Florida’s Growth Management Act: How Far We Have Come, and How Far We Have Yet to Go

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I. INTRODUCTION

In 1985, Florida adopted the Local Government Comprehensive Planning and Land Development Regulation Act (the “Act”).\(^1\) The Act requires that each local government in Florida adopt a local comprehensive plan consistent with the Act.\(^2\) The Act calls for the adoption of these comprehensive plans over a three-year period.\(^3\) The last of these plans was adopted in the middle of 1992. Although a number of plans are still in litigation and have therefore not been brought into “compliance” with the

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1. 1985 Fla. Laws ch. 85-55 (current version at FLA. STAT. §§ 163.3161-.3215 (1995)).
2. FLA. STAT. §§ 163.3181, .3184; see also FLA. ADMIN. CODE ANN. r. 9J.11 (1995).
3. FLA. STAT. § 163.3167(4).
Act, most local governments have moved onto the next critical phase of growth management—the implementation and enforcement of the plans through plan amendments and individual development orders.

The planning process now shifts from the review of the initial plans to the refinement and application of the plans through subsequent amendments and more detailed Land Development Regulations ("LDRs"). Also, individual development orders issued by local governments must be consistent with the adopted plans⁵ and LDRs. These orders are subject to "consistency" challenges under a statutory cause of action.⁶ In theory then, all development orders issued by local governments are consistent with the state's adopted growth management policies. At the same time, many local governments are revisiting their plans through the amendment process.

The first decade of Florida's modern era of growth management has produced an incredible, but not an unpredictable, amount of change, controversy, disappointment, and even some success stories. As growth management enters its second decade, it seems an appropriate time to assess where we have come from and where we are headed.

This article will begin by presenting a primer on the basics of the growth management process in Florida. Next, it will discuss the important substantive issues which have arisen during the implementation of the Growth Management Act as a means of providing a practice guide to the practitioner. Finally, this article will analyze the success or failure of growth management and will offer some suggestions for changes which the author thinks are necessary to make growth management in Florida more effective.

II. THE BASICS OF THE GROWTH MANAGEMENT PROCESS IN FLORIDA

A. Purposes and Basic Requirements

1. Purposes of the Growth Management Act

The purposes of the Growth Management Act are, among other things, to "guide and control future development,"⁷ to "overcome present handi-

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4. As of this writing, Monroe, Walton, and Polk Counties have not yet brought their plans into compliance.
5. FLA. STAT. § 163.3194(1)(a).
6. Id. § 163.3215.
7. Id. § 163.3161(2).
caps; and deal effectively with future problems which may result from the use and development of land[,]” to “preserve, promote, protect, and improve the public health, safety, comfort and good order,” 8 and “to protect human, environmental, social and economic resources[.]” 9 The Act is to be “construed broadly to accomplish its stated purposes and objectives.” 10

2. The Form and Content of Plans

The Act specifies that “comprehensive plans must consist of material in such descriptive form, written or graphic, as may be appropriate to the prescription of principles, guidelines, and standards for the orderly and balanced future economic, social, physical, environmental, and fiscal development of the area.” 11 Comprehensive plans must have a capital improvements element and a future land use plan element. In addition, the plan must have a traffic circulation element consisting of proposed and existing thoroughfares and transportation routes. The plan must also have a sanitary sewer, solid waste, drainage, potable water and natural groundwater aquifer recharge element, a natural resource conservation element, a recreation and open space element, a housing element, a coastal management element, and an intergovernmental coordination element. 12 In recognition of Florida’s critical need to protect its coastal areas from natural disasters and environmental degradation, an entire subsection of the Act is devoted to establishing requirements for coastal management elements. 13 Coastal

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8. Id. § 163.3161(3).
9. Id. § 163.3161(7).
10. FLA. STAT. § 163.3177(1).
11. Id. § 163.3194(4)(b).
12. Id. § 163.3177(6)(c).
13. Id. § 163.3178; see also id. § 163.3177(6)(d), (g). The intent of the coastal management portions of that law is that local plans “restrict development activities where such activities would damage or destroy coastal resources, and that such plans protect human life and limit public expenditures in areas that are subject to destruction by natural disaster.” FLA. STAT. § 163.3178(1).

Section 163.3178(2) of the Florida Statutes requires that the coastal management element of a local comprehensive plan be based on studies, surveys, and data. Further, it requires that it be consistent with coastal resource plans “prepared and adopted pursuant to general or special law.” Id. § 163.3178(2). In addition, the plan must contain, among other things:

(a) A land use and inventory map of existing coastal uses, wildlife habitat, wetland and other vegetative communities, undeveloped areas, areas subject to coastal flooding, public access routes to beach and shore resources, historic preservation areas, and other areas of special concern to local government.
management elements which must be designed to "restrict development activities where such activities would damage or destroy coastal resources. . . ." Local governments are also authorized to adopt optional elements including a mass transit element, a port, aviation, and related facilities element, a recommended community design element, and a general area

(b) An analysis of the environmental, socioeconomic, and fiscal impact of development and redevelopment proposed in the future land use plan, with required infrastructure to support this development or redevelopment, on the natural and historical resources of the coast, and the plans and principles to be used to control development and redevelopment to eliminate or mitigate the adverse impacts on coastal wetlands; living marine resources; barrier islands, including beach and dune systems; unique wildlife habitat; historical and archaeological sites; and other fragile coastal resources.

(d) A component which outlines principles for hazard mitigation and protection of human life against the effects of natural disaster, including population evacuation, which take into consideration the capability to safely evacuate the density of coastal population proposed in the future land use plan element in the event of an impending natural disaster.

(e) A component which outlines principles for protecting existing beach and dune systems from human-induced erosion and for restoring altered beach and dune systems.

(f) A redevelopment component which outlines the principles which shall be used to eliminate inappropriate and unsafe development in the coastal areas when opportunities arise.

(h) Designation of high-hazard coastal areas, which for uniformity and planning purposes herein, are defined as category 1 evacuation zones. However, application of mitigation and redevelopment policies, pursuant to s. 380.27(2) and any rules adopted thereunder, shall be at the discretion of local government.

(j) An identification of regulatory and management techniques that the local government plans to adopt or has adopted in order to mitigate the threat to human life and to control proposed development and redevelopment in order to protect the coastal environment and give consideration to cumulative impacts. *Id.* § 163.3178(2)(a), (b), (d)-(f), (h), (j).

Also, under § 163.3178(8) of the *Florida Statutes*, each county that is required to prepare a coastal management element must establish a county-based process for identifying and prioritizing coastal properties so they may be acquired as part of the state’s land acquisition programs. The process must include the establishment of criteria for prioritizing coastal acquisitions which, in addition to recognizing pristine coastal properties and coastal properties of significant or important environmental sensitivity, recognize hazard mitigation, beach access, beach management, urban recreation, and other policies necessary for effective coastal management. *Id.* § 163.3178(8).

14. *Id.* § 163.3178(1).
redevelopment element. In comprehensive plans for a city or country covering a population greater than 50,000, the mass transit element and the coordination of port, aviation, and similar facilities are mandatory.

The Department of Community Affairs ("DCA") adopted an administrative rule to implement the statutory requirement for "principles, guidelines and standards" by requiring that plans contain specific types of goals, objectives, and policies. A goal is defined as "the long-term end toward which programs or activities are ultimately directed." An objective is "a specific, measurable, intermediate end that is achievable and marks progress toward a goal." Policies answer the question of how "programs and activities are conducted to achieve an identified goal." The Act, and the administrative rule which guide the Department in its review of comprehensive plans include very specific requirements for the subject matter and intended result of the adopted plans.

16. Id. § 163.3177(6)(d).
18. Id. at r. 9J-5.003(86).
19. Id. at r. 9J-5.003(95).
20. Among the most notable substantive requirements, the plans must:
   1. Conserve, use, and protect natural resources, including water, water recharge areas, marshes, soils, floodplains, and other natural resources. Fla. Stat. § 163.3177(6)(d).
   2. Conserve, develop, utilize, and protect natural resources within their jurisdictions. Id. § 163.3161(3).
   4. Include an objective which addresses protecting the functions of natural groundwater recharge areas and natural drainage features. Id. at r. 9J-5.011(2)(b)5.
   5. Include a policy which regulates land use and development to protect natural drainage features. Id. at r. 9J-5.011(2)(c)4.
   6. Include an objective which protects surface waters. Id. at r. 9J-5.013(2)(b)2.
   7. Include an objective which protects soils and native vegetation. Id. at r. 9J-5.013(2)(b)3.
   9. Include a policy which restricts activities and land uses known to adversely affect the quality and quantity of identified water sources. Id. at r. 9J-5.013(2)(c)1.
10. Include a policy which protects native vegetative communities from destruction by development activities. Id. at r. 9J-5.013(2)(c)3.
11. Include a policy which restricts activities known to adversely affect the survival of endangered and threatened wildlife. Id. at r. 9J-5.013(2)(c)5.
12. Include a policy which protects the natural functions of existing soils, wildlife habitat, wetlands, and floodplains. Id. at r. 9J-5.013(2)(c)6.
The goals, objectives, policies, standards, findings, and conclusions within the proposed comprehensive plan must be supported by relevant and appropriate data which is gathered in a professionally accepted manner. The data and analysis which need not be adopted as part of the plan will be discussed at length below. It is the goals, objectives, and policies which constitute the operative, adopted parts of the plan since they have the force of law. Essentially, these requirements mean that comprehensive plans must firmly establish the fundamental value judgments which will govern land use decisions within a given jurisdiction.

Interpreting these provisions, several administrative orders have ruled that a policy in a plan which states simply that the local government will subsequently adopt an LDR that addresses a specific rule requirement is unacceptable. The plan itself must contain a policy which provides some guidance, value or "policy" judgment on each issue required to be addressed in chapter 9J-5 of the Florida Administrative Code. Simply deferring to LDRs does not provide the same level of attention to the issue because LDRs, which can be amended, revised, or repealed without the procedural safeguards that apply to plan amendments, do not have the same legal status as policies within a plan. Furthermore, deferring the establishment of meaningful standards to the LDRs would not fulfill the requirements of

14. Include an objective which coordinates future land uses with soil conditions and topography. *Id.* at r. 9J-5.006(3)(b)1.
15. Include an objective which encourages the elimination or reduction of uses inconsistent with the community character. *Id.* at r. 9J-5.006(3)(b)3.
16. Include a policy which provides for the compatibility of adjacent land uses. *Id.* at r. 9J-5.006(3)(c)2.
17. Include an objective addressing the extent to which future development will bear a proportionate cost of facility improvements necessitated by the development in order to adequately maintain adopted level of service standards. *Id.* at r. 9J-5.016(3)(b)4.
18. Include a policy assessing new developments and appointing a pro rata share of the costs to finance public facility improvements necessitated by their development. FLA. ADMIN. CODE ANN. r. 9J-5.016(3)(c)8. (1995).
19. Include an objective which encourages the redevelopment and renewal of blighted areas. *Id.* at r. 9J-5.006(3)(b)2.
20. Include an objective discouraging the proliferation of urban sprawl. *Id.* at r. 9J-5.006(3)(b)8.
21. Include a policy addressing the provision for drainage and stormwater management. *Id.* at r. 9J-5.006(3)(c)4.
22. Include an objective to coordinate future land uses with the appropriate topography and soil conditions, and the availability of facilities and services. *Id.* at r. 9J-5.006(3)(b)1.

section 163.3177(9)(e) of the Florida Statutes or rule 9J-5.005 of the Florida Administrative Code. However, leaving it to the LDRs to establish the specific performance standards for the granting of special exceptions does not necessarily render a plan not “in compliance.”

These issues concern the level of detail and specificity which must be included in a plan so that is to be found in compliance. Most local governments have fought attempts to require a great level of detail in plans. They did not want to give away their ability to exercise discretion when later deciding the content of more specific land development regulations, or in deciding whether a specific development proposal was consistent with that plan. Obviously, the more vague the plan, the greater range of decisions that will be consistent with that plan. This is still the preferred approach of local governments who typically want greater latitude to approve, or disapprove, of development proposals, without strictly complying with a predetermined standard. However, judicial interpretations of the “consistency” requirement have begun to greatly diminish the ability of a local governments to disapprove of something which is “consistent” with their plans. Therefore, this has removed much of the discretion the governing body believed it had reserved for itself. This development, which will be described in greater detail below, has called into question the practice of leaving too much room for interpretation in plans.

3. Internal Consistencies

Coordinating the elements of the plan is a “major goal” of the planning process, and the various elements of a plan must be consistent with each other. This means that adopted goals, objectives, and policies are not just binding on decisions concerning land development regulations and development orders. The balance of a plan’s provisions, and subsequent plan amendments, must also be internally consistent with adopted goals, objectives, and policies. Thus, the plan’s adopted goals, objectives and policies must guide future amendments to the plan.

This “internal consistency” requirement is strongest as it applies to the role of the Future Land Use Map (“FLUM”). The FLUM must “reflect [the plan’s] goals, objectives, and policies within all elements . . . .” This

23. FLA. STAT. § 163.3177(2).
24. Id. § 163.3187(2).
provision establishes the critical role of FLUM decisions in determining whether the plan implements and complies with stated planning objectives. As the majority of planning activity currently taking place involves the adoption of amendments to FLUMs, this is possibly the most important requirement in the rule and will be discussed in greater detail below.

4. Concurrency

The Act's concurrency provisions require that every plan include 1) a requirement that adequate public facilities be available when a development order is issued and 2) that this requirement be enforced at the development order stage. An early decision of a hearing officer strictly interpreted the Act's initial concurrency provisions. Transportation concurrency has clearly proven to be the most difficult issue, and the Act has been revised in several ways over the past three years to allow for a more flexible application of this policy. Since a number of recent articles have quite adequately discussed the concurrency requirement, it will only be mentioned briefly in this article.

The hottest issue regarding the Act at this time is school concurrency. The Act does not require that there be adequate public school facilities to save new development but does allow a local government to require school concurrency if it has a study to show how it can be implemented.

B. Procedural Issues

1. Review of the Draft Plan or Amendment

Plans developed to initially meet the requirements of the Act were first transmitted as draft plans for review by the DCA. This procedure was also required for all amendments.

The Act requires a local planning agency hearing and recommendation prior to a local government transmittal hearing. The First District Court of Appeal has stated that the requirement concerning the local planning

26. FLA. STAT. § 163.3180.
27. See generally David L. Powell, Recent Changes in Concurrency, 68 FLA. B.J. 67 (Nov. 1994).
28. FLA. STAT. § 163.3184(3).
29. Id. § 163.3184(10).
30. Id. § 163.3174(4)(a).
agency can be met de facto and strict compliance is not necessary.\textsuperscript{31} However, notice must be given seven days prior to the local governing board's transmittal hearing.\textsuperscript{32}

Prior to a 1993 law,\textsuperscript{33} the Environmental Lands Management Study ("ELMS"), which largely implemented the Final Report of the Third Environmental Lands Management Study Committee, the DCA automatically reviewed each proposed or "transmitted" amendment. Working with other review agencies, the DCA reviewed the draft plan within ninety days of receipt and issued its Objections, Recommendations, and Comments Report ("ORC Report"), which identified deficiencies in the draft plan or amendment and provided specific guidance on how the deficiencies should be corrected. Now, the Act requires a copy of a "proposed" amendment to be transmitted to the DCA and also to the appropriate regional planning council and water management district, the Department of Environmental Protection, and the Department of Transportation.\textsuperscript{34} The legislature also deleted the requirement for an automatic review and gave the DCA the discretion to decide, within forty-five days of the transmittal of the plan or amendment, whether to conduct a review.\textsuperscript{35} However, the DCA must conduct a review if requested to do so by a regional planning council, an affected person as defined in section 163.3184(1)(a) of the \textit{Florida Statutes}, or the local government, as long as such request is received within forty-five days of the transmittal of the proposed amendment.\textsuperscript{36}

Once the DCA issues the ORC Report, a local government has sixty days to review the ORC Report and adopt the plan or amendment.\textsuperscript{37} A plan or amendment thereto is adopted by ordinance.\textsuperscript{38} For amendments adopted pursuant to an Evaluation and Appraisal Report ("EAR"), legislation adopted in 1992 extended this time period to 120 days.\textsuperscript{39}

\textsuperscript{31} B & H Travel Corp. v. Department of Community Affairs, 602 So. 2d 1362, 1366 (Fla. 1st Dist. Ct. App. 1992). Most local governments governing boards have appointed a local planning agency and usually a body of lay volunteers. In addition, some governing boards sit themselves as the local planning agency.

\textsuperscript{32} \textsc{Fla. Stat.} § 163.3184(15)(b)1.


\textsuperscript{34} \textsc{Fla. Stat.} § 163.3184(4) (1995).


\textsuperscript{36} \textsc{Fla. Stat.} § 163.3184(5) (1995).

\textsuperscript{37} \textit{Id.} § 163.3184(7).

\textsuperscript{38} \textit{Id.} § 163.3184(15)(a).

\textsuperscript{39} \textit{Id.} § 163.3184(7).
Legislation adopted in 1995 exempted small scale plan amendments from review and challenge by the DCA.\textsuperscript{40} Such amendments can only be challenged by affected persons.\textsuperscript{41}

2. Review of Adopted Plan or Amendment

After a local government adopts its plan or amendment, it is again transmitted to the DCA for review. The DCA then has forty-five days to review the plan or amendment and publish a Notice of Intent finding the plan in compliance, or not in compliance, with the Act.\textsuperscript{42} The DCA’s statement of intent must be based upon matters raised in its ORC Report, or adopted plans or amendments, or portions thereof, that were not previously transmitted for an ORC review.\textsuperscript{43} This forty-five day requirement has been held not to be jurisdictional and the DCA’s failure to strictly comply does not preclude a formal challenge to the plan or amendment.\textsuperscript{44}

Prior to the ELMS bill, the DCA, if requested to do so, had to “participate” in the local plan or amendment adoption hearing in order to find a plan or amendment not in compliance. This requirement gave rise to a number of unsuccessful claims of non-participation by local governments, but was interpreted to require little more than mere attendance at the hearing. It was later deleted in the ELMS bill.\textsuperscript{45}

The ELMS bill evidences the intent only to allow for a shorter amendment process and does not foreclose the DCA, or any affected person, from challenging the adoption of an amendment which had not previously been reviewed. In cases where a review of the transmitted plan was not conducted, the compliance determination must be based solely on the plan or amendment as adopted.

\textsuperscript{40} Ch. 95-322, § 3, 1995 Fla. Laws at 2875 (codified at FLA. STAT. § 163.3187(3)(a) (1995)) (stating that “[a]ny affected person may file a petition with the Division of Administrative Hearings pursuant to § 120.57”).
\textsuperscript{41} See FLA. STAT. § 163.3187(3)(a)-(c) (1995).
\textsuperscript{42} Id. § 163.3184(8)(a).
\textsuperscript{43} Id. § 163.3184(8).
\textsuperscript{44} Caliente Partnership v. Department of Community Affairs, 604 So. 2d 886, 887 (Fla. 1992).
3. Adoption of the Plan or Amendment and Legal Effect Thereof

The procedures for adopting plans and amendments are contained in sections 163.3181 and 163.3184 of the *Florida Statutes*, and chapter 9J-11 of the *Florida Administrative Code*. Prior to the 1993 law, plans and amendments were effective and governed the adoption of land development regulations and the issuance of development orders immediately upon adoption.\(^4^7\) Now, however, plan amendments are not effective until the issuance of a final order by the DCA or when the Administration Commission ("Commission") finds the amendment to be "in compliance."\(^4^8\) It is important to note that chapter 163 of the *Florida Statutes* does not give the state, either through the DCA or through the governor and cabinet, the authority to adopt, repeal, amend, or render ineffective, an adopted plan or plan amendment. The "teeth" of the Act is in the authority of the governor and cabinet to levy "sanctions." These sanctions are mostly financial and are levied against a local government which either does not adopt a plan that is in compliance, or which adopts an amendment which causes its plan to lose compliance.\(^4^9\)

The commission may order that the local government is not eligible for grants administered under certain programs, including the Florida Small Cities Community Development Block Grant Program; the Florida Recreation Development Assistance Program; and revenue sharing. In addition, the commission may direct the Trustees of the Internal Improvement Trust Fund to consider the noncompliance of the plan when determining whether to issue permits under section 161.053 of the *Florida Statutes*. Sanctions can also include ordering state agencies not to provide funds to improve roads, bridges, or water systems within the boundaries of those local governments which have not complied with the Growth Management Act in the plan adoption and amendment stages.\(^5^0\)

The governor and cabinet may impose economic sanctions against the local government if they determine that the plan or amendment is out of compliance.\(^5^1\) These sanctions take the form of ineligibility for state grants under a number of specific programs. Any funds so withheld must be deposited into the Growth Management Trust Fund created by section

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47. FLA. STAT. § 163.3194(1)(a) (1995).
48. Id. § 163.3189(2)(a).
49. Id. § 163.3184(11).
50. Id. § 163.3184(11)(a).
51. Id.
186.911 of the Florida Statutes. An additional sanction can be a direction to The Department of Natural Resources ("DNR") that the noncompliance be "a consideration" when deciding whether to grant coastal permits or interests in sovereignty lands.\textsuperscript{52}

The effect of a recommended or final order finding a plan amendment not in compliance is that any previous plan provisions are not reinstated. Only a local government can adopt a legally effective plan provision.\textsuperscript{53} A local government may choose to make its amendment effective and subject itself to the imposition of sanctions after the entry of a final order of noncompliance. This decision must be made by resolution at a duly noticed public meeting.\textsuperscript{54}

### 4. Public Notice

The local governing body is required to hold at least two advertised public hearings regarding a comprehensive plan or plan amendment.\textsuperscript{55} The first public hearing must be held at the transmittal stage while the second public hearing must be held at the plan adoption stage.\textsuperscript{56} A comprehensive plan may be adopted only after the required public hearings have been held and advertised according to section 163.3184(15) of the Florida Statutes. For plan amendments which will change the allowable use of land, the notice requirements include no less than a quarter-page advertisement in a standard size newspaper of general interest and with general distribution in the county. The advertisement may not be placed where legal notices and advertisements appear.\textsuperscript{57}

### C. The Legal Standard

#### 1. "Compliance"

The legal standard for judging the content of a plan or plan amendment is that it must be "in compliance" with chapter 163 of the Florida Statutes.\textsuperscript{58} Under the terms of the Act, a plan or amendment is "in compli-

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\textsuperscript{52} FLA. STAT. § 163.3184(11)(b).
\textsuperscript{54} FLA. STAT. § 163.3181(2).
\textsuperscript{55} Id. § 163.3184(2).
\textsuperscript{56} Id. § 163.3184(15)(b).
\textsuperscript{57} Id. § 163.3184(15)(c).
\textsuperscript{58} Id. § 163.3184(1)(b).
ance” if it is consistent with sections 163.3177 and 163.3178 of the Florida Statutes, the State Comprehensive Plan 59 as codified in chapter 187 of the Florida Statutes, 60 the relevant regional policy plan adopted by rule pursuant to section 186.508, and the Minimum Criteria Rule contained in chapter 9J-5 of the Florida Administrative Code. 61

A local comprehensive plan will be considered consistent with the state plan and the applicable regional plan if the local plan, as amended, is “compatible with” and “furthers” those plans. 62 “Compatible with” means “not in conflict with” and “furthers” means “to take action in the direction of realizing . . .” 63 In determining consistency with the state or regional plans, “the state or regional plan shall be construed as a whole and no specific goal or policy shall be construed or applied in isolation from the other goals and policies in the plan.” 64

Plan amendments must be “in compliance” when judged individually and must not cause the plan as a whole to become out of compliance. 65 All plan amendments must meet the requirements of chapter 9J-5 of the Florida Administrative Code. 66 This was a big issue which arose in the context of a challenge by the DCA to FLUM amendments adopted by Dade County. The county argued that the amendments could be found out of compliance only if they had the effect of rendering the entire FLUM out of compliance. The DCA and citizen’s groups argued that a FLUM amendment for an individual parcel of land could be out of compliance as an individual planning decision, regardless of its impact on the rest of the FLUM. While the hearing officer sided with the county, the parties subsequently settled and the governor and cabinet entered a stipulated final order. That order and the other orders of the Commission, as well as subsequently enacted legislative changes, make it clear that the department’s interpretation is the law. However, the plan in its entirety must still be

60. FLA. STAT. § 186.508 (1995).
62. FLA. STAT. § 163.3177(10)(a).
63. Id.
64. Id.; see also Department of Community Affairs v. City of Jacksonville, No. 90-7496GM, 1994 Fla. ENV LEXIS 53, at *41 (Dep’t of Community Affairs Feb. 24, 1994).
65. See the following cases for examples of when an amendment is not in compliance: Cooper v. City of St. Petersburg Beach, 14 Fla. Admin. L. Rep. 3589, 3590 (Admin. Comm’n 1992); Department of Community Affairs v. St. Lucie County, 15 Fla. Admin. L. Rep. 4744, 4745 (Dep’t of Community Affairs 1993); Pope v. City of Cocoa Beach, 12 Fla. Admin. L. Rep. 4758 (Dep’t of Community Affairs 1990).
considered in an amendment compliance review when judging the effect of
textual changes to a plan.67

If a plan amendment is inconsistent with the existing comprehensive
plan, chapter 163 of the Florida Statutes, rule 9J-5 of the Florida Adminis-
trative Code, the regional policy plan, or the state comprehensive plan,
neither amendment nor the comprehensive plan, as amended, is in compli-
ance with the Act.68

Compliance decisions are made based on the circumstances (as
evidenced by the data and analysis) as they exist at the time the plan or
amendment is adopted. A subsequent change in circumstances, or in the
interplay of the plan’s textual provisions with the plan’s land use designa-
tions, or any other change in how the plan as a whole would be expected to
operate, can cause a plan to lose compliance.

2. The Bottom Line: Sanctions

The Administration Commission was given the authority to levy
sanctions against local governments for the complete failure to submit and
adopt a comprehensive plan, and for adopting a plan that is not in compli-
ance. The Commission has only the authority to impose economic sanctions
or to require the noncompliance of a plan to be considered when the state
is considering the issuance of permits necessary for coastal construction.69

There were three local governments which were sanctioned for failing
to submit their plans for review.70 In one of the earliest reported cases
under the new Act,71 the sanctions, and the statutory provision upon which
they were based, were upheld against an unlawful delegation argument. In
that case, the First District Court of Appeal held that the Commission,
through a chapter 120.57(1) hearing process, may validly apply “incipient”
policy concerning sanctions for three local governments which had failed to
submit their plans on time.72 The court ruled that the policies could be
applied to the three municipalities, but remanded the case back to the
commission to provide the municipalities an opportunity to challenge the

67. Department of Community Affairs v. Lee County, 12 Fla. Admin. L. Rep. 3755,
68. FLA. STAT. §§ 163.3189(2)(a), .3184(10).
69. Id. § 163.3184(11).
71. Florida League of Cities v. Administration Comm’n, 586 So. 2d 397 (Fla. 1st Dist.
72. See id. at 412-13.
underlying basis for the finding of non-submittal in a formal administrative hearing.

Although all plans are now in, this issue will become relevant again as local government EAR amendments become due for adoption.

Only two local governments, the City of Islandia and Escambia County, have ever been sanctioned for adopting a plan that was out of compliance with the Act.

D. Exclusivity of Proceedings

The Act clearly states that it has established the sole process for the adoption, amendment, and review of comprehensive plans. The courts have respected this admonition. When Lee County tried to enjoin affected persons from challenging its amended plan, the circuit court ruled that only the hearing officer for the Division of Administrative Hearings ("DOAH") had jurisdiction to decide whether the amendments were "substantially similar" to those which had been agreed to in a settlement agreement. The court rejected the notion that the agreement was a contract which it could enforce and instead deemed it a stipulation of the parties which the hearing officer should abide by in his decision on the merits. The First District Court of Appeal issued a related order that encouraged the hearing officer to take this approach.

In another case, the First District Court of Appeals ruled that a circuit court had no jurisdiction to prevent the DOAH from conducting a compliance hearing under the Act.

E. The "Consistency" Requirement

Once a comprehensive plan is adopted, all development and actions in regard to development orders taken by government agencies regarding land
covered by the plan must be consistent with the plan. 80 Therefore, all decisions concerning specific developments must be consistent with the plan as a whole. This essentially means that goals, objectives, and policies included in an adopted plan are binding, not merely advisory. This is demonstrated by the express terms of the Act, including the definitions of "goal," "objective," and "policy," and by sections 163.3177(2), and 163.3194 of the Florida Statutes, and rule 9J-5.006 of the Florida Administrative Code. All adopted provisions in a plan are legally enforceable, and not merely aspirational statements. To implement this requirement, courts will review consistency challenges to a development order of consistency with "strict scrutiny." 81 This strict scrutiny review considers all parts of an adopted plan, including the FLUM, the density and intensity standards, and the textual goals, objectives and policies. 82 The consistency requirement, which has caused something of a revolution in land use law in Florida, will be discussed in detail below.

F. Administrative Proceedings

1. Initiation of Proceedings

If the plan or amendment is determined by the DCA to be not in compliance, the DCA is required to file a petition with the DOAH for the assignment of a hearing officer and scheduling of a formal administrative hearing. 83 Affected persons may intervene in support of the plan, in support of the DCA's challenge to the plan, or raise new issues challenging the plan. Any new issues must be raised within twenty-one days of the publication of the DCA's Notice of Intent. 84 Under the DOAH's procedural rules, intervenors not raising new issues may intervene up to five days prior to hearing.

If the DCA finds the plan or amendment to be "in compliance," affected persons may challenge that determination by filing a petition for administrative hearing with the DCA within twenty-one days of publication of the notice. 85

80. FLA. STAT. § 163.3194(1)(a).
81. Board of County Comm'rs v. Snyder, 627 So. 2d 469, 475 (Fla. 1993).
83. FLA. STAT. § 163.3184(10)(a).
84. Id.
85. Id. § 163.3184(9)(a).
The following charts were printed in the Miami Herald on April 18th, 1995 in commemoration of Earth Day’s 25th Anniversary. They depict the rapid increases of land development and the conversion of undeveloped land to agriculture in south Florida from 1900 to 1995.

**LEGEND**

- Native plant communities
- Other agriculture / pastureland
- Canals
- Urban areas
- Everglades agricultural area (Sugar cane)
SOUTH FLORIDA IN 1900.

Before drainage, the Everglades system included 4 million acres, beginning above Lake Okeechobee, with water flowing in a southwesterly direction through the Shark River Slough to the Gulf of Mexico.
BY 1953, the flood control canals had been established, Lake Okeechobee diked, and the agricultural area south of the lake was expanding.
1973. After the first Earth Day, agriculture and rangeland areas were expanding, urban areas growing and the extensive system of canals to control water supply was in place. The Kissimmee River had been channelized in the 1960s.

SOURCE: South Florida Water Management District
TODAY, half of the Everglades, or 2 million acres, has been developed. The Everglades Forever Act, passed by Congress in 1994, proposes to restore what's left of the ecosystem, though the feasibility study is not expected to be concluded for several more years.
2. Standing/Intervention

In enacting the Act, the legislature expressed its intent "that the public participate in the comprehensive planning process to the fullest extent possible." This intent is reflected in the broad standing allowances that are provided for in the Act.

Section 163.3184(1)(a) of the Florida Statutes which governs standing to initiate and intervene in "compliance" proceedings, reads as follows:

"Affected person" includes the affected local government; persons owning property, residing, or owning or operating a business within the boundaries of the local government whose plan is the subject of the review; and adjoining local governments that can demonstrate that the plan or plan amendment will produce substantial impacts on the increased need for publicly funded infrastructure or substantial impacts on areas designated for protection or special treatment within their jurisdiction. Each person, other than an adjoining local government, in order to qualify under this definition, shall also have submitted oral or written comments, recommendations or objections to the local government during the period of time beginning with the transmittal hearing for the plan or plan amendment and ending with the adoption of the plan or plan amendment.

The administrative and judicial interpretations of this standing provision have generally been read broadly. For instance, an Administration Commission final order ruled that this list of persons or entities, who are included within the definition of "affected person," is not exclusive, and granted standing to an owner of property directly adjacent to property covered by the Plan. The Commission found that this owner, whose property would have been adversely affected by the Plan, (i.e., adverse traffic impacts, adverse impact on natural resources, increased hurricane evacuation times, etc.) had standing. Furthermore, a nonprofit public interest corporation which was established to promote sound planning has been found to be an "affected person" both as a corporation which does business in various local governments and as a representative of its members who would have

86. Id. § 163.3181(1).
88. Id.
standing to bring such a challenge in their own right. The Commission found that the organization's members did not have to submit oral or written objections themselves in order for the organization to have standing. In addition, the term "[a]ffected persons" has been read to include unincorporated associations.

There are two decisions which can be read to inhibit overly-broad interpretations of the Act's standing provisions. A 1990 recommended order adopts a hearing officer's holding that a business, for the purpose of this section, is an activity engaged in for a pecuniary gain or the other compensation. More recently, the First District Court of Appeal ruled that holding periodic meetings with its members and appearing at local government public hearings does not constitute the conduct of a business in a local jurisdiction which would confer standing on a public interest group as a party in its own right. Rather, the organization will have to base its standing on the associational standing which has developed under chapter 120. In addition, it must actually prove on the record its allegations that it has members who reside in, own property in, or operate a business within a local jurisdiction.

Finally, nothing in section 163.3184(1)(a) of the Florida Statutes prohibits an affected person from raising issues in a section 163.3184 proceeding that he or she did not raise in his or her oral or written objections during the local government plan review and adoption proceedings. Once an affected person establishes standing by showing that he or she submitted timely objections, there is no basis for estopping him or her from raising additional issues in the section 163.3184 proceeding.

89. Department of Community Affairs v. Board of County Comm'rs of Monroe County, 11 Fla. Admin. L. Rep. 4004 (Dep't of Community Affairs 1989) (granting 1000 Friends of Florida's Petition to Intervene).

90. See Falk v. City of Miami Beach, 12 Fla. Admin. L. Rep. 4548 (Dep't of Community Affairs 1990); Southwest Ranches Homeowners Ass'n v. Broward County, 502 So. 2d 931, 934-35 (Fla. 4th Dist. Ct. App. 1987).


93. FLA. STAT. § 163.3184(8) (limiting notice of intent issued by the DCA on a plan or plan amendment to issues that the DCA raised earlier in its ORC Report). See Manasota 88 v. Department of Community Affairs, 14 Fla. Admin. L. Rep. 1447 (Div. of Admin. Hearings 1992) (holding that petitioner failed to prove standing to initiate formal proceedings). Note that this opinion was filed prior to the 1992 amendments to § 163.3184(10)(a).
3. Indispensable Parties

A petition challenging the DCA’s determination that a local government plan or amendment is “in compliance” must include both the DCA and the local government as respondents.94

4. Standard of Proof

When the DCA is challenging a plan or amendment it, and parties on its side, must prove its case by a “preponderance of the evidence.”95 When a plan or amendment is initially determined by the DCA to be in compliance, the challenger must meet a more difficult standard of proof—that the compliance determination is not “fairly debatable.”96 In all cases, the issue of whether a plan or amendment is internally consistent is governed by the “fairly debatable” rule.97 The “fairly debatable” standard is “a deferential one that requires affirmance of a local government’s action if reasonable persons could differ as to its propriety.”98 “If reasonable minds could conclude that the [city’s] determination that its plan amendment is ‘in compliance’ is correct, the plan amendment must be found to be ‘in compliance.’”99

5. The Hearing

Administrative hearings in “compliance” cases are full-blown trials similar to some bench trials in circuit court. Expert witnesses and evidence are submitted and subject to cross-examination and rebuttal. The Florida Evidence Code and other procedural requirements are loosely adhered to, and the atmosphere is generally more relaxed than in a formal courtroom setting. The plan or amendment and the supporting data and analysis are

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94. Monroe County v. Department of Community Affairs, No. 93-6448GM (Div. of Admin. Hearings Nov. 30, 1993) (order granting Motion to Dismiss). In Monroe, a hearing officer dismissed the petition of Monroe County challenging the DCA’s determination that the City of Key West’s plan was in compliance on the basis that the city was an indispensable party. Id. The petition was dismissed with leave to amend. Id.

95. FLA. STAT. § 163.3184(10)(a).

96. Id.

97. Id.


typically the most important documents introduced into evidence, however, other relevant information may also be admitted.

6. Evidence

It is not necessary to submit evidence other than the plan or amendment itself to support a challenge to a plan or amendment. Contents of settlement discussions and proposed settlement positions are not relevant evidence in a compliance hearing. Plans must be evaluated solely based on what they allow or disallow. Deed restrictions are ineffective to demonstrate that a parcel will develop at less than the maximum allowable density under the plan.

G. Post-Hearing Procedure

After the close of the hearing, each party may submit to the hearing officer a "proposed" recommended order which includes the findings of fact (based on references to specific evidence or testimony) and conclusions of law that the party thinks the hearing officer should make. The hearing officer's recommended order specifically rules upon each party's proposed findings of fact. When the recommended order is issued, its factual findings (e.g., parcel x is a habitat for woodpeckers) are binding upon the agency issuing the final order, but, its legal conclusions (e.g. the land use element is consistent with section 163.3177(6) of the Florida Statutes) may be changed by the final order.

In cases where the DCA's initial determination is that the plan or amendment is not in compliance, the recommended order is forwarded to the governor and cabinet, sitting as the Administration Commission, for the entry of a final order. In cases where the DCA's initial determination was that the plan or amendment was in compliance, the recommended order is forwarded to the DCA for review. If, after reviewing the recommended order, the DCA determines that the plan or amendment is in compliance, the

104. FLA. STAT. § 163.3184(10).
DCA will enter a final order to that effect within thirty days of the issuance of the recommended order. If the DCA determines the plan or amendment is out of compliance, the DCA will send the recommended order to the governor and cabinet for entry of the final order. Whenever a recommendation of noncompliance is forwarded to the Commission, the DCA must provide a recommendation on remedial actions and sanctions within fifteen days. Unless the time requirement is waived or extended by the parties, the Commission must enter a final order within ninety days of receipt of the recommended order.

H. The Evaluation and Appraisal Process

Under the Act, planning is an ongoing and continuing process. This is reflected in the requirement that local governments prepare Evaluation and Appraisal Reports ("EAR") to assess the extent to which the plan’s goals, objectives, and policies have been met, and to recommend necessary changes to the plan to react to changing circumstances. After the submission of the EAR, each local government must adopt an amendment or set of amendments to the plan based upon the EAR. While the EAR itself is subject only to a sufficiency, but not a compliance, review, the amendments must be in compliance with the Act and based upon the EAR. The first EAR report was due to be submitted to the DCA on November 1, 1995. Thereafter, an EAR must be prepared and submitted every five years.

I. Significant Substantive Issues: Data and Analysis

1. Generally

All elements in a comprehensive plan, including “all goals, objectives, policies, standards, findings, and conclusions” must be “clearly based” upon

105. Id. § 163.3184(9)(b).
106. Id. § 163.3184(10).
108. Id. at r. 28-39.005(3).
109. FLA. STAT. § 163.3191(1).
111. The requirements for EARs and EAR amendments are specified in § 163.3191 of the Florida Statutes and chapter 9J-33 of the Florida Administrative Code.
relevant and appropriate data. This support data is used in the determination of compliance and consistency. This compliance review requires an evaluation of "whether the data [was] collected and applied in a professionally acceptable manner." The science/art of planning fundamentally requires that data be gathered and analyzed before determining what the plan should be. Thus, an adopted plan was easily found to be not in compliance when the City Commission first voted to designate the entirety of its jurisdiction (which consisted almost entirely of submerged Biscayne Bay bottom) as appropriate for residential development at six units per acre, and then hired a consultant to prepare a plan for submittal to the DCA.

The data used shall be the best available existing data. Appropriate data is the best data, or the most specific data, and what is appropriate for any case will vary with the nature of the amendment. The discretion which local governments have under the Act includes the ability to determine which two or more professionally acceptable data sources on the same issue to use as the basis for a plan or amendment. However, if an uncontested, professionally acceptable source of information on a relevant planning matter exists, the "best available data" requirement means that a plan, and subsequently a compliance decision, must consider and be based on that information. Essentially the requirement is a "call to action" which requires a local government to react in a meaningful way to that data which does exist; it does not allow a local government to wholly fail to implement any planning strategy on the basis that more data may be forthcoming in the future.

Chapter 9J-5 of the Florida Administrative Code places great emphasis on the need for scrutiny of data and analysis to support an assumption that a particular strategy in a plan is reasonably calculated to work. For example, the Code requires that "[a]ll background data, studies, surveys, analyses and inventory maps not adopted as part of the comprehensive plan . . . be available for public inspection while the comprehensive plan is being considered for adoption and while it is in effect." The Code also

requires that "[a]ll goals, objectives, policies, standards, findings and conclusions within the comprehensive plan and its support documents . . . shall be based upon relevant and appropriate data." Where underlying data is crucial to a determination as to how a goal, objective, or policy will operate, such data must be submitted for a compliance determination or administrative hearing.

The Act contemplates that the level of required specificity and detail of data and analysis is to be based upon a flexible standard applied depending upon the appropriate circumstances. It requires the district courts to take into account the five factors in rule 9J-5.002(2) as it “applies the rule in specific situations with regard to the detail of the data and analysis required.” As a whole, the statutory and rule requirements concerning data and analysis clearly indicate that the type of required data will vary depending on the relevant planning issues and circumstances.

2. Requirements for Plan Amendments

No language in chapter 163 of the Florida Statutes or chapter 9J-5 of the Florida Administrative Code absolutely requires the collection of new data and analysis to support plan amendments, unless the local government annexes land over which it has not previously exercised planning jurisdiction. The courts have expressly recognized that data and analysis may support more than one land use designation.

Although the Act does not require site-specific information gathering as part of the review of a plan amendment, such information, when it is available, must be considered. When Broward County’s entire plan was challenged based on an allegedly deficient wetland map, the hearing officer

119. Id. at r. 9J-5.005(2)(a).
121. FLA. STAT. § 163.3177(10)(i).
122. In addition to the important substantive data and analysis requirements, plans must include a number of additional elements. Plans must also:
1. contain an assessment of the impacts of development based on the proposed adverse impacts on water quality as a result of facilities proposed in the plan;
2. contain an objective addressing the protection of the functions of natural drainage features; and
found that reliable site specific data concerning each wetland did not exist and upheld the plan. The city's failure to base the plan on incomplete information was justified.

A challenge to a set of map amendments adopted by Dade County highlights this issue. When Dade County adopted the amendments, site specific information concerning the three parcels at issue was available. Dade County's Planning Department ("Department") explicitly analyzed this data, which was transmitted to the Department along with the adopted amendments. During the review of the amendment, the Department found the amendments were not in compliance and brought an administrative challenge. The hearing officer, after making findings of fact that were favorable to those proposed by the Department, and its co-parties concluded as a matter of law that consideration of site specific information was not required and that an amendment was objectionable only if it caused the entire comprehensive plan to come out of compliance. This recommendation was inconsistent with previous recommended and final orders which had interpreted the Act. The parties, however, reached a settlement before the case was heard by the Administration Commission, which subsequently entered a Stipulated Final Order stating that the Recommended Order had no effect.

The most relevant and important case on the issue of admissibility of evidence in a compliance proceeding is Department of Community Affairs v. St. Lucie County. In St. Lucie County, the hearing officer agreed with the county that information concerning the effect of previously issued development orders on the actual remaining supply of land was relevant to the compliance review. This information concerned areas of the county which had in fact received development for densities which were lower than those allowed on the face of the plan. These prior approvals reduced the number of dwelling units available for development approval under the plan. This evidence was admitted and considered, although it was not included in the plan, or its data and analysis, because it revealed the "reality" of the

land supply/demand issue. On the merits, the hearing officer found that the previously issued development orders had not reduced the amount of available land to an acceptable amount. The opinion however, makes it clear that while compliance decisions are to be based upon what a plan or plan amendment allows on its face, data about the underlying situation must also be considered.

A 1991 order of the DCA described the proper relationship between plan amendments and the data and analysis requirements. Every plan amendment, of any scope or impact, need not solely comply with every data, analysis, goal, objective, and policy requirement. However, each amendment, as a distinct planning decision, must comply with each requirement which it implicates, "[t]he nature of the criterion and the plan amendment are critical. For instance, all plan provisions, including amendments, must be supported by data and analysis. A plan amendment that is unsupported by the data and analysis is inconsistent with this criterion."


A Declaratory Statement issued by the DCA to Clay County discussed the requirement that data be gathered and applied in a professionally acceptable manner, and found that the county’s population projections failed to meet this standard. The reason for this determination is discussed below.

4. Population Projections

Chapter 9J-5 states that a local government must base its population projections upon those provided by the Bureau of Business and Economic Research at the University of Florida ("BEBR") unless it can demonstrate that its own projections are also professionally acceptable. The Clay County population projections were not professionally acceptable because they did not identify the source of baseline data, describe methodology, or justify departure from the BEBR projections. Also, the population projections were

128. Id. at 4776.
129. Id. at 4777.
based on subjective estimates, not objective data, and contained mathematical errors.\textsuperscript{132}

A local government is not required to update its population projections every time it amends its FLUM. Between the adoption of the original plan and the submittal of its EAR, a local government may amend its plan without having to base the amendment on the 1990 Census data.\textsuperscript{133}

5. Natural Resource Maps

The First District Court of Appeal, in \textit{Environmental Coalition of Florida v. Broward County},\textsuperscript{134} found a wetland’s map was “based upon the best available data” even though it was incomplete because no complete map existed at the time of plan adoption and a map proffered by a challenger was justifiably rejected as unreliable.\textsuperscript{135} This case stands for the proposition that a comprehensive plan should be based on whatever data a local government does have, even if that data is not complete.\textsuperscript{136} In this case, an environmental group challenged the plan alleging that the wetlands map was not based on “the best available data.”\textsuperscript{137} The group wanted the county to adopt a map based on the findings of a local botanist with whom they had consulted. However, the map received strong criticism from the commenting agencies. Therefore, the County Commission determined that the map was unreliable and instead relied on an incomplete map prepared by the county’s Planning Council.

The hearing officer, and subsequently the appellate court, found that since the county did not have maps depicting wetlands the county had reasonably rejected the environmental consultant’s map as unreliable.\textsuperscript{138} Thus, the county acted reasonably in adopting the incomplete wetland’s map along with a policy which committed the county to conduct further studies and supplement the map.\textsuperscript{139} The court found that the hearing officer’s factual findings clearly explained why the county had logically rejected certain data based on the “[c]ounty’s inability to obtain additional reliable

\begin{footnotes}
\item[132.] Id.
\item[134.] 586 So. 2d 1212 (Fla. 1st Dist. Ct. App. 1991).
\item[135.] Id. at 1216.
\item[136.] Id.
\item[137.] Id. at 1213.
\item[138.] Id. at 1216.
\item[139.] \textit{Environmental Coalition of Fla., Inc.}, 586 So. 2d at 1216.
\end{footnotes}
data in a timely manner." Additionally, the methodology was not challenged and district courts "may not determine whether one accepted methodology is better than another." 141

6. Use of Data and Analysis at a Hearing

The requirement that plans and amendments be based on the "best available data" precludes the introduction into evidence of data that was not available at the time of adoption. However, "analysis" of preexisting data, even if first performed after the date of adoption, may be used as evidence in a compliance hearing. Data and analysis which is otherwise admissible need not have been expressly relied upon or addressed by the local government in adopting its plan. A district court's final order, however, ruled that data generated after a plan is adopted cannot be used at a hearing to demonstrate that a plan violates the "best available data" requirement. 142

The order can be read to indicate that it applied to analysis as well, although the order did not refer to the recommended order discussed above. The order seems to suggest that "later-available" data and analysis can be used to demonstrate that the data and analysis employed by the local government was not collected or applied in a professionally acceptable manner. 143

Where underlying data is crucial to a determination as to how a goal, objective, or policy will operate, such data must be submitted for a compliance determination or an administrative hearing. 144

7. Land Supply/Demand

This issue is best understood and most relevant within the context of its role as the initial step in the future land use planning process and is therefore discussed under that heading below.

140. Id.
141. Id.
143. Id. at 2738-39.
III. FUTURE LAND USE ELEMENT AND MAP

A. Factors Affecting Land Use Decisions

Possibly the most essential part of a comprehensive plan is the future land use element. The Act requires plans to include:

A future land use plan element designating proposed future general distribution, location, and extent of the uses of land for residential uses, commercial uses, industry, agriculture, recreation, conservation, education, public buildings and grounds, other public facilities, and other categories of the public and private uses of land. The future land use plan shall include standards to be followed in the control and distribution of population densities and building and structure intensities. The proposed distribution, location, and extent of the various categories of land use shall be shown on a land use map or map series which shall be supplemented by goals, policies, and measurable objectives.\textsuperscript{145}

Future land uses are to be allocated "based upon surveys, studies, and data regarding the area, including the amount of land required to accommodate anticipated growth; the projected population of the area; the character of undeveloped land; the availability of public services; and the need for redevelopment."\textsuperscript{146} Specific data and analysis requirements in other sections of the statute supplement the general data and analysis requirement. Chapter 9J-5, which concerns identification and analysis of natural resources and other areas with development constraints, the suitability of land for various uses, and the availability of facilities, services and infrastructure also supplements the general data and analysis requirement.\textsuperscript{147}

Plans are, in turn, required to include goals, objectives, and policies which, among other requirements, protect, conserve and appropriately use natural resources and other areas with development constraints,\textsuperscript{148} coordinate land uses with topography, soils, and the availability of infrastructure,\textsuperscript{149} and provide for the compatibility of adjacent land uses.\textsuperscript{150}

These requirements reveal an understanding that not all land is equally suitable for all uses and that undeveloped land cannot be assumed to be

\textsuperscript{145} FLA. STAT. § 163.3177(6)(a).
\textsuperscript{146} Id.
\textsuperscript{147} See, e.g., FLA. ADMIN. CODE ANN. rr. 9J-5.006(2)(a), (b), 9J-5.013(1) (1995).
\textsuperscript{148} FLA. STAT. § 163.3177(6)(d).
\textsuperscript{149} FLA. ADMIN. CODE ANN. r. 9J-5.006(3)(b)1 (1995).
\textsuperscript{150} Id. at r. 9J-5.006(3)(c)2.
available for a specific land use simply by virtue of the fact that it is vacant and previously zoned for such use.

The Act also includes a little known provision which has never been applied or interpreted, requiring all land uses identified on adopted FLUMs to be "consistent with applicable state laws and rules." However, an interesting argument could be made that if a certain use could not receive a permit which is necessary under Florida law, such as an environmental resource permit under chapters 373 or 403, or a coastal development permit under chapter 161, then it should not be allowed in the plan.

B. The Role of FLUM: Does It "Reflect" the Plan's Goals, Objectives, and Policies?

1. The "Multiplier" Issue

Future land uses are allocated based upon "surveys, studies, and data regarding the area, including, [among other things], the amount of land required to accommodate anticipated growth." This roughly translates into a requirement that future land uses demonstrate the "need" for a given amount any specific type of land use allowed in a plan or amendment. While this issue is discussed in greater detail below, a few basic issues should be discussed here.

First, maximum land use densities must be used to judge whether plan amendments are supported by data and analysis. Therefore, the expressed intent or likelihood of the landowner to build at a lesser density, based on factors such as the surrounding densities or historic building at less than maximum, will not justify an analysis of the amendment based on a lower number. Only binding, actual restrictions in the plan itself can be considered.

Importantly, the Act does not establish the specific nexus which must exist between documented demand and the supply provided in the plan. In a technical memorandum published in the early stages of plan reviews, the DCA stated that once a plan allows more than 125% of the documented need, this may indicate that the required relationship does not exist. Also, the DCA's view of plans adopted early in the process took this
approach rather scrupulously, and the agency routinely sought to have local governments reduce densities outside of existing urbanized areas in order to reduce the "overall location." This produced some intense political and legal controversies as well as an impressive series of successful defenses of DCA's policies. In later years, the DCA applied this requirement more liberally.

The clearest administrative order on the subject found a FLUM amendment increasing development potential from sixty-five units (clustering required) to 163 units (without clustering) on a 164-acre agricultural parcel outside of a proposed urban service area was unsupported by the data and analysis. There was currently three times the number of acres designated for residential development as were needed to accommodate projected needs. This case, concerning St. Lucie County, held that a previously approved, currently existing oversupply of land must be considered when proposing amendments to increase density to avoid exacerbating the problem.

2. The FLUM Must "Reflect" Relevant Policies

The required link between the textual provisions of a plan and the actual land uses allowed on the ground is supplied by rule 9J-5.005(5)(b) which mandates that all maps depicting future conditions, including the FLUM, "reflect" the plan's goals, objectives, and policies. "The Future Land Use Map is a critical component of the plan. . . . [It] provides an essential visual representation of the commitment to uphold local comprehensive plan goals, objectives, and policies, as supported by appropriate data and analysis . . . "

Based on this rule, a challenge to Sarasota's plan was successful when the FLUM allowed extensive development on septic tanks in flood plains. This was found to be inconsistent with and not reflective of the plan's objective to coordinate land uses with topography and soil types. The

FLUM was not in compliance because, as a practical matter, it undermined the plan's stated objectives.

Similarly, a FLUM amendment which increased density on a 2.3 acre parcel to allow High Density Multi-Family Development within the Coastal High Hazard Area was inconsistent, beyond a fair debate, with an adopted objective to direct population concentration landward of the Coastal High Hazard Area ("CHHA"). The amendment was not in compliance despite the obvious possibility that the subject property or any of the other lands in the CHHA would not actually develop to the maximum densities allowed. It was the potential for this to happen which caused the amendment to violate the Act.

In a case which was controversial for other reasons, a FLUM amendment which converted agricultural land outside of an Urban Service Boundary ("USB") to a residential use was not in compliance with rule 9J-5.006(3)(b)1 because it failed to reflect policies which called for discouraging urban sprawl, maintaining agricultural lands, promoting land use compatibility, and other objectives. The amendment was contrary to those provisions and thus was not in compliance, even though the evidence did not prove that agricultural lands adjacent to the subject property would no longer be used for agricultural purposes upon the conversion of the subject property or that such a phenomenon had previously occurred in the county. The likelihood of such impacts was evidenced and recognized by objectives and policies in the plan.

The possibility or speculation that the property owner would choose not to develop the property for residential uses or that adjacent owners of agricultural land would not feel market pressure to convert their land could not save the amendment. The amendment constituted a planning decision which ran counter to the objectives and policies previously adopted in the plan and thus violated the Growth Management Act. Indeed, one of the main reasons the amendment was not in compliance was because it exacerbated a previously existing problem in the County. In this case, the existing problem was an oversupply of land for residential use:

While the existing provisions of the Plan are not subject to review, when asked to consider an amendment providing for an increase in residential property, the existence of excessive residential property should not be ignored. In this case, to ignore the realities of the

excessive allocation of land for residential purposes in the County contained in the Plan and approve the classification of additional property as residential, would simply exacerbate an already existing excessive allocation.¹⁶¹

These cases and others¹⁶² make it clear that a FLUM amendment that runs counter to the established policies in an adopted plan is particularly vulnerable to an administrative challenge. Indeed, it is most likely the real world impact of such an amendment which determines whether or not it is in compliance. These cases, and the terms of chapter 163, make it clear that a compliance decision is not based on segmenting any distinct part of a plan to determine whether, on its face, it says the right things. A compliance decision is a determination of whether a plan establishes appropriate end results, requires specific strategies that are reasonably calculated to achieve those results, and, most importantly, translates these strategies and results into what will actually happen on the ground.

3. Urban Sprawl

The requirements concerning future land uses and "need" merged together to create the "urban sprawl" issue, one of the most controversial issues surrounding growth management. Chapter 9J-5 requires that plans include an objective to "[d]iscourage the proliferation of urban sprawl."¹⁶³ The DCA's efforts to strictly require FLUMs to "reflect" such an objective created an uproar, leading to agency secretaries being hung in effigy, challenges to unadopted interpretations concerning urban sprawl,¹⁶⁴ and challenges to adopted rules which sought to more specifically define the term.

The DCA was extremely successful in the early application of the Act in challenging relatively high densities¹⁶⁵ through settlement or final order, resulting in plan amendments significantly reducing densities.¹⁶⁶ The

¹⁶¹. Id. at 4764.
¹⁶⁵. These high densities were between one unit per acre and one unit per 20 acres.
¹⁶⁶. Densities were reduced to one unit per 20 acres or lower. See, e.g., Department of Community Affairs v. Escambia County, No. 92-010, 1992 Fla. ENV LEXIS 115, at *87 (Admin. Comm'n July 22, 1992); Charlotte County, 12 Fla. Admin. L. Rep. at 91.
DCA's non-rule application and interpretation of the term "urban sprawl" was upheld and found not to constitute a rule which was required to be formally adopted. In this rule challenge, the hearing officer found that the DCA's interpretation of this term appropriately varied with the circumstances of each local government and had a basis in chapters 163 and 187 of the Florida Statutes, the State Comprehensive Plan.

Even though the term "urban sprawl" is not used in chapter 163, or chapter 187, the rule requirement to discourage "urban sprawl" was found not to be an unreasonable interpretation of those statutes. The specific location of a proposed land use is relevant to the issue of whether it constitutes urban sprawl.

The DCA has now adopted a lengthy section of chapter 9J-5 to define and identify factors that are indicators of urban sprawl. This section

168. See id. at 98.

The primary indicators that a plan or plan amendment does not discourage the proliferation of urban sprawl are listed below...

1. Promotes, allows or designates significant amounts of urban development to occur in rural areas at substantial distances from existing urban areas while leaping over undeveloped lands which are available and suitable for development.

8. Allows for land use patterns... which disproportionately increase the cost in time, money and energy, of providing and maintaining facilities and services, including roads, potable water, sanitary sewer, stormwater management, law enforcement, education, health care, fire and emergency response, and general government.

10. Discourages or inhibits infill development or the redevelopment of existing neighborhoods and communities.

13. Results in the loss of significant amounts of functional open space.

*Id.* at r. 9J-5.006(5)(g)2., 8., 10., 13.

Development controls are set forth in rule 9J-5.006(5)(j) of the Florida Administrative Code. These include: "[a]location of the costs of future development based on the benefits received"; "[t]he extent to which new development pays for itself"; "[l]and use functional relationship linkages and mixed land uses"; "[j]obs-to-housing balance requirements"; "[p]olicies specifying the circumstances under which future amendments could designate new
was upheld against a rule challenge. In *Florida East Coast Industries, Inc. v. Department of Community Affairs*, the hearing officer found that the proposed rules were supported by chapters 163 and 187 because a consideration of "urban sprawl" fell within the "myriad of goals, objectives and policies addressed by the Act." Also, the officer found that the rule was not vague because, although it required the exercise of professional planning judgement, the rule could reasonably be applied by persons of common intelligence.

a. *Special Regulations*

A "future land use plan may designate areas for future planned development involving combinations of types of uses for which special regulations may be necessary to ensure development in accord with the principles and standards of the comprehensive plan and this act." This contemplates that a local government would expressly provide in its plan that a certain land area or areas will be subject to specific regulations. This would be appropriate where the local government had reason to believe that special regulations would be necessary to ensure development in a manner that would be consistent with particular objectives in its plan. Examples include the Wekiva River Protection Zone in Lake County and the Econfina River Protection Zone in Seminole County.

b. *Carrying Capacity Approach*

The "based upon" factors identified in section 163.3177(6)(a) of the *Florida Statutes*, essentially establish the environmental, technical, and infrastructural limitations of an area as the primary basis for land use plans. The Monroe County (Florida Keys) Comprehensive Plan explicitly uses the "carrying capacity" approach to planning. A recent DOAH’s order affirmed the use of a "carrying capacity" based plan to implement the future land use

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lands for the urbanizing area"; "[p]rovision for new towns, rural villages or rural activities centers"; "[r]estricion on expansion of urban areas"; "urban service areas"; "urban growth boundaries"; and "access management controls." *Id.* at r. 9J-5.006(5)(j). Rule 9J-5.006(5)(h) reflects the factors included in the evaluation of land uses. These include: extent, location, distribution, density, intensity, compatibility, suitability, functional relationship, land use combinations, and demonstrated need over the planning period. *See id.* at 9J-5.006(5)(h).

173. *Id.* at 1661.
174. *Id.* at 1662.
requirements. The order rejected the argument that a Comprehensive Plan must accommodate all of the projected population regardless of the impact on the other factors established in the Act, such as the natural character of the land and the availability of infrastructure. In this case, Monroe County’s limited ability to evacuate its citizens in the event of a hurricane, to properly treat wastewater, and to protect special habitat areas through permitting standards rendered it unrealistic to plan for the amount of population growth which might otherwise have been projected. Not only did the hearing officer affirm the use of an annual permit cap as a means of coordinating growth with these limitations, he also ruled that the Monroe County comprehensive plan allowed too much growth based on these limitations. Because of its unique environmental sensitivity and geography, Monroe County represents the first and most acute application of the carrying capacity approach. However, there are many distinct geographic areas in Florida such as drainage basins, bays, and peninsulas, for which this approach is appropriate. The Monroe County order clearly establishes that chapter 163 does not require, in all cases, that a community accommodate all of its projected population regardless of its development constraints. Thus, the Act provides the most appropriate legal mechanism to implement the concepts of ecosystem management and sustainable development.

c. Planning Versus Permitting

The Act emphasizes the establishment of the appropriate type and density of land use, not permitting standards to duplicate those of regional and state agencies. Indeed the Act does not allow the DCA to require a local government to duplicate or exceed a permitting program that is implemented by another agency. In the author’s opinion, the DCA routinely violates the spirit of this intent by allowing densities that are not inherently suitable for a given area based on the adoption of “performance standards” within the plan that are intended to mitigate the impacts of the density. The local government is usually willing to accept the tradeoff because the DCA has no direct role at the later stages of the development process when the performance standards are being interpreted, applied, and often ignored through the issuance of development orders.

178. FLA. STAT. § 163.3184(6)(c).
C. *Vested Rights and Property Rights*

The Act specifically identifies those rights which are vested from the requirements of new comprehensive plans:

> [(n)othing in this act shall limit or modify the rights of any person to complete any development that has been authorized as a development of regional impact pursuant to chapter 380 or who has been issued a final local development order and development has commenced and is continuing in good faith.]

While the application of new growth management rules makes vested rights a crucial issue in the implementation of the Act, the Act itself has generated very little case law on the subject.

The vast majority of administrative opinions on vested rights arise from petitions for declaratory statements that were filed by developers seeking to determine whether previous "binding letters" under chapter 380 informing them that they were exempt from the Development of Regional Impact ("DRI") requirements vested them from the requirements of the new chapter 163. Generally, the answer was no. In a 1990 ruling which reflected a facial "takings" challenge to an adopted plan, the purposes of the Act were discussed and cited with approval.

D. *Notice/Public Participation Requirements*

The adequacy of the public participation procedures leading up to the adoption of a plan or amendment is a relevant "compliance" issue.

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179. *Id.* § 163.3167(8).


182. Austin v. Department of Community Affairs, No. 89-31, 1989 Fla. ENV LEXIS 147 (Admin. Comm'n Sept. 29, 1989), held that the public participation requirements of § 163.3181 is included within the scope of compliance review under § 163.3184(1)(b), although not expressly referenced in the definition of compliance. *Id.* at *4-6.
Some courts strictly construe notice requirements. In Benson v. City of Miami Beach,\textsuperscript{183} the Third District Court of Appeal invalidated the plan for the City of Miami Beach because notice of its intended adoption was not provided in a newspaper of general circulation in Dade County.\textsuperscript{184}

Not all courts, however, strictly construe compliance requirements. In Gong v. Department of Community Affairs,\textsuperscript{185} a less strict view of the Act’s notice requirements was taken concerning the City of Hialeah’s plan. In this case, both the hearing officer and the DCA found a plan amendment to be in compliance, even though the public notice did not strictly comply with section 163.3184 of the Florida Statutes.\textsuperscript{186} The orders held that the petitioners failed to demonstrate prejudice as a result of the noncompliance and that, despite the technical defects, the notice did comply with the Act as a whole.\textsuperscript{187}

The statutory requirements of public participation do not require the consideration or response of local government to public comments to meet any minimum qualitative standard, unless the response is so meritless as to have precluded consideration of the comment. Further, when a local government official responds with an opinion, “[n]othing in the law requires that the opinion reflect the provisions of a plan or its data and analysis, or even that the opinion be informed.”\textsuperscript{188}

A public participation challenge was also rejected where the petitioners suffered little, if any, prejudice from the defect when a local government failed to include the petitioner’s parcels in the map which appeared in the public notice for a “transmittal” hearing and petitioners had five months to participate and change the vote as to their property prior to the final adoption of the map.\textsuperscript{189} Plan amendments will not be found out of compliance by an unnecessarily restrictive reading of the map notice requirements in section 163.3184(15)(c) of the Florida Statutes, when the defect occurs months before the final adoption and the adoption notice is adequate.\textsuperscript{190}

\textsuperscript{183} 591 So. 2d 942 (Fla. 3d Dist. Ct. App. 1991), rev. denied, 601 So. 2d 551 (Fla. 1992).
\textsuperscript{184} Id. at 943.
\textsuperscript{186} Id. at 312-14.
\textsuperscript{187} Id. at 314.
\textsuperscript{189} Id.
\textsuperscript{190} Id.
If the defect is not prejudicial, the plan will not be rejected. In one case, the petitioners experienced problems in examining the adopted plan.191 The court stated the conduct did not rise to the level such that the petitioners were unable to reasonably advance their opposition to the adopted plan. In this case, the procedural infirmity and the inconvenience to the petitioners was not so prejudicial as to cause the plan to be rejected.192

E. Consistency with Chapter 9J-5

Although the chapter refers to itself as a “minimum criteria” rule, it has in practice been interpreted as a “consistency” rule. This means that so long as the purpose of a specific rule provision is served by the plan as a whole, a plan or amendment can still be found “in compliance” even if a particular rule provision has not been strictly met.193

The statutory definition of “consistent” in section 163.3177(2) of the Florida Statutes does not apply to internal consistency. A plan is internally consistent as long as its various elements do not conflict with each other. There is no reason to insist that all objectives and policies of a plan take action in the direction of realizing the other objectives and policies of the same plan.194

F. Authority to Plan for Specific Areas

The Act specifically authorizes planning agreements between local governments.195 Absent a joint agreement with the county, a city may not amend its FLUM to plan for a property which it has not yet annexed.196

G. Consistency with Other Jurisdictions

Nothing in chapter 163 or 9J-5 requires adjacent land uses in neighboring counties to be identical. Therefore, decisions made in one county with

191. Problems were due to the illness of the town clerk. See Harris v. Town of McIntosh, 15 Fla. Admin. L. Rep. 2977, 2983 (Dep’t of Community Affairs 1993).
192. Id. at 2983-84.
195. FLA. STAT. § 163.3171(3).
respect to its plan are not binding on the adjacent local government. A plan was found to have met the data and analysis requirements, as well as the requirements for consistency with the plans of adjacent local governments, when it discussed in its data and analysis, a planned bridge shown on the plans of adjacent local governments but did not plan for or depict the bridge as part of its future transportation network.

H. What May Plans Regulate?

As described above, the Act requires plans to include:

A future land use plan element designating proposed future general distribution, location, and extent of the uses of land for residential uses, commercial uses, industry, agriculture, recreation, conservation, education, public buildings and grounds, other public facilities, and other categories of the public and private uses of land. The future land use plan shall include standards to be followed in the control and distribution of population densities and building and structure intensities. The proposed distribution, location, and extent of the various categories of land use shall be shown on a land use map or map series which shall be supplemented by goals, policies, and measurable objectives.

In a declaratory statement, since overturned on other grounds, the DCA determined that comprehensive plans may control the placement and maintenance or upgrading of electric power lines as a "use of land," even though such activities are not "development" as defined in the Act. The reasoning of that declaratory statement, and the express identification of agriculture as a use of land which shall be shown on a land use map or map series which shall be supplemented by goals, policies, and measurable objectives make a strong argument that plans can and should manage the impacts of agricultural uses, even though agriculture is excluded from the Act's definition of "development."


199. FLA. STAT. § 163.3177(6)(a).

I. **Intergovernmental Coordination**

Intergovernmental coordination has always been a primary stated objective of the Act, but is commonly understood to be a weak link in the process. The 1993 ELMS legislation adopted a phase out of the DRI process in Florida, along with a significant increase in the intergovernmental coordination requirements for local plans designed to provide the extra-jurisdictional reviews for all projects that is currently provided only for DRIs.\(^\text{201}\) The question remains unresolved whether these changes will result in more meaningful coordination among the various levels of government in Florida. This legislation may not change the political realities attendant with the sovereignty of each municipality and county in Florida. Whenever a local government that is making a land use decision has the ability to increase its tax base while straining the infrastructure or service capacity of an adjoining local government or causing other adverse impacts, the inherent disincentives to real coordination may be too much to overcome absent aggressive oversight by the state.

J. **Obstacles to Bringing an Action**

When a final order of the Administration Commission requires specific plan amendments, the doctrine of res judicata will bar a local government, in a subsequent compliance challenge, from arguing that the plan is in compliance without such amendments.\(^\text{202}\)

Lack of standing may also bar a party once a compliance agreement has been entered. The Supreme Court of Florida has ruled that once a county entered into a compliance agreement with the DCA to bring its plan into compliance, it had no standing to seek a declaratory judgement that chapter 163 is unconstitutional.\(^\text{203}\)

\(^{201}\) See FLA. STAT. ch. 163.


\(^{203}\) Santa Rosa County v. Administration Comm’n, No. 84-545, 1995 Fla. ENV LEXIS 55, at *4-5 (Fla. 1995).
K. Settlement and Mediation Process

1. Mediation

In 1993, the Florida Legislature established a process designed to "speed up" the administrative hearing process. At any time after a matter has been referred to the DOAH, the local government proposing the amendment may demand formal mediation. Neither the DCA nor any other party appears to have this same right. The local government or any affected person who has intervened may demand informal mediation or expeditious resolution of the amendment proceedings by serving written notice. The hearing officer must set the matter for final hearing no more than thirty days after receipt of any such request. Once such hearing has been set, "no continuance ... and no additional time for post-hearing submittals, may be granted without the written agreement of the parties absent a finding ... of extraordinary circumstances." Final orders in cases proceeding under the mediation subsection must, absent a showing of extraordinary circumstances or a written agreement of the parties, be entered within forty-five days of the issuance of the recommended order.

2. Compliance Agreements

The Act establishes a very detailed settlement process. The DCA and the local government may voluntarily enter into a compliance agreement to resolve one or more of the issues raised in a compliance proceeding. "Affected persons who have initiated a formal proceeding or intervened may also enter into the compliance agreement." "All parties granted intervenor status shall be provided reasonable notice of, and a reasonable
opportunity to participate in, the negotiation process."\textsuperscript{213} Negotiation meetings must be open to the public.\textsuperscript{214} The DCA must provide each intervenor with a copy of the compliance agreement within ten days after the agreement is executed.\textsuperscript{215}

The compliance agreement shall list each portion of the plan or plan amendment which is not in compliance, and shall specify remedial actions which the local government must complete within a specified time in order to bring the plan or plan amendment into compliance, including adoption of all necessary plan amendments. The compliance agreement may also establish monitoring requirements and incentives to ensure that the conditions of the compliance agreement are met.\textsuperscript{216}

Upon filing "of a compliance agreement executed by the agency and the local government with the [DOAH], any administrative proceeding . . . regarding the plan or plan amendment covered by the compliance agreement shall be stayed."\textsuperscript{217} "Prior to [the] execution of a compliance agreement, the local government must approve the compliance agreement at a public hearing advertised at least [ten] days before the public hearing in a newspaper of general circulation in the area in accordance with the [statutory requirements]."\textsuperscript{218}

Compliance agreement amendments can be adopted without first being transmitted as proposed amendments and subjected to an ORC Report.\textsuperscript{219} Within ten working days after adoption of a compliance amendment, the local government must transmit the amendment to the DCA and one copy to any party to the administrative proceeding.\textsuperscript{220} Then the DCA will "issue a cumulative notice of intent addressing both the compliance agreement amendment and the plan or plan amendment that was the subject of the agreement . . . ."\textsuperscript{221}

"If the local government adopts a comprehensive plan amendment pursuant to a compliance agreement and a notice of intent to find the plan amendment in compliance is issued, [the DCA must] forward the notice of

\textsuperscript{213} Id.
\textsuperscript{214} FLA. STAT. § 163.3184(16)(a).
\textsuperscript{215} Id.
\textsuperscript{216} Id.
\textsuperscript{217} Id. § 163.3184(16)(b).
\textsuperscript{218} Id. § 163.3184(16)(c).
\textsuperscript{219} FLA. STAT. § 163.3184(16)(d).
\textsuperscript{220} Id.
\textsuperscript{221} Id. § 163.3184(16)(e).
At least three different approaches had been taken by hearing officers. Some ruled that the petitions of non-signing intervenors are not dismissed. However, the Department has consistently ruled that after it finds a plan as amended pursuant to a compliance agreement to be "in compliance," the petitions of any intervenors are completely dismissed and the petitioners must file a new petition directed to the new statement of intent in order to protect their rights to challenge the plan. Yet a third approach did not dismiss the intervenors but judged their challenges using the "fairly debatable" standard. Legislation adopted in 1995 ended the debate by clearly stating that existing intervenors are not dismissed but that they must file an amended petition directed to the plan as amended if the amendment mooted or changed any previously raised issue or gave rise to a new issue. The legislation also provides that their challenge will be governed by the "fairly debatable" standard.

If the local government adopts a comprehensive plan amendment pursuant to a compliance agreement and a notice of intent to find the plan amendment not in compliance is issued, the DCA shall forward the notice of intent to the DOAH. The DOAH will then consolidate the proceeding with the pending proceeding and set a date for hearing in the pending proceeding. Affected persons who are not a party to the underlying proceeding may challenge the plan amendment adopted pursuant to the compliance agreement by filing a petition.

If the local government fails to adopt a comprehensive plan amendment pursuant to a compliance agreement, the DCA shall notify the DOAH, which shall set the hearing in the pending proceeding at the earliest convenience. Additionally, at least one hearing officer has ruled that, based on the "cumulative notice" language of the statute, when the DOAH issues a cumulative notice of intent to find a plan or amendment in

222. Id. § 163.3184(16)(f).
225. See generally FLA. STAT. § 163.3184.
226. Id. § 163.3184(16)(f).
227. Id. § 163.3184(16)(a).
228. See id.
229. Id.
compliance following the adoption of remedial amendments, an affected person can challenge any part of the plan including parts that had been in the plan and remained unchallenged since its original adoption.\textsuperscript{230}

3. Attorney’s Fees

Any award of attorney’s fees or costs in administrative compliance proceedings is governed by section 163.3184(12) of the \textit{Florida Statutes} which provides:

The signature of an attorney or party constitutes a certificate that he or she has read the pleading, motion, or other paper and that, to the best of his knowledge, information, and belief formed after reasonable inquiry, it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay, or for economic advantage, competitive reasons, or frivolous purposes or needless increase in the cost of litigation. If a pleading, motion, or other paper is signed in violation of these requirements, the hearing officer, upon motion or his own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney’s fee.\textsuperscript{231}

The DCA interpreted this provision in a case in which the DCA affirmed a hearing officer’s denial of a motion for attorney’s fees.\textsuperscript{232} The DCA reasoned that, although each of the petitioners’ challenges had been rejected on the merits, an award of fees and costs was not proper because the petitioners “were motivated only by a desire to improve the quality of life in their city.”\textsuperscript{233} The DCA found that the petitioners had no ulterior motive. They filed their petitions because they felt that it was in the best interests of the City of Key West that they do so.”\textsuperscript{234}

The preceding discussion of the basic substantive procedural issues demonstrates that comprehensive planning is a simple concept but complex in application. The next section describes the basic requirements and

\begin{itemize}
  \item \textsuperscript{230} Department of Community Affairs v. City of Key West, No. 92-0515GM (Fla. Div. of Admin. Hearings Nov. 30, 1993) (admin. order).
  \item \textsuperscript{231} FLA. STAT. § 163.3184(12).
  \item \textsuperscript{232} Frame v. Department of Community Affairs, No. 89-3931GM (Fla. Dep’t of Community Affairs June 20, 1990) (final order).
  \item \textsuperscript{233} \textit{id.}
  \item \textsuperscript{234} \textit{id.}
\end{itemize}
IV. LAND DEVELOPMENT REGULATIONS

A. Contents of the LDRs

Within one year after submission of its initial draft plan to the DCA, each local government was required to adopt LDRs that are consistent with and implement the comprehensive plan. The procedures for adopting LDRs are set out at section 163.3202 of the Florida Statutes, and rule 9J-24 of the Florida Administrative Code. Substantive requirements specifying the content of LDRs are contained in section 163.3202(2) of the Florida Statutes.

B. Enforcement of Plans Through LDRs

There are two enforcement mechanisms for determining whether LDRs conform with the Act. First, the DCA can pursue judicial proceedings to require local governments that have failed to adopt LDRs to do so.235 Second, citizens with the requisite interest236 can initiate administrative proceedings to determine whether LDRs that have been adopted are consistent with the adopted plan.237 Distinct from its role regarding comprehensive plans, the DCA does not automatically review local government action to determine that required LDRs have been adopted, or that they are consistent with the plan.238

1. Challenging the Complete Failure to Adopt a Required LDR

The Act establishes a detailed procedure for determining whether a local government has adopted required LDRs.239 Under this process, the DCA requires local governments to submit LDRs for review only if it has reasonable grounds to believe that there has been a failure to adopt required

235. FLA. STAT. § 163.3215.
236. The Act grants standing to “substantially affected persons” as defined by chapter 120 of the Florida Statutes. Because there are no final decisions interpreting the standing requirements for LDR challenges, the practitioner should consult cases that interpret standing under chapter 120. See, e.g., Agrico Chemical Co. v. Department of Envtl. Regulation, 406 So. 2d 478, 481-82 (Fla. 2d Dist. Ct. App. 1981).
237. See FLA. STAT. § 163.3213(3).
238. Id. § 163.3213(5).
239. See id. § 163.3202; see also FLA. ADMIN. CODE ANN. r. 9J-24.004 to .006 (1995).
regulations.240 The DCA will consider reasonable grounds to exist only if it receives a letter stating that required regulations have not been adopted.241 When it receives such a letter, the DCA directs the local government to submit LDRs for review.242 If the local government has not adopted the LDRs, it is required to advise the DCA, and establish a schedule for adopting the regulations within 120 days.243 If the local government does not respond to the DCA’s request to submit the LDRs for review, the DCA will institute an action in circuit court to require the response.244

Once LDRs are submitted, they are reviewed to determine whether there has been a complete failure to adopt required regulations.245 This review is conducted for that purpose only, and does not involve any determination of whether the LDRs which have been adopted are consistent with the adopted comprehensive plan.246 If the DCA determines that there has been a failure to adopt, it notifies the local government and specifies required regulations that need to be adopted.247 The local government then has thirty days to adopt the required regulations. If it does not, the DCA can then initiate a proceeding in circuit court.248

There is very little case law in this area. Usually, a local government is able to point to some provision in its LDRs which arguably addresses any part of its plan, which thereby converts the challenge into one concerning the consistency, rather than the existence of the LDR.

2. Administrative Review of LDRs for Consistency with a Comprehensive Plan

Proceedings to determine whether LDRs adopted by a local government are consistent with its comprehensive plan are administrative proceedings, conducted in accordance with the Florida Administrative Procedure Act, chapter 120 of the Florida Statutes.249 The DCA does not automatically review LDRs. Review occurs only if a substantially interested person files

240. FLA. STAT. § 163.3202(1).
241. Id. § 163.3202(4).
242. Id.
243. Id.
244. Id.
245. See FLA. STAT. § 163.3213(3).
246. Id.
247. Id.
248. Id.
249. See id. § 163.3213.
a petition for review with the local government. After the deadline for adopting LDRs passes, a substantially affected person can challenge them within twelve months of adoption. A substantially affected person commences such a challenge by filing a petition with the local government, directing a copy to the DCA.

The local government then has thirty days to provide a written response to such a petition with a copy sent to the DCA. However, the thirty-day period can be extended by mutual agreement of the parties. The substantially affected person may submit a petition to the DCA within thirty days from receiving the local government's response. If there is no response, such a petition can be submitted to the DCA within ten days from the end of the thirty-day response period. A copy of the petition must be submitted concurrently to the local government.

If the DCA determines that the petition is sufficient, it notifies the local government within twenty-one days. The DCA can then request further information necessary to review the regulations, conduct informal hearings, receive oral and written testimony, and conduct whatever inquiry it deems necessary. The DCA issues its decision with regard to the consistency of the LDRs not earlier than thirty days and not later than sixty days after receiving the petition.

If the DCA determines that the LDRs are consistent with the comprehensive plan, the substantially affected person can request a hearing from the DOAH within twenty-one days. If the district court of appeal finds the LDRs inconsistent with the plan, it requests a hearing with the DOAH. The hearing before DOAH must be held in the affected jurisdiction, but no sooner than thirty days after the DCA's determination. The necessary

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250. FLA. STAT. § 163.3213(3).
251. Id. Requirements for the content of this petition are set out at rule 9J-24.007(3) of the Florida Administrative Code.
253. Id.
254. Id. at r. 9J-24.007(5).
255. Id.
256. Id. The requirements for the content of this petition are set out in rule 9J-24.007(6)
of the Florida Administrative Code.
258. Id.
259. Id.
260. Id. at r. 9J-24.007(10).
parties to the hearing are the petitioner, any intervenor, the DCA, and the local government. 261

The hearing officer conducts a formal proceeding in accordance with section 120.57(1) of the Florida Statutes. 262 If the hearing officer determines the LDR is inconsistent with the plan, the final order is submitted to the Administration Commission for the sole purpose of determining what sanctions may be appropriate. 263

The most detailed discussion of the relationship of comprehensive plans and land development regulations is included in an order from the DCA which upheld Lee County's wellfield protection ordinance. 264 The DCA found that an ordinance which protects most of the wellfields in Lee County was consistent with a comprehensive plan which required, without qualification, the protection of wellfields. 265 However, in a case which took a stricter view of the required relationship between plans and LDRs, substantial portions of Lake County's vested rights ordinance were found inconsistent with the comprehensive plan because the plan did not authorize the vested rights granted by the LDRs. 266 A relatively small number of orders or decisions on LDR challenges leave this a very unsettled area of the law. As a practical matter, the deadlines and the time frames for the adoption of LDRs came and went while the initial plan adoption was still being debated, negotiated, and litigated. The adoption and enforcement of consistent LDRs which implement comprehensive plans continues to be a weak link in the planning process. 267

261. Id.
263. Id. at r. 9J-24.007(12).
265. Id. at 2127.
V. ENFORCEMENT OF COMPREHENSIVE PLANS THROUGH DEVELOPMENT ORDER CHALLENGES

A. Consistency Requirement

As mentioned earlier, the Act's bottom line requires that all public and private development be consistent with adopted, effective comprehensive plans.\(^{268}\) The Act defines development order as "any order granting, denying, or granting with conditions an application for a development permit."\(^{269}\) The Act defines development permit as "any building permit, zoning permit, subdivision approval, rezoning, certification, special exception, variance, or any other official action of local government having the effect of permitting the development of land."\(^{270}\)

1. Statutory Cause of Action

The Act authorizes

[a]ny aggrieved or adversely affected party [to] maintain an action for injunctive or other relief against any local government to prevent such local government from taking any action on a development order . . . which materially alters the use or density or intensity of use on a particular piece of property that is not consistent with the comprehensive plan . . . .\(^{271}\)

"Suit under this section [is the sole remedy] available to challenge the consistency of a development order with a comprehensive plan."\(^{272}\)

"Aggrieved or adversely affected party" means any person or local government which will suffer an adverse effect to an interest protected or furthered by the local government comprehensive plan, including interests related to health and safety, police and fire protection service systems, densities or intensities of development, transportation facilities, health care facilities, equipment or services, or environmental or natural resources. The alleged adverse interest may be shared in common with

\(^{268}\) FLA. STAT. §§ 163.3161(5), .3194(1)(a).
\(^{269}\) FLA. STAT. § 380.031(3) (1995).
\(^{270}\) Id. § 163.3164(8).
\(^{271}\) Id. § 163.3215(1).
\(^{272}\) Id. § 163.3215(3)(b).
other members of the community at large, but shall exceed in degree the
general interest in community good shared by all persons.\textsuperscript{273}

2. Procedure

As a precondition to filing a complaint for injunctive or other relief, the
complaining party, within thirty days after the alleged inconsistent action has
been taken, must file a verified (sworn) complaint "setting forth the facts
upon which the complaint is based and the relief sought."\textsuperscript{274} The verified
complaint has been interpreted by the courts to be jurisdictional.\textsuperscript{275}
Further, the complaint must be filed within thirty days of the decision,
whether or not the decision has been reduced to writing.\textsuperscript{276} After receipt
of a verified complaint, the local government has thirty days to respond. If
an adequate response is not forthcoming, the legal action must
be instituted
within thirty days of the expiration of the local government's response
period.\textsuperscript{277} In a 1993 decision which may have reflected what the legisla-
ture intended, the Supreme Court of Florida ruled that the statutory
consistency cause of action is available only to aggrieved third parties and
that an applicant for a development order who wishes to challenge the local
government's decision thereon may not invoke this procedure, but has as the
only remedy, a petition for writ of certiorari.\textsuperscript{278}

3. Consistency Standard

The statute defines "consistent" but does not assign the burden of proof
in consistency challenges. Florida courts have confused and struggled with
these issues. The statutory definition of "consistent" is as follows:

\begin{quote}
\textbf{a development order or land development regulation shall be}
consistent with the comprehensive plan if the land uses, densities or
intensities, and other aspects of development permitted by such order or
regulation are compatible with and further the objectives, policies, land
\end{quote}

\begin{footnotes}
\item 273. \textit{Id.} § 163.3215(2).
\item 274. \textit{Fla. Stat.} § 163.3215(4).
\item 275. \textit{See} Leon County v. Parker, 566 So.2d 1315, 1317 (Fla. 1st Dist. Ct. App. 1990),
\textit{quashed}, 627 So. 2d 476 (Fla. 1993).
\item 276. Board of County Comm'rs v. Monticello Drug Co., 619 So. 2d 361, 363 (Fla. 1st
Dist. Ct. App. 1993), \textit{quashed}, 630 So. 2d 578 (Fla. 1994); Board of Trustees of the Internal
Improvement Trust Fund v. Seminole County Bd. of County Comm'rs, 623 So. 2d. 593, 595-56
(Fla. 5th Dist. Ct. App. 1993).
\item 277. \textit{Fla. Stat.} § 163.3215(4).
\item 278. Parker v. Leon County, 627 So. 2d 476, 479 (Fla. 1993).
\end{footnotes}
uses, and densities or intensities in the comprehensive plan and if it meets all other criteria enumerated by the local government. 279

Further,

[a] development approved or undertaken by a local government shall be consistent with the comprehensive plan if the land uses, densities or intensities, capacity or size, timing, and other aspects of the development are compatible with and further the objectives, policies, land uses, and densities or intensities in the comprehensive plan and if it meets all other criteria enumerated by the local government. 280

In addition,

A court, in reviewing local governmental action or development regulations under this act, may consider, among other things, the reasonableness of the comprehensive plan, or element or elements thereof, relating to the issue justiciably raised or the appropriateness and completeness of the comprehensive plan, or element or elements thereof, in relation to the governmental action or development regulation under consideration. The court may [also] consider the relationship of the comprehensive plan, or element or elements thereof, to the governmental action taken or the development regulation involved in litigation, but private property shall not be taken without due process of law and the payment of just compensation. 281

4. Current Issues

a. Relationship with Non-Statutory Remedies

The Act does not discuss the relationship of the statutory "consistency" cause of action, which has been interpreted to be de novo in nature, with the certiorari and declaratory action remedies that have traditionally been used to challenge local land use decisions. These remedies are probably still available on the same theories previously available but "consistency" per se may not be raised in those actions. 282 Most courts have recognized the exclusivity of the statutory "consistency" cause of action and have not

279. FLA. STAT. § 163.3194(3)(a).
280. Id. § 163.3194(3)(b).
281. Id. § 163.3194(4)(a).
allowed parties to raise consistency as an issue in a petition for writ of certiorari. However, a number of "consistency" cases have erroneously been decided by courts by way of petition for writ of certiorari.

The statutory requirement for the filing of a verified complaint as a precondition to maintaining a "consistency" suit does not toll the thirty-day requirement for the filing of a petition for writ of certiorari. Thus, if a third party has a basis to challenge the development order because it is inconsistent with the comprehensive plan and also on the basis that the local government's record does not include evidence which demonstrates entitlement to the development order under the applicable regulations, that party would at the same time raise the former issue in a verified complaint filed with the local government, and the latter issue in a petition for writ of certiorari filed with the circuit court.

b. Burden of Proof

The Act does not establish the required burden of proof. However, the Supreme Court of Florida, in a now famous case, Board of County Commissioners v. Snyder, quashed a Fifth District Court of Appeal ruling that upon a rezoning applicant's prima facie showing that a requested rezoning is consistent with the plan, the burden shifts to the local government to show "by clear and convincing evidence that a specifically stated public necessity requires a more specified restrictive use." The Supreme Court of Florida overruled the requirement for clear and convincing evidence and placed the burden of proof on the party challenging the denial of the rezoning to show that the denial was inconsistent with the plan. At least one district had previously held that the proponent of the development order always bears the burden of proof in a "consistency" challenge.

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283. See, e.g., Turner v. Sumter County Bd. of County Comm'rs, 649 So. 2d 276 (Fla. 5th Dist. Ct. App. 1995).
284. 627 So. 2d 469 (Fla. 1993).
285. Snyder v. Board of County Comm'rs, 595 So. 2d 65, 81 (Fla. 5th Dist. Ct. App. 1991), quashed, 627 So. 2d 469 (Fla. 1993).
286. Snyder, 627 So. 2d at 475.
287. Id. at 476.
c. **Standard of Review**

Both before and after the passage of the Act, courts have struggled with the issue of which standard of review to apply. This issue may be the most problematic and controversial one presented by “consistency” challenges.

In **Snyder**, the Supreme Court of Florida established new rules for the judicial review of local government zoning decisions in the era of comprehensive planning.\(^{289}\) The court redefined local government rezoning decisions as quasi-judicial, raised the level of scrutiny courts should apply to rezoning decisions, and required greater consistency between rezonings and comprehensive plans.\(^{290}\) The standard of review is “strict scrutiny,” under which a court will review a development order to determine whether it complies with the entire comprehensive plan.\(^{291}\) However, the court upheld the discretion of local governments to act within the range of options established within their comprehensive plan.\(^{292}\) **Snyder** continued the judicial trend toward reasoning that most zoning and other development order decisions implement previously determined policy decisions (those made in the comprehensive plan) and are thus quasi-judicial, or at least no longer purely legislative in nature.

This is a great departure from the traditional view that rezonings are legislative. The **Snyder** court, as well as other courts, have determined that quasi-judicial decisions of local governments should be reviewed by courts using a “strict scrutiny” standard, not the “fairly debatable” standard historically employed to review local legislative decisions.\(^{293}\) Site plan approvals, variances, special exceptions and the like, have more or less uniformly been treated as quasi-judicial and reviewed under a strict scrutiny standard.

The Fifth District Court of Appeal in the **Snyder** decision limited its analysis to small, site-specific rezonings, and ruled that large-scale, jurisdiction-wide rezonings still involve policy making on a general scale, and are, therefore, legislative.\(^{294}\) Since all rezonings must be consistent with adopted plans, the distinction is not immediately obvious; the distinction seems to be one of scale and not one of concept. Moreover, the **Snyder** opinion gives no real guidance as to the dividing line between

\(^{289}\) **Snyder**, 627 So. 2d at 474-75.

\(^{290}\) *Id.* at 475-76.

\(^{291}\) *Id.* at 475; *see also* B.B. McCormick & Sons, Inc. v. City of Jacksonville, 559 So. 2d 252, 255 (Fla. 1st Dist. Ct. App. 1990).

\(^{292}\) **Snyder**, 627 So. 2d at 475.

\(^{293}\) *See id. ; see also* B.B. McCormick & Sons, Inc., 559 So. 2d at 255.

\(^{294}\) *See Snyder*, 595 So. 2d at 80.
individual, quasi-judicial rezonings, and large scale rezonings which would continue to be viewed as legislative decisions. There is little judicial guidance for determining which rezonings are subject to Snyder and which are not.

d. Definition of Consistency

Snyder emphasized the statutory definition of "consistent" and rejected any presumption that a landowner was entitled to the most intensive use potentially allowed on the face of a comprehensive plan. The statutory definition\(^{295}\) contemplates that any zoning decision which provides for a level of development that is within the range of densities allowed by the plan would be consistent with that plan.

e. Local Hearing Procedures

The trend to characterize decisions which implement comprehensive plans as quasi-judicial has raised a number of controversial procedural issues which are discussed below.

Ex Parte Communications. The Third District Court of Appeal has held that ex parte communications have been held to give rise to a presumption that the party against whom the decision was ultimately made was prejudiced thereby, which would seem to render the decision invalid.\(^{296}\) However, legislation adopted by the 1995 Florida Legislature has attempted to overrule Jennings. This legislation grants counties and cities the option of establishing a process to disclose ex parte communications in and on the public record so as to rebut any presumption of prejudice.\(^{297}\) The Act applies to "elected or appointed public official[s] holding a county or municipal office."\(^{298}\) Therefore, communication between staff members and involved parties are not ex parte, while communication between the local community's attorney and the involved parties would be governed by ex parte rules.

Quasi-judicial Procedures. Although the court in Snyder stated that findings of fact should be encouraged, it declined to require local governments to make formal findings of fact to support a zoning decision.\(^{299}\)

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295. See Fla. Stat. § 163.3194(3).
298. Id.
299. Snyder, 627 So. 2d at 476.
Courts and commentators have reached no consensus on whether sworn testimony, cross examination or other trappings of quasi-judicial proceedings are essential requirements of due process in rezoning hearings. This is possibly the most confused issue because a local decision is reviewable both de novo, based on the “consistency” issue by an action for declaratory relief, and via appeal by way of a writ of certiorari. For de novo action, the existence of a complete record below is not necessary to further review, whereas a complete record is required for certiorari review.

What is Competent Substantial Evidence? One of the primary implications of characterizing a decision as quasi-judicial is that stricter rules will apply in terms of who is competent to testify and what they can testify about. Generally, in a quasi-judicial hearing an expert or experts will be required to establish a competent record. However, the testimony of lay persons can constitute competent evidence on certain issues. Lay persons can provide competent testimony based on their own personal observations. For instance, the Second District Court of Appeal held that lay persons could competently testify on issues of natural beauty and recreational advantages of an area. 300 This court opined that “[t]he local, lay individuals with first-hand knowledge of the vicinity . . . were as qualified as expert [area] witnesses to offer views on the ethereal, factual matter of whether the [application] would materially impair the natural beauty and recreational advantages of the area.” 301 In this case the court found the local residents had expertise equivalent to the engineers and planners, and held that the local agency, as finder of fact, could base its decision on the “expert” testimony of the residents. 302

The Second District Court of Appeal has also found lay testimony regarding aesthetics, compatibility, and high residential vacancy rates to be valid. 303 In a non-Florida case, a local planning board found the personal observations of local residents concerning the location of a high water line to be more persuasive than the testimony of an expert. 304 On appeal, the court found the local government board could accept the testimony of the residents based on their personal observations, even though the testimony was in direct conflict with the testimony of the “expert witnesses” supplied.

300. Board of County Comm’rs v. City of Clearwater, 440 So. 2d 497, 499 (Fla. 2d Dist. Ct. App. 1983).
301. Id.
302. Id.
304. See Mack v. Municipal Officers, 463 A.2d 717, 720 (Me. 1983).
by the applicant. The Third District Court of Appeal invalidated the denial of a rezoning because a lay-person had testified about a matter deemed to require planning expertise. However, just recently, the Third District granted a petition to hear the case en banc and reversed the three judge panel. The Miami Herald summarized the holding by stating that "citizens don't have to be experts to [speak up] about unwelcome development in their neighborhoods, removing a legal muzzle that Dade's homeowner activists say threatened to render them powerless."

f. Applicability

Snyder was a rezoning case but its discussion and analysis of the consistency requirement would appear to make it applicable to challenges to any development order under the terms of chapter 163 of the Florida Statutes. However, at least one Florida trial court has ruled that the strict scrutiny standard of review, as used in land use cases, does not apply to a case in which the applicant is seeking a special exception, rather than a rezoning.

The procedural and substantive issues which govern development orders have significantly increased the scope and complexity of local public hearings and legal challenges. Although not mentioned in the Snyder opinion, even comprehensive plan amendment decisions have been treated by some jurisdictions as quasi-judicial. The evolution of the law concerning enforcement of development orders, and the existing interpretations of the requirements for plans and LDRs brings us full circle and requires a reassessment of the relationships between plans, LDRs and development orders. The following section of this article analyzes the current status of the planning and development process and offers suggestions about how to better integrate the various steps in the process and provide for simpler and more meaningful governmental and citizen review.

305. Id.
VI. SO HOW IS IT WORKING?

Growth management in Florida was meant to be an integrated program which effectively and efficiently combined and coordinated the various environmental and land use processes that exist at the different various levels of government in Florida. Growth management has successfully raised the minimum standards of practice in Florida, instituting the most rudimentary planning practices in Florida’s rural and small communities, and providing a mechanism to improve enforcement of planning requirements in older, more sophisticated jurisdictions. However, growth management clearly has not reached its full potential. Some of the problems are simple glitches in the procedural aspects of the statute. The resolution of others may require fundamental changes to current enforcement mechanisms. In addition, a number of important substantive changes should be made to the Act. Changes to other state laws may be necessary so that Florida truly has an integrated growth management program where the relative roles of planning and permitting are clearly delineated and understood. Only in this way will all private and public players be playing by the same rules. Finally, Florida’s implementation of growth management has suffered from a significant information gap about the true costs and benefits of land use controls. These issues are discussed below.

A. Procedural Issues: Planning

1. Coordination of Chapters 163 and 380 of the Florida Statutes

The proper relationship between chapters 163 and 380 of the Florida Statutes was not analyzed or determined with the adoption of chapter 163. While the Act expresses the appropriate intent for close coordination, certain specific statutory provisions prevent this from happening.

A significant problem concerns the comprehensive plans for local governments which have all or part of an Area of Critical State Concern (“ACSC”) within their jurisdiction. ACSCs are those parts of the state which have been determined to be the most sensitive to development and require the highest level of protection and state oversight of planning. However, a perhaps unintended consequence of chapter 163 is that it takes significantly longer to put into place a chapter 163 comprehensive plan in these areas. This is because the Act states that a plan for an ACSC cannot
become effective until the Administration Commission formally adopts a rule which approves of the plan. 311

Given the liberal opportunities for rule challenges provided in Florida’s Administrative Procedures Act and the fact that proposed rules cannot proceed to final adoption until the completion of the rule challenges, 312 the very areas which are most in need of improved comprehensive plans have experienced delays in the effectiveness of their plans. Monroe County, the Florida Keys, 313 has clearly provided the best example of this paradox. The Monroe County Board of County Commissioners adopted a plan in an attempt to comply with the Act in 1990, when it was due. The county did not contest the subsequent “not in compliance” determination and entered into a settlement agreement which contemplated a complete rewrite. Finally, a plan was adopted on April 13, 1993, but again was found not in compliance. While other local plans became effective upon adoption, even though their full compliance with the Act was subsequently challenged, Monroe County’s plan did not become effective then and is still not effective as of this writing due to unresolved challenges to the Administration Commission’s proposed rule which approved of the plan with changes. While every party to the combined chapters 163 and 380 of the Florida Statutes litigation, except the county, agreed that the plan was not fully in compliance, there is little question that the plan improves the county’s ability to protect its natural resources and otherwise manage its growth. Thus, it is with some frustration to all parties, including the county, the DCA, and the environmental intervenors that this improved plan cannot become effective until the chapter 380 rule challenge process has been completed. The implementation of improvements to the Polk County comprehensive plan, as it relates to the Green Swamp ACSC, has suffered from similar delays. Seemingly adopted to prevent a local government in an ACSC from adopting and enforcing a plan amendment which weakens environmental protections without the safeguard of state oversight, this provision has instead delayed the effectiveness of required improvements to such plans.

Chapter 163 of the Florida Statutes should be amended so that the plan amendments adopted by local governments to bring their plans into compliance which chapter 163 are effective upon the issuance of a final order of the DCA or Administration Commission finding them to be in

311. See FLA. STAT. § 380.05 (1995).
312. See FLA. STAT. §§ 120.54(4), .56 (1995).
313. Pursuant to § 380.0552 of the Florida Statutes, Monroe County is a designated “Area of Critical State Concern.”
compliance. The ability to preclude the effectiveness of a plan amendment that would weaken the protections in an ACSC plan is now accomplished by the stay on the effectiveness of plan amendments until a final order finding them in compliance. Additionally, the Administration Commission would retain its authority under chapter 380 of the Florida Statutes to adopt its own amendments to a comprehensive plan in an ACSC.

The DCA has jurisdiction over both chapter 163, comprehensive planning activities, chapter 380,\(^{314}\) DRI and ACSC activities. These statutes evince a legislative intent that they be viewed and implemented together as two stages of one orderly planning and development process. For instance:

> In conformity with, and in furtherance of, the purpose of the Florida Environmental Land and Water Management Act of 1972, chapter 380, it is the purpose of this act to utilize and strengthen the existing role, processes, and powers of local governments in the establishment and implementation of comprehensive planning programs to guide and control future development.\(^{315}\)

The legislature contemplated a high level of coordination between the comprehensive planning and DRI processes. Chapter 380 also suggests a direct connection between the DRI and comprehensive plan processes. Section 380.06(6)(b) prohibits “favorable consideration” of a plan amendment solely because it is “related” to the DRI, which suggests that the reviewers of the comprehensive plan amendment know of the DRI application and what it contains. The statute’s use of “related” means that the legislature intended, or wanted to allow, the two plans to be considered together. In section 380.06 (6)(b)(2) of the Florida Statutes, the fact that a DRI would “necessitate” a comprehensive plan amendment could only indicate that the two plans are intended to work together. Because the DRI necessitates the amendment, reviewers of the amendment would need to know why, and they would have to look to the DRI to find those answers.

The legislative intent of chapter 163 is also furthered by a high level of coordination between these two programs. For comprehensive plan amendments intended to accommodate DRI’s, the “best available” and “appropriate” data would, in most cases, be the DRI information. The DRI contains the most specific and reliable information available at the time.


\(^{315}\) Id. § 163.3161(2) (emphasis added).
about the projected impact of the plan amendment, and therefore constitutes
the “best available” and “appropriate” data.

Both Acts require the government to deal “effectively” with future
problems which could result from the use and development of the land. Governmental decisions must be based upon the most specific and reliable
available data. Because the information contained in an application for DRI
development approval contains the most specific information about the
developer’s actual intentions, its use will allow the government to deal most
effectively with future problems. When an amendment to a comprehensive
plan is proposed for the purpose of accommodating a proposed DRI, the
plan of development in the Application for Development Approval and the
DRI information must be considered the best available data as to the future
land use for the subject area. The plan of development in the ADA and the
DRI information are the best information available about how the amend-
ment, in reality, will impact the operation of the plan.

More importantly, future problems concerning the development of land
are likely to be ineffectively dealt with, or avoided. This occurs when a
plan amendment is approved based on an assumption or conclusion drawn
from the face of the amendment, which is refuted by more specific
information disclosed by the related DRI application or development order.
If the amendment is approved based on one set of “facts,” but the DRI
review proceeds on a different set of “facts,” the two processes are not
working together. This creates an inexcusable and avoidable inconsistency
that can have different results.

First, the DRI application could be denied because it is inconsistent
with the comprehensive plan, thus wasting the time and resources of all
public and private entities involved. Alternatively, the amendment could be
approved because the basis of the “facts” showed it met the terms of chapter
163, and the DRI application also could be approved because the basis of
the “facts” showed it met the terms of chapter 380. Since the “facts” from
the DRI Development Order really determine what will happen in the
affected area, the chapter 163 review was meaningless and the substantive
requirements of that Act would not have been met. Neither of these
scenarios, one wasteful and one bordering on fraudulent, can be viewed as
acceptable or consistent with the law.

Despite these considerations, a final order from the DCA ruled that
when a plan amendment and DRI application are submitted concurrently, the
plan amendment is judged solely upon the information contained in the

316. Id. § 163.3161(3).
application, and the data and analysis and the DRI information is not relevant or admissible in the plan compliance proceeding. While this order remains the DCA’s only actual ruling on the issue, a recent reorganization has the potential to significantly increase the level of coordination between the comprehensive planning and DRI programs.

It would be consistent with Florida’s new emphasis on streamlining governmental processes and would simply make common sense to require, when DRI applications and a related plan amendment are pending before the DCA at the same time, that the more specific information in the DRI application be considered as the “data and analysis” for the comprehensive plan amendment. This would prevent a scenario where the plan amendment is approved, or denied, based on a set of assumptions that is belied by the reality of the DRI plans.

An even better response to the disconnect between the comprehensive planning and DRI programs would be to accelerate the complete phase out of the DRI program and replace its essential functions with an increase in the requirements for comprehensive plan amendments. Such an approach would require the same type of data analysis and substantive conditions for plan amendments as are currently required for DRIs. While it might be appropriate to have some threshold for very small plan amendments, it would be important to review sub-DRI-threshold plan amendments for inter-jurisdictional impacts.

2. Applicability of Chapter 9J-5 of the *Florida Administrative Code* to Plan Amendments

Chapter 163 of the *Florida Statutes* and rule 9J-5 of the *Florida Administrative Code* were written for the purpose of determining whether adopted provisions included everything that needed to be included in a plan. They were not written in a manner which emphasizes the adoption or denial of discreet plan amendments as an individual planning decision. Although it will always be necessary to maintain a set of requirements which preclude, or more accurately, strongly discourage, local governments from deleting important and necessary parts of their plans, the Act and the rule should be rewritten to more appropriately govern the act of amending an existing plan. Legislation adopted in 1995 has directed the DCA to analyze this issue and make a set of recommended changes on or before December 15, 1995.


The author recommends that changes be made to rule 9J-5 which require more detailed, including original, data gathering an analysis and which insert into the compliance review process the same essential substantive requirements that now apply to DRIs.

B. Substantive Issue

The consistency requirement does not apply to state agencies. Thus, an agency may issue a permit under a program it administers which is inconsistent with the relevant local government comprehensive plan. Indeed the case law prohibits an agency from considering a local plan unless the statutory authority it is implementing specifically makes the local plan a relevant consideration.\textsuperscript{319} This is a major omission which significantly reduces the impact of an adopted local plan and which creates some resentment that the state requires local governments to adopt plans that they are not required to comply with.

Just as problematic is the ability of a state agency to develop a project that is inconsistent with a local comprehensive plan or beneficial growth management practices. The Board of Regents decision to site Florida's tenth state university in the far reaches of rural southwest Lee County, is perhaps the best or worst example. The Department of Transportation has "plenary" authority to site and build new or expanded roadways and its decisions do not have to be consistent with local comprehensive plans.\textsuperscript{320} Also, the DCA itself may find it difficult to explain the importance of discouraging urban sprawl from its future new home in the southeast reaches of Leon County. Given the significant growth-related impacts of public infrastructure planning decisions, the lack of a state consistency requirement makes it difficult to justify strict applications of growth management policies to single-family home developments, and undercuts public confidence in the fairness of the process. The state must lead by example. When it acts either as developer or regulator, it must be consistent with the plans it has required local governments to adopt.

C. Procedural Issues: LDRs and Development Orders

The implementation of plans, through land development regulations and development orders, raises the most current issues surrounding growth


\textsuperscript{320} See Department of Transp. v. Lopez-Torres, 526 So. 2d 674, 677 (Fla. 1988).
There are several very important conflicts and holes in the existing processes which should be corrected. First, the statutory "consistency" cause of action expressly applies only to consistency with comprehensive plans and it is not clear that violations of LDRs which are more specific interpretations of the terms of the plan, can also be raised in a section 163.3215 consistency challenge. In order to promote cohesiveness and clarity in the enforcement of a local government's adopted growth management policies, it should be clear that violations of either the plan or the LDRs can be enjoined under the consistency requirement. It makes no sense whatsoever for an affected person to have to challenge an inconsistent development order in an original action to enjoin a violation of the plan, and by way of certiorari to enjoin a violation of the LDRs. The legislature should amend the Act to establish the statutory cause of action in section 163.3125 as the exclusive mechanism for challenging the issuance or denial of a development order on any basis.

The second issue to be discussed is the distinction which the Florida Supreme Court has found to exist in the "consistency" cause of action which creates a separate process for challenging inconsistent development orders for applicants and "third parties." As it is currently being interpreted and practiced, the following scenario has unfolded. When a local government is considering a quasi-judicial decision, there will typically be an applicant and a third party who opposes the request. Where either party is going to challenge the decision on the basis that it is not supported by competent substantive evidence on the record, it departs from the essential elements of applicable law, or suffers from a procedural flaw, judicial review is by petition for writ of certiorari in the circuit court. The process and standards, which are well known, are the same for each party.

However, if either party wants to challenge the decision on the basis that it is inconsistent with the plan, they must follow divergent paths. According to the supreme court's Parker decision, the disappointed applicant's remedy is also a certiorari action except that they may also raise the theory that the development order is inconsistent with the comprehensive plan. The third party, however, must follow the statutory procedure and file a verified complaint with the local government. If that does not result in an appropriate action, the third party must then bring an original action in the circuit court with the sole issue being consistency with the plan. Other issues must be raised in a petition for certiorari which must be filed within the same time frame as the verified complaint. While a certiorari proceed-

321. Parker v. Leon County, 627 So. 2d 476, 479 (Fla. 1993).
ing is appellate in nature, and is based exclusively on the record that had been previously established, the third party’s consistency challenge is an original action. The Act is silent on how or even whether the record below can be used in this original proceeding.

The first issue this raises is why there should be one process for the applicant’s consistency challenge and another for that brought by a third party. The second issue is whether there should be one process to challenge a development order on some theories and another to challenge on the theory of consistency. In the author’s view, Florida should combine the common law and statutory processes and theories for challenging development order decisions into a single cause of action. Given the recent emphasis on alternative dispute resolution, it is probably best to use the statutory cause of action’s verified complaint process as an initial step and then allow the subsequent initiation of formal proceedings. The issue then becomes whether the judicial review should be de novo or on the record.

Given that most local governments have now instituted procedures to implement Snyder, complete and reviewable records are typically being made at the local level despite Snyder’s failure to require local governments to include findings of fact in their development orders. However, third parties are increasingly disadvantaged at the local hearing level as the complexity of the procedural and substantive requirements increases. Without attorneys and experts to represent them at the public hearing, it is difficult for affected persons to make an adequate record. Under the existing process, they can wait and see what happens at the public hearing. If their position wins, they will have saved the money that might otherwise have been spent on experts and attorneys. If their position loses, they can then hire experts and lawyers for purposes of the consistency challenge. If they do not have the ability to make a record at a subsequent de novo hearing, they will always need to make one at the public hearing, when the decision of the local government is still in doubt.

Of course, as a practical matter, it is still important to make a case at the public hearing in an attempt to persuade the local commission of the correctness of one’s position, and public policy would seem to encourage putting all relevant information and argument into the record prior to the initiation of litigation. Notions of administrative and judicial economy would suggest that judicial review be based on the record below and that there not be a second opportunity to make a record. On the other hand, those same considerations might suggest discouraging a process that increases the time and financial resources required to conduct a local government public hearing.
Among the options is to create a land use board of appeals to which local government decisions are appealable de novo, but where the record below is entered into the record and can support findings of fact. This would relieve local governments from having to institute strict quasi-judicial procedures but would not penalize those who do so. The incentive to do so would still exist in the opportunity to set a clear and compelling record which might discourage a lawsuit. The lack of a requirement to use quasi-judicial procedures would not invite arbitrary decisions given the clear consistency requirement and the availability of other landowner remedies like the property rights law. Third parties, although able to make a record at the administrative challenge level, should have to appear and submit objections at the local level in order to have standing to bring such a challenge. Further, although the Snyder opinion specifically declined to require local governments to include findings of fact, state law should require this as a means of providing an articulated basis for the decision. This would give both potential litigants and reviewing bodies a much better idea of the merits of the local government's decision.

D. The Quasi-Judicial Issue

Appeals from a decision of a land use board of appeals would be, to the relevant district court, another way in which enforcement of plans could be more meaningful. This method would increase the specificity of comprehensive plans and plan amendments. The clearer the plans are, the less question there can be about the consistency of development orders. The substantive requirements for plan amendments discussed above, if implemented, would lend important structure to development order decisions, and narrow the issues to be resolved. Better planning would lead to better development order decisions and fewer legal challenges.

As discussed above, a number of courts have begun to take a view of site-specific comprehensive plan amendments which likens them to quasi-judicial rezonings under the Snyder case. This has added an extremely interesting and generally confusing twist to the plan amendment process, and has blurred the distinction between the planning and zoning processes. The procedural and substantive requirements for adopting and amending comprehensive plans are specifically laid out in the Act. Despite this fact and despite the “exclusivity” clause in the Act, some litigants and courts

322. See Florida Inst. of Technology, Inc. v. Martin County, 641 So. 2d 898, 899 (Fla. 4th Dist. Ct. App. 1994); see also Section 28 Partnership, Ltd. v. Martin County, 642 So. 2d 609, 612 (Fla. 4th Dist. Ct. App. 1994).
have argued that the process is also governed by the quasi-judicial principles established in the *Snyder* case for rezoning decisions. While the *Snyder* opinion is largely based on the understanding that planning and zoning are separate acts, the quasi-judicial approach emphasizes the site-specific nature of either decision to argue for a higher level of judicial review.

This author maintains that *Snyder* held site specific rezonings to be quasi-judicial because the legislative decision is now made at the planning stage. Thus, extending *Snyder* to plan amendment decisions would mean that, since the jurisdiction-wide plans have now all been adopted, local governments no longer have the ability to act in a legislative capacity relative to specific areas. Also, the quasi-judicial view, if it holds, would ignore the specific set of procedural and substantive standards for the plan amendment process which has been established by the legislature, grafting on top of that a requirement to adhere to the procedures and standards which are required of a quasi-judicial decision. The *Snyder* approach is simply not a good fit for plan amendments as they are currently constituted. For instance, how can a court strictly scrutinize a decision declining to adopt a plan amendment for whether the decision is consistent with the comprehensive plan? Under the terms of Florida’s Growth Management Act, these decisions are required to be consistent with chapter 163, of the *Florida Statutes*. There is no entitlement anywhere in statutory or common law for a landowner to receive a plan amendment. Thus, there is no basis to “strictly scrutinize” a decision declining to approve such an amendment. As long as a plan amendment decision is consistent with chapter 163, of the *Florida Statutes*, it should be upheld.

The push to view plan amendment decisions as quasi-judicial has resulted in a number of consequences which run counter to the understood concepts and procedures which were intended to guide growth management in Florida. First, this approach greatly inhibits the ability to implement the Act’s emphasis on public participation and intergovernmental coordination. Prohibiting a county commissioner from speaking to a representative of a state or regional agency with expertise relative to a pending plan amendment proposal precludes just the sort of information sharing which is necessary and encouraged to make comprehensive planning work.

Next, because the very concept of comprehensive planning recognizes that a decision on a single parcel of land has jurisdiction-wide implications, it does not lend itself to a standard of judicial review which focuses primarily on the rights of particular individuals. For instance, as a local government attempts to maintain a relationship between land supply and demand for purposes of directing growth to and away from specific areas,
a decision granting a plan amendment for one parcel is a decision not to grant it to another. The decision to grant or deny a plan amendment may actually be a decision about whether to set a precedent or to open an entire area up to urban level development, which will then require commitments of public resources to provide necessary services and facilities. This is why the Act's standing provision is as broad as it is. This is a legislative decision. It affects the entire community. It should be treated by the courts as such.

The quasi-judicial debate forces us to examine the changing roles and relationships between the map amendment and the rezoning processes. The classic and doctrinally correct view of making a generalized plan followed by the distinct act of rezoning specific parcels applies best as a jurisdiction-wide plan. One consideration which supports this view is that most FLUM amendments are decided on the basis of fairly site-specific data and analysis. Indeed, it is often the case that an application for a plan amendment is accompanied by an application for rezoning and other quasi-judicial approval, such as a site plan approval. When viewed in the context of the legal requirements for data and analysis support and full compliance review for plan amendments, an argument can be made that FLUM amendments serve essentially the same purpose as rezonings used to serve. Of course not all FLUM amendments are the same. For instance, the process used by Dade County is probably not going to be the same as in Glades County. However, it is tempting to want plan amendments to be treated as rezonings have been treated in the past. However, while it is possible for FLUM amendments to serve this function, some changes are needed to Florida's current substantive requirements for plan amendments.

First, while the law allows a site-specific analysis of parcels for which a plan amendment is proposed, it expressly does not require a local government to collect or consider any data which does not already exist. This should change, or the Act should be amended to state clearly that in the absence of supporting data, an amendment may not be approved. FLUM amendments, and other related amendments should be required to analyze and be based upon the extrajudicial impacts, the projected financial costs and benefits to the public, and the effect on the local government's ability to meet all of its adopted planning goals, objectives, and policies.

Second, changes should be made to require more specificity in terms of analysis and application of existing or generated data for plan amendments. This is particularly important concerning the mapping of development and preserve areas. The approval of FLUM amendments should include up front commitments by the developer related to these issues. As the Snyder line of cases continues to move in the direction of "if the plan
says it, you get it,” the need for more certainty and commitments at the amendment stage increases dramatically. Moreover, the state-level review of plan amendments provides the best opportunity for each governmental agency which would have jurisdiction over some phase of a development project to coordinate their information and substantive requirements to facilitate the adoption of a “plan” which anticipates and avoids regulatory problems and which maximizes the benefits of coordinated governmental input.

One way to increase the quality and specificity of data and analysis for plan amendments, as well as for the resulting decision, is to significantly improve intergovernmental coordination. While the Act currently provides for such coordination, in practice, the potential of intergovernmental coordination has never been achieved. Local governments and the DCA continue to over-rely on the expediency of negotiated plan amendments which have not been critically analyzed by third parties and other agencies with expertise. If local governments and the DCA increased the use of planning and design meetings at which all relevant agencies and persons are at the table, potential development order and permitting problems could be more easily anticipated and avoided. A true commitment to planning still does not exist in Florida even though the legal framework and judicial precedent clearly exist to plan effectively. What is needed now is for local governments to be more willing to make more specific decisions earlier in the process. For their part, state agencies must significantly increase the amount of information they make available to local governments and to commit resources and actions to the local planning process without completely deferring to their narrow regulatory programs.

VII. CONCLUSION

South Florida, in particular, requires comprehensive planning solutions to critical problems which threaten major consequences such as the restoration of the Everglades, a secure future water supply, the loss of its agricultural lands, the overwhelming cost of providing services to development at the western fringe, and the restoration of the environmental systems in the Florida Keys. Recently, decisions have been made to allow residential development in the Agricultural Reserve in Palm Beach County, to intensify residential densities in an area of western Broward County that is being studied for Everglades restoration options, and to widen Highway US 1 into the Keys from two lanes to four. The failure of the state, in the form of the DCA, to seek the reversal of these decisions, each of which will have profound growth management implications, calls into serious question the
long term usefulness of growth management to this region. The burden increasingly falls upon citizens to enforce the Act and turn growth management into a reality. The complex processes, burdens of proof, and political and financial realities do not portend well for the prospects. Some of the changes recommended in this article are intended to make the process simpler and more effective.

Growth management continues to suffer from the compartmentalization that it was intended to remedy. Until it is viewed and practiced as a continual process from the initial planning concept to the final development order, it will be more costly and less effective than it should be. We have in so many ways come so far in this state. We cannot measure success, however, by how far we have come, but instead we must always focus on getting to where we need to be.