

“Environmental View of the 50 Year Picture.”

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"A thing is right when it tends to preserve the integrity, stability, and beauty of the biotic community. It is wrong when it tends otherwise."

Aldo Leopold, A Sand County Almanac 224-25 (1949).

I. Introduction

As I attempted to articulate a forecast of the next 50 years, I began to focus on how and why the developer, landowner, government or other perspective would be appreciably different from mine. Can there be much diversion, among those who work in this business and have thought about the future, in the view that a narrow peninsula sitting largely just atop its water source, surrounded by the sea, its narrowing habitats and watersheds ever degraded, fragmented, and invaded is unlikely to survive 50 more years of trend growth?.

Perhaps that is not the question that first comes to mind for some. Do others first imagine jobs figures, new business or housing starts, tourism figures, or other economic statistics. Do they wonder if big tax bills, tuition costs, productivity and stress costs increasing with traffic, disappointing schools, the replacement of communities with developments and diminishing spaces to clear ones head in the wilderness uninterrupted by jet engines extracted more cost than value. Or whether environmental and land use law might be simply a transactional - type affair that prevents new building from washing existing residents homes away or contaminating

their back yards, but in no sense guided growth and protected our vulnerable green infrastructure to the degree needed to maintain what is special and valuable about Florida. Or whether the legislative intent of our dozens of laws on the subject, and even our constitutional have any realistic chance of being met.

That the current situation is unsustainable is clear, as evidenced by the South Florida experience, which will slowly but surely be felt farther up the state as population increases. The Florida Keys terrestrial and marine ecosystems have exceeded their tolerance levels, as has their evacuation infrastructure. (Florida Keys Carrying Capacity Study and related documents). In the 1990's a Governor's Commission for a Sustainable South Florida grappled with south Florida's sustainability crisis. According to the South Florida Ecosystem Restoration Task Force, "[o]n its present course South Florida is not sustainable."¹ These problems are now being faced by the Treasure Coast, through the Committee for a Sustainable Treasure Coast. Southwest Florida has the legendary Tampa Bay area water wars and related problems. The Wekiva area, the vast lands being developed by the St. Joe company, the Green Swamp, and many other parts of Florida are already experiencing or will likely experience similar problems in the foreseeable future. According to the Florida Legislature, "[m]any of Florida's unique ecosystems, such as the Florida Everglades, are facing ecological collapse due to Florida's burgeoning population." S. 259.105(2)(a)6, Fla. Stat.

While protecting the environment requires balance, if you cant swim off the beach, eat a fish you just pulled out of a river, or have to keep your children indoors

¹ The Working Group of the South Florida Ecosystem Restoration Task Force, "*An Integrated Plan for South Florida Ecosystem Restoration and Sustainability*," April 1998, p. 4.

due to bad air quality, a dangerous line has been crossed. The fabled Florida Keys - our state's canary in the coal mine - have exceeded three critical development capacity limits - as set and determined by the state's own rules and science, yet the recent regulatory reaction was to *increase* the amount of development in the name of affordable housing. With no good reason to expect that things will be different as the rest of the state builds out, surely, we all have reason to be gravely concerned for Florida's future.

Before we can confront the future, we should take an honest view of whether we share the same priorities. I imagine for many, the specter of terrible taxes and traffic and loss of open space and species for future generations is bad, but not bad or immediate enough to act to one's immediate detriment. The answer the question of what Florida will look like in 50 years will come from what people care about and where their priorities are.

We must have an honest and frank discussion about Florida's finite amount of land and financial and practical ability to sustain unlimited land development. Worn slogans like "you can't put a fence at the state line" offer nothing relevant in a state whose natural environment, built communities and infrastructure are being overwhelmed by growth that is not paying for itself. To sustain anything like the social, cultural, economic, and environmental character that makes Florida worthy of living or investing in, will require a change in law and policy that recognizes the finite carrying capacity Florida has to accommodate growth. You can't put up fences, but neither is a state or community required to subsidize its own ruination. Government can and must ensure that the public fisc and welfare are not harmed by the amount, type and location of new development.

Let this Section begin that dialogue now, and not wait for the kinds of crisis faced by South Florida to be repeated everywhere. We can either manage growth now, as we know we should for our own benefit, or have it die on its own when its too late and no one is coming because Florida has little to offer except health - threatening sunshine. Government can require growth to truly pay for itself. It can also regulate land strictly, even adopt annual growth caps, if important to ecosystem, farmland and community protection. It can maintain a tax system and fiscal policies that work in the same direction as the rules. We must talk about carrying capacity limits in polite company and government buildings.

II. What is Our Role?

Does the Florida environmental or land use lawyer have the obligation to work to prevent the ecology, economy, social structure and culture of the state from collapsing, both through the administration of existing law and advocacy for changes to existing law?

The Preamble (A Lawyer's Responsibilities) to the Rules of Professional Conduct tell us that:

“A lawyer is a representative of clients, an officer of the legal system, and a **public citizen having special responsibility for the quality of justice.**”

As a public citizen, **a lawyer should seek improvement of the law,**

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

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

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

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

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

(c))(Emphasis added)..

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

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

Reflecting on this Constitutional provision as well as the entire body of Florida environmental law, the Florida Supreme Court remarked that:

“The clear policy underlying Florida environmental regulation is that our *society is to be the steward of the natural world, not its unreasoning overlord.*”

“There is an obvious public interest in such a policy, given the fact that **environmental degradation threatens not merely aesthetic concerns vital to the State's economy but also the health, welfare, and safety of substantial numbers of Floridians.**” Department of Community Affairs v. Moorman, et al., 664 So. 2d 930 (Fla. 1995)(emphasis added).

Finally, as our Florida practice brings us into federal or even international

forums, should we not remain mindful that:

“[a]n **obligation to future generations** is a common feature of national and international environmental law”?²

III. Overview of the Environmental Look Ahead

Even among those environmentalists³ who continue to believe that a disaster for Florida can be averted by an immediate change in public policies, there is great doubt that it will happen. We uniformly agree that Florida must intelligently and aggressively use the many modern legal and other tools available to allow adequate protection of the environment while respecting private property rights and the realities of population growth.

I set out to ask two questions about Florida fifty years from now:

1. What will be the health and status of the landscape and ecology.

² John C. Tucker, Constitutional Codification of and Environmental Ethic, 52 Fla. L. Rev. 299 (2000). (See fn11). A prominent example cited by Tucker is the National Environmental Policy Act (NEPA), at 42 U.S.C. § 4331(b)(1), which creates an ongoing obligation for the federal government to "use all practicable means . . . [to] fulfill the responsibilities of each generation as trustee of the environment for succeeding generations. *Id.* at fn. 24).

³ I hesitate to use the word, for fear of perpetuating the illogical view that “environmentalism” should be viewed as some sort of belief system or philosophy. I submit that if you at any point in your life ingest food or water, breathe air, recreate outdoors, ponder your life while gazing at the stars or the surf, venture into traffic, or share your living space with a neighbor, your health and happiness depends on the environment and respect for the laws of nature.

2. What will our land use and environmental laws and programs look like.

This is impossible to do. Professional projections of such things typically extend for 20 years at most, and even then suffer from significant uncertainty. Certainly, the prediction of nature's long term response to today's regulatory or physical actions is by its nature an inexact science,⁴ although even a crude analysis of Florida's ecological future suggests many stark realities.

And predicting the political and regulatory situation over the next 50 years is even more difficult. What about today's environmental laws, politics and programs would have been predicted in 1955? With so much dependant on the unknown political, social and cultural changes that will surely come with such a fast-growing and increasingly diverse population, and in a state that is directly impacted by international events, and disregarding the warning of a friend that "I'm not sure giving a realistic view of the picture will be inspirational", I proceed with some trepidation.

A. The Health and Status of the Landscape and Ecology

⁴As discussed in Bradley C. Karkkainen's article, *Toward a Smarter NEPA: Monitoring and Managing Government's Environmental Performance*, "[s]cientists recognize that we will never be able to predict with great accuracy the outcome of conservation decisions" due to the "inherent stochasticity or chaos of nature," combined with the fact that "planners rarely if ever have the luxury of sufficient information on species and natural communities to foresee the future" See Reed F. Noss et al., *The Science of Conservation Planning: Habitat Conservation Under the Endangered Species Act 64* (1997); See also C.S. Holling et al., *Science, Sustainability and Resource Management, in Linking Social and Ecological Systems: Management Practices and Social Mechanisms for Building Resilience* 342, 346-47 (Fikret Berkes et al. eds., 1998) (describing the emerging scientific understanding of the "complexity of... behaviour of complex [natural] systems" in which "uncertainty is high," "knowledge of the system we deal with is always incomplete," "[s]urprise is inevitable," and "the system itself is a moving target").102 *Colum. L. Rev.* 903 (2002).

The current situation is seriously adverse to the health of Florida's ecosystems. In 1999, the Legislature adopted the Florida Forever Act, Afind[ing] and declar[ing] that:

AThe continued alteration and development of Florida's natural areas to accommodate the state's rapidly growing population have contributed to the degradation of water resources, the fragmentation and destruction of wildlife habitats, the loss of outdoor recreation space, and the diminishment of wetlands, forests, and public beaches.” S. 259.105(2)(a)2, Fla. Stat. “The potential development of Florida's remaining natural areas and escalation of land values require a continuation of government efforts to restore, bring under public protection, or acquire lands and water areas to preserve the state's invaluable quality of life.” S. 259.105(2)(a)3, Fla. Stat. “Florida's groundwater, surface waters, and springs are under tremendous pressure due to population growth and economic expansion and require special protection and restoration efforts.” S. 259.105(2)(a)4, Fla. Stat.” Many of Florida's unique ecosystems, such as the Florida Everglades, are facing ecological collapse due to Florida's burgeoning population. To preserve these valuable ecosystems for future generations, parcels of land must be acquired to facilitate ecosystem restoration.” S. 259.105(2)(a) 6, Fla. Stat.

As discussed by John C. Tucker, in *Constitutional Codification of and Environmental Ethic*, 52 Fla. L. Rev. 299 (2000):

"For example, during the past 50 years human activities have destroyed about 90% of Florida's old-growth longleaf pine forests, which historically covered more than half of the state. See Ronald L. Myers & John J. Ewel, Problems, Prospects, and Strategies for Conservation, in Ecosystems of Florida; (Ronald L. Myers & Jack J. Ewel, eds., 1990). The state has also lost over 50% of its wetlands. See Florida Department of Environmental Protection, Ecosystem Management Committee Reports 17 (Nov. 1994). As a result of these and other disruptions of natural systems, Florida has more federally listed species than any other state in the nation except California. See Joseph M. Schaefer, An Overview of Florida's Endangered and Threatened Species and Their Habitats, in Wildlife, Habitat and Land Use Law: Florida's Developing Zoo 1.3 (Florida Bar Seminar, Feb. 8-9, 1991)."

So, what will the situation be fifty years from now?

Population

The population of Florida is currently about 15 million, and is projected by the United States Census Bureau to be over 28 million by 2030, having added over 12 million people since 2000. See, Bureau of the Census, Statistical Abstract of the United States 35 (2005). At this rate, the population might be around 36 million at 2050. I will leave it to others with calculators and sophisticated software to project the number of housing units, classrooms, roadway lane miles, public buildings and facilities, million gallons per day of potable water, acres of farm and natural areas paved, total nutrient input to receiving waters and other measures of the resulting impact. That is more than double the existing human footprint and impact, which is

currently not sustainable. So even increases in sustainable development and living practices may not be enough to offset the sheer amount of the impact.

Beyond Florida's population, with most of south Florida at elevations barely above sea-level, and with so many coastal barrier islands, should Florida take an active role in influencing US policy regarding worldwide family planning as a means to stem the far-reaching impacts of world population growth?

Florida's Waters

Given the scope and sources of the nutrient and other problems causing so many water bodies to currently be considered impaired or in non-compliance with water quality standards, there is serious cause for concern for the health of Florida springs and rivers, which so defined it as a paradise. In 2004, state health officials tripled the number of rivers and lakes on a caution list to 172. The number of fish that should be eaten in limited quantity rose sevenfold to 59, including popular saltwater catches from snook to red snapper. Fifty years from now, it is anyone's guess how many lakes or rivers remain in which you can let your kids swim in or from which you can eat your catch. Ground/ drinking water contamination from saltwater intrusion and land - based pollution could be substantial.

There may be very few healthy shellfish harvesting areas, and there will be draconian limits on take of many fish species. There will likely be severe water conservation requirements throughout all of south east and southwest Florida in 50 years, even with expensive re-use and de-salinization facilities in expanded use.

In 50 years, it is quite possible, even likely, that increased nutrient pollution and wetland loss have caused the multiple individual dead zones in the Gulf of Mexico to

grow together.⁵ 50 years on, it is a very real possibility that the living coral on the reefs in the Florida Keys could be all but gone.⁶

In fifty years, might petroleum shortages and/or extreme prices lead to oil drilling off the Florida coast, with potentially disastrous environmental consequences? Oil rigs may be within sight along Panhandle beaches. Throughout the state, there are frequent red tides, sewage and stormwater - related “no swimming” warnings, and advisories against eating fish landed from the beach. The beach experience may often be limited to watching the waves from under specialty-umbrellas that compensate for more intense sun caused by increasing ozone holes. At some point, the thought of swimming or boating in contaminated waters, or paying to visit tropical wilderness areas are panned in the travel guides as little more than outdoor museums of natural history that will severely damage tourism and the state economy.

Air Pollution

According to *Danger in the Air: Unhealthy Levels of Air Pollution in 2003*, (FPIRG 2004) the Tampa Bay area suffered from six “smog days” in 2003, when air pollution levels exceeded the EPA’s 8-hour ozone health standard. As urban densities increase due to land scarcity, unless Florida invests significantly in mass-transit, more urban areas will have chronically unhealthy air quality. Even if we get cleaner technology, will the population increase offset any gains.

⁵ *Gulf in Distress*, PBS 2002

⁶ In 2000, scientists monitoring the Florida Keys National Marine Sanctuary reported declines of up to 30% in living corals at some reefs. (NOAA FKNMS, US EPA and State of Florida. 2003. Sanctuary Science Report 2001: An Ecosystem Report Card. 112pp.)

Ecosystems: Upland and Wetland Habitat

The St. Petersburg Times recently did a major investigative series recently, which documented that in the past 15 years 84,000 acres of wetlands in Florida have been lost as a result of dredge and fill permits.⁷ At that same rate of loss, over 250,000 additional acres of wetlands will be lost fifty years from now.

Fifty years out, there may well be no more Florida panthers, gopher tortoises, or scrub jays. Bear populations may have become so fragmented from each other that inbreeding the maintenance of viable, sustainable populations is impossible. Roads may have fragmented the habitat of all large terrestrial wildlife species in Florida to the extent that all are listed as endangered, at least by the state. The future of manatees and of beaches available for sea turtles nesting is quite uncertain. Suburban sprawl will have cut into the critical mass of intact acreage required to perpetuate many species.

Invasive plants and animals may have impacted the integrity of every significant ecosystem in the state.

⁷ Waite and Pittman, St. Petersburg Times, May 22, 2005 (part of the “Vanishing Wetlands” investigative series).

Public Lands & Recreation and Open Space

A burgeoning population coupled with diminishing natural areas will prove to be a major double-whammy. Management conflicts over public lands and waters will be major problems (hunters versus hikers; kayakers vs. jet skiers; over-crowded favorite fishing spots; ORV enthusiasts vs. passive users, etc.). All users of public land will likely be competing with increased pressure to use public lands for non-natural uses, such as proposals to “surplus” public lands to subsidize affordable housing and to locate public facilities and services on public lands.⁸ In other words, there is a realistic possibility that substantial acres of lands ostensibly purchased for “preservation” will not be preserved.

Agriculture

The state is losing about 150,000 acres of productive farmland a year to urbanization.⁹ Over 50 years, at that rate, 7.5 million acres now in agriculture will be gone. As urbanization replaces farms and threatens others, and as wetland loss moves the freeze zone farther south¹⁰, the size and nature of farms will shrink dramatically,

⁸ For example, Florida law currently states that “[t]o ensure that sufficient quantities of water are available to meet the current and future needs of the natural systems and citizens of the state, and assist in achieving the planning goals of [DEP] and the water management districts, water resource development projects on public lands, where compatible with the resource values of and management objectives for the lands, are appropriate.” S. 259.105.(2) (a)4, Fla. Stat.

⁹ Barnett, *Agriculture: Focusing on Water, Land*, Florida Trend Magazine, Jan. 2004.

¹⁰ Bowman, *Converted wetlands lead to harsher freezes*, Scripps Howard News Service (Nov.19, 2004)(reporting that former wetlands converted to agricultural use are more susceptible to severe

and nurseries - mostly growing and selling landscaping plants to serve new development - may be the states primary agricultural use.

Economic Development, Fiscal Resources & Infrastructure

Fifty years from now, user and impact fees will either be astronomical, or, due to issues related to the affordability of housing¹¹ or legislative limits on the ability of local government to extract such fees, or other political considerations, the state's infrastructure backlog will be beyond a crisis stage, having caused serious economic problems related to poor schools, low quality community amenities and transportation problems. In 50 years, will Florida have fundamentally improved its standing among the 50 states in terms of education so that it is attracting clean, high-paying industries? Will it have a state income or services tax? Or will we still be reliant on sales tax, property taxes, construction (with its major economic and environmental externalities) and tourism (what might that industry look like after 50 more years of degraded natural areas)?

Climate Change

Global climate change, sea level rise and related impacts on species extinction, nutrient contamination, property damage, weather cycles and other things could have overwhelming impacts - particularly in south Florida - fifty years from now. Perhaps

freezes, based on a NASA-sponsored study of land use changes in Florida).

¹¹ *Despite delays, impact fees expected to increase*, Naples Daily News February 4, 2005 (describing building industry opposition to increased impact fees due to impact on housing affordability).

the enormity of these problems is why government is not responding to them seriously. Most climate scientists believe that, assuming we start today, we won't even start to reverse the accumulation of green house gases for 50 years.

The impact of rising water levels on coastal property, natural resources, public infrastructure funding demands, insurance rates, and the overall state economy could be devastating if Florida does not immediately begin to look realistically at the future implications of today's policies.

The Build-out of Florida

Currently, Broward County has already built out to the publicly-owned Everglades. Palm Beach County is not far behind. An Administrative Law Judge just found that the entire County (save the Everglades Agricultural Area) will be built out in 30 years.¹² In Miami-Dade County, the ongoing South Miami-Dade Watershed Study is projecting that, under a "trend growth" scenario (as opposed to a smart growth scenario), at 2050 almost all of the agricultural and wetland parcels in south Miami Dade (except for the wetland areas south of Florida City) will be urbanized.¹³ In Martin County, the rural lands designated at one unit per 20 acres between the urban area and Lake Okeechobee are being heavily marketed, causing great debate over the future of the area.¹⁴ In Collier County, a major rural lands study resulted in a

¹² 1000 Friends of Florida, et al. v. Palm Beach County, et al. (DOAH Case No.: 04-4492GM)(Recommended Order April 25, 2005).

¹³ South Miami-Dade Watershed Study and Plan, Sub-task 2.2 (Draft Final Work Product)(March 17, 2005).

¹⁴ *Clustering could be option for growth in western Martin County*, Stuart News, May 22, 2005.

set of comprehensive plan amendments that set the stage for more or less permanent decisions about the eastern part of the County / western Everglades.¹⁵ It is reasonable to expect that by 2050, south Florida will have been built out, the land use issues will related to redevelopment, and many other parts of the state will be close to the same situation. One might speculate, that in 50 years, the Panhandle will have the highest growth rate in the nation, but still no state wetland regulation. In 50 years, will the development of the vast St. Joe lands truly have used the advantages of large tracts in single ownership and truly preserved sustainable ecosystem functions as well as north Florida's unique charm. Or will this special region have been developed with only slightly better results than we had in south Florida?

Florida may be in environmental collapse within 50 years unless we change our approach in major ways, and soon.

B. What Our Land Use and Environmental Laws and Programs Will Look Like.

Introduction

The modern era of environmental law started in the 1960s, as part of the overall change in social awareness throughout the Country. The horror and outrage at burning rivers and the like produced major national and state of Florida environmental legislation in the early 1970's. For the next 30 years, a complacency and sense of routine set in, and economics again became a primary consideration. Lately, both

¹⁵ According to various Collier County officials, growth in eastern Collier County threatens to overrun the county's ability to keep up with it, and it is currently trying to figure out how to avoid what one official describes as "a train wreck" related to the environment and infrastructure costs. *Officials: County's growing pains could get unbearable*, Naples Daily News April 2, 2005.

Congress and the Florida Legislature have been dominated by majorities that the conservation community obviously views as hostile to environmental and land use regulation. Most recently, activism and political leadership has come mostly from the local level, and scientific knowledge and public awareness of the inadequacy of our regulatory and non-regulatory approaches to the protection of our ecosystems and communities are growing. Perhaps we are on the verge of a new revolution in our public policy approach to these issues.

The Future of Government's Role

In general, I expect that 50 years from now, government may have gotten its processes about right, having followed the lead of the private and NGO Sectors.¹⁶ The question is whether it will be soon enough for Florida.

Non-Regulatory Approaches

In the future, the currently evolving economic models will be refined and will have given us a very clear understanding of the real economic costs (and benefits) of development. This information will have changed land use and environmental politics fundamentally, as the masses will no longer stand for having to subsidize the ruination of their own quality of life¹⁷. Tax incentives for land preservation, impact and user

¹⁶See e.g., *A Shift to Green*, By Miguel Bustillo (LA Times June 12, 2005)(“Driven by profit and the opportunity to shape regulations, major corporations are backing stronger measures to reduce global warming”)

¹⁷ As a *Florida Trend* writer put it, currently “[w]e subsidize people’s arrival, and we

fees, the tax structure in general, full-cost accounting economic impact statements for even smaller developments, and other such things, will be major components of land use and environmental policy. The state's economic development efforts may by law be mandated to support ecosystem protection and restoration, as well as redevelopment goals. Market and incentive - driven approaches may result in widespread use of hydrogen cars, tele-commuting and other practices that significantly increase the sustainability our resident and tourist population. But will the sheer numbers out weigh these improvements?

In general, the restoration of cities and ecosystems will be big business, with areas that are currently pristine the subject of multi-billion dollar restoration projects, and some of today's new subdivisions undergoing redevelopment. Many ecosystems with existing problems will be the subject of restoration projects as the economic and other costs of their degradation become evident.¹⁸

Land Acquisition

The state has been spending the same \$300 million a year on land acquisition since it started buying land almost 30 years ago, despite the huge escalation in land values that has occurred over that time. That is obviously a major decrease in real terms. By 2050, the state should have listened to its own economists and

can't afford their upkeep." Skene, *Fatalistic Attraction: Florida leaders are bad at managing growth but sure are good at counting and building*. Florida Trend April 2005.

¹⁸See Cunningham, The Restoration Economy (the previously hidden "restoration" economic sector - currently a trillion dollar industry- will "dominate the rest of the 21st century.")

appropriations will reflect the understanding that it is a much better investment of public dollars to buy land more land sooner as opposed to later, particularly when compared to the costs of providing facilities and services to that land if it were to develop. Yet, increased acquisition may be seriously hindered by the inflation in fair market values caused by increased competition with the private market for an ever-shrinking land inventory.

Water Quality and Quantity

Enforceable point source legislation will continue to be a major component of our laws, as such laws have largely proven effective enough. Non-point source (stormwater) regulations may have increased as the reality of the impact of stormwater and the inadequacy of the current regulations applicable only to new development become apparent. Might it be that the sheer number of homes and businesses with exotic landscaping has forced major programs both regulatory and incentive-based to encourage the conversion of existing planted landscapes and yards to native, a means of reducing fertilizer and pesticide usage. With over half of a resident's consumptive water use related to landscaping, the double impact of such measures increases their utility. Because the vast amount of water diverted to meet urban demands has seriously damaged or is threatening the viability and even existence of many springs, lakes, rivers and wetlands¹⁹, draconian water use restrictions maybe common-place.

Ecosystem Protection

¹⁹See *Current use of ground water supplies threatens wells, growth for future. (Florida) Clean Water Report*, Oct 20, 2003 v41 i21 p207(COPYRIGHT 2003 Business Publishers, Inc.)

Whether we will have meaningful terrestrial ecosystem protection is the most troubling question, particularly given the political and practical obstacles and the possibility that it may already be too late.

The state requires permits to impact wetlands, but there is no ecosystem impact permit. The gap between the scientific understanding of how our natural areas work and the how our regulatory structure is set up is alarming and inexcusable.²⁰ If wetland resource permits are not changed in the next few five years to be Florida Ecosystem permits based on defined systems and criteria based on the core science of how that ecosystem works, the essential functions of every single one of Florida's rivers, lakes, forests, swamps, estuaries and water supplies, will be significantly degraded or threatened, with major economic consequences. Ecosystem - specific rules (kind of like existing ones such as for the Wekiva area or Areas of Critical State Concern, only improved) would avoid the unhelpful "least common denominator" impact that comes from writing broad rules to cover many different areas.

Even more important is that the Growth Management Act be amended immediately to direct basic use and density/ intensity away from defined ecosystems. This requirement needs to be mandatory (not just encouraged), and it must be express that every way to avoid severe landowner impacts will be explored, but there are certain areas what simply cannot be paved, bisected or near people and city life. Specifically identified studies and reports - things like the GAP Report, The Comprehensive Everglades Restoration Plan, Estuary Management Plans, various regional plans, etc. should be the presumptively required basis for planning decisions.

The argument against adopting “general plans that lack site-specific, ground-truthed data is easily met with provisions allowing such better information to override the general study. Consistency with regional policy plans (likely to have more region-appropriate, specific requirements, but which treated now as irrelevant to compliance decisions) would be mandatory. The idea of reducing the state’s role in Urban Service Areas (as this years growth management legislation suggests) would be a reasonable suggestion only if the real important stuff that impacted all of us - like watersheds, groundwater sources, and important wildlife areas was actually being preserved. That is not happening now, as even major future land use map amendments and Developments of Regional Impact are being approved in locations that cause severe cuts through and out of important ecosystems. Chapters 163 and 380 need to be applied as the location-guiding, big picture, up- front planning laws they were intended as, and not as glorified permitting laws, which, in my opinion, has been the case for a number of years.

Much like a developer site plans the parcel based on his/ her bottom line needs or designs, the state must maximize and coordinate its planning, permitting, land acquisition and fiscal and tax policies to aggressively protect - before it is too late - those ecosystems we all know are vital to this state’s future. We need to find the political courage to say no to some landowners in some places, and to maximize targeted land acquisition, TDRs (real ones, where landowners in preferred areas must buy rights to increased densities and they can transfer across local boundaries), tax incentives and other modern tools already available so as to prevent to make that doable. While the creation of a landowner revolt by regulating everyone just shy of a taking might not be wise public policy, we do need to remember that major profits (or

even minor ones) are not a property right²¹ and the preservation of important resource lands, as well as public health, are essential governmental functions. Tax money now subsidizing growth in the wrong place should be shifted to buying the area. Having our laws and executive actions actually reflect these things would have the added benefit of reducing land speculation that fuels our affordable housing and land protection problems.

Unless these things are done at the beginning of the next 50 years, the perspective for Florida's ecosystems is bleak.

Administration

As land use law becomes more complex and controversial, land use disputes may be taken out of the hands of administrative law judges and circuit court judges, and handled (both at the planning and development order stages) by specialized land use courts. The author supports this approach, with said courts set up as independent bodies.

Next, while counter to the current political thinking which is towards more local control, it is difficult to imagine Florida successfully managing issues like ecosystem protection, transportation , evacuation and affordable housing unless meaningful regional governance is in place. Such entities would not be governed by elected officials from the local governments which they oversee (such as is the case with regional planning councils currently), and might combine land planning, transportation, and ecosystem management functions. Florida can not continue to

²¹ See *Old McDonald Still Has a Farm: Agricultural Property Rights After the Veto of S.B. 1712*, The Florida Bar Journal, March 2005, at 41

build roads through ecosystems, approve up-plannings” and generally have its left hand not know what its right hand is doing and have any chance of sustaining itself.

The Carrying Capacity Approach

As mentioned above, Florida can only sustain itself and avoid economic and ecological crisis if its policies and laws respect and reflect the realities of the laws of nature, the finite (and shrinking) amount of land in this peninsula, and its ability to pay for more growth. Growth management must become, in many places, a growth limitation and where and when development can occur.

Contrary to much popular belief, the Growth Management Act does not require comprehensive plans to fully accommodate projected population estimates regardless of the impacts. Section 163.3177(6)(a), Fla. Stat. states that a comprehensive plan must be "based upon" a list of factors related to natural character, community issues, infrastructure availability, population and growth projections, and other factors. According to Rule 9J-5, Florida Administrative Code, comprehensive plans are also to allocate land uses based on the identification of natural resources and other areas with development constraints, the suitability of land for various uses, and the availability of facilities, services, and infrastructure.²² In addition, Chapter 163 and Rule 9J-5 include provisions discouraging sprawl, encouraging redevelopment, protection of ecosystems, and requiring internal consistency with the comprehensive plan as a whole.

²² Rule 9J-5.006(2)(a) and (b) and Rule 9J-5.013(1), F.A.C.

In compliance with the law, the comprehensive plans of Monroe County and its cities impose annual growth caps that are well below population projections. Originally, those growth caps were the result of hurricane evacuation constraints, but in recent years, the growth rate was reduced in response to ecosystem protection concerns. Florida's Governor and Cabinet, who have the final say on implementing the growth management act, issued a ruling that comprehensive plans are not required to accommodate projected population regardless of the impacts to other planning issues, and must be based on a full analysis of all growth limitations.²³

A letter from the Department of Community Affairs (DCA) regarding Palm Beach County's population forecasts strengthens the *Monroe County* precedent. Interpreting the law, DCA stated:

"Local governments are not required to convert agricultural lands based solely on population trends without consideration for other planning objectives and needs. "[L]ocal governments are not compelled to authorize unlimited or unchecked urbanization simply to accommodate past growth trends resulting from rapid urbanization."²⁴

Our entire system of environmental and land use laws is based upon the view that some environmental degradation must be allowed in favor of property rights and population growth. Yet each of those laws sets standards, or thresholds beyond which

²³ DCA, et al. v. Monroe County, ER: 95:148 (Admin. Comm., Dec. 12, 1996) (Final Order and Order of Partial Remand).

²⁴ DCA Letter to Lorenzo Aghemo, Palm Beach County Planning Director, (July 28, 2003)

adverse impacts are not to be allowed. It is clear that those limits have been exceeded in some places and will be soon in others. In the Keys, the limits are the ability of its fabled marine system to handle more nutrient pollution, its limited evacuation capacity (obviously a compelling public safety issue) and the minimum spatial needs of several endangered and other listed species. On mainland south Florida, there is a minimum spatial extent of land needed to restore the Everglades and maintain a water supply. In other places the issue may be the necessary “critical mass” of farmland to sustain an agricultural economy, the maximum allowable pollution loads in rivers, lakes or springs, minimum flows and levels for water bodies, or habitat needs similar to those in south Florida. Whatever the limits, they exist, and land use planning is the only realistic mechanism that can meaningfully reflect and respect them. We have got to learn to say no.

The Florida Supreme Court has upheld local government authority to decline requested plan amendments to allow an increase in density.²⁵ Such decisions are legislative in character, and will only be overturned if not “fairly debatable,” a highly deferential standard for local governments. A local government's decision not to change its plan will be upheld when any valid planning rationale supports the decision.²⁶

Surely, the avoidance of the unacceptable results suggested by the trends of the past 50 years justifies, and indeed requires a major shift in our current ethic and strategies for managing growth if each of us wants to be proud of the future we are leaving for our grandchildren.

²⁵ Snyder v. Brevard County, 627 So.2d 469 (Fla. 1993).

²⁶ Martin County v. Yusem, 690 So. 2d 1288, 1295 (Fla. 1997) and Martin County v. Section 28 Partnership, 668 So. 2d 672, 675 (Fla. 4th DCA 1996).

IV. Conclusion To the Young Lawyers

(Meaning all of us who haven't retired yet)

We must all be part of a new legal and administrative revolution that makes bold, structural changes to how we preserve what is important about Florida. While it is hard to be an optimist when one's most hopeful scenario is that "some global calamity will re-balance the scales"²⁷, we have incredibly sophisticated tools at our disposal, and some of the best minds in the world, in this state, fully able to prevent calamity and achieve sustainability and balance. I invite my friends and colleagues in this most important business to join in common pursuit of the latter.

²⁷ E-mail correspondence from a respected member of this Section who shall remain anonymous.