

Land Planning And Population Growth – People vs. Diminishing Resources: A Legal Case For Sustainable Planning And Permitting Decisions, Fla. Bar, Env. & Land Use Law Section Annual Update Materials (Aug. 21, 2008)

**Richard Grosso, Esq.
Professor, Shepard Broad Law Center, Nova Southeastern University
General Counsel, Everglades Law Center, Inc.**

August 2008

I. INTRODUCTION

The title of the panel suggests a discussion of “sustainability”, crudely cast by this layman author as the ability of Florida’s natural resources to and public facilities and services to handle the impacts of population growth. Among the questions to be discussed are whether people and natural resources are in conflict. It’s a complex question with perhaps not a single correct answer. Some people might view the need to protect natural resources as conflicting with their lifestyle, economic or other desires. Others might view the protection and continued existence of natural resources as essential to their quality of life, and are persuaded by existing and emerging economic study as demonstrating the economic importance of natural resources. Count me among them. Where conflicts truly exist, some would suggest that the desires of man should always outweigh the needs of nature. Others would strongly disagree. Putting aside one’s personal views on these questions, lawyers could debate whether there is anything that responsible government agencies could legally do about it if irreconcilable conflicts did truly exist between people and nature. My premise is that rhetoric such as “we can’t put up a gate; we have to put them somewhere” is inadequate to describe the reality of government’s options in the face of population growth, or the importance of exercising those options. There is no basic Constitutional or human right for all who might want to live in Florida to have their home in (a rapidly degraded or paved - over) paradise subsidized by the government or the ecosystem. At the same time, there will be continued population growth and important decisions need to be made about where, when and how that growth takes place.

As I’ve argued in this Forum before, I’m sure to the irritation of some, there can be little honest doubt that Florida’s natural resources are severely threatened by development, roads, mines and other impacts. Florida’s water resources are suffering significant harm, water quality continues to degrade and rare and endangered wildlife habitat continues to dwindle.

So, how should a lawyer view the question of population growth versus natural resources? This author submits that Florida law provides government with the legal tools to protect diminishing natural and financial resources, and does not cast population projections as the ultimate determiner of Florida’s fate.¹ Instead, legal authority exists to

1. The author would like to thank Section members Jason Totoiu, Esq. of the Everglades Law Center, Deborah J. Andrews, Esq., of Ponte Vedra Beach, Marcy Lahart, Esq., of

ensure that development only proceed to the extent that it is fiscally and environmentally sustainable.

Achieving sustainability requires the combined exercise of land use planning authority by local governments and the Department of Community Affairs, and permitting decision by regional and state agencies, as well as the federal government. It starts with land use decisions of local governments about potential maximum use and intensity based on the inherent suitability of the land under Chapter 163. The most fundamental questions about sustainability must first be asked at the planning stage where the big picture is in focus and where land use impacts can be evaluated in conjunction with the broad array of issues that are relevant under Chapter 163. Planning decisions determine the type and intensity of land use and development, and therefore set the course for sustainability or not. Bad planning decisions that create inappropriate development expectations and corresponding property values can render the permitting process little more than window – dressing. Good planning decisions allow environmental laws to work, allowing permitting agencies, based on the standards applicable to environmental permits, to ensure that the end result of development that is potentially suitable to the natural character of the land and other characteristics does not result in unacceptable environmental impacts. As to fiscal sustainability, the law provides ample support, particularly for local governments, for requiring that the fiscal impacts of new development are fully mitigated by the developer.

Agencies can, and in the authors’ opinion, should exercise their discretion using the precautionary principle as they apply and implement pre-existing legal authorities and requirements to requests for planning, zoning and permitting approval. Most, if not all, land use and environmental laws provide a legal basis to prevent development that “goes too far”² and causes or contributes to an unacceptable environmental or other public impact. Our entire system of environmental and land use laws is based upon the view that some environmental degradation must be allowed in favor of property rights and population growth. Yet each of those laws sets standards, or thresholds beyond which adverse impacts are not to be allowed.

A brief analysis of the relevant legal authorities follows.

II. LEGAL FRAMEWORK FOR ECOLOGICAL AND FISCAL SUSTAINABILITY

A. The Florida Constitution

"It shall be the policy of the state to conserve and protect its natural

West Palm Beach, as well as Nova Southeastern University Certified Legal Intern Nicolette Kramer, and NSU law students Michael Riley, Tessan Farbiarz, Joshua Lunderby, Jamie Such and Cristy McRea and for their contributions to these materials.
2. This is the standard enunciated in *Pennsylvania Coal v. Mahon*, 260 U.S 393, 415 (1922) for determining when a regulation amounts to a taking of private property.

resources and scenic beauty. Adequate provision shall be made for the abatement of air and water pollution and of excessive and unnecessary noise." Art. II, Sect. 7, Fla. Const.

B. Private Property Rights

The Florida Supreme ruled, in Graham v. Estuary Properties, Inc. 399 So. 2d 1374 (Fla. 1981) that a landowner does not possess an inherent property right to substantially change the essential natural character of land and put it to a use for which it is not inherently suitable:

“An owner of land has no absolute and unlimited right to change the essential natural character of his land so as to use it for a purpose for which it was unsuited in its natural state and which injures the rights of others.”

In Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302 (2002), the U.S. Supreme Court held that an agency could temporarily prohibit construction, without compensating affected landowners, while studying the carrying capacity of the area and formulating a regional plan for development. The Court rejected the claim that "a moratorium on development imposed during the process of devising a comprehensive land-use plan constitutes a per se taking of property requiring compensation under the Takings Clause of the United States Constitution." Id. at 306.

C. The Public Trust Doctrine

State government's exercise of its Public Trust responsibilities over the use of sovereign lands can and should emphasize sustainability and resource protection. The U.S. has adopted and modified the common law described under the Institutes of Justinian, Book II, which states, "Thus, the following things are by natural law common to all -- the air, running water, the sea, and consequently the sea-shore." Article X, Section 11 of the Florida Constitution states

“Title to land under navigable waters within the boundaries of the state which have not been alienated, including beaches below mean high water lines, is held by the state by virtue of its sovereignty in trust for all the people.”

Section 253.12, Fla. Stat. grants the power to manage, sell or convey tidal and tidelands to The Board of Trustees of the Internal Improvement Trust Fund. City of Daytona Beach v. Tona-Rama, 294 So.2d 73, 77 (Fla. 1974); White v. Hughes, 190 So. 446 (1939); Sullivan v. Richardson 13 So. 692 (1894).

D. Florida's Growth Management Act

Under Florida’s comprehensive planning law, how many people are expected to live and use land in a community is an important question. Where, and how, they will live and use land are completely separate questions. The law gives government the ability to not accommodate the full projected population if doing so would have unacceptable impacts on other required planning factors. It also requires that, whatever amount of the projected population is accommodated by the plan, the “where” and “how” be determined by those other planning policies. The Act requires a consistent approach on the population projections from which all the state and local governments are working, and suggests a policy, borne out by its’ implementation, of accommodating projected growth if at all possible. But the Growth Management Act does not absolutely mandate that comprehensive plans make enough land available for development to accommodate the entire projected population regardless of the impacts on other planning factors.

The Act requires that a local government’s future land use plan:

“be based upon surveys, studies, and data regarding the area, including [among other things] **“the amount of land required to accommodate anticipated growth; the *projected population* of the area; the *character of undeveloped land*; the *availability of water supplies, public facilities, and services*; [...] the need for redevelopment, including the renewal of blighted areas and the *elimination of nonconforming uses which are inconsistent with the character of the community*;”** §163.3177(6)(a), Fla. Stat. (emphasis added).

Section 163.3177(6)(f)1a., Fla. Stat. requires a Housing Element “consisting of standards, plans, and principles to be followed in ... [t]he provision of housing for all current and anticipated future residents of the jurisdiction.” Rule 9J-5.010(3)(b)1 requires comprehensive plans to “contain one or more specific objectives for each goal statement which address the requirements of §163.3177(6)(f), Fla. Stat., which provide for ... [t]he ***creation and/or preservation of affordable housing for all current and anticipated future residents of the jurisdiction***, and households with special housing needs including rural and farmworker housing;....” (emphasis added).

The primary Rule 9J-5 provisions require a transparent and consistent methodology to identifying the projected population during a comprehensive plan’s adopted timeframes.

9J-5.005(2)

(e) The comprehensive *plan shall be based on resident and seasonal population estimates and projections. Resident and seasonal population estimates and projections shall be either those provided by the University of Florida, Bureau of Economic and Business Research, those provided by the Executive Office of the Governor, or shall be generated by the local government.* If the local government chooses to base its plan on the figures provided by the University of Florida or the Executive Office of the Governor, *medium range projections should be utilized.* If the local government chooses to base its

plan on either low or high range projections provided by the University of Florida or the Executive Office of the Governor, a detailed description of the rationale for such a choice shall be included with such projections.

1. If the local government chooses to prepare its own estimates and projections, it shall submit estimates and projections and a description of the methodologies utilized to generate the projections and estimates to the Department with its plan when the plan is due for compliance review unless it has submitted them for advance review. If a local government chooses to prepare its own resident and seasonal population estimates and projections, it may submit them and a description of the methodology utilized to prepare them to the Department prior to the time of compliance review. The Department may request additional information regarding the methodology utilized to prepare the estimates and projections.

2. The *Department will evaluate the application of the methodology utilized by a local government in preparing its own population estimates and projections and determine whether the particular methodology is professionally accepted.* The Department shall provide its findings to the local government within sixty days. In addition, the Department shall make available, upon request, beginning on December 1, 1986, examples of methodologies for resident and seasonal population estimates and projections that are deemed by the Department to be professionally acceptable. The Department shall be guided by the Executive Office of the Governor, in particular the State Data Center, in its review of any population estimates, projections, or methodologies proposed by local governments.

Consistent with §163.3177(6)(a)'s mix of factors upon which allowable land uses and intensities must be based, Rule 9J-5.006(2)(a) and (b) and Rule 9J-5.013(1), F.A.C require comprehensive plans to allocate land uses based on the identification of natural resources and other areas with development constraints, the suitability of land for various uses, and the availability of facilities, services, and infrastructure. Chapter 163 and Rule 9J-5 include provisions discouraging sprawl, encouraging redevelopment, and requiring protection of ecosystems, and requiring internal consistency with the comprehensive plan as a whole.

9J-5.006 (1) Existing Land Use Data Requirements. The **element shall be based upon** the following data requirements pursuant to subsection 9J-5.005(2), F.A.C.

(g) **Population projections as prescribed in the general requirements** section of this chapter.

(2) **Land Use Analysis Requirements.** The *element shall be based upon* the following analyses which support the comprehensive plan pursuant to subsection 9J-5.005(2), F.A.C.

(a) An analysis of *the availability of facilities and services* as identified in the traffic circulation, transportation, and sanitary sewer, solid waste, drainage, potable water

and natural groundwater aquifer recharge elements, to serve existing land uses included in the data requirements above and land for which development orders have been issued;

(b) An *analysis of the character and magnitude of existing vacant or undeveloped land in order to determine its suitability for use*, including where available:

1. Gross vacant or undeveloped land area, as indicated in paragraph (1)(b);
2. Soils;
3. Topography;
4. Natural resources; and
5. Historic resources;

(c) An *analysis of the amount of land needed to accommodate the projected population*, including:

1. The categories of land use and their densities or intensities of use,
2. The estimated gross acreage needed by category, and
3. A description of the methodology used;

(3) Requirements for Future Land Use Goals, Objectives and Policies.

(a) The element shall contain one or more goal statements which establish the long-term end toward which land use programs and activities are ultimately directed.

(b) The element shall contain one or more specific *objectives* for each goal statement which address the requirements of paragraph 163.3177(6)(a), F.S., and which:

1. *Coordinate future land uses with the appropriate topography and soil conditions, and the availability of facilities and services;*
2. Encourage the redevelopment and renewal of blighted areas;
3. Encourage the elimination or reduction of uses inconsistent with the community's character and future land uses;
4. *Ensure the protection of natural resources* and historic resources;
5. *Coordinate coastal planning area population densities* with the appropriate local or regional *hurricane evacuation plan*, when applicable;....” (emphasis added)

The rule does not require a goal, objective or policy to accommodate the full population projections for the local government.

Beyond the numerous requirements in Ch. 163 and Rule 9J-5 related to protection of agricultural and natural resources, the Act places an additional emphasis on allowing only as much development as can be provided adequate public facilities and services.

It is the intent of the Legislature that public facilities and services needed to support development shall be available concurrent with the impacts of such development in accordance with §§163.3177(10) (h), 163.3180, et. seq., Fla. Stat. Under the statewide concurrency requirement, sanitary sewer, solid waste, drainage, adequate water supplies, and potable water facilities shall be in place and available to serve new development no later than the issuance by the local government of a certificate of occupancy or its functional equivalent. §163.3180(2)(a), Fla. Stat. Rule 9J-5.006(3)(b)1, F.A.C. requires a

planning objective to “coordinate future land uses with the availability of facilities and services....” Rule 9J-5.016(3)(b)3, F.A.C. requires “the coordination of land use decisions and available and projected fiscal resources with a schedule of capital improvements which maintains adopted level of service standards and meets existing and future facility needs....”

Of growing importance are the 2005 legislative changes, which require the implementation of alternative water supplies to limit impacts to water resources and require that local government comprehensive plans be consistent with consumptive use permits and regional water supply plans. The law also explicitly added water availability to the list of primary factors listed in §163.3177(6)(a), Fla. Stat. which determine the compliance of future land use plans, and amendments thereto. This change is a key to coordinating land and water planning. It was designed to prevent comprehensive plan changes that increased demands on water resources unless and until it was clear that demands from all uses already approved in comprehensive plans would be met and that water would in fact be available for new land uses.

Despite the provisions of the Act and Rule discussed above, to date, almost every comprehensive adopted under Ch. 163 has made enough land available to accommodate projected population and growth and then some.³

However, a 2003 letter from the Department of Community Affairs (DCA) regarding Palm Beach County’s population forecasts strengthens the *Monroe County* precedent. Interpreting the Act, DCA stated:

Local governments are not required to convert agricultural lands based solely on population trends without consideration for other planning objectives and needs.

3. See e.g. *DCA v. St. Lucie County, et al.*, 1993 WL 943708, 15 FALR 4744 (Admin. Comm. 1993); *Growth and Env'tl. Org., Inc. et al v. Sarasota County, et al*, 1997 WL 1052570, ER:FALR 97:108 (DCA 1997); *DCA et al., v. Walton County*, 1992 WL 880475 (Admin. Comm. 1992); *DCA v. Escambia County*, 1992 WL 880137 (Admin. Comm. 1992); *DCA, et al., v. Zemel, etc, et al.*, 1996 WL 1059844; 18 FALR 4040; DOAH Case No. 95-0098GM (Admin. Comm. 1996); *DCA et al v. Lee County, et al*, 96 ER FALR 118 (Admin. Comm. 1996); *Sheridan v. Lee County et al.*, 94 ER FALR 17; DOAH Case No. 90-7791GM (Admin. Comm. 1994); *SCAID v. DCA, and Sumter County, et al*, 730 So. 2d. 370 (Fla. 5th DCA 1999); *Dept. of Community Affairs et al. v. Collier County*, DOAH Case No. 98-0324GM (Admin. Comm. June 1999); *Citizen's Political Committee, Inc. and James Kessler v. Collier County and DCA*, DOAH Case No. 90-4545GM (Admin. Comm. 1992); *DCA v. Charlotte County et al*, 90 ER FALR 130; WL 644350; DOAH 89-0810GM (Admin. Comm. 1990).

"[L]ocal governments are not compelled to authorize unlimited or unchecked urbanization simply to accommodate past growth trends resulting from rapid urbanization."⁴

In the clearest example of this principle, the comprehensive plans of Monroe County and its cities impose annual caps on new development approvals that are well below population projections. Originally, those growth caps were the result of hurricane evacuation constraints, but in recent years, the growth rate was reduced in response to ecosystem protection concerns. A 1996 Order of the Administration Commission (Florida's Governor and Cabinet) required and approved the "carrying capacity" – based Monroe County Plan and found that comprehensive plans are not required to accommodate projected population regardless of the impacts to other planning issues, and must be based on a full analysis of all growth limitations.⁵

This Order resulted from the application of the Act to Monroe County (the Florida Keys) in the early 1990s. The original adopted plan adopted by the county was greatly deficient and was disapproved by the state. The County agreed to completely re-write the plan, based upon an overall "carrying capacity" approach. The amended plan was still deficient, and a second legal challenge resulted in dramatic findings by a state administrative law judge that the carrying capacity of the Keys' near shore waters to assimilate additional nutrient (wastewater and stormwater) pollution had been exceeded. The Order ruled that the amount of development allowed in the initial Plan was "excessive because of the inability ... to evacuate people in the event of a Category 3, 4, 5 hurricane and because the ability of the near shore waters and sea grasses to sustain development had been exceeded." Abbott et al. v. Admin. Comm., 1997 WL 1052490 (DOAH Final Order 1997) (paragraph 118). The plan was again invalidated and the next re-write limited annual and overall new permitting to that which could meet a "no net nutrient increase" pollution standard, and be accommodated within a 24 – hour evacuation time. Because the health of the marine and terrestrial systems were also known limitations on development (but not as easily quantified as hurricane evacuation times), the amendments also conditioned each year's permit allocations on "substantial progress" on tasks in an annual Work Program, making such progress a condition precedent to maintaining the existing growth rate. The Order discussed how these provisions were required in order to bring the plan into compliance with the Act.⁶

The approved plan changes required that each year, the Commission "shall determine whether... substantial progress has been achieved toward accomplishing the

⁴ DCA Letter to Lorenzo Aghemo, Palm Beach County Planning Director, (July 28, 2003)

⁵ DCA, et al. v. Monroe County, ER: 95:148 (Admin. Comm., Dec. 12, 1996) (Final Order and Order of Partial Remand)

6. Abbot et al. v. Admin. Comm., 1997 WL 1052490 (DOAH Final Order 1997). Remedial amendments are required to bring a plan into compliance with Ch. 163.

tasks of the work program. If ... substantial progress has not been made, the unit cap for new residential development shall be reduced by at least 20 percent for the following year.”⁷

The Commission found a lack of "substantial progress" in 1999 and reduced the annual permit allocation by 20% and extended the five-year Work Program to seven years.

Key among the Work Program requirements was that an overall carrying capacity study be performed and that the land use plan be amended by 2003 to implement the findings of that study. The specific legal requirement for the study was as follows:

"The carrying capacity analysis shall be designed to **determine the ability of the Florida Keys Ecosystems, and the various segments thereof, to withstand all impacts of additional land development activities.** The carrying capacity analysis shall consider aesthetic, socioeconomic (including sustainable tourism), quality of life and community character issues, including the concentration of population, the amount of open space, diversity of habitats, and species richness. The analysis shall reflect the interconnected nature of the Florida Keys' natural systems, but may consider and analyze the carrying capacity of specific islands or groups of islands and specific habitats, including distinct parts of the Keys' marine ecosystem."

Once the study was completed, Monroe County was to, by July 2003:

"Implement the carrying capacity study by, among other things, the adoption of all necessary plan amendments to establish a rate of growth and a set of development standards that ensure that any and all new development does not exceed the capacity of the county's environment and marine system to accommodate additional impacts. Plan amendments will include

7. 1997 Final Order interpreted this provision:

"The number of permits authorized [annually] is ... conditional." (para 122)).

"If the ... Commission determines that substantial progress has not been achieved, [it] is required to reduce the number of authorized residential permits ... by *a minimum* of 20 percent." Id. (para 124))(emphasis added).

"Continued development ... is conditioned upon "substantial progress" being made in completing the Work Program." Id. (para 172).

a review of the County's Future Land Use Map series and changes to the map series and the "as of right" and "maximum" densities authorized for the plan's future land use categories based upon the natural character of the land and natural resources that would be impacted by the currently authorized land uses, densities and intensities."

In late 2002, a final version of the Study was completed. Among its chief findings were:

"Development in the Florida Keys has surpassed the capacity of the upland habitats to withstand further development."

"Any further encroachment into areas dominated by native vegetation" ...
"would exacerbate habitat loss and fragmentation."

"[T]he Lower Keys marsh rabbit and silver rice rat are highly restricted and likely could not withstand further habitat loss without facing extinction." It makes a similar finding relative to the Key Deer, and finds that any further habitat loss would place the Stock Island tree snail in jeopardy.

"Development in the Florida Keys has surpassed the capacity of several protected species to withstand the effects of further development activities."

"Secondary and indirect effects of development further contribute to habitat loss and fragmentation" and that "any further development in the Florida Keys would exacerbate secondary and indirect impacts to remaining habitat."

As of this writing, the County and the state remain in the process of implementing the Carrying Capacity Study and the rest of the Comprehensive Plan. While the details of the remaining issues and debates are beyond the scope of this article, the key point is that the comprehensive plans adopted in the Keys under the Act limited the total amount of, and strictly regulated the standards for, future development.

The outcome in the Keys springs from the very compelling nature of the planning facts – the “data and analysis” under Ch. 163 – in the Keys. The extreme ecological and infrastructure limits on growth in the unique and fragile Florida Keys – as evidenced by their status as an Area of Critical State Concern under Ch. 380, Fla. Stat. were the dominant factor in this outcome. Yet the basic legal principle would apply anywhere in Florida. To the extent that the data and analysis reveals significant natural or other constraints on development and land use impacts in other local governments, a similar outcome (in the context typically of either EAR-based amendments or the denial of

applications for Future Land Use Map or policy amendments) is possible in other jurisdictions.

In the Keys, the limits are the ability of its fabled marine system to handle more nutrient pollution, its limited evacuation capacity (obviously a compelling public safety issue) and the minimum spatial needs of several endangered and other listed species. On mainland south Florida, there is a minimum spatial extent of land needed to restore the Everglades and maintain a water supply. In other places the issue may be the necessary Acritical mass@ of farmland to sustain an agricultural economy, the critical spatial mass, quality or function of ecosystems and natural features, or agricultural industries, the maximum allowable pollution loads in rivers, lakes or springs, minimum flows and levels for water bodies, or habitat needs similar to those in south Florida. Growth numbers could also be limited as a result of the inability to provide critical public facilities or services such as evacuation capacity⁸; safe, efficient transportation; wastewater; potable water; flood protection; solid waste or other necessities. As Florida continues to grow, and forests, swamps, watersheds, wildlife habitats, water bodies and other natural features grow more degraded or fragmented, and as farming acreage falls below the critical mass needed to support long-term investment, and as expansion of key public facilities becomes increasingly constrained or precluded, such circumstances are likely to appear farther up the state.

Decisions to deny requested land use amendments based on these considerations are likely to be upheld if challenged. The Florida Supreme Court has upheld local government authority to decline requested plan amendments to allow an increase in density.⁹ Such decisions are legislative in character, and will only be overturned if not Afairly debatable, a highly deferential standard for local governments. A local government's decision not to change its plan will be upheld when any valid planning rationale supports the decision.¹⁰

The Policy Implications of Making Population Projections the Determinant of Land Use Plans

⁸ See e.g. §163.3178(2)(a), Fla. Stat. (requiring a comprehensive plan's coastal management element to include "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.").

⁹ Snyder v. Brevard County, 627 So.2d 469 (Fla. 1993).

¹⁰ Martin County v. Yusem, 690 So. 2d 1288, 1295 (Fla. 1997) and Martin County v. Section 28 Partnership, 668 So. 2d 672, 675 (Fla. 4th DCA 1996).

When discussing the policy implications of allowing population projections to dictate determinations about the amount of development to allow within local comprehensive plans, local communities might consider going back and analyzing previously – approved, large – scale Future Land Use Map amendments and ask a series of questions, such as:

- Did the population or growth projections used to support the amendment become a reality?
- Were the market or growth projections of the earlier part of this century an accurate reflection of subsequent reality?
- Did some local governments approve major land use amendments fueled by landowner, developer and lending -institution views of the market that did not pan out?
- Did this contribute to the current real estate problems, including empty “spec houses” and “hard-to sell” existing homes?
- Did these approvals require local and state government to pay to extend roads, water and sewer lines and other infrastructure to largely vacant subdivisions?
- Did the market for the planned commercial and other complementary land uses not materialize, resulting in single –use sprawl and subsequent or future requests to convert to other uses?
- Did the optimistic projections of internal trip capture fail to materialize?
- Did the projections of beneficial tax revenue fail to materialize?
- Were the only meaningful jobs created construction jobs?
- Did we end up unnecessarily converting irreplaceable and valuable farmland, timberland, or natural habitat to largely vacant sprawl subdivisions?
- Did those land use approvals of questionable projects in questionable locations create huge surpluses of land that potentially good projects now be unapprovable by plan amendment due to a lack of need?
- Can we afford – economically, environmentally or socially, to make these mistakes again?

III. RELATED LAWS & PROGRAMS TO AVIOD FORCING RESIDENTS TO SUBSIDIZE FISCALLY UNSOUND DEVELOPMENT

Neither constitutional nor statutory law requires Florida to subsidize financially new development and population growth. Government (local, county, municipal, or special district) - imposed impact fees equal to 100% of development costs are not constitutionally (U.S. or Fla.) or statutorily prohibited. Thus, while we may not be able to “build a fence at the state line”, we can build a toll plaza and charge the full amount that it will cost to provide the full range of public facilities and services required to meet the needs of all new population.

A. Impact Fees, The Constitution and Florida Statutes

No Federal or Florida statute specifically cap, or set a maximum monetary limit, for impact fees imposed by a counties, municipalities, or special districts. Section

163.31801, Fla. Stat., et. seq., - the "Florida Impact Fee Act" - does not set a cap on impact fees. Rather, under § 163.31801(3), Fla. Stat., impact fees are subject to requirements regarding their form of adoption, advance notice, method of calculation (based on the most recent and localized data); accounting and reporting; and other procedural and accountability requirements.

In Florida, the amount of allowable impact fees are governed primarily by case law, rather than by statute. Impact fees are analyzed legally under the *Takings Clause* as exactions. The *Takings Clause*, *U.S. Const. amend. V*, made applicable to the states through the *U.S. Const. amend. XIV*, provides "[N]or shall private property be taken for public use, without just compensation." The Florida Constitution, under *Art. X §6(a)*, is essentially the same, but requires "full" compensation. Analyzed together, the U.S. Supreme Court held in *Nollan* and *Dolan* that an exaction, such as a mandated developmental impact fee, must meet two tests:

(1) there must be an "essential nexus" between the exaction and a legitimate state interest that it serves; and

(2) the exaction must be "roughly proportional" to the nature and extent of the project's impact. (*see Dolan v. City of Tigard*, 512 U.S. 374 (1994), where the Court held that the city failed to establish that in issuing a permit to petitioner, its property dedication requirement was roughly proportionate to its land use plan and the impact of petitioner's proposed development.).

In determining whether the imposition of an impact fee is constitutionally permissible, the Florida Supreme Court has adopted the "dual rational nexus test," similar to the U.S. Supreme Court's "rough proportionality" test, which requires the local government to demonstrate "a reasonable connection, or rational nexus, between the need for additional capital facilities and the growth in population generated by the [development]" and "a reasonable connection, or rational nexus, between the expenditures of the funds collected and the benefits accruing to the [development]." Save Our Septic Sys. Comm., Inc. v. Sarasota County, 957 So. 2d 671, 672 (Fla. 2nd DCA 2007); *see also St. Johns County v. N.E. Fla. Builders Ass'n*, 583 So.2d 635, 637 (Fla. 1991) (citing Hollywood, Inc. v. Broward County, 431 So.2d 606, 611-612 (Fla. 4th DCA 1983)).

Thus, so long as the impact fee or exaction is in fact calculated to offset no more than 100% of the development's public facility and service requirements, government may charge that amount.

Under Florida law, a municipality, county or special district does not violate constitutional restraints by levying impact fees equal to 100 percent of development costs. The courts, however, must review each assessed impact fee on a case by case basis by applying the "dual rational nexus test" to ensure that the fee charged is proportional to the anticipated impact on jurisdictional resources and services.

B. Growth Management Act Requires New Development to Pay For Itself

Florida's Growth Management Act includes several provisions that require local governments to adopt Comprehensive Plan provision that prevent taxpayers from subsidizing new development.

Section 163.3178(1), concerning coastal management, declares "the intent of the Legislature that local government comprehensive 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."

Rule 9J-5.012, F.A.C. requires Coastal Management Elements of local comprehensive plans to "*restrict development activities where such activities would damage or destroy coastal resources, and protect human life and limit public expenditures in areas that are subject to destruction by natural disaster.*" (emphasis added)

Rule 9J-5.012 (3)(b)(5), F.A.C. requires Coastal Management Elements to include an objective to "*Limit public expenditures that subsidize development permitted in coastal high-hazard areas* subsequent to the element's adoption except for restoration or enhancement of natural resources." (emphasis added)

Rule 9J-5.016(b)2., F.A.C. requires the Capital Improvements Element of comprehensive plans to include objectives which address:

* "[t]he *limitation of public expenditures that subsidize development in high hazard coastal areas*..."¹¹

* "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"¹²; and

* "The demonstration of the local government's ability to provide or require provision of the needed improvements identified in the other local government comprehensive plan elements and to manage the land development process so that *public facility needs created by previously issued development orders or future development do not exceed the ability of the local government to fund and provide or require provision of the needed capital improvements.*"¹³

11 Rule 9J-5.016(b)2, F.A.C. (emphasis added)

12 Rule 9J-5.016(b)4, F.A.C. (emphasis added)

13 Rule 9J-5.016(b)5, F.A.C. (emphasis added)

The Act also requires that the Capital Improvements Element of comprehensive plans to include one or more policies for “[a]ssessing new developments a pro rata share of the costs necessary to finance public facility improvements necessitated by development in order to adequately maintain adopted level of service standards...”¹⁴ (emphasis added).

IV. ENVIRONMENTAL PERMITTING AND PROTECTION LAWS

A. Environmental Resource Permit Laws / Chapter 373, Fla. Stat.

Florida’s Environmental Resource Permitting laws protect the viability of water resources in the face of population and development pressures in a number of ways. A number of provisions of Florida’s Environmental Resource Permit program establish a requirement that ecological harm which goes beyond a point of acceptability can not be authorized.

The Environmental Resource Permit Public Interest Standard §373.414(1), Fla. Stat..

Public Interest Criteria

The statutory “Public Interest” criteria for the approval of an Environmental Resource Permit, which emphasize the protection of natural systems, requires cumulative and secondary impact analysis and mitigation for unavoidable impacts, and requires projects to be not contrary to or clearly in the public interest protects the state against unacceptable impacts to wetlands and other water resources. On their face, these criteria support a determination that a proposed project is not in the public interest if, based on a preponderance of the evidence, it’s adverse environmental impacts exceed those which the affected ecosystem can handle:

Fla. Stat. § 373.414 *Additional criteria for activities in surface waters and wetlands*

(1) As part of an applicant's demonstration that an activity regulated under this part will not be harmful to the water resources or will not be inconsistent with the overall objectives of the district, the governing board or the department shall require the applicant to provide reasonable assurance that state water quality standards applicable to waters as defined in [s. 403.031\(13\)](#) will not be violated and ***reasonable assurance that such activity*** in, on, or over surface waters or wetlands, as delineated in [s. 373.421\(1\)](#), ***is not contrary to the public interest***. However, if such an activity significantly degrades or is within an ***Outstanding Florida Water***, as provided by department rule, the applicant must provide reasonable assurance that the **proposed activity will be clearly in the**

¹⁴ Rule 9J-5.016(c)8, F.A.C. (emphasis added)

public interest.

(a) In determining whether an activity, which is in, on, or over surface waters or wetlands, as delineated in [s. 373.421\(1\)](#), and is regulated under this part, is not contrary to the public interest or is clearly in the public interest, the governing board or the department *shall consider and balance the following criteria*:

1. Whether the activity will *adversely affect the public health, safety, or welfare* or the property of others;
2. Whether the activity will *adversely affect the conservation of fish and wildlife*, including endangered or threatened species, *or their habitats*;
3. Whether the activity will adversely affect navigation or the flow of water or cause harmful erosion or shoaling;
4. Whether the activity will *adversely affect the fishing or recreational values or marine productivity* in the vicinity of the activity;
5. Whether the activity will be of a *temporary or permanent* nature;
6. Whether the activity will adversely affect or will enhance significant historical and archaeological resources under the provisions of [s. 267.061](#); and
7. The *current condition and relative value of functions* being performed by areas affected by the proposed activity.

These criteria are to be considered and balanced. While a negative affect on any particular criteria does not necessarily render a project contrary to the public interest, in any given case, one criterion may well be more critical than the other six. An applicant must also prove compliance with the public interest test on the whole. Higgins, et. al v. Roberts, et. al and Department of Environmental Regulation, 9 FALR 5045, 5047-5048 (DER 1987) (applying the test to a proposal that would adversely impact the habitat of endangered and threatened wildlife species)

In addition, Rule 62-302.300 Florida Administrative Code governs the consideration of ERPs. F.A.C. 62-302.300(14) states that “existing uses and the level of water quality necessary to protect the existing uses shall be fully maintained and protected.”

The law supports a denial of a wetland permit in cases of extreme damage to environment that cannot be mitigated. 1800 Atlantic Developers v. Department of Environmental Regulation, 552 So. 2d 946 (Fla. 1st DCA. 1989). The Department and Water Management Districts, when given authority by the Legislature, can heighten permit requirements. For example, the SJRWMD has authority to adopt proposed rules defining areas within district as hydrologic basins and establishing more restrictive

permitting and development requirements within those basins, where the Legislature provided authority to identify geographic areas that require greater environmental protection and to impose more restrictive permitting requirements in those areas. St. Johns River Water Mgmt. Dist. v. Consolidated-Tomoka Land Co., 717 So. 2d 72 (Fla. 1st DCA. 1998).

In Florida Power Corp. v. Department of Env'tl. Regulation, 638 So. 2d 545 (Fla. 1st DCA 1994) the Court upheld the Department's rejection of a hearing officer's recommendation that FPC's project would have no adverse impact and was not contrary to public interest. The Court found competent substantial evidence to support the Department's emphasis on the lack of type for type mitigation and the importance of ensuring actual offset for the proposed destruction of 6 acres of forested wetlands for the benefit of the plants and animals solely dependent on forested wetlands. One of the factors the Court considered was the "edge effect," referring to the negative or positive influences one ecosystem may have on adjacent ecosystems. The Court noted that the Department properly determined that the extent of the impact on the environment from the destruction of the forest was a policy matter and not a question of fact, to be resolved by a hearing officer.

Minimization and Avoidance

State ERP rules emphasize requiring a permit applicant to make all practicable modifications to the development proposal that would avoid or eliminate wetland impacts. Orlando Central Park v. SFWMD, 9 F.A.L.R. 1305-A, 1319-20-A, 1330 – A (DOAH 1987); Dibbs v. DEP and Booker Preservation, Inc., 1995 WL 1052814 (DOAH 1995); VHQ Development, Inc. v. Department of Environmental Protection, DOAH Case No. 92-7456, 15 FALR 3407 (DEP Final Order, August 13, 1993), aff'd, 642 So. 2d. 755 (Fla 2nd DCA 1994); County Line Coalition, Inc. v. Southwest Florida Management District. 1999 WL 1483750 (Fla. Div. Admin. Hrgs. 1999); See e.g. Rule 62-312.060, Fla. Admin. Code.

These rule requirements to try to avoid wetland impacts altogether, and then to require full mitigation to offset unavoidable impacts is a policy decision to ensure the sustainability of wetland and water resources.

Mitigation Requirements to "Offset" Wetland Impacts

If an application does not meet the public interest test, the Department must consider mitigation. §403.918(2)(b), Fla. Stat. The Department shall consider measures proposed by or acceptable to the applicant to mitigate adverse effects that may be caused by regulated activity. §373.414(1)(b), Fla. Stat. Mitigation *must offset* the adverse effects caused by the regulated activity. *Id.* The rules require that the mitigation offset the impacts to the specific functions of the specific wetlands being impacted. Southwest Florida Water Management Dist. v. Charlotte County, 774 So.2d 903 (Fla 2nd DCA 2001); VHQ Development, Inc. v. Department of Environmental Protection, DOAH Case No. 92-7456, 15 FALR 3407 (DEP Final Order, August 13, 1993), aff'd, 642 So. 2d. 755

(Fla 2nd DCA 1994); County Line Coalition, Inc. v. Southwest Florida Management District. 1999 WL 1483750 (Fla. Div. Admin. Hrgs.1999). The mitigation must address the negative factors in the public interest test which tipped the balance against the public interest. McCormick v. Jacksonville and DER, 12 FALR 960 (DEP 1990).

In Florida Power Corporation v. DER, 92 ER FALR 56 (DER Final Order April 1, 1992) the Department held that, “although there is no absolute "no net loss" standard for mitigation, the avoidance or minimization of net loss is an important guiding principle of mitigation.” Since mitigation by preservation necessarily results in loss of jurisdictional wetlands, the Department generally accepts preservation mitigation only after on-site wetland creation and/or enhancement is shown to be not feasible or not sufficient to tip the public interest balancing test "scales" in favor of permit issuance. Id.

Cumulative Impact Analysis

Environmental Resource Permitting agencies must consider the cumulative impacts of their permitting decisions. Sierra Club v. St. Johns River Water Mgmt., 816 So. 2d 687, 688 (Fla.1st DCA 2002)

Section 373.414, (8)(a) Fla. Stat.: Additional criteria for activities in surface waters and wetlands.

“The governing board or the department, in deciding whether to grant or deny a permit for an activity regulated under this part shall consider the **cumulative impacts** upon surface water and wetlands, as delineated in s. [373.421](#)(1), within the same drainage basin as defined in s. [373.403](#)(9), of:

1. The activity for which the permit is sought.
2. Projects which are existing or activities regulated under this part which are under construction or projects for which permits or determinations pursuant to s. [373.421](#) or ¹s. [403.914](#) have been sought.
3. Activities which are under review, approved, or vested pursuant to s. [380.06](#), or other activities regulated under this part which may reasonably be expected to be located within surface waters or wetlands, as delineated in s. [373.421](#)(1), in the same drainage basin as defined in s. [373.403](#)(9), based upon the comprehensive plans, adopted pursuant to chapter 163, of the local governments having jurisdiction over the activities, or applicable land use restrictions and regulations. (emphasis added).

Reported cases amply support the view that this consideration of cumulative impacts is designed to prevent an end result for the impacted environment that exceeds its tolerance thresholds. Examples include:

* Florida Power Corp. v. Department of Env'tl. Regulation, 638 So. 2d 545 (Fla. 1st DCA 1994), rev. denied, 650 So. 2d 989 (Fla. 1994).

“a *de minimis* exception [to the cumulative impact analysis requirement] “would completely undercut the purpose of the cumulative impact analysis required by Section 403.919’.” 638 So.2d at 561.

* McCormick v. City of Jacksonville, 12 FALR 960 (FLWAC January 22, 1990). In this Final Order, FLWAC recognized that cumulative impact analysis is necessary to "prevent piecemeal destruction of the environment." FLWAC went on to say that "without the ability to consider the long term impacts of a project in combination with past and reasonably likely similar projects in the area, the MSSW permitting agency would be helpless to prevent the gradual elimination of environmental resources through MSSW permits."

B. Consumptive Use Permit (CUP) Standards

The standard for the approval of a Consumptive Use Permit unambiguously precludes the allowance of harm to the state's water resources:

“The governing board or the department may require such permits for consumptive use of water and may impose such reasonable conditions as are necessary to assure that such use is consistent with the overall objectives of the district or department and is not harmful to the water resources of the area.” Fla. Stat. Ann. § 373.219 (1) “To obtain a permit pursuant to the provisions of this chapter, the applicant must establish that the proposed use of water: (a) is a reasonable-beneficial use as defined in §373.019; (b) will not interfere with any presently existing legal use of water; and (c) is consistent with the public interest.” § 373.233(1) Fla. Stat. According to §373.019 (16), “Reasonable-beneficial use” is defined as “the use of water in such quantity as is necessary for economic and efficient utilization for a purpose and in a manner which is both reasonable and consistent with the public interest.” Harloff v City of Sarasota, 575 So.2d 1324, 1326 (Fla. 2nd DCA 1991).

This standard implements the legislative “Declaration of policy” set forth in § 373.016, Fla. Stat., that:

“(1) The waters in the state are among its basic resources. Such waters have not heretofore been conserved or fully controlled so as to realize their full beneficial use.

(2) The department and the governing board shall take into account cumulative impacts on water resources and manage those resources in a manner to **ensure their sustainability.**” (emphasis added)

SFWMD Regional Water Availability Rule

A recent example of a “sustainable” policy decision in the context of CUP decisions, in April 2007, based on a determination that it was not in the public interest to allow the ecological impacts of additional water withdrawals from the Everglades and the Biscayne Aquifer, the South Florida Water Management District adopted the “Regional Water Availability” (RWA) rule, capping withdrawals from the Biscayne Aquifer, the Lower East Coast’s primary drinking water source. This cap requires the development of alternative water supplies to accommodate growth in water supply beyond 2006 levels.

C. Water Reservation Rules

State law provides authority for the DEP and Water Management Districts to:

“reserve from use by permit applicants, water in such locations and quantities, and for such seasons of the year, as in its judgment may be required for the protection of fish and wildlife or the public health and safety.” § 373.223(4), Fla. Stat.

Few reservations have been adopted in Florida under this directive. Yet, in order to ensure the continued functioning of the state’s water bodies to support sustainable populations of fish and wildlife, it should become a more frequently – employed tool to protect the state’s ecological values against the consumptive use demands of a growing population. This is particularly critical in the central and south Florida regions.

For a case upholding a water reservation rules, see. Assoc. of Florida Community Developers v DEP, 943 So. 2d 989 (Fla. 1st DCA 2006).

D. Minimum Flows & Levels

The statutory requirement for the establishment of “minimum flows and levels” for surface and ground waters in the state to prevent significant harm resulting from additional withdrawals seems clearly aimed at preventing population growth from creating consumptive use demands that are unsustainable for the natural system. Water management districts are required by the Florida Water Resources Act of 1972 to establish minimum flows and levels for surface waters and aquifers within their respective jurisdictions. § 373.042 Fla. Stat. “Minimum flows and levels provide a tool for planning and allocation of water resources by specifying the extent and limits of the availability of the State's surface and ground water. Minimum flows and levels are just a

part of a comprehensive water resources management approach geared toward assuring the sustainability of the water resources. They must be considered in conjunction with all other resource protection responsibilities granted to the water management districts by law, including consumptive use permitting, water shortage management, and water reservations.” John J. Fumero 18 J. Land Use & Envtl. L. 379, 384 (2003).

“§373.042(1), Fla. Stat.

Within each section, or the water management district as a whole, the department or the governing board shall establish the following:

(a) Minimum flow for all surface watercourses in the area. The minimum flow for a given watercourse shall be the limit at which further withdrawals would be significantly harmful to the water resources or ecology of the area.

(b) Minimum water level. The minimum water level shall be the level of groundwater in an aquifer and the level of surface water at which further withdrawals would be significantly harmful to the water resources of the area.”

Each water management district is required to adopt a priority list of waters for the adoption of MFLs, and must address MFLs in their regional water supply plans for any area where water sources are not sufficient over a twenty year period “to supply water for all existing and projected reasonable-beneficial uses and to sustain the water resources and related natural systems.¹⁵” These plans must include prevention or recovery strategies if water levels are currently below MFLs or are projected to fall below MFLs within twenty years.¹⁶

E. Total Maximum Daily Load Requirements (TMDLs)

The Clean Water Act requires states to develop Total Maximum Daily Loads for all surface waters within their boundaries that do not meet specified water quality standards, and prohibits the issuance of permits that would cause or contribute to violations of water quality standards. §303(d)(1)(D)(2); 40 CFR 122.4(i); 40 CFR 122.44(d); 40 C.F.R. §130.7; Friends of Pinto Creek v United States EPA, 504 F.3d 1007 (9th Cir. 2007).

F. Federal Endangered Species Act

¹⁵ § 373.0361(1), Fla. Stat.

¹⁶ § 373.0421(2), Fla. Stat.

The Endangered Species Act (ESA) was enacted in 1973 with the express purpose of "providing a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved" through the development of a program to protect such endangered and threatened species, and through the enforcement of various treaties and conventions within the Act, which set forth national and international standards. 16 U.S.C. § 1531(b). The purpose of the ESA is to "provide a program for the conservation of...endangered species and threatened species...and to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved." 16 U.S.C. § 1531(b). The overarching policy of the ESA is that "all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes" of the ESA. 16 U.S.C. § 1531 (c)(1).

The ESA "represent[s] the most comprehensive legislation for the preservation of endangered species ever by any nation." Tennessee Valley Authority v. Hill, 437 U.S. 153, 180 (1978). "[T]he language, history, and structure of the Endangered Species Act showed beyond doubt that Congress intended endangered species to be afforded the highest of priorities." 437 U.S. at 174. The Court observed that "the plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost." 437 U.S. at 184.

Two key provisions of the ESA seek to prevent impacts on listed species which go too far. Under the ESA, the Fish and Wildlife Service cannot issue an incidental take permit (ITP) for private land use activities if they will "appreciably reduce the likelihood of the survival and recovery of the species in the wild." 16 USC 1539(a)(2)(B).

Next, Section 7(a)(2) commands each federal agency to "insure that any action authorized, funded, or carried out by such agency ... is not likely to jeopardize the continued existence of any endangered species or threatened species" If the Fish and Wildlife Service finds a federal agency action will jeopardize a listed species or adversely modify or destroy that species' critical habitat, the Service must suggest those reasonable and prudent alternatives which it believes would avoid jeopardy or adverse modification of critical habitat. 16 U.S.C. § 1536(b)(3)(A). "In response to an opinion finding "jeopardy or adverse modification," the acting agency must comply with the substantive mandate of section 7(a)(2) and either "terminate the action, implement the proposed alternative, or seek an exemption from the Cabinet-level Endangered Species Committee pursuant to 16 U.S.C. § 1536(e)." Fla. Key Deer v. Paulison, 522 F.3d 1133 (11th Cir. 2008). (The FEMA Flood Insurance Case).

G. CCCL Permitting Program

Among other things, it is the intent of Florida's Coastal Construction Control Line permitting process to "*to preserve and protect them from imprudent construction which can jeopardize the stability of the beach-dune system, accelerate erosion, ... or interfere with public beach access.*" §161.053(1)(a), Fla. Stat. (emphasis added).

In order for a CCCL permit to be issued, the application must meet the Chapter 62B-33, Florida Administrative Code design and siting requirements, which include a review of the potential impacts to the beach dune system, adjacent properties, native salt resistant vegetation, and marine turtles. In Leto v. State of Fla. Dept. of Environmental Protection, 824 So.2d 283 (Fla. 4th DCA 2002), construction permits were denied because, among other reasons, “the structure, as designed, failed to adequately protect local marine turtles.” *Id.* at 284.

H. Federal Clean Water Act – 404 Permits

The Clean Water Act ("CWA"), 33 U.S.C. § 1251 *et seq.*, is designed to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a)(2). Dredged or fill materials are pollutants under the CWA. *See* 33 U.S.C. § 1362(6). Section 404 of the CWA, 33 U.S.C. § 1344, authorizes the Corps to issue permits to discharge or place "dredged or fill materials" into waters of the United States, including wetlands, only at specified sites and under prescribed circumstances and conditions.

Under the Act, the U.S. Army Corps of Engineers is required to give wetlands the highest possible level of protection. “[W]etlands constitute a productive and valuable public resource, the unnecessary alteration and destruction of which should be discouraged as contrary to the public interest.” 33 C.F.R. § 320.4(b).

The EPA’s “guidelines” for the issuance of dredge and fill permits articulate a presumption against allowing any damage to wetlands: “From a national perspective, the degradation or destruction of . . . wetlands is considered to be among the most severe environmental impacts.” 40 C.F.R. § 230.1(d). “The guiding principle should be that degradation or destruction of [wetlands] may represent an irreversible loss of valuable aquatic resources.” *Id.*

The EPA guidelines provide that “dredged or fill material should not be discharged into the aquatic ecosystem [wetlands], unless it can be demonstrated that such a discharge will not have an unacceptable adverse impact either individually or in combination with known and/or probable impacts of other activities affecting the ecosystems of concern.” *Id.* § 230.1(c) (emphasis added). The EPA guidelines further provide that the Corps may not issue a dredge and fill permit “which will cause or contribute to significant degradation of [wetlands],” 40 C.F.R. § 230.10(c), and that effects “contributing to significant degradation considered individually or collectively, include . . . loss of fish and wildlife habitat . . .” 40 C.F.R. §§ 230.10(c)(3).

A permit may not be issued if (i) there is a practicable alternative which would have less adverse impact and does not have other significant adverse environmental consequences, (ii) the discharge will result in significant degradation, (iii) the discharge does not include all appropriate and practicable measures to minimize potential harm, or (iv) there does not exist sufficient information to make a reasonable judgment as to whether the proposed discharge will comply with the Corp's Guidelines for permit

issuance. 40 C.F.R. § 230.12(a)(3)(i-iv). A permit may not be issued "unless appropriate and practicable steps have been taken which will minimize potential adverse impacts of the discharge on the aquatic ecosystem." 40 C.F.R. § 230.10(d).

The EPA's guidelines also strictly prohibit the Corps from issuing any permit "if there is a practicable alternative . . . which would have less adverse impact on the aquatic ecosystem." 40 C.F.R. § 230.10(a) (emphasis added)

V. JUDICIAL STANDARDS OF REVIEW SUPPORT PLANNING AND REGULATION BASED ON ECOLOGICAL OR OTHER THRESHOLDS

As long as an ordinance or regulation bears a substantial relationship to the promotion of the public health, safety, morals, or general welfare, it is constitutional. Davis v. Sails, 318 So.2d 214, 217 (Fla. 1st DCA 1975). Local Governments have a statutory right and responsibility to enact comprehensive plans and such plans, like legislative acts, will be presumed valid when challenged. *Id.*; City of Miami Beach v. Lachman, 71 So.2d 148, 150 (Fla. 1953). Absent a showing that the comprehensive plan is unreasonable and is an arbitrary exercise of police power without any relationship to the public health, safety, morals, or welfare, the courts will not overturn the plan. City of Boca Raton v. Boca Villas Corp., 371 So.2d 154, 158 (Fla. 4th DCA 1979). The burden is on the party challenging an ordinance to make this demonstration. City of Miami v. Kayfetz, 92 So.2d 798, 802 (Fla. 1957).

To resolve this issue, courts will utilize the "fairly debatable" test, under which, if reasonable minds could differ as to the reasonableness or rationality of an ordinance, the ordinance will be upheld. Davis, 318 So.2d at 217. A plan will be deemed fairly debatable if there is competent, substantial evidence to support the local government's decision. Lee County v. Morales, 557 So.2d 652, 655 (Fla. 2d DCA 1990). If the plan is found to be fairly debatable, then its application cannot be disturbed by the courts. Davis, 318 So.2d at 222. Only where a plan is not supported by any substantial evidence and is not fairly debatable, will it be deemed arbitrary, capricious, and a denial of due process. Broward County v. Capeletti Bros., 375 So.2d 313, 315 (Fla. 4th DCA 1979). To show that a land use restriction is unreasonable and arbitrary, the challenging party must prove that the restriction has no rational relationship to the public health, morals, safety or general welfare, and is not reasonably designed to correct the adverse condition. City of Hollywood v. Hollywood, Inc., 432 So.2d 1332, 1336, *cert. denied*, 441 So.2d 632. Once the plan meets the fairly debatable test, the court may not substitute its judgment for that of the local government. Davis, 318 So.2d at 221.

The essence of these cases is that as long as there is a good reason for the regulation it will not be struck by the Court because the challenger disagrees with that reason. In Capeletti Bros., the court upheld the denial of a rezoning on the basis that it conflicted with existing land use plans and the concern. 375 So.2d at 316. Differences of opinion on this matter did not invalidate the ordinance on the basis that conclusive proof of the need to deny the rezoning did not exist. Instead, this demonstrated that the issue was fairly debatable and thus within the Commission's discretion to decide. *Id.*

Importantly, the court explained that, due to the sensitivity of decisions affecting land use, those decisions should be made by local governments and unless the decisions are arbitrary, discriminatory, or unconstitutional the court should let those decisions stand. Id. at 315; See also, Kayfetz, 92 So.2d at 801.

Similarly, the court in Morales stated that because zoning is a legislative function, the courts should only intervene when the action of the zoning body is so unreasonable and unjustified as to amount to a taking. 557 So.2d at 655. The Court further held that it is not for the judiciary to determine what would be the proper zoning, but to ascertain whether or not the zoning body's decision is fairly debatable. Id.

Scientific conclusions are by their nature uncertain. Therefore, courts give deference to the government on such matters. Island Harbor v. Dept. of Natural Resources, 495 So.2d at 223 (Fla. 1st DCA 1986). In Island Harbor, the Department of Natural Resources employed a new scientific methodology, which was allegedly unproven and unaccepted in the scientific community, in reestablishing a coastal construction control line. The court held that "selection and use of new scientific methodology was a matter of agency discretion that should not be set aside absent a showing by a preponderance of evidence that the agency's action is either arbitrary, capricious, an abuse of discretion, or not reasonably related to the statutory purpose."¹⁷ The court concluded by stating that the setting of coastal construction control lines for the purpose of adequately protecting the beaches and dunes of this state is not a matter of scientific certainty and thus, the court was compelled to give great deference to DNR. Id. at 223.¹⁸

In the context of local government comprehensive planning decisions, local governments are encouraged to use any data necessary so long as methodologies are professionally applied, collected, and accepted. Comprehensive plans should be based on whatever data a local government does have, even if that data is not complete.

17. Citing Baltimore Gas & Electric Co. v. Natural Resources Defense Council, 462 U.S. 87, 103, stating that the uncertainty of science only serves to emphasize the limitation of judicial review and the need for greater deference to policy making entities. Id. at 218.

18. See also Morales. (the rationality and reasonableness of a downzoning, which was based upon an expert's study and the planning staff's assessments and recommendations that the land be rezoned in consideration of environmental, archaeological, and historical protection/preservation, was fairly debatable); See also Lachman. (if any logical deduction supports the local government's contentions, a court may not substitute its judgment for that of the local government); accord, Davis, 318 So.2d at 222; See also Graham v. Estuary Properties, 399 So. 2d 1374, 1381 (Fla. 1981). (agency decision to give great weight to environmental impact of proposed development was within the realm of its responsibilities and the court would not substitute its judgment for the agency's when it was backed by competent evidence).

Environmental Coalition of Fla., Inc. v. Broward County, 586 So.2d 1212 (Fla. 1st DCA 1991).

Protection of environmentally sensitive areas and pollution prevention are legitimate concerns within the police power. See Estuary Properties. Cases like Morales continue to consistently apply and amplify this rule. In Morales, the court upheld a down-zoning, based on an expert study, of a barrier island which was designed to preserve archaeological resources, protect the environment and adjoining aquatic preserve, and to guard against the threat by hurricanes and flooding to development. Id. at 653.19 Florida courts also have recognized a local government's legislation to protect their community's appearance as a legitimate exercise of police power. City of Sunrise v. D.C.A. Homes, Inc., 421 So.2d 1084, 1085 (Fla. 4th DCA 1982). Likewise, the United States Supreme Court has ruled that preservation of open space and protection from urbanization and the consequences of urban sprawl, e.g., water pollution, destruction of scenic beauty, disturbance of the ecology and environment, are valid public interests and legitimate governmental goals. Agins v. City of Tiburon, 447 U.S. 255, 261-2 (1981).

Limited Growth Ordinances have been upheld by the courts. In City of Hollywood v. Hollywood, Inc., 432 So.2d 1332 (Fla. 4th DCA 1983), the city had adopted an annual cap on density based on its concerns for water and sewage capacities, fire and police protection, hurricane evacuation, ecological and environmental protection, aesthetics, and public access to the ocean. Id. at 1334-5. Under the cap, the specific number of permits to be issued each year was based specifically and solely on the calculations concerning traffic capacity, due to the fact that there was no existing method that would yield a specific number to represent the limitations that existed relative to the other factors. Upon challenge, the court upheld the density cap even though it found that the traffic study upon which the overall density cap was based was flawed. Id. at 1334. The Court found that the number of permits chosen by the City to be allocated was a reasonable approximation of its actual, but un-quantified growth limits, and thus that it could not rule that the growth cap, even given the flawed traffic numbers, was unreasonable or arbitrary. Id. In addition, the judge gave great weight to the fact that the City Commission had held countless hearings and meetings on the issue before adopting the ordinance. Id. at 1335. Based on the reports, public meetings, studies, and comprehensive plans, the cap was ruled to be a valid exercise of police power which contributed substantially to the public health, morals, safety, and welfare of its citizens and therefore was not arbitrary. Id. at 1336.

In contrast, where the City of Boca Raton established a cap on permits by referendum, which was not based on any analysis or even consultation with the City Planning Department, it was invalidated by the court. There was no evidence presented by the City that public facilities and infrastructure were insufficient to handle the impacts

19. The Court found that "the zoning board was appropriately concerned with limiting the effects of future commercial development . . . in view of legitimate environmental concerns, public safety concerns, and concern for preserving the island's aesthetic, historical, and archeological characteristics." Id.

of future growth. The Court found that no substantial competent evidence existed to support a finding that the cap was rationally related to valid municipal purposes of public health, morals, safety, and welfare. Thus, the cap was arbitrary and unreasonable. City of Boca Raton v. Boca Villas Corp., 371 So.2d 154, 156. See also Innkeepers Motor Lodge v. City of New Smyrna Beach, 460 So.2d 379 (Fla. 5th DCA 1984). (Found a density cap arbitrary and unreasonable because no study was ever conducted to justify the figures used; nor could anyone determine where the figures had come from).

VI. ETHICAL – PROFESSIONAL RESPONSIBILITIES

Does the Florida environmental or land use lawyer have the obligation to work in pursuit of sustainability in the face of population growth?

The Preamble (A Lawyer's Responsibilities) to the Rules of Professional Conduct tells us that: A lawyer is a representative of clients, an officer of the legal system, and a **public citizen having special responsibility for the quality of justice.**

As a public citizen, **a lawyer should seek improvement of the law, the administration of justice**, and the quality of service rendered by the legal profession. As a member of a learned profession, **a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law**, and work to strengthen legal education. **A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance, and should therefore devote professional time and civic influence in their behalf.**

A lawyer is also guided by personal conscience and the approbation of professional peers. A lawyer should strive to attain the highest level of skill, to improve the law and the legal profession, and to exemplify the legal profession's ideals of public service. (Emphasis added).

Next, the **Bylaws of the Environmental and Land Use Law Section** establish the purpose of our Section to include:

To provide a forum for discussion and exchange of ideas leading to ***increased knowledge and understanding of environmental and land use law*** on the part of Bar members.

To ***study proposed and existing legislation affecting the environment and use of land*** and recommend to the Board of Governors that the Bar support or oppose that legislation. (Bylaws, Section 2(b) & (c))(Emphasis added)..

Next, as officers of the legal system, is it not our duty to implement **Fla. Const. Art. II, ' 7(a)**?:

It shall be the policy of the state to conserve and protect its natural resources and scenic beauty. Adequate provision shall be made by law for the abatement of air and water pollution and of excessive and unnecessary noise and for the conservation and protection of natural resources.

VII. CONCLUSION

Florida can only sustain itself and avoid economic and ecological crisis if its policies and laws respect and reflect the realities of the laws of nature, the finite (and shrinking) amount of land in this peninsula, and its ability to pay for more growth. Growth management must become, in some places, a growth limitation and where and when development can occur. Certainly the potential impacts of sea – level rise alone constitutes “data and analysis” relative to whether proposed land uses, densities and locations would meet the terms and intent of the Growth Management Act.

We must have an honest and frank discussion about Florida’s finite amount of land and financial and practical ability to sustain unlimited land development. In a state whose natural environment, built communities and infrastructure are being overwhelmed by growth that is not paying for itself, government can and must ensure that the public fiscal and welfare are not harmed by the amount, type and location of new development. Government can require growth to truly pay for itself. It can also regulate land strictly, even adopt annual growth caps, if important to ecosystem, farmland and community protection. It can maintain a tax system and fiscal policies that work in the same direction as the rules. We must be able to talk about carrying capacity limits in polite company and government buildings.