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DATE: April 9, 1997

**HOUSE OF REPRESENTATIVES
AS REVISED BY THE COMMITTEE ON
REAL PROPERTY & PROBATE
BILL RESEARCH & ECONOMIC IMPACT STATEMENT**

BILL #: HB 963

RELATING TO: Local Government Planning

SPONSOR(S): Representatives Turnbull and Gay

STATUTE(S) AFFECTED: Sections 163.3184, Florida Statutes and 235.193, Florida Statutes

COMPANION BILL(S): SB 1276 (I)

ORIGINATING COMMITTEE(S)/COMMITTEE(S) OF REFERENCE:

- (1) COMMUNITY AFFAIRS YEAS 6 NAYS 0
- (2) REAL PROPERTY & PROBATE
- (3)
- (4)
- (5)

I. SUMMARY:

This bill makes the following changes to the Local Government Comprehensive Planning & Land Development Regulation Act:

- Amends the definition of "affected person" by removing business operators from the list of persons who potentially have standing to challenge a plan or plan amendment;
- Deletes the provision that a party may allege a new issue as a reason to find a plan or plan amendment not in compliance in an administrative pleading if it is within 21 days after publication of notice and the party establishes good cause for not alleging the issue within the original time period.
- Creates a new section, creating an ex parte communications prohibition during the Department's review process of the plan or plan amendment and establishes civil fines up to \$500.

This bill also makes changes to the Educational Facilities Act, relating to the requirements for affected persons who are challenging a local government's determination of consistency of a the siting of an education facility with its local comprehensive plan.

This bill has an indeterminate fiscal impact on the Department of Community Affairs and state government.

This bill has no fiscal impact on local government.

On March 27, 1997, the House Committee on Community Affairs adopted an amendment that substantially changed the provisions of the bill. See AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES section for a summary of the bill as amended.

II. SUBSTANTIVE RESEARCH:

A. PRESENT SITUATION:

In 1985, the Legislature passed the Local Government Comprehensive Planning and Land Development Regulations Act (Act), codified at chapter 163, part II, Florida Statutes. The Act requires local governments to adopt a comprehensive plan, subject to review and approval or appeal by the Department of Community Affairs (Department). The Act outlines the required and optional elements of local government comprehensive plans, provides for public participation in the local comprehensive planning process, requires local governments to follow specified procedures for adoption of the comprehensive plans, and requires local governments to update their comprehensive plans at regular intervals.

Affected Persons:

Section 163.3184, Florida Statutes, defines “affected person” as follows:

“Affected person” includes the affected local government; persons owning property, residing, or owning or operating a business within the boundaries of the local government whose plan is the subject of the review; and adjoining local governments that can demonstrate that the plan or plan amendment will produce substantial impacts on the increased need for publicly funded infrastructure or substantially impacts on areas designated for protection or special treatment with their jurisdiction. Each person, other than an adjoining local government, in order to qualify under this definition, shall also have submitted oral or written comments, recommendations, or objections to the local government during the period of time beginning with the transmittal hearing for the plan or plan amendment and ending with the adoption of the plan or plan.

Process If Local Plan Or Amendment Is Not In Compliance:

Section 163.3184(10), Florida Statutes, provides:

“No new issue may be alleged as a reason to find a plan or plan amendment not in compliance in an administrative pleading filed more than 21 days after publication of notice unless the party seeking that issue establishes good cause for not alleging the issue within that time period. Good cause shall not include excusable neglect.”

Evaluation and Appraisal:

Section 163.3191, Florida Statutes, requires each local government to prepare an evaluation and appraisal report (EAR) on their local government comprehensive plan. The EAR is the principal process for updating local comprehensive plans to reflect changes in state policy on planning and growth management. The EAR must include statements of the effect of future changes to growth management plans and rules on the local comprehensive plan, actions necessary to meet planning issues, anticipated plan amendments necessary to implement changes, and public participation processes.

Sustainable Communities Demonstration Project:

In 1996, the Legislature adopted chapter 96-416, Laws of Florida, creating a sustainable communities demonstration project, as codified in section 163.3244, Florida Statutes. Subsection 163.3244(4), Florida Statutes, requires the Department to designate all or part of local government as a sustainable community in a written agreement which is considered to be a final agency action subject to formal administrative procedure hearing requirements and references affected persons as defined in paragraph 163.3184(1)(a), Florida Statutes. In addition, subsection 163.3244(5), Florida Statutes, enumerates the benefits to local governments receiving the designation of a sustainable community, and references affected persons as defined in paragraph 163.3184(1)(a), Florida Statutes.

Ex parte communications:

“Ex parte” is a legal term of art which generally refers to a communication, in a judicial or quasi-judicial proceeding, by a participant or his/her counsel to a decision maker concerning the issue or issues under consideration. Currently, the term “ex parte communications” has not been applied to the Departments’ consistency review of comprehensive plans or plan amendments.

Educational Facilities:

In 1995, the Legislature adopted chapter 95-341, Laws of Florida, amending, among others, subsection 235.193(5), Florida Statutes, requiring that as early as possible, but before commencing construction of new public educational facilities, the local government regulating the land use of the property, shall within 90 days after receiving a request for consistency from the local school board issue a determination of consistency or non-consistency with the appropriate local government comprehensive plan and the State Building Code. This section also provides that a determination of consistency allows the construction of the school. In addition, if the local government fails to issue the determination within the 90 days, the new public educational facility shall be deemed consistent.

B. EFFECT OF PROPOSED CHANGES:

Section 163.3194, Florida Statutes:

Affected Persons: This bill removes from the list of “affected persons” persons operating a business within the boundaries of the local government whose plan is the subject of the review.

New Issues: The bill deletes the provision that a party may allege a new issue as a reason to find a plan or plan amendment not in compliance in an administrative pleading if it is within 21 days after publication of notice and the party establishes good cause for not alleging the issue within the original time period.

Ex parte communications: This bill creates a communications prohibition, concerning the merits of the Department’s review of the plan or plan amendment, between the Department and any person or person’s representative or counsel, who has a direct or

indirect substantial interest in the plan or plan amendment. This bill provides up to a \$500 fine against any person or employee of the Department who violates this prohibition.

Section 235.193, Florida Statutes:

Coordination of Planning with Local Governing Bodies: This bill applies to areas where local governments and school boards have adopted joint procedures for school siting. In those limited situations, the bill requires that, "affected persons," as defined in section 163.3184, Florida Statutes, must have submitted oral or written comments, recommendations, or objections to the local government during the period of time beginning with the transmittal of the necessary information and the school board's request for a determination, and ending with the issuance of the determination by the local government.

C. APPLICATION OF PRINCIPLES:

1. Less Government:

a. Does the bill create, increase or reduce, either directly or indirectly:

(1) any authority to make rules or adjudicate disputes?

Not applicable (N/A)

(2) any new responsibilities, obligations or work for other governmental or private organizations or individuals?

Yes.

- This bill would create additional responsibilities, obligations, and work for either the local government to provide to the Department or the Department to obtain, a complete list of names and addresses of all "affected persons" in order to avoid violating the "ex parte communications" prohibition. Upon contact of the Department by any individual, a determination will be necessary to determine if the person is a "affected party" and thus, an "ex parte communication" or a citizen making a "public records request" or making an attempt to "access the government."

- This bill will increase the record keeping responsibilities of the Department of all communications made to the Department concerning any aspect of comprehensive plans or amendments being reviewed by the Department.

(3) any entitlement to a government service or benefit?

N/A

b. If an agency or program is eliminated or reduced:

(1) what responsibilities, costs and powers are passed on to another program, agency, level of government, or private entity?

N/A

(2) what is the cost of such responsibility at the new level/agency?

N/A

(3) how is the new agency accountable to the people governed?

N/A

2. Lower Taxes:

a. Does the bill increase anyone's taxes?

No

b. Does the bill require or authorize an increase in any fees?

No

c. Does the bill reduce total taxes, both rates and revenues?

No

d. Does the bill reduce total fees, both rates and revenues?

No

e. Does the bill authorize any fee or tax increase by any local government?

N/A

3. Personal Responsibility:

a. Does the bill reduce or eliminate an entitlement to government services or subsidy?

No

b. Do the beneficiaries of the legislation directly pay any portion of the cost of implementation and operation?

No

4. Individual Freedom:

- a. Does the bill increase the allowable options of individuals or private organizations/associations to conduct their own affairs?

No. By removing persons operating a business from the definition of "affected persons," this bill removes the available options to such persons to challenge a plan or plan amendment.

By creating classes of persons whose contacts to the Department may be classified as "ex parte," this bill may interfere with rights of citizens to access government under Article 1, Section 24(a), Florida Constitution.

In addition, this bill may interfere with chapter 119, Florida Statutes, "Public Records" by creating a fine liability of up to \$500 for certain classes of persons contacting the Department and inquiring about making or making a "public records request."

- b. Does the bill prohibit, or create new government interference with, any presently lawful activity?

Yes. See section a above.

5. Family Empowerment:

- a. If the bill purports to provide services to families or children:

N/A

(1) Who evaluates the family's needs?

(2) Who makes the decisions?

(3) Are private alternatives permitted?

(4) Are families required to participate in a program?

(5) Are families penalized for not participating in a program?

- b. Does the bill directly affect the legal rights and obligations between family members?

- c. If the bill creates or changes a program providing services to families or children, in which of the following does the bill vest control of the program, either through direct participation or appointment authority:

(1) parents and guardians?

(2) service providers?

(3) government employees/agencies?

D. SECTION-BY-SECTION RESEARCH:

Section 1: Amends subsection 163.3194(1)(a), Florida Statutes, relating to the definition of "affected person." The amendment reduces the pool of "affected persons" to no longer include "operators" of businesses.

Amends subsection 163.3184(10)(a), Florida Statutes, to delete the provision that a party may allege a new issue as a reason to find a plan or plan amendment not in compliance in an administrative pleading if it is within 21 days after publication of notice and the party establishes good cause for not alleging the issue within the original time period.

Section 2: Incorporates the amended definition of "affected persons" in section 163.3191(12)(f), Florida Statutes, relating to evaluation and appraisal of comprehensive plans.

Section 3: Incorporates the amended definition of "affected persons" in subsections 163.3244(4)(a) and (5), Florida Statutes, relating to the Sustainable Communities Demonstration Project.

Section 4: Creates section 163.3190, Florida Statutes, to provide an ex parte communications prohibition against any person who, directly or indirectly, has a substantial interest in comprehensive plan or plan amendment, during the Department's review of the comprehensive plan or plan amendment.

Section 5: In communities where the local government and school board has adopted joint procedures for school sitings, "affected persons," as amended by this bill, must submit oral or written objections, comments, or recommendations to the local government during the time period beginning with the school board's transmittal of the necessary information and request for a consistency determination and ending with the local government's issuance of the determination.

III. FISCAL RESEARCH & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE AGENCIES/STATE FUNDS:

1. Non-recurring Effects:

Indeterminate. The potential number and amounts of fines levied and collected due to ex parte communications is indeterminate at this point in time.

2. Recurring Effects:

Indeterminate.

3. Long Run Effects Other Than Normal Growth:

Indeterminate. See above.

4. Total Revenues and Expenditures:

Indeterminate. See above.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS AS A WHOLE:

1. Non-recurring Effects:

None.

2. Recurring Effects:

None.

3. Long Run Effects Other Than Normal Growth:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

1. Direct Private Sector Costs:

None.

2. Direct Private Sector Benefits:

None.

3. Effects on Competition, Private Enterprise and Employment Markets:

None.

D. FISCAL COMMENTS:

None.

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

This bill does not require the expenditure of funds by counties or municipalities.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

This bill does not reduce the revenue-raising authority of counties and municipalities.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

This bill does not reduce the percentage of state tax shared with counties and municipalities.

V. COMMENTS:

Section 1:

"Affected Persons": This is the mechanism that various citizen groups and nonprofit advocacy groups use to obtain standing to make comments and objections to the local government during the local government review and adoption process and to the state land planning agency during its review. In addition, this is the mechanism that various citizen groups and nonprofit advocacy groups use to obtain standing to challenge comprehensive plans and plan amendments in the administrative hearing process.

By removing business operators from the definition of affected persons, this bill may reduce the number of people and organizations that may qualify as "affected persons" to comment, object, make recommendations, or challenge a comprehensive plan or plan amendment.

"New Issues": Removal of the 21 day limitation for alleging new issues to find a plan or plan amendment not in compliance may create an ambiguity in the statute. Either, no party may raise any issues that were not addressed in the notice of intent to find the plan not in compliance, or new issues may be raised by the Department, the local government, or an affected party anytime prior to the final hearing.

Without the language limiting the raising of new issues to 21 days after the publishing of the notice of intent to find a plan not in compliance, further clarification of when or if new issues may be raised may be needed in this section to avoid confusion on the issue.

Section 4:

“Ex Parte Communications”: The determination by a Department employee that a citizen or citizen’s representative contact may be ex parte may not be possible, as at this stage of review, the status of “affected persons” has not been determined.

This bill may conflict with Article 1, Section 24(a), Florida Constitution, which establishes a constitutional right of access for any person to inspect or copy any public record made or received in connection with the official business of any public body, except with respect to specifically exempted records. The bill does not exempt from the ex parte communications prohibitions citizens or their representatives who desire to have access to the public records created and obtained in the review process.

This bill may create a potential conflict with chapter 119, Florida Statutes, relating to public records because a conversation with a person who does not meet the “affected person” criteria but who is contacting the Department to request records or inquire as to what records are available, may be construed as an “ex parte” communication and subject both the citizen and the Department employee to the \$500 fine.

Sponsor’s Intent

The sponsor has stated that the intent of the bill is to solve one overall problem: that of individuals circumventing the comprehensive planning process at the local level by going to the state level to make arguments or waiting until an administrative hearing process to raise concerns.

To accomplish this, the bill:

- 1) Eliminates the opportunity for special interests to have special advantage when a plan amendment goes to the Department of Community Affairs by making sure of all contacts.
- 2) Makes it clear that all arguments for and against a plan amendment are to be made at the local level and that no new issues can be raised in an administrative hearing within a certain time period.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

One amendment was adopted by the House Committee on Community Affairs on March 27, 1997. A summary of the “strike everything after the enacting clause” amendment is as follows:

Section 1: Amends subsection 163.3184(2), Florida Statutes, 1996 Supplement, to require the state land planning agency to maintain one file concerning any proposed or adopted plan amendment submitted by a local government. The file is to contain copies of all correspondence, papers, notes, memoranda, and other documents (including

paper copies of electronic mail correspondence), received or generated by the agency. Specific language is added to permit the file and its contents to be available for public inspection pursuant to chapter 119, Florida Statutes.

Section 2: Amends paragraph 163.3184(6)(d), Florida Statutes, 1996 Supplement, to require that the objections, recommendations, and comments report (ORC) prepared by the Department to identify, in writing, all oral and written communications with the Department regarding the proposed plan amendment prior to the issuance of the report.

In the event that no ORC report is issued, the Department must notify the local government, in writing, of all oral and written communications received within 30 days after the transmittal and prior to the Department's decision not to issue an ORC report.

Both the ORC report or the written notification of communications to the local government shall include a log of oral contacts from non-agency personnel to agency personnel. The log must include, at least, the following: telephone calls received by Department employees (identified by date, name, address, and telephone number of person making the call); written identification of all documents received or generated by the agency (sufficiently specific to enable documents to be identified and copies requested); and name of the person at the Department to be contacted to request copies of documents. The log is also to be made a part of the public record.

Section 3: Amends paragraph 163.3184(9)(a), Florida Statutes, 1996 Supplement, by limiting the ability of any party or intervenor from raising any new issue to find a plan or plan amendment not in compliance in an administrative pleading filed more than 21 days after the publication of the notice of intent.

Section 4: Amends paragraph 163.3184(10)(a), Florida Statutes, 1996, Supplement, by limiting the ability of any party or intervenor from raising any new issue to find a plan or plan amendment in compliance in an administrative pleading filed more than 21 days after the publication of the notice of intent.

Section 5: Provides that the act shall take effect on October 1, 1997.

VII. SIGNATURES:

COMMITTEE ON COMMUNITY AFFAIRS:

Prepared by:

Legislative Research Director:

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