The Florida Senate

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Committee on Community Affairs Senator Michael S. "Mike" Bennett, Chair

LAND USE BOARD OF APPEALS

SUMMARY

Land use decisions in Florida may be subject to challenge in an administrative or judicial forum, depending on the nature of the land use decision. There are instances where a hearing officer or judge with little or no background in land use law may render a decision on a land use appeal. Some have argued that the process for appealing land use decisions in Florida is unwieldy and, as a result, is not a very consistent or effective process. To remedy this, some have favored creating a land use board of appeals.

Proponents of a land use board of appeals are seeking greater consistency, predictability in the land use process; assurance in the quality of decisions; and, a less expensive, but more efficient and effective land use appeal process. The state of Oregon has had a land use board of appeals in place since 1979. The board publishes an annual report on its success in meeting performance measures.

Should the committee wish to create a land use board of appeals, there are many administrative determinations that are necessary to any language creating such a board.

BACKGROUND

Many states have enacted comprehensive growth management programs, including Florida, Georgia, Hawaii, Maine, Maryland, New Jersey, Oregon, Rhode Island, Vermont, and Washington. For several of these states, one facet of their growth management system is a land use board of appeals or similar body with limited jurisdiction over certain types of land use and environmental decisions.

The three types of land-use decisions that are reviewed by the Florida Department of Community Affairs (DCA) are amendments to local comprehensive plans, land development regulations, and development orders. In Florida, an appeal of one of these land use decisions may be heard by an administrative or judicial body depending on the type of land use decision at issue. Often, the hearing officer or judge hearing the appeal may not have any expertise with regard to land use decisions. The following are forums in which a land use decision in Florida may be appealed:

Administrative Review of Consistency Challenges

The Local Government Comprehensive Planning and Land Development Regulation Act of 1985, ("Act") ss. 163.3161-163.3246, F.S., establishes a growth management system in Florida and requires each local government (or combination of local governments) to adopt a comprehensive land use plan that includes certain required elements, such as: a future land use plan; capital improvements; and an intergovernmental coordination element. After a comprehensive plan has been adopted, subsequent changes are made through amendments to the plans. There are generally two types of amendments: 1) amendments to the future land use map that change the land use category designation of a particular parcel of property or area; and 2) text amendments that change the goals, objectives or policies of a particular element of the plan. In addition, every seven years a local government must adopt an evaluation and appraisal report (EAR) assessing the progress of the local government in implementing its comprehensive plan. The local government is required, pursuant to s. 163.3191(10), F.S., to amend its comprehensive plan based on the recommendations in the report.

Following DCA's review of a plan or plan amendment, DCA must issue an Objections, Recommendations and Comments (ORC) report that identifies areas of the proposed plan amendment that are inconsistent with ch. 163, Part II, F.S. The local government may or may not address DCA's recommendations, and then elect to adopt or not adopt the plan amendment. If the plan or plan amendment is adopted by the local government, such plan or amendment is then forwarded to DCA for compliance review. The DCA is required to issue a

Notice of Intent within 20 to 45 days to find the plan or amendment either in or not in compliance with the Growth Management Act.

Section 163.3184, F.S., provides for an "affected person" to challenge DCA's decision that an amendment to a local government's comprehensive plan is or is not in compliance. For purposes of such a challenge, the term "affected persons" includes the local government adopting the plan amendment; an adjoining local government that can demonstrate substantial impacts on publicly funded infrastructure or areas designated for protection or special treatment; persons owning property, residing, or owning or operating a business within the local government's jurisdiction whose plan amendment is the subject of the challenge; and, owners of real property abutting real property that is the subject of a proposed change to a future land use map. With the exception of the local government, a party instituting a challenge must have submitted oral or written comments to the local government during the time period beginning with transmittal of the amendment and ending with its adoption.

If DCA issues a Notice of Intent to find a plan or plan amendment in compliance, any affected person may file a petition with DCA within 21 days after the publication of the notice.[1] A hearing will be held by an administrative law judge from the Division of Administrative Hearings. The standard of review is "fairly debatable",[2] which "requires approval of a planning action even where reasonable persons could differ as to its propriety."[3] Following issuance of a proposed recommended order by the administrative law judge, DCA must allow for the filing of exceptions to the recommended order and then issue a final order if the amendment is in compliance. However, if DCA finds that the plan or plan amendment is not in compliance, the recommended order must be submitted to the Administration Commission (Governor and Cabinet) for final agency action.

If DCA issues a Notice of Intent to find a comprehensive plan or plan amendment not in compliance with the Growth Management Act, the Division of Administrative Hearings must conduct a hearing under ss. 120.569 and 120.57, F.S., in the county of and convenient to the affected local government's jurisdiction.[4] The parties in such a proceeding are DCA, the affected local government, and any affected person who intervenes. Florida Statutes provide that a local government's determination that a plan or plan amendment is in compliance is presumed correct. This determination will be sustained unless it can be shown through a preponderance of the evidence that the plan amendment is not in compliance. However, the "fairly debatable" standard is applicable when reviewing a local government's determination that the elements of its comprehensive plan are related to and consistent with each other.[5] Mediation and alternative dispute resolution are encouraged and the hearing may be delayed for up to 90 days, or longer if agreed to by the parties, to allow for such proceedings.[6] Following the hearing, the administrative law judge must submit a recommended order to the Administration Commission for final agency action.[7]

Challenging the Consistency of Land Development Regulations

Section 163.3202, F.S., requires each county and each municipality to adopt and enforce land development regulations that are consistent with and implement their adopted comprehensive plan. Such regulations must contain specific and detailed provisions necessary or desirable to implement the adopted comprehensive plan and must, at a minimum:

- Regulate the subdivision of land;
- Regulate the use of land and water for those land use categories included in the land use element and ensure the compatibility of adjacent uses and provide for open space;
- Provide for protection of potable water wellfields;
- Regulate areas subject to seasonal and periodic flooding and provide for drainage and stormwater management;
- Ensure the protection of environmentally sensitive lands designated in the comprehensive plan;
- Regulate signage;
- Provide that public facilities and services meet or exceed the standards established in the capital improvements element required by s. 163.3177, F.S., and are available when needed for the development, or that development

[1] Section 163.3184(9), F.S.
[2] Section 163.3184(9)(a), F.S.
[3] *See Martin County v. Yusem*, 690 So. 2d 1288, 1295 (Fla. 1997).
[4] Section 163.3184(10), F.S.
[5] Section 163.3184(10)(a), F.S.
[6] Section 163.3184(10)(c), F.S.
[7] Section 163.3184(10)(b), F.S.

> orders and permits are conditioned on the availability of these public facilities and services necessary to serve the proposed development. Not later than 1 year after its due date established by the state land planning agency's rule for submission of local comprehensive plans pursuant to s. 163.3167(2), F.S., a local government shall not issue a development order or permit which results in a reduction in the level of services for the affected public facilities below the level of services provided in the comprehensive plan of the local government; and
> - Ensure safe and convenient onsite traffic flow, considering needed vehicle parking.

Local governments, in adopting land development regulations to implement their comprehensive plans, are required to include specific and detailed provisions necessary or desirable to implement the plan which must, at a minimum, ensure the compatibility of adjacent uses. Section 163.3213, F.S., defines "land development regulation" to mean:

> an ordinance enacted by a local governing body for the regulation of any aspect of development, including a subdivision, building construction, landscaping, tree protection, or sign regulation or any other regulation concerning the development of land.

This term includes a general zoning code, but does not include a zoning map, an action which results in zoning or rezoning of land, or any building construction standard adopted pursuant to and in compliance with the provisions of chapter 553, F.S.

Section 163.3213, F.S., authorizes a substantially affected person within 12 months after final adoption of a land development regulation to challenge the regulation on the basis that it is inconsistent with the local comprehensive plan. Prior to instituting such a challenge, a substantially affected person must file a petition with the local government outlining the facts on which the petition is based and the reasons that the substantially affected person considers the land development regulation to be inconsistent with the local comprehensive plan. The local government has 30 days after the receipt of the petition to respond. Thereafter, the substantially affected person may petition DCA no later than 30 days after the local government has responded or at the expiration of the 30-day period which the local government has to respond. The local government and the petitioning, substantially affected person may by agreement extend the 30-day time period within which the local government has to respond. The petition to DCA must contain the facts and reasons outlined in the prior petition to the local government.[8]

The DCA is required to notify the local government of its receipt of a petition and must give the local government and the substantially affected person an opportunity to present written or oral testimony on the issue and must conduct any investigations of the matter that it deems necessary. These proceedings are informal. No later than 60 days after receiving the petition, DCA must issue its written decision on the issue of whether the land development regulation is consistent with the local comprehensive plan, giving the grounds for its decision.[9]

If DCA determines that the regulation is consistent with the local comprehensive plan, the substantially affected person may, within 21 days, request a hearing from the Division of Administrative Hearings, and an administrative law judge must hold a hearing in the affected jurisdiction no earlier than 30 days after DCA renders its decision. Florida Statutes provide that the adoption of a land development regulation by a local government is legislative in nature and may not be found to be inconsistent with the local plan if it is fairly debatable that it is consistent with the plan.[10]

If DCA determines that the regulation is inconsistent with the local comprehensive plan, it must, within 21 days, request a hearing from the Division of Administrative Hearings, and an administrative law judge must hold a hearing in the affected jurisdiction no earlier than 30 days after DCA renders its decision. The fairly debatable standard is the applicable standard of review.[11]

If the administrative law judge finds the land development regulation to be inconsistent with the local comprehensive plan, the order must be submitted to the Administration Commission for imposition of sanctions. An administrative proceeding under this section is the sole proceeding available to challenge the consistency of a land development regulation with a comprehensive plan adopted under part II of ch. 163, F.S.

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[8] Section 163.3213(4), F.S.
[9] Section 163.3213(4), F.S.
[10] Section 163.3213(5)(a), F.S.
[11] Section 163.3213(5)(b), F.S.

Judicial Review of Development Orders Based on Consistency

The term "development order" is defined in s. 163.3164(7), F.S., as: "any order granting, denying, or granting with conditions an application for a development permit." Section 163.3215, F.S., creates a civil cause of action for an aggrieved or adversely affected party to challenge the consistency of a development order with an adopted local comprehensive plan. An aggrieved or adversely affected party may challenge any action on a development order by a local government 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 . . . ."[12] The definition of "an aggrieved or adversely affected party" who may maintain an action under this section differs from the definition of affected person under s. 163.3184(1), F.S. For the purposes of s. 163.3215, F.S., the term "aggrieved or affected party" is defined as:

> 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, and environmental or natural resources.

The alleged adverse interest may be shared in common with other members of the community at large, but must exceed in degree the general interest in community good shared by all persons. The term includes the owner, developer, or applicant for a development order.[13]

An aggrieved or affected party may maintain a de novo action for declaratory, injunctive, or other relief against a local government to challenge its decision on a development order. However, the de novo action must be filed within 30 days of the local government's issuance of a development order or other written decision, or the exhaustion of all local administrative appeals, whichever is later.[14]

Alternatively, if a local government adopts the standards established in s. 163.3215(4), F.S., which provide for a quasi-judicial hearing before a special master, the aggrieved or affected party's sole method to challenge the development order is to file a petition for a writ of certiorari in the circuit court within 30 days after issuance of the order or the exhaustion of all local administrative appeals, whichever is later.[15] The principles of administrative or judicial res judicata, as well as collateral estoppel, will apply to these proceedings.[16]

Administrative Review of Development Orders

Section 380.07, F.S., creates the Florida Land and Water Adjudicatory Commission, which is the Administration Commission (Governor and Cabinet). The commission is charged with ensuring compliance with the Areas of Critical State Concern and Developments of Regional Impact programs. Within 45 days after a development order is rendered in an area of critical state concern or relating to a DRI, the owner, developer, or DCA may appeal the order to the commission.[17] Prior to issuing an order, the commission must hold a hearing using the provisions of ch. 120, F.S.[18] The commission is required to issue a decision granting or denying permission to develop, applying the standards in ch. 380, F.S., and may attach restrictions and conditions.[19]

Oregon's Land Use Board of Appeals

Oregon established its growth management program in 1973, which is noted for its urban growth boundary that is intended to accommodate anticipated growth without encouraging sprawl. In addition to requiring each local government to prepare a comprehensive land use plan that satisfies statewide planning goals, the Department of Land Conservation and Development was created to review and approve these plans. The department is overseen by a citizens' commission. In addition, a land use board of appeals hears appeals of local governments' land use decisions.

Oregon created its land use board of appeals (LUBA) in 1979. Prior to the board's creation, land use decisions could be appealed in both administrative and judicial forums. The role of the board is to hear appeals of land use decisions made by local governments and special districts. Circuit courts in Oregon no longer have jurisdiction over such appeals. The board consists of three members who are appointed by the Governor and considered experts in land use planning law. The

[12] Section 163.3215(3), F.S.
[13] Section 163.3215(2), F.S.
[14] Section 163.3215(3), F.S.
[15] Section 163.3215(4), F.S.
[16] Section 163.3215(4), F.S.
[17] Section 380.07(2), F.S.
[18] Section 380.07(4), F.S.
[19] Section 380.07(5), F.S.

board acts as an independent agency and the Land Conservation and Development Commission (whose counterpart in Florida is the Department of Community Affairs) may assert its interpretation of statewide planning goals and applicable statutes along with other parties.

The jurisdiction of LUBA is limited to the review of any final "land use decisions" and "limited land use decisions." The term "land use decision" is defined as a final decision by a local government or special district relating to the adoption, amendment, or application of statewide planning goals, a comprehensive plan provision, or a land use regulation. Examples of such land use decisions include: comprehensive plan changes, zoning changes, conditional use permits; variances, and the subdividing of rural lands. Also, any decision of a state agency that applies the statewide planning goals is a final land use decision for purposes of review by LUBA. A decision may also qualify for review under LUBA as a final land use decision under current case law if it will have a significant impact on present or future land uses in the area.

Oregon Statutes define the term "limited land use decision" as certain listed types of decisions that affect sites within established urban growth boundaries. Those types of decisions include an urban partition, urban subdivision, urban site review decision, and an urban design review decision. Petitioners in a LUBA appeal are required to explain why the appealed decision is subject to review by LUBA. Failure to provide this information may result in dismissal of the petition. Also, a decision must be final to sustain an appeal before LUBA. Typically, a decision is considered final if it is in written form. Also, certain local governments may require official signatures before a decision is final. Further, local ordinances or regulations may require that any other appeal to a higher body within the same unit of government be exhausted prior to instituting an appeal with LUBA.

In order to initiate an appeal with LUBA, a Notice of Intent to Appeal must be filed at LUBA within 21 days after issuance of the land use decision to be appealed becomes final. Along with the Notice of Intent to Appeal, the Petitioner must also include $325 to cover the $175 filing fee and a $150 deposit for costs. Should the Respondent prevail in the appeal before LUBA, the deposit for costs is used to reimburse the Respondent for preparing the record on appeal.

Mediation is encouraged in Oregon's land use appeal process. An appeal proceeding before LUBA may be stayed at any time if all parties stipulate the proceeding should be held in abeyance to allow the parties to enter into mediation.

METHODOLOGY

Staff researched the role of existing land use boards of appeal in other states and performance measures applied to those boards. Additionally, staff discussed the issue with interested parties, including local government staff.

FINDINGS

Benefits of a Land Use Board of Appeals

Proponents of a land use board of appeals contend that such a board could provide greater consistency and predictability in the land use process; assure the quality of decisions; and create a less expensive, but more efficient and effective land use appeal process. Oregon's performance measures indicate that its land use appeals board is accomplishing these goals. Performance data for the board is submitted to the Department of Administrative Services every quarter and presented to its legislature at each biennial session. This performance data is now also available on the board's home page. The board itself is responsible for establishing performance measures and they are as follows:[20]

- Percentage of final opinions issued within the required statutory deadline or with no more than a 7-day stipulated extension (87% in the period July 1, 2003 to June 30, 2004);
- Resolution of all issues when reversing or remanding a land use decision in 95% of its final opinions (100% in the period July 1, 2003 to June 30, 2004);
- Issuance of final decisions that are sustained 80% of the time (89% in the period July 1, 2003 to June 30, 2004); Publication of LUBA Reports in volumes with 5 months of final orders and opinions within 3 months after issuance of the last final opinions and orders to be included in the volume (Goal met for the September 2003 and February 2004 volumes which were published during the reporting period July 1, 2003 to June 30, 2004.);

[20] *Land Use Board of Appeals Annual Report, July 1, 2003 – June 30, 2004*, http://luba.state.or.us/Performance%20Measures/Annual%20Report.htm.

(Note: The above measures were adopted in 1992 to resolve land use appeals quickly, resolve all issues in an appeal if possible, resolve land use appeals correctly, and provide for the timely publication of LUBA opinions to guide decision makers and the public.)

- Issuance of orders on record objections within 60 days of receiving the objection 90% of the time (94% in the period July 1, 2003 to June 30, 2004).

(Note: This measure was added in 2001 in response to a statutory tracking requirement.)

- Percentage of weeks in which the LUBA slip opinions are posted on its web page on the Monday following the week in which the opinion was issued (96% in the period July 1, 2003 to June 30, 2004);

- Interval in days following the publication of a LUBA Report that the headnotes are incorporated into the headnote digest on the LUBA webpage (The 29 days for Volume 44 and 26 days for Volume 45 exceed the target of 30 days for the reporting period July 1, 2003 to June 30, 2004); and,

- Number of oral arguments scheduled annually outside Salem (where the board is located) in geographically dispersed locations. (Target of 4 oral arguments outside Salem was met for the reporting period July 1, 2003 to June 30, 2004.)

(Note: Although not required by statute, these measures were added in 2002 to provide quantifiable measures of LUBA's efforts to assure that the LUBA appeal process is open and accessible to decision makers, attorneys and the citizens.)

The board intends to improve the percentages discussed above for the 2005 reporting period as part of its efforts to provide further efficiencies.

Proposed Florida Land Use Board of Appeals
The following are considerations for the committee if there is consensus on the creation of a Florida Land Use Board of Appeals.

- Jurisdiction of the board. At its broadest, the jurisdiction of the board may include appeals of decisions of the Florida Land and Water Adjudicatory Commission; appeals of DCA's determination that a plan or plan amendment is or is not in compliance with the Growth Management Act; appeals of DCA's consistency review of a local government's land use development regulations; and, appeals on the consistency of a development order issued by a local government. The committee may wish to consider expanding or phasing in the board's jurisdiction over a period of time.

- Appointment of board members. There are many options the committee may wish to consider, including appointment by the Governor with Senate confirmation of the appointees or having the Governor, President of the Senate, and the Speaker of the House of Representatives each appoint members.

- Qualifications of board members. The committee may wish to require that board members be attorneys licensed to practice in Florida with expertise in land use law.

- Standard of review. The committee must determine whether it wishes to have an applicable standard of review that is more deferential to the local government (i.e., fairly debatable) or preponderance of the evidence.

- Timeframes for the filing and resolution of an appeal.

- Language creating a land use board of appeals may also encourage early, informal dispute resolution or mediation.

- Reporting requirements. The committee may wish to have the board provide statistics on the cases that have come before the board and their resolution in the form of an annual report.

RECOMMENDATIONS

Staff recommends that the committee consider creating a land use board of appeals. It is likely that there are efficiencies to be gained and the consistency of land use decisions would improve. If the committee decides to offer legislation creating such a board, the language must address: the jurisdiction of the board, appointment of board members, qualifications of board

members, standard of review, and the timeframes for the filing and resolution of an appeal.