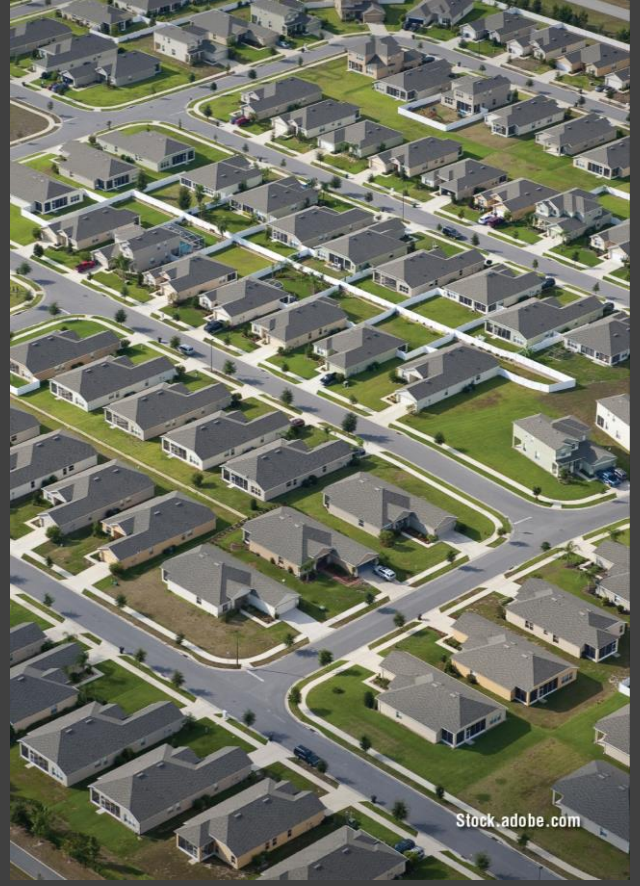

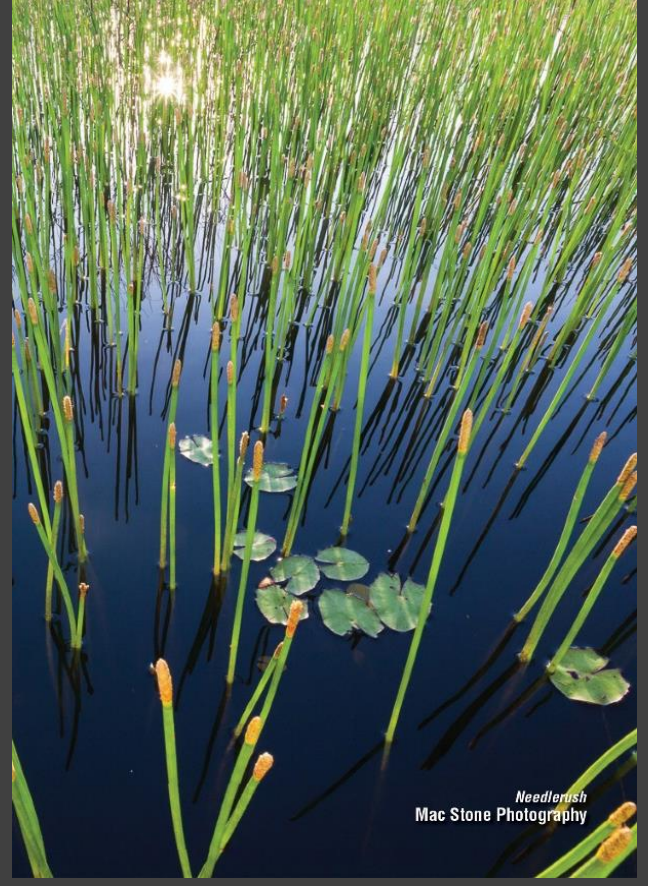

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Understanding Land Use and Growth Management Planning in Florida

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May 4, 1924 – April 13, 2012

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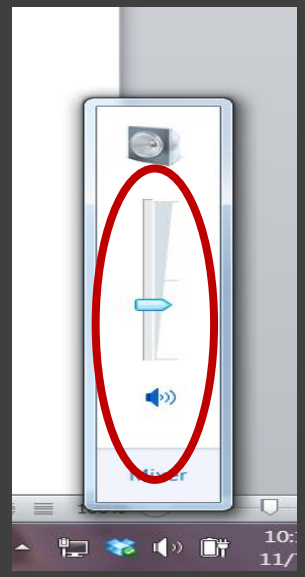

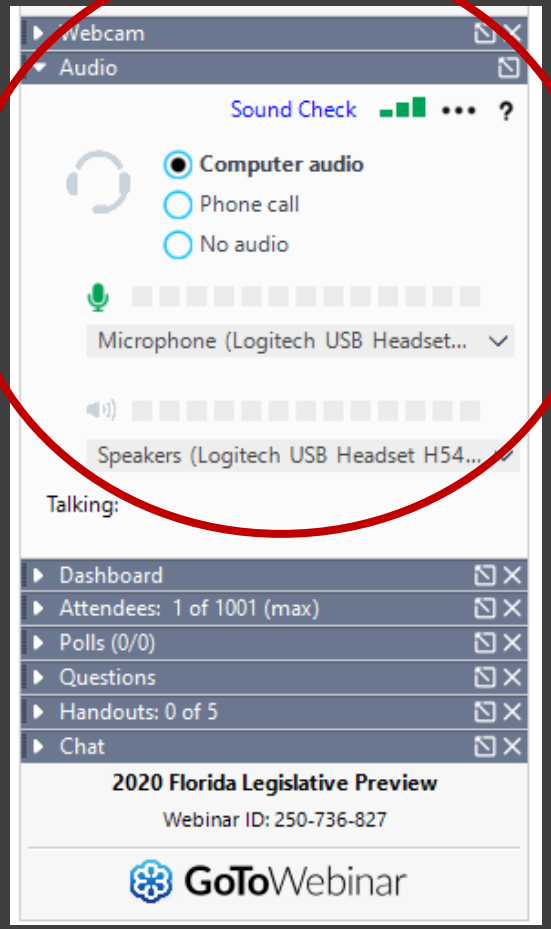

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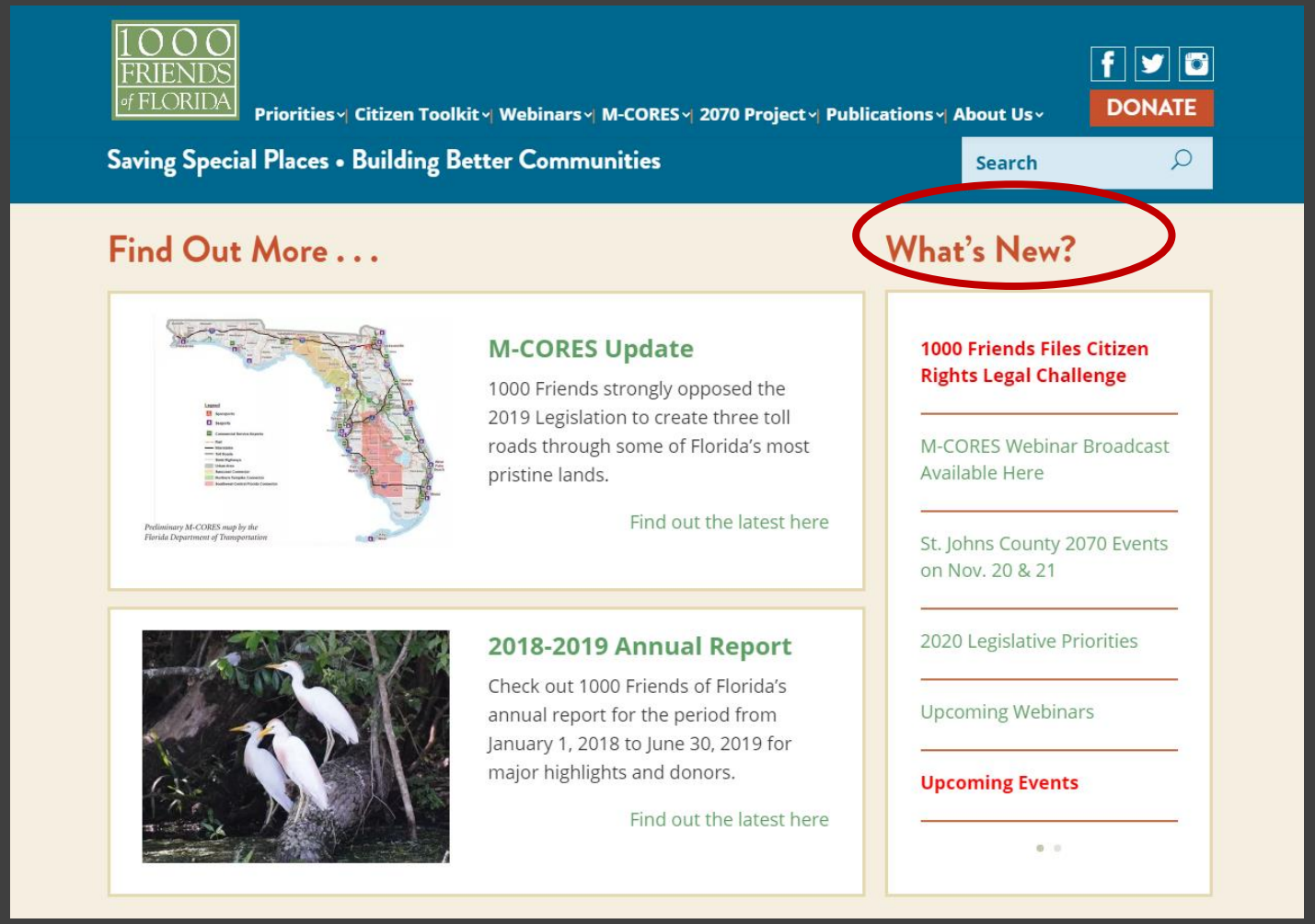

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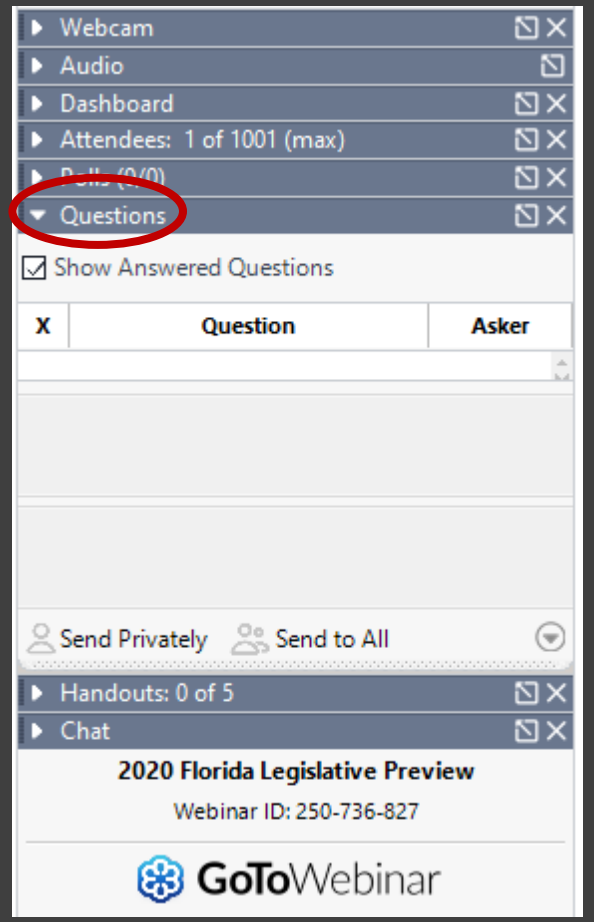

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Presenters

Paul Owens

President of 1000 Friends of Florida

Previously with the Orlando Sentinel, serving as Opinions Editor from 2013 to 2018

In that capacity wrote extensively on growth management, environment and quality of life issues facing Florida.

Also served as the Sentinel's Florida Forward Moderator, organizing and moderating public forums on topics including transportation and affordable housing

Has a Bachelor of Arts in History with honors from Swarthmore College and a Master of Arts in Journalism from Stanford University

Richard Grosso, Esq.

Attorney and law professor at the Shepard Broad College of Law at Nova Southeastern University in Ft. Lauderdale

Teaches courses in land use, environmental, energy, administrative, and constitutional law.

Former Executive Director and General Counsel of the Everglades Law Center, Inc., a public interest environmental law firm

Former Legal Director for 1000 Friends of Florida

Has 33 years of experience as a practicing lawyer and policy advocate

Has successfully litigated several of the most important and precedential land use, environment and property rights judicial decisions impacting Florida's environment.

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Jane West

Policy and Planning Director for 1000 Friends

Provides guidance to citizens on critical growth and development issues, advocates before the Florida legislature, and coordinates legal advocacy

Has practiced law for 21 years, focusing on precedent-setting public interest land use and environmental cases throughout Florida.

AV-rated attorney admitted to the U.S. Supreme Court, the 7th and 11th U.S. Court of Appeals and the Southern and Middle Districts of Florida.

Previously practiced law in Portland, Maine, and Jupiter and West Palm Beach, Florida.

Law degree from the Shepard Broad Law Center at Nova Southeastern University and B.A. from the University of South Florida.

Introduction

Paul Owens, President
1000 Friends of Florida

A Brief History of Growth Management in Florida

"… necessitated by massive, unmanaged population growth that brought with it the threat of major negative impacts on the state's environment, especially its sensitive water systems."

Dr. John M. DeGrove, Florida's "Father of Growth Management" and co-founder of 1000 Friends of Florida

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1972: Year Zero for Growth Management in Florida

Spurred by drought, Everglades fires in 1970-71, Gov. Reubin Askew convened conference on water management followed by task force on land use

Package of water management, land-use laws drafted by task force was approved by Legislature in 1972

Some highlights:

- Authorized state, regional regulation of Developments of Regional Impact
- Created special protection for areas of critical state concern
- Laid foundation for land acquisition programs
- Established Environmental Land Management Study Committee (ELMS)
  - Led by John DeGrove
  - Included broad set of stakeholders from business, labor, development, environmental community, agriculture, higher education, etc.

Gov. Reubin Askew

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The Aftermath of ELMS

Drawing on committee's work, Legislature adopted Local Government Comprehensive Planning Act in 1975

- Required local governments to adopt blueprints for growth
- Law stated intent "that no public or private development shall be permitted except in conformity with comprehensive plans, or elements or portions thereof, prepared and adopted in conformity with this act."
- Florida went from "being a laggard to a leader nationally in growth management" – John DeGrove

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Evaluating Florida's First Go at Growth Management

INCOMPLETE

- A necessary foundation, but lacking enforcement
- No requirement for local governments to comply with their own comprehensive plans
- No funding to cover costs of growth
- Infrastructure backlogs, traffic, school crowding, water pollution intensified

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ELMS II:
Florida Takes Another Stab at Growth Management

- In 1982, Gov. Bob Graham created another Environmental Land Management Study Committee (ELMS II)
- Largely drawing from ELMS II, Legislature in 1985 adopted Local Government Comprehensive Planning and Land Development Regulation Act (1985 Growth Management Act)
  - Provided state review of local comprehensive plans to ensure compliance with state law
  - Provided citizen enforcement of development decisions to ensure consistency with comprehensive plans
- Compliance, consistency became pillars of growth management in Florida

Gov. Bob Graham

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1985 Growth Management Act: More Highlights

- Established process for state to approve local comprehensive plans and amendments
- Required plan components including future land use maps, capital improvement elements and others
- Created formal state administrative hearings for challenges and sanctions for noncompliance
- Enhanced citizen standing to file challenges
- Limited most comprehensive plan amendments to twice a year

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The Verdict on Florida's Second Stab at Growth Management?

SUCCESS

- Before 1985 Act, many of Florida's local governments did not have or did not implement local plans, and some had no zoning or other land use regulations
- Act institutionalized local planning process at local level – every local government has a local plan
- Most have planning departments and ongoing planning processes to address growth and development

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Enter 1000 Friends of Florida …

- As watchdog for 1985 Growth Management Act, another on the list of successes attributable to ELMS II
- From founding in 1986, strengthened growth management
  - Promoted sustainable development throughout Florida
  - Helped enact programs to protect environmentally valuable land from development: Preservation 2000 and Florida Forever
  - Led effort to pass Sadowski Act to provide funding for affordable housing
  - Helped create Florida's Greenways and Trails program

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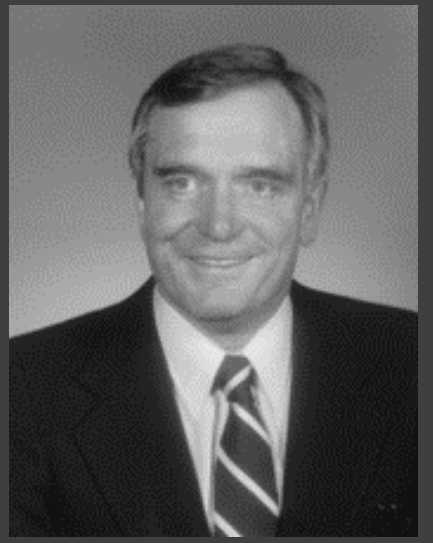
ELMS III:
More Adjustments to Growth Management

- Amid recession and pressure building against growth management, Gov. Lawton Chiles empaneled another Environmental Land Management Study Committee (ELMS III) in 1991
  - 174 recommendations, but consensus to sustain growth management system remains
- Legislature made further changes to growth management policy in 1993, adopting most of ELMS III recommendations



Gov. Lawton Chiles

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With Changing Political Climate in Tallahassee, Growth Management Momentum Wanes

- In 1995, Legislature passed Bert J. Harris Jr. Private Property Rights Protection Act
  - Creating cause of action for property owners burdened by land-use regulation to collect monetary damages
- In 2005, Legislature adopted Growth Management Reform Act
  - Changes included easing of transportation concurrency mandate for developers

Gov. Jeb Bush

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The Community Planning Act of 2011: The Great Unraveling

- Following Great Recession, Legislature and Gov. Rick Scott weakened or eliminated key growth management provisions
  - Eliminated Florida Department of Community Affairs, making new Department of Economic Opportunity's Division of Community Development the state land planning agency, and significantly reduced planning staff
  - Removed important checks and balances over local planning decisions
  - Made it more challenging for citizens to participate in the planning process
  - A "legislative wrecking crew" – Bob Graham

Gov. Rick Scott

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Community Planning Act: More Unraveling

- Lessened protection of environmentally sensitive lands
- Restricted state and regional review of comprehensive plan amendments to “important state resources and facilities” not defined in the Act
- Created expedited process that provided less time and ability for in-depth state review
- Prohibited state land planning agency from intervening in challenges
- Gave greater deference to local governments when third-party challenges did occur

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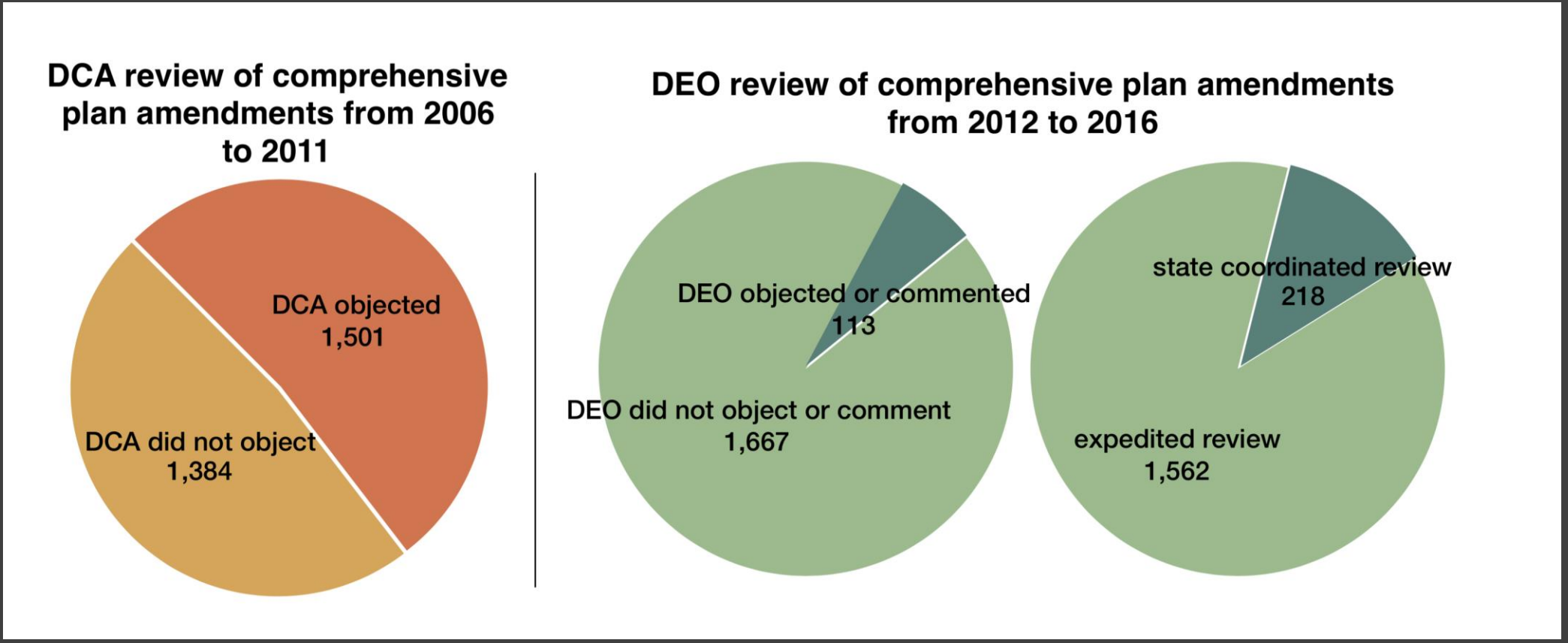
Impact of eliminating DCA



More Slings and Arrows Suffered by Growth Management Since 2011

- In 2011 …
  - Legislature weakened water policy by taking authority over the five water management district budgets and slashing them
  - Eliminated requirements that local comp plans address energy-efficient land use patterns and greenhouse gas reductions
- In 2016 and 2018 …
  - Repealed remaining requirements related to Developments of Regional impact
- In 2019 …
  - Effectively eliminated last enforcement mechanism for local comp plans with law requiring losers in consistency challenges to pay legal costs for winners

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Changes to Growth Management Since 2011: What's Been Missing?

- ELMS approach involving diverse stakeholders, careful study, consensus building
- No formal analysis of connection between good planning, environmental protection, economic growth
- No official *Florida 2070*-style recommendations on accommodating population growth while preserving environment, quality of life

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Understanding Land Use and Growth Management Planning in Florida

Richard Grosso, Esq.
Professor of Law, Nova Southeastern University, Ft. Lauderdale
rgrosso@nova.edu

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The State Review Process [for comp plan amendments]

- Substantially limits the role of the state land planning agency in reviewing and commenting on comprehensive plan amendments.
- Limited timeframes for state agency review.
- Three separate review processes for the proposal, review, and adoption of plan amendments, depending on the type of amendment.

Three Levels Of Review

- Expedited review (163.3184(3), F.S.)

  Will apply to most plans and plan amendments.
- State coordinated review (163.3184(4), F.S.)
- Small scale amendments (163.3187, F.S.)

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Department of Economic Opportunity

- Dept. of Economic Opportunity (DEO) authority to comment on and challenge plan amendments for compliance with the law is significantly reduced, limited now to the protection of **"important state resources and facilities…."** § 163.3184(3)-(5), Fla. Stat.
- That term is undefined.
- DEO has indicated it includes Coastal High Hazard Areas, hurricane evacuation, the Everglades, and urban sprawl.
- Other issues that may qualify, given language in other laws:
  - Economic Base of Agriculture, Tourism, and the Military
  - Affordable Housing
  - Areas of Critical State Concern

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Expedited Review – Ch.163.3184(3), F.S.

- Locals transmit to DEO and state agencies within 10 days
- Comments made directly to local government within 30 days
- Adoption hearing must be held within 180 days
- DEO determines completeness within 5 days
- Amendment goes into effect 31 days after completeness unless challenged
- 90% plus of all amendments use this process

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State Coordinated Review – Ch. 163.3184(4), F.S.

- Applies to ACSC, RLSAs, Sector Plans, EAR based amendments, new comp plans and certain exempted DRI categories (hospitals, electric lines, sports facilities/seating, harbor expansions, petroleum storage, water ports/marinas and others)
- Locals transmit to DEO and state agencies
- DEO collects comments, prepares ORC report, and sends to local government
- Local government adopts within 180 days and sends to DEO, state agencies and any commenting local government
- DEO determines completeness within 5 days and issues NOI within 45 days on its website
- Amendment goes into effect unless challenged

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Small Scale Amendments – Ch. 163.3187, F.S.

- Involves 10 acres or less and does not cumulatively exceed 120 acres
- Increased to 20 acres for rural areas of opportunity
- No text change allowed – limited to FLUM only unless directly related to amendment
- Only requires one public hearing
- Becomes effective 31 days after adoption unless challenged by DEO or affected party

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Other Important Programs / Types of Plan Amendments

- Developments of Region Impact (DRI in Ch. 380.06, F.S.)
- Areas of Critical State Concern (Ch. 380.05, F.S.)
- Sector Plans (Ch. 163.3245, F.S.)
- Rural Land Stewardship Areas (Ch. 163.3248, F.S.)
- Evaluation and Appraisal Report (EAR in Ch.163.3191, F.S.)

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Effectively Using the State Review Process

- Other agencies may also (but are not required to) comment on large-scale plan amendments, but only on issues directly related to their statutory mission.

- For example, regional planning council comments are limited to adverse effects on regional resources or facilities identified in the regional policy plan and extra-jurisdictional impacts that are inconsistent with affected local government's plan.

- The comments of water management districts are limited to flood protection and floodplains, wetlands and other surface waters and regional water supply.

- All comments go directly to the local government. Section 163.3184 (3), Fla. Stat.

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State Commenting Agencies

- Department of Environmental Protection
- Department of Transportation (through its district offices)
- Department of State
- Department of Education
- Department of Agriculture and Consumer Services
- Florida Fish and Wildlife Commission
- Governor’s Office of Tourism, Trade and Economic Development
- The appropriate Regional Planning Council
- The appropriate Water Management District
- Other commenting agencies may include county(s), municipality(s), and military installation(s) impacted by the proposed amendment

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Other Commenting Agencies

- Typically, during the proposed phase agencies have approximately 30 days after the first public hearing to submit comments.

- During the adopted phase, those agencies that commented during the proposed phase have approximately 30-45 days after the adoption hearing to submit comments.

- DEO may challenge adopted amendments based on these comments.

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Effectively Using the State Review Process

- Important to contact the appropriate review agencies with any concerns about plan amendments immediately after the first governing body public hearing in the proposed phase and the adoption hearing in the adopted phase to ensure that there is sufficient time for them to comment.

- DEO more likely to object with support & data & analysis from a sister agency of expertise

- Whether or not DEO objects/ challenges, the comment letters can be important evidence (data and analysis) in a citizen challenge.

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Citizen Challenges To Comprehensive Plan Amendments – Ch. 163.3184(5)

- Standing (the legal right) to challenge a plan amendment is quite liberal; the challenger must be an "affected person."

- "Affected persons" include those who own property, reside, or own or operate a business within the boundaries of the local government that adopted the plan amendment or who own property which abuts the property affected by a future land use map amendment.

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Standing to Challenge Plan Amendments

- The “affected person” must have submitted comments during the period of time beginning with the transmittal hearing and ending with the adoption of the plan amendment.

- This may be satisfied by oral and/or written presentation(s) at local governing body public hearings, and/or letters sent to elected officials at or between the transmittal hearing and final adoption of the plan amendment.

- .

Strongest Legal Issues for Challenge

- Plans must include **"meaningful and predictable standards** for the use and development of land and provide meaningful guidelines for the content of more detailed land developments and use regulations." § 163.3177(1), Fla. Stat.

- **Plans must establish the key policy decisions**; it violates the law to remove those provisions from the Plan or rely on the land development code or inter-agency agreements, etc. DCA, *et al.* v. Monroe County, *1995 Fla. ENV LEXIS 129; 95 ER FALR 148* (Admin. Comm., Dec. 12, 1996)

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Data and Analysis Requirement

- Amendments **must be based upon surveys, studies, and data** regarding the character of undeveloped land, the availability of public facilities and services, growth projections and other issues. . §163.3177 (1) f, and (6) (a) (2) and (8), Fla. Stat.

- Data & Analysis must be professionally acceptable. §163.3177 (1) f (2), Fla. Stat.

- To be "based upon" data & analysis means **"to react to it in an appropriate way and to the extent necessary as indicated by the data available …."** §163.3177(1) (f), Fla. Stat.

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Data and Analysis Requirement

- **Conclusory claims inadequate – must be supported by actual data or analysis.** *Moehle v. City of Cocoa Beach, et al*, 1997 WL 1052873, DOAH 96-5832GM (Oct. 20, 1997)

- **There must be data to support assurances articulated in goals, objectives & policies.** *Austin et. al. v. City of Cocoa and DCA*, ER FALR 89:0128 (Admin. Comm. 1989)

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The Limitations of the Data and Analysis Requirement

The application of a methodology utilized in data collection or whether a particular methodology is professionally accepted may be evaluated. However,

… **the evaluation may not include whether one accepted methodology is better than another**.

… **Original data collection** by local governments is **not required.** §163.3177(1) (f), 2, Fla. Stat.

- **New analysis of existing data** may be presented at hearing, Zemel v. Lee County, DOAH Case No. 90-7793GM, RO Para. 129-145.

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Internal Consistency Requirement

- Local plans, as locally-specific applicationsof general statutory language, provide more specific/ enforceable stadnards thatn the sttute.

- § 163.3177(1), Fla. Stat.: **plan must "guide future decisions in a consistent manner** …." The plan's "goals, objectives, and policies, shall describe how the local government's programs, activities, and land development regulations will be initiated, modified, or continued to implement the comprehensive plan in a consistent manner…."

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Future Land Use & Transportation Map Internal Consistency

Section 163.3177(2), Fla. Stat.:

"[**c]oordination of the several elements** of the … comprehensive plan shall be a **major objective ….** The several elements of the comprehensive plan shall be consistent.

Each map depicting future conditions [including the Future Land Use Map] **must reflect the principles, guidelines, and standards within all elements**, and each such map must be contained within the comprehensive plan."

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FLUM Must “Walk The Talk”

- **FLUM** "is a critical component of the Plan. [It] **provides an essential visual representation of the commitment to uphold ... goals, objectives, and policies** ….” *Austin et al .v. City of Cocoa and DCA*, 1989 WL 645182 (1989); ER FALR 89:0128 (Admin. Comm. 1989) (Rec. Order at 75).

- **Future Land Use Map decisions that do not reflect a plan’s goals, objectives and policies are not in compliance.** *SCAID v. DCA, and Sumter County, et al*, 730 So. 2d 370 (Fla. 5th DCA 1999); *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); *DCA v. St. Lucie County*, 1993 WL 943708, 15 FALR 4744 (Admin. Comm. 1993)(converting farmland to urban use fails to reflect policies discouraging urban sprawl, and promoting agricultural protection, land use compatibility and other objectives); *Pope v. City of Cocoa Beach et al.*, 1990 WL 749217, 12 FALR 4758 (1990) (increased density fails to reflect objective to direct population away from the coastal high hazard area)

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The Legal Standard to Successfully Challenge a Plan Amendment

- Burden always on challenger to overcome presumption that the plan amendment is “in compliance.

- But the state is given a less onerous burden than applies to citizens.

- On the other hand, the basis upon which DEO can challenge is limited, while citizens can enforce any part of the law on any relevant basis

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The Legal Standard to Successfully Challenge a Plan Amendment

- **DEO** ability to challenge shall be limited to the comments it or other reviewing agencies provided, and must "state with specificity how the amendment will adversely impact the important state resource of facility." The "fairly debatable" issue.
- The local government may challenge DEO's determination of an important state resource or facility, in which case, DEO must prove "by clear and convincing evidence" that its determination of adverse impact is correct.
- The local government's determination that the plan remains internally consistent is subject to the "fairly debatable" standard. § 163.3184 (5) (c) 2, Fla. Stat.

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Citizen Challenge

- An “affected person” (local citizen) has 30 days to file a petition for administrative hearing after the local government’s adoption of the amendment.

- The state land planning agency may not intervene in such proceedings.

- In such challenges, the comprehensive plan or plan amendment is determined to be in compliance if the local government’s determination of compliance is “fairly debatable.” § 163.3184 (5)(c), Fla. Stat

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The “Fairly Debatable” Standard Of Review

A “highly deferential standard, **requiring approval** of a planning action **if reasonable persons could differ as to its propriety**.” *See Martin Cnty. v. Yusem*, 690 So. 2d 1288, 1295 (Fla. 1997).

But… **The standard of proof to establish a finding of fact is preponderance of the evidence**. §120.57 (1) (l), Fla. Stat.; *Sierra Club et. al. v. Miami Dade County*, 2006 Fla. ENV LEXIS 155, 2006 ER FALR 209 (Final Order No. DCA 06-GM 219 (Sept. 12, 2006) (Rec. Order ¶ COL 185).

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Formal Administrative Hearings (Trials)

Very similar to civil trials before a trial judge with no jury

Full discovery [depositions, interrogatories, etc], pre-trial motions, and trial prep.

But much more expedited thatn civil trials; hearings usually within 30-70 days after petition filed.

Trials similar to bench trials, but typically more relaxed than judicial trials [e.g. no bailiff], and ALJ's are typically experienced in comp plan cases

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Formal Administrative Hearings - Evidence

Rules of evidence apply, but “hearsay rule” is relaxed – can be introduced to corroborate non-hearsay evidence.

Typically involves competing planning and other expert witnesses, whose testimony tends to revolve around whether:

- The data and analysis submitted to support the amendments is “professionally accepted”
- Whether the amendment reacts appropriately to the data and analysis.
- The impacts the plan, as amended, are likely to allow/ create
- Whether the plan as amended remains internally consistent

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After the Hearing

- **All parties submit Proposed Recommended Orders, citin to the trial record.**
- **If the administrative law judge finds the amendment not in compliance**, the recommended order is sent to the Administration Commission for final agency action.
- The Administration Commission must enter a final order "expeditiously but at a minimum within the time period provided by s. 120.569." § 163.3184 (5)(d), Fla. Stat.
- Under §120.569(2)(l), Fla. Stat. an agency must issue a Final Order within 90 days of receipt of the Recommended Order.

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After the Hearing

- **If the ALJ recommends that the amendment be found in compliance,** he or she "shall submit the recommended order to the state land planning agency."§ 163.3184(5)(e), Fla. Stat.

- **If DEO determines that the plan amendment should be found not in compliance**, it "shall make every effort to **refer** the recommended order and its determination expeditiously **to the Administration Commission** for final agency action, but at a minimum within the time period provided by s. 120.569." 163.3184(5)(e)1, Fla. Stat.

- **If DEO determines that the plan amendment should be found in compliance**, it "shall make every effort to enter its final order expeditiously, but at a minimum within the time period provided by s. 120.569." § 163.3184(5)(e), Fla. Stat.

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What it Means If Amendment "Not in Compliance"

- Governor and Cabinet Practice
- - part facts & law; part politics

- Gov & Cab. Cannot invalidate amendments

- Can only levy sanctions (including withholding of funds) for failure to withdraw a non-compliant amendment. Section 163. 3184 (8), Fla. Stat.

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Appeals

- Standing to challenge plan amendments does not guarantee standing to appeal if you do not prevail.

- To appeal, one must be “adversely affected” for purposes of §120.68 (1) (a), Fla. Stat., a standard courts have interpreted to require a “special injury”.

- Appellate decisions have been mixed.

Final Analysis – Plan Amendment Reviews & Challenges

Currently not a strong state land planning agency.

DEO has found few plan amendments not in compliance.

Citizens carry the responsibility to implement the act,

State's planners no longer a department unto themselves, but a division subservient to the over-arching economic development mission of the new department, with half its former planning staff, implementing a law that tells them that a plan amendment better "clearly and convincingly" be a huge deal before they seek to make a comment or challenge.

Act still authorizes strong planning but doesn't necessarily require it or allow the state to enforce such a requirement.

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Final Analysis – Plan Amendment Reviews & Challenges

State's role as referee over inter-jurisdictional planning disputes diminished.

Local governments concerned about the impacts of their neighbors planning decisions should be assertive to insist their neighboring communities do not make planning decisions that adversely impact their citizens, resources or facilities.

All interest groups might want to consider whether joint planning, regional or other collaborative planning efforts between and among local governments and regional and state agencies might make up for the lack of mandatory mechanisms in the act for such things.

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PLAN IMPLEMENTATION – Land Development Regulations

Local governments implement their comprehensive plans through land development regulations and development orders, which must be in compliance with the comprehensive plan. Successful challenges at this stage are particularly difficult.

- Land development regulations (LDRs)
- Development orders (DOs)
- Permitting

Land Development Regulations (LDRs) – Ch. 163.3202, F.S.

Land development regulations (LDRs) are the local ordinances that make the comprehensive plan work. These deal with:

- Subdivisions
- Zoning
- Compatibility
- Well fields, flooding, drainage and stormwater management
- Environmentally sensitive lands
- Signage
- Concurrency management of public facilities
- Can challenge within one year under 163.3213, F.S.

LDRs

- Typically, the Local Planning Agency (LPA) conducts at least one public hearing.
- The governing body also must hold a public hearing prior to adoption.
- Most LDRs are not challenged.
- However, a process is in place should a “substantially affected person” believe that the LDR is inconsistent with the plan.

Development Orders Consistency Requirement

Act strictly prohibits the approval of a development order that is inconsistent with Plan. §§163.3161(5), 163.3184(7), and 163.3194(1) (a), §163.3194(1) & (3), 163.3215, Fla. Stat.; *Pinecrest Lakes v. Shidel*, *795 So.2d 191* (Fla. 4th DCA. 2001)

Dev. Order decisions are considered "quasi-judicial", as they implement the established law (the comprehensive plan)…

Thus allowing far less discretion to the local government and allowing much greater "strict" judicial scrutiny of the decision.

Snyder v. Board of County Commissioners of Brevard County, 627 So. 2d 469 (Fla. 1993); *Machado v. Musgrove*, 519 So. 2d 629 (Fla. 3d DCA 1987)

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Quasi-Judicial Process

- Challenges based on violations of the A **quasi-judicial / due process rules are brought under a different legal mechanism – appeals-like processes called "Petitions for Writ of Certiorari", that are limited to proving violations of law based o the existing record before the local government.**

- **These record review/ cet. challenges also apply to challenges to development orders on the basis that they violate the** land development code [as opposed to the comp plan]

- Such challenges are **less expensive** [because there is no trial process] **but legal standing is more limited & challenger faces more difficult burden** to prevail in court. *Renard v. Dade County*, 261 So. 2d 832, 835 (Fla. 1972).

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Quasi-Judicial Process

- A **quasi-judicial hearing must meet basic due process requirements** of providing notice & opportunity to be heard.
- **Exactly what "process" is "due" is not dictated by the courts, and varies with the nature and extent of the impact of the decision being made**. *Carillon v. Seminole County*, 45 So.3d 7 (Fla. 5th DCA 2010).
- Such proceedings are not governed by "strict rules of evidence and procedure." Id. at 10.
- At a minimum, parties must be able to **present evidence, cross-examine witnesses, and be informed of all the facts upon which the commission acts**. *Jennings v. Dade County*, 589 So. 2d 1337, 1340 (Fla. 3d DCA 1991).

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Party or Public?

- All “parties” to a quasi-judicial proceeding are entitled to some measure of procedural due process in that quasi-judicial hearing. *Carillon Community Residential v. Seminole County*, 45 So.3d 7, 9 (Fla. 5th DCA 2010).

- But “**important to distinguish between *parties* and *participants.***”

- **The law is not clear.**

Specific Law Creating Right to Challenge Consistency with Comp Plans

- "aggrieved or adversely affected party" may challenge a rezoning by bringing a declaratory judgment action in local circuit (trial level) court. § 163.3215

- **Standing is liberalized** compared to certiorari cases, but still requires an adverse effect on the Plaintiff that exceeds the impact on the general public. *Save the Homosassa River Alliance, Inc. v. Citrus County,* 2 So. 3d 329 (Fla. 2nd DCA 2008)

- This is a **de novo action** – a full trial before a judge (no jury) with new witnesses & evidence – not limited to the record before the local government.

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Definition of “Consistent”

Section 163.3194(3) defines “consistent”:

(a) A development order …shall be **consistent** with the comprehensive plan **if the land uses, densities or intensities, and other aspects** of development permitted … **are compatible with and further the objectives, policies, land uses, and densities or intensities** in the comprehensive plan **and if it meets all other criteria** enumerated by the local government.

(b) A development approved … shall be **consistent with the comprehensive plan if the land uses, densities or intensities, *capacity or size, timing, and other aspects*** of the development **are compatible with and further the objectives, policies, land uses, and densities or intensities** in the comprehensive plan ***and if it meets all other criteria*** enumerated by the local government.

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Scope of Consistency Requirement

Most courts say all adopted, relevant provisions of a comprehensive plan are enforceable. *Pinecrest Lakes, Inc. v. Shidel,* 795 So.2d 191 (Fla. 4th DCA 2001); *Machado v. Musgrove*, 519 So. 2d 629, 632 (Fla. 3d DCA 1987); *Southwest Ranches Homeowners Assoc., Inc. v. County of Broward*, 502 So.2d 931, 936 (Fla. 4th DCA 1987) ; *Save the Homosassa River Alliance, Inc., et al v. Citrus County,* 2 So.3d 329 (5th DCA 2008); *Bay County v. Harrison*, 13 So.3d 115 (Fla. 1st DCA 2009)

Contrary case: *Heine v. Lee County*, 221 So.3d 1254 (Fla. 2d DCA 2017):

"The statute enunciates only three bases upon which a party may challenge a development order's purported inconsistency with a comprehensive plan. … "use or density or intensity"

Consistency Challenge Legal Standards

- **Burden is on the proponent of the development order** to prove that it conforms strictly to the comprehensive plan. *U.S. Sugar Corp. v. 1000 Friends of Fla*., 134 So. 3d 1052 (Fla. 4th DCA 2013)

- Board of County Commissioners of Brevard County v. Snyder, 627 So. 2d 467 (Fla. 1993) established "strict scrutiny" standard of review.

- A strict examination of all aspects of the development order compared to all relevant plan provisions – the "antithesis of deferential review". *Machado v. Musgrove*, 519 So. 2d 629, 631 (Fla. 3d DCA 1987)

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Strict Scrutiny Means…

- Court gives no deference to the interpretation of the comprehensive plan given by local government. *Board of County Commissioners of Brevard County v. Snyder*, 627 So. 2d 467, 475 (Fla. 1993); *Johnson v. Gulf County*, 26 So.3d 33 (Fla. 1st DCA 2009); *Pinecrest Lakes v. Shidel, 795 So.2d 191* (Fla. 4th DCA. 2001).

- Court's interpret the plans, which are "legislation" like they interpret laws – i.e., "plain language" and other rules of interpretation. *1000 Friends of Fla., Inc. v. Palm Beach County and Bergeron Sand & Rock Mine Aggregates, Inc.*, 69 So. 3d 1123 (Fla. 4th DCA 2011)

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Focus on Rezonings

- Comp plan's **Future Land Use Map & element establish a range of allowable uses and densities** / intensities over large areas, and the specific use and intensities for specific parcels within that range decided by the zoning map.

- Local governments **not required to rezone land to the most intensive use potentially allowed by the plan** so long as zoning is consistent with the range of uses allowed by the plan. *Brevard County v. Snyder*, 627 So. 2d 469 (Fla. 1993). In *Lee Cty. v. Sunbelt Equities*, 619 So. 2d 996, 1006 (Fla. 2d DCA 1993)

- **Proposed use must be permitted in the plan** "either specifically or by reasonable implication. *Saadeh v. City of Jacksonville,* 969 So.2d 1079 (Fla. 1st DCA 2007).

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Remedy for Inconsistency

- The statute authorizes "injunctive or other relief." §163.3215(3) and (4), Fla. Stat.

- Interpreted broadly and strictly - Courts can require removal of buildings constructed in violation of a plan. *Pinecrest Lakes, Inc. v. Shidel*, 795 So. 2d 191 (Fla. 1st DCA 2001).

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But… The 2019 Stink-Bomb

- 2019 bill, enacted by Legislture and signed by Gov. DeSantis added this:

Section 163.3215 (8)(c), *Fla. Stat.*:

*The **prevailing party** in a challenge to a development order under subsection (3) is **entitled to recover reasonable attorney fees** and costs incurred in challenging or defending the order, including reasonable appellate attorney fees and costs.*

-

Final Advice On Using The Law & Process

- Educate elected and appointed officials, the media & public.
- Get appointed
- Emphasize economic & social implications
- Diversify your coalition.
- Develop relationships with staff, whose recommendations usually determine outcomes – they work for you too.
- Prepare for hearings from the beginning (documentation, etc).
- Be prepared, factual, and solution – oriented

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Advice on Being an Effective Advocate in the Planning Process

- Use public records laws. If emails, texts, or other written materials have been sent to staff or officials, you have a right to see them. Calendars and phone messages are also public.
- Learn the process, timeframes, deadlines, etc.
- Offer compromises or hold firm based on circumstances.
- Use the law to support & shape advocacy and messaging but understand the limitations of litigation.
- Still ultimately political decisions; so electing planning adherents matters most.

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Public Hearings During This Pandemic

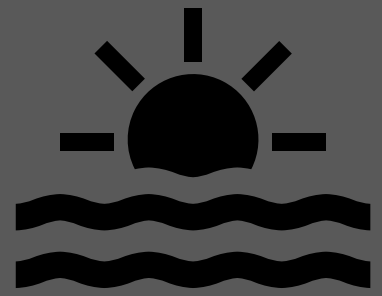
Jane West, Policy & Planning Director
1000 Friends of Florida

EXECUTIVE ORDER 20-69

Executive Order 20-69 suspends any law that requires a quorum to be present in person. Suspends the requirement that a local governing body meet at a specific public place. Local governments may use telephonic and video conferencing for public hearings.

March 20, 2020 (extended by Executive Order 20-112 – no expiration date)

Local Government in the Sunshine



Fla. Stat. 286 - Sunshine is still in place!

- Meetings must be reasonably noticed
- Meetings must be open to the public
- Minutes must be taken
- The public must have an opportunity to speak
- There must be a verbatim transcript of the proceedings

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Due Process Issues

- DOAH and many Courts have switched to virtual hearings. This is appropriate for quasi-judicial hearings as well.
- Is the technology sufficient for public participation?
- Is preliminary training offered for those members of the public who are not familiar with the technology?
- Does the local government have an IT contact to address glitches?
- Provide records online and in advance of the public hearing
- Is there a dedicated phone line and email address for public comment to become part of the record?

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How are counties handling hearings?

* Source: Institute for County Government

- 38 counties are meeting in person
- 32 counties are meeting remotely

Choices	Percentage	Count
Other	35.82%	24
Zoom	29.85%	20
Facebook Live	17.91%	12
GoTo Meeting/Webinar	10.45%	7
No answer	10.45%	7
YouTube Live	8.96%	6
	Total Entries	67
	Unanswered	*6*

How is the public participating?

* Source: Institute for County Government

Choices	Percentage	Count
Other	35.82%	24
Email	28.36%	19
Through electronic chat function	19.40%	13
In person	17.91%	12
No answer	5.97%	4
They cannot	1.49%	1
	Total Entries	67
	Unanswered	*12*

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Questions and answers

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Please ask questions!

- Your webinar control panel includes a “Questions” box
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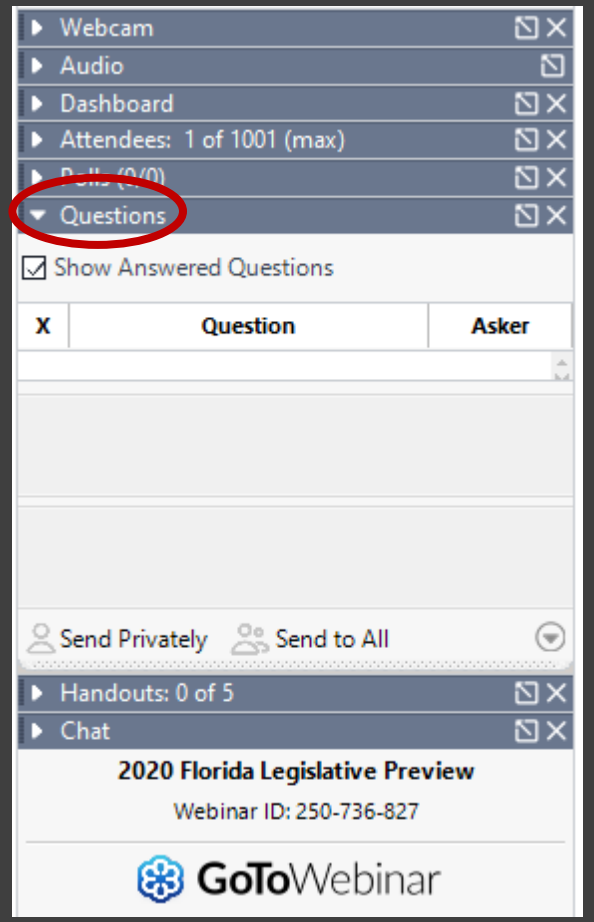
- Please keep your questions succinct!
- Staff will ask the presenters questions, as time permits



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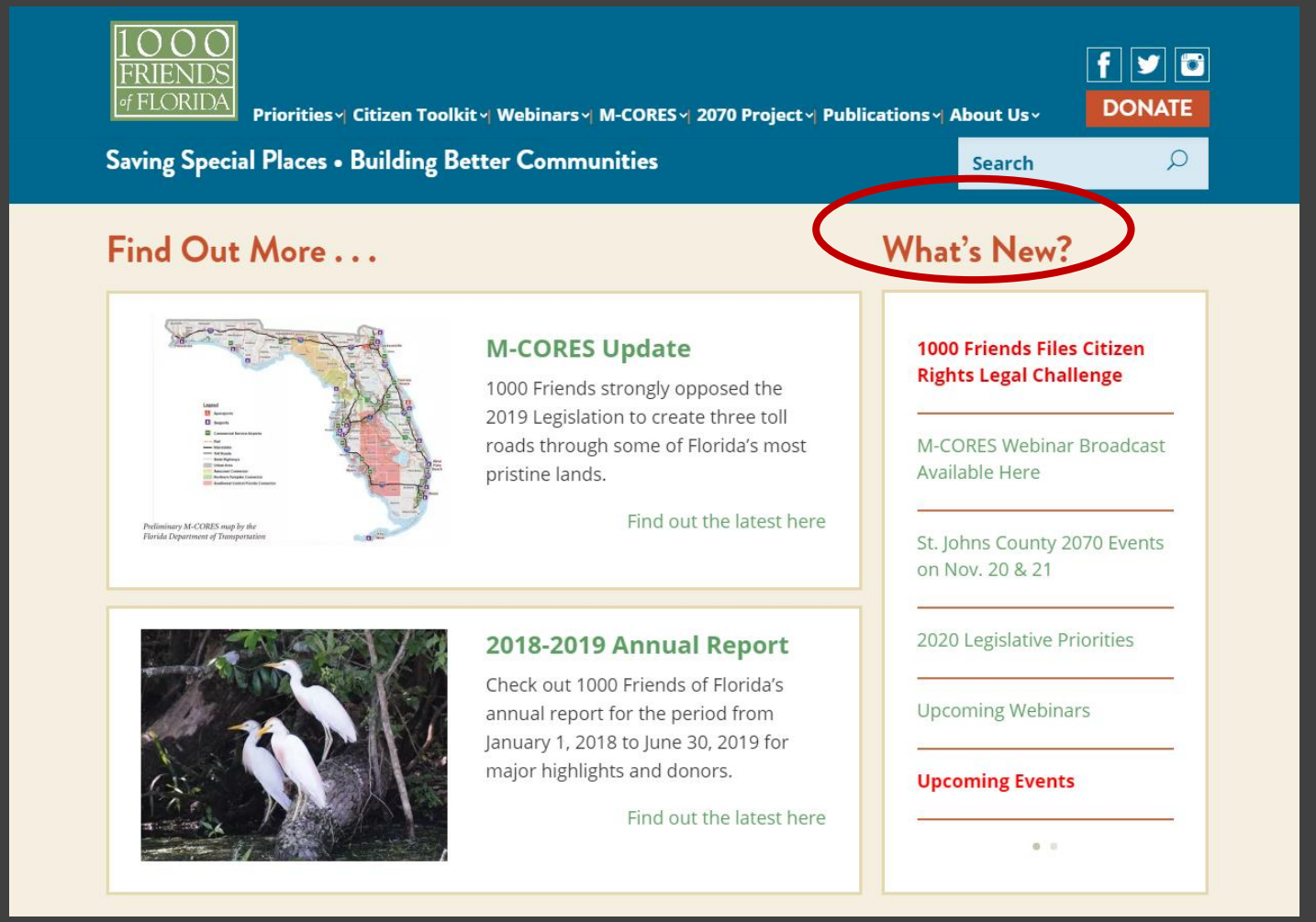
The PowerPoint is posted under "What's New" at www.1000fof.org



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An application has been submitted for Florida Landscape Architects (DBPR) but we cannot guarantee approval.

The Florida Bar has reopened applications for CLE credits and we are seeking to have this event approved but cannot guarantee credits at this time

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3. Add the course number, provider number and your number to the certificate
4. Submit the certificate yourself to DBPR

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