

A Call for increased regulations and temporary moratoria

Legal Analysis of Carrying Capacity - Based Planning and Regulation
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Introduction

There is often debate and confusion about the legalities of land use or environmental regulations designed to protect ecological or aesthetic and community values related to the basic validity of such regulation in general, and the type and extent of technical or scientific support required for such regulation. This legal outline attempts to describe the relevant Florida law that applies to these questions.

General Constitutionality

"It shall be the policy of the state to conserve and protect its natural resources and scenic beauty. Adequate provision shall be made for the abatement of air and water pollution and of excessive and unnecessary noise." Art. II, Sect. 7, Fla. Const.

Legal Standard and Burden of Proof

In order to be declared constitutional, an ordinance or regulation must bear a substantial relationship to the promotion of the public health, safety, morals, or general welfare. *Davis v. Sails*, 318 So.2d 214, 217 (Fla. 1st DCA 1975). Counties have a statutory right and responsibility to enact comprehensive plans and such plans, like legislative acts, will be presumed valid when challenged. *Id.* However, zoning is arbitrary, unreasonable, and thus unconstitutional only if it does not have a substantial relationship to the public health, safety, morals, and general welfare. *City of Miami Beach v. Lachman*, 71 So.2d 148, 150 (Fla. 1953). Absent a showing that the comprehensive plan is unreasonable and is an arbitrary exercise of police power without any relationship to the public health, safety, morals, or welfare, the courts will not overturn the plan. *City of Boca Raton v. Boca Villas Corp.*, 371 So.2d 154, 158 (Fla. 4th DCA 1979). The burden is on the party challenging an ordinance to make this demonstration. *City of Miami v. Kayfetz*, 92 So.2d 798, 802 (Fla. 1957).

To resolve this issue, courts will utilize the "fairly debatable" test. Under this test, if reasonable minds could differ as to the reasonableness or rationality of an ordinance, the ordinance will be upheld. *Davis*, 318 So.2d at 217. A plan will be deemed fairly debatable if there is competent, substantial evidence to support the local government's decision. *Lee County v. Morales*, 557 So.2d 652, 655 (Fla. 2d DCA 1990). If the plan is found to be fairly debatable, then its application cannot be disturbed by the courts. *Davis*, 318 So.2d at 222. Only where a plan is not supported by substantial evidence and is not fairly debatable, will it be deemed arbitrary, capricious, and a denial of due process. *Broward County v. Capeletti*

Bros., 375 So.2d 313, 315 (Fla. 4th DCA 1979). To show that a land use restriction is unreasonable and arbitrary, the challenging party must prove that the restriction has no rational relationship to the public health, morals, safety or general welfare, is not reasonably designed to correct the adverse condition, and is not even fairly debatable. *City of Hollywood v. Hollywood, Inc.*, 432 So.2d 1332, 1336, cert. denied, 441 So.2d 632. Once the plan meets the fairly debatable test, the court may not substitute its judgment for that of the local government. Davis at 221.

In *Capeletti*, the court upheld a County Commission's zoning decision which was contrary to recommendations of both the zoning board and the division of planning. *Capeletti*, 375 So.2d 313. In this case, a rezoning was denied on the basis that it conflicted with existing land use plans and the County Commission felt it would lead to a proliferation of rockpits in the area. *Id.* at 316. Differences of opinion on this matter did not invalidate the ordinance on the basis that conclusive proof of the need to deny the rezoning did not exist. Instead, this demonstrated that the issue was fairly debatable and thus within the Commission's discretion to decide. *Id.*

The *Capeletti* court held that the judiciary is to determine whether the local government's decision is fairly debatable based upon the evidence before the court and that the burden of demonstrating that the zoning is not fairly debatable rests upon the landowner. *Id.* at 315. Importantly, the court explained that, due to the sensitivity of decisions affecting land use, those decisions should be made by local governments and unless the decisions are arbitrary, discriminatory, or unconstitutional the court should let those decisions stand. *Id.* at 315; see also, *Kayfetz*, 92 So.2d at 801.

Similarly, the court in *Morales* stated that because zoning is a legislative function, the courts should only intervene when the action of the zoning body is so unreasonable and unjustified as to amount to a taking. 557 So.2d at 655. The *Morales* court further held that it is not for the judiciary to determine what would be the proper zoning, but to ascertain whether or not the zoning body's decision is fairly debatable. *Id.*

Environmental, Aesthetic, and Community Character- Related Factors Provide a Valid Basis For Land Use Restrictions

The Florida Supreme Court has firmly established that protection of environmentally sensitive areas and pollution prevention are legitimate concerns within the police power. *Graham v. Estuary Properties, Inc.* 399 So.2d 1374, 1381 (Fla. 1981). In *Estuary Properties*, a regulation which prevented the destruction of mangroves for development purposes was judged to be a valid exercise of police power since it was necessary to prevent unreasonable pollution to the water, thereby causing a public harm. *Id.*

Cases like *Morales* continue to consistently apply, and indeed amplify this rule. 557 So.2d 652. In *Morales*, the court upheld a downzoning of a barrier island which was designed to preserve archaeological resources, protect the environment and adjoining aquatic preserve, and to guard against the threat by hurricanes and

flooding to development. Id. at 653. The downzoning was based on an expert study which found that the island, which contains 5 threatened or endangered animal species and seven threatened or endangered bird species and is one of the last undeveloped barrier islands in the U.S., should be preserved and that development should be prohibited. Id. The court ruled that there was substantial competent evidence upon which the decision was based and that protection of environmentally sensitive areas and pollution prevention are legitimate concerns within the police power. Id. at 655. The Court specifically ruled that "the zoning board was appropriately concerned with limiting the effects of future commercial development . . . in view of legitimate environmental concerns, public safety concerns, and concern for preserving the island's aesthetic, historical, and archeological characteristics." Id.

The Florida and U.S. Supreme Courts have recognized as a legitimate exercise of police power a local government's legislation to protect their community's appearance. *City of Sunrise v. D.C.A. Homes, Inc.*, 421 So.2d 1084, 1085 (Fla. 4th DCA 1982). Likewise, the courts have ruled that preservation of open space and protection from urbanization and the consequences of urban sprawl, e.g., water pollution, destruction of scenic beauty, disturbance of the ecology and environment, are valid public interests and legitimate governmental goals. *Agins v. City of Tiburon*, 447 U.S. 255, 261-2 (1981).

What Type or Level of Evidence is Legally Required to Uphold a Land Use Restriction

In the Morales case, landowners challenged the constitutionality of a downzoning. The court held that the rationality and reasonableness of the downzoning, which was based upon an expert's study and the planning staff's assessments and recommendations that the land be rezoned in consideration of environmental, archaeological, and historical protection/preservation, was fairly debatable. 557 So.2d at 655. The court held that as long as there is competent, substantial evidence to support the zoning authority's decision, the decision will be considered fairly debatable. Id.

In Lachman, the City presented substantial evidence to support its zoning ordinance. 71 So.2d 148. However, there was ample evidence produced to offset or contradict the City's evidence. The City enacted the ordinance after more than a year of study and advice from the Country's best zoning experts. Both parties' contentions raised serious policy, economic, and administrative questions which placed the zoning within the fairly debatable realm. The court opined that if any logical deduction supports the local government's contentions, then the court may not substitute its judgment for that of the local government. Id.; accord, *Davis*, 318 So.2d at 222. It is important that Monroe County's efforts to limit its annual rate of growth are required and supported by Florida's Growth Management Act.

The Act dictates, in section 163.3177 (8), that all elements of the comprehensive plan shall be based upon data appropriate to the element involved. § 163.3177 (6)(a), Fla. Stat. mandates that land use plans shall be based upon surveys, studies, and data regarding the area and Rule 9J.5005, F.A.C. requires a

comprehensive plan to be based upon relevant and appropriate data and analyses. Finally, § 163.3177 (10)(e), indicates that the Legislature expects that the plan will be based on appropriate data, however, the Legislature does not intend for the support data to be subject to review. In addition, while the Department may evaluate whether the methodology is professionally accepted, it may not evaluate whether one methodology is better than the other. Once a comprehensive plan is approved under Florida's Growth management Act, it is deemed to have been supported by the best available data.

Local governments are specifically required to consider the impact of sewage facilities upon adjacent natural resources, as well as evaluate the adequacy, condition, and life expectancy of public facilities. Rule 9J-5.011(1)(f)(2), Fla. Admin. Code.

Rule 9J-5.005, F. A. C defines "based on data" to mean to react appropriately and as necessary as indicated by the data available on that particular subject at the time of adoption of the plan. This indicates that a local government can not wait for more conclusive data or evidence on a problem before it adopts a remedial action. Local governments are encouraged to use any data necessary so long as methodologies are professionally applied, collected, and accepted. *Environmental Coalition of Fla., Inc. v. Broward County*, 586 So.2d 1212 (Fla. 1st DCA 1991), stands for the proposition that a comprehensive plan should be based on whatever data a local government does have, even if that data is not complete. Accordingly, Monroe County will be acting within the realm of its authority and responsibility if it imposes a cap on permits because there is substantial competent evidence to support a conclusion that the marine system and other environmental limitations on growth in the Keys are even more severe than are evacuation constraints.

A local government may base a decision on inconclusive data that needs further study, as in *Environmental Coalition*, particularly in the absence of data which demonstrates the County's decision to be wrong. Under the Growth Management Act, specifically § 163.3177(10)(e), this decision, as long as it has some rational basis, would not be second-guessed.

In a case where the Department of Natural Resources employed a new scientific methodology in reestablishing a coastal construction control line, the court held that "selection and use of new scientific methodology was a matter of agency discretion that should not be set aside absent a showing by a preponderance of evidence that the agency's action is either arbitrary, capricious, an abuse of discretion, or not reasonably related to the statutory purpose." *Island Harbor v. Dept. of Natural Resources*, 495 So.2d 209, 218 (Fla. 1st DCA 1986). *Island Harbor* contested DNR's use of methodology that was allegedly unproven and unaccepted in the scientific community. The court held that agencies are permitted to choose particular scientific methodologies or techniques as a matter of discretion accorded to the agency because of its expertise. *Id.* at 217-18. The court cited *Baltimore Gas & Electric Co. v. Natural Resources Defense Council*, 462 U.S. 87, 103, which stated that the uncertainty of science only serves to emphasize the limitation of judicial review and the need for greater deference to policy making entities. *Id.* at 218. In

Island Harbor, there was sufficient evidence produced to show that the challenged methodology was realizable and, therefore, competent to support its use by DNR. The court concluded by stating that the setting of coastal construction control lines for the purpose of adequately protecting the beaches and dunes of this state is not a matter of scientific certainty and thus, the court was compelled to give great deference to DNR. *Id.* at 223.

In *Estuary Properties*, the court stated that the agency was reasonable in giving great weight to the environmental impact of the proposed development. 399 So.2d at 1379. The court held that the decision was backed by competent evidence that the development would pollute surrounding bays and that even though there was sufficient evidence presented to the contrary by the developer, the court would not substitute its judgment for a decision made by the agency that was within the realm of its responsibilities. *Id.*

Lee County downzoned a barrier island from commercial to agricultural/rural residential based on an expert study and planning staff comprehensive planning assessment. *Morales*, 557 So.2d 652. The island is habitat for several threatened and endangered flora and fauna. The planning staff assessed that development would endanger the unique environmental, archaeological, historical, and recreational resources. The court held that "in light of the substantial competent evidence regarding the potentially negative effects that future commercial development would have" the regulation could not be found to be arbitrary, capricious, nor unreasonable. *Id.* at 655.

Policy dictates that science is uncertain and therefore deference should be given to the local legislative bodies because they have the most expertise over zoning matters. *Island Harbor*, 495 So.2d at 223.

Clearly the determination of what is the best data and analysis is a matter within the Commission's discretion. Since the permit cap is not arbitrary and there is substantial competent evidence that indicates the Keys are over the carrying capacity of their infrastructure, the courts will most likely give deference to the Commission and let its decision stand. Furthermore, under Rule 9J-5.005, the Commission does not have to wait for more conclusive data before it can react appropriately to correct the problem.

Limited Growth Ordinances

Florida law offers excellent, clear rulings on what does and does not constitute a legally acceptable growth cap or limitation. First, the City of Boca Raton had established a cap on permits by referendum. This was not based on any analysis or even consultation with the City Planning Department. Upon a challenge, there was no evidence that public facilities and infrastructure were insufficient to handle the impacts of future growth. The City presented its case in the abstract with no factual showing of necessity and thus failed to establish proof to any rational justification for the cap. There was no evidence presented to indicate that any of the factors cited in support of the ordinance were the reason for the cap, which was found to

be unnecessary in light of the fact that the public facilities and infrastructure were sufficient to allow for development. The court held that the cap was too far-reaching because it unnecessarily sought to establish a water resource budget in complete disregard of the city's existing water management planning. The Court found that no substantial competent evidence existed to support a finding that the cap was rationally related to valid municipal purposes of public health, morals, safety, and welfare. Thus, the cap was arbitrary and unreasonable. *City of Boca Raton v. Boca Villas Corp.*, 371 So.2d 154, 156.

In another case, a density cap was struck down as arbitrary and unreasonable because no study was ever conducted to justify the figures used; nor could anyone determine where the figures had come from. *Innkeepers Motor Lodge v. City of New Smyrna Beach*, 460 So.2d 379 (Fla. 5th DCA 1984).

Monroe County's Rate of Growth Ordinance is distinguishable from the ordinance that was invalidated in *Boca Villas* and *Innkeepers Motor Lodge*. Unlike the situation in Monroe County, in *Boca Villas*, there were no public hearings, the city planners were not consulted, and the City presented its case in the abstract, without any evidence to support the need for a growth limitation. In contrast, Monroe County has substantial expert scientific evidence to support its decision for the permit cap and will have held numerous public hearings on the issue. Although the scientific evidence may not conclusively demonstrate that the environmental and water quality carrying capacities have been or are about to be exceeded (in the eyes of some), there is no evidence that this is not the case, and there is no contrary conclusive scientific evidence.

The case of *City of Hollywood v. Hollywood, Inc.*, 432 So.2d 1332 (Fla. 4th DCA 1983) is most directly applicable and relevant to the Monroe Rate of Growth Ordinance. In *Hollywood, Inc.*, a city had adopted an annual cap on density based on its concerns for water and sewage capacities, fire and police protection, hurricane evacuation, ecological and environmental protection, aesthetics, and public access to the ocean. *Id.* at 1334-5. Under the cap, the specific number of permits to be issued each year was based specifically and solely on the calculations concerning traffic capacity. This was because there was no existing method that would yield a specific number to represent the limitations that existed relative to the other factors.

Upon challenge, the court upheld the density cap even though it found that the traffic study upon which the overall density cap was based was flawed. *Id.* at 1334. Despite this flaw, the Court found that the specific growth allocation \ limitation was based upon and justified by a variety of considerations which were substantially related to the public interest, and not solely upon traffic considerations. *Id.* 1334 - 1336. Thus, the Court found that the number of permits chosen by the City to be allocated was a reasonable approximation of its actual, but unquantified growth limits, and thus that it could not rule that the growth cap, even given the flawed traffic numbers, was unreasonable or arbitrary *Id.* In addition, the judge gave great weight to the fact that the City Commission had held countless hearings and meetings on the issue before adopting the ordinance. *Id.* at 1335. The court stated

that the question of whether the restriction was unreasonable and arbitrary became a battle of the experts, each determined to put his client's best foot forward and that an ordinance does not become fairly debatable just because the City's experts disagree with the developer's experts, i.e., the judge still must determine the credibility of the attributed experts; otherwise, the City would prevail just by presenting an expert to uphold the City's position. *Id.* Based on the reports, public meetings, studies, and comprehensive plans, the cap was ruled to be a valid exercise of police power which contributed substantially to the public health, morals, safety, and welfare of its citizens and therefore was not arbitrary. *Id.* at 1336.

The City of Hollywood case is an extremely relevant application of the principle that a court will not substitute its judgment for that of a local government about its needs absent a showing that this judgment is arbitrary.

The court in *Bennett M. Lifter v. Metropolitan Dade County.*, 482 So.2d 479 (Fla. 3d DCA 1986), rejected the argument that the test to determine whether an ordinance is a valid exercise of police power is to measure the record, before the County Commission, which must include formal studies; the court held that the proper tests to determine a valid exercise of police power are the substantial relationship and fairly debatable tests. 482 So.2d at 481-2. The Lifter court further stated that prior completion of a formal study is not required because the constitutionality of legislative acts will be presumed; therefore, all factual determinations of a county commission will be upheld unless conclusive evidence to the contrary is shown. *Id.* In Lifter, the plaintiffs challenged the constitutionality of a zoning regulation requiring subdividers of hotels/motels to demonstrate compliance with existing codes before they could receive new permits. This regulation was enacted to assure compliance with existing zoning regulations which regulate land use, density, and parking, after numerous hotels/motels had or were in the process of subdividing and changing from non-hotel/motel use to apartment type-use. The changes had resulted in increased density and violations of the amount of off-street parking that the subdividers were required to provide. The regulation did not increase any previous requirements, but was established as a means to ensure that subdividers who did not continue to operate as a hotel/motel would not enjoy the leaner requirements of a hotel/motel operator. The judge ruled that these motives were substantially related to the public welfare, health, and safety and that they were not arbitrary, since the Commission had studied the matter extensively and the ordinance was substantiated by the totality of the evidence. *Id.*