PROTECTING THREATENED ECOSYSTEMS THROUGH FLORIDA’S GROWTH MANAGEMENT SYSTEM

by

DEFENDERS OF WILDLIFE (January, 2001)

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In July, 2000, the governor of Florida appointed a Growth Management Study Commission to “identify appropriate goals and desired outcomes for planning and directing the future growth of our state” and to “recommend... implementation strategies to further the goals.....”1 Defenders of Wildlife believes that this is a rare opportunity at a critical time to take a holistic look at the challenges of Florida’s tremendous growth. The challenge is basically two-fold: to restructure the complex, inefficient, and oftentimes counterproductive layers of bureaucracy that frustrate private and public interests alike, and to do it in a way that preserves the natural, cultural and economic qualities that have made Florida so attractive to both residents and visitors.

Defenders of Wildlife is a national non-profit conservation organization with over 400,000 members (including over 30,000 in Florida) which shares the State of Florida’s dedication to protecting wildlife and the ecosystems upon which they depend. Florida is the leading state in the nation in vigorous land acquisition, in ecosystem mapping, and in enacting the most comprehensive attempt at growth management ever undertaken.

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Florida’s growth management experiment has had some growing pains, however, and we need to use what we have learned to make the system better.\(^2\)

The purpose of this Report is to show the importance of incorporating habitat and ecosystem protection as a compelling state interest in Florida law, and to recommend ways to accomplish this while simultaneously meeting the goal of making the growth management process more efficient and effective.

I. Ecosystem preservation is a compelling state interest

Florida officially recognizes the importance of protecting its natural systems. The Florida Constitution, the State Comprehensive Plan, growth management statutes, land acquisition programs, and agency projects and studies authorized and endorsed by the legislature, all contain explicit pronouncements declaring the state’s interest in preserving its natural heritage. In this Section I we discuss the policy statements, and then in Section II we discuss the existing laws which implement those policies.

A. Florida Constitution and State Comprehensive Plan

The Florida Constitution’s declares that “It shall be the policy of the state to conserve and protect its natural and scenic beauty.”\(^3\) This policy is also articulated in the State Comprehensive Plan (SCP). F.S. 187.201(10) sets a SCP Goal to “protect and acquire unique natural habitats and ecological systems... and restore degraded natural systems to a functional condition.”

In furtherance of this goal, the SCP at F.S. 187.201(10)(b), states the following policies:

1. Conserve forests, wetlands, fish, marine life, and wildlife to maintain their environmental, economic, aesthetic, and recreational values....

3. Prohibit the destruction of endangered species and protect their habitats.

4. Establish an integrated regulatory program to assure the survival of endangered and threatened species in the state....

7. Protect and restore the ecological functions of wetlands systems to ensure their long-term environmental, economic, and recreational value....

9. Develop and implement a comprehensive planning, management, and acquisition program to ensure the integrity of Florida’s river systems.

10. Emphasize the acquisition and maintenance of ecologically intact systems in all land and water planning, management and regulation.

\(^2\) In an analysis of the country’s most endangered ecosystems, Florida was identified as the state at most risk of losing its native habitats. "Endangered Ecosystems: A status report on America’s vanishing habitat and wildlife," by Reed Noss and Robert Peters, December 1995, published by Defenders of Wildlife.

\(^3\) Article II, Section 7(a).
B. The Florida Fish and Wildlife Conservation Commission GAPS Report

The Florida Fish & Wildlife Conservation Commission (FFWCC) in 1994 published its report, “Closing the Gaps in Florida’s Wildlife Habitat Conservation System”, and supplemented that report in 2000 with “Habitat Conservation Needs of Rare and Imperiled Wildlife in Florida”. The maps developed from those reports are continually being updated, with the latest version residing in the computer at the FFWCC Office of Environmental Services. (cumulatively, “GAPS Report”)

The GAPS Project recognizes that Florida’s growth management laws, passed in the 1980’s, have not provided enough protection for the state’s diverse wildlife and habitat, especially with respect to essential upland systems.4 The GAPS Report describes habitat areas in Florida that should be conserved if key components of the state’s biological diversity are to be maintained. The lands recommended in the report for additional protection [Strategic Habitat Conservation Areas (“SHCAs”)] depict lands needed to meet minimum conservation goals for the following:

[a] 30 species of wildlife inadequately protected by the current system of conservation lands,
[b] high quality sandhill sites,
[c] high quality scrub sites,
[d] high quality pine rockland sites,
[e] high quality examples of tropical hardwood hammocks,
[f] bat maternity caves and winter roost caves,
[g] wetlands important to the breeding success of eight species of wading birds,
[h] lands important to the long-term survival of 105 globally rare species of plants.

The SHCAs encompass 4.82 million acres, or approximately 13% of the land area of Florida. These lands are essential to providing some of the state’s rarest animals, plants, and natural communities with the land base necessary to sustain populations into the future.... 5

The GAPS Report concludes that “additional protection” is necessary because, “It seems unlikely that all lands within the identified SHCAs will ever come under State ownership...” id.

C. Ecological Network

In 1998, the Florida Department of Environmental Protection (DEP) funded and prepared, in conjunction with the Florida Greenways Coordinating Council, a report entitled “Connecting Florida’s Communities with Greenways and Trails.” The Florida Statewide

4 Section II.C, below, outlines some of the reasons for this failure.
Greenways System Planning Project was the result of that endeavor. The Greenways System Planning Project identifies and recommends for conservation specific areas in the Greenways system known as the “Statewide Ecological Network”. The lands identified in the Ecological Network contain many of the same lands identified as SHCAs in the GAPS Report, omitting some areas outside of greenway corridors. The Executive Summary of the Greenways System Planning Project states that the purpose of the Ecological Network is for “protection of an integrated state reserve system that could effectively conserve Florida’s biological diversity and other important land resources... into an updated and completely linked reserve system of statewide significance.” The Executive Summary goes on to recommend: “It is essential that the Ecological Network be incorporated into the planning process....” pp. 12-13.

The primary purpose of the Greenways project was to identify lands for acquisition, and the report did not deal with matters of growth management or regulation. However, the science behind the Ecological Network shows that, as with the GAPS Report, there is a compelling state interest in preserving those specifically identified areas critically necessary for providing the minimum protection to enable the survival of Florida’s major ecosystems and biological diversity.

D. Florida Natural Areas Inventory

Also funded by the Florida DEP and used extensively by the Conservation and Recreation Lands (CARL) Trust Fund, the Florida Natural Areas Inventory (FNAI) is a private, scientific analysis of more than 26,000 occurrences of rare plant and animal species and high-quality natural communities throughout the state. The FNAI data is used by and largely incorporated in both the GAPS report and the Ecological Network.

E. The Extent of Unprotected Endangered Ecosystem Lands

It has been estimated that nearly 50% of the state’s wildlife are in decline. The agencies and reports above are highly consistent in their appraisal of the minimum necessary critical lands which need additional protection if Florida’s biological landscape is to survive. Florida has spent significant time and money having these reports prepared, and is, to Defenders’ knowledge, the leading state in the nation in critical habitat and ecosystem mapping. For convenience, we will refer to the SHCAs in the GAPS Report, the Ecological Network from the Greenways Project, and the 26,000 occurrence sites catalogued in the FNAI, together with any other areas identified as wetlands or endangered species habitat under federal law, cumulatively as the “SHCA Network”.8

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8 Under the Florida Forever Act, F.S. 259.105, the Florida Forever Advisory Council, F.S. 259.0345, has commissioned the preparation of a State Conservation Needs Assessment, including a Biodiversity Overlay Map and Integrated Water Resources Overlay, utilizing data from what we are referring to as the “SHCA Network”. Defenders endorses this work, and all references to the “SHCA Network” herein are intended to apply to any such supplemental mapping completed by the state.
The GAPS Report identifies 4.82 million acres in SHCAs which are not currently owned or protected by the state or private conservation easements.\textsuperscript{9} The Ecological Network (1998) lists 5.2 million acres in private uplands,\textsuperscript{10} which are also not protected by state ownership or present regulation.\textsuperscript{11} Over 80% of the SHCAs in GAPS and the “areas of conservation interest” identified in FNAI, as well as most of the intact natural communities and species occurrences tracked by the FNAI, are contained in the Ecological network.\textsuperscript{12} Currently, a state Conservation Needs Assessment including a biodiversity overlay and integrated water resources overlay are being prepared under the Florida Forever Act.\textsuperscript{13} There is therefore significant scientific consensus, funded and built over years of work by the State of Florida, that the minimum needs for habitat and ecosystem protection in the State depend upon the protection of the core lands identified in the SHCA Network.

There are many other upland areas throughout the state with significant habitat and ecosystem value, in addition to the SHCA Network. However, the SHCA Network constitutes the minimum protection necessary for immediate ecosystem survival.\textsuperscript{14}

Dealing with the SHCA Network on a regional or state-wide basis rather than exclusively by local governments makes sense for both practical as well as policy reasons. As a practical matter, ecosystems and natural communities cannot be regulated or protected on a local, piecemeal basis, because ecosystem boundaries do not follow local jurisdictional lines. As a policy matter, if protection is to be science based, then it must be uniform and consistent according to ecosystem needs, and not varying local political needs. The SCP recognizes this need to “establish an integrated regulatory program,”\textsuperscript{15} and the Greenways Project emphasizes that “It is essential that the Ecological Network be “incorporated in the [state] planning process.”\textsuperscript{16}

Yet, at present, local governments and the state agencies have no communication about developments going on in SHCA Network areas. Indeed, FFWCC does not even track if, when, and where development is taking place in the SHCA Network. Local governments have no incentive or mechanism to be aware of or consult with FFWCC about developments in the SHCA Network, and FFWCC has no mechanism or way to advise the local governments about prospective developments which may affect the SHCA Network. Right now the SHCA Network data is sitting there, all dressed up with nowhere to go.

This lack of inter-government coordination is partly because the state agency data is in digital GIS format, and local government maps are in lot and block metes-and-bounds format.

\begin{itemize}
\item \textsuperscript{9} Since 1994, approximately 800,000 of these acres have been bought by the state, leaving about 4 million acres of SHCAs unprotected by conservation ownership or easement.
\item \textsuperscript{10} Executive Summary, The Florida Statewide Greenways Planning Project, p. 12.
\item \textsuperscript{11} The wetlands component of these lands is covered under wetland permitting regulations; however, neither the reports, nor Defenders, considers this to mean the land is “protected”. See Section II.D.1, below.
\item \textsuperscript{13} F.S. 259.0345 and 259.105.
\item \textsuperscript{14} See Exhibit 1, attached.
\item \textsuperscript{15} F.S. 187.201(10)(b)?.
\item \textsuperscript{16} Executive Summary, pp. 12-13.
\end{itemize}
There is a desperate need to provide the funding to integrate the maps and provide a mechanism for information flow and coordination between local governments and the state data base.\textsuperscript{17}

Based on the statements in the State Comprehensive Plan, the conclusions of FFWCC and DEP in the stated reports, and the practical and policy reasons stated above, preservation of the core lands identified in the SHCA Network should be recognized as a compelling state interest, and be incorporated in a comprehensive state-wide scheme of planning, regulation, and acquisition.

II. Existing Law

The approximately 5 million acres involved is perhaps twice the amount that can be bought with present P2000 funding.\textsuperscript{18} Certainly we must do everything possible to guarantee the maximum acquisition dollars and options.\textsuperscript{19} However, in the meantime, while the clock ticks, and for those lands without willing sellers, planning incentives, education and regulation must be addressed, or we will lose these areas forever. The health of Florida’s ecosystems is just as important to Florida’s future as housing, water supply, and wetlands, and should be treated with equal care and concern. Unfortunately, up to now this has not been the case.

A. Introduction

At least since the GAPS Report in 1994, then, Florida has had the data and maps to carry out the state’s express policy that “unique natural habitats and ecological systems”\textsuperscript{20} should have special protection under the law. Florida law attempts to provide such special protection for some of the areas included in the GAPS and Ecological Network analysis: wetlands,\textsuperscript{21} coastal construction zones,\textsuperscript{22} and Areas of Critical State Concern (ACSC).\textsuperscript{23} These attempts have met with varying levels of success.

Of the approximately 5 million acres in the SHCA Network, about 2 million acres are salt and freshwater wetlands.\textsuperscript{24} The remaining 3 million acres, containing five of the six ecosystem types\textsuperscript{25} listed in the GAPS Report as essential to protect,\textsuperscript{26} have not received the same level of protection as have wetlands and coastal and marine resources, due to the varying approaches taken by multiple local governments, and the lack of a clearly stated policy to preserve integrated ecosystems. In this section, we identify the Florida laws which apply to growth management, and discuss how they apply to the protection of habitats and ecosystems, especially uplands.

\textsuperscript{17} See Recommendation #22.
\textsuperscript{18} GAPS Report 1994, Executive Summary, p.1.
\textsuperscript{19} See Recommendation #6.
\textsuperscript{20} State Comprehensive Plan, F.S. 187.201(10).
\textsuperscript{21} See, e.g., F.S. Chapter 373, and Section II.D.1, below.
\textsuperscript{22} See, e.g., F.S. Chapter 161.
\textsuperscript{23} See F.S. Chapter 380, and Section II.B.4, below
\textsuperscript{24} GAPS Report, 1994, Table 21, p. 141.
\textsuperscript{25} Sandhill, scrub, pine rockland, tropical hardwood hammock, and bat caves.
\textsuperscript{26} GAPS Report, 1994, p.1.
Laws governing growth and development are often discussed in terms of planning versus regulation. “Planning” seeks to determine what land uses are appropriate for a particular area or region, while “regulation” (sometimes also called permitting) is in charge of how it is done. This is an important conceptual distinction while in the drafting stage. Once the laws are in place, however, as a practical matter, growth management is accomplished both by having planning requirements, and by implementing and enforcing those requirements through the permitting procedure. Without enforcement, the planning function becomes meaningless posturing. We therefore examine both the planning provisions that apply to ecosystem protection, as well as how permitting and enforcement procedures affect the implementation of that planning.

B. The Planning Laws

Florida’s land planning scheme consists of a top-down pyramid of Comprehensive Plans, including the State Comprehensive Plan, Strategic Regional Policy Plans, and Local Comprehensive Plans for each city and county. Local Plans are reviewed for consistency with the Regional and State Plans, and the Regional Plans must be consistent with the State Plan.

The Florida Department of Community Affairs (DCA) is the lead agency charged with overseeing the implementation of the growth management laws.

1. State Comprehensive Plan

Section I above quotes the sections of the State Comprehensive Plan (SCP) which apply to Florida’s natural communities. As a planning tool, the conservation goal in the SCP is strong and unequivocal: to “protect and acquire unique natural habitats and ecological systems... and restore degraded natural systems to a functional condition,” with a policy to “Prohibit the destruction of endangered species and protect their habitats.” F.S. 187.201(10). The implementation of this goal and policy is inhibited, however, by the inclusion of the following language in the statute:

The goals and policies contained in the State Comprehensive Plan shall be reasonably applied where they are economically and environmentally feasible, not contrary to the public interest, and consistent with the protection of private property rights. The plan shall be construed and applied as a whole, and no specific goal or policy in the plan shall be construed or applied in isolation from the other goals and policies in the plan.

Since the “other goals” in the SCP include the competing interests of “housing”, “employment”, “tourism”, and “the economy”, it is impossible to enforce the goal to protect ecosystems and prohibit destruction of habitat where it is inconsistent with these interests. It is evident that the SCP was intended by the legislature to be only precatory, and this is in fact how

27 F.S. Chapter 187, F.S. 186.507, and F.S. Chap. 163, Part II.
28 F.S. 163.3177(10), F.S. 163.3184(1)(b), and F.S. 186.507(1). There are also State Agency Strategic Plans (F.S. 186.021(1)) and State Land Development Plans (F.S. 380.031(17)) of more particular application.
29 F.S. 187.101(3).
it has been construed and applied. In few if any cases has protection of habitat has been required by a court (or even a state agency) solely on the authority of F.S. 187.201(10).

Although often cited as one of the supporting rationales for planning decisions, the importance of the SCP is primarily to show the high priority the state places on ecosystem protection as a state policy, and not as an enforceable planning requirement.30

2. Strategic Regional Policy Plans

The primary use of Strategic Regional Policy Plans, F.S. 186.507, is for the review of Developments of Regional Impact (DRIs) by Regional Planning Councils (RPCs). Amendments to Chapter 163 enacted in 1993 narrowed the scope of regional plans and the issues which an RPC can review, and prohibited DCA from finding a local comprehensive plan not in compliance based on inconsistency with a regional plan. F.S. 163.3184(5). Local plans need not, therefore, strictly adhere to regional plans, nor are regional plans in themselves enforceable as the basis to challenge a local government plan, LDR, or development order.

3. Local Comprehensive Plans

Chapter 163, Part II, requires counties and municipalities to enact comprehensive plans, which must contain the elements enumerated in F.S. 163.3177.31 F.S. 163.3177(6)(d) requires that each plan have:

A conservation element for the conservation, use, and protection of natural resources in the area, including air, water, water recharge areas, wetlands, waterwells, estuarine marshes, soils, beaches, shores, flood plains, rivers, bays, lakes, harbors, forests, fisheries and wildlife, marine habitat, minerals, and other natural and environmental resources.

a. Conservation Element

Chapter 9J-5, Florida Administrative Code, enacted pursuant to Chapter 163.3177(9)and(10), prescribes the necessary elements in comprehensive plans. The requirements for the Conservation Element in comprehensive plans are contained in Rule 9J-5.013, F.A.C. In addition to requiring objectives which address the resources listed in F.S. 163.3177(6)(d), above, Rule 9J-5.013(2) also requires that

(b) The element shall contain one or more specific objectives... which:

* * *

3. Conserve, appropriately use and protect minerals, soils and native vegetative communities including forests; and

30 See Recommendations #1 and #2.
31 These include a capital improvements element, a future land use plan element, a public utilities element, a conservation element, a recreation and open space element, a housing element, a coastal management element, an intergovernmental coordination element, as well as optional elements and elements dependent on community size. All elements must be internally consistent with the conservation element and all other elements. F.S. 163.3177(2).
4. Conserve, appropriately use and protect fisheries, wildlife, wildlife habitat and marine habitat.

(c) The element shall contain one or more policies for each objective which address implementation activities for the:

* * *

3. Protection of native vegetative communities from destruction by development activities;

* * *

5. Restriction of activities known to adversely affect the survival of endangered and threatened wildlife;

6. Protection and conservation of the natural functions of existing soils, fisheries, wildlife habitats, rivers, bays, lakes, floodplains, harbors, wetlands including estuarine marshes, freshwater beaches and shores, and marine habitats;

* * *

8. Continuing cooperation with adjacent local governments to conserve, appropriately use, or protect unique vegetative communities located within more than one local jurisdiction....

Unlike the State Comprehensive Plan, which expressly forbids any particular goal or policy from being independently enforceable, local government comprehensive plan policies are independently enforceable. F.S. 163.3177 and Rule 9J-5 require that plans must address implementation activities to protect and conserve natural communities and habitats, and once a plan containing these policies is enacted, every development order issued by that local government must be consistent with them. F.S. 163.3194(1)(a).

DCA first determines whether the proposed plan or plan amendment is “consistent” with the State and Regional Plans. In this determination, the balancing function comes into play, and no one policy can be enforced on its own. Next, DCA must determine whether the proposed plan or plan amendment is “in compliance” with Chapter 163 and Chapter 9J-5. This compliance review has no such balancing requirement, and each and every requirement of Chapter 163 and 9J-5 must be met, or the Plan is not in compliance.

Under Chapter 163, neither the DCA nor the Administration Commission has the power to repeal or amend a local comprehensive plan found not in compliance. The only remedy available to the state if a local government decides to go forward with a plan found not in compliance, is to impose “sanctions”, primarily the withholding of state funds.

32 See Recommendations #3a, #3b, and #3c.
33 Machado v. Musgrove, 519 So.2d 629 (Fla. 3rd DCA 1988).
34 F.S. 163.3177(10)(a); F.S. 163.3184(6).
35 F.S. 163.3184(1)(b) and (8)(a).
b. Data and Analysis

Another provision relevant to the status of habitat and ecosystem protection under the comprehensive planning process is Rule 9J-5.005(2), which requires:

(a) All goals, objectives, policies, standards, findings and conclusions within the comprehensive plan and its supporting documents, and within plan amendments and their supporting documents, shall be based upon relevant and appropriate data and the analysis applicable to each element.

* * *

(b) The data used shall be the best available existing data....

There can be little dispute that the SHCA Network (including the GAPS Report, the FNAI, and the Greenways Ecological Network, supplemented where available with WMD and county data) is the best available data on the subject of ecosystem and habitat identification and protection in Florida. These are the most advanced studies of their kind, using cutting edge technology. The law allows for updated information to reflect ground-truthing and changes over time.\textsuperscript{37} With Rule 9J-5 requiring both mandatory protection and the use of the best data and analysis, one would expect that the SHCA Network would automatically be incorporated in all of the Comprehensive Plans in the state where SHCA Network lands appear.\textsuperscript{38}

Yet only a handful of the 472 local governments in Florida have habitat or ecosystem protection in their comprehensive plans beyond that which is required under wetland and endangered species law. And even in those few, Defenders knows of none where the SHCA Network has been expressly referenced and given special consideration. The reasons for this lie not as much in the planning laws as in the way they have been implemented, as discussed in Section II.C, below.

c. Future Land Use Element

Perhaps the most important part of a comprehensive plan, and the part which most directly affects natural resources and habitats, is the Future Land Use Element. This element must show, on a map know as the Future Land Use Map (FLUM), “[t]he proposed distribution, location, and extent of the various categories of land use”, including a use for “conservation”, and the element must “include standards to be followed in the control and distribution of population densities and building and structure intensities.”\textsuperscript{39} The map must be based on the best available data, including an analysis of natural resources.\textsuperscript{40}

Although an objective is required to “Ensure the protection of natural resources,”\textsuperscript{41} the policy requirement immediately following leaves out natural resource protection and only requires “protection of potable water wellfields by designating appropriate uses

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\textsuperscript{37} Rule 9J-5.005(2)(c).
\textsuperscript{38} See Recommendation #3f.
\textsuperscript{39} F.S. 163.3177(6)(a).
\textsuperscript{40} Rule 9J-5.006(2), citing Rule 9J-5.005(2), F.A.C.
\textsuperscript{41} Rule 9J-5.006(3)(b)4, F.A.C.
within...environmentally sensitive lands....

F.S. 163.3177(6)(d) and Rule 9J-5-006(4)(b), specifying the natural resources to be shown on the FLUM, do not mention upland ecosystems or natural communities of any kind, but only water-related resources and minerals. Although the objectives are arguably enforceable on their own, the lack of specificity in the policies and FLUM requirements makes this more difficult and seems inconsistent.

4. Areas of Critical State Concern

Under F.S. 380.05, certain areas of the state may be designated as Areas of Critical State Concern (ACSC).

ACSC designation does two things: First, the designation allows the DCA to prescribe Principles for Guiding Development (PGDs), with which the local government’s comprehensive plan and land development regulations must thereafter comply. The PGDs are cumulative to, and must be followed in addition to, the Plan requirements in Chapter 163.

The actual language of the PGDs in the ACSCs, although tailored for each ACSC, are not substantially different in effect from the upland and wildlife protections already included in Chapter 163. Cf., e.g., Rule 9J-5.013(2)(b) [quoted above] with the following PGD covering upland resources in the Florida Keys, F.S. 380.0552(7)(c):

To protect upland resources, tropical biological communities, freshwater wetlands, native tropical vegetation (for example hardwood hammocks and pinelands), dune ridges and beaches, wildlife and their habitat.

The second and most important consequence of ACSC designation is that the DCA has automatic review power over all comprehensive plan enactments and land development regulations passed by the local government. Unlike the DCA review of plans under Chapter 163, the ACSC review process does include the power of the Administration Commission, by Rule, to repeal or amend the local comprehensive plan found not in compliance.

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42 Rule 9J-5.006(3)(c)6, F.A.C.
43 See Recommendations #3d and #3e. See HEC, Inc. v. DCA and Highlands County, DOAH Case No. 94-2095GM, DCA Final Order No. DCA-96-261-FOI-GM, November 26, 1996, where FLUM objectives were held not to require protection of scrub.
44 At present there are 5 such areas: The Big Cypress Area, F.S. 380.055, Chapter 28-14 F.A.C.; The Green Swamp Area, F.S. 380.0551, Chapter 28-26, F.A.C.; The Florida Keys Area, F.S. 380.0552, Chapters 28-20, 30-32, and 34, F.A.C.; and the City of Key West, Chapters 28-33, 36, and 37, F.A.C. The Apalachicola Bay Area, F.S. 380.0555, has been de-designated except for the City of Apalachicola.
45 F.S. 380.05(1)(a).
46 F.S. 308.05(5)-(11). ACSCs do seem to have attained greater natural resource protection than other areas. Undoubtedly this is due to a combination of factors, including the more explicit standards of the PGDs, the greater powers of DCA and FLWAC to amend and repeal plans and orders, the exceptional nature of the resources, and the fact that DCA has focused more attention in these areas.
In addition, the owner, the developer, or the DCA (on its own or at the request of the RPC or any citizen) may appeal any development order in an ACSC to the Governor and Cabinet sitting as the Florida Land and Waters Adjudicatory commission (FLWAC).  

5. Developments of Regional Impact

When a development affects more than one county, it may be considered a development of regional impact (DRI). In the DRI process, the application for development approval (ADA) goes to the appropriate Regional Planning Council (RPC), which does a review and sends a Regional Report and Recommendations (RPC Report) to the local government. The issues reviewed by the RPC include a determination of the project’s impacts on the state or regional resources listed in the State and Regional Plans.

The RPC review of habitat and ecosystem effects for DRIs is codified in Rule 9J-2.041, Listed Plant and Wildlife Resources Uniform Standard Rule. Section 9J-2.041(3)(e) provides:

The avoidance of significant adverse impacts to state and regionally significant listed plant and wildlife resources is the most desirable and first option that should be considered by regional planning councils and local governments in all development review and approvals. However, in some circumstances, adverse impacts to state and regionally significant listed plant and wildlife resources will need to be addressed through appropriate mitigation. Generally, onsite mitigation and management is preferable, although often the mitigation of significant impacts will need to be, or will only be appropriate when accomplished through offsite mitigation; the approach selected should be that which best ensures long-term species and habitat protection.

The definition of “Preservation or Mitigation” in Section 9J-2.041(4)(c) is limited to preservation of “documented populations” of listed species, which is defined at 9J-2.041(2)(h)and(i) as the present documented occurrence of the species at the location. Thus preservation and mitigation under the rule do not extend to natural communities, or to suitable habitat necessary for the recovery of an endangered species not present due to low population size.

a. DRI Review.

Perhaps the most valuable part of the DRI process is the preapplication inter-agency review. After the application is completed, the RPC files its RPC Report with the local government, which holds a hearing and renders a decision on final permitting approval based on

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47 F.S. 380.07(2). Only the landowner, the developer, or the DCA can appeal to FLWAC. All others must use normal judicial review procedures and meet the standing requirements for those procedures. See Appendix A.
48 Or meets the size or use criteria specified in F.S. 380.0651.
49 Reviewed under F.S. 380.06 and Rule 9J-2, F.A.C.
50 F.S. 380.06(12). See Rules 9J-2.024 and 9J-2.040(4) F.A.C.
51 DCA review for purposes of appeal under F.S. 380.07(2) also uses this rule.
52 See Recommendations #3g and #3h.
53 F.S. 380.06(7) and Rule 9J-2.021.
consideration of the project’s consistency with the RPC Report and the State and Regional Plans. In Areas of Critical State Concern, the local government approval must be based on consistency with the ACSC criteria applicable to the region.

The RPC Report is only advisory, and its findings and recommendations are not binding on the local government. Compare F.S. 380.06(13) and F.S. 380.06(14). Subsection 13 prohibits approval of any DRI in an ACSC which does not comply with the PGDs and LDRs for the ACSC. Subsection 14, however, only requires that the local government consider the extent to which the DRI is consistent with the RPC report and regional and state plans.

6. Exemptions and Exclusions from the Planning Process

Both Chapter 163, in F.S. 163.3164(6), and Chapter 380 use the definition of "development" contained in F.S. 380.04. The most important part of this definition as it relates to ecosystem protection lies in the exclusions listed in F.S. 380.04(3). These include agriculture, roads, and utilities. Additionally, state agencies are not required to follow local comprehensive plans. The provisions of Chapters 163 and 380 simply do not apply to any of these activities, regardless of how they may affect the goals or principles elucidated in those laws.

Planning cannot be effective unless it is integrated and holistic - that is, considers all the pieces of the puzzle and then decides how to best put them together in a unified, integrated, comprehensive effort. The existence of major omissions creates substantial gaps and weaknesses, not only in the protection afforded ecosystems and wildlife, but in the entire growth management process.

a. Agriculture

Clearing, draining, plowing, cultivation, site alteration, installation of structures, and other alterations to wild lands for agriculture has been the single largest source of loss of wildlife habitat in the state. Thousands of acres may be affected by a single landowner decision. Enormous natural resource, as well as economic, values for an entire region can be affected. The suitability of the land for future development is also affected. Yet so long as the activity is considered "agriculture", local governments may exempt these decisions from growth management planning:

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54 F.S. 380.06(11)(d), 380.06(12), and 380.06(14).
55 See Recommendation #11. DCA reviews the development order for consistency with the local plan. Rule 9J-2.040(3)(c). As in ACSCs, the owner, the developer, or the DCA (on its own or at the request of the RPC or any citizen) may appeal any DRI order issued by the local government to FLWAC. F.S. 380.07(2). FLWAC can grant or deny the development, with or without conditions, based on any standards in Chapter 380. F.S. 380.07(5).
56 The exemptions and exclusions discussed in this section, although not covered by Chapters 163 and 380, must still comply with regulatory permitting procedures for wetlands (F.S. Chapter 373 and the federal Clean Water Act) and endangered species (federal Endangered Species Act and Florida endangered species laws). These regulatory schemes and how they fit into habitat and ecosystem protection are the subject of section II.D, below.
57 See Recommendation #4.
58 See GAPS Report, 1994, Table 2, p. 10, listing “grass [i.e., pasture] and agriculture” as the single largest category of disturbed land cover in the state at 6.3 million acres, constituting almost 20% of the state’s land area.
59 About 10% of the SHCA lands (474,000 acres) in GAPS are pasture or farmlands. GAPS Report, 1994, Table 21, p. 141.
The exemption applies to comprehensive plan goals, objectives and policies that regulate development activities. It supercedes limitations in those plan provisions regarding impacts of development activities on natural resources. * * * The legislature has determined that the benefits of such an exemption outweighs [sic] its impacts, including those on natural resources.\textsuperscript{60}

It is hard to believe that the legislature, which has gone to such extreme lengths to give the highest priority to the preservation of Florida's natural resources, ever intended individual planting and clearing decisions to override the state interest in natural resource protection. But under the above decision, that is the existing law. The effect of this interpretation, allowing all agricultural activities to be exempt from planning decisions, is so great that, as far as habitat and ecosystem protection is concerned, the exception swallows the rule.\textsuperscript{61}

The agriculture exemption does not apply to the FLUM, which still must show where agriculture is allowed, and must set standards for “the measurement of the use of or demand on natural resources.”\textsuperscript{62} This language could theoretically be used to require plans to limit agriculture based on the demand on natural resources, but DCA has not thus far chosen to apply it in this way.

Eliminating this exemption would not mean that agriculture would necessarily be disfavored. Throughout Florida, many endangered species and large tracts of valuable habitat occur on low intensity use agricultural lands. These beneficial agricultural uses need to be encouraged in the planning process. As noted in the GAPS Report:

[L]ow intensity land uses, such as silviculture and rangeland, are compatible with the habitat conservation needs of many species. In fact, the management of wildlife habitat on many private lands has been excellent, and conservation measures should focus on maintaining existing land uses on private lands through positive incentives such as tax breaks, conservation easements, or cooperative agreements with landowners.\textsuperscript{63}

b. Roads

Fragmenting of habitats, vehicular mortality, introduction of exotic and fringe species, and facilitation of urban sprawl and other development expansion are some of the reasons road construction and transportation patterns have had a major negative effect on wildlife, habitats and ecosystems in Florida.

\textsuperscript{60} ECSF, Inc., v. DCA and Collier County, DCA Case No. 97-226-FOF, DOAH Case No. 96-4752GM, Order of Remand (Nov. 5, 1997), approved in Final Order (Dec. 16, 1997). In that case, clearing panther habitat in an ACSC for orange trees was considered agriculture and exempted from certain restrictions.

\textsuperscript{61} The exemption is optional, id., and in fact several local governments have chosen to establish land use plan criteria for agricultural activities.

\textsuperscript{62} Rules 9J-5.006(3)(c)(7) and 9J-5.003(63), F.A.C.(definition of “intensity”).

\textsuperscript{63} GAPS Report, 1994, p.1.
The exemption of roads from the definition of development only applies to the improvement or expansion of the existing right-of-way. Although a transportation element is required in some comprehensive plans, the requirements are limited to provision of sufficient facilities to meet levels of service and coordination with the capital improvements element. There is no requirement that comprehensive plans must contain any consideration of the environmental impacts of transportation decisions except as to airport and marine port siting.

Recommendation #29 of the legislature’s Transportation and Land Use Study Committee, Final Report, January, 1999, is particularly appropriate to this discussion:

The FDCA should give increased emphasis to assuring internal consistency among the elements of the local government comprehensive plans.... [P]articular attention should be given to ensuring internal consistency among the future land use, transportation, capital improvement and conservation elements...

c. Utilities

As with roads, the exemption of utilities from the definition of development is limited to work in an existing right of way. Infrastructure is usually expanded within existing rights-of-way, however, and the expansion of infrastructure is usually a catalyst for development expansion.

d. State Agency Consistency

State agencies are not bound by local comprehensive plans unless compliance with the local plan is required by the agency’s authorizing legislation or rules. This includes both the power to grant permits without considering whether the permitted activity complies with the local plan, as well as the right of the agency to construct developments of their own which are exempt from the growth management laws.

This is a major omission which significantly reduces the impact of an adopted local plan. In addition to the adverse impacts of the permitted activities and agency projects themselves, this hypocritical double standard creates justifiable resentment that the state requires local governments to adopt plans, and makes everyone else follow them, but does not do so itself. The exemption makes it difficult to justify strict application of growth management policies to private citizens, and undercuts public confidence in the fairness of the process.

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64 F.S.380.04(3)(a).
65 F.S.3177(6)(j), Rule 9J-5.019, F.A.C.
66 Rule 9J-5.019(4)(c)(18) and (19), F.A.C.
67 F.S.380.04(3)(b).
68 F.S. 380.05(22) requires state agencies to coordinate their rules and programs applicable to the ACSC with the principles guiding development for the area. However, DOT v. Lopez-Torres, 526 So.2d 674 (Fla.1988) holds that this consideration is discretionary, not mandatory.
69 See Recommendation #12.
e. School Districts

School siting is another area which affects the expansion of development into rural areas. Although not exempted from the definition of development, schools are excluded from the concurrency requirement. A Public School Concurrency element is optional under Rule 9J-5.025. This means that while all other development must show that sufficient public facilities exist to support the increased demand for utilities and infrastructure caused by the new development, schools are exempt from this consideration. Thus, a school may itself create a demand for new infrastructure, and become a magnet for new development or urban sprawl, in a location that would have been considered inappropriate in a more integrated planning process.

C. Implementation of the Planning Laws

A plan is only effective if it is put into action. In Florida, the planning process under Chapters 163 and 380 has been hampered far more by flaws in the implementation and enforcement process than by weaknesses in the substantive requirements of the law. Appendix A contains an analysis of the statutory provisions and procedures involved in the enforcement and implementation process. This section will discuss some of the practical difficulties that process has faced.

1. Procedural Problems

Part of the reason that the goals of natural resource protection have not been realized in the growth management scheme stems from some practical, and possibly unforeseen consequences of the laws. These include:

a. Role of DCA

As described in Appendix A, Chapters 163 and 380 give significant guidance as to the elements required in local government comprehensive plans and LDRs. The actual execution of those directives, however, was left largely to the discretion of DCA and the Administration Commission. In addition to its other responsibilities, DCA reviews an average of over 12,000 plan amendments, hundreds of ACSC development orders, and about 200 DRIs annually. With a staff of 35 planners for the entire state, this comes out to churning out finished reviews at the rate of about 2 per planner per day, if they did nothing else. It is not surprising that well over 90% of proposed plan amendments are approved.

70 Rule 9J-5.0055(1), F.A.C. A Public School Concurrency element is optional under Rule 9J-5.025. See F.S. 163.3191(2)(k) regarding the evaluation of school siting in the EAR.
71 F.S. 235.193 requires that the location of schools must be consistent with local comprehensive plans, and allows the local government to impose conditions relating to environmental concerns. The only mandatory condition is that the school site conform to the FLUM. F.S. 235.193(6).
72 See Recommendation #5.
73 In addition to reviewing plan amendments and DRIs, DCA also has discretionary responsibility over EAR sufficiency, F.S. 163.3191(6), and the review of LDRs, F.S. 380.05, and development orders, F.S. 380.07, in ACSCs.
74 Includes re-applications.
It is also an interesting fact that on only two occasions have sanctions been imposed by FLWAC for the failure of any local government to enact a plan in accordance with the Act. This can either be seen as evidence that the threat of sanctions is making local governments obedient, or as evidence that the DCA\textsuperscript{76} has been rarely willing to enforce the law to the point where sanctions are necessary. Undoubtedly both are true to some degree.

The fact remains that even Executive Order 2000-196 decries the failure of growth management to live up to its intended purpose. A 1995 USF study showed that if all of the state’s FLUMs were built out to even half their intended density, the development created would be almost 3 times the state’s projected population. At full buildout, a capacity of 86 million residents is envisioned by 2010, a 650 percent increase in 15 years.\textsuperscript{77}

This is not good planning. The state’s existing comprehensive plans allocate far more development than is needed or appropriate, at the expense of infrastructure, natural resources, and quality of life. DCA’s lack of consistent enforcement, both in the review of proposed plans, and in the implementation of approved plans, has been a major factor in creating the present planning crisis.

The force and detail in the substantive requirements of Chapters 163 and 380 make it seem extremely doubtful that the legislature intended those requirements to be abandoned by weak enforcement. The present review and appeal procedures desperately need to be re-crafted to make them more responsive to the law. As stated by former DCA Secretary Tom Pelham:

> Whether because of the sheer magnitude of the task, political pressure, inadequate staff and financial resources, or lack of gubernatorial support or leadership, there has been a growing perception that state oversight of local comprehensive plan amendments is not effectively implementing or enforcing state growth management requirements.\textsuperscript{78}

This is not to say that DCA review should be eliminated; quite the contrary. Local governments have shown that without oversight, local political realities will overcome considerations of what is best for the state's long term planning needs. It should not be the burden and responsibility of private unpaid citizens to monitor and make sure its government is following the law and doing its job. That has been the function of DCA, and where staffing and funding and politics have allowed, DCA has done that job well.

Florida needs to increase funding to DCA to insure that DCA will have sufficient staff and resources to do an adequate review of plan amendments, LDRs, and development orders in cases that are either in an area where significant state interests appear, or are above a specified threshold in size or impact. DCA oversight should include, as a minimum, all plan amendments,

\textsuperscript{76} Sanctions may only be imposed by FLWAC after DCA has pursued a non-compliance determination to a final order.

\textsuperscript{77} Analysis of the Florida Future Land Use Map, Brinkmann and Lindberg, USF, Center for Urban Transportation Research, 1995.

\textsuperscript{78} “Restructuring Florida’s Growth Management System”, by Tom Pelham, October 13, 2000, p.8.
LDRs, and development orders which affect the state's significant native habitats and ecosystem, including but not limited to the SHCA Network.79

b. **Burden of proof**

Aggravating the DCA’s lack of adequate oversight on plan amendments is the statutory burden of proof which results from a DCA finding of compliance. If DCA finds that a plan amendment is in compliance, then the amendment is upheld in the administrative hearing if that finding is fairly debatable. If DCA finds the plan to be not in compliance,80 then the presumption of compliance may be overcome by a simple preponderance of the evidence.81

This disparity makes a tremendous difference in court. The preponderance test is the same simple, fair, which-side-has-the-heavier-weight-of-the-evidence test used in civil trials. The fairly debatable test, on the other extreme end of the burden-of-proof scale, is the most difficult burden in law, the civil equivalent of beyond-a-reasonable-doubt. Where there is any evidence upon which it could be debated that compliance might be found, the amendment will be upheld, even if there is much more evidence and weight showing that the amendment is not in compliance with the act.82

The practical effect of this double standard is that, where DCA approves an amendment, it will rarely be challenged. Although this kind of limited review might have made sense to a legislature which thought DCA would be giving proposed amendments a careful look, it makes no sense in a world where agency review is necessarily cursory. Given the limitations of DCA review, using the fairly debatable standard defeats the statutory purpose of screening non-compliant amendments, and also defeats the statutory purpose of full and adequate citizen review and participation.83

The current system also puts the burden of proof on challengers attempting to show that a development order is not consistent with a comprehensive plan, contrary to the legal status otherwise given to plans by state law, and contrary to the “strict scrutiny” with which courts are supposed to review development orders for plan consistency.84

The present scheme therefore deals a one-two punch to the laudable purposes of the growth management laws. First the screening process (DCA review) is given massive holes (inadequate staffing and funding, high discretion in a politically influenced body), and then the back-up safeguard of citizen review is incapacitated with an inflated burden of proof.

When we mix DCA’s critical level of discretion with the political realities influencing DCA’s staffing, funding, and decision-making, and then debilitating the process with an inequitable burden of proof to challengers, it is no wonder that:

79 See Recommendation #7.
80 Or if it is a small scale amendment and therefore not reviewed.
81 Cf. F.S. 163.3184(9)(a) with F.S. 163.3184(10).
82 Martin County v. Yusem, 690 So.2d 1288 (Fla. 1997). See, e.g., HEC, Inc. v. DCA and Highlands County, DOAH Case No. 94-2095GM, DCA Final Order No. DCA-96-261-FOI-GM, Nov. 26, 1996.
83 See Recommendation #8a.
84 See Recommendation #8c.
...although the processes established by these laws are well intended, the quality of growth has not met our expectations, the strains on infrastructure have been only marginally reduced and, in essence, we have created a more complicated, more costly process without the expected corresponding benefits.\textsuperscript{85}

c. Inadequacy of Quasi-Judicial Local Bodies

Practically all of the development decisions in the state other than plan amendments are given their first level of review in what is know as a “quasi-judicial proceeding” in front of a body designated by the local government. The exact body differs from jurisdiction to jurisdiction,\textsuperscript{86} but it has traditionally been, and in almost all cases in the state still is, a group of lay citizens appointed by the local government, with little or no legal or land use training. Yet these untrained, inexperienced, lay boards are the site of hearings which set the official records for technical legal issues which underlie the vast bulk of the land use decisions and appeals in the state. This is ordinarily the citizen’s and developer’s one shot at making their case for or against the proposed development.

Such quasi-judicial proceedings are supposed to provide minimum due process,\textsuperscript{87} but there are no rules or standards for what that means, and in practice it often translates to a citizen being given 3 minutes to speak. Opportunities for entering evidence and cross-examination are difficult and often discouraged. Such an inadequate record serves neither developers nor citizens well.

Compounding the problem is the fact that, other than plan amendments and ACSC challenges, most development orders are reviewed in the circuit court. Due to crowded court dockets, this is a long and expensive procedure that causes delay for developers and discouragement for citizens.\textsuperscript{88}

d. DRI and Plan Amendment Coordination

If a DRI (or any development order) needs a plan amendment in order to be allowed, that means, by definition, that the proposed development must be inconsistent with the existing comprehensive plan, or the DRI would not need the plan amendment. F.S. 163.3194 prohibits any DRI that is inconsistent with an existing plan, and therefore no DRI application should be accepted until after the plan amendment is in place.

Presently, however, when a DRI needs a plan amendment, the DRI and the plan amendment are often heard together. The case law holds that the plan amendment must be considered independently of the DRI, and that information in the DRI application and RPC

\textsuperscript{86} Often called a “planning board” or a “board of adjustment” or comprised of the elected commissioners themselves.
\textsuperscript{87} Snyder v. Board of County Comm'rs of Brevard County, 627 So. 2d 469 (Fla. 1993).
\textsuperscript{88} See Recommendation #9.
Report cannot be used as a basis for determining the propriety of the plan amendment. But the information in the DRI application and RPC Report are the best available data as to how the amendment, in reality, will impact the plan. And Rule 9J-5.005(2)(b) requires that the best data available must be used. This inconsistency should be resolved to allow the best data to be used in DRI decisions.

The DRI process also weakens the goals of planning in other ways. DRIs are exempt from the data and analysis rule that projects must show that they are needed to serve future development. Special vesting privileges apply to DRIs. And citizens have no standing to enter the DRI process before it gets to the local government hearing, when all the planning and agency negotiations are already over.

e. Other Procedural Difficulties

Some other difficulties in the procedural enforcement process which are not directly related to habitat and ecosystem protection, but which affect proceedings involving natural resource issues are:

Notice and Standing

Development orders are issued in a variety of ways, sometimes by staff without any hearing. Uniform rules of notice and standing need to be enacted that will allow full and fair disclosure and review of development decisions affecting the community. Defenders endorses and adopts by reference the comments and recommendations on notice and standing contained in the Position Statement of the Environmental Community submitted to the Growth Management Study Commission.

Lack of remedy

In Chapter 163, there is no way for either a private citizen or the DCA to insure that a comprehensive plan or LDR actually meets the requirements of the act. There seems no logical reason why DCA and the Administration Commission should have the power to amend and repeal plans and LDRs in ACSC but not in other areas. Similarly, there seems no reason why a court could not enforce Chapter 163 in a private action. This would have the added benefit of expanding enforcement of the act at no cost to the state.

ACSC plans not effective until all appeals final

Neither plan amendments, F.S. 163.3184(14), nor LDRs, F.S. 380.05(6) are effective until all appeals are final. Unfortunately, this has applied to improved plans and amendments proposed by DCA as well as to attempts to weaken plans by local governments. At times, this

89 1000 Friends of Florida, et. al. v. DCA and City of Daytona Beach, DOAH Case Nos. 93-4863GM and 93-4864GM (May 17, 1994).
91 See Recommendation #10.
92 See Recommendation #16.
has caused inferior and detrimental plans and LDRs that DCA has found not in compliance to remain in effect for years while the appeal process dragged on.\footnote{The Monroe County Comprehensive Plan, adopted in April, 1993, and subsequently challenged and modified by the Administration Commission, is still not effective as of this date due to administrative appeals. See Recommendation #13.}

**LDRs presumed consistent after 12 months**

Under F.S. 163.3213(6), LDRs are “deemed consistent” with the adopted local plan if they have not been challenged in 12 months. This seems unwise and unnecessary. Often an affected party has no notion that a given LDR exists or applies to his situation until a controversy arises. It is a strange concept for an illegal law to be “vested”. As a practical matter, under F.S. 163.3194(1), if the LDR is inconsistent with the plan it cannot be enforced anyway. It seems silly to have a law prohibiting it from being challenged directly when it can be avoided indirectly.\footnote{See Recommendation #14.}

**DCA plan appeals must be limited to the ORC**

Under F.S. 163.3184(8)(a), DCA cannot raise any issues in a compliance action which was not raised in its ORC. This has had the practical effect of forcing DCA to create voluminous and extremely detailed ORCs, wasting time and resources, and obscuring rather than clarifying those planning issues that are truly most critical.\footnote{See Recommendation #15.}

D. Land Acquisition

1. Florida Forever Act

The Florida Forever Act (FFA),\footnote{F.S. 259.105.} adopted in 1998, continues the state's commitment to conserving areas of natural, recreational, and cultural resource value. When Florida adopted Preservation 2000 in 1990 it established the largest land acquisition program in the United States by funding $3 Billion over 10 years through direct allocations and bonding. Funding comes largely through the documentary stamp tax collected from real estate transactions. The Florida Forever Act redistributed the Preservation 2000 money so as to give a greater percentage of funds to water resources and urban areas, but the recipients remained basically the same: Department of Environmental Protection (DEP) for conservation and recreation areas (commonly referred to as the CARL program) (35%), Water Management Districts (35%), Florida Communities Trust (22%), Florida Recreational Development Assistance Program (2%), Fish and Wildlife Conservation Commission (1.5%), Division of Forestry (1.5%), Division of Recreation and Parks (1.5%), and the Office of Greenways and Trails (1.5%).

DEP's CARL program is the primary source of funds for the purchase of large tracts of conservation lands which is executed through both fee simple and less than fee acquisition. Most of the conservation areas are subject to multiple use by public and private interests, including
water extraction, and, in some cases, continue to be used for low intensity agricultural operations. The smaller funds are used to secure inholdings and additions to designated public lands, and for recreational trails. The FFA also provides funds to qualifying counties (rural counties with populations less than 150,000) and their local governments for payments of taxes that are no longer available to them once an area is transferred into public ownership.

The FFA is essential to the protection of wildlife habitat. In particular, the CARL fund and to a large degree the District funds, can secure large parcels that contribute to the protection of ecosystems, endangered species habitat, and connections among valuable conservation areas.

2. County land acquisition programs

About a third of Florida's counties have adopted self taxing referenda to purchase open space. Experience has shown that voter support for these referenda is high wherever the purpose of such referenda is clear, and the list of such counties continues to grow. These local programs have made a significant contribution to conserving important wildlife habitat both where the county is the full purchaser of land, and where county funds are used as leverage in matching funds with other programs.

3. Limitations on Land Acquisition

The advantages of land acquisition programs include paying private land owners rather than regulating land owners or losing habitat, and providing the greatest assurance that ecosystems and wildlife habitat will remain protected into the future. However, the amount of money presently available is insufficient to purchase all areas necessary to conserve Florida's biological diversity.

Three of the problems associated with the FFA include 1) diminished funding for conservation lands as compared to the previous program, 2) the inability of the state to list and map important areas that belong to land owners that are currently unwilling to sell, and 3) the FFA funds are eyed as a source of additional money for other, albeit important, programs, such as land and water management, providing a water supply to growing municipalities, environmental clean up, and private land owner incentives. FFA cannot fulfill its purpose if it is diluted in an attempt to solve all of Florida's mounting environmental needs.

E. Regulation

1. State and Federal Wetlands Regulations

Federal Clean Water Act

The federal Clean Water Act (CWA) regulates the dredging and filling of wetlands by what is known as the Section 404 permitting process. (33 U.S.C. Sec. 1344). This process has some effect on limiting adverse impacts to wetland wildlife habitat. Section 404 does not require a permit for any development activities in uplands. Once a development in wetlands triggers the
404 process, however, the indirect impacts on uplands may then be considered under the CWA, and also by referral to the U.S. Fish and Wildlife Service (FWS) for consultation under Section 7 of the Endangered Species Act (ESA).

The effectiveness of the ESA Section 7 consultation requirement for agricultural upland clearing activities is greatly limited by Section 404(f)(1)(A), which exempts the permitting requirements under Section 404 or 402\textsuperscript{97} for the discharge of dredged or fill material:

[for] normal farming, silviculture, and ranching activities such as plowing, seeding, cultivating, minor drainage, harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices.\textsuperscript{98}

Thus, all development, in SHCAs and elsewhere, is exempt from Section 404 if it is not in wetlands, and normal agricultural activities are exempt from federal wetland and water quality permitting even in isolated wetlands.

Environmental Resource Permits

F.S. 373.413 authorizes the regulation of activities that affect water resources.\textsuperscript{99} Permits under this section are called “Environmental Resource Permits” (ERPs), and are governed by Rules 40B-E, F.A.C.\textsuperscript{100} As in federal wetland permitting under the CWA, ERPs are only required for activities affecting wetlands and surface waters. Rule 40E-4.041. Secondary\textsuperscript{101} and cumulative\textsuperscript{102} impacts on uplands are considered, but only to the extent that they involve water-dependent upland activities, such as the nesting or denning of a wetland dependent species.

Agriculture, silviculture, floriculture, and horticulture land clearing activities are exempt, regardless of size, from the ERP criteria provided the alteration is not for the sole or predominate purpose of impounding or obstructing surface waters\textsuperscript{103}, or alter wetlands.\textsuperscript{104}

The WMD criteria prior to the adoption of the ERP rule in 1995 required wetland buffers and did not restrict the consideration of secondary and cumulative impacts to wetland dependent species. In that respect the current ERP rule is weaker than the prior WMD rules.

\textsuperscript{97} Federal NPDES water quality permitting.
\textsuperscript{98} 33 U.S.C. Section 1344(f)(1)(A). Normal farming activities are not exempt if the purpose is to bring an area of "navigable waters" into a use to which it was not previously subject. (33 U.S.C. Section 404(f)(1) & (2)).
\textsuperscript{99} Operating agreements between the Department of Environmental Protection (DEP) and the water management districts (WMD) determine whether a particular permit will be issued by DEP or the WMD. Since land use permits are generally administered by the WMDs, we will refer to them as the issuing agency for purposes of this discussion.
\textsuperscript{100} Each WMD has its own rule, but they are essentially similar.
\textsuperscript{101} see Rule 40E-4.2.7, F.A.C.
\textsuperscript{102} see Rule 40E-4.2.8, F.A.C.
\textsuperscript{103} Rule 40E-4.051(11), F.A.C.
\textsuperscript{104} Rules 40E-4.301 and 40E-4.302, F.A.C.
Limitations of wetlands protection

Both the CWA and ERPs have been construed by their respective administering agencies to provide an absolute right to develop wetlands, so long as the agency determines that sufficient mitigation is provided. Mitigation and permitting requirements can at times be severe, and in fact the existence of these laws has greatly discouraged and limited the amount of development in wetlands as compared to uplands. Nevertheless, the SHCA Network lands covered by these wetlands laws cannot be considered protected and secure from development. The SHCA Network reports, and Defenders, strongly encourage all the SHCA Network lands, wetlands and uplands, to be considered necessary for protection, and of the highest priority for acquisition or easement.

2. State and Federal Wildlife Regulation

Federal Endangered Species Act

The ESA affects habitat protection in basically two ways. One is through Section 7, which prohibits federal agency actions which will jeopardize federally listed endangered and threatened species. The other is Section 9, which prohibits individuals (including state agencies) from “taking” endangered or threatened species.

Protection under Section 7. ESA Section 7 is not applicable to development or land clearing in the SHCA Network, or anywhere else, unless the development needs a federal permit or is either funded, authorized or carried out by a federal agency.

Protection under Section 9. Under Section 9 of the ESA it is unlawful for any person to take any endangered species in the United States. The ESA defines "take" to mean "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." In order for habitat modification to be a Section 9 take, the habitat modification must significantly impair essential behavioral patterns, and it must result in actual, not hypothetical or speculative, injury or death to an actual individual member of the protected wildlife species.

Protection of Florida’s natural communities, such as those described in the SHCA Network, involves protecting much more than individual members of endangered species. The reason that the ecosystem approach has been embraced in the literature as reflected in the SHCA Network, is precisely because a “take” approach proved insufficient. By the time habitat modification is so significant that it rises to the level of a Section 9 take – that is, starts killing individuals – the ecosystem is in its final stages of deterioration. The purpose of the SHCA is to

105 1800 Atlantic v. DER, 552 So.2d 946 (1DCA 1989). In rare cases the ACE may deny a permit based on the Sec. 404(b)(1) guideline in 40 CFR 230.10(a) requiring that a non-wetland “practical alternative” be used if available.
106 See Recommendation #18.
identify and protect natural systems before that point, when they can still be preserved for the future in healthy form.

FFWCC Rules

Although the Florida Fish and Wildlife Conservation Commission (FFWCC) is authorized by the Florida Constitution to “exercise the regulatory and executive powers of the state with respect to wild animal life,” it has chosen to do so primarily regarding the regulation of hunting and fishing. F.S. Chapter 372. The FFWCC reviews development permit applications as part of the agency review process in DRI, ERP, CWA, and power line and power plant siting projects. If a development will cause harm to an endangered species or its habitat which violates FFWCC Rule 68-27, F.A.C., then FFWCC has the power to require an incidental take permit, and place conditions on the development. In general, however, FFWCC review does not go beyond examination of impacts to individual animals, does not look at ecosystem effects, and does not recognize development and land clearing as activities for which FFWCC permits must be granted.

III. Discussion of Possible Solutions

This section contains specific recommendations as to how to incorporate explicit protection for Florida’s significant native habitats and ecosystems into the growth management process. A summary of the highest priorities are listed first with stars, and a detailed list of all recommendations then follows.

SUMMARY OF HIGHEST PRIORITY RECOMMENDATIONS:

* Recognize the importance of the SHCA Network and significant habitats and ecosystems in comprehensive plans. (Recommendations #3a-f)

* Include agriculture in growth management planning. (Recommendation #4)

* Make the burden of proof in land use hearings more fair and realistic. (Recommendation #8)

* Create a simplified, uniform hearing process. (Recommendation #9)

* Insure that ecosystems are included in periodic plan reviews (“EAR Process”). (Recommendation #17)

* Provide adequate funding for land acquisition, DCA review, private landowner incentives programs, and state/local coordination on SHCA Network data. (Recommendations #7, #22 and #23)

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110 Florida Constitution, Article IV, Section 9.
111 Izaac Walton League v. FG&FWFC, 592 So.2d 1162 (1 DCA 1992).
112 See Recommendation #19.
DETAILED LIST OF PRIORITY AND SUPPORTING RECOMMENDATIONS:

1. Incorporate native ecosystems into the State Comprehensive Plan and Regional Policy Plans.

Now that the state, through the SHCA Network, has successfully identified the minimum lands which must be conserved if the state’s biological diversity is to be maintained, and has determined that those minimum needs include upland ecosystems as well as wetlands, this finding should be incorporated into the State Comprehensive Plan and Regional Policy Plans. The SCP, at F.S. 187.201(10), sets a goal to “protect and acquire unique natural habitats and ecological systems... and restore degraded natural systems to a functional condition.” Policy 7 thereunder, however, is limited to a policy to “protect and restore the ecological functions of wetland systems to ensure their long-term environmental, economic, and recreational value...” In order to encompass the non-wetland component of the “unique natural habitats and ecological systems” which the goal promises to protect, and which the SHCA Network identifies, Policy 7 should be amended to read:

Protect and restore the ecological functions of the state’s significant native habitats and ecosystems, including but not limited to forests, wetlands, sandhill, scrub, pine rockland, tropical hardwood hammock, and specialized sites, such as bat maternity and winter roost cave systems to ensure their long-term environmental, economic, and recreational value....

Regional Policy Plans should include similar language for the ecosystems which are found in their region.

2. Make the State Comprehensive Plan enforceable.

Change F.S. 187.201(3)\textsuperscript{113} to:

The goals and policies contained in the State Comprehensive Plan shall be considered to express the public interest, and shall be reasonably applied where they are economically and environmentally feasible with due regard for private property rights as protected in the state constitution. The plan shall be construed and applied to effectuate each of the goals and policies whenever possible.

Since Regional Plans are only required to be consistent with the State Plan, and are not subject to the criteria in F.S. Chapter 163,\textsuperscript{114} they should remain advisory as they are.

Require that all State Agency Strategic Plans (F.S. 186.021(1)) and State Land Development Plans (F.S. 380.031(17)) be consistent with the State Comprehensive Plan and Chapter 163.

\textsuperscript{113} This assumes that the present text, as quoted in Section II.B.1, above, is not weakened.
\textsuperscript{114} F.S. 186.507(1).
3. Require that the ecosystem needs expressed in the SHCA Network be reflected in local comprehensive plans and development orders.

   a. Add “the state’s significant native habitats and ecosystems, including but not limited to forests, sandhill, scrub, pine rockland, tropical hardwood hammock, and specialized sites, such as bat maternity and winter roost cave systems” to the list of natural resources in F.S. 163.3177(6)(d) (stating the contents of the conservation element of each plan).

   b. Add “the state’s significant native habitats and ecosystems, including but not limited to forests, sandhill, scrub, pine rockland, tropical hardwood hammock, and specialized sites, such as bat maternity and winter roost cave systems” to the list of native vegetative communities listed in Rule 9J-5.013(2)(b)3 (stating the contents of objectives required in each plan; presently lists only “forests”).

   c. Amend Rule 9J-5.013(2)(c)3 to read: “Protection of native vegetative communities including forests, sandhill, scrub, pine rockland, and tropical hardwood hammock, and specialized sites, such as bat maternity and winter roost cave systems, from destruction by development activities.” (stating the contents of policies required under the conservation objectives in each plan).

   d. Add a policy to Rule 9J-5.006(3)(c) (specifying policies required under the Future Land Use Element) which provides for: “Protection of native vegetative communities including forests, sandhill, scrub, pine rockland, and tropical hardwood hammock, and specialized sites, such as bat maternity and winter roost cave systems, from destruction by development activities.”

   e. Amend F.S. 163.3177(6)(d) and Rule 9J-5-006(4)(b) (specifying the natural resources to be shown on the FLUM) to include “native vegetative communities including forests, sandhill, scrub, pine rockland, and tropical hardwood hammock, and specialized sites, such as bat maternity and winter roost cave systems.”

   f. Add a section to Rule 9J-5.005(2) (data and analysis requirements) to state:

   The data and analysis contained in (1) The Florida Fish & Wildlife Conservation Commission 1994 report entitled, “Closing the Gaps in Florida’s Wildlife Habitat Conservation System”, as supplemented in 2000 with “Habitat Conservation Needs of Rare and Imperiled Wildlife in Florida”, and also as supplemented with additional data updates, (2) the “Statewide Ecological Network”, contained in The Greenways System Planning Project, prepared by the Florida Greenways Coordinating Council in cooperation with the Florida Department of Environmental Protection, and (3) the Florida Natural Areas Inventory, shall be presumed to be the best available existing data, unless augmented or updated data is available to the local government under section 9J-5.005(2)(c).

   g. Amend Rule 9J-2.041(3)(e) (regarding DCA review of DRI applications and other development approvals) to add:
Wherever prudent and feasible, avoidance, and not mitigation, will be required of all significant impacts on or adversely affecting lands identified as Strategic Habitat Conservation Areas in the Florida Fish & Wildlife Conservation Commission reports entitled, “Closing the Gaps in Florida’s Wildlife Habitat Conservation System” (1994) and “Habitat Conservation Needs of Rare and Imperiled Wildlife in Florida” (2000).

h. Amend the definition of “Preservation or Mitigation” in Rule 9J-2.041(4)(c) to include preservation of the ecosystems identified in the SHCA Network, and not just “documented populations” of listed species as defined at 9J-2.041(2)(h)and(i).

4. Remove the exclusions for agriculture, roads, and utilities from the definition of development in F.S. 380.04 and F.S. 163.3164(6).

5. Add school siting to the concurrency requirement in F.S. 163.3180(1)(a) and Rule 9J-5.0055(1)(a), and amend F.S. 235.193 to make school siting subject to concurrency and the conservation element of local plans.

6. Increase funding and expedite procedures for acquisition (by fee or easement) in those cases where protection of natural resources or provision for orderly growth management creates hardships on private owners which must be compensated as a constitutional taking of property rights.

7. Increase funding to DCA to insure that DCA will have sufficient staff and resources to do an adequate review of plan amendments, LDRs, and development orders in cases that are either in an area where significant state interests appear, or are above a specified threshold in size or impact. Local governments have shown that without oversight, local political realities will overcome considerations of what is best for the state's long term planning needs. DCA oversight should include, as a minimum, all plan amendments, LDRs, and development orders which affect the state's significant native habitats and ecosystem, including but not limited to the SHCA Network.

8. Burden of Proof

a. Amend F.S. 163.3184(9)(a) to be consistent with F.S. 163.3184(10), and provide that regardless of whether DCA finds a plan amendment in compliance or not, the presumption that the local government plan is in compliance may be overcome by the preponderance of the evidence.

b. Site-specific FLUM amendments intended to facilitate a specific development proposal should always have the burden to show that they are appropriate and necessary.

c. Proponents of a development order should always have the burden to show that the order is consistent with the comprehensive plan.
9. Create a uniform hearing and appeal process for review of local development orders, with a clear point of entry and uniform standing to “aggrieved or adversely affected parties” as defined in F.S. 163.3215, to facilitate the orderly, open, and inexpensive resolution of land use disputes. The vast majority of development orders are routine and not appealed. These the local government can handle in their normal way. For any decision which either the developer, an appropriate agency, or a party with standing wants to appeal, there should be the opportunity for a de novo hearing in front of a special land use hearing officer or special master, appointed by the division of administrative hearings. Uniform procedural rules would apply. The hearing would supplant the circuit court and appeals would go to the District Court of Appeals.

   a. Notice and Standing. Defenders endorses and adopts by reference the comments and recommendations on expanded notice and uniform standing contained in the Position Statement of the Environmental Community submitted to the Growth Management Study Commission.

10. Projects that affect regional interests need some kind of regional review; the present DRI process does not accomplish this task well. Whomever does the review, be it DCA, RPC, or WMD, should use complete data, review the DRI for all impacts which may affect regional interests, not create any special vesting privileges, and allow citizen input early in the process. If the present DRI process is continued, then at a minimum, Rule 9J-2, F.A.C. should be amended to provide that for any DRI that requires a plan amendment:

   a. the plan amendment must be approved in a separate hearing prior to the consideration of the DRI application, and,

   b. the ADA and RPC Report for the DRI shall be considered the best available data for proposed uses in the plan amendment area.

11. Amend F.S. 380.06(14) to be in harmony with F.S. 380.06(13), and prohibit approval of DRIs which are inconsistent with the RPC report or with the regional or state plans. RPCs should be allowed to review DRIs for all impacts under F.S. Chapter 163, and not just those covered in the regional plan.

12. Provide that state agencies must follow local comprehensive plans in the issuance of permits and the execution of their own development plans.

13. Amend F.S. 163.3184(14) to allow plan amendments in ACSC which have been found in compliance by DCA to become effective upon approval by DCA, and not when all appeals are final.

14. Repeal the last sentence of F.S. 163.3213(6), thereby removing the grandfathering of LDRs after 12 months.
15. Amend F.S. 163.3184(8)(a) to allow DCA to raise issues on plan review that were not specified in the ORC.\textsuperscript{115}

16. Amend F.S. 163.3184(11) to allow DCA, or a court in a proper case, to amend or repeal local comprehensive plan provisions found not in compliance with Chapter 163 or inconsistent with the state plan.

17. Amend F.S. 163.3191(6) to specify that the periodic review of comprehensive plans (the "EAR process") must insure that significant habitats and ecosystems are protected.

18. In order to effectuate the substantive planning recommendations above, the legislature should expand the permitting authority of the WMDs under F.S. 373.413 to require an ERP for all developments affecting SHCA Network areas. The ERP should require avoidance of adverse effects to the SHCA Network whenever possible. Provide funding sources and high acquisition priority (either by fee or by easement) for cases where ERP requirements result in a constitutional taking of property rights.

Suggested language:

Applicants required to obtain an ERP under Ch. 373 shall demonstrate as a condition of obtaining the ERP that the proposed development will not have an adverse impact on the ecosystem values identified in [the SHCA Network]. Existing uses, unless identified as adverse [in the SHCA Network data and analysis] shall be presumed to have no adverse impact. If adverse impacts cannot be avoided by alteration of the project design, then such adverse impacts shall first be minimized by alteration of the project design as much as possible, and then mitigation for any remaining adverse impacts may be allowed. If such minimization and mitigation will not avoid the adverse impacts of the project without causing a constitutional taking of the landowner's property rights, then the property rights so taken shall be placed at a high priority in the state's land acquisition program.

19. The Florida Fish and Wildlife Conservation Commission should be funded for, and encouraged to exercise its constitutional authority as to the protection of the ecosystems identified in the SHCA Network as necessary for the protection and conservation of wildlife.

20. Department of Transportation

The Final Report of the Transportation and Land Use Study Committee, created by the 1998 Legislature in Section 30 or CS/SB 2474, Chapter Three, Section II, p. 37, entitled, “Improving Impact Assessments and Mitigation”, contains an excellent analysis of the ways and reasons that Florida’s agencies charged with planning and reviewing the state’s transportation needs have overlooked and failed to adequately consider “the most damaging environmental effects” of transportation decisions. A copy of that section is attached to this report as Exhibit 2.

\textsuperscript{115} See Appendix A, paragraphs c and d.
Defenders adopts and incorporates the recommendations of that study, and particularly endorses Recommendation #29 therein:

The FDCA should give increased emphasis to assuring internal consistency among the elements of the local government comprehensive plans. Particular attention should be given to ensuring internal consistency among the future land use, transportation, capital improvement and conservation elements...

21. **Concurrency and Carrying Capacity**

F.S. 163.3180(1)(a) omits carrying capacity of natural resources (e.g., the minimum natural resources necessary to support the habitats and ecosystems in the planning area) from concurrency regulation. The purpose of concurrency is to make sure that sufficient healthy infrastructure exists to support the needs of the projected population. One part of the “infrastructure” necessary to support the population, perhaps the most important part, is the healthy existence and functioning of the natural world. Insuring that minimum natural resources be maintained could be accomplished by:

a. Amend F.S. 163.3180 to include a finding that the SHCA Network constitutes the minimum lands necessary to be protected and maintained in order to preserve Florida’s essential ecosystem functions, and to protect Florida’s wildlife and habitat.

b. Amend F.S. 163.3180 to provide that no development or infrastructure affecting any ecosystem values identified in the SHCA Network may be authorized by any local government or state agency unless it can first be demonstrated that the development orders or infrastructure will not adversely affect those ecosystem values, either directly, indirectly, or cumulatively.

c. Amend F.S. 163.3177(6)(a) to include the following language:

The distribution, location, density, intensity, and extent of the land uses shown on the future land use plan shall be consistent with the ecosystem values identified in [the SHCA Network], and shall be based on data and analysis that demonstrates that the ecosystem values identified in [the SHCA Network] will not be adversely affected, either directly, indirectly, or cumulatively by such uses.

22. **Local Access to Ecosystem Information**

In addition to regulatory recommendations for improving the protection of Florida's ecosystems through growth management, we respectfully suggest recommendations to enable and encourage communities to plan for and protect native habitats and ecosystems.

a. The DCA should create a program that would allow communities to access information on where important native habitats are located. This program would allow the natural resource agencies (including FWC and the FNAI) to put their GIS information on biological resources into a format that is usable to communities. The program would also
provide training to planners and planning commissions on how this information can be used and integrated into comprehensive planning. Initially, the program could focus on several pilot programs in key regions.

b. DCA should be authorized and funded to assist communities in consulting and contracting with FWC officials during planning at the local, regional, and state levels. By involving FWC’s technical capacity during planning, the agency can identify potential conflicts earlier in the process and avoid destruction of essential native habitats and ecosystems.

23. Landowner conservation incentive programs

Public and private programs which provide landowners with voluntary incentives to maintain rural lands in low intensity agriculture and preserve natural communities need to be continued and expanded. Examples of such programs are:

- purchase of conservation and agricultural easements
- promoting and rewarding highest quality management practices and rural lands stewardship programs, such as the Forest Stewardship Program
- providing supplemental funds to federal programs (e.g., Federal Farm Act) and creating comparable state programs especially for upland protection
- tax relief and rebates related to conservation management practices and the equipment to carry out the activities
- promoting land trusts and educating land owners regarding both tax relief and conservation opportunities on trust lands
- promoting and supporting conservation wise nature-heritage tourism
- assisting farmers with developing supplemental income through diversification or small business enterprises
- further modifying appraisals and property taxes with incentives to conserve and disincentives to intensify use
- land exchanges
- a workable transfer of development rights program
- improved purchase of development rights (PDR) and transfer of development rights (TDR) mechanisms and funding, encompassing the full "bundle of rights" that lie with land (e.g., grazing, timbering, mining, hunting, recreational access, etc, as well as development rights)
- urging congressional action to restructure the federal inheritance tax in those cases where that tax is shown to be an impediment to continued resource protection on agricultural and wild lands in family ownership.

Funding for incentives programs may come from traditional sources such as real estate transaction fees or a more strategic use of mitigation funds from the private sector and from public works, such as, DOT mitigation funds. New funding sources could include a surcharge on the sale of pesticides and herbicides, or a surcharge on recreational vehicles and outdoor equipment. Impact fees commensurate with the full effect of development should be instituted in areas outside of identified urban service boundaries and used for ecosystem and habitat protection.

Existing incentive programs can be improved by increasing their funding, scope, and variety to encourage the participation of both small and large landowners. Many programs are not well promoted, involve burdensome paperwork and processing, and do not provide the monetary compensation necessary to attract land owners. Incentive programs should target ecologically important areas, and information about the array of programs available, and how to navigate through them, should be made more widely and easily available to land managers.

IV. Conclusion

Upland habitats have traditionally been the ill-favored stepchild of environmental protection. Concentration of development in uplands has squeezed upland-dependent species and ecosystems to their last battlegrounds. As the SHCA Network reports show, the squeeze continues, with no help from the cavalry in sight. Even with the most aggressive land acquisition program in the nation, time is running out. It is time to reunite the forgotten stepchild with the rest of her natural family – wetlands, endangered species, and coastal resources – for a future all of Florida’s families can share.

APPENDIX A – REVIEW OF THE COMPREHENSIVE PLANNING PROCESS

1. Comprehensive Plan Adoption

The process for enacting original comprehensive plans and plan amendments is basically the same. F.S. 163.3184. Since all local plans are now complete, the only ongoing process, except in new incorporations, is plan amendments. The steps for plan amendment are:

a. The local government, after a public hearing, F.S. 163.3184(15), approves the proposed plan amendment and transmits it to DCA with copies to the agencies listed in the statute. F.S. 163.3184(3)(a)-(d).

b. DCA reviews the proposed plan amendment. F.S. 163.3184(6). No review takes place if (1) neither DCA, the RPC, nor any “affected person” (as defined in F.S.
requests a review, F.S. 163.3184(6)(a), or (2) the amendment qualifies as a “small scale amendment” under F.S. 163.3187(1)(a). F.S. 163.3187(3)(a). The RPC review of a proposed plan amendment is limited to regional issues, and may not be the basis of a finding of inconsistency by DCA. F.S. 163.3184(5).

c. DCA issues a report of its objections, recommendations, and comments (ORC report), F.S. 163.3184(6)(a), within the time specified in F.S. 163.3184(7). State and federal agencies and the public may also submit written comments. F.S. 163.3184(6)(c).

d. DCA issues its Notice of Intent to either find the amendment “in compliance” or “not in compliance” with the act. F.S. 163.3184(8). If an ORC was done, the DCA finding must be based only upon the issues raised in the ORC. F.S. 163.3184(8)(a).

e. If the DCA issues a Notice of Intent to find that the amendment is in compliance, then any affected persons who object may file a petition for an administrative hearing within 21 days after the notice of intent. At the hearing the “plan amendment shall be determined to be in compliance if the local government’s determination of compliance is fairly debatable.” F.S. 163.3184(9)(a). If the hearing officer finds the amendment in compliance, then DCA issues the final order. If the hearing officer finds the amendment not in compliance, then the Administration Commission issues the final order. 163.3184(9)(b).

f. If the DCA issues a Notice of Intent to find the amendment not in compliance, then an administrative hearing is automatically commenced, with the parties being DCA, the local government, and any affected person who intervenes. F.S. 163.3184(10). The hearing may be delayed for 90 days if any party requests mediation. F.S. 163.3184(10)(c). At the hearing, the local government’s finding that the amendment is in compliance will be upheld unless shown to be incorrect by a preponderance of the evidence. F.S.163.3184(10). The Administration Commission issues the final order. F.S. 163.3184(10)(b). If the DCA and the local government settle in a compliance agreement under F.S. 163.3184(16), the burden of proof for any remaining objectors changes as if the plan amendment had been found in compliance. F.S. 163.3184(16)(f)2.

g. The hearings provided for in F.S. 163.3184 are the exclusive way to determine plan amendment compliance. F.S. 163.3184(13). In ACSCs, no plan amendment is effective until a final order has been issued. F.S. 163.3184(14).

h. Every 7 years each local government must prepare and submit to DCA an Evaluation and Appraisal Report (EAR). F.S. 163.3191. DCA reviews the EAR for sufficiency, and makes recommendations. F.S. 163.3191(6).

Note that the definition of “affected person” for purposes of challenging plan amendments under this section is much broader than the definition of “substantially affected person” under F.S. 163.3213 for challenging LDRs, which in turn is different from the definition of “aggrieved or adversely affected party” under F.S. 163.3215 for purposes of challenging development orders for consistency with a comprehensive plan, which in turn is also different from the definition of a person with standing for purposes of certiorari or other appellate challenge of development orders on grounds other than plan consistency. See section on procedural enforcement.

See previous footnote.
...i. If the local government refuses to amend its Plan in conformity with the Administration Commission final order in the F.S. 163.3184 compliance hearing, or if the local government fails to adopt DCA’s report and make the comprehensive plan changes indicated in an EAR review, then the only remedy available to the state is for the Administration Commission, in its discretion, to impose “sanctions”, primarily the withholding of state funds or permits. F.S. 163.3184(11).

2. **Comprehensive Plans In ACSCs**

Unlike other plan amendments which will only be reviewed on request, F.S. 163.3184(6)(a), those in ACSCs are all reviewed by DCA without request. F.S. 380.05(10)and(11). The exemption of review for small scale amendments does not apply in ACSCs. F.S. 163.3187(3)(a). Another difference is that in ACSCs, no plan amendment is effective until a final order has been issued. F.S. 163.3184(14). Finally, only in ACSCs, the Administration Commission has the power to amend or repeal a local government’s plan found to be not in compliance. F.S. 380.05(8). In other respects, the administrative appeal process in ACSCs is the same as for other plan amendments.

3. **Land Development Regulations**

All local governments must amend their land development regulations (LDRs) so that the LDRs are consistent with and implement their comprehensive plans and plan amendments. F.S. 163.3202. If the local government fails to adopt such LDRs, the DCA can get a circuit order adopting LDRs required by DCA. F.S. 163.3202(4). An administrative proceeding by a “substantially affected person”118 under F.S. 163.3213 is the “sole proceeding available” to challenge the consistency of an LDR with a comprehensive plan. F.S. 163.3213(7). In that proceeding, the LDR will be upheld if it is fairly debatable that it is consistent with the plan. F.S. 163.3213(6). Should an LDR be inconsistent with a comprehensive plan, the comprehensive plan prevails, and the LDR can be ignored, whether or not the LDR was challenged. F.S. 163.3194(1).119 However, no LDR can be challenged more than 12 months after its adoption. F.S. 163.3213(6).

4. **Land Development Regulations in ACSCs**

Like plan amendments, LDRs are automatically reviewed by DCA in ACSCs, and can be repealed or modified by the Administration Commission. F.S. 380.05(6)-(10). In any administrative appeals by third parties, the DCA has the burden of proving the validity of its final order, and the LDR is not effective until the appeal is final. F.S. 380.05(6). Also unlike non-ACSC proceedings, the DCA at the hearing “has the burden of proving the validity of the final order”, regardless of whether the amendment was approved or rejected. F.S. 380.05(6); cf. F.S. 163.3213(6).

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118 See footnote 85, above.
119 F.S. 163.3194(4) states that it is the intention of the act that comprehensive plans only “set general guidelines and principles”. The courts, however, have uniformly held that where a comprehensive plan and an LDR conflict, the comprehensive plan must prevail. Machado v. Musgrove, 519 So.2d 629 (Fla. 3rd DCA 1988).
5. Development Orders

There are a plethora of ways that a development order may be issued or appealed. Each of the 472 local governments in Florida has its own procedures and boards for hearing requests and issuing development orders. There are many types of development orders. Some orders are issued by staff without a hearing, and can then be appealed to a hearing body, others require a hearing before they can be issued.\(^{120}\)

a. If the appellant is a third party (e.g., neighbor or environmental group) who wants to argue that the approved development order is inconsistent with the comprehensive plan, she or they must use the verified complaint procedure in F.S. 163.3215.\(^{122}\) This is a de novo procedure.\(^{123}\) It is the burden of the person challenging the development order to show that it is not consistent with the comprehensive plan.

b. If the appellant is the developer and the local government ruled that the development was not consistent with the comprehensive plan; or if the appellant is a third party who wants to argue that the approved development order is illegal for any reason other than inconsistency with the comprehensive plan, the remedy is writ of certiorari.\(^{124}\)

c. If the remedy is certiorari, then the local government body that issues the development order, the appellate body that reviews the order, and the rules of procedure for the hearing and review, all vary from local jurisdiction to jurisdiction. The distinctive feature of certiorari is that the review is limited to the record made at the hearing before the local government body that approved the development order. There are no uniform rules of evidence or procedure.

d. If a third party appellant has objections to due process, or claims that the development order violates the LDRs in addition to objections to consistency, then it may be necessary for the objector to bring two simultaneous actions, one in circuit court (under F.S. 163.3215 for the consistency claim) and one in the certiorari tribunal (for all non-consistency claims). Where the procedure used is unconstitutional, challenge can also be brought in circuit court under a separate declaratory judgment action. Webb v. Town Council, 766 So.2d 1241 (1DCA 2000).

e. If the development is a DRI or in an ACSC, then the landowner, developer, or DCA may appeal the development order to FLWAC. F.S. 380.07(2) The DRI appeal cannot be commenced until all the local governments have issued their development orders. F.S. 380.07(3). The ACSC appeal cannot be commenced until all local appeals are final.\(^{125}\)

\(^{120}\) Examples include developments of right, or permits that can be issued at the discretion of the building official.

\(^{121}\) Examples include conditional uses, re-zonings, and variances.

\(^{122}\) Leon County v. Parker, 566 So.2d 1315 (Fla. 1st DCA 1990).

\(^{123}\) Poulos, et al v. Martin County et al, 700 So. 2d 163 (Fla. 4th DCA 1997).

\(^{124}\) Parker v. Leon County, 627 So. 2d 476 (Fla. 1993).

\(^{125}\) Rule 9J-1.003(2), F.A.C.
f. Hearings on plan amendments are considered quasi-legislative, and will be upheld on appeal if it is fairly debatable that the amendment is consistent with Chapter 163 and Rule 9J-5. A challenge to the granting of a small scale amendment is in an administrative proceeding under a preponderance burden. F.S. 163.3187(3)(a). Whether a denial of a small scale amendment is quasi-legislative or quasi-judicial is presently before the Supreme Court.\textsuperscript{126}

\textsuperscript{126} City of Jacksonville Beach v Coastal Dev. of N. Fla., Inc., 730 So.2d 792 (1DCA1999).