The Florida Senate

Interim Project Report 2006-107 *September 2005*

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

LAND USE BOARD OF APPEALS

SUMMARY

Currently, Florida has a bifurcated process for appealing land use decisions. Depending on the type of decision at issue, the challenger may have to seek review in either an administrative or judicial forum. Challenges to large scale plan amendments, to small scale amendments, and to the consistency of land development regulations within 12 months of its adoption are heard by the Division of Administrative Hearings (DOAH) using the administrative hearing process. The Governor and Cabinet also hears the appeal of a final order issued by DOAH regarding the consistency of a small scale amendment and challenges to development orders within an area of critical state concern or a development of regional impact. Citizen challenges to the consistency of a development order are heard by the circuit court or by a special master if the local government has set up such a process.

Various interested parties have suggested consolidating the appeal of the different types of land use decisions in one forum similar to the land use board of appeals that is used in Oregon. The Oregon model is an independent body of three attorneys that meet certain criteria and are appointed by the Governor and confirmed by the Senate. Committee staff considered the possibility of creating a similar board and concluded it would be more efficient to allow a challenge to certain land use decisions by filing a petition for an administrative hearing with DOAH. The division already provides review for certain land use decisions and has the staff and existing structure to handle additional cases.

Specifically, staff recommends the committee consider transferring jurisdiction to review all land use decisions concerning comprehensive plans, plan amendments, and development orders, with the exception of development orders within an area of critical state concern to DOAH. This transfer of jurisdiction should be phased in over a period of two years. The administrative law judges who will be assigned these cases should be required to meet specified qualifications regarding experience, expertise, etc., and to fulfill continuing education requirements. This transfer of jurisdiction will allow for more efficient review of land use decisions by administrative law judges with expertise in land use and will lead to the development of a consolidated body of case law relating to land use changes in Florida.

BACKGROUND

Last year, this committee drafted Interim Project Report 2005-119 that discussed Florida's system of administrative and judicial review of land use decisions and the likely success of creating a land use board of appeals to provide greater efficiency. Proponents of a land use board of appeals argue it would be beneficial to have a consolidated forum for land use appeals with an expedited timeframe for review. This consolidated review of land use decisions would also lead to the development of a body of case law relating solely to land use issues.

The Growth Management Act of 1985, ss. 163.3161-163.3246, F.S., establishes a growth management system in Florida and requires each local government to adopt a comprehensive land use plan that includes certain required elements. After a comprehensive plan has been adopted, subsequent changes are made through amendments to the plan. Currently, Florida Statutes provide for both administrative and judicial review depending on the nature of the land use decision on appeal.

Administrative Challenges to Decisions Involving Publicly Financed Capital Improvements

Under s. 163.3181, F.S., an affected person may request an administrative hearing to object to a publicly financed capital improvement project as not consistent with the local government's comprehensive plan. The affected person must file a petition within 30 days after the public hearing on whether to proceed with the

project or after certain information regarding the project is made available.[1] Affected local governments, DCA, or other affected persons may intervene in the proceeding. The administrative law judge must, by order, establish a schedule that provides for a final hearing within 60 days. If a proposed recommended order is submitted, it must be submitted within 10 days after receipt of the hearing transcript. Following receipt of the recommended order, the DCA must issue a final order within 45 days.[2]

Administrative Challenges to DCA's Determination on the Consistency of a Plan or Plan Amendment

Section 163.3184, F.S., provides a process for the adoption of a comprehensive plan or plan amendment. An "affected person" may challenge the DCA's determination that a plan or plan amendment is in compliance under s. 163.3184(9), F.S., by filing a petition for an administrative hearing within 21 days after DCA's publication of the Notice of Intent. An administrative law judge from DOAH must hold a hearing in the county of and convenient to the affected jurisdiction. The standard of review for a citizen challenge under s. 163.3184, F.S., is fairly debatable.[3] Following the hearing, the administrative law judge is required to submit a recommended order to DCA. Parties may file exceptions to the recommended order with DCA.[4] If DCA determines the plan or plan amendment is not in compliance, then DCA submits the recommended order to the Administration Commission for final agency action.[5]

When DCA issues a Notice of Intent to find a plan or plan amendment not in compliance, DOAH must hold an administrative hearing in the county of the affected local government's jurisdiction.[6] The parties to the proceeding are DCA, the affected local government, and any affected party who intervenes. In this proceeding, the local government enjoys a presumption that the plan or plan amendment is in compliance unless it is shown otherwise by a preponderance of the evidence.[7] However, the local government's determination that the elements of its plan are related to and consistent with each other must be sustained if it is fairly debatable. Before the administrative hearing, DCA must give the parties an opportunity to mediate or otherwise resolve the dispute.[8] Following the hearing, the administrative law judge is required to submit a recommended order to the Administration Commission for final agency action.[9] The commission may impose sanctions if the order involves a comprehensive plan that is not in compliance or an amendment to a plan that has not been finally determined to be in compliance.

Compliance Agreements

There is a provision for compliance agreements in s. 163.3184, F.S. After DCA issues a notice of intent to find a plan or plan amendment not in compliance or after the initiation of the administrative hearing process under s. 163.3184(9), F.S., DCA and the local government may voluntarily enter into a compliance agreement.[10] An affected person who has initiated the hearing process or who has intervened may also enter into the compliance agreement.[11] When DCA receives a plan amendment that is adopted pursuant to a compliance agreement and issues a notice of intent, DOAH must realign the parties, or consolidate the proceeding if DCA intends to find the plan or amendment not in compliance, and continue the hearing process.[12] Also, if a local government fails to adopt a plan amendment as required by the compliance agreement, DCA must notify DOAH and the hearing will be scheduled.[13]

Administrative Challenges to Small Scale Amendments

Section 163.3187, F.S., provides a separate process for the review of small scale amendments. These amendments involve 10 acres or less and satisfy other statutory conditions. Small scale development amendments require only one public hearing, which is an adoption hearing.[14] Pursuant to s. 163.3187(3), F.S., DCA does not review or issue a notice of intent for small scale amendments. However, any affected person may petition for a hearing to challenge the compliance of a small scale development amendment. The administrative law judge must hold a hearing not less than 30 days and not more than 60 days following the petition. Parties to the proceeding include the

[1] Section 163.3181(3)(c), F.S.
[2] Section 163.3181(3)(c), F.S.
[3] This standard "requires approval of a planning action even where reasonable persons could differ as to its propriety." *See Martin County v. Yusem*, 690 So. 2d 1288, 1295 (Fla. 1997).
[4] Section 163.3184(9)(b), F.S.
[5] Section 163.3184(9)(b), F.S.
[6] Section 163.3184(10), F.S.
[7] Section 163.3184(10)(a), F.S.
[8] Section 163.3184(10)(c), F.S.
[9] Section 163.3184(10)(b), F.S.
[10] Section 163.3184(16), F.S.
[11] Section 163.3184(16)(a), F.S.
[12] Section 163.3184(16)(f), F.S.
[13] Section 163.3184(16)(g), F.S.
[14] Section 163.3187(1)(b)3., F.S.

petitioner, the local government, and any intervenor. The DCA may intervene in this proceeding.

Under s. 163.3187(3)(b)1., F.S., if the administrative law judge recommends that the amendment be found not in compliance, the administrative law judge must submit a recommended order to the Administration Commission for final agency action. If the administrative law judge recommends that the small scale amendment be found in compliance, the administrative law judge must submit a recommended order to DCA. Should DCA agree that the amendment is in compliance, they will enter a final order within 30 days after receiving the recommended order.[15] However, if DCA determines that the amendment is not in compliance, they must submit the recommended order to the Administration Commission for final agency action.[16]

Administrative Challenges to Local Governments' Land Development Regulations

A local government has 12 months to adopt land development regulations that are consistent with and implement its comprehensive plan.[17] The term "land development regulation" refers to an ordinance governing "any aspect of development, including a subdivision, building construction, landscaping, tree protection, or sign regulation…"[18] Section 163.3213, F.S., authorizes a substantially affected person to challenge a land development regulation adopted within the last 12 months on the basis that it is inconsistent with the local government's comprehensive plan. Prior to filing such a challenge, the substantially affected person must file a petition with the local government outlining the facts and reasons based on which the person thinks the regulation is inconsistent.[19] After a specified time frame, the affected person may petition DCA to review the regulation for consistency with the local government's comprehensive plan. If DCA determines that the regulation is not consistent with the local comprehensive plan, the DCA must request that DOAH hold a hearing within 30 days of DCA's determination.[20]

Also, if DCA finds the regulation is in compliance, the affected party may request a hearing from DOAH within 21 days after DCA renders its decision.[21] The burden of proof for a challenge under s. 163.3213, F.S., is fairly debatable.[22]

Judicial Challenges to Development Orders

A development order may also be challenged in a judicial forum. For purposes of such a challenge, the term "development order" means "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 whether a development order is consistent with the local government's comprehensive plan. The aggrieved or adversely affected party may maintain a de novo action for declaratory, injunctive, or other relief against a local government when challenging a development order. The de novo action must be filed within 30 days after the local government's issuance of the development order or exhaustion of local administrative appeals, whichever is later. Florida Statutes also allow a local government to establish a special master process that includes a quasi-judicial hearing. If the local government has a special master, the aggrieved or affected party's sole method to challenge a development order is by filing a petition for writ of certiorari in circuit court within the 30-day timeframe.

Administrative Action in the Evaluation and Appraisal Report Process

The Administration Commission and DOAH also play a role in the evaluation and appraisal report process. Each local government is required to adopt an evaluation and appraisal report every 7 years for the purpose of assessing its progress in implementing the local comprehensive plan.[23] The DCA may initiate an administrative hearing if a local government fails to adopt and submit an evaluation and appraisal report or to implement its report through the timely adoption of amendments.[24] The local government shall be a party to any such proceeding and an affected person may intervene by filing a petition with DOAH.[25] The administrative law judge must hold a hearing pursuant to ss. 120.569 and 120.57(1), F.S., and submit a recommended order to the Administration Commission for final agency action. The commission also has the authority to impose sanctions.[26]

[15] Section 163.3187(3)(b)1., F.S.
[16] Section 163.3187(3)(b)2., F.S.
[17] Section 163.3202, F.S.
[18] Section 163.3213(1)(b), F.S.
[19] Section 163.3213(3), F.S.
[20] Section 163.3213(5)(b), F.S.
[21] Section 163.3213(5)(a), F.S.
[22] Section 163.3213(5)(a)-(b), F.S.
[23] Section 163.3191, F.S.
[24] Section 163.3191(11), F.S.
[25] Section 163.3191(11), F.S.
[26] Section 163.3191(11), F.S.

Administrative Challenges to Development Orders
Challenges to development orders within a development of regional impact or an area of critical state concern are heard by the Florida Land and Water Adjudicatory Commission (Governor and Cabinet) under s. 380.07, F.S. The owner, developer, or DCA may appeal a decision on a development order within an area of critical state concern or a development of regional impact to the commission if filed within 45 days of the decision.[27] The commission is required to hold a hearing using the provisions of chapter 120, F.S., and then issue an order granting or denying permission to develop and may attach conditions and restrictions.[28]

Oregon's Land Use Board of Appeals
As discussed in Interim Project Report 2005-119, the state of Oregon created its land use board of appeals in 1979 to create a more efficient method of appealing land use decisions. Similar to Florida, land use decisions could be challenged in both an administrative and judicial forum prior to the creation of the board. The land use board consists of three members appointed by the Governor who are considered experts in land use planning law. The jurisdiction of Oregon's land use board of appeals includes any "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 are comprehensive plan changes, zoning changes, conditional use permits, variances, and the subdividing of rural lands. Circuit courts in Oregon no longer have jurisdiction over these types of appeals.

Division of Administrative Hearings
DOAH is part of the Division of Management Services.[29] Chapter 120, F.S., the Administrative Procedure Act, governs proceedings conducted by DOAH. Specifically, ss. 120.569 and 120.57, F.S., provide procedures for matters involving the substantial interests of a party as determined by an agency or those involving disputed issues of material fact, respectively. In this context, the term "agency" refers to: the Governor in the exercise of executive powers that are not derived from the constitution, each state department, regional planning agency, and any other unit of government in the state, including counties and municipalities to the extent the entity is made subject to chapter 120, F.S., by general law.[30]

Pursuant to s. 120.569, F.S., an agency may refer a petition or request for a hearing to DOAH only if the petition or request contains the items required by the uniform rules.[31] At that point, DOAH assigns an administrative law judge to conduct the proceeding "with due regard to the expertise required for the particular matter."[32] All parties are afforded an opportunity for a hearing with reasonable notice of not less than 14 days.[33] The notice must include: a statement of the time, place, and nature of the hearing; and a statement of the legal authority and jurisdiction under which the hearing will be held.[34] Section 120.569(2), F.S., provides procedures for discovery and conducting the hearing. This section also authorizes a party to seek enforcement of a subpoena, an order directing discovery, or an order imposing sanctions under chapter 120, F.S., by filing a petition in circuit court. Unless the time period is waived or extended with the consent of all parties, a written final order with findings of fact and conclusions of law must be rendered within 90 days after: the conclusion of a hearing if the agency conducts the hearing, the recommended order is submitted to the agency if DOAH conducts the hearing, or the agency has received the materials it authorized to be submitted.[35]

Section 120.57, F.S., provides additional procedures for administrative hearings involving disputed issues of material fact. All parties involved shall have an opportunity to present evidence and argument on the issues involved, to conduct cross-examination, and to submit rebuttal evidence.[36] The parties may also submit proposed findings of fact and to file exceptions to the recommended order.[37] All proceedings conducted pursuant to s. 120.57(1), F.S., shall be de novo.[38]

METHODOLOGY

Staff met with DOAH to discuss the possibility of expanding DOAH's jurisdiction to review certain land

[27] Section 380.07(2), F.S.
[28] Section 380.07(4)-(5), F.S.
[29] Section 20.22(2), F.S.
[30] Section 120.52(1), F.S.
[31] Section 120.569(2)(d), F.S.
[32] Section 120.569(2)(a), F.S.
[33] Section 120.569(2)(b), F.S.
[34] Section 120.569(2)(b), F.S.
[35] Section 120.569(2)(l), F.S.
[36] Section 120.57(1)(b), F.S.
[37] Section 120.57(1)(b), F.S.
[38] Section 120.57(1)(k), F.S.

use decisions. Staff also circulated draft legislation to stakeholders for comments.

FINDINGS

Prior to instituting its land use board of appeals, land use decisions in Oregon were reviewed by the Land Conservation and Development Commission or the circuit court. This system led to lengthy delays with the resolution of some cases taking over a year. Oregon's land use board has led to an expedited process designed to meet target performance standards. Reportedly, a case filed with the board takes an average of 100 days until completion.

Performance data for the land use board of appeals is submitted to the Department of Administrative Services every quarter and presented to Oregon's legislature at each biennial session. This performance data is separated into eight measures and the annual report is available on the board's home page. The following is performance data for the periods July 1, 2004 – June 30, 2005 and July 1, 2003 – June 30, 2004:[39]

- Percentage of final opinions issued within the required statutory deadline or with no more than a 7-day stipulated extension (89% in 2004-05 and 87% in 2003-04);
- Resolution of all issues when reversing or remanding a land use decision in 95% of its final opinions (100% in 2004-05 and 2003-04);
- Issuance of final decisions that are sustained on appeal 80% of the time (84% in 2004-05 and 89% in 2003-04);
- 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 2004-05 and 2003-04);
- Issuance of orders on record objections within 60 days of receiving the objection 90% of the time (93% in 2004-05 and 94% in 2003-04).
- 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 2004-05 and 2003-04);
- Interval in days following the publication of a LUBA Report that the headnotes are incorporated into the headnote digest on the LUBA webpage (met target of 30 days or less in 2004-05 and 2003-04); and,
- Number of oral arguments scheduled annually outside Salem, Oregon (where the board is located) in geographically dispersed locations (met target of 5 oral arguments in 2004-05 and target of 4 oral arguments in 2003-04).

The problems associated with various types of challenges to land use decisions in Florida include decision makers that may lack land use law experience and lack of consistency in decisions statewide. Planners, developers, and citizens alike have advocated for a more efficient and consistent forum in which to challenge land use decisions. Proponents of a land use board are concerned about the complexity of the current administrative and judicial process for challenging these decisions.

Proposed Legislation

Initially, discussions of consolidating the appeal of land use decisions revolved solely around creating an independent board. This would involve establishing:

- Jurisdiction of the board.
- Appointment of board members.
- Qualifications of board members.
- Timeframes for the filing and resolution of a challenge heard by a land use board of appeals.
- Reporting requirements.
- Web access.

Based upon further discussions with stakeholders, the consolidation of challenges to land use decisions in one entity may fit well within the existing structure of DOAH. Currently, DOAH hears challenges to land use decisions under s. 163.3184, F.S. Committee staff looked at the possibility of creating a specialized unit to hear challenges to certain land use decisions within DOAH. Those administrative law judges assigned to a specialized unit may be required to have prior land use experience and take specified continuing legal education courses.

Jurisdiction over challenges to land use decisions heard by the Florida Land and Water Adjudicatory Commission and the Administration Commission, with the exception of challenges to development orders

[39] *Land Use Board of Appeals Annual Report, July 1, 2004 – June 30, 2005*, http://luba.state.or.us/Performance%20Measures/Annual%20Report.htm. *See also Land Use Board of Appeals Annual Report, July 1, 2003 – June 30, 2004*, http://luba.state.or.us/Performance%20Measures/Annual%20Report.htm.

within an area of critical state concern, could be transferred to DOAH within the first year. Also, DOAH should be given final order authority for challenges under s. 163.3184, F.S. Challenges to newly adopted land development regulations and, finally, citizen challenges to a development order under s. 163.3125, F.S., could be transferred in the second year after the effective date of the legislation.

Stakeholders have also suggested allowing a party to file a motion for en banc review of a final order by three administrative law judges with the requisite qualifications to hear petitions regarding land use decisions at DOAH. Following the resolution of such a motion, a party may seek appellate review of the final order. After the issuance of a final order by DOAH and the exhaustion of appellative review, DCA may petition the Administration Commission for sanctions against the local government that fails to comply with the order. Also, stakeholders suggested the timeframe for conducting a hearing should be not more than 60 days after the filing of a petition requesting a hearing unless an extension is granted based upon a showing of good cause. There would be filing fee to petition DOAH for a hearing.

Few changes would be required to DOAH's website. The website for DOAH currently allows the public to search that are grouped under the category of "growth management." The website also contains information on filing a petition with DOAH, final orders, status on appellate review, and data on performance measures.

RECOMMENDATIONS

Based on research and continuing discussions with stakeholders, staff recommends that jurisdiction over challenges to land use decisions in Florida be consolidated within the existing structure of DOAH. Staff also recommends establishing minimum criteria that an administrative law judge must have in order to be assigned to hear challenges relating to land use decisions.

In addition, staff suggests phasing in the transfer of jurisdiction to DOAH over a 2-year period, beginning with those challenges currently heard by the Governor and Cabinet and concluding with citizen challenges to development orders under s. 163.3215, F.S. DOAH should also be given final order authority in challenges involving land use decisions to further expedite the process. DOAH should maintain a separate link from its website to a webpage providing specific information on filing a petition for a hearing to challenge a land use decision.

Finally, DOAH should be required to submit an annual written report to the Legislature to address the division's performance in handling its growth management caseload effectively.