LAND USE PLANNING & ZONING

Land Use Planning & Zoning: Comprehensive Plan—Amendments

Advisory Opinion to the Attorney General Re Referenda Required For Adoption and Amendment of Local Government Comprehensive Land Use Plans, 14 So. 3d 224 (Fla. 2009)

A financial impact statement is not clear and unambiguous if it assumes that the proposed amendment will not have its planned effect or includes vague financial terms or specific dollar amounts based on speculative assumptions that could mislead voters as to the costs of the proposed amendment.

FACTS AND PROCEDURAL HISTORY

In 2006, the Florida Supreme Court approved the placement on the ballot of a constitutional amendment regarding the revision of local governments' comprehensive land use plans. The proposed amendment requires any amendments to or adoptions of local governments' comprehensive land use plans be submitted to voters for approval. In 2007, the Attorney General of Florida sought the Florida Supreme Court's review of the validity of the financial impact statement that corresponded to the proposed amendment to determine whether it complied with Florida Statutes Section 100.371 (2006).

After reviewing the financial impact statement, the Court rejected it and remanded the statement to the Financial Impact Estimating Conference (FIEC) for revision because it did not meet the statutory requirements of Section 100.371. After the statement's revision, the Attorney General, in 2008, again submitted it to the Court for review. The Court, holding the revised statement suffered from the same errors of the initial statement, again rejected and remanded the statement for revision to comply with Section 100.371. In 2009, after the statement's final revision, the Attorney General submitted the statement to the Court for review and the Court, in the instant opinion, determined that the statement was clear and unambiguous and thus complied with Section 100.371's mandates.

ANALYSIS

In determining whether a financial impact statement of a proposed constitutional amendment is valid, the Court's narrow review consists only of determining whether the statement complies with the Florida Constitution and the Florida statutes. Florida Constitution, Article XI, Section 5 provides that prior to an election, the legislature shall require a financial impact statement to accompany any proposed amendment. Pursuant to Article XI, Section 5, the Florida legislature set forth the guidelines for financial impact statements in Section 100.371, which requires the statement be clear and unambiguous. In construing whether an impact statement is clear and unambiguous, the Court reviews whether the statement was "misleading, vague, or confusing." In determining that the proposed impact statement met Section 100.371's statutory requirements, the Court concluded that the statement was not misleading, vague, or confusing.

First, as opposed to the first two drafts of the statement, the Court determined that the revised statement was not misleading, vague, or confusing because it did not imply that the proposed amendment would not have its intended effect. Both previous statements assumed that numerous land use revisions would occur and thus the need for special out-of-cycle elections would inevitably result from the passage of the amendment. This gave the false impression that the proposed amendment would automatically trigger out-of-cycle elections, thus misleading voters to believe the proposed amendment would not have its planned effect of decreasing the number of land use plan changes by requiring a vote before their adoption. The Court determined that the final revised statement did not use language that would lead voters to believe that the proposed amendment would result in numerous land use revisions and trigger many special elections, which is contrary to the amendment's purpose, thus the statement was not misleading.

Second, the statement was not misleading, vague, or confusing because it removed the prior vague language and specific dollar amounts, present in the first two drafts, which could mislead voters as to the costs associated with the passage of the proposed amendment. Both the 2007 and 2008 proposed statements noted that millions of dollars would be incurred as a result of out-of-cycle elections, yet the statements failed to indicate that the esti-

mated millions of dollars of costs were dependent on the number of times any city or county attempted to make out-of-cycle amendments to their land use plans. These conclusions were based on speculative assumptions, such as the number of times local governments would amend or change their plans, whether the change would involve a special election, and the costs of elections.

In contrast, while the final statement notes that local governments will incur added costs to conduct any elections for land use plans, it specifically lists the added expenses and costs that will be required by the amendment rather than providing a dollar figure based on the FIEC's speculative assumptions. The present statement does not estimate the potential costs of the amendment, which could mislead voters, but acknowledges that the amendment's costs can vary, noting the variables upon which the amendment's costs depend.

SIGNIFICANCE

This case confirms that a financial impact statement is clear and unambiguous if it does not contain the misleading assumption that the proposed amendment will not have its intended effect. Further, this case reiterates that a financial impact statement is clear and unambiguous if it does not mislead voters as to the costs associated with the passage of the amendment by including vague financial terms or specific dollar amounts based on speculative assumptions.

RESEARCH REFERENCES

- 10 Fla. Jur. 2d *Constitutional Law* § 14 (2009).
- 12A Fla. Jur. 2d *Courts and Judges* § 158 (2009).

Amy Paulke

Land Use Planning & Zoning: Comprehensive Plan—Consistency

***Bay County v. Harrison*,**
13 So. 3d 115 (Fla. 1st Dist. App. 2009)

In assessing whether a proposed development is consistent with a local government's comprehensive land use plan, a court must examine the plan's policies and objectives as well as any land use and population density restrictions. In addition, the reviewing court should acknowledge that planners may impose different population density restrictions for residential dwellings and transient residential lodgings.

FACTS AND PROCEDURAL HISTORY

Bay County (County) amended its comprehensive land use plan in 1999, designating parts of Laguna Beach as a seasonal/resort community. In 2005, the County issued a development order (DO) approving a proposal for a 279-unit resort condominium submitted by Laguna Beach Properties, LLC. Appellee Brenda Harrison, who lived in the vicinity of the proposed construction site, and West Beaches Neighborhood Defense Fund, a group of area homeowners, challenged the DO before the Bay County Land Use Planning Commission. When that appeal was rejected, the appellees filed a consistency challenge under Florida Statutes Chapter 163 arguing that the DO was inconsistent with the County's comprehensive plan and thus prohibited by law. Fla. Stat. § 163.3194(1)(a), 163.3215(5) (2005).

The trial court noted that the County's comprehensive plan limited population density in a seasonal/resort area to fifteen dwelling units per acre, while the proposed resort condominium would consist of 279 units on approximately two acres. Although a county planning commissioner testified that the resort was meant to function as a hotel, not as a residential property, the trial court held that the DO was inconsistent with the County's comprehensive plan. The trial court voided the DO and ordered that the County amend its comprehensive plan before reissuing it. The County and the developer jointly appealed.

On appeal, Florida's First District Court of Appeal reversed the trial court's final judgment, holding that the resort was akin

to a hotel and thus not covered by the comprehensive plan's restriction on dwelling units. Furthermore, a hotel was an allowable land use in keeping with the County's objective of transforming Laguna Beach into a tourist area.

ANALYSIS

Florida law prohibits local governments from authorizing development that is inconsistent with an applicable comprehensive land use plan. Fla. Stat. § 163.3194(1)(a). If an aggrieved party challenges the consistency of a DO, the reviewing court must determine whether the proposed development is "compatible with and further[s] the objectives, policies, land uses, and densities or intensities in the comprehensive plan." *Bay Co.*, 13 So. 3d at 118 (quoting Fla. Stat. § 163.3194(3)(a) (2005)). If a comprehensive plan does not address a particular land use, courts typically find that use to be disallowed.

Key to the First District's analysis in this case is the definition of the phrase "dwelling units" as compared to units that make up a resort condominium. The court noted that the comprehensive plan's limit on the number of dwelling units is defined within a restriction on housing densities, and that the plan equates housing with permanent residences. The proposed development, in contrast, is a resort condominium, which is defined by statute as a "public lodging." Fla. Stat. § 509.242(1) (2005).

The court concluded that the proposed development is not for dwellings and thus not covered by the restriction on the number of dwelling units. Furthermore, the comprehensive plan places no comparable restrictions on the densities of resort condominium units. Although planners may impose different densities for residential and non-residential properties, the Bay County comprehensive plan is silent regarding public lodging densities. Thus, the County did not intend to limit public lodging density.

The court also found the proposed development to be in keeping with the County's stated objective to transform the Laguna Beach community into a tourist area, as well as the comprehensive plan's clear preference for temporary lodging as opposed to residences. Based upon these findings, the First District reversed the final judgment of the trial court.

SIGNIFICANCE

Bay County stresses a commonsense judicial review of comprehensive land use plans that would encourage court decisions that support a local government's policies and objectives. Reviewing courts should frame their reading of a comprehensive plan's language in the context of its overall goals. In particular, courts should recognize that planners may set different population density caps for various uses. Silence as to population density likely indicates a decision not to impose a density limitation, particularly if such a limitation would effectively nullify the comprehensive plan's objectives.

RESEARCH REFERENCES

- 7 Fla. Jur. 2d *Building, Zoning, and Land Controls* §§ 115, 117 (2005 & Supp. 2009).
- 101A C.J.S. *Zoning & Land Planning* § 39 (2009).

Cheryl Cooper

Land Use Planning & Zoning:
Comprehensive Plan—Noncompliance

***Key Largo Ocean Resort Co-Op, Inc. v. Monroe Co.*,**
5 So. 3d 31 (Fla. 3d Dist. App. 2009)

Florida Statutes Section 719.1055 (2008) may require a cooperative to obtain unanimous approval of all affected shareholders, lien holders, and record unit owners in order to amend its bylaws so as to affect the size or configuration of the cooperative's units. However, this provision is triggered only when the cooperative's organizing documents are silent as to the amendment procedure.

FACTS AND PROCEDURAL HISTORY

Key Largo Ocean Resort Co-Op, Inc. (KLOR) was originally zoned as a Recreational Vehicle District and was comprised of 285 campsites on which permanent structures were prohibited. Unit owners purchased a leasehold interest in a unit, which entitled them to a share in the corporation. Over time, unit owners built permanent structures, violating Monroe County's zoning restrictions. Through code enforcement proceedings, the County ob-

tained a lien against the corporation. Because KLOR neither paid its debt nor remedied its code violations, the County attempted to foreclose upon the lien. KLOR was given time to seek rezoning and to cure its code violations.

Ultimately, KLOR and the County undertook court-ordered mediation and negotiated a 2006 Development Agreement through which KLOR and the County would cooperate to remedy the property's code violations. The Development Agreement included a proposed site plan that would change the size and configuration of certain of the cooperative's units in order to widen roads for emergency vehicle access, to remove non-compliant structures, and to relocate certain common areas.

Some KLOR residents intervened, believing that the proposed changes unfairly impacted their interests and asserting that Florida Statutes Section 791.1055(1) required KLOR to obtain unanimous approval of the proposed site plan. KLOR sought a declaratory judgment that 51% approval by shareholders and residents would be sufficient—as provided by KLOR's bylaws and articles of incorporation. The trial court ruled that KLOR was subject to Section 719.1055(1) and therefore needed 100% approval of the proposed site plan. Subsequently, KLOR obtained 69.4% approval of its shareholders. KLOR then petitioned for writ of certiorari quashing the trial court's order, which the Third District granted.

ANALYSIS

The Third District structured its analysis around the elements necessary to obtain a writ of certiorari. Under this standard, "there must exist '(1) a departure from the essential requirements of the law, (2) resulting in material injury for the remainder of the case (3) that cannot be corrected on postjudgment appeal.'" *Key Largo Ocean Resort Co-Op, Inc.*, 5 So. 3d, at 33 (quoting *Reeves v. Fleetwood Homes of Fla., Inc.*, 889 So. 2d 812, 822 (Fla. 2004) (quoting *Bd. of Regents v. Snyder*, 826 So. 2d. 382, 387 (Fla. 2d Dist. App. 2002))).

As an initial matter, the court determined that because the unit owners' purchase of a leasehold interest in a single unit made them shareholders in the corporation itself, KLOR met the statutory definition of "cooperative" and was therefore subject to the provisions of Chapter 719 of the Florida Statutes. Addition-

ally, KLOR's bylaws described the corporation as a cooperative and expressly adopted the relevant statutory provisions to govern its operation. The court rejected KLOR's argument that its failure to comply with certain statutory requirements barred this determination, finding that KLOR was equitably estopped from benefiting from its own noncompliance with the law.

Having found that KLOR was subject to Chapter 719, the Third District then determined that the trial court departed from the essential requirements of the law by misreading and misapplying Florida Statutes Section 719.1055 to KLOR's amendment process. The court explained that Section 719.1055(1) provides that amendments to a cooperative's bylaws impacting the size or configuration of its units may require 100% approval of shareholders, lien holders, and unit owners; however, this requirement is triggered only when the cooperative's organizing documents do not provide an amendment procedure. Because KLOR's bylaws and articles of incorporation established a procedure applicable to the amendment process at issue, the requirements of Section 719.1055(1) were inapplicable.

The court then held that to allow the trial court's order to stand would cause material harm by "(1) invalidat[ing] the proper KLOR unit-owner vote . . . ; (2) invalidat[ing] the final settlement agreement [between KLOR and Monroe County] . . . ; and (3) forc[ing] Monroe County to compel resolution of the health and safety issues at KLOR, which would likely involve the re-institution of the lien foreclosure proceedings." *Id.* at 35. The court concluded that this material harm would endure throughout the case and could not be corrected on postjudgment appeal. The Third District therefore granted KLOR's petition for writ of certiorari and quashed the trial court's order.

SIGNIFICANCE

Key Largo Ocean Resort highlights the need to draft a corporation's bylaws and articles of incorporation thoroughly and carefully, as certain default rules apply when organizing documents are silent as to specific topics. Additionally, *Key Largo Ocean Resort* demonstrates the circumscribed analysis permitted by the standard of review for a petition for writ of certiorari.

RESEARCH REFERENCES

- Fla. Stat. § 719.1055 (2008).
- 10 Fla. Jur. 2d *Condominiums and Cooperative Apartments* § 10 (2009).

Jennifer Morris McPheeters

Land Use Planning & Zoning: Constitutional Requirements

***Westgate Tabernacle, Inc. v. Palm Beach County*,**
14 So. 3d 1027 (Fla. 4th Dist. App. 2009)

Where a plaintiff seeks to challenge a zoning requirement under either the FRFRA or the RLUIPA, the plaintiff must first exhaust all administrative remedies before the plaintiff can claim that the zoning requirement imposes a substantial burden upon the plaintiff's exercise of religion.

FACTS AND PROCEDURAL HISTORY

Plaintiff, Westgate Tabernacle, Inc. (Plaintiff), operated a homeless shelter in West Palm Beach to further its religious mission. Defendant, Palm Beach County passed the Unified Land Development Code (ULDC), compelling all persons and entities operating a "congregate living facility" that houses more than six people to apply for a conditional use permit (CUP). Plaintiff's facility housed more than six people and, therefore, was required to obtain a CUP. Although Plaintiff initially applied for the CUP, Plaintiff withdrew its application before it could be processed. Plaintiff looked into purchasing alternate property from which to carry out its operations but was unsuccessful. Plaintiff operated unlawfully for approximately eighteen months after receiving notice from Defendant that it was violating the ULDC. Defendant fined Plaintiff $22,700 and obtained a lien on Plaintiff's property. Plaintiff thereafter filed suit in the First Circuit Court under the theory that Defendant's ULDC violated the Florida Religious Freedom Restoration Act (FRFRA) and the federal Religious Land Use and Institutionalized Persons Act (RLUIPA). The First Circuit found for the Defendant, and the Plaintiff appealed to the Fourth District.

ANALYSIS

The Fourth District held that the ULDC violated neither the FRFRA nor the RLUIPA, as the ULDC did not impose a "substantial burden" on Plaintiff's exercise of religion.

Under both the FRFRA and the RLUIPA, a government may substantially burden the exercise of religion if it can demonstrate both that the government action is in furtherance of a compelling governmental interest and that the statute is the least restrictive means of furthering that compelling governmental interest. Prior to subjecting the government action to this analysis, the plaintiff challenging the statute must first demonstrate that the government action imposes a "substantial burden" on its exercise of religion. Demonstrating the existence of a "substantial burden" requires the plaintiff to show that the government action "either compels the religious adherent to engage in conduct that his religion forbids or forbids him to engage in conduct that his religion requires." *Westgate Tabernacle, Inc.*, 14 So. 3d at 1031 (quoting *Warner v. City of Boca Raton*, 887 So. 2d 1023, 1033 (Fla. 2004)).

The Fourth District held that the ULDC imposed no substantial burden in this case. First, Plaintiff was not compelled to act or refrain from acting in a way that is contrary to its religion, as Plaintiff failed to apply for a CUP. Had Plaintiff applied for a CUP, Plaintiff might have been given permission to operate its homeless shelter. If Plaintiff had been given such permission, no substantial burden would exist. Because Plaintiff failed to apply for a CUP and thereby failed to exhaust its administrative remedies, it is mere speculation that Plaintiff would have been denied permission to operate its homeless shelter.

Second, Plaintiff failed to prove that conducting its activities at its specific, present location was fundamental to exercising its religion. Plaintiff might have moved its location and practiced elsewhere. As a result, the ULDC did not compel Plaintiff to forego its religious mission.

Based on these observations, the Fourth District held that the ULDC violated neither the FRFRA nor the RLUIPA.

SIGNIFICANCE

Westgate Tabernacle, Inc. places a sizeable burden on a plaintiff who seeks to challenge a zoning requirement under either the FRFRA or the RLUIPA. The court noted that no substantial bur-

den was present because, even if Plaintiff had completed the application process, Plaintiff could have simply relocated its operations. The court based this reasoning upon the fact that Plaintiff had considered purchasing alternate property from which to carry out its operations, even though the purchase was ultimately unsuccessful. The court did not give much weight to the financial circumstances that caused Plaintiff not to purchase alternate property. This suggests that if a plaintiff considers relocating, the court may conclude that remaining at the plaintiff's present location is not fundamental to the exercise of religion and, as a result, no suit can succeed under either the FRFRA or the RLUIPA.

RESEARCH REFERENCES

- 10A Fla. Jur. 2d *Constitutional Law* § 280 (2009).
- 45 Fla. Jur. 2d *Religious Societies* § 12 (2007 & Supp. 2009).

Charles E. Simpson

Land Use Planning & Zoning: Injunctions

***A. Duda and Sons, Inc. v. St. Johns River Water Management District*,**
17 So. 3d 738 (Fla. 5th Dist. App. 2009)

Agriculturists and those engaged in similar occupations are exempt from water management district permitting requirements when making topographical alterations consistent with the practice of such occupations even though the alterations' effect of impounding or obstructing surface waters is greater than incidental.

FACTS AND PROCEDURAL HISTORY

A. Duda and Sons, Inc. (Duda) operates farms and groves across the state of Florida, one of which is under the jurisdiction of the St. Johns River Water Management District (District). The District served Duda with an administrative complaint, alleging that Duda constructed drainage ditches without the necessary permits. Duda contended it was exempt from the permitting requirements, requested a hearing, and filed a petition with numerous complaints.

The administrative law judge denied Duda's challenges to certain rules, policies, and statutory interpretations, instead agreeing with the District. Duda appealed and the Fifth District Court of Appeal affirmed in part and reversed in part.

ANALYSIS

The court focused on whether Florida Statutes Section 373.406(2) (2007) had been properly interpreted by the District.

The court first looked to the overall power of the District to manage water and related land resources. Based on numerous sections of the Florida Statues, and specifically the definition of "works," the court found that the District had the power to regulate artificial structures such as ditches, subject to a limitation in the context of agriculture. Specifically, there is an exemption for those who "1) are engaged in the occupation of agriculture; and 2) the alteration of the topography is consistent with the practice of agriculture." *A. Duda & Sons, Inc.*, 17 So. 3d at 741.

However, the exemption is itself limited by statutory language that states that the alteration "may not be for the sole or predominant purpose of impounding or obstructing surface waters." *Id.* at 741 (quoting Fla. Stat. § 373.406(2)). The District interpreted the limited language to mean the exemption did not apply if the alteration had more than an incidental effect on surface water. Duda argued that if the main intent of the alteration was consistent with agriculture, the property owner was exempt from permitting requirements, regardless of the effect on surface waters. The court concluded that neither party had correctly interpreted the statute.

The court turned its discussion to the limiting sentence of Section 373.406(2), focusing on the words "purpose," "predominant," and "obstructing." Duda argued that the meaning of "purpose" was the subjective intent of the actor, while the District argued that the meaning of "purpose" was the objective effect or function. The court agreed with the District, reasoning that (1) the legislature did not likely intend an exemption to be conditioned on the subjective intent of a property owner, and (2) holding otherwise would significantly limit the otherwise broad power granted to the Florida water management districts.

The court next looked to the meaning of the word "obstructing." Duda argued that the District was ignoring the plain mean-

ing of the statute by finding the "obstructing" surface water language of the statute to include the "diverting" of surface water. The court agreed with the District's interpretation, reasoning that because damage from flooding or erosion could occur through diversion of surface water just as it would from obstruction of surface water, defining "obstructing" as narrowly as Duda proposed did not serve any policy; rather, "diverting" should be included within the meaning of "obstructing."

The final term the court interpreted was "predominant." The District interpreted "predominant" to mean "more than incidental." *Id.* at 743. The court found this interpretation to be incorrect, reasoning that a whole can be made of many parts of incidental size, with no individual part large enough to qualify as predominant. Therefore, an alteration of topography could have a greater than incidental effect without rising to the level of a "predominant" effect. The court reinforced its logic by looking at the District's existing exemption for activities with only minimal effects, which, if combined with the District's interpretation that the agricultural exemption applied only to effects less than incidental, would render the agricultural exemption essentially moot.

The court held that because the District adopted rules and policies based on an erroneous interpretation of "predominant," which conflicted with the plain language of the statute, the conflicting rules and policies must be rejected as an invalid exercise of delegated legislative authority.

SIGNIFICANCE

A. Duda clarifies the scope of the agricultural exemption, creating a broader exemption than the District allowed. With the existing exemption for minimal changes and the expansion of the agricultural exemption, the effect of an alteration to the flow of surface water can be nearly the predominant effect before requiring a permit from the District.

RESEARCH REFERENCE

- 2A Fla. Jur. 2d *Agriculture & Crops* § 40 (2005).

Justin P. Miller

Land Use Planning & Zoning: Judicial Interpretation

***Johnson v. Gulf County*,**

26 So. 3d 33 (Fla. 1st Dist. App. 2009)

If the language of a county's comprehensive plan or ordinance is unambiguous, interpretation of the language through the use of parol evidence is inappropriate regardless of the intent or subsequent interpretation by the drafters.

FACTS AND PROCEDURAL HISTORY

In 1990, Gulf County (County) enacted a comprehensive plan for future growth and development of land. In 1992, the Department of Community Affairs (DCA) and the County entered into an agreement that stated the County would prohibit development within fifty feet of coastal waters and wetlands. This language was then incorporated into the County's comprehensive plan. Florida Statutes Section 163.3202 (2006) requires counties to adopt and enforce land use regulations, which are used to implement the comprehensive plan. In 1993, the County adopted a land use regulation, which states that its provisions apply to all development in the County and that all development can proceed only after authorization pursuant to the regulation. The regulation further defined development to include clearing and filling.

Fred Johnson, appellant, owned property in Gulf County on St. Joseph Bay. William Rish Jr. bought a 4.12-acre parcel of property near Johnson's property. Rish, along with the County and other land owners, were the appellees in this case. Rish submitted dredge and fill application to the Florida Department of Environmental Protection (DEP) and the United States Army Corps of Engineers (Corps) before purchasing the property. In its reply letter, the DEP stated that Rish's property was not located within its jurisdiction, so Rish did not need to obtain a wetland resource permit from the DEP. The DEP further stated that its letter did not authorize Rish to place any fill in regulated wetlands. Rish also received a reply letter from the Corps, stating that Rish did not need a permit from the Department of the Army to develop his property because the wetlands on his property were not within the regulatory jurisdiction of the Corps. Appellees contend that after the receipt of these letters, Rish was not prohib-

ited from filling and developing the non-jurisdictional wetlands on his property.

Rish began to fill and clear his property on August 17th or 18th. After unsuccessfully protesting to the County, Rish's neighbors, including Johnson, sought injunctive relief, claiming that Rish's clearing did not maintain a fifty-foot buffer for the wetlands, and therefore violated the County's comprehensive plan.

Rish continued to clear and fill his property throughout the continuing litigation, and on March 21, 2007, he filed his first "minor replat" application with Gulf County. Rish's property initially consisted of lots 4, 5, and 6. After the first minor replat, the boundaries of lots 5 and 6 were moved, resulting in three parcels of land, A, B, and C, which were different sizes than lots 4, 5, and 6. On March 27, 2008, Rish filed a second "minor replat" which divided lot C into three parcels of land, labeled lots C, D, and E.

Johnson's complaint alleged that the County violated its comprehensive plan and land use regulations by allowing Rish to continue the development of his property because Rish was required to gain authorization from the County before he cleared and filled his land. Johnson alleged that only after a landowner acquired a development order from the County, and only after any adversely affected landowners had a chance to challenge the development order within thirty days, could the County issue a development permit. Additionally, Johnson challenged Rish's subdivision of his land into five lots.

The trial court found for Rish and the County on both issues. On appeal, the First District ruled in favor of Johnson, reversing and remanding the trial court's ruling.

ANALYSIS

First, the court found that the language of the ordinance unambiguously prohibited development within fifty feet of coastal waters and wetlands, and that the trial court erred in using parol evidence to interpret the ordinance. Even though the trial court heard evidence that those involved in amending the comprehensive plan intended the prohibition to apply only to the St. Joseph Aquatic Bay Preserve, reliance on such evidence was improper because the unambiguous language of the ordinance did not justify such an interpretation.

Second, the court addressed the County's claim that Section 4.01.01 of the Gulf County Florida Unified Land Development Regulations distinguished between jurisdictional and non-jurisdictional wetlands, and that because the DEP and the Corps determined that the wetlands in question were non-jurisdictional, the County did not require Rish to take any action before clearing or filling his property. The court found this inconsistent with the 1992 agreement that was incorporated into the County's comprehensive plan. Since the County must implement the comprehensive plan through regulations that are consistent with the plan, interpreting Section 4.01.01 as prohibiting the County from exercising jurisdiction over the wetlands in question would be interpreting Section 4.01.01 in a way that is inconsistent with the comprehensive plan. The court held that "Gulf County's comprehensive plan required it to take jurisdiction and regulate any development within fifty feet of wetlands under its land development regulations." *Johnson*, 26 So. 3d at 42.

Third, the court held that the County was required to enter a development order before a landowner could initiate any development activities. Because Rich's actions of "clearing" and "filling" are explicitly characterized as "development or development activity" in the County's land use regulations, the County was required to issue a development order before Rish began his development activity. The court held that on remand, the County must issue a development order, and, because Johnson alleges that Rish's completed development violates the comprehensive plan, Johnson must have the opportunity to have a *de novo* hearing to challenge the County's permission for Rish's development. Additionally, the County must decide the appropriateness of other remedies, including a requirement that the new owners of Rish's land restore the wetlands to their original state.

With regard to whether the DEP and the Corps correctly declined to exercise jurisdiction over the wetlands, the court held that it would not address the issue because neither the DEP nor the Corps was a party to the litigation. If Johnson requested a *de novo* hearing on remand, the trial court could at that time address whether or not to consider evidence as to the appropriateness of the DEP and Corps decisions. The court held that, nevertheless, the jurisdiction of the DEP and the Corps have no effect on the

County's jurisdiction to adopt land use regulations to implement its comprehensive plan.

Finally, the court held that Rish's division of the initial three lots into five lots, all different from the original three, required compliance with the County's subdivision ordinance. Contrary to the trial court's holding, the First Circuit held that the first minor replat changed the boundaries of the land lots, and such changing of the boundaries was not an exception to the subdivision ordinance. Since Rish's second replat divided lot C into three lots, County ordinances required him to do so only with a development plan. Additionally, the land use regulation prohibits subsequent division of an approved minor replat without submitting a development plan. As such, the court held that the trial court should have granted a declaratory judgment against the County for not enforcing the terms of the subdivision ordinance. The court held that until appellees comply with the ordinance, all further development activity must be enjoined. The court subsequently reversed the decision and remanded to the trial court.

SIGNIFICANCE

Johnson emphasizes the authority of unambiguous language in a county's comprehensive plan and land use ordinances over the intent of legislators. Regardless of the intent or subsequent interpretation by the drafter of the regulations or comprehensive plan, if the language of the plan or ordinance is unambiguous, interpretation through the use of extrinsic evidence is inappropriate.

RESEARCH REFERENCE

- 83 Am. Jur. 2d *Zoning and Planning* § 22 (2003).

Mitali Vyas

Land Use Planning & Zoning: Special-Use Permit

***Keene v. Zoning Board of Adjustment*,**
22 So. 3d 665 (Fla. 5th Dist. App. 2009)

A county's Land Development Code (LDC) serves to implement the provisions of the county's Comprehensive Land Use

Plan (Plan). When a property owner applies for a Special Use Permit (SUP), the county's zoning board must determine under which category in the Plan the use falls. The land use falls in the category that more specifically identifies the use, regardless of whether that category permits or prohibits the land use.

FACTS AND PROCEDURAL HISTORY

Ronald D. Wilson and Ossie Wilson (the Wilsons) own an eleven-and-a-quarter acre tract of land in Putnam County, on which they run a horseback riding school and sponsor a competitive endurance trail run twice a year. Harold D. Keene (Keene) is the Wilsons' neighbor. The Wilsons' land was designated as Rural Residential Future Land Use according to the Plan. After zoning authorities discovered the riding school and the endurance runs, the Wilsons applied for a SUP. The Zoning Board of Adjustment of Putnam County (the Zoning Board) granted the SUP and classified the Wilsons' riding school and stabling activities as "commercial: agriculture-related uses" and as "rural recreational uses."

Keene sued and sought declaratory relief against the Zoning Board, requesting the court find the SUP was erroneously granted. During litigation, although the Zoning Board realized the land uses granted in the SUP were not permitted on rural residential property like the Wilsons', it claimed the proposed uses were "Limited Agricultural Uses" which were permitted on rural residential property. The Wilsons further claimed the uses were permitted under the rural-residential category because they were either limited agricultural, activity-based recreational, or resource-based recreational uses.

The trial court held the Zoning Board properly granted the SUP because the Wilsons' proposed land uses were "resource-based or activity-based recreational uses." Keene appealed.

ANALYSIS

The Fifth District reversed, finding the Zoning Board erroneously granted the SUP. The court held the proposed land uses fell under the "commercial: agriculture-related" category under the LDC, and since that is not a permitted use on rural-residential land, the SUP should not have been granted.

First, the court determined the purpose and effect of the LDC in relation to the Plan. Referring to Florida Statute Section 163.3201 (2007), the court emphasized the LDC's purpose of adopting and implementing the Plan. The court further referred to Section 2.02.01(b) of the Putnam County Development Code, which provides that a proposed land use must be placed in the most specific category in which it fits, regardless of whether that category permits or prohibits the proposed land use. The court stated: "when a use or activity falls into a category of permissive uses, but more closely falls into a category that is prohibited by the Plan, the latter trumps the former and the activity must be prohibited." *Keene*, 22 So. 3d at 670.

Next, the court evaluated each category in the LDC to determine in which category the Wilsons' proposed land use best fit. In doing so, the court focused on the specific characteristics of the riding school and the competitive endurance trail. The court acknowledged the monetary gain afforded the Wilsons, both through use of the riding school and through revenue collected during the endurance runs, and concluded these uses are commercial.

The court then explained why the proposed land use does not fit into any of the categories proposed by the Wilsons and encouraged by the dissent. The court stated that the "activity-based recreational uses" category is not appropriate in this case because the Wilsons do not have a facility, such as a court, field, or any other structure affixed on the property designed to be used for recreation and sports. The court also rejected the "resource-based recreational uses" category because the Wilsons do not have any natural resources resembling a park or a beach on their property.

Finally, the court concluded that the proposed use of allowing a riding school and a competitive endurance trail fits more appropriately into the "commercial: agriculture-related" category, which is prohibited on rural-residential land. The court therefore reversed the ruling of the trial court and held in favor of Keene.

The dissent stated the proposed use fits within the "resource-based comprehensive plan category," and as such the proposed use is not inconsistent with the Plan and should be permitted through the SUP. The dissent further stated that the use is not "commercial" in nature because this money covers expenses rather than qualifying as income from the activities. The dissent

concluded by pointing out how the proposed uses are not inconsistent with the Plan because these uses are listed elsewhere in the Plan. Therefore, the dissent would have affirmed the trial court's ruling and found in favor of the Zoning Board.

SIGNIFICANCE

Keene emphasizes that a proposed land use must be placed in the category that most specifically describes the use, regardless of whether this placement permits or prohibits the land use.

RESEARCH REFERENCE

- 83 Am. Jur. 2d *Zoning and Planning* § 105 (2009).

Mitali Vyas

Land Use Planning & Zoning: Takings

***Citrus County v. Halls River Development, Inc.*,**
8 So. 3d 413 (Fla. 5th Dist. App. 2009)

Equitable estoppel can be utilized against a government entity only in extreme circumstances and will not apply to transactions that are contrary to law or public policy. A county's comprehensive plan will prevail over its land development code, and property owners will be held to the provisions of the comprehensive plan whether or not they had actual knowledge of the provisions therein.

FACTS AND PROCEDURAL HISTORY

In February 2000, Halls River entered into a contract to purchase approximately eleven acres of land located in Citrus County, Florida, intending to build a condominium complex. The contract provided Halls River 150 days to inquire with government authorities as to whether the property was suitable for its intended purpose. The County agreed that multiple units could be built on the property as long as they conformed to the Land Development Code (LDC). Halls River closed on the property in January 2001, and the County Commission approved Halls River's amended project application.

In 1997, an amendment to the County's Comprehensive Plan (the Plan) had changed the Halls River property from mixed use (MXU), which permitted a multifamily condominium, to low intensity coastal and lakes (CL), which allowed only one unit per twenty acres of real property. Following the amendments, the County did not update the classification in the LDC or the LDC zoning maps because it mistakenly believed that the amendment allowed it to continue to approve higher-density development. The project's opponents believed that Halls River's application was inconsistent with the classification of the property and challenged the project's approval in the circuit court. In November 2002, the circuit court overturned the Commission's approval of the project.

In April 2002, the County adopted the ordinance that conformed the LDC and zoning maps to the Plan. However, the County exempted the Halls River property from the operation of the ordinance because it recognized that Halls River may have had some vested rights in the planned development. After the trial court overturned the project's approval, Halls River resubmitted its application, and the project's opponents filed for a writ of prohibition in the circuit court. The court granted prohibition because the project was inconsistent with the Plan. The County then notified Halls River that the Commission would not consider the application.

Halls River notified the County of its claim for compensation under the Harris Act in April 2003. After the County issued a ripeness decision offering no settlement, Halls River sued the County, claiming that the ordinance inordinately burdened its property. Halls River also asserted claims for declaratory relief and equitable estoppel.

The circuit court determined that the County's actions placed an inordinate burden on the Halls River property. The court explained that the County had assured Halls River that the regulation would permit Halls River's intended development, and the County staff knew Halls River relied on its expertise. The trial court held that, while both parties were mistaken, the County should bear the burden.

The County appealed, arguing that the ordinance did not place an inordinate burden on Halls River's property because it specifically exempted the property from the ordinance. The County also contended that the property classification changed to

CL in 1997 when the plan was amended and, therefore, a Harris Act claim was barred because it should have been made within one year of the application of the regulation to the affected property.

ANALYSIS

Florida Statutes Section 70.001 (2005), the Harris Act, compensates property owners who suffer inordinate regulatory burdens to existing or reasonably foreseeable land uses. If a settlement agreement is not reached between the government entity and the landowner, the court must determine whether the real property has been inordinately burdened. If the court finds this, a jury determines the amount of damages.

Halls River argued that its intended use for the property fell within the statutory definition of "existing use." However, the court disagreed. At the time Halls River purchased the property, it was being used as a single-family residence. Furthermore, Halls River's intended use for the property as a condominium complex was not reasonable because the Plan classified the property as CL. Halls River and the County should have known that the CL classification in the Plan would control over the LDC.

The court also rejected Halls River's equitable estoppel claim, finding that Halls River did not have a vested right in its intended use of the property based upon that theory. Equitable estoppel is a remedy granted to a party that in good faith relies on government acts or omissions and substantially changes its position or incurs extensive expenses based on that reliance. However, "[equitable] estoppel should be invoked against the government only in exceptional circumstances . . . [a]nd . . . does not generally apply to transactions that are forbidden by law or contrary to public policy." *Halls River Development, Inc.*, 8 So. 3d at 422. Here, the Plan prohibited the property's use as a multifamily condominium. Therefore, equitable estoppel did not apply.

Additionally, the Ordinance clearly exempted the Halls River property. Thus, the court rejected Halls River's argument that the 2002 Ordinance imposed an inordinate burden upon it. If an inordinate burden exists, the 1997 amendment that changed the classification on the property from MXU to CL created that burden. The court agreed with the County that the Harris Act claim was untimely. A Harris Act claim must be brought within a year after

a regulation negatively effects a property. The impact on the Halls River property was ascertainable when the amendment came into effect. Thus, the Harris Act was triggered, if at all, when the classification for the property changed in 1997.

The court acknowledged that the result of the case may seem unduly harsh. However, regardless of the County's incorrect advice, Halls River could establish neither an existing use nor vested right, and the Harris Act claim was untimely. For these reasons the Fifth District Court of Appeal reversed the lower court's decision.

SIGNIFICANCE

Halls River is significant for two reasons. First, it makes clear that claims of equitable estoppel apply against a government entity only in exceptional circumstances and, even then, will not apply to unlawful transactions. Second, it clarifies the relationship between a local government's comprehensive land use plan and its land development code. This case emphasizes not only that the comprehensive land use plan will prevail over the land development code, but also that property owners will be held to the property classifications in the Plan, regardless of the LDC or the behavior of local government staff.

RESEARCH REFERENCES

- 7 Fla. Jur. 2d *Building, Zoning and Land Controls*, § 98 (2009).
- P.H. Vartanian, *Applicability of Doctrine of Estoppel against Government and Its Governmental Agencies*, 1 A.L.R.2d 338, § 2 (2009).

Riley Landy

Land Use Planning & Zoning: Takings

***City of Jacksonville v. Coffield*,**
18 So. 3d 589 (Fla. 1st Dist. App. 2009)

To bring a claim against the government for interfering with expected property rights, a property owner must establish that the property's intended use is either a vested right or an existing

use of the land. Any notice of government action that could restrict a potential future use will foreclose a claim under Florida's Bert J. Harris, Jr., Private Property Rights Protection Act (Harris Act).

FACTS AND PROCEDURAL HISTORY

Harold Coffield contracted for the purchase of two acres of property, intending to develop eight residential, single-family lots. Under the contract, Coffield could recover his deposit if, within a certain time, he found he could not use the property for this purpose. After signing the contract, Coffield discovered the neighboring homeowners' association applied to the City to close a roadway that would serve as Coffield's only access from the development to public roads. Nevertheless, Coffield proceeded to plan his development, mistakenly assuming the City would deny the application.

The following month, the City issued a Concurrency Reservation Certificate (CRC) reserving the necessary public utilities for Coffield's development. Subsequently, a city employee sent Coffield a letter explaining the process and conditions necessary to get driveway connection permits, but Coffield failed to undertake this required process. After Coffield closed the sale, the City granted the homeowners' association's application to close the roadway and informed Coffield he needed to ensure his development would have access to public streets. Without access to the newly closed roadway, Coffield could not develop his property as planned.

Consequently, Coffield filed a claim against the City pursuant to the Harris Act, alleging the City inordinately burdened an existing use of his property by approving the application. The circuit court found that the City led Coffield to believe he could continue with his development despite the application to close the roadway and concluded that developing the property into residential lots constituted both an existing use and a vested right, which the City inordinately burdened. The City appealed.

ANALYSIS

Florida Statutes Section 70.001, the Harris Act, protects property owners from government actions that do not rise to constitutional takings but that restrict the use of property nonethe-

less. If the government inordinately burdens an existing use of the real property or interferes with a vested right to a specific use of the real property, the property owner can seek damages. Section 70.001(3)(a) describes an existing use as an actual use or activity on the property.

The First District Court of Appeal concluded that developing the property into eight, residential, single-family lots did not constitute an actual or present use. Furthermore, Coffield lost any vested right he may have had to develop the property into eight lots when he received notice of the homeowners' association's application to close the roadway. The court focused on Coffield's notice of the possible closure of the roadway and his limited refundable investment, which did not constitute a reasonable, investment-backed expectation in developing the property. Although Coffield mistakenly believed the City would deny the application, he still had notice of the possibility of the road closure.

In applying Section 70.001, the court acknowledged it could consider equitable estoppel and principles of substantive due process, but an equitable estoppel argument would fail because "no action or omission on the part of the City reasonably led Mr. Coffield to believe that his proposed development could proceed *in the event the City closed or abandoned the roadway*." *Coffield*, 18 So. 3d at 597 (emphasis in original). The CRC and the letter explaining the application process for driveway connection permits were the only two representations the City made to Coffield. The CRC served solely as notice of the reservation of public utilities for the development. It did not function as consent or permission to develop the property. Furthermore, the letter clearly stated the several conditions necessary to acquire a driveway connection permit. Yet, Coffield never applied for such a permit. Neither representation provided an objectively reasonable basis for Coffield to believe he had a vested right to develop the property according to his plans, and without such a right in the property, the City could not have violated the Harris Act.

Accordingly, the court reversed the lower court's decision.

SIGNIFICANCE

Coffield clarifies the application of Section 70.001 by elucidating the meaning of a vested right or an existing use in real property. The court set forth an objective standard that focused on the

actual circumstances at hand rather than the property owner's subjective belief. As a result, prior to entering into a contract and generating expectations of potential uses of land, a property owner should be fully aware of any possible restrictions on the property. Ignorance or mistaken belief regarding the regulation will not be a valid argument to support the presence of an existing use or vested right. If a property owner has any knowledge of potential restraints on the intended use, he will be unable to prove the government inordinately burdened his right to use the land.

RESEARCH REFERENCES

- 10A Fla. Jur. 2d *Constitutional Law* § 274 (2009).
- Roy Hunt, *Property Rights and Wrongs: Historic Preservation and Florida's 1995 Private Property Rights Protection Act*, 48 U. Fla. L. Rev. 709 (1996).

Kristin Shusko

Land Use Planning & Zoning:
Takings—Statute of Limitations

***Sutton v. Monroe County*,**
2009 Fla. App. LEXIS 20048 (Fla. 3d Dist. App. 2009)

In a suit against the government to recover compensation for a regulatory taking of real property, the statute of limitations begins to run upon the finality of the denial of the landowner's application for a building permit.

FACTS AND PROCEDURAL HISTORY

In 1971, the Plaintiff, Geneva Sutton, purchased the first portion of the subject property—approximately 22,600 square feet of real estate consisting of a salt marsh, buttonwood area, hammock, and mangroves. Sutton purchased the remaining portion of the property in 1984. Two years later, in 1986, the Defendant, Monroe County, implemented a new land use plan. Environmental and wetland regulations passed in accordance with the land use plan rendered Sutton's property unbuildable. Ten years later, in 1996, Sutton applied for a building permit to construct a single-

family residence on the property. The application was denied in 1997. Sutton appealed the denial to the Monroe County Planning Commission (Commission), and the Commission held that the property was unbuildable.

In 2005, Sutton applied for a Beneficial Use Determination (BUD). At the BUD hearing, the Special Master made two pertinent findings of fact. First, the environmental and wetland regulations denied Sutton of "all reasonable economic use" of the property. Second, Sutton was entitled to just compensation by virtue of being deprived of all beneficial use of the property. Based on these findings, the Special Master recommended that Sutton was entitled to just compensation valued at the date the property became unbuildable, which was in 1986. The Special Master's recommendations were adopted by the Board of County Commissioners (BOCC), and the BOCC adopted a resolution requesting that the Monroe County Land Authority make a purchase offer for Sutton's property based on the fair market value of the property in 1986, which was $113,423, including interest.

Sutton then filed a civil complaint against the County, alleging inverse condemnation. The County filed a motion to dismiss, arguing that Sutton's claim was barred by the statute of limitations. The trial court agreed that Sutton's claim was barred and, accordingly, dismissed the complaint. Sutton appealed to the Third District Court of Appeal. The Third District affirmed the holding of the trial court.

ANALYSIS

In a suit against the government for a regulatory taking of real property, the statute of limitations begins to run upon the finality of the denial of the landowner's application for a building permit. Further, Florida Statutes Section 95.11(3)(p) (2007) provides that, other than for the recovery of real property, "[a]ny action not specifically provided for in these statutes" shall be commenced within four years.

First, Sutton's claim was final "in 1997 after her administrative appeal of [the County's] denial of her application for a building permit, not in 2006 when the BUD was rendered." *Sutton*, 2009 Fla. App. LEXIS 20048, at *4. Accordingly, the statute of limitations began to run in 1997. Second, Sutton's claim is not specifically provided for in the Florida Statutes. Consequently,

Sutton's claim is subject to a four-year statute of limitations, resulting in expiration of her claim in 2001. Sutton's claim was not filed until 2006 and, therefore, was filed outside of the window during which she could have brought her suit. Thus, her claim was barred.

SIGNIFICANCE

Sutton clarifies that, in a claim to recover compensation as a result of a regulatory taking of real property, the statute of limitations begins to run when the decision to deny the landowner the desired use of the property becomes final. This finality requirement is met when the landowner has exhausted her administrative appeals of the decision to deny the building permit.

RESEARCH REFERENCES

- 7 Fla. Jur. 2d *Building, Zoning, and Land Control* § 43 (2004 & Supp. 2010).
- Eugene McQuillin, *The Law of Municipal Corporations* vol. 8, § 25.150 (3 ed., 2010).

Charles E. Simpson