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Dedicated to representing the public interest in environmental and land use matters.*

Restoring the Everglades Through Planning: The Responsibility of Local Governments and the State to Avoid Urbanizing Lands Important to the Restoration of the Everglades

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Introduction

Congress authorized the Comprehensive Everglades Restoration Plan (CERP) in 2000¹, thus setting in motion a process whereby the United States Army Corps of Engineers (the federal sponsor) and the South Florida Water Management District (the state sponsor) would undertake the grandest ecosystem restoration project ever attempted on the planet. The CERP is designed to improve and restore wetlands and uplands, capture fresh water currently drained to the sea, and store it in reservoirs, marshes, storm water treatment areas and other features to partially reverse the great loss of water to tide and to restore natural hydrology and habitat. The goal is to restore the natural hydrology of the ecosystem and replenishing water supplies. The world's most ambitious restoration project, it will cost \$7.8 billion and take more than 20 years to complete. The project will involve the raising of water levels underneath some private property, the outright use of portions of private property and the fee - simple or less than fee acquisition of interests in private land. It will also require the avoidance of additional drainage and water supply demands in certain areas, as well as the avoidance of secondary impacts on existing and restored natural areas.²

The CERP is an excellent, necessary and innovative law, which fashions a 30 -year partnership between the state and federal governments. As an act of the Federal government however, it does not address the variable that is perhaps most crucial to its success - the amount of land that will be available for restoration purposes. Given the huge growth pressures in south Florida, the adoption of CERP essentially launched a race against time, with federal and state restoration planners competing for land with developers.³ Given the rapid rate of development in south Florida, the Corps and its state partner have been asked to paint a masterpiece on an ever-shrinking canvas, as lands necessary or potentially necessary for restoration, are approved for development.

For this reason, the local governments of south Florida play a major role in the fate of the Everglades. While the federal law approving of CERP establishes no legal requirements upon them, local governments are bound by Florida's "Growth Management Act"⁴, which does

provide ample authority and requirements for making comprehensive planning decisions that increase the success of the federal - state restoration effort. The great benefits the CERP promises to local governments, in the form of water supply, drainage, economic, social, recreational and other impacts, combined with their statutory planning obligations, provide a strong argument for the denial of comprehensive plan amendments that would reduce restoration options.

The plan to restore the Everglades does not require local governments to deny development permits to which landowners are entitled under existing planning and zoning approvals. What is addressed here are local government actions in response to requests to amend their current comprehensive plans - typically requested changes from an agriculture, rural or conservation - type of designation to one that allows suburban or commercial development. Landowners have no property or other right to the approval of requested comprehensive plan changes. Such decisions are considered highly discretionary, "legislative" decisions by local governments.⁵

On the other hand, such discretion is governed by Ch. 163, Part II, Fla. Stat., which requires that any amendment to a local comprehensive plan be "in compliance" with the Act and its implementing administrative rule. S. 163.3184, Fla. Stat. Plan amendments must thus be consistent with various sections of Ch 163, Part II, Rule 9J-5, Fla. Admin. Code and the relevant Regional Policy Plan. As is shown below, plan amendments which increase the development potential of agricultural, rural or sensitive lands upon or near lands slated or being studied for Everglades restoration are likely inconsistent with state law, even where it can be argued that there is a general need for more development within the local government.

The Legal Basis For Denying Plan Amendments Impacting Restoration Lands

Adopted in 1985, Florida's Growth Management Act (Chapter 163, Part II, Florida Statutes, *The Local Government Comprehensive Planning and Land Development Regulation Act*) requires all of Florida's 67 counties and 410 municipalities to adopt Local Government Comprehensive Plans that guide future growth and development. Comprehensive plans contain chapters or "elements" that address future land use, housing, transportation, infrastructure, coastal management, conservation, recreation and open space, intergovernmental coordination, and capital improvements.⁶

The purposes of the Growth Management Act are, among other things, to "guide and control future development",⁷ to "overcome present handicaps; and deal effectively with future problems which may result from the use and development of land..."⁸ The Act is to be "construed broadly to accomplish its stated purposes and objectives."⁹

In order for a plan amendment to be "in compliance" it must be consistent with sections 163.3177 and 163.3178, Fla. Stat., consistent with the State Comprehensive Plan as codified in Ch. 187, Fla. Stat.; consistent with the relevant regional policy plan, and consistent with the Minimum Criteria Rule, Rule 9J-5, Florida Administrative Code.¹⁰

A comprehensive plan's Future Land Use Map (FLUM), and its corresponding policies, identify the type and intensity of use that may be approved on any given parcel of land.¹¹ A FLUM or other plan amendment is not "in compliance", and should be denied if it would (1) constitute a disincentive to redevelopment in urban revitalization areas; (2) contribute less in fees and taxes than would be required for all facilities and services; (3) contribute to the loss of agricultural production; (4) decrease the amount of freshwater recharge through the Everglades system; (5) increase seepage loss of groundwater; (6) increase competition for scarce potable water resources; (6) compromise the wetland and water resource protection and restoration component that is central to Everglades restoration; (7) adversely impact species habitat; (8) not be required to accommodate growth (because of available land elsewhere); (8) otherwise contribute to urban sprawl; (9) be inconsistent with the relevant Regional Policy Plan in any fashion; or (10) be inconsistent with existing provisions of the local Comprehensive Plan

Future Land Use Element Requirements

Plans are required to protect, conserve and appropriately use natural resources and other areas with development constraints,¹² coordinate land uses with topography, soils, and the availability of infrastructure,¹³ and provide for the compatibility of adjacent land uses.¹⁴

Based in part on these requirements, the Administration Commission's Final Order concerning the Monroe County Comprehensive Plan ruled that Plans cannot allow development to exceed the "carrying capacity" of an ecosystem or infrastructure facility.¹⁵ Given the scarcity of land available to restore the Everglades, and the finite and diminishing drinking water resources and wetlands in south Florida, development in these areas may exceed the relevant environmental, infrastructure and service limitations.

The Future Land Use Map

"The Future Land Use Map is a critical component of the plan. [It] provides an essential visual representation of the commitment to uphold local comprehensive plan goals, objectives, and policies, as supported by appropriate data and analysis"¹⁶ In addition, coordinating the elements of a Comprehensive Plan is a "major goal" of the planning process, and the various elements of a plan must be consistent with each other.¹⁷ The fundamental component of this "internal consistency" requirement is that Future Land Use Map must "reflect the plan's goals, objectives and policies within all elements"¹⁸ Thus, the plan's adopted goals, objectives and policies must guide future amendments to the plan. Thus, existing provisions in a Plan that purport to support Everglades restoration would also support the denial of plan amendments that would compromise restoration. Violations of this "internal consistency" requirements are among the most common reasons that land use amendments are found not in compliance.¹⁹

Data and Analysis Requirements

Plan amendments that are inconsistent with the Comprehensive Everglades Restoration Plan or any component thereof, would not be "clearly based" upon the relevant and appropriate data and analysis, and would not be "in compliance".²⁰ Future land uses are to be allocated based

upon "surveys, studies, and data regarding the area, including the amount of land required to accommodate anticipated growth; the projected population of the area; the character of undeveloped land; the availability of public services; and the need for redevelopment."²¹ This requirement is supplemented by the specific data and analysis requirements in other sections of the statute and Rule 9J-5 concerning the identification and analysis 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

Rule 9J-5, Fla. Admin. Code

Many provisions of Chapter 9J-5 would be violated by plan amendments which adversely impact Everglades restoration efforts. If a plan amendment would urbanize rural or agricultural lands, adversely impact wetlands, recharge areas or wellfields, create new drainage or water supply demands, intensify land uses near areas slated for restoration or protection, it may well violate one or more of the following requirements:

1. Plans must discourage urban sprawl.²³
2. Plans must conserve, use and protect natural resources, including water, water recharge areas, marshes, soils, flood plains, and other natural resources.²⁴
3. Plans must protect surface waters.²⁵
4. Plans must protect soils and native vegetation.²⁶
5. Plans must conserve, appropriately use and protect wildlife habitat.²⁷
6. Plans must restrict activities and land uses known to adversely affect the quality and quantity of identified water sources. Rule 9J-5.013(2)(c)1, F.A.C.
7. Plans must protect native vegetative communities from destruction by development activities.²⁸
8. Plans must restrict activities known to adversely affect the survival of endangered and threatened wildlife.²⁹
9. Plans must protect the natural functions of existing soils, wildlife habitat, wetlands and flood plains.³⁰
10. Plans must designate and protect environmentally sensitive lands.³¹
11. Plans must protect the functions of natural drainage features.³²
12. Plans must limit the specific and cumulative impacts of development or redevelopment upon wetlands, water quality, water quantity, and wildlife habitat.³³
13. Plans must coordinate future land uses with soil conditions and topography. Rule 9J-5.006(3)(b)1, F.A.C.
14. Plans must provide for the compatibility of adjacent land uses.³⁴

Urban Sprawl

The state defines urban sprawl as "urban development or uses which are located in predominantly rural areas, or rural areas interspersed with generally low-intensity or low-density urban uses" which have certain specified characteristics.³⁵ Comprehensive plan amendments that increase uses or densities in rural, agricultural, or environmentally important areas, away from the existing urban areas, where necessary infrastructure does not exist, or when an adequate

supply of development land currently exists in the local government are likely to constitute urban sprawl, are strongly discouraged by the Act. The Act's discouragement of urban sprawl is so central to its purposes that the state has adopted a special and detailed rule with which comprehensive plans and amendments must comply.³⁶ A compendium of the adopted urban sprawl rules is attached.

Many comprehensive plans and plan amendments have been found out of compliance because they caused or contributed to urban sprawl.

A comprehensive plan amendment must maintain a reasonable relationship between the land allocated for development within the planning time frame and the expected population within that time frame.³⁷ In a Lee County case, the state found a ratio of 2.53 between the land allocated for development within the planning time frame and the expected population within that time frame to be an impermissible over- allocation of land.³⁸ In another case the state found a plan not in compliance because "the more a plan exceeds an allocation of 1 to 1.5 of the amount of land projected to be needed, the more likely it is that it is encouraging urban sprawl."³⁹

In St. Lucie County, an amendment converting farmland to a residential use was found to be urban sprawl, and contrary to agricultural preservation goals.⁴⁰ In Escambia County, high densities in agricultural areas were found to cause sprawl, where the plan had already "over-allocated" residential densities.⁴¹ In another case, an appeals court found a map amendment out of compliance because it was inconsistent with plan policies discouraging urban sprawl, and because the parcel was outside of the County's Urban Expansion Area.⁴²

In Collier County, in a case involving the western Everglades, the state found comprehensive plan amendments not in compliance because they allowed urban sprawl in to rural eastern Collier County, and required an extensive list of remedial amendments to bring the amendments into compliance.⁴³ In Charlotte County, a plan was found to cause sprawl due to relatively high densities in agricultural and rural areas.⁴⁴

Local decisions about annexation⁴⁵ and developments of regional impact⁴⁶ have also been invalidated due to urban sprawl impacts.

Regional Policy Plans

Three Regional Planning Councils are relevant to lands within the Everglades watershed - the Treasure Coast Regional Planning Council, the Southwest Florida Regional Planning Council, and the South Florida Regional Planning Council. Plan amendments that are not consistent with the Everglades Restoration provisions of the Regional Policy Plans adopted by these RPCs are not "in compliance."

Three Regional Planning Councils are relevant to land within the Everglades watershed - the Treasure Coast Regional Planning Council, the Southwest Florida Regional Planning Council, and the South Florida Regional Planning Council. Each of these has adopted a policy

plan which includes several goals and policies related to the Everglades. A compendium of provisions from each of these Regional Policy Plans is attached.

State Comprehensive Plan

Plan amendments that are inconsistent with the State Comprehensive Plan (SCP) are not in compliance. The SCP contains many provisions that are relevant to the protection of the various components of the Everglades. However, Section 187.201 (9) (b)(8) is most direct:

"Promote restoration of the Everglades system and of the hydrological and ecological functions of degraded or substantially disrupted surface waters."
(Emphasis added).

Conclusion

It is the legislative policy of the state of Florida to restore the Everglades.⁴⁷ Florida's growth management laws and implementing regulations include ample legal support for implementing this policy through local government planning decisions and state actions concerning such decisions. The single most critical variable that will determine the success of the effort to restore the Everglades is the amount of land left available to restore as a result of local land use decisions.⁴⁸ The time is now for local governments in south Florida to maximize the chances of successful restoration by zealously meeting their requirements under Florida's planning law.

End Notes

1. Water Resources Development Act of 2000 (Sec. 601 et. seq.), Public Law 106-541 (114 Stat. 2688). WRDA 2000 was enacted to approve CERP "as a framework for modifications and operational changes to the C&SF Project to restore, preserve, and protect the South Florida ecosystem while providing for other water-related needs of the region, including water supply and flood protection." (Sec. 601(b))
2. http://www.evergladesplan.org/about/why_restore.cfm
3. South Florida Ecosystem Restoration Land Acquisition Strategy, South Florida Ecosystem Restoration Task Force Working Group Land Acquisition Task Team. July 2004 Draft ("...The region's population is expected to double by 2050- land prices throughout the Everglades watershed are skyrocketing)(p.15.)
4. Ch. 163, Part II, Fla. Stat.
5. Martin County v. Yusem, 690 So. 2d 1288, 1293 (Fla. 1997)

6. See generally section 163.3177, Fla. Stat.
7. Section 163.3161(2), Fla. Stat.
8. Section 163.3161(3), Fla. Stat.
9. Section 163.3194(4)(b), Fla. Stat.
10. Section 163.3184(1)(b), Fla.Stat.
11. Section 163.3177(6), Fla. Stat.
12. Section 163.3177(6)(d), Fla. Stat.
13. Rule 9J-5.006(3)(b)1, F.A.C.
14. Rule 9J-5.006(3)(c)2, F.A.C.
15. Dept. of Community Affairs, et al v. Monroe County, ER: 95:148 (Admin. Comm., Dec. 12, 1996)
16. Austin et. al. v. City of Cocoa and DCA, ER FALR 89:0128 (Admin. Comm. Case No. 89- 31 (Admin. Comm. Sept. 29, 1989).
17. Section 163.3177(2), Fla. Stat.
18. Rule 9J-5.005(5)(b), F.A.C.
19. See section on urban sprawl beginning at page 5. See also Hiss v. Sarasota County and DCA, 1992 WL 880868, 15 FALR 830 (Admin. Comm. 1991), *aff'd* 602 So. 2d 5353 (Fla. 1st DCA 1992); Pope v. City of Cocoa Beach et al., 12 FALR 4758 (1990)
20. Sections 163.3177(8), 163.3177(10)(e), Fla. Stat., Rule 9J-5.005(2)(a), F.A.C.
21. Section 163.3177(6)(a), Fla. Stat; Rule 9J-5.006(2)(c), F. A. C.
22. See e.g. Rule 9J-5.006(2)(a) and (b), F.A.C.; Rule 9J-5.013(1), F.A.C.
23. Rule 9J-.006(5)(g), F.A.C.
24. Rules 9J-5.006(3)(b)4, F.A.C.; 9J-5.011(2)(b)5; 9J-5.011(2)(c)4, F.A.C.
25. Rule 9J-5.013(2)(b)2, F.A.C.
26. Rule 9J-5.013(2)(b)3, F.A.C.
27. Rule 9J-5.013(2)(b)4, F.A.C.

28. Rule 9J-5.013(2)(c)3, F.A.C.
28. Rule 9J-5.013(2)(c)5, F.A.C.
29. Rule 9J-5.013(2)(c)6, F.A.C.
30. Rule 9J-5.013(2)(c)9, F.A.C.
31. Rule 9J-5.011(2)(b)5, F.A.C.
32. Rule 9J-5.012(3)(c)1, F.A.C.
33. Rule 9J-5.006(3)(c)2, F.A.C.
34. Rule 9J-5.003(140), F.A.C.
35. Rule 9J-5.006(5), F.A.C.
36. Rule 9J-5.006(5), F.A.C.
37. See DCA, et al., v. Zemel, etc, et al., 1996 WL 1059844; 18 FALR 4040; DOAH Case No. 95-0098GM (Admin. Comm. 1996).
38. DCA et al v. Lee County, et al, 96 ER FALR 118 (Admin. Comm. 1996). See also Sheridan v. Lee County et al., 94 ER FALR 17; DOAH Case No. 90-7791GM (Admin. Comm. 1994) where the state found plan amendments not in compliance in part for failing to discourage urban sprawl.
39. DCA et al., v. Walton County, 1992 WL 880475; DOAH Case No. 91-1080GM (Admin. Comm. 1992)
40. DCA v. St. Lucie County, et al., 1993 WL 943708; AC Case No. Acc-93-063 (Admin. Comm. 1993)
41. DCA v. Escambia County, 1992 WL 880137; AC Case No. 92-010; DOAH Case No. 90-7663GM (Admin. Comm. 1992).
42. SCAID v. DCA, and Sumter County, et al, 730 So. 2d. 370 (Fla. 5th DCA 1999).
43. Dept. of Community Affairs et al. v. Collier County, DOAH Case No. 98-0324GM (Admin. Comm. June 1999). See also The Citizen's Political Committee, Inc. and James Kessler v. Collier County and DCA, DOAH Case No. 90-4545GM (Admin. Comm. 1992), where the stat found the Capital Improvement Element portions of the plan amendments related to urban sprawl to be out of compliance.

44. DCA v. Charlotte County et al, 90 ER FALR 130; WL 644350; DOAH 89-0810GM (Admin. Comm. 1990).
45. In Martin County and 1000 Friends of Fla., Inc. v. Dept. of Community Affairs and City of Stuart, 771 So.2d 1268 (Fla. 4th DCA 2000), the circuit court held that an ordinance adopting a Future Annexation Area Map was an amendment to the city's comprehensive plan which failed to discourage urban sprawl and was not supported by data and analysis.
46. In Burke v Desoto County, 92 ER FALR 166; DOAH Case No. 91-0372DRI (Fla. Land and Water Adjudicatory Comm. April 1992) the state issued a final order upholding a county's decision to deny a development of regional impact because the project would have encouraged urban sprawl. The DRI would have allowed an urban use that was inconsistent with surrounding land uses, and which exceeded the projected need for urban uses.
47. The Florida Legislature has specifically found that CERP implementation is "in the public interest and is necessary for restoring, preserving and protecting the South Florida ecosystem..." Section 373.1502(2)(a), Fla. Stat.
48. According to the Central and Southern Florida Project Comprehensive Review Study, Final Integrated Feasibility Report and Programmatic Environmental Impact Statement, U.S. Army Corps of Engineers and South Florida Water Management District, April 1999, "[I]and use in the future ... is expected to be characterized by the continued urbanization of the developable lands which lie east of the Water Conservation Areas in the Lower East Coast, and continued urbanization of Osceola and southern Orange County area associated with the development of Disney properties. Southwest Florida is currently experiencing a very rapid rate of population growth; this trend is expected to continue." (Section 4-6)

ATTACHMENT 1

Compendium of Urban Sprawl Rules

1. Rule 9J-5.006(3)(b)8, F.A.C. requires that a comprehensive plan contain one or more objectives to [d]iscourage the proliferation of urban sprawl.
2. The purpose of Rule 9J-5.006(5)(a), F.A.C. is:

"to give guidance to local governments and other interested parties about how to make sure that plans and plan amendments are consistent with relevant provisions...regarding discouraging urban sprawl, including provisions concerning the efficiency of land use, the efficient provision of public facilities and services, the separation of urban and rural land uses, and the protection of agriculture and natural resources."
3. Section 9J-5.006(5)(b), F.A.C.:

“[t]he determination of whether a plan or plan amendment discourages the proliferation of urban sprawl shall be based upon the standards contained in this subsection.
4. Section 9J-5.006(5)(d), F.A.C.:

“Paragraph (5)(g) describes those aspects or attributes of a plan or plan amendment which, when present, indicate that the plan or plan amendment may fail to discourage urban sprawl. of that indicator shall be considered. The presence and potential effects of multiple indicators shall be considered to determine whether they collectively reflect a failure to discourage urban sprawl.”
5. Rule 9J-5.006(5)(g), F.A.C. lists the 13 primary indicators of urban sprawl:
 - (1) Promotes, allows or designates for development substantial areas of the jurisdiction to develop as low intensity, low density, or single-use development or uses in excess of demonstrated need.
 - (2) Promotes, allows or designates significant amounts of urban development to occur in rural areas at substantial distances from existing urban areas while leaping over undeveloped lands which are available and suitable for development.
 - (3) Promotes, allows or designates urban development in radial, strip, isolated or ribbon patterns generally emanating from existing urban developments.
 - (4) As a result of premature or poorly planned conversion of rural lands to other uses, fails adequately to protect and conserve natural resources....
 - (5) Fails to protect adjacent agricultural areas and activities including silviculture, and including active agricultural activities as well as passive agricultural activities and dormant, unquie, and prime farm lands, and soils.

- (6) Fails to maximize the existing public facilities and services.
- (7) Fails to maximize use of future public facilities and services.
- (8) Allows for land use patterns or timing which disproportionately increase the cost in time, money and energy, of providing and maintaining facilities and services, including roads, potable water, sanitary sewer, storm water management, law enforcement, education, healthcare, fire and emergency response, and general government.
- (9) Fails to provide a clear separation between rural and urban uses.
- (10) Discourages or inhibits infill development or the redevelopment of existing neighborhoods and communities.
- (11) Fails to encourage an attractive and functional mix of uses.
- (12) Results in poor accessibility among linked or related land uses.
- (13) Results in the loss of significant amounts of functional open space.

- 6. Section 9J-5.006(5)(h), F.A.C. provides that plan amendments should be reviewed individually and for their impact on the remainder of the plan. It also provides:

“Land use types cumulatively (within the entire jurisdiction and areas less than the entire jurisdiction, and in proximate areas outside the jurisdiction) will be evaluated based on density, intensity, distribution and functional relationship, including an analysis of the distribution of urban sprawl and rural land uses. ”

This subsection then lists ten bases for evaluation of each land use type: extent, location, distribution, density, intensity, compatibility, suitability, functional relationship, land use combinations, and demonstrated need over the planning period.

- 7. Section 9J-5.006(5)(I) provides that each of the factors in paragraph (h) will be evaluated within the context and characteristics unique to each locality. It then lists ten features and characteristics: size of developable area, projected growth rate (including population, commerce, industry and agriculture), projected growth amounts (acres per land use category), facility availability (existing and committed), existing pattern of development (built and vested) and extent to which it reflects urban sprawl, projected growth trends (changes in density or intensity of urban development) over the planning period, costs of facilities and services, extra-jurisdictional and regional growth characteristics, transportation networks and use characteristics (existing and committed), and geography, topography and various natural features.
- 8. According to Section 9J-5.006(5)(f), F.A.C., paragraph (k) describes how the analysis components described in Subsections (5)(h) through (5)(j) are combined in a systematic way to determine the presence of urban sprawl indicators.
- 9. Section 9J-5.006(5)(k), F.A.C.:

"Each of the land use types and land use combinations analyzed in Paragraph (5)(h) above will be evaluated within the context of the features and characteristics of the locality, individually and together (as appropriate), as listed in Paragraph (5)(I).

ATTACHMENT 2

Excerpts from Regional Policy Plans

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