



# LAKE COUNTY

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## MEMORANDUM

**TO:** Amye King, AICP, Growth Management Director  
Brian T. Sheahan, AICP, Director of Planning and Community Design

**FROM:** Sanford A. Minkoff, County Attorney   
Erin Hartigan, Assistant County Attorney 

**DATE:** April 30, 2009

**RE:** 2030 Comprehensive Plan – County Attorney's Office Comments  
*\*Page Numbers reference the April 15, 2009 copy of the proposed Plan*

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County Attorney staff met with Planning and Growth Management staff a number of times to review the proposed 2030 Comprehensive Plan, and provided some general comments that have been incorporated into the Workshop Staff Report. However, there are several legal issues raised by the proposed 2030 Comprehensive Plan that the County Attorney wishes to comment on separately; for this reason, the following memo is submitted for your review.

1. **Issue:** requirements for dedication of easements and other interests in property.
  - **Example:** p. 32 of the proposed Comprehensive Plan, Future Land Use Element, Policy I-2.2.2, "Guiding Principles for Development," second bulletpoint, under Objective I-2.2, "Sunnyside Community": "Wetland areas shall be delineated as part of any development application. Wetlands within the property proposed for development shall be placed under a conservation easement and dedicated or deeded to an approved governmental or non-governmental conservation agency."
  - **Recommendation:** For every reference to a dedication of conservation easements, add the phrase "to the extent allowed by law."
  - **Rationale:** Under the United States Supreme Court decisions in Nollan v. California Coastal Commission and Dolan v. City of Tigard, a government cannot require a dedication of private property without there being an "essential nexus" (Nollan) between the dedication requirement and the legitimate public interest in the dedication, and a

- “rough proportionality” (Dolan) between the required dedication and the impact of the proposed development. With regard to how the City of Tigard might have applied the “rough proportionality” test to the required dedications in that case (a dedication of area in the floodplain for storm drainage and a dedication of property adjacent to floodplain as a bicycle/pedestrian pathway), the Supreme Court stated, “No precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development.” Dolan v. City of Tigard, 512 U.S. 374, 391 (1994). Any time the County requires dedication of wetlands on private property to the County or any another agency, the County must perform the legal tests articulated by the U.S. Supreme Court in Nollan and Dolan.

2. **Issue:** Prohibitions on the filling of wetlands.

- **Example:** p. 36 of the proposed Comprehensive Plan, Future Land Use Element, Policy I-2.3.14, “Environmental Design Standards,” under Objective I-2.3, “Ferndale Community”: “The filling of wetlands within Ferndale shall be prohibited, except as necessary to provide legal ingress and egress to buildable areas.”
- **Recommendation:** For every statement concerning a prohibition on the filling of wetlands, add the phrase “to the extent allowed by law.”
- **Rationale:**
  - Under Florida’s Bert J. Harris, Jr., Private Property Rights Protection Act (Harris Act), the Florida Legislature has provided, “as a separate and distinct cause of action from the law of takings . . . for relief, or payment of compensation, when a new law, rule, regulation, or ordinance of the state or a political entity in the state, as applied, unfairly affects real property.” Fla. Stat. §70.001(1) (2006). The Harris Act further states in §70.001(2), “When a specific action of a governmental entity has inordinately burdened an existing use of real property or a vested right to a specific use of real property, the property owner of that real property is entitled to relief, which may include compensation for the actual loss to the fair market value of the real property caused by the action of government, as provided in this section.”
  - A blanket prohibition on the filling of wetlands in a particular area of the County could subject the County to Bert Harris claims for those who own property with large amounts of wetlands where such property is otherwise developable.

3. **Issue:** CUP requirement for resource extraction, including bottling operations.

- **Example:** p. 90 of the proposed Comprehensive Plan, Future Land Use Element, Policy I-7.4.9, “Natural Resource Extraction,” under Objective I-7.4, “Coordination of Land Use with Environmental Protection”: “Lake County shall regulate uses that extract or deplete

natural resources of the County, to the extent allowed by federal and state law. In addition to requiring compliance with all other provisions of the Comprehensive Plan and Land Development Regulations, these uses including but not limited to mining and bottling operations shall require a conditional use permit approved by the Board of County Commissioners. The approval, or existence, of a mine or other extractive use shall not be construed as the basis for a future land use change.”

- **Recommendation:** The provision does not necessarily need to be amended, as it includes the phrase “to the extent allowed by federal and state law,” but because the County is effectively preempted in the area of water use regulation by the State of Florida and the Water Management Districts, a better alternative might be to limit resource extraction activities to lands within the Heavy Industrial or some other future land use category.
- **Rationale:** With regard to review of bottling operations and other water-intensive uses that undergo consumptive use permit review by one of the State’s Water Management Districts, while the County could probably require a conditional use permit for uses proposing water resource extraction, the County’s ability to deny its own conditional use permit if the Water Management District with jurisdiction were to approve the application for a consumptive use permit is probably limited or nonexistent.
  - Recently, on March 20, 2009, the Fifth District Court of Appeal (Fifth DCA) of the State of Florida issued a corrected opinion for a previous opinion filed in the case of Marion County v. C. Ray Greene, III. While this opinion is not yet final, it is unlikely that Marion County will petition for certiorari to the Florida Supreme Court, and the contents of this corrected opinion from the Fifth DCA are instructive. In this case, Marion County noted that the water withdrawal being proposed by Mr. Greene required a special use permit (SUP) from Marion County, in addition to a consumptive use permit (CUP) from the St. Johns River Water Management District. However, Greene did not obtain a SUP from Marion County prior to applying to the St. Johns Water Management District for a CUP. Marion County argued that the District should not have been able to issue their CUP until Greene showed that he had received an SUP from the County. The 5<sup>th</sup> DCA rejected this argument, stating:

Chapter 373 of the Florida Statutes grants the District exclusive authority to approve CUP applications. Section 373.217(3) expressly states that when a county ordinance is in conflict with the water management district’s exclusive authority, the ordinance is deemed superseded for purposes of regulating the consumptive use of water. Neither the statutes nor the rules regarding CUPs impose any requirements on the District related to compliance with a local government’s comprehensive plan or land development regulations.

Marion County v. C. Ray Greene, III, 2009 WL 722021 (Fla. 5th Dist. Ct. App. 2009).

4. **Issues:** A reference to “annexation agreements,” and a provision concerning Interlocal Service Boundary Agreements.

- **Examples:**

- **Annexation Agreements:** p. 33 of the proposed Comprehensive Plan, Future Land Use Element, Policy I-2.3.1, “Annexation Agreements,” under Objective I-2.3, “Ferndale Community”: “Within 12 months of the effective date of the Comprehensive Plan, the County shall pursue Annexation Agreements with the Town of Montverde and City of Minneola in order to preserve the integrity of Ferndale as a rural community within unincorporated Lake County.”
- **Interlocal Service Boundary Agreements:** p. 95 of the proposed Comprehensive Plan, Future Land Use Element, Policy I-7.10.2, “Interlocal Service Boundary Agreements,” under Objective I-7.10, “Intergovernmental Coordination, which states in part: “Interlocal Service Boundary Agreements that consider central water and sewer utilities shall include a Joint Planning Area wherein the County and municipality agree upon the future land use of the lands within the boundary.”

- **Recommendations:**

- **Annexation Agreements:** Amend Policy I-2.3.1 as follows: “Within 12 months of the effective date of the Comprehensive Plan, the County shall pursue Annexation Agreements binding agreements concerning annexation pursuant to Chapter 171 of the Florida Statutes with the Town of Montverde and City of Minneola, in order to preserve the integrity of Ferndale as a rural community within unincorporated Lake County.”
- **Interlocal Service Boundary Agreements:** Delete Policy I-7.10.2 or amend it to state that the County shall comply with Chapter 171 Part II of the Florida Statutes in entering into Interlocal Service Boundary Agreements.
- **Rationale:** Both the annexation and the Interlocal Service Boundary Agreement provisions within the proposed comprehensive plan contain language that varies from Chapter 171 of the Florida Statutes and/or imposes additional requirements not currently imposed by Chapter 171 itself. Because the County is preempted by the State in these areas through Chapter 171 of the Florida Statutes, it is likely that an annexation agreement entered into pursuant to the proposed comprehensive plan provision would be held unenforceable by a court of law. Further, the County would appear to be in violation of Part II of Chapter 171 by creating a requirement for Interlocal Service Boundary Agreements that is not present in the statute. Attempting to require an agreement between the County and a municipality on land use issues through an Interlocal Service Boundary Agreement would frustrate the primary purpose of these agreements, which is to “encourage local governments to jointly determine how to provide services to residents and property in the most efficient and effective manner . . . .” Fla. Stat. §171.201.

- Part I of Chapter 171 of the Florida Statutes addresses municipal annexation or contraction, and Part II addresses Interlocal Service Boundary Agreements. Chapter 171 was enacted “in 1974 to provide for a uniform annexation procedure throughout the state. It set forth a uniform method and criteria for annexation. After Chapter 171 was adopted, these procedures became the exclusive method to be used for municipal annexation.” City of Ormond Beach v. City of Daytona Beach, 794 So.2d 660, 661 (Fla 5th Dist. Ct. App. 2001) (citation omitted). Chapter 171 “provides general law standards and procedures for adjusting the boundaries of Florida municipalities and acts as a preemption to the state regarding legislation in this area.” 2004-24 Fla. Op. Att’y Gen. 2 (2004). Because annexation is a governmental, legislative power, the right or ability to annex cannot be “contracted away” in an agreement between two governmental entities, and a court cannot enjoin a legislative act absent illegality or fraud. City of Ormond Beach, 794 So.2d at 663-664. Thus, Lake County would likely not be able to enforce any “annexation agreement” entered into under the proposed comprehensive plan provision, unless the agreement was entered into pursuant to Chapter 171 and contained no provisions in conflict with Chapter 171. For example, the Florida Attorney General has advised a municipality that it is precluded, “absent express general or special law authorization, from enacting any annexation procedures contrary to Chapter 171, Florida Statutes, *regardless of whether such procedures would be less stringent or more stringent* than those provided in Chapter 171.” 2004-24 Fla. Op. Att’y Gen. 3 (emphasis added) (citation omitted).
- The County’s proposed Policy I-7.10.2 requires that any Interlocal Service Boundary Agreement that “considers” water and sewer utility services must also address future land use, and as such is more stringent than the Florida Statutes, which do not require that an Interlocal Service Boundary Agreement address both of these items. The risk the County would run by entering into an Interlocal Service Boundary Agreement under the proposed comprehensive plan provision is that a municipality could claim that this provision is invalid and that the County is failing to negotiate in good faith by imposing requirements not present in the statute. This interpretation seems to be supported by Fla. Stat. 171.094(1), which states that “an interlocal service boundary agreement *entered into pursuant to part II is binding* on the parties to the agreement, and a party may not take any action that violates the interlocal service boundary agreement” (emphasis added). Additionally, the statute allows Interlocal Service Boundary Agreements to be narrowly tailored; for instance, governing one service such as solid waste, fire or police protection.

**5. Issue:** Supermajority requirement for Comprehensive Plan amendments.

- **Example:** p. 100 of the proposed Comprehensive Plan, Future Land Use Element, Policy I-7.13.7, “Super Majority Requirement,” under Objective I-7.13, “Comprehensive Plan Amendment Standards of Review”: “Amendments to the Comprehensive Plan must be approved by a super majority vote of the Board of County Commissioners. ‘Super

majority' shall mean an affirmative vote of a majority plus one of the full membership of the Board of County Commissioners.”

- **Recommendation:** None at this time. The Board of County Commissioners should know that there is some question as to whether or not this provision would withstand legal challenge, and that the County Attorney’s Office believes that even if the Board were to retain this provision in the 2030 Comprehensive Plan and the provision were to survive any legal challenges, it is the County Attorney’s Office opinion that the Board could also remove this provision at any time by a simple majority vote.
- **Rationale:** There is conflicting evidence as to whether a non-charter county like Lake County may adopt a supermajority vote requirement for comprehensive plan amendments. The Local Government Comprehensive Planning and Land Development Regulation Act (“Act”) in the Florida Statutes does not contemplate or require that comprehensive plan amendments be approved by a supermajority vote of the local governing body: Section 163.3184(15)(a) of the Act states that the procedure for adoption and transmittal of a comprehensive plan amendment “shall be by affirmative vote of *not less than a majority* of the members of the governing body present at the hearing,” and a prior section, Fla. Stat. 163.3184(2), states that “each comprehensive plan or plan amendment proposed to be adopted pursuant to this part shall be transmitted, adopted and reviewed *in the manner prescribed in this section.*” (emphasis added). The Act does require a unanimous- not a supermajority- vote for emergency comprehensive plan amendments (Fla. Stat. §163.3187(1)(a)).
  - The Martin County Attorney examined this same issue in 2004 and concluded that a comparison of all of these provisions in the Act raises the question of whether the Act sets a minimum standard for the voting process on a comprehensive plan amendment, which would allow for the “creation of an alternate process” such as the supermajority provision proposed in the 2030 Comprehensive Plan, or whether the Act, read as a whole, operates to prohibit any voting requirement more stringent than a simple majority requirement.
  - The County Attorney’s Office has learned that several other Florida counties currently have a supermajority vote requirement for comprehensive plan amendments or for amendments to certain portions of their comprehensive plans (Sarasota County, Palm Beach County, Hillsborough County, and Hernando County). However, all of these other counties are charter counties with the exception of Hernando County. A non-charter county like Lake County may only enact ordinances that are “not inconsistent with general or special law.” Fla. Const. art. VIII, §1(f). Because there is some question as to whether or not the proposed supermajority provision is inconsistent with general law, there is an accompanying question of whether a non-charter county like Lake County may adopt a supermajority requirement for amendments to the Comprehensive Plan. The Martin County Attorney summarized the difference between charter and non-charter counties aptly:

“A County Charter is to the County Commission what the Constitution is to the Legislature. Charters can and commonly do include super-majority and referenda requirements. For example, if Martin County had a charter, the charter could limit building heights to four stories and even if a future County Commission changed the Comprehensive Plan to allow buildings exceeding four stories, those buildings would violate the charter unless and until a charter amendment was approved by the electors.”

6. **Issue:** DCA approval of Green Swamp regulations.

- **Example:** Lines 25-27 on p. 58 of the proposed Comprehensive Plan, Future Land Use Element, Policy I-4.1.5, “Principles for Guiding Development within the Green Swamp Area of Critical State Concern,” under Objective I-4.1, “Designation of the Green Swamp Area of Critical State Concern”: “Any review and approval mechanism shall not become effective, amended or modified, and no action taken under such mechanism shall be effective, until first reviewed and approved by the Department of Community Affairs, pursuant to Chapter 380, F.S.”
- **Recommendation:** The County Attorney’s Office recommends that this sentence in Policy I-4.1.5 be deleted or rewritten to state as follows: “The County shall comply with all provisions in Section 380.05 of the Florida Statutes.”
- **Rationale:** Florida Statutes 380.05, entitled “Areas of critical state concern,” contains language that varies substantially from the provision in the Comprehensive Plan. Subsection 19 of Fla. Stat. 380.05 states, “In addition to any other notice required to be given under the local land development regulations, the local government shall give notice to the state land planning agency of any application for a development permit in any area of critical state concern . . .”

7. **Issue:** Requirement for private investment in infrastructure improvements.

- **Example:** p. 97 of the proposed Comprehensive Plan, Future Land Use Element, Policy I-7.11.4, “Private Investment for Infrastructure,” under Objective I-7.11, “Public Facilities and Services”: “The County shall require private investment in infrastructure improvements (e.g. schools, feeder roads, aerial fire apparatus, right-of-way, signalization, access improvements, transit facilities, stormwater, etc.) where a rational nexus demonstrates that the improvements are needed to accommodate the development and to minimize attendant public costs associated with growth.”
- **Recommendation:** Delete this provision or limit the provision’s reach to stormwater infrastructure, since the County does not currently charge an impact fee for stormwater facilities.

- **Rationale:** The County already charges educational, transportation, fire rescue, park and library impact fees throughout the unincorporated areas of the County, and charges some impact fees in some of the incorporated areas. Impact fees must be based on a reasonable connection or “rational nexus” between a government’s need for additional facilities and the population growth generated by the development, and a rational nexus between the expenditure of the impact fees and the benefits to the proposed development. St. Johns County v. Northeast Florida Builders Association, Inc., 583 So.2d 635, 637 (Fla. 1991). Because the proposed provision would double-charge development for the same impacts already addressed by the County’s charging of impact fees, it would fail the dual rational nexus test articulated by the Florida Supreme Court in the St. Johns County case.

8. **Issue:** Requirement that County object to particular annexations.

- **Example:** p. 95 of the proposed Comprehensive Plan, Future Land Use Element, Policy I-7.10.3, “Municipal Annexations,” under Objective I-7.10, “Intergovernmental Coordination”: “The County shall monitor municipal annexations. If a municipality initiates action to annex property that is not reasonably compact, contiguous to the present municipal corporate limits, or creates an enclave as described per Florida Statute, the County shall object to the annexation and shall, when appropriate, legally challenge the annexation.”
- **Recommendation:** Amend this provision as follows: “The County shall monitor municipal annexations. If a municipality initiates action to annex property that is not reasonably compact, contiguous to the present municipal corporate limits, or creates an enclave as described per Florida Statute, the County shall may object to the annexation and ~~shall~~ may, when appropriate, legally challenge the annexation.
- **Rationale:** The Florida Statutes do not require a county or other governmental entity to object to an annexation. Rather, the Statutes delineate appeal procedures for “affected parties,” who are those who believe that “material injury” will result “by the failure of the municipal governing body to comply with the procedures set forth in this chapter for annexation . . .” Fla. Stat. §171.081(1). The proposed provision in the County’s comprehensive plan effectively requires the County to appeal an annexation not meeting certain criteria whether or not the County believes that material injury will result. Furthermore, the Statutes provide that affected parties that are governmental entities must utilize the conflict resolution procedures in F.S. Chapter 164. Fla. Stat. §171.081(2). Finally, use of the word “shall” followed by the words “when appropriate” creates an ambiguity in the sentence.

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