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Thursday, May 9, 2019

Governor Ron DeSantis  
State of Florida  
The Capitol  
400 S. Monroe Street  
Tallahassee, Florida 32399

Re: Request for veto of House Bill 7103

Dear Governor DeSantis,

We urge you to veto HB 7103. The Legislature amended this bill in the closing days of session to structurally undermine Florida's system of growth management. No committee heard this last-minute amendment, no legislative staff provided analysis on its impact, no public or private group provided testimony on it, and neither house debated its significance or need.

Unfortunately, the unvetted language would end enforcement of city and county comprehensive plans which plan for growth in all Florida communities. If this bill becomes law, it will take from landowners and from Florida residents the most essential tool to protect property values and community quality of life.

**Legislature amended bill without analysis, public testimony, or debate in the final hours of session.**

Senator Lee sponsored SB 1730 on March 1. Representative Fischer sponsored a House companion, HB 7103, on March 25. On filing, both bills dealt just with: local government development orders requiring housing to be affordable, maximum timelines for local governments to approve or deny development orders, and impact fees.

Throughout three committee hearings for SB 1730, and three committee hearings for HB 7103, legislators received staff analysis, heard public testimony, and debated on these bills. On April 25, the House approved HB 7103.

On Wednesday, May 1 at 3:43 PM, two months after SB 1730 was filed, Senator Brandes sponsored an amendment to HB 7103 numbered 168742 to require losing parties to comprehensive plan enforcement actions to pay the opposing party's attorney fees and to require courts to hear comprehensive plan enforcement actions using a summary procedure designed to limit discovery. Amendment 168742 was similar to an amendment that Senator Brandes had submitted about one week before but that he had withdrawn prior to consideration.

The Senate amended HB 7103 the next day, Thursday, May 2, to include this amendment after a brief introduction by its sponsor. The Senate did not discuss the amendment, did not receive any staff analysis, did not hear any public testimony on the amendment, and did not debate the amendment.

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On Friday, May 3, Senator Lee proposed a strike-all amendment to HB 7103 numbered 444806. This amendment included the language regarding summary procedures and mandatory attorney fees in comprehensive plan enforcement actions that the Senate had adopted the previous day. Again, the Senate did not discuss the provision, did not receive any revised staff analysis, did not hear any public testimony on the provision, and did not debate the provision. The following is that provision.

- (a) In any proceeding under subsection (3), either party is entitled to the summary procedure provided in s. 51.011, and the court shall advance the cause on the calendar, subject to paragraph (b) or subsection (4), the Department of Legal Affairs may intervene to represent the interests of the state.
- (b) Upon a showing by either party by clear and convincing evidence that summary procedure is inappropriate, the court may determine that summary procedure does not apply.
- (c) The prevailing party in a challenge to a development order filed 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.<sup>1</sup>

On Friday, May 3, the Senate and the House approved HB 7103.

As discussed below, the amendment requiring payment of attorney fees and summary procedure practically eliminates enforcement of the local government comprehensive plans by Florida's citizens. This change is a seismic shift in how land use planning works (or does not work) in the state of Florida. *Without the benefit of any analysis or discussion, legislators certainly did not know the impact of this chance.*

### **The significance of the consistency challenge under the Community Planning Act.**

#### **The Community Planning Act requires that local governments adopt and follow comprehensive plans for land use.**

Florida's Community Planning Act (Act), which Florida originally enacted in 1985, mandates that all local governments adopt and maintain a comprehensive plan that guides future land development.<sup>2</sup> Once adopted, the comprehensive plan guides the local government when it makes individual development decisions. All actions a local government takes with regard to authorizing development must be consistent with the adopted comprehensive plan.<sup>3</sup>

Local comprehensive plans provide for some of the most important and locally-appropriate protections for flood protection, fiscally responsible infrastructure provision, neighborhood stability, and property investment protection. Florida Statutes require that these plans include requirements for "orderly and balanced future economic, social, physical, environmental, and fiscal development. ..." <sup>4</sup> They address capital improvements, future land use, transportation, general sanitary sewer, solid waste, drainage,

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<sup>1</sup> Bill No. CS/CS/HB 7103, 2nd Eng., § 7 (2019).

<sup>2</sup> See FLA. STAT. § 163.3167. Under the Act, cities and counties "shall have power and responsibility ... [t]o adopt and amend comprehensive plans, or elements or portions thereof, to guide their future development and growth." FLA. STAT. § 163.3167(1)(b). "Each local government shall maintain a comprehensive plan of the type and in the manner set out in this part ... ." FLA. STAT. § 163.3167(2).

<sup>3</sup> FLA. STAT. § 163.3161(6) ("[The] intent of act that adopted comprehensive plans shall have the legal status set out in this act and that *no public or private development shall be permitted except in conformity with comprehensive plans, or elements or portions thereof ...* ") (emphasis added).

<sup>4</sup> FLA. STAT. § 163.3177(1).

potable water, natural groundwater aquifer recharge, conservation, recreation and open space, housing, coastal management, and intergovernmental coordination.<sup>5</sup>

**The consistency challenge is the only tool the Community Planning Act allows to hold local governments accountable to their plans.**

To hold local governments accountable to their plans, the Act provides a cause of action for persons with standing to seek a local circuit court order invalidating a development order on the basis that it is inconsistent with a governing comprehensive plan. This cause of action is the consistency challenge, so called because it requires development orders to be consistent with the comprehensive plan.

The consistency challenge is the exclusive mechanism for landowners and residents to challenge development orders that are not consistent with the local government comprehensive plan.<sup>6</sup> To be clear, *other than the consistency challenge, no means exists to enforce local government comprehensive plans. The state, landowners, developers, and residents have no other way to ensure that local governments adhere to their own plans.*

**Without the consistency challenge, the Community Planning Act would be meaningless.**

For comprehensive plans to be more than just words on a page, local governments must be accountable for following their comprehensive plans. The consistency challenge is what holds local governments accountable and the challenge is essential for the Community Planning Act to work.

This principle is not just present in the legislative history of Florida's growth management rules, but courts have repeatedly acknowledged it explicitly.

- The courts have made it clear that the Act's "purpose cannot be achieved without meaningful judicial review in lawsuits brought under the Planning Act."<sup>7</sup>
- "[C]itizen enforcement is the primary tool for insuring consistency of development decisions with the Comprehensive Plan."<sup>8</sup>
- The Florida Legislature adopted the "development order consistency" requirement and its citizen enforcement mechanism to correct the bad history of local governments "*making individual zoning changes based on political vagary.*"<sup>9</sup>

If this development order consistency requirement could not be enforced, then the Act and the comprehensive plans that have been maintained over the past 30 years would become meaningless.

**Mandatory payment of attorney fees and use of summary procedure will end local government accountability to their comprehensive plans.**

The new language added to Section 163.3215, Florida Statutes entitles prevailing parties in consistency challenges to recover attorney fees and requires courts to resolve consistency challenges using summary procedures. These changes emasculate the Act.

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<sup>5</sup> See, FLA. STAT. §§ 163.3177(3)(a) and 163.3177(6).

<sup>6</sup> FLA. STAT. § 163.3215(1); *Bd. of Tr. of the Internal Improvement Tr. Fund v. Seminole County Bd. of Cty. Comm'rs*, 623 So. 2d 593 (Fla. 5th DCA 1993), *review denied*, 634 So. 2d 622 (Fla. 1994).

<sup>7</sup> *Sw. Ranches Homeowners Assoc. v. Broward Cty.*, 502 So. 2d 931, 936 (Fla. 4th DCA 1987).

<sup>8</sup> *Pinecrest Lakes, Inc. v. Shidel*, 795 So. 2d 191, 202 (Fla. 4th DCA 2001).

<sup>9</sup> *Machado v. Musgrove*, 519 So. 2d 629, 632 (Fla. 3rd DCA 1987) (emphasis added).

**Prevailing party entitlement to attorney fees will practically eliminate landowners' and citizens' abilities to bring consistency challenges.**

If landowners and citizens face mandatory attorney fee awards, all meaningful enforcement of comprehensive plans will cease. While HB 7013 would allow challengers to receive compensation for their attorney fees if they win such a suit, this is hardly an even-handed approach. The reality of land development is that the applicant (to whom a development order is issued) and the local government are in a far superior position to absorb such an award as compared to a neighboring landowner or other citizen.

Those who must bring suit to defend their interests in safety, clean water, community livability, safe hurricane evacuation times or any other issue addressed by a comprehensive plan do not have the same direct financial stake as does an applicant. They simply cannot take the risk of losing a close case and then having to pay tens or hundreds of thousands of dollars to the local government or to another intervening party.

*Prevailing party entitlement to attorney fees will absolutely prohibit, as a practical matter, any person or organization with an interest in local government adhering to its plans from bringing a consistency challenge.* Comprehensive plans are written for the very purpose of governing individual development decisions. If that purpose cannot be enforced by the only persons with standing to do so, the entire Community Planning Act is essentially repealed.

**Summary procedures are not appropriate for consistency challenges which involve complicated questions of law and fact.**

Summary procedures are not appropriate in cases involving complex issues of law and fact. These procedures limit the process of discovery to save time. But land use cases are expert intensive and typically present novel questions of law such as reviewing a comprehensive plan for the first time. Using summary procedures would prevent a court from fulfilling the role the Community Planning Act assigns it.

**Florida law already places appropriate limits on consistency challenges by allowing awards of attorney fees and by requiring that challengers be aggrieved or adversely affected.**

The Community Planning act already allows judges to award attorney's fees against anyone who brings a consistency challenge for an improper purpose such as "to harass or to cause unnecessary delay or for economic advantage, competitive reasons or frivolous purposes or needless increase in the cost of litigation."<sup>10</sup> Also, Florida Statutes require all claims to be supported by facts and allow courts to award attorney fees for claims which are unsupported.<sup>11</sup>

In addition, only landowners and residents who are "aggrieved or adversely affected" have standing to bring consistency challenges.<sup>12</sup> The law prohibits "gadfly" litigation by persons who want to obstruct development but have no interest in the outcome of the dispute. Courts have definitively held that persons with only a generalized interest in community well-being or the environment do not have standing to bring consistency challenges.<sup>13</sup>

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<sup>10</sup> FLA. STAT. § 163.3215(6).

<sup>11</sup> FLA. STAT. § 57.105(1).

<sup>12</sup> FLA. STAT. § 163.3215(3).

<sup>13</sup> *Florida Rock Props. v. Keyser*, 709 So. 2d 175, 177 (Fla. 5th DCA 1998).

**We urge you veto HB 7103.**

Because the consistency challenge is essential to the Community Planning Act, and because HB 7103 will make the consistency challenge practically unavailable and was adopted without an opportunity for public debate, we urge you to veto HB 7103. Like any system, Florida's system of land use regulation depends on tools to hold participants accountable. The consistency challenge is the only tool to hold any local government accountable to its comprehensive plan. *Provisions of HB 7103 would make Florida's land use laws unworkable for landowners and residents.*

Sincerely,



Paul Owens  
President