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A Guide to Development Order "Consistency" Challenges Under Florida Statutes Section 163.3215

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INTRODUCTION

Legal challenges to local government development orders on the basis that they violate adopted comprehensive plans are unique and specialized cases. Because these orders are governed by a mix of statutory and judicial rules that depart significantly from common law practice, practitioners should be well aware prior to undertaking or defending such a case. This Article comprehensively introduces practitioners to those rules.

I
COMPREHENSIVE PLANS, THE CONSISTENCY REQUIREMENT AND CAUSE OF ACTION

A. Comprehensive Plans and the Consistency Requirement

The Community Planning Act[1] (Act) mandates that all local governments adopt and maintain a comprehensive plan that guides future land development,[2] and then adhere to that plan when making individual development decisions.[3]

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1 FLA. STAT. ANN. § 163.3161 (West 2018).

2 *See* FLA. STAT. ANN. § 163.3167 (West 2018). 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." § 163.3167(1)(b). "Each local government shall maintain a comprehensive plan of the type and in the manner set out in this part . . . ." § 163.3167(2).

3 § 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).

A comprehensive plan is a statutorily mandated legislative plan to control and direct the development of land.[4] Comprehensive plans must "provide the principles, guidelines, standards, and strategies for the orderly and balanced future economic, social, physical, environmental, and fiscal development . . . ."[5] Comprehensive plans "shall guide future decisions in a consistent manner . . . ."[6]

The law requires that comprehensive plans include several "elements," including capital improvements,[7] future land use,[8] transportation,[9] general sanitary sewer, solid waste, drainage, potable water, natural groundwater aquifer recharge,[10] conservation,[11] recreation and open space,[12] housing,[13] coastal management,[14] and intergovernmental coordination.[15] The required "principles and strategies" in each of these elements are generally labelled as "goals, objectives, or policies."[16]

Next, and fundamental to the issues discussed in this Article, the law requires that comprehensive plans "establish meaningful and predictable standards for the use and development of land."[17] These goals, objectives, and policies need not be written with as much detail

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4 § 163.3161(4) ("Through the process of comprehensive planning, it is intended that . . . local government can preserve, promote, protect, and improve the public health, safety, comfort, good order, appearance, convenience, law enforcement and fire prevention, and general welfare; facilitate the adequate and efficient provision of transportation, water, sewerage, schools, parks, recreational facilities, housing, and other requirements and services; and conserve, develop, utilize, and protect natural resources within their jurisdictions.").

5 FLA. STAT. ANN. § 163.3177(1) (West 2018).

6 *Id.*

7 § 163.3177(3)(a) (requiring capital improvement elements to identify the need for and location of public facilities to encourage their efficient use).

8 § 163.3177(6)(a) (requiring future land use elements to designate the distribution, location, and extent of residential, commercial, industrial, agricultural, recreation, conservation, education, public facilities, and other uses).

9 § 163.3177(6)(b).

10 § 163.3177(6)(c).

11 § 163.3177(6)(d).

12 § 163.3177(6)(e).

13 § 163.3177(6)(f).

14 § 163.3177(6)(g).

15 § 163.3177(6)(h) ("coordinating the adopted comprehensive plan with the plans of school boards, regional water supply authorities, and other units of local government").

16 § 163.3177(1).

17 *Id.* (requiring comprehensive plans provide "meaningful guidelines for the content of more detailed land developments and use regulations").

and specificity as would be found in a land development regulation but must be specific enough to enable a court to determine whether a subsequently issued development order is consistent with the comprehensive plan.

B. The Consistency Requirement

Once a local government has adopted a comprehensive plan as mandated by the Act, *all* subsequent actions taken by it with regard to authorizing development must be consistent with that plan.[18] The Courts have strictly enforced this statutory mandate.[19]

The development order must be consistent with the comprehensive plan as it exists on the date of issuance of the development order, not on the date of application.[20]

C. The Cause of Action

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:

> Any aggrieved or adversely affected party may maintain a de novo action for declaratory, injunctive, or other relief against any local government to challenge any decision of such local government granting or denying an application for, or to prevent such local government from taking any action on, a development order, as defined in s. 163.3164, which materially alters the use or density or intensity[21] of use on a particular piece of property which is not consistent with the comprehensive plan adopted under this part.[22]

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18 §§ 163.3194(1)(a), (3), 163.3201, 163.3213(1), 163.3215(3).

19 *See* Pinecrest Lakes, Inc. v. Shidel, 795 So. 2d 191, 197 (Fla. Dist. Ct. App. 2001), *review denied*, 821 So. 2d 300 (Fla. 2002) (holding the Act strictly prohibits the approval of a development order that is inconsistent with an adopted plan) (editor's note: The author was counsel of record in this decision); Machado v. Musgrove, 519 So. 2d 629, 631–32 (Fla. Dist. Ct. App. 1987) (holding that a comprehensive plan is a statutorily mandated plan to control and direct the use and development of property—like a constitution governing all future development decisions); Dixon v. City of Jacksonville, 774 So. 2d 763, 764 (Fla. Dist. Ct. App. 2000) ("It is well established that a development order shall be consistent with the governmental body's objectives, policies, land uses, etc., as provided in its comprehensive plan.").

20 Lake Rosa v. Bd. of Cty. Comm'rs, 911 So. 2d 206, 208 (Fla. Dist. Ct. App. 2005).

21 "[A] development order that permits an increase in the number or size of structures on land is an alteration of the intensity of the use of the land, and a development order that permits an increase in population is an alteration of density. . . ." (citing *Lake Rosa*, 911 So. 2d at 210).

22 § 163.3215(3).

This cause of action authorizes only local citizens who are adversely affected to enforce local comprehensive plans. The state land planning agency (the Department of Economic Opportunity) that oversees the adoption and amendment of the plans themselves has no standing to enforce those plans by challenging local development orders.[23] The Department of Legal Affairs (the Attorney General) is authorized to intervene in development order challenges initiated by local citizens to represent the interests of the state.[24]

Florida Statutes section 163.3215 provides the *exclusive mechanism* for citizens to challenge development orders that are not consistent with the local government comprehensive plan.[25] Despite this express statutory limitation, some courts have allowed comprehensive plan consistency challenges to be brought via other actions. In *Das v. Osceola County*, the court issued a writ of mandamus to compel the issuance of a development order and enforcement of comprehensive plans.[26] In *Bay Point Club, Inc. v. Bay County*, the court affirmed a decision of the Florida Land and Water Adjudicatory Commission in a Florida Statutes section 380.06 Developments of Regional Impact development order appeal based on inconsistency with the local comprehensive plan.[27] Other courts, despite the clear statutory language, have recognized certiorari as an appropriate remedy for challenging consistency of a development order with the comprehensive plan.[28] In *Baker v. Metropolitan Dade County*, the Court held that, although section 163.3215 is ordinarily the sole method of challenging consistency of a development order with the comprehensive plan, a petition for writ of certiorari was appropriate where the county acknowledged that the development order was inconsistent with the comprehensive plan and approved it anyway.[29] In *Palazzo Las Olas Group, L.L.C. v. City of Fort Lauderdale*, the court held that a count in the complaint for declaratory and injunctive relief

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23 *Pinecrest Lakes, Inc.*, 795 So. 2d at 199.

24 § 163.3215(8).

25 § 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. Dist. Ct. App. 1993), *review denied,* 634 So. 2d 622 (Fla. 1994).

26 Das v. Osceola Cty., 685 So. 2d 990, 993 (Fla. Dist. Ct. App. 1997).

27 Bay Point Club, Inc. v. Bay Cty., 890 So. 2d 256, 259–60 (Fla. Dist. Ct. App. 2004).

28 Saadeh v. City of Jacksonville, 969 So. 2d 1079, 1082 (Fla. Dist. Ct. App. 2007).

29 Baker v. Metro. Dade Cty., 774 So. 2d 14, 18 (Fla. Dist. Ct. App. 2000).

pursuant to section 163.3125 "which precludes local governments from acting in a manner contrary to their Comprehensive Plan"[30] should not be dismissed, but also held that "any direct challenge seeking to overturn the Commission's decision denying site plan approval had to be sought via the filing of a petition for writ of certiorari . . . ."[31] In a subsequent case, however, the Fourth District held that comprehensive plan consistency cannot be raised in a petition for certiorari, and can only be challenged under section 163.3215.[32]

While section 163.3215 is the exclusive mechanism for challenging development orders on the basis that they are inconsistent with comprehensive plans, it does not apply to challenges to a development order on other grounds.[33] For example, a party alleging that a development order violates the more detailed land development regulations that implement comprehensive plans must bring such a challenge by way of *a petition for writ of certiorari*. If a challenge is made, the petitioner has the burden to prove, based on the then existing record, that the local government either did not (1) afford procedural due process; (2) apply the correct law; or (3) support its decision with competent substantial evidence.[34]

The remainder of this Article focuses exclusively on the procedural and substantive aspects of judicial review under the cause of action to challenge local government development orders on the basis that they violate that city or county's comprehensive plan.

As the courts have recognized, the Act's "purpose cannot be achieved without meaningful judicial review in lawsuits brought under the Planning Act."[35] The various aspects of that judicial review are explained below.

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30 Palazzo Las Olas Grp., L.L.C. v. City of Fort Lauderdale, 966 So. 2d 497, 502 (Fla. Dist. Ct. App. 2007).

31 *Id.*

32 Stranahan House, Inc. v. City of Fort Lauderdale, 967 So. 2d 1121, 1125–26 (Fla. Dist. Ct. App. 2007).

33 City of Coconut Creek v. City of Deerfield Beach, 840 So. 2d 389, 392 (Fla. Dist. Ct. App. 2003); Cook v. City of Lynn Haven, 729 So. 2d 545, 546 (Fla. Dist. Ct. App. 1999); Thomas v. Suwannee Cty., 734 So. 2d 492, 497 (Fla. Dist. Ct. App. 1999); Educ. Dev. Ctr., Inc. v. Palm Beach Cty., 721 So. 2d 1240, 1241 (Fla. Dist. Ct. App. 1998).

34 Broward Cty. v. G.B.V. Int'l. Ltd., 787 So. 2d 838, 843 (Fla. 2001).

35 Sw. Ranches Homeowners Assoc. v. Broward Cty., 502 So. 2d 931, 936 (Fla. Dist. Ct. App. 1987).

II
STANDING TO CHALLENGE DEVELOPMENT ORDERS

The statute defines, in subjective terms, those who have standing, and the courts have provided clarifying interpretations. Standing is one of the more commonly contested issues in development order challenges. Standing challenges comprise a large number of the reported appellate decisions under the consistency statute.

A. Statutory Grant of Standing

Under the Act, an "aggrieved or adversely affected party" may challenge a local government development order by bringing a declaratory judgment action in local circuit (trial level) court.[36] An "aggrieved or adversely affected party" is defined as follows:

> Any person or local government that will suffer an adverse effect to an interest protected or furthered by the local government comprehensive plan, including interests related to health and safety, police and fire protection service systems, densities or intensities of development, transportation facilities, health care facilities, equipment or services, and environmental or natural resources. The alleged adverse interest may be shared in common with other members of the community at large but must exceed in degree the general interest in community good shared by all persons. The term includes the owner, developer, or applicant for a development order.[37]

B. Liberalized Standard

Section 163.3215 has been interpreted to grant "significantly enhanced standing to challenge the consistency of development decisions with the Comprehensive Plan" compared with prior standing

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36 FLA. STAT. ANN. § 163.3215(3) (West 2018).

37 § 163.3215(2) (2018). Judicial decisions issued before the 2002 statutory amendment that explicitly granted standing to such parties had ruled that an owner, developer, or applicant did not have standing under section 163.3215. *See* Parker v. Leon Cty., 627 So. 2d 476, 479 (Fla. 1993); Poulos v. Martin Cty., 700 So. 2d 163, 164 (Fla. Dist. Ct. App. 1997); Fla. Inst. of Tech., Inc. v. Martin Cty., 641 So. 2d 898, 899 (Fla. Dist. Ct. App. 1994), *review denied*, 651 So. 2d 1195 (Fla. 1995); Moore v. City of Punta Gorda, 627 So. 2d 1313, 1314 (Fla. Dist. Ct. App. 1993). Those cases are no longer good law, and such parties challenge certain aspects of a development order, such as restrictions or conditions, they believe are inconsistent with the comprehensive plan.

law.[38] "As remedial statute, section 163.3215, [Fla. Stat.], should be liberally construed to ensure standing for a party with a protected interest under the comprehensive plan who will be adversely affected by the local government's actions."[39]

The Fourth District Court of Appeals explained, in *Education Development Center, Inc. v. Palm Beach County*, that section 163.3215 "*enlarged the class of persons with standing* to challenge a development order as inconsistent with the comprehensive plan."[40] Thus, wrote the court, the statute is to "be liberally construed to advance the intended remedy."[41] In an earlier case, the same court observed that the Act "*demonstrates a clear legislative policy in favor of the enforcement of comprehensive plans* by persons adversely affected by local action."[42]

C. Instructive Judicial Interpretations

Florida courts have applied this standing provision to a number of factual scenarios in a series of decisions that have shaped the contours of standing for individuals and associations.

1. Proximate Property Ownership

The decisional law makes clear that those who own land or live near a proposed development project have standing under section 163.3215.

An association of property owners whose land adjoins a proposed landfill, and who would thus be directly affected by its operation, had standing because they had a more direct stake in the matter than those with only general interest in environmental issues.[43] Likewise, an

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38 Pinecrest Lakes, Inc., v. Shidel, 795 So. 2d 191, 197 (Fla. Dist. Ct. App. 2001), *review denied*, 821 So. 2d 300 (Fla. 2002).

39 Bay Cty. v. Harrison, 13 So. 3d 115, 118–19 (Fla. Dist. Ct. App. 2009); Edgewater Beach Owners Ass'n v. Walton Cty., 833 So. 2d 215, 220 (Fla. Dist. Ct. App. 2002); *Sw. Ranches Homeowners Ass'n*, 502 So. 2d at 935; Save the Homosassa River All., Inc. v. Citrus Cty., 2 So. 3d 329, 336 (Fla. Dist. Ct. App. 2008); Parker v. Leon Cty., 627 So. 2d 476, 479 (Fla. 1993); City of Ft. Myers v. Splitt, 988 So. 2d 29, 32 (Fla. Dist. Ct. App. 2008).

40 Educ. Dev. Ctr., Inc. v. Palm Beach Cty., 751 So. 2d 621, 623 (Fla. Dist. Ct. App. 1999) (emphasis added).

41 *Id.*

42 *Sw. Ranches Homeowners Ass'n*, 502 So. 2d at 935 (emphasis added); *see also* Stranahan House, Inc. v. City of Fort Lauderdale, 967 So. 2d 427, 433 (Fla. Dist. Ct. App. 2007); Dunlap v. Orange Cty., 971 So. 2d 171, 175 (Fla. Dist. Ct. App. 2007); Payne v. City of Miami, 927 So. 2d 904, 907 (Fla. Dist. Ct. App. 2005); *Pinecrest Lakes, Inc.*, 795 So. 2d at 202 (holding that "citizen enforcement is the primary tool for insuring consistency of development decisions with the Comprehensive Plan").

43 *Sw. Ranches Homeowners Ass'n*, 502 So. 2d at 934.

association that owned land adjacent to a proposed building that would block the ocean views of association members and cast unwanted shade over the associations' recreational facilities had standing, because it had a more direct stake in the impact of the development than the general community.[44]

In another case, *Combs v. City of Naples*, owners of property immediately adjacent to property for which a development order had been issued and an association formed to protect the interests of homeowners in an adjacent subdivision were found to have standing.[45] However, a person who did not own adjacent property and whose only interest as a city resident and taxpayer was deemed to not be an aggrieved or adversely affected party, and thus was denied standing.[46]

Similarly, an advocacy group whose members owned and operated a marine business on the Miami River and an owner-operator of a tugboat company, were found to have standing to challenge a development order for a multi-use retail and residential condominium project in an area that had previously been restricted to water-related and water-dependent marine industrial uses.[47] The increased difficulty of conducting marine industrial business as a result of residential development was an adverse effect.[48]

In another example, the owner of an historic property adjacent to a proposed development was granted standing due to alleged negative impacts from increased traffic and lighting, altered enjoyment of light and air, visual and noise pollution, and the shadow cast over the historical property.[49] Owners of lakefront property had standing to challenge a development order because they would be affected by the construction of a boat ramp to a greater extent than other landowners in the area who did not own lakefront property.[50] Finally, the heirs of a family who dedicated land "for public park purposes only" and who

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44 Edgewater Beach Owners Ass'n v. Walton Cty., 833 So. 2d 215, 220 (Fla. Dist. Ct. App. 2002).

45 Combs v. City of Naples, 834 So. 2d 194, 197 (Fla. Dist. Ct. App. 2002).

46 *Id.*

47 *Payne*, 927 So. 2d at 909.

48 *Id.*

49 Stranahan House, Inc. v. City of Fort Lauderdale, 967 So. 2d 427, 433–34 (Fla. Dist. Ct. App. 2007).

50 Dunlap v. Orange Cty., 971 So. 2d 171, 175 (Fla. Dist. Ct. App. 2007).

retained a reversionary future estate in the land if the deed restriction was violated, had standing to challenge a development order.[51]

2. Standing Not Limited to Ownership or Use of Adjacent or Nearby Land

The key aspect of standing that the courts have viewed as more liberal, compared to common law standing, is that the statute "does not say that a party must be harmed to a greater degree than the general public."[52] Nor does the law require plaintiffs to either own property adjacent to a proposed development or conduct activities on property immediately adjacent to it to have standing.[53]

Instead, a plaintiff's harm may be shared by others, as long as the extent of the plaintiff's harm will exceed that of the general public. A prominent example is *Save the Homosassa River Alliance, Inc. v. Citrus County*, where the court ruled that

> [a]n interpretation of the statute that requires *harm* different in degree from other citizens would eviscerate the statute and ignore its remedial purpose. It drags the statute back to the common law test. The statute is designed to remedy the governmental entity's failure to comply with the established comprehensive plan, and, to that end, it creates a category of persons able to prosecute the claim. The statute is not designed to redress damage to particular plaintiffs. To engraft such a "unique harm" limitation onto the statute would make it impossible in most cases to establish standing and would leave counties free to ignore the plan because each violation of the plan in isolation usually does not uniquely harm the individual plaintiff. Rather, the statute simply requires a citizen/plaintiff to have a particularized *interest* of the kind contemplated by the statute, not a legally protectable right.[54]

Thus, demonstrated efforts to protect, or regular use an enjoyment of, an area to be affected can confer standing. An environmental organization has standing (i.e. the harm it suffers "exceeds the harm caused to the public in general")[55] if it has invested resources and volunteer activities to protect the health and welfare of the lands that could be impacted by a development order, and to encourage

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51 White v. Metro. Dade Cty., 563 So. 2d 117, 126–27 (Fla. Dist. Ct. App. 1990).

52 Save the Homosassa River All., Inc. v. Citrus Cty., 2 So. 3d 329, 337 (Fla. Dist. Ct. App. 2008).

53 *See id.* at 339.

54 *Id.* at 340.

55 *Id.* at 334.

environmentally sound development practices in and around them.[56] Courts will also find "that an organization has an interest that is greater than 'the general interest in the community well being[sic]' when the organization's primary purpose includes protecting the particular interest that they allege will be adversely affected by the comprehensive plan violation."[57] A non-profit corporation that alleged specific adverse effects that the corporation and its members would suffer as a result of a development's impact on the natural resources in a state forest was sufficient to establish standing under section 163.3215.[58] The group had alleged that the potential destruction of the species studied by its members would adversely affect them and that it had been involved in the original acquisition of the land for use as a state forest. Thus, the group's interests were found to exceed those of the general public.[59]

However, plaintiffs must demonstrate that they would likely suffer an adverse effect as a result of a development order. In one case, plaintiffs who lived over a mile from the subject property and who were separated from it by a large bay and a fifty-seven-acre buffer area were unable to prove that they would be affected by noise, traffic impact, and loss of property value, and thus lacked standing.[60] In another case, *Florida Rock Properties, Inc. v. Keyser*, an owner of property within the local government who lived and recreated nowhere near the subject property could allege only an interest in maintaining the bucolic nature of his county and therefore, did not have standing under section 163.3215.[61] "Keyser never demonstrated any specific injury, only that the county would not be as bucolic as it once was. Keyser is a citizen with an interest in the environment and nothing more."[62]

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56 *Id.* (requiring that an interest that "'exceed[s] in degree the general interest in community good shared by all persons' . . . simply means that a party must allege that they have an interest that is something more than 'a general interest in community well being [sic]'").

57 *Id.* at 337.

58 Putnam Cty. Envtl. Council, Inc. v. Bd. of Cty. Comm'rs, 757 So. 2d 590, 593–94 (Fla. Dist. Ct. App. 2000).

59 *Id.*

60 Pichette v. City of N. Miami Beach, 642 So. 2d 1165, 1165–66 (Fla. Dist. Ct. App. 1994).

61 Florida Rock Props. v. Keyser, 709 So. 2d 175, 177 (Fla. Dist. Ct. App. 1998).

62 *Id.*

III
JURISDICTIONAL TIME LIMITS

The Act sets a strict thirty-day time limit to bring a consistency challenge. "The de novo action must be filed no later than 30 days following rendition of a development order or other written decision, or when all local administrative appeals, if any, are exhausted, whichever occurs later."[63] Thus, the thirty-day jurisdictional clock starts when the development order is filed with the local government clerk.[64]

This time limit is jurisdictional.[65] In *Bal Harbor Village v. City of North Miami Beach*, the complainant entered into a settlement agreement with the local government that had issued a development order.[66] The settlement provided that the complainant could proceed with its section 163.3215 suit at a later date in the future, and that the local government would waive any defense based on timeliness.[67] The court held that the time limits could not be waived and dismissed the complaint, because it was brought after the thirty-day clock had expired.[68]

The thirty-day time limit applies to the local government action that actually approves the development order and is not triggered by preliminary decisions. In *Beach v. Village of North Palm Beach City Council*, the Village's approval of a final certificate of appropriateness was deemed the triggering event, not the prior approval of a preliminary certificate of appropriateness.[69] In *Lee v. St. Johns County Board of County Commissioners*, the county commission's final approval of the development plan—not the Planning and Zoning Agency's preliminary or recommended approval—was found to be the event that triggered the statutory filing deadline event.[70]

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63 FLA. STAT. ANN. § 163.3215(3) (West 2018).

64 5220 Biscayne Boulevard, L.L.C. v. Stebbins, 937 So. 2d 1189, 1191 (Fla. Dist. Ct. App. 2006).

65 Jensen Beach Land Co. v. Citizens for Responsible Growth of the Treasure Coast, Inc., 608 So. 2d 509 (Fla. Dist. Ct. App. 1992).

66 Bal Harbor Village v. City of N. Miami, 678 So. 2d 356, 359 (Fla. Dist. Ct. App. 1996).

67 *Id.* at 360.

68 *Id.* at 360–361.

69 Beach v. Vill. N. Palm Beach City Council, 682 So. 2d 164, 165 (Fla. Dist. Ct. App. 1996).

70 Lee v. St. Johns Bd. of Cty. Comm'rs, 776 So. 2d 1110, 1113 (Fla. Dist. Ct. App. 2001).

Next, the filing deadline does not begin to run until the public has been given adequate notice of the issuance of the development order. In *Das v. Osceola County*, the court held that a letter issued to a landowner, with no notice to the public, stating that the removal of a tree was exempt from the comprehensive plan, did not constitute the rendition of a development order that triggered an objector's jurisdictional timeframe to bring suit under section 163.3215.[71] The court stated, "[a] county should, at the least, issue an order or permit *of public record* before the rights of the public to file a consistency challenge are foreclosed by the expiration of time."[72] *Das* holds that a third party's deadline for filing a section 163.3215 complaint is not triggered unless and until the local government issues a proper development order. The court ruled that the plaintiffs had not waived their right to challenge a county's determination that a proposed pipeline was consistent with or exempt from the comprehensive plan, because no development order making such a finding, with due notice to the public, had ever been issued. The court rejected the argument that "the County's permitting of tree removal related to the pipeline constituted such notice of a development order."[73]

City of Tallahassee v. Kovach,[74] and *5220 Biscayne Boulevard., L.L.C. v. Stebbins*,[75] followed *Das* in holding that the thirty-day filing deadline is not triggered until formal rendition and notice to the public of a development order.

IV
WHAT IS A DEVELOPMENT ORDER?

A development order is "any order granting, denying, or granting with conditions an application for a development permit."[76] A "'[d]evelopment permit' includes any building permit, zoning permit, subdivision approval, rezoning, certification, special exception,

71 Das v. Osceola Cty., 685 So. 2d 990, 993 (Fla. Dist. Ct. App. 1998).

72 *Id.* at 994.

73 *Id.* at 993.

74 City of Tallahassee v. Kovach, 733 So. 2d 576, 579 (Fla. Dist. Ct. App. 1999).

75 5220 Biscayne Boulevard, L.L.C. v. Stebbins, 937 So. 2d 1189, 1191–92 (Fla. Dist. Ct. App. 2006).

76 FLA. STAT. ANN. § 163.3164(15) (West 2018).

variance, or any other official action of local government having the effect of permitting the development of land."[77]

The Act incorporates the definition of "development" in Florida Statutes section 380.04. Development is defined as "the carrying out of any building activity or mining operation, the making of any material change in the use or appearance of any structure or land, or the dividing of land into three or more parcels."[78]

The key exclusions from this definition are roads, utility lines, and agricultural uses.[79] The definition excludes work for the maintenance or improvement of a road if carried out within a right-of-way.[80] *Robbins v. City of Miami Beach* held that a city resolution approving a "streetscape improvement project" that limited a segment of a road to two lanes instead of three was not a development order.[81]

A development agreement is also not a "development order" challengeable under section 163.3215.[82]

On the other hand, a letter from the planning department to neighbors, stating that a development did not violate the comprehensive plan and informing them of their right to challenge that determination under section 163.3215, was a development order.[83] A development of regional impact development order is a development order challengeable under section 163.3215.[84]

Holding that "section 163.3164 does not suggest that a development order is one which grants development rights only in the advanced stages of the development process or to a shovel-ready project," *Graves v. Pompano Beach* found that a plat approval constituted a challengeable development order.[85]

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77 § 163.3164(16).

78 FLA. STAT. ANN. § 380.04(1) (West 2018).

79 FLA. STAT. ANN. § 380.04(3)(a), (b), (e) (West 2018); *see* Florida Wildlife Fed. v. Collier Cty., 819 So. 2d 200, 204 (Fla. Dist. Ct. App. 2002) (holding that local governments are not authorized to regulate agricultural practices under the Act).

80 FLA. STAT. ANN. § 380.04(3)(a) (West 2018); *see also* 1000 Friends of Fla., Inc. v. St. Johns Cty., 765 So. 2d 216, 217 (Fla. Dist. Ct. App. 2000); Friends of Mantanzas, Inc. v. Dep't of Envtl. Prot., 729 So. 2d 437, 440 (Fla. Dist. Ct. App. 1999); Bd. of Cty. Comm'rs v. Dep't of Comm. Affairs, 560 So. 2d 240, 241 (Fla. Dist. Ct. App. 1990); Rinker Materials Corp. v. Lake Park, 494 So. 2d 1123, 1126 (Fla. 1986).

81 Robbins v. Miami Beach, 664 So. 2d 1150, 1151 (Fla. Dist. Ct. App. 1995).

82 Combs v. Naples, 834 So. 2d 194, 196 (Fla. Dist. Ct. App. 2002).

83 Das v. Osceola Cty., 715 So. 2d 1105, 1105–06 (Fla. Dist. Ct. App. 1998).

84 Edgewater Beach Owners Ass'n v. Walton Cty., 833 So. 2d 215, 220–21 (Fla. Dist. Ct. App. 2002).

85 Graves v. Pompano Beach, 74 So. 3d 595, 599 (Fla. Dist. Ct. App. 2011).

Finally, it is what a development order authorizes to be built, not what the developer intends to build, that determines consistency with the comprehensive plan.[86]

V
THE STATUTORY DEFINITION OF "CONSISTENT"

The statute includes a clear definition of "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.
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> (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.[87]

Consistency of a development order with the comprehensive plan is determined solely by reference to "the objectives, policies, land uses, and densities and intensities in the comprehensive plan" and not by reference to regulations adopted to implement the plan.[88] Consistency with a local government's land development regulations does not demonstrate consistency with the comprehensive plan.[89]

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86 *See* United States Sugar Corp. v. 1000 Friends of Fla., 134 So. 3d 1052, 1053 (Fla. Dist. Ct. App. 2013) (holding "[w]hether a development order is consistent with a comprehensive plan is determined by comparing what the order *permits*, not what the current holder *intends* to do under the order.").

87 FLA. STAT. ANN. § 163.3194(3)(a)–(b) (West 2018) (emphasis added).

88 Buck Lake All., Inc. v. Bd. of Cty. Comm'rs, 765 So. 2d 124, 127 (Fla. Dist. Ct. App. 2000)

89 *Id. See also* Bay Cty. v. Harrison, 13 So. 3d 115, 118 (Fla. Dist. Ct. App. 2009); Vill. of Key Biscayne v. Tesaurus Holdings, Inc., 761 So. 2d 397, 398 (Fla. Dist. Ct. App. 2000); Franklin Cty. v. S.G.I. Ltd., 728 So. 2d 1210, 1211 (Fla. Dist. Ct. App. 1999); Windward Marina, L.L.C. v. City of Destin, 743 So. 2d 635, 637–39 (Fla. Dist. Ct. App. 1999); Alachua Cty. v. Eagle's Nest Farms, Inc., 473 So. 2d 257, 260 (Fla. Dist. Ct. App. 1985); Sengra Corp. v. Metro. Dade Cty., 476 So. 2d 298, 299 (Fla. Dist. Ct. App. 1985); Hillsborough Cty. v. Putney, 495 So. 2d 224, 226 (Fla. Dist. Ct. App. 1986).

A. The Scope of the Consistency Requirement

All relevant provisions of a comprehensive plan are enforceable under the Act. In *Machado v. Musgrove*, the Third District held that a development order must be consistent with all elements of the comprehensive plan—not just the land use element. [90] "The test," wrote the court, "is whether the zoning authority's determination that a proposed development *conforms to each element and the objectives of the land use plan* is supported by competent and substantial evidence. The traditional and non-deferential standard of strict judicial scrutiny applies."[91]

Machado addressed testimony from area residents who opposed the proposed zoning because they feared it "would bring burdensome traffic and alter the character of the area."[92] The decision cited with approval prior judicial examples of "nonconformity with the plan" including "a different and incompatible character of use"[93] "or a failure to comply with the plan's mandatory procedures."[94] *Machado* ruled that "[b]ecause the applicants were unable to show that their proposed commercial project was consistent with each element of the land use plan and furthered its objectives, the circuit court was eminently correct in voiding the rezoning."[95]

In *White v. Dade County*, the court enjoined a development order by enforcing comprehensive plan provisions that regulated *how* development should happen.[96] Noting that *Machado* requires "that developments challenged as contrary to master plans must be strictly construed and that the burden is on the developer to show . . . that the development conforms strictly to the master plan, its elements, and objectives";[97] the court enjoined construction of a tennis complex—not because the use of a tennis court was prohibited by the plan, but because the development was not proven to comply with the plan's guidelines for environmentally sensitive zones.[98] The legal basis for this ruling was that the "[c]ounty did not . . . demonstrate that the complex

90 Machado v. Musgrove, 519 So. 2d 629, 632 (Fla. Dist. Ct. App. 1987).

91 *Id.* (emphasis added).

92 *Id.* at 631.

93 *Id.* at 633 (citing Alachua Cty., 473 So. 2d at 259).

94 *Id.* (citing Hillsborough Cty., 495 So. 2d at 225–26).

95 *Id.* at 635–36.

96 White v. Metro. Dade Cty., 563 So. 2d 117 (Fla. Dist. Ct. App. 1990).

97 *Id.* at 128.

98 *Id.* at 127–29.

conforms strictly to the [comprehensive plan], its elements, and objectives. . . . under the strict standard of review . . . ."[99]

The law is the same in the Fourth District. In *Southwest Ranches Homeowners Ass'n v. County of Broward*, the court said a comprehensive plan is enforceable in its entirety:

> [W]e reject the . . . assertion that the land use element . . . alone should be considered in determining consistency. . . . The other elements of the plan were adopted pursuant to the statutory mandate of Chapter 163. . . . On the contrary, each subsequently adopted element was designed to fulfill the overall requirements and goals of the statute, as the text of these elements amply demonstrates. We find no conflict between the charter powers of the County and the statutorily mandated obligation to adopt a comprehensive plan and abide by *all* its elements.[100]

The Fifth District, in *Save Homosassa River Alliance, Inc.*, found enforceable under section 163.3215 comprehensive plan provisions related to "compatib[ility] with the character and vision of Old Homosassa."[101]

The First District, in *Bay County v. Harrison*, described the cause of action this way:

> [A] local government may not authorize any development that would be inconsistent with the applicable comprehensive plan. . . . An *aggrieved party may challenge a DO as inconsistent with a comprehensive plan*. . . . In a chapter 163 consistency proceeding, a court will find "consistency" between a DO and the extant comprehensive plan
>
> > if the land uses, densities or intensities, and other aspects of development permitted by such order or regulation are compatible with and further the objectives, policies, land uses, *and* densities or intensities in the comprehensive plan. . . .

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99 *Id.* at 128.

100 Sw. Ranches Homeowners Ass'n v. Cty. of Broward, 502 So. 2d 931, 935 (Fla. Dist. Ct. App. 1987); *see also* Stranahan House, Inc. v. City of Fort Lauderdale, 967 So. 2d 1121, 1123 (Fla. Dist. Ct. App. 2007) (taking jurisdiction over a challenge to a site plan's inconsistency with Historic Preservation Element policies requiring a review of the impact of development on historic resources); Pinecrest Lakes, Inc. v. Shidel, 795 So. 2d 191, 204 (Fla. Dist. Ct. App. 2001) (rejecting the theory that a development order that complied with a plan's allowable uses and densities could not be challenged for inconsistency with a plan policy requirement for land use compatibility).

101 Save Homosassa River All. v. Citrus Cty., 2 So. 3d 329, 335 (Fla. Dist. Ct. App. 2008).

> Under the statute, a reviewing court will evaluate consistency "by reference to 'the objectives, policies, land uses, *and* densities and intensities in the comprehensive plan,' itself."[102]

Further, in *Dixon v. Jacksonville*, the court explained that "we apply the standard of strict scrutiny . . . a process which involves a detailed examination of the development order for exact compliance with, or adherence to, the comprehensive plan."[103] As the court further explained, "[i]t is well established that a development order shall be consistent with the governmental body's objectives, policies, land uses, etc., as provided in its comprehensive plan."[104]

In *Franklin County v. S.G.I. Ltd.*, the court recognized that a development order concerning a site-plan was actionable based on allegations that it was inconsistent with plan provisions concerning adverse impacts on the ecological well-being of Apalachicola Bay.[105] It upheld a county's denial of a development order—a site plan for a golf course, not because golf courses were not an allowable use but because of adopted comprehensive plan objectives to "support the conservation and protection of ecological communities" and "maintain the estuarine water quality surrounding coastal resources so that there shall be no loss of any approved shellfish harvesting classifications through the year 2000."[106] The court explained that "the county is empowered by statute to disapprove an application for site approval if it finds that a proposed development is inconsistent with *any of the objectives in the comprehensive plan*."[107] It ruled that

> [t]he circuit court's statement that the county commission could not deny . . . approval based on "general objectives and policies" in the comprehensive plan is in direct opposition to the language and requirements of the . . . Act, and is not supported by relevant law applying the [A]ct.[108]

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102 Bay Cty., v. Harrison, 13 So. 3d 115, 118 (Fla. Dist. Ct. App. 2009) (emphasis added). There is no language limiting enforcement to any particular elements or type of policies in a plan. The court used the conjunctive "and" when referencing to the "objectives, policies" in an adopted plan, in addition to its "land uses," "densities and intensities." *Id.* at 118–19.

103 Dixon v. City of Jacksonville, 774 So. 2d 763, 765 (Fla. Dist. Ct. App. 2000) (emphasis added).

104 *Id.* at 764.

105 Franklin Cty. v. S.G.I. Ltd., 728 So. 2d 1210, 1211 (Fla. Dist. Ct. App. 1999).

106 *Id.*

107 *Id.* (emphasis added).

108 *Id.* (citing City of Jacksonville Beach v. Marisol Land Dev., Inc., 706 So. 2d 354 (Fla. Dist. Ct. App. 1998)).

In *Windward Marina, L.L.C. v. City of Destin*, the court upheld the denial of a development order based on comprehensive plan policies requiring "compatibility" of land uses and prohibiting "nuisances."[109] The plan's policies identified several specific development characteristics as being relevant to the compatibility determination, including—*in addition to type of use, density, and intensity*—height, appearance, aesthetics, odors, noise, smoke, vibration, traffic generation, nuisances, building location, dimensions, location, parking, ingress and egress routes and service areas, hours of operation, outdoor lighting, setbacks, buffers-fences, walls, landscaping, and open space requirements.[110] *Mann v. Board of County Commissioners*, upheld a county's denial of a rezoning on the basis that the rezoning was inconsistent with a policy governing the timing of zoning approvals relative to adequate public facilities and an objective in the Public Schools Facilities Element requiring the County to "[m]anage the timing of new development to coordinate with adequate school capacity."[111]

Contrarily, in *Heine v. Lee County*, the Second District ruled that "[t]he statute enunciates only three bases upon which a party may challenge a development order's purported inconsistency with a comprehensive plan."[112] The court ruled that those bases were limited to "use or density or intensity" only.[113] The court rejected the need to read "the Consistency Statute in *pari materia* with [Florida Statutes] section 163.3194(3)(a) [the definition of consistent]."[114] It ruled that "other aspects of development permitted"[115]—beyond the use, density, and intensity standards—are not enforceable.[116]

Finally, the Florida Supreme Court, in *Coastal Development of North Florida, Inc. v. City of Jacksonville Beach*, observed that "the comprehensive plan as a whole, including the future land use map and all of the other policies of the plan, consists of legislative policies that

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109 Windward Marina, L.L.C. v. City of Destin, 743 So. 2d 635, 637 (Fla. Dist. Ct. App. 1999).

110 *Id.*

111 Mann v. Bd. of Cty. Comm'rs, 830 So. 2d 144, 148 (Fla. Dist. Ct. App. 2002).

112 Heine v. Lee Cty., 221 So. 3d 1254, 1257 (Fla. Dist. Ct. App. 2017).

113 *Id.*

114 *Id.* at 1258.

115 *Id.*

116 *Id.*

must be applied to determine what uses can be made of a specific tract of land."[117]

The *Heine* decision appears to be an outlier. It is the only reported appellate decision in Florida that has not ruled that the entire comprehensive plan is enforceable under section 163.3215. It is contrary to the plain language of the statute, and the Florida Supreme Court's opinion in *City of Jacksonville Beach*.

VI
THE BURDEN OF PROOF AND STANDARD OF JUDICIAL REVIEW

The burden of proof and the standard of judicial review in cases under § 163.3215. reflect a judicial approach that gives real "teeth" to the statutory cause of action to enforce comprehensive plans through the development order consistency requirement.

A. Burden of Proof

In a challenge by de novo trial under section 163.3215, the burden is on the applicant or the local government (the proponent of the development order) to prove that it conforms strictly to the comprehensive plan.[118]

B. Standard of Review – "Strict Scrutiny"

A development order does not make law or policy but *applies* law and policy already made (in the comprehensive plan) to a specific application. Such decisions are "quasi-judicial" and far less discretionary than comprehensive planning decisions;[119] that legal characterization leads to a much stricter review of development order decisions by courts. The Florida Supreme Court, in *Brevard County v. Snyder*, criticized the highly deferential, loose judicial scrutiny that was previously used by courts, and which led to inconsistent development decisions, and adopted "strict scrutiny" as the proper standard of judicial review.[120]

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117 Coastal Dev. of N. Fla., Inc. v. City of Jacksonville Beach, 788 So. 2d 204, 208–09 (Fla. 2001).

118 *See* United States Sugar Corp. v. 1000 Friends of Fla., 134 So. 3d 1052 (Fla. Dist. Ct. App. 2013); Machado v. Musgrove, 519 So. 2d 629 (Fla. Dist. Ct. App. 1987), *cert. denied* 529 So. 2d 694 (Fla. 1988); White v. Metro. Dade Cty., 563 So. 2d 117, 128 (Fla. Dist. Ct. App. 1990); Bd. of Cty. Comm'rs v. Snyder, 627 So. 2d 469 (Fla. 1993).

119 *Snyder*, 627 So. 2d at 471.

120 *Id.* at 475–76.

The strict scrutiny standard is best described in *Machado v. Musgrove*, a prior appellate court decision adopted by the Supreme Court in *Snyder*.[121] According to *Machado*, "strict implies rigid exactness or precision. A thing scrutinized has been subjected to minute investigation. Strict scrutiny is thus the process whereby a court makes a detailed examination of a statute, rule or order of a tribunal for exact compliance with, or adherence to, a standard or norm.[122]

This judicial standard of review reflects the statutory definition of consistency in Florida Statutes section 163.3194. *Machado* wrote:

> The word "consistent" implies the idea or existence of some type or form of model, standard, guideline, point, mark or measure as a norm and a comparison of items or actions against that norm. Consistency is the fundamental relation between the norm and the compared item. If the compared item is in accordance with, or in agreement with, or within the parameters specified, or exemplified, by the norm, it is "consistent" with it but if the compared item deviates or departs in any direction or degree from the parameters of the norm, the compared item or action is not "consistent" with the norm.[123]

The court further explained that "the term 'strict scrutiny' arises from the *necessity of strict compliance* with comprehensive plan."[124] Therefore, strict scrutiny is "the process whereby a court makes a detailed examination of a[n] . . . order of a tribunal for exact compliance with, or adherence to, a standard or norm. It is the *antithesis of a deferential review*."[125]

Machado declared that a comprehensive plan is

> *not a "vest-pocket tool" for making individual zoning changes based on political vagary*. Instead, it is a broad statement of a legislative objective "to protect human, environmental, social, and economic resources; and to maintain, through orderly growth and development, the character and stability of present and future land use and development in this state."[126]

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121 Machado v. Musgrove, 519 So. 2d 629, 632 (Fla. Dist. Ct. App. 1987).

122 City of Cape Canaveral v. Mosher, 467 So. 2d 468, 470 (Fla. Dist. Ct. App. 1985).

123 *Id.* at 633–34.

124 *Snyder*, 627 So. 2d at 475.

125 *Machado*, 519 So. 2d at 632 (emphasis added).

126 *Id.* at 635 (internal citations omitted) (emphasis added).

C. No Deference to Local Government Interpretation

Under strict scrutiny, when a reviewing court must determine what a particular goal, objective or policy of what a comprehensive plan means, no deference is given to the local government's construction or interpretation of its own comprehensive plan.[127]

The case of *Dixon v. City of Jacksonville* made it clear that Comprehensive Plans are binding written laws that are to be interpreted according to what they say, not how they have been interpreted by the local government in the past:

> Because . . . the issue before us is one that is "easily subject to examination for strict compliance with the plan," *we apply the standard of strict scrutiny to resolve it, a process which involves a detailed examination of the development order for exact compliance with, or adherence to, the comprehensive plan. We reject . . . the City's argument that deference should be given to the City's interpretation of a law which it administers,* thereby requiring its approval so long as its construction falls within the range of possible interpretations. *We are instead presented with a question which is purely one of law, and we are not constrained by more deferential standards from substituting our judgment for that of the lower tribunal. . . .*
>
> Indeed, were we to adopt the deferential standard . . . , the ultimate determination of a planned development would be placed within the discretion of whoever composes the membership of the governmental body's planning department at any given time, and the goal of certainty and order in future land-use decision-making would be circumvented.[128]

Similarly, in *Pinecrest Lakes*, the court explained:

> The statute is framed as a rule, a command to cities and counties that they must comply with their own Comprehensive Plans after they have been approved by the State. The statute does not say that local governments shall have some discretion as to whether a proposed development should be consistent with the . . . Plan. Consistency with a Comprehensive Plan is therefore not a discretionary matter.[129]

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127 *See Snyder*, 627 So. 2d at 475; Johnson v. Gulf Cty., 26 So. 3d 33 (Fla. Dist. Ct. App. 2009); Pinecrest Lakes, Inc. v. Shidel, 795 So. 2d 191 (Fla. Dist. Ct. App. 2001), *aff'd*, 821 So. 2d. 300 (Fla. 2002); Dixon v. City of Jacksonville, 774 So. 2d 763 (Fla. Dist. Ct. App. 2000), *aff'd*, 831 So. 2d 861 (Fla. 2000).

128 *Dixon*, 774 So. 2d at 765 (emphasis added).

129 *Pinecrest Lakes, Inc.*, 795 So. 2d at 198.

The Court explained that such deference "would not only be inconsistent with the text and structure of the statute, but it would ignore the very reasons for adopting the legislation in the first place."[130]

The Court ruled that a judge must "pay deference only to the facts in the case and the applicable law. In light of the text of section 163.3215 and the foregoing history, we reject the developer's contention that the trial court erred in failing to defer to the County's interpretation of its own Comprehensive Plan."[131]

D. Violations of Comprehensive Plans Not Allowed Based Upon Fundamental Fairness Considerations

Another aspect of strict scrutiny is that a local government cannot disregard an inconsistency with a comprehensive plan by invoking the doctrine of "fundamental fairness." If the plan is unfair or inappropriate, the local government must seek to formally amend it before it may approve such development.[132] In *Machado*,[133] the court rejected an interpretation that Florida Statutes section 163.3194(4)(a),[134] which requires a consideration of "fundamental fairness questions as may arise from a strict application of the plan," constituted "a license to second-guess the legislative body where there is simply the to-be-expected collision of the plan with private interests."[135]

E. The Limits of Strict Scrutiny

As demonstrated by the decisions discussed above, the burden of proof and the strict scrutiny standard of review have favored appellate decisions finding or upholding lower court findings of comprehensive

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130 *Id.* at 202.

131 *Id.*

132 *See Baker*, 774 So. 2d at 19.

133 Machado v. Musgrove, 519 So. 2d 629, 629 (Fla. Dist. Ct. App. 1987).

134 FLA. STAT. ANN. § 163.3194(4)(a). "A court, in reviewing local governmental action . . . under this act, may consider, among other things, the reasonableness of the comprehensive plan, or elements thereof, relating to the issue justiciably raised or the appropriateness and completeness of the comprehensive plan, or element or elements thereof, in relation to the governmental action . . . under consideration. The court may consider the relationship of the comprehensive plan, or element or elements thereof, to the governmental action taken . . . but private property shall not be taken without due process of law and the payment of just compensation." *Id.*

135 *Machado*, 519 So. 2d at 629, 635.

plan violations. Several reported cases have upheld development orders. One example is *Bay County v. Harrison*, which reversed a trial court's ruling that a development order that authorized the construction of a large beachfront resort was inconsistent with the county's comprehensive plan.[136] Overturning the trial court's ruling that the resort violated the plan's density limit on "dwelling units" in a "seasonal or resort" area, the court found that the resort is a "hotel" and did not fit under the definition of "dwelling unit," which the court interpreted the plan to define as "a permanent residence."[137] The court also considered how other comprehensive plans in the state differentiated between dwelling units and "transient units," and reasoned that the Bay County plan as a whole reflected a conscious decision not to impose a density cap on transient units or lodging establishments.[138]

In *Arbor Properties, Inc. v. Lake Jackson Protection Alliance, Inc.*, the court reversed a trial court's finding of comprehensive plan inconsistency based on the appellate court's interpretation of the comprehensive plan.[139] This section 163.3215 action was brought by an applicant who challenged an approved development order to contest conditions that required stringent storm water restrictions the applicant believed did not apply to the property.[140]

The court stated that the

> Legislature has established that in reviewing consistency, a court may consider the "reasonableness of the comprehensive plan, or element or elements thereof, relating to the issue justiciably raised or the appropriateness and completeness of the comprehensive plan, or element or elements thereof, in relation to the governmental action or development regulation under consideration."[141]

The Court overturned the development order conditions, ruling that the trial court had failed to consider the "reasonableness of the comprehensive plan, or element or elements thereof."[142] The appellate court ruled that the correct interpretation of the applicable provisions

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136 *Harrison*, 13 So. 3d at 120.

137 *Id.*

138 *Id.*

139 Arbor Props., Inc. v. Lake Jackson Prot. All., Inc., 51 So. 3d 502, 503 (Fla. Dist. Ct. App. 2010).

140 *Id.* at 504.

141 *Id.* at 505 (citing FLA. STAT. § 163.3194(4)(a)).

142 *Id.* at 506 (citing FLA. STAT. § 163.3194(4)(a)).

of the Plan as a whole meant that stringent development limitations were not meant to apply to the subject property.[143]

Arbor Properties' reliance on section 163.3194(4) (a) (which authorizes a court to consider the reasonableness of the comprehensive plans it applies to development order) begs the question of the actual impact of that section on the judicial consistency analysis. While citing that statutory clause as the basis for ruling that the development order's conditions were inconsistent with the plan, the court's decision resulted from a simple legal interpretation of the plan. It is not at all clear whether the "reasonableness" clause in section 163.3194 (4)(a) means anything beyond the basic notion that courts must interpret comprehensive plans based upon a de novo legal interpretation. The decisions governing judicial interpretations are discussed in the following section.

VII
INTERPRETING WHAT A COMPREHENSIVE PLAN MEANS

A. Interpreted Like a Statute

Comprehensive plans are legislation and are interpreted according to the rules of statutory interpretation, as illustrated by the decisions identified below.[144] Where the language is clear and unambiguous, the plan must be given its plain and ordinary meaning.[145] If a comprehensive plan provision is ambiguous and does not have a "plain meaning," courts will resort to a variety of rules of construction such as "the specific prevails over the general," "the mention of one thing excludes things not mentioned," and other legal principles.[146]

One clear example of applying the plain meaning and not deferring to a local government's interpretation of its own comprehensive plan is

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143 *Id.*

144 *See, e.g.*, 1000 Friends of Fla., Inc. v. Palm Beach Cty., 69 So. 3d 1123, 1127 (Fla. Dist. Ct. App. 2011); Rinker Materials Corp. v. North Miami, 286 So. 2d 552, 553 (Fla. 1973) (applying the same rules of construction to a zoning ordinance plan that would apply to other statutes).

145 *See 1000 Friends*, 69 So. 3d at 11251126; *see also* Thayer v. State, 335 So. 2d 815, 816–17 (Fla. 1976); Fla. Birth-Related Neurological Injury Comp. Ass'n v. Fla. Div. of Admin. Hearings, 686 So. 2d 1349, 1354 (Fla. 1997) (holding that undefined terms in a comprehensive plan "should usually be given its plain and ordinary meaning").

146 Seminole Cty. v. Coral Gables Fed. Sav. and Loan Ass'n, 691 So. 2d 614, 615 (Fla. Dist. Ct. App. 1997); *Thayer*, 335 So. 2d at 817.

Johnson v. Gulf County, in which the court overturned a development order for its failure to require a buffer zone around wetlands.[147] While the comprehensive plan categorically required buffers around "wetlands," the county claimed that its long-standing interpretation was that the policy only applied to wetlands over which the state or federal government had permitting jurisdiction.[148] Rejecting this claim, the court ruled that the development orders must comply with the actual terms of a comprehensive plan—not the local government's interpretation of the plan.[149]

Next, a comprehensive plan must be read together as a whole (*in pari materia*) and individual provisions harmonized.[150]

B. The Legal Effect of the Future Land Use Map

A comprehensive plan's Future Land Use Element, specifically the Future Land Use Map and corresponding policies establishes a range of allowable uses and densities or intensities over large areas, and the specific use and intensities for specific parcels within that range are decided by a more detailed, implementing zoning map.[151] Local governments are not required to rezone land to the most intensive use potentially allowed by the plan and can put or keep land in any zoning category that is consistent with the range of uses allowed by the plan.[152] In *Lee County v. Sunbelt Equities, II, Partnership*, the court explained that

> it is not enough that Sunbelt's proposal is consistent with what Lee County planners envision as the eventual buildout of this area. One must also look to the *present* character of the area, which is reflected in the existing zoning classification. This aspect of the comprehensive plan represents, in effect, a future ceiling above

147 Johnson v. Gulf Cty., 26 So. 3d at 33, 43–44 (Fla. Dist. Ct. App. 2009).

148 *Id.* at 40.

149 *Id.* at 44.

150 *See* Arbor Props., Inc. v. Lake Jackson Prot. All., Inc., 51 So. 3d 502, 505 (Fla. Dist. Ct. App. 2010); *see also* Katherine's Bay, L.L.C. v. Fagan, 52 So. 3d 19, 28 (Fla. Dist. Ct. App. 2010); Realty Assocs. Fund IX, L.P. v. Town of Cutler Bay, 208 So. 3d 735, 738 (Fla. Dist. Ct. App. 2016).

151 *See* FLA. STAT. ANN. § 163.3177(6)(a)(1) (requiring a comprehensive plan's Future Land Use Element to establish the "distribution, location, and extent of" the land uses, and the "population densities and building and structure intensities" allowed on each parcel of land); *see also* Brevard Cty. v. Snyder, 627 So. 2d 469, 475 (Fla. 1993) (explaining that a comprehensive plan's Future Land Use Element establishes a long-range maximum limit on the intensity of land use and the implementing zoning ordinance establishes parcel-specific limits within that range).

152 *Brevard Cty.*, 627 So. 2d at 475.

> which development should not proceed. It does not give developers *carte blanche* to approach that ceiling immediately, or on their private timetable, any more than a city or county is entitled to view its planning and zoning responsibilities as mere make-work.[153]

C. The Listing of Permitted Uses

The proposed use must be permitted in the comprehensive plan, "either specifically or by reasonable implication."[154] Where none of the uses permitted by the future land use category reasonably suggest the proposed use, the proposed use is not permitted, based on the traditional maxim of construction, *expressio unius est exlusio alterius* (the mention of one is the exclusion of the other.)[155] Consistent with these rulings, "when a use or activity falls into a category of permissive uses, but more closely falls into a category that is prohibited by the Plan, the latter trumps the former and the activity must be prohibited."[156]

VIII
TRIAL

Even before section 163.3215 was amended in 2002 to explicitly identify the cause of action to be by a *de novo* trial, appellate courts held that the pre-2002 version of the statute, given the overall objectives and scheme of the Act, provided for a de novo trial, not circuit court review in its appellate capacity.[157]

However, since 2002, local governments have been authorized to establish a local process for holding a quasi-judicial hearing on an application for a development order.[158] Where such a process is

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153 Lee Cty. v. Sunbelt Equities II, Ltd. P'ship, 619 So.2d 996, 1008 (Fla. Dist. Ct. App. 1993).

154 Saadeh v. Jacksonville, 969 So. 2d 1079, 1084 (Fla. Dist. Ct. App. 2007).

155 Dixon v. Jacksonville, 774 So. 2d 763, 766 (Fla. Dist. Ct. App. 2000).

156 Keene v. Zoning Bd. of Adjustment, 22 So. 3d 665, 669 (Fla. Dist. Ct. App. 2009) (citing Volusia v. Aberdeen at Ormond Beach, L.P., 760 So. 2d 126 (Fla. 2000)); *see* Stroemel v. Columbia, 930 So. 2d 742 (Fla. Dist. Ct. App. 2006); Saadeh v. Stanton Rowing Found., Inc., 912 So. 2d 28 (Fla. Dist. Ct. App. 2005); Barry v. Garcia, 573 So. 2d 932 (Fla. Dist. Ct. App. 1991).

157 *See* Poulos v. Martin Cty., 700 So. 2d 163, 164 (Fla. Dist. Ct. App. 1997) (editor's note: The author was counsel of record in this decision); *see also*, Gregory v. Alachua, 553 So. 2d 206, 209 (Fla. Dist. Ct. App 1989).

158 FLA. STAT. ANN. §163.3215(4) (West 2018).

established, it limits legal challenges to development orders to a petition for writ of certiorari.[159]

IX
ATTORNEY'S FEES AND COSTS

If a pleading has been filed for an improper purpose, the court may impose an appropriate sanction on the person who signed the pleading, the represented party, or both.[160] The sanction may include an order to pay the other party's reasonable expenses, including attorney's fees, incurred as a result of the filing of the pleading.[161]

In *Minto PBLH, L.L.C. v. 1000 Friends of Florida, Inc*.,[162] the Fourth District upheld a trial court's denial of sanctions against one plaintiff (under Florida Statute sections 57.105 and 163.3215(6)) and overturned the trial court's sanction against another unsuccessful plaintiff, which had been granted under section 57.105.[163]

Given the key role that the interpretation of comprehensive plan language plays in development order challenges under section 163.3215, the court's ruling was significant. The court noted that "[a] court's finding that a party's interpretation of a legal document is incorrect 'does not mean that the other party is necessarily entitled to section 57.105 57.105 fees.'"[164] Applying that rule to the plaintiff's unsuccessful claim that the approval of a college and a hotel violated the county's comprehensive plan, the court ruled that "although the plaintiffs' claims were tenuous with respect to the alleged inconsistency between the Comprehensive Plan and the college and hotel uses authorized in the Development Orders, there was at least an *arguable* basis for the plaintiffs' claims."[165]

Underscoring the importance of citizen access to enforce the law, the court stated that

> while the plaintiffs' contentions were not particularly strong and were ultimately determined to be incorrect, we affirm the trial court's denial of sanctions . . . . Our decision is guided by the need to apply section 57.105 with restraint. To rule otherwise would risk chilling

159 *Id.*

160 FLA. STAT. ANN. § 163.3215(6) (West 2018).

161 *Id.*

162 *See* Minto PBLH, L.L.C. v. 1000 Friends of Fla., Inc., 228 So. 3d. 147 (Dist. Ct. App. 2017)

163 *Id.* at 149.

164 *Id*. at 149 (quoting Peyton v. Horner, 920 So. 2d 180, 183 (Fla. Dist. Ct. App. 2006)).

165 *Id.*

> access to the courts. For example, if [the developer's] argument were taken to its logical extreme, a losing party would be subject to sanctions under section 57.105 every time a court found that a statute or legal document was unambiguous and that the losing party's interpretation was incorrect.[166]

Finally, the decision emphasized that the limitation on the availability of sanctions under section 163.3215(6), applies only to situations where a party seeking fees can meet the burden of proving that a non-prevailing party brought the suit for an improper purpose.[167]

X
SETTLEMENT

Section 163.3215(7), provides that, "[i]n any action under this section, no settlement shall be entered into by the local government unless the terms of the settlement have been the subject of a public hearing after notice as required by this part."[168]

XI
REMEDY

The statute authorizes "injunctive or other relief."[169] "[T]he statutory text makes the injunction the first and preferred remedy to alleviate the affects of in [sic] inconsistent land use."[170]

An inconsistent development order is void and the court's broad powers under the Act include entry of an injunction mandating the subject property's compliance with the comprehensive plan and restoration to its original condition, including the demolition of substantial buildings erected in violation of the comprehensive plan.[171] In *Pinecrest Lakes*, the court ruled that the integrity of the consistency requirement could not be avoided by the construction of the disputed

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166 *Id.* at 149–50.

167 *Id.* at 149 n.1. "[T]he trial court properly denied sanctions . . . under § 163.3215(6), Florida Statutes, as Minto did not make a showing that the plaintiffs' claims were brought for an improper purpose." *Id.*

168 Chung v. Sarasota Cty., 686 So. 2d 1358, 1360 (Fla. Dist. Ct. App. 1996) (citing FLA. STAT. § 163.3215(7) (1996)).

169 FLA. STAT. ANN. § 163.3215(3), (4) (West 2018).

170 Pinecrest Lakes, Inc. v. Shidel, 795 So. 2d 191, 206 (Fla. Dist. Ct. App. 2001).

171 *Id.* at 207.

buildings during the pendency of the section 163.3215 case.[172] The court affirmed a trial judge's ruling that removal of the buildings was proper.[173]

The court rejected the developer's argument that the injunction should have been denied because the monetary loss that it would suffer from demolition ($3.3 million) outweighed the diminution in property value that the plaintiff had suffered ($26,000).[174] It also rejected the argument that the trial court should have awarded monetary damages or ordered screening, such as trees and shrubbery, instead of demolition.[175] The court held that neither of these approaches would have corrected the violation of the comprehensive plan policy requiring "comparable density" and "compatibility dwelling unit types" for new development adjacent to large-lot single-family homes in the plaintiff's zoning district.[176]

The court ruled that it would not engage in a balancing of the financial inequities as suggested by the developer because it would lead to "substantial non-compliance with comprehensive plans."[177] The court ruled that to allow a developer to shroud an inconsistency with trees and shrubs, the more certain it is that courts will not enjoin an inconsistency and require its removal if already built.[178]

In this case, the court found that the alleged inequity would have been avoided had the developer waited for the exhaustion of legal remedies before undertaking construction.[179] Therefore, it found no inequity in ordering the apartments to be removed.[180] The court found that the law does not allow a developer to escape this requirement by making the cost of enforcing the law excessive.[181] It ruled that the integrity of the law requires that an injunction should always be granted to remove the development or structures that are found to be inconsistent with a comprehensive plan.[182] The "statutory rule," wrote

172 *Id.* at 209.
173 *Id.* at 196–97.
174 *Id.* at 207.
175 *Id.* at 207–08.
176 *Id.* at 196 n.8.
177 *Id.* at 207.
178 *Id.* at 207–08.
179 *Id.* at 208.
180 *Id.*
181 *Id.*
182 *Id.* at 209.

the court, "is that if you build it, and in court it later proves inconsistent, it will have to come down."[183]

Although the court laid down a clear legal principle that an injunction should always be issued under Chapter 163, it also ruled that even the traditional "discretionary" approach of balancing the equities where an injunction is requested strongly supported removal of these apartments.[184] Given the developer's business decision to assume the risk with full knowledge that the final court decision could order removal of any non-conforming buildings, it was "difficult to perceive from the record any great inequity in requiring demolition."[185] Moreover, said the court, the public interest in preventing the "flouting" of the comprehensive planning requirements would outweigh the monetary loss to a developer.[186] Rejecting the developer's plea that the multi-million-dollar cost of the buildings should preclude their removal, the court ruled that the developer's conscious business decision to proceed with construction with knowledge that the legal challenge could result in the removal of the buildings placed the equities in favor of the plaintiff.[187] To allow the buildings to stand, ruled the court, "would allow developers . . . to build in defiance of the limits and then escape compliance by making the cost of correction too high."[188] The court said that

> [w]e claim to be a society of laws, not of individual eccentricities in attempting to evade the rule of law. . . . If the rule of law requires land uses to meet specific standards, then allowing those who develop land to escape its requirements by spending on a project out of compliance would make the standards of growth management of little real consequence.[189]

For these reasons, the court found it improper to balance the equities in terms of the relative financial loss to be felt by the developer and the affected person.[190] Such balancing would lead to substantial non-compliance, as the cost of the newly allowed construction will usually

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183 *Id.*

184 *See id.* at 204.

185 *Id.* at 208.

186 *Id.*

187 *See id.*

188 *Id.* at 208.

189 *Id.*

190 *See id.* at 207–08.

be greater than any property value loss experienced by individual neighbors resulting from the inconsistency.[191] The developer's argument would "allow those with financial resources to buy their way out of compliance with comprehensive plans."[192]

The *Pinecrest Lakes* decision is perhaps the most powerful and striking example of judicial application of the strict scrutiny standard of review, and of remedial enforcement of the statutory prohibition on development that is inconsistent with adopted comprehensive plans.

CONCLUSION

The strict statutory and judicial approach to enforcement of the requirement that development orders be consistent with comprehensive plans is manifested in many ways and has several key implications for practitioners. First, the drafting of comprehensive plan goals, objectives, and policies must consider how developers can meet their burden of demonstrating consistency with those provisions and how affected citizens can point to them to protect their interests. Second, practitioners must consider how those adopted comprehensive plan provisions are likely to be interpreted and applied by courts under the "strict scrutiny" standard of review. Comprehensive plan language should be written in a manner that reflects the maxim "say what you mean and mean what you say." Practitioners should also be aware that the non-deferential and broad enforcement cause of action does not limit judicial review to the record made during the process that resulted in the challenged local government decision. Neither does judicial review defer to prior practice or current interpretations by a local government of its own comprehensive plan. Judicial enforcement decisions will typically be made based on a new trial, new evidence, and the language of the comprehensive plan at issue. Practitioners must be aware of the rules courts will apply to the enforcement of the development order consistency requirement of section 163.3215 from the initial drafting of comprehensive plan language through the determination of remedial injunctive relief by a court at the completion of a successful legal challenge.

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191 *Id.* at 207.

192 *Id.*