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Recent Developments in Land Use and Environmental Law

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RECENT DEVELOPMENTS IN LAND USE AND ENVIRONMENTAL LAW*

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I. INTRODUCTION

This section highlights significant recent developments in federal and state environmental and land use case law. The reader is encouraged to further explore several of the sources from which these developments were drawn. Particularly useful were the Florida Legislature's web site <www.leg.state.fl.us>, which includes links to the following two useful sites: the Department of Community Affairs's web site, <www.dca.state.fl.us>, and the Department of Environmental Protection's web site, <www.dep.state.fl.us>. Descriptions of the bills passed by the 1999 Florida Legislature are in most cases excerpts taken verbatim or directly paraphrased from one of these three sites. The Environmental and Land Use Section of the Florida Bar's web site <www.eluls.org>, has many useful articles and updates that were a source of information for this section as well. Also very useful was the FLORIDA ENVIRONMENTAL COMPLIANCE UPDATE, available though M. Lee Smith Publishers, LLC, <www.mleesmith.com>.

This section focuses on federal cases, Florida case law and Florida legislation. Federal legislation and rulemaking were not reviewed for this edition. The reader can find an excellent comprehensive review of federal environmental law in the annually updated YEAR IN REVIEW, put out by the American Bar Association's Natural Resources, Energy and Environmental Law Section.

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II. FEDERAL CASES

City of Monterey v. Del Monte Dunes at Monterey, Ltd., 119 S. Ct. 1624 (1999)

As noted in the case note found in this issue of the *Journal*,[1] *Del Monte Dunes* principally discusses whether a takings claim may be submitted to a jury in federal court under 42 U.S.C. § 1983.[2] Of more direct interest to land use practitioners is the Court's holding that the rough proportionality of *Dolan* applies to exactions, and not to takings by inverse condemnation:

> [W]e have not extended the rough-proportionality test of *Dolan* beyond the special context of exactions - land-use decisions conditioning approval of development on the dedication of property to public use. See *Dolan*, supra, at 385, 114 S.Ct. 2309; *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 841, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987). The rule applied in *Dolan* considers whether dedications demanded as conditions of development are proportional to the development's anticipated impacts. It was not designed to address, and is not readily applicable to, the much different questions arising where, as here, the landowner's challenge is based not on excessive exactions but on denial of development. We believe, accordingly, that the rough-proportionality test of *Dolan* is inapposite to a case such as this one.[3]

Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc., 149 F.3d 303 (4th Cir. 1998), *cert. granted*, 119 S. Ct. 1111 (1999)

In *Friends of the Earth*, the Fourth Circuit Court of Appeals held that plaintiffs lacked Article III standing to file suit under the citizen-suit provision of the Federal Water Pollution Control Water Act, 33

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1. Nancy E. Stroud, Note, *A Review of* Del Monte Dunes v. City of Monterey *and its Implications for Local Government Exactions*, 15 J. LAND USE & ENVTL. L. 191 (1999).

2. *See Del Monte Dunes*, 119 S. Ct 1624.

3. Id. at 1635. For additional information on *Del Monte Dunes*, see Stroud, *supra* note 1, and Dwight H. Merriam, *The United States Supreme Court's Decision in* Del Monte Dunes: *The Views of Two Opinion Leaders* (Parts 1 and 2), ZONING AND PLANNING LAW REPORT, Vol. 22, No. 7, 8 (1999).

U.S.C.A. § 1365(a)(1).[4] Defendant Laidlaw appealed a district court finding that it had violated permit requirements and the Court's imposition of a $405,800 fine.[5] The Fourth Circuit reversed and remanded, holding that plaintiffs lacked standing to bring the suit.[6] Citing *Steel Co. v. Citizens for a Better Environment*,[7] the court noted that standing requires a plaintiff to have an actual or threatened injury in fact, the injury must have been caused by the defendant's complained-of conduct, and the injury must be redressable by the relief sought.[8] The court focused its' analysis on the redressability element of standing, noting:

> [i]n *Steel Co.*, the Supreme Court held that a plaintiff lacked standing to prosecute a private enforcement action under the citizen-suit provision of the Emergency Planning and Community Right-To-Know Act of 1986, because the relief requested could not redress the injury plaintiff had allegedly suffered. In particular, the Court noted that any civil penalties imposed would be payable to the United States Treasury and not to the plaintiff and therefore that the penalties would not benefit the plaintiff. . . . Applying the reasoning of *Steel Co.*, we conclude that this action is moot because the only remedy currently available to Plaintiffs - civil penalties payable to the government - would not redress any injury Plaintiffs have suffered. [9]

On appeal to the U.S. Supreme Court, the petitioners claim the Fourth Circuit mistakenly applied the analysis found in *Steel Co.*[10] Petitioners state that *Steel Co.* addresses standing to sue at the initiation of a suit.[11] Thus, the appropriate guiding precedent, petitioners argue, was the Supreme Court's Clean Water Act ruling in *Gwaltney of Springfield Ltd. v. Chesapeake Bay Foundation, Inc.*,[12], which ad-

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4. *See Friends of the Earth*, 149 F.3d at 305.
5. *See* Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC) Inc., 956 F. Supp 588 (D.S.C. 1997).
6. *See Friends of the Earth*, 149 F.3d at 306-7.
7. 118 S. Ct. 1003 (1998).
8. *See Friends of the Earth*, 149 F.3d at 306.
9. *Id.* at 306-7 (citations omitted).
10. *See* Daily Environment Report, 12 DEN (BNA) S-29 (1999).
11. *See id.*
12. 484 U.S. 49 (1987).

dresses the mootness of an ongoing suit.[13] Petitioners claim that not only do the facts in *Gwaltney* more closely resemble the facts in their case, but the case also held that citizen plaintiffs have standing to seek only civil penalties under the act's citizen suit provision.[14]

The Supreme Court granted certiorari on March 1, 1999.[15] The Soliciter General requested, and was granted, leave to participate in oral argument as amicus curiae and for divided argument on September 10, 1999.[16]

Gatlin Oil Co. v. U.S., 169 F.3d 207 (4th Cir. 1999)

The Fourth Circuit vacated the district court's finding that an oil company was entitled to compensation from the Oil Spill Liability Trust Fund for all of its recovery costs and damages resulting from an oil spill and an ensuing fire.[17] The court held that the company had a complete defense under the Oil Pollution Act because the spill was caused by a third party.[18] Therefore, the company is entitled to full compensation costs for removal costs and lost wages and earnings.[19] However, the company may not recover compensation for fire damage because the fire neither caused the discharge of oil into navigable waters nor posed a substantial threat to do so.[20] Similarly, the company may not recover expenditures that were directed by state authorities.[21]

Avondale Federal Savings Bank v. Amoco Oil Co., 170 F.3d 692 (7th Cir. 1999)

The Seventh Circuit Court of Appeals held that a private party cannot recover cleanup costs incurred from the responsible party after bringing an action under the Resource Conservation and Recovery Act's (RCRA) citizen suit provision.[22] Avondale Federal Savings Bank held title to contaminated property formerly owned by Amoco Oil.[23] In order to promptly sell the land, Avondale filed suit under RCRA against Amoco, proceeded to clean up the site, and

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13. *See* Daily Environment Report, *supra* note 10, at S-29.
14. *See id.*
15. *See* Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 119 S. Ct. 1111 (1999).
16. *See* Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 120 S. Ct. 32 (1999).
17. *See Gatlin Oil Co.*, 169 F.3d at 208-9.
18. *See id.* at 210.
19. *See id.* at 211-2.
20. *See* at 212.
21. *See* at 213.
22. *See Avondale*, 170 F.3d at 694.
23. *See id.* at 693.

then went back to court to recover costs from Amoco.[24] The court, however, noted that RCRA's citizen suit provision is not directed at providing compensation for past cleanup efforts.[25]

General Motors v. EPA, 168 F.3d 1377 (D.C. Cir. 1999)

The United States Court of Appeals for the District of Columbia Circuit denied General Motors' petition for review of an order of the Environmental Protection Agency (EPA).[26] The issue arose when the EPA determined that General Motors violated a Clean Water Act permit issued by the State of Michigan, for which the agency imposed an administrative penalty.[27] General Motors argued that the EPA erred in refusing to consider the company's collateral attack upon validity of the state-issued permit.[28] The court held that, first, the EPA reasonably interpreted the Clean Water Act to preclude such a collateral attack in the course of an enforcement proceeding and, second, that substantial evidence supports the EPA's finding that General Motors violated the permit.[29]

American. Trucking Associations, Inc. v. U.S. Environmental Protection Agency, 175 F.3d 1027 (D.C. Cir. 1999), *reh'g granted in part and denied in part*, 195 F.3d 4 (D.C. Cir. 1999)

The D.C. Circuit Court of Appeals struck down the U.S. EPA's final rules for National Ambient Air Quality Standards (NAAQS) on particulate matter and ozone, because the rules lacked an "intelligible principle," stating:

> [c]ertain "Small Business Petitioners" argue in each case that EPA has construed §§ 108 & 109 of the Clean Air Act so loosely as to render them unconstitutional delegations of legislative power. We agree. Although the factors EPA uses in determining the degree of public health concern associated with different levels of ozone and PM are reasonable, EPA appears to have articulated no "intelligible principle" to channel its application of these factors; nor is one apparent from

24. *See id.* at 693-4.
25. *See id.* at 694.
26. *See General Motors Corp.*, 168 F.3d at 1378.
27. *See id.* at 1379.
28. *See id.* at 1380.
29. *See id.* at 1383.

> the statute. The nondelegation doctrine requires such a principle.[30]

On EPA's subsequent request for rehearing, the court denied in part and granted in part.[31] Most importantly, the request for rehearing on "intelligible principles" failed to garner the majority of judges needed to grant a rehearing.[32] EPA argued that the Clean Air Act (CAA) provide such a principle:

> [Section] 109(b)(1) requires EPA to promulgate NAAQS based on air quality criteria issued under § 108 that are "requisite to protect the public health" with "an adequate margin of safety." This language and related legislative history provide directions for EPA to follow in setting the NAAQS. Moreover, EPA has consistently interpreted § 109(b)(1) to provide further decisionmaking criteria to guide the standard setting process. Thus, the CAA provides a more than sufficient "intelligible principle" to guide EPA's discretion.[33]

The per curiam opinion held that EPA's statement of an intelligible principle "begged the question", because the agency had not stated of what that principle consists.[34] Although EPA had taken no further legal action on this matter at the time this summary was published, the issue is one of such significance that such action may be anticipated.

III. FLORIDA CASES

St. Johns River Water Management District v. Consolidated-Tomoka Land Co., 717 So. 2d 72 (Fla. 1st DCA 1998), *cert. denied*, 727 So. 2d 904 (Fla. 1999)

At issue was the appropriate standard of judicial review for agency rulemaking. The First District Court considered an appeal by the St. Johns River Water Management District (SJRWMD) of an ad-

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30. *American Trucking Ass'ns, Inc.*, 175 F.3d at 1034.
31. *American Trucking Ass'ns, Inc.*, 195 F.3d 4 (D.C. Cir. 1999).
32. *See id.*
33. 195 F.3d at 7 (D.C. Cir. 1999).
34. *See id.*

ministrative law judge's final order declaring a series of the SJRWMD's rules invalid.[35] Those rules defined two areas within the SJRWMD as hydrologic basins and established more restrictive permitting and development requirements within that basin.[36] The SJRWMD cited chapter 373, *Florida Statutes*,[37] as the source of it's authority to pass those rules.[38] Specifically, the rules were based on Part IV, "Management and Storage of Surface Waters," of § 373.413, which, as cited in the case, states:

> [T]he Governing Board [of the Water Management District] or the department [of Environmental Protection] may require such permits and impose such reasonable conditions as are necessary to assure that the construction or alteration of any stormwater management system, dam, impoundment, reservoir, appurtenant work or works will comply with the provisions of this part and applicable rules promulgated thereto and will not be harmful to the water resources of the district. The department or the governing board may delineate areas within the district wherein permits may be required.[39]

Tomoka challenged the SJRWMD's authority under § 373.413 to pass those hydrologic basin rules.[40] Citing a 1996 revision to the FLA. STAT., § 120.52(8) (1998), the administrative law judge determined that the proposed rules were supported by the evidence, but were invalid as a matter of law.[41] The basis for that ruling was the rules were not within the "particular powers and duties" granted by the enabling legislation, as required by § 120.52(8).[42]

The First District Court focused its' analysis on the phrase "particular powers and duties" in § 120.52(8), noting that the section was not clear and could have more than one meaning. The court stated:

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35. *See Tomoka Land Co.*, 717 So. 2d at 72.
36. *See id.* at 75.
37. FLA. STAT. ch. 373 (Supp. 1998).
38. *See Tomoka Land Co.*, 717 So. 2d at 78.
39. *Id.*; *see also* FLA. STAT. § 373.413 (Supp. 1998).
40. *See id.* at 75-6.
41. *See id.* at 76.
42. *See id.*; *see also* FLA. STAT. § 120.52(8) (Supp. 1998).

> The use of the term "particular" in this phrase could signify that the powers and duties conferred on the agency must be identified by some defining characteristic or that they must be described in detail.
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> . . . .
>
> The administrative judge interpreted the phrase "particular powers and duties" to mean that the enabling statute must "detail" the powers and duties that will be the subject of the rule. . . . We disagree. In our view, the term "particular" in section 120.52(8) restricts rulemaking authority to subjects that are directly within the class of powers and duties identified in the enabling statute. It was not designed to require a minimum level of detail in the statutory language used to describe the powers and duties.
>
> . . . .
>
> We consider it unlikely that the Legislature intended to establish a rulemaking standard based on the level of detail in the enabling statute, because such a standard would be unworkable.
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> . . . .
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> A standard based on the sufficiency of detail in the language of the enabling statute would be difficult to define and even more difficult to apply. . . . An argument could be made in nearly any case that the enabling statute is not specific enough to support the precise subject of a rule, no matter how detailed the Legislature tried to be in describing the power delegated to the agency.[43]

The court concluded that the proper test to determine whether a rule is a valid exercise of delegated authority is a functional test

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43. *Id.* at 79-80.

based on the nature of the power or duty at issue and not the level of detail in the language of the applicable statute.[44]

As noted by several commentators, the Florida Legislature passed CS/HB 107 Administrative Procedure Act[45] to overturn the court's decision.[46] The revised APA creates the unfortunate possibility of placing many important environmental rules in jeopardy[47] and, as noted in the First District Court's opinion above, will likely lead to difficulty in developing and applying a standard of judicial review for agency rulemaking. The APA revision granted an "amnesty period" for agencies to continue under existing rules, if the agencies reported a list of rules for which they lack authority to the Legislature by October 1, 1999.[48] Rules so reported would be protected from challenge under the "unauthorized" standard while the Legislature considers whether to grant the specific authority.[49] The Department of Environmental Protection submitted twelve of its own rules and, for good measure, several of the water management districts' rules as well.[50] The Legislature has self-imposed a regulatory review deadline of these "unauthorized" rules to conclude with the end of the legislative session in 2000.[51]

Fleeman v. City of St. Augustine Beach, 728 So.2d 1178, (Fla. 5th DCA, 1998), *cert. granted*, (Fla. 1999)

Petitioner Fleeman requested the district court grant certiorari review of the Circuit Court's dismissal of his petition for certiorari review of a zoning decision involving a small parcel comprehensive plan amendment pursuant to section 163.3187(1)(c), *Florida Stautes*.[52] At issue is whether a small scale plan amendment is a legislative

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44. *See id.* at 80.

45. *See infra* Part IV.

46. *See* Lawrence E. Sellers Jr., *APA: Legislature Clarifies Agency Rulemaking Authority*, SECTION REPORTER: 1999 LEGISLATURE EDITION (Fla. B. Ass'n. Envtl. & Land Use Sec.), June 1999 (visited Nov. 17, 1999) <www.eluls.org/june1999_sellers_l.html>; Terrell K. Arline, *The Environmental Impacts of the Administrative Procedures Act Bill*, SECTION REPORTER: 1999 LEGISLATURE EDITION (Fla. B. Ass'n. Envtl. & Land Use Sec.), June 1999 (visited Nov. 17, 1999) <www.eluls.org/june1999_arline_l.html>.

47. *See id.*

48. *See* M. Chistopher Bryant, *DEP Reports to Legislature on "Unauthorized" Rules*, FLORIDA ENVIRONMENTAL COMPLIANCE UPDATE, November 1999, at 5.

49. *See id.*

50. *See id.*

51. *See id.*

52. *See Fleeman*, 728 So. 2d at 1179; *see also* FLA. STAT. § 163. 3187(1)(C) (Supp. 1998).

action, reviewable by a declaratory judgement or a quasi-judicial action, subject to certiorari review.[53]

The court, citing *Martin County v. Yusem*[54], noted the Florida Supreme Court has determined all amendments to a comprehensive land use plan are legislative decisions subject to a fairly debatable standard of review.[55] In *Martin*, however, the court had expressly stated that its' opinion did not include small scale plan amendments, noting the legislature had amended § 163.3187 (1)(c) in 1995 to revise those procedures.[56] Petitioner Fleeman argued that these small scale plan amendments are more akin to small-parcel rezoning, affecting a limited number of people and, thus should fall under the strict scrutiny standard of review for quasi-judicial actions under *Board of County Commissioners of Brevard County v. Snyder*.[57]

The Fifth District Court, rejecting the petitioner's argument, held that small scale plan amendments are legislative in nature, stating:

> We cannot discern any good reason for the courts to treat small-parcel amendments differently than any other amendments or adoption of comprehensive land use plans. To do so would invite more uncertainty in this still unsettled area of law. How small must the parcel be? How many people must be affected? In all cases, the denial or granting of a small-parcel amendment to a comprehensive plan is a legislative function. The question being asked is whether to change the plan - a matter of policy consigned to the discretion of the governing body.[58]

The court also granted petitioner's motion for certification to the Florida Supreme Court, certifying that the issue is one of great public importance and in conflict with the Third District Court's ruling on method of review in *Debes v. City of Key West*.[59]

Following this decision, two other Florida courts, the First District Court in *City of Jacksonville Beach v. Coastal Development of*

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53. *See Fleeman*, 728 So. 2d at 1179.
54. 690 So. 2d 1288 (Fla. 1997).
55. *See Fleeman*, 728 So. 2d at 1180.
56. *See id.* (citing *Martin*, 690 So. 2d at 1293, n.6).
57. 627 So. 2d 469 (Fla. 1993).
58. *Id.* at 1180.
59. 690 So. 2d 700 (Fla. 3rd DCA 1997).

North Florida, Inc.[60], and the Third District Court in *Palm Springs General Hospital, Inc. v. City of Hialeah Gardens*[61], have considered the question of whether small scale plan amendments are legislative or quasi-judicial in nature.

In *Jacksonville Beach*, the court agreed with the conclusions of *Fleeman*. In discussing those conclusions, the First District Court noted:

> [i]t seems to us that all comprehensive plan amendment requests necessarily involve the formulation of policy, rather than its mere application. Regardless of the scale of the proposed development, a comprehensive plan amendment request will require that the governmental entity determine whether it is socially desirable to reformulate the policies previously formulated for the orderly future growth of the community. . . . Such considerations are different in kind from those which come into play in considering a rezoning request. [62]

The court, following the Fifth District Court's lead, certified the question as one of great public importance to the Florida Supreme Court as to whether § 163.3187(1)(c) small scale plan amendments are legislative or quasi-judicial in nature.[63] In *Palm Springs*, the Third Circuit Court cited *Fleeman* and *Jacksonville Beach* in leaving stand a circuit court's denial for writ of certiorari.[64] The court noted that the other two districts had certified the question to the Florida Supreme Court and took the same action.[65] In *William E. Poland Jr., Trust v. The City of Jacksonville*[66], the First District Court, noting its previous holding in *Jacksonville Beach*, denied a petition for writ of certiorari and once again recertified the question to the Florida Supreme Court.[67]

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60. 730 So. 2d 792 (Fla. 1st DCA, 1999).
61. 740 So. 2d 596 (Fla. 3rd DCA, 1999).
62. *Jacksonville Beach*, 730 So. 2d at 794.
63. *See id.* at 795.
64. *See Palm Springs General Hospital, Inc.*, 740 So. 2d at 596 (Fla. 3rd DCA 1999).
65. *See id.*
66. 743 So. 2d 1176 (Fla. 1st DCA. 1999).
67. For a thoughtful analysis on the question of the proper standard of review, see Kent Wetherell, *Small Scale Plan Amendments: Legislative or Quasi-Judicial in Nature?*, Fla. B.J., Apr. 1999, at 80.

IV. FLORIDA LEGISLATION

The descriptions below are excerpts from Senate or House Committee summary reports compiled by legislative staff and listed at the Florida Legislature's web site, <www.leg.state.fl.us>. Summaries for many of these bills are also available at either the Department of Community Affairs's site, <www.dca.state.fl.us>, or the Department of Environmental Protection's web site, <www.dep.state.fl.us>. The reader is also encouraged to review the 1999 Environmental and Land Use Section of the Florida Bar's Legislative Report, prepared by Kent Wetherell of Hopping, Green, Sams and Smith, P.A., available at <www.eluls.org/reporter_leg_june1999.html

CS/CS/HB 17 Community Revitalization
Chapter 99-378, *Florida Statutes*

Creates the Growth Policy Act, establishing a voluntary program for local governments to designate urban infill and redevelopment areas for the purpose of holistically approaching the revitalization of urban centers, and ensuring the adequate provision of infrastructure, human services, safe neighborhoods, educational facilities, job creation and economic opportunity. The act creates an incentive program for areas designated as urban infill and redevelopment areas and creates a matching grant program for local governments.

In addition, the bill:

- Provides exceptions from transportation concurrency requirements, Development of Regional Impact substantial deviation thresholds, and limitations on amendments to comprehensive plans, for certain types of development within urban infill and redevelopment areas. The bill also amends the State Comprehensive Plan, chapter 187, *Florida Statutes*, to establish the preservation and revitalization of urban centers as a goal.
- Adopts several recommendations of the Transportation and Land Use Study Commission: defining "projects that promote public transportation" to include projects which are transit oriented; an exemption from the concurrency requirement for public transit facilities; allows local governments to establish level-of-service standards for general lanes in urbanized areas; allows certain multi-use developments or regional impact to satisfy transportation concurrency requirements by the payment of a proportionate share contribution.

- Exempts comprehensive plan amendments necessary to establish school concurrency from the twice-a-year amendment limitation and clarifies that local governments must comply with a requirement for identifying land use categories appropriate for school siting no later than October 1, 1999.
- Revises the Florida Local Government Development Agreement Act to provide certain assurances to the developer of a brownfield site.
- Authorizes the acquisition by eminent domain of property in an unincorporated enclave surrounded by a community development district.
- Revises the requirements for feasibility studies for proposed incorporations, and allows municipalities to annex unincorporated areas through a single referendum of the residents of the unincorporated area to be annexed.
- Provides procedures by which a county or a combination of counties and municipalities may develop and adopt plans to improve efficiency, accountability, and coordination of delivery of local government services. The bill provides new criteria for feasibility studies that are submitted in conjunction with proposals for incorporation of a municipality.
- Creates the State Housing Tax Credit Program authorizing tax credits to be issued against the state corporate income tax.
- Creates an Urban Homesteading Program within the Governor's Office to make single-family housing properties available to eligible low-income buyers for purchase.
- Amends chapter 190, *Florida Statutes*, regarding community development districts, and includes a number of changes to chapter 290, *Florida Statutes*, relating to Community Development Districts, which were the content of CS/SB 2456. This includes financial disclosure requirements; the imposition and collection of special assessments; revising bidding and contracting procedures; providing additional functions authorized for CDDs; offering training for new board members; and making it easier to alter district boundaries.
- Authorizes water management districts to advertise bids, RFPs, or other solicitations in a newspaper of general circulation in the county where the principal office of the water management is located at least 7 days before the meeting, instead of the Florida Administrative Weekly.
- The bill includes appropriations of $2.5 million to the Department of Community Affairs for the Urban Infill and Re-

development Program and $2.5 million for the State Housing Tax Credit Program.

CS/HB 107 Administrative Procedure Act
Chapter 99-379, *Florida Statutes*

Amends sections 120.52 and 120.536, *Florida Statutes*, both of which contain the required standard for the adoption of rules by agencies. Under the amendment to these sections, an agency may adopt only rules that implement or interpret the specific powers and duties granted by the enabling statute. Further, the amendment to these sections provides that no agency has authority to adopt a rule only because it is within the agency's class of powers and duties. Statutory language granting rulemaking authority or generally describing the powers and functions of an agency can be construed to extend no further than implementing or interpreting the specific powers and duties conferred by the same statute.

Requires agencies to provide to the Joint Administrative Procedures Committee (JAPC) by October 1, 1999, a listing of each rule, or portion of a rule, that was adopted before the effective date of the bill, which exceeds the rule making standard. The JAPC is required to provide a cumulative listing to the President of the Senate and the Speaker of the House of Representatives. During the 2000 Regular Session, the Legislature will consider whether specific legislation authorizing the identified rules should be enacted. The bill requires agencies to initiate proceedings to repeal rules that were identified as exceeding the rule making authority permitted and for which authorizing legislation does not exist. The JAPC must submit to the Legislature by February 1, 2001, a report identifying those rules previously identified as exceeding the rule making standard if rule repeal proceedings have not been initiated. Any rule may be challenged as of July 1, 2001, on the basis that it exceeds the rule making authority permitted by the section.

CS/HB 223 Governmental Conflict Resolution
Chapter 99-279, *Florida Statutes*

Modifies governmental conflict resolution procedures. The purpose and intent of the Florida Governmental Conflict Resolution Act is to promote, protect, and improve the public health, safety, and welfare and to enhance intergovernmental coordination by a conflict resolution procedure that is equitable, expeditious, effective, and inexpensive. The bill provides that it is the intent of the Legislature

that conflicts between governmental entities be resolved to the greatest extent possible without litigation.

Defines "local governmental entities" and "regional governmental entities." Places a duty on governmental entities to negotiate with other governmental entities to resolve disputes. The Act encourages use of the procedures at any time there is conflict. If a governmental entity files suit against another governmental entity, court proceedings on the suit must be abated until the procedural options of the act have been exhausted. The Act specifies types of actions which do not fall under its' procedural requirements, such as some eminent domain actions, administrative proceedings, and where the governing body of the governmental entity finds by a three-fourths vote that the immediate health, safety, and welfare of the public is threatened. Issues such as municipal annexation, service provision areas, siting of hazardous waste facilities, and others, are covered by this Act.

HB 297 Florida Empowerment Zone Act
Chapter 99-342, *Florida Stautes*

Establishes a 10-year economic development program entitled the "Florida Empowerment Zone Program" within the Department of Community Affairs (DCA) in conjunction with the Federal Empowerment Zone Program.

Appropriates $3.5 million to the DCA each fiscal year, for 10 years, beginning FY 1999-2000 for the purpose of funding local government awards under the Federal Empowerment Zone designation. The bill further authorizes DCA to adopt and enforce rules necessary to administer the program.

HB 591 Transportation Department
Chapter 99-385, *Florida Statutes*

Includes the Department of Transportation's (DOT) 1999 legislative proposals as contained in CS/HB 1147. The bill addresses a number of transportation infrastructure financing issues and conforms state law to recent changes in federal transportation law, the Transportation Equity Act for the 21st Century (TEA-21). Many of the provisions in the bill are related to department operations and are intended to allow DOT to operate more efficiently. Major provisions in the bill would:

- Enhance or implement transportation finance programs related to right-of-way and bridge bonds, federal grant anticipation

revenue bonds, fixed guideway project bonds, and direct federal loans for railroad rehabilitation and improvement financing.

- Conform DOT's and Metropolitan Planning Organization's (MPO) transportation planning process with new federal requirements, including placing more emphasis on freight and intermodal issues in transportation planning and project selection.
- Improve DOT contract administration process, including increasing the number of construction contract claims that can be resolved by the State Arbitration Board prior to litigation and allowing DOT to contract directly with utility company for right-of-way clearing work necessary for utility relocation.

CS/HB 2067 Environmental Protection
Chapter 99-353, *Florida Statutes*

A companion bill to CS/SB 2282, CS/HB 2067 restates the TMDL requirements. CS/HB 2067 also includes directives on the Northwest Florida Water Management District's permitting program (administered jointly by NWFWMD and FDEP) and authorizes the Secretary of DEP to reorganize the department within current statutory prescribed divisions and in compliance with section 216.292.

The bill also deletes the 3-day nonresident freshwater fishing license. The license and permit fees established under chapter 372 must be reviewed by the Legislature during its regular session every 5 years beginning in 2000.

HB 2151 Petroleum Contamination Site Rehabilitation
Chapter 99-376, *Florida Statutes*

Addresses certain glitches and other problems that have arisen since the passage of chapter 96-277, Florida Laws. This bill allows the Department of Environmental Protection to provide funding for source removal activities. Funding for free product recovery may be provided in advance of the order established by the priority ranking system for site cleanup activities; however, a separate prioritization for free product recovery must be established consistent with the priority ranking system. No more than $5 million may be encumbered from the Inland Protection Trust Fund in any fiscal year for source removal activities conducted in advance of the priority order.

Under the Petroleum Cleanup Participation Program, sites for which a discharge occurred before January 1, 1995, are eligible for

rehabilitation funding assistance on a 25-percent cost-sharing basis. This bill provides that if the DEP and the owner, operator, or person otherwise responsible for site rehabilitation are unable to complete negotiations of the cost-sharing agreement within 120 days after commencing negotiations, the DEP shall terminate the negotiation; the site becomes ineligible for state funding under this program; and all liability protections provided under this program are revoked.

CS/CS/SB 662 One-Stop Permitting System
Chapter 99-244, *Florida Statutes*

Authorizes the Department of Management Services to create, by January 1, 2000, a One-Stop Permitting Internet System to provide individuals and businesses with a central source of development permit information. Certain permit fees are waived for applicants who use the One-Stop Permitting System for the first six months a permit is available on-line, and complete applications submitted on the system must be processed within 60 days, rather than 90 days. The bill also creates a Quick Permitting County Program where counties who certify that they employ certain permitting "best management practices", must be designated as Quick Permitting Counties by the Department of Management Services and become eligible for grant money of up to $50,000 per county to connect to the One-Stop Permitting Internet System.

Amends section 403.973, the expedited permitting process, to provide counties and the Office of Tourism, Trade and Economic Development (OTTED) with additional flexibility to certify projects as eligible for expedited permitting in counties where the ratio between the number of jobs created and the number of Work and Gain Economic Self-Sufficiency Act (WAGES) clients are low. In such counties, the jobs created by the project need not be considered high wage jobs that diversify the state's economy. In addition, OTTED is authorized to delegate to a Quick Permitting County the responsibility for certifying certain projects as eligible for expedited review and the convening of regional permit teams.

Repeals permit information clearinghouse responsibilities of OTTED within the Governor's Office and repeals the Jobs Siting Act, sections 403.950-403.972.

Appropriates $100,000 to the Department of Management Services to fund the administrative costs of establishing the One-Stop Permitting System and $3 million from nonrecurring general revenue to offset revenue lost to agencies as a result of the 6-month permit fee waiver for users of the expedited One-Stop Permitting System. In

addition, the Appropriations Act appropriates $550,000 to the Department of Management Services to fund the grant program for One-Stop Permitting Counties.

CS/CS/SB 864 Fish and Wildlife Conservation Commission
Chapter 99-245, *Florida Statutes*

Developed in response to an amendment to the State Constitution known as Revision 5 which was approved by voters in November 1998. This legislation was necessary to provide the details for implementation of the new Fish and Wildlife Conservation Commission.

Creates section 20.331 to establish the Fish and Wildlife Conservation Commission (FWCC). The commission shall appoint an executive director subject to Senate confirmation. The Game and Fresh Water Fish Commission and the Marine Fisheries Commission are transferred to the FWCC using a type two transfer. The Bureau of Environmental Law Enforcement, the Bureau of Administrative Support, and the Office of Enforcement Planning and Policy Coordination within the Division of Law Enforcement at the Department of Environmental Protection (DEP) are transferred to the FWCC. However, the Bureau of Emergency Response, the Office of Environmental Investigations, the Florida Park Patrol, and any sworn positions classified as Investigator I or Investigator II positions shall remain within a Division of Law Enforcement at DEP. No boating safety related matters shall remain with DEP.

This bill also transfers the Office of Fisheries Management and Assistance Services within the Division of Marine Resources at DEP to the FWCC. A Division of Marine Fisheries is established in the FWCC. The Florida Marine Research Institute is transferred to the Office of the Executive Director at the FWCC and established as a separate budget entity. The Bureau of Protected Species Management is assigned as a bureau to the Office of Environmental Services at the FWCC. The Bureau of Marine Resource Regulation and Development is transferred from DEP to the newly created Division of Aquaculture within the Department of Agriculture and Consumer Services (DACS).

SB 906 Florida Forever Trust Fund
Chapter 99-246, *Florida Statutes*

Creates the Florida Forever Trust Fund to carry out the provisions of sections 259.032, 259.105, and 375.031, *Florida Statutes*. The Department of Environmental Protection will administer the fund.

Proceeds from the sale of bonds, except proceeds of refunding bonds, issued under section 215.618, and payable from moneys transferred to the Land Acquisition Trust Fund under section 201.15(1)(a), shall be deposited into the fund. The fund shall not exceed $3 billion and is to be distributed according to the provisions of section 259.105(3), and recipients shall spend the funds within 90 days after the department initiates the transfer. The bond resolution adopted by the governing board of the Division of Bond Finance of the State Board of Administration may contain additional provisions governing disbursement of the bond proceeds.

CS/CS/SB 908 Florida Forever Program
Chapter 99-247, *Florida Statutes*

Authorizes the issuance of up to $300 million in bonds in FY 2000-2001 and thereafter with debt service paid from documentary stamp tax revenues with total debt service not exceeding $300 million for all bonds issued. The amount of debt service for the first fiscal year in which bonds are issued may not exceed $30 million. The amount of debt service is limited to an additional $30 million in each fiscal year in which bonds are issued. Funds will be distributed as follows:

- 35 percent ($105 million) for water management district (WMD) projects. Over the life of the program, at least 50 percent of the funds must be used for land acquisition. Projects will be selected and approved by WMD governing boards from a 5-year work plan.
- 35 percent ($105 million) for Conservation and Recreation Lands (CARL)-type projects. Up to 10 percent of the funds may be used for capital project expenditures. Projects will be prioritized and recommended by the Acquisition and Restoration Council but must be approved by the Board of Trustees of the Internal Improvement Trust Fund (Trustees).
- 24 percent ($72 million) for the Florida Communities Trust (FCT). Eight (8) percent ($5.76 million) of the FCT funding will be used for the Florida Recreation Development Assistance Program (FRDAP). Thirty (30) percent of the FCT funding ($21.6 million) will be used in SMSA's with one-half of that amount being used in built-up areas, while at least five (5) percent ($3.6 million) must be used for recreational trails.
- 1.5 percent ($4.5 million) each for the Division of Recreation and Parks, Fish and Wildlife Conservation Commission (FWCC),

and Division of Forestry for the acquisition of additions and inholdings.

- 1.5 percent ($4.5 million) for the Greenways and Trails Program.

SB 934 Coastal Zone Protection Act
Chapter 99-211, *Florida Statutes*

Eliminates the 5-year cumulative total provision from the definition of "substantial improvement" in the Coastal Zone Protection Act of 1985, sections 161.52-161.58. The effect of this bill is to impose less restrictive requirements to determine when "substantial improvements" have been made to existing coastal structures which do not meet elevation and other building code requirements. Stricter building code requirements are not imposed unless a single improvement or repair equals or exceeds 50 percent of a structure's market value.

CS/CS/SB 1270 Motor Vehicles and Highway Safety
Chapter 99-248, *Florida Statutes*

This bill implements numerous changes to laws relating to programs administered by the Department of Highway Safety and Motor Vehicles (DHSMV) such as:

- Amends sections 325.2135 and 325.214 to allow DHSMV to extend the current emissions inspection contracts for a period of time sufficient to implement new contracts resulting from competitive proposals. DHSMV must enter into one or more contracts by June 30, 2000. The contracts must provide for an inspection program in which vehicles 4 model years and older would be inspected every 2 years for hydrocarbon and carbon monoxide emissions (current testing procedures.) The inspection fee is capped at $19.
- Provides contracts may not exceed 7 years. In addition, contracts must provide that, after 4 years, DHSMV reserves the right to cancel a contract at any time before the conclusion of the contract term upon 6 months notice to the contractor. The bill also authorizes DHSMV to amend the contracts if the Legislature enacts legislation changing the number of vehicle model years subject to inspection. Finally, this bill also authorizes DHSMV to amend or cancel the contracts upon statewide implementation of clean fuel requirements promulgated by the United States Environmental Protection Agency.

CS/CS/SB 1566 Commerce
Chapter 99-251, *Florida Statutes*

This is a general bill creating numerous initiatives and programs in order to foster economic development in Florida.

1. Enterprise Florida Restructuring

Revises the organizational structure of Enterprise Florida, Inc. (EFI) through the elimination of the International Trade and Economic Development Board, the Capital Development Board, the Technology Development Board, and the Enterprise Florida Nominating Council. EFI is authorized to create advisory committees or similar organizations to assist in carrying out its mission. At a minimum, EFI must, by August 1, 1999, establish advisory committees on international business and on small business, comprised of individuals with expertise in the respective fields.

Amends section 288.9015, *Florida Statutes*, governing the mission of EFI, to specify that EFI shall aggressively market Florida's rural communities and distressed urban communities as locations for potential investment, assist in the retention and expansion of existing businesses in these areas, and assist these areas in the identification and development of new economic development opportunities for job creation. EFI is also charged with assessing, on an ongoing basis, Florida's competitiveness as compared to other states, and with incorporating the needs of minority and small businesses into its core functions of economic, international, and workforce development.

2. Economic Development Initiatives

- Certified Capital Company Act: Expands the definition of the term "transferee" for purposes of allocating unused premium tax credits under the Certified Capital Company (CAPCO) Act. The revised definition enables such credits to be utilized by a subsidiary of the certified investor; by an entity 10 percent or more of whose outstanding voting shares are owned by the certified investor; or by a person who directly or indirectly controls, is controlled by, or is under the common control with the certified investor. The bill also specifies that the amount of tax credits vested under the CAPCO Act shall not be considered in rate-making proceedings involving a certified investor. The primary purpose of the CAPCO program, as stated in section 288.99, is expanded to include increasing access to capital by minority-owned businesses and businesses located in Front

Porch communities, enterprise zones, certain distressed urban and rural areas, and historic districts. In addition, the Black Business Investment Board is specifically identified in the bill as an "early stage technology business" and as a "qualified business" for the purpose of receiving investments by CAPCOs.

- Qualified Target Industry (QTI) Tax Refund Program: Revises the QTI Program to reduce certain requirements and restrictions applicable to the tax refunds, and to establish a statutory cap on the state share of payable refunds of $24 million for fiscal year 2000-01 and $30 million for future fiscal years. The measure also authorizes OTTED to approve for tax refund an expansion of an existing business in a rural community or an enterprise zone that results in a net increase in employment of less than 10 percent. The term "rural community" is defined for purposes of the QTI program as a county with a population of 75,000 or less, a county with a population of 100,000 or less that is contiguous to a county with a population of 75,000 or less, or a municipality within either of such counties.
- Urban High-Crime Area and Rural Job Tax Credit Programs: Specifies that call centers and similar customer service operations are eligible businesses under the two job tax credit programs under sections 212.097 and 212.098, and authorizes specified retail businesses to be eligible under the urban high-crime program. In addition, OTTED is authorized to recommend to the Legislature additions to or deletions from the list of standard industrial classifications used to determine an eligible business for purposes of both programs.
- Enterprise Zone Pilot Project: Creates section 290.0069, to direct OTTED to designate a pilot project within one enterprise zone. Eligibility criteria are specified for the pilot project/enterprise zone, including, among others, that the pilot project area contains a diverse cluster or grouping of facilities or space for a mix of retail, restaurant, or service related industries. Beginning December 1, 1999, no more than four businesses in the project area may claim a credit for taxes due under chapters 212 and 220. Credits must be computed as $5,000 times the number of full-time employees of the business and $2,500 times the number of part-time employees of the business, and the total amount of credits that may be granted under this section annually is $1 million. This section further provides for prorated credit amounts in the event of excess demand. This section specifies eligibility requirements for businesses, including,

among others, that the business has entered into a contract with a developer of a diverse cluster or grouping of facilities or space located in the pilot area, governing lease of commercial space in a facility. This section stands repealed on June 30, 2010.

- Economic Development Property Tax Exemptions: Amends sections 196.012 and 196.1995, to allow a business sited on property that is annexed into a municipality to continue receiving the ad valorem tax exemption that had been provided by the county.

3. Rural Economic Development

Encourages economic development in Florida's rural communities. Specifically, the bill:

- Provides that job creation and economic development shall be considered as factors in future land use plans and in designation of industrial use, notwithstanding existing population or low-density population.
- Provides that regional planning councils shall have a duty to assist local governments with economic development activities, and authorizes regional planning councils to use their personnel, consultants, or other assistants to help local governments with economic development activities.
- Codifies the Rural Economic Development Initiative (REDI) within OTTED and provides its duties and responsibilities - including coordinating and focusing the efforts and resources of state and regional agencies on the problems which affect the fiscal, economic, and community viability of Florida's economically distressed rural communities.
- Authorizes OTTED to allow a rural area of critical economic concern to retain repayments of principal and interest under the Rural Community Development Revolving Loan Fund if certain conditions are met.
- Creates the Rural Infrastructure Fund within OTTED, under which grants are authorized for infrastructure in support of specific economic development projects, including certain storm water systems, electrical, telecommunications, natural gas, roads, and nature based tourism facilities.
- Authorizes the provision of grants to rural communities to develop and implement strategic economic development plans.
- Directs the Florida Fish and Wildlife Conservation Commission to provide assistance, including marketing and

product development, related to nature-based recreation for rural communities.

- Allows a rural electric cooperative to provide any energy or nonenergy service to its membership.
- Authorizes the Governor to waive the eligibility criteria of any program or activity administered by OTTED or EFI, to provide economic relief to a small community that has been determined to be in an economic emergency.
- Amends section 378.601, to expand the circumstances under which a heavy mineral mining operation that annually mines less than 500 acres and whose proposed consumption of water is 3 million gallons of water per day or less may not be required to undergo a development of regional impact (DRI) review. The bill broadens the scope of this DRI exemption to include certain cases in which the operator has received a development order under section 380.06(15).

4. Urban Economic Development

To assist in administration of the Front Porch Florida initiative, the Office of Urban Opportunity is created within the Office of Tourism, Trade, and Economic Development. The bill provides that the director of the urban office shall be appointed by and serve at the pleasure of the Governor. The measure also provides for the creation of an Institute on Urban Policy and Commerce as a Type I institute under the Board of Regents at Florida Agricultural and Mechanical University, the stated purpose of which is to improve the quality of life in urban communities through research, teaching, and outreach activities.

5. Community Assistance Initiatives

Local Government Financial Technical Assistance Program: Created in section 163.055, provides technical assistance to municipalities and special districts to enable them to implement workable solutions to financially related problems. Under the program, the Comptroller is directed to enter into contracts with providers who shall, among other requirements, assist municipalities and independent special districts in developing alternative revenue sources, and assist them in the areas of financial management, accounting, investing, budgeting, and debt issuance.

- Florida Interlocal Cooperation Act: Amends section 163.01 to specify that a local self-insurance fund established under this

section may financially guarantee certain bonds or bond anticipation notes issued or loans made under the statute.

- Small School District Stabilization Program: Created to provide technical and financial assistance to maintain the stability of the educational program in the school districts in rural communities that document economic conditions or other significant influences that negatively impact the district. As part of the program, the Office of Tourism, Trade, and Economic Development may consult with Enterprise Florida, Inc., on development of a plan to assist the county with its economic transition. The bill authorizes grants to the school districts, effective July 1, 2000, which may be equivalent to the amount of the decline in projected revenues.
- Discretionary Per-Vehicle Surcharge: Amends section 218.503 to provide that the governing authority of any municipality with a resident population of 300,000 or more, and which has been declared to be in a state of emergency within a specified period, may impose a discretionary per-vehicle surcharge of up to 20 percent on the gross revenues of the sale, lease, or rental of space at public parking facilities within the municipality.

CS/CS/SB 1672 Water Resources
Chapter 99-143, *Florida Statutes*

Provides a finding that the Comprehensive Review Study of the Central and Southern Florida Project (Restudy) is important for restoring the Everglades ecosystem and sustaining the environment, economy, and social well-being of South Florida. It is also the intent of the Legislature to facilitate and support the Restudy through a process concurrent with federal government review and congressional authorization. It is further the intent of the Legislature that all project components be implemented through the appropriate processes of chapter 373, *Florida Statutes*, and be consistent with the balanced policies and purposes of that chapter, specifically section 373.016. Clarification is provided that the bill is not intended in any way to limit federal agencies or Congress in the exercise of their duties and responsibilities.

CS/SB 2282 Florida Watershed Restoration Act
Chapter 99-223, *Florida Statutes*

Provides a process for restoring Florida's waters through the establishment of total maximum daily loads (TMDLs) for pollutants of impaired water bodies as required by the federal Clean Water Act.

Creates section 403.067 to provide for the establishment and implementation of TMDLs. The Department of Environmental Protection (DEP) is to be the lead agency in administering and coordinating the implementation of this program and shall coordinate with local governments, water management districts, the Department of Agriculture and Consumer Services, local soil and water conservation districts, environmental groups, regulated interests, other appropriate state agencies and affected pollution sources in developing and executing the TMDL program. The DEP shall establish a priority ranking and schedule for analyzing such waters. The list, priority ranking, and schedule cannot be used in the administration or implementation of any other regulatory program. The list, priority ranking, and schedule must be made available for public comment, but they are not subject to challenge under chapter 120, nor are they to be adopted by rule. The DEP must adopt by rule a methodology for determining those waters which are impaired. Such rules shall also set forth water quality analysis requirements, approved methodologies, data modeling, and other appropriate water quality assessment measures.

By February 1, 2000, the DEP is required to submit a report to the Governor, president of the Senate, and the Speaker of the House of Representative containing recommendations, including draft legislation, for any modifications to the process for allocating TMDLs. The recommendations must be developed by the DEP in cooperation with a technical advisory committee.

Other Recent Developments of Particular Importance

Florida, Georgia and Alabama have made significant progress in resolving a decade old water war. Recent developments were reported in two September 15, 1999 Wall Street Journal editions[68] noting that each state elected new governors last year and two of the

68. Will Pinkston, *Hope is Seen For Resolving Water Battle*, WALL ST. J. (Fla. Journal), Sept. 15, 1999, at F1; Will Pinkston, *Signs of Hope In Battle Over Water*, WALL ST. J. (S.E. Journal), Sept. 15, 1999, at S1; Will Pinkston; *Summit Seeks to Avoid Future Problems*, WALL ST. J. (S.E. Journal), Sept. 15, 1999, at S4.

three negotiation teams have new appointed staff. The articles note that while significant disagreements remain, negotiators are confident they will settle their differences by year's end.

The Department of Community Affairs is conducting a statewide growth-management survey. Available directly from the agency or online at <www.dca.state.fl.us> the survey will be used as part of the agency's preparation for developing legislative proposals for the 2000 session.