinion to the local government. By the time a plan

amendment is adopted, serious objectors will have had more than adequate time to formulate objections and prepare evidence. The panel should be required to enter a written decision within thirty days of the hearing. The recording or transcript of the public hearing, with written submissions, would create a record for judicial review, which should be limited to appellate review by certiorari.

CIRCUIT COURTS HAVE BECOME SUPER-ZONING AUTHORITIES

In *Board of County Commissioners of Brevard County v. Snyder*,[37] the Florida Supreme Court required quasi-judicial hearings for most rezonings.[38] The well-established appellate standard of review in a certiorari case requires that the local zoning decision be upheld if there is any substantial competent evidence in the record to support the local government's decision.[39] The court may "not reweigh the evidence nor . . . substitute its judgment for that of the [local body]."[40] In addition, *Snyder* endorsed a standard that is very deferential to local governments that refuse to rezone property to a more intense use, which would be consistent with the comprehensive plan.[41] The court held that the local government need only "demonstrate that maintaining the existing zoning classification . . . accomplishes a legitimate public purpose."[42] In sum, in the rezoning context, decision-making authority and discretion reside primarily with the local government.

When a development order is issued, third-party challengers may file a verified complaint, pursuant to Section 163.3215, to challenge the consistency of a proposed development with the comprehensive plan.[43] In this proceeding, decision-making power is strongly shifted to the circuit court, whose review is de novo. Despite the fact that the issuance of a development order may follow a quasi-judicial hearing before the local government, the circuit

37. 627 S.2d 469 (Fla. 1993).

38. *Id.* at 474.

39. *City of Ft. Lauderdale v. Multidyne Med. Waste Mgt., Inc.*, 567 S.2d 955, 957 (Fla. Dist. App. 4th 1990).

40. *Educ. Dev. Ctr., Inc. v. City of W. Palm Beach Zoning Bd. of App.*, 541 S.2d 106, 108 (Fla. 1989).

41. 627 S.2d at 475 (stating that "the comprehensive plan is relevant only" in a challenge to a zoning classification when the suggested use of the plan is inconsistent with the plan itself).

42. *Id.* at 476.

43. Fla. Stat. § 163.3215; Boggs & Apgar, *supra* n. 22, at 6.

court accords no presumption of correctness to the local permitting decision. Thus, the circuit court becomes a super land use authority with virtually unreviewable discretion. This issue could be resolved by a statutory amendment, which states that when a development order has been the subject of a full and fair quasi-judicial hearing before the local government that satisfies fundamental standards of due process, it shall be reviewed by certiorari and shall not be subject to de novo review by the circuit court.

TRANSPORTATION CONCURRENCY HAS OVER-SHADOWED MORE IMPORTANT PLANNING GOALS

The mandate for public facility concurrency described above was arguably the most innovative and far-reaching requirement of the 1985 Planning Act amendments.[44] However, application of concurrency to transportation facilities has proven to be problematic. For this reason, it is time to reassess this application. Experience has shown that transportation concurrency has had two major unintended consequences. First, by prohibiting development where roads are congested and there is little roadway capacity, concurrency regulations have tended to force new development out of developed urban areas and into the surrounding rural areas that have more lightly traveled roads. Thus, concurrency regulations have come into conflict with goals and policies that seek to slow the expansion of urban areas and promote redevelopment.

Second, by utilizing motor vehicle level of service standards to measure concurrency, to the exclusion of all other modes of travel, transportation concurrency has forced local officials to pursue improved motor vehicle mobility at the expense of more walkable, liveable communities. It is time to seriously reexamine transportation concurrency and to reduce the priority on motor vehicle mobility by rescinding the requirement to apply level of service standards to specific developments at least within designated urban growth or redevelopment districts.

The 1998 Florida legislature created the Transportation and Land Use Study Committee, which "was charged with evaluating transportation and land use planning and coordination issues."[45] The Committee's report was submitted to the Florida legislature on

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44. *Supra* nn. 21–27 and accompanying text.

45. Transp. & Land Use Study Comm., *Final Report of the Transportation and Land Use Study Committee* i (Jan. 15, 1999).

January 15, 1999.[46] It is a comprehensive, carefully prepared document that bears further study. The tenor of the report is captured in the following introductory statement:

> Despite much well intended work and effort, Florida's land use and transportation system is failing many of the nearly 15 million Floridians and the 47 million plus annual visitors to our state. Heavy peak hour traffic congestion is the norm in most urban areas. Few communities offer viable alternative transportation modes to the automobile. Florida leads the nation in automobile-related deaths each year among both pedestrians and bicyclists. Our fastest growing population group, elders over 75 years of age, are becoming increasingly homebound and isolated as they lose their driver's licenses. Lower income persons unable to afford a car are increasingly isolated from entry level jobs and economic opportunity as a whole. The cost of automobile dependency is increasing in terms of fuel consumption, system maintenance, wear on vehicles, increased distances between daily destinations, and time spent coping with congestion and accidents.[47]

The report addresses the shortcomings of transportation concurrency at length. In a section entitled "A Good Idea with Unintended Consequences," the report characterizes the current situation in the following terms:

> Planning and building communities with sufficient multi-lane, high-speed roadways to maximize automobile and freight mobility tends to create communities that are unfriendly to transit and dangerous to pedestrians.... Thus, land planning as based on current transportation concurrency practices increases our reliance on automobiles and prevents communities from achieving higher standards of pedestrian friendliness, compact urban growth, urban infill and redevelopment, and a better quality of life.[48]

In retrospect, the original concept of concurrency, as applied to transportation, seems faulty. The unspoken assumption of transportation concurrency is that cities and counties can build their way out of congestion. In fact, experience has shown that building high-

46. *Id.* at 1.
47. *Id.* at 2.
48. *Id.* at 20.

speed thoroughfares shapes our communities in ways that increase our dependency on automobiles, ultimately increase congestion despite the new roads, and prevent us from achieving a higher quality of life in Florida's communities. In the Author's opinion, it is time to revisit transportation concurrency and to repeal concurrency as a permitting standard, at least within designated urban growth boundaries or redevelopment areas. Concurrency should continue to be a goal of comprehensive planning. However, it must be recognized as a goal, not the most important goal, which should give way to considerations of people-friendly urban form.

CONCLUSION

Today, Florida's success with comprehensive planning is incomplete. Many Florida communities are experiencing serious frustration with the delay and expense of comprehensive plan challenges and litigation over the consistency of local development orders with the comprehensive plan. In our eagerness to be certain that every Florida citizen should have all the due process that can be provided, we have overcommitted to decision-making models that work against the cooperative, consensus-building process that successful planning requires. As a result, disputes over comprehensive plan amendments lead to lengthy and expensive trial-like proceedings before boards of elected or appointed officials. Understandably, they are neither well qualified to preside over judicial hearings nor enthusiastic about listening to lawyers argue over the finer points of the rules of evidence. Conversely, circuit judges have become interpreters of comprehensive plans and of the inherent public policy decisions that this function requires. The questions should be decided, at least initially, by elected officials. We can do better by seriously reconsidering our total dependence on adversarial, trial-like models of dispute resolution in disputes over the legislative decisions and priorities that make up comprehensive plans.

In addition, many Florida communities are frustrated by their inability to contain urban sprawl. The transportation concurrency requirement of the Planning Act is a major part of the problem. It literally forces local governments to allow major new developments to locate in more lightly developed areas, because neither the local government nor the State can afford to expand existing roadways to accommodate growth. Moreover, the single-minded focus on automobile mobility ensures that government's resources primarily must be devoted to building and expanding roadways, despite the adverse

effects this may have on the quality of life in Florida's communities. When these problems are addressed, Floridians can further improve the quality of their local comprehensive plans and their ultimate quality of life in the twenty-first century.