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FROM TOOLS TO TOYS—THE GUTTING OF THE INFAMOUS PRIMARY INDICATORS: HOW THE FLORIDA LEGISLATURE ACCIDENTALLY ENCOURAGED URBAN SPRAWL . . . AGAIN

Kathryn Barkett Rossmell[*]

INTRODUCTION

In 2011, the Florida Legislature replaced the Florida Growth Management Act with the Community Planning Act[1] (CPA). The previous Florida Growth Management Act was criticized for encouraging urban sprawl, in part because of its concurrency requirements.[2] Although this iteration of Florida's attempt at growth

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1. Part II of Chapter 163 of the Florida Statutes is referred to as the "Community Planning Act." FLA. STAT. § 163.3161(1) (2011).

2. *See, e.g.*, Ruth L. Steiner, *Florida's Transportation Concurrency: Are the Tools Adequate to Meet the Need for Coordinated Land Use and Transportation Planning?* 12 U. FLA.

management drastically differs from the last in many respects, the two acts have at least one significant thing in common: they encourage urban sprawl.

The Florida Legislature defined urban sprawl for the first time in the CPA. Urban sprawl means:

> [A] development pattern characterized by low density, automobile-dependent development with either a single use or multiple uses that are not functionally related, requiring the extension of public facilities and services in an inefficient manner, and failing to provide a clear separation between urban and rural uses.[3]

However, the CPA also lists the thirteen primary indicators of urban sprawl[4] that were formerly found in Rule 9J-5 of the Florida Administrative Code, and eight factors indicating discouragement of the proliferation of urban sprawl.[5] The achievement of any four of these

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J.L. & PUB. POL'Y 269, 270, 296, (2001) (stating that the transportation concurrency management system is seen as contributing to urban sprawl) (citing Florida Department of Transportation, *The Transportation and Land Use Study Committee: Final Report*, 20 (1999)).

3. FLA. STAT. § 163.3164(51).

4. *Id.* § 163.3177(6)(a)(9)(a)(I)-(XIII). The thirteen primary indicators are used to determine whether the plan or plan amendment: (I) Promotes, allows, or designates for development substantial areas of the jurisdiction to develop as low-intensity, low-density, or single-use development or uses. (II) Promotes, allows, or designates significant amounts of urban development to occur in rural areas at substantial distances from existing urban areas while not using undeveloped lands that are available and suitable for development. (III) Promotes, allows, or designates urban development in radial, strip, isolated, or ribbon patterns generally emanating from existing urban developments. (IV) Fails to adequately protect and conserve natural resources, such as wetlands, floodplains, native vegetation, environmentally sensitive areas, natural groundwater aquifer recharge areas, lakes, rivers, shorelines, beaches, bays, estuarine systems, and other significant natural systems. (V) Fails to adequately protect adjacent agricultural areas and activities, including silviculture, active agricultural and silvicultural activities, passive agricultural activities, and dormant, unique, and prime farmlands and soils. (VI) Fails to maximize use of existing public facilities and services. (VII) Fails to maximize use of future public facilities and services. (VIII) Allows for land use patterns or timing which disproportionately increase the cost in time, money, and energy of providing and maintaining facilities and services, including roads, potable water, sanitary sewer, stormwater management, law enforcement, education, health care, fire and emergency response, and general government. (IX) Fails to provide a clear separation between rural and urban uses. (X) Discourages or inhibits infill development or the redevelopment of existing neighborhoods and communities. (XI) Fails to encourage a functional mix of uses. (XII) Results in poor accessibility among linked or related land uses. (XIII) Results in the loss of significant amounts of functional open space.

5. *Id.* § 163.3177(6)(a)(9)(b)(I)-(VIII). The eight factors are: (I) Directs or locates economic growth and associated land development to geographic areas of the community in a manner that does not have an adverse impact on and protects natural resources and ecosystems. (II) Promotes the efficient and cost-effective provision or extension of public infrastructure and

eight factors signifies that a future land use plan or amendment is not urban sprawl.[6]

Deterring urban sprawl has been part of Florida's growth management plan for years,[7] and a detailed explanation of the reasons is unnecessary in light of the extensive literature on the subject. However, a brief note on the importance of discouraging urban sprawl brings into focus the reasons this legislation is significant.[8]

On a national scale, urban sprawl has been linked to everything from obesity,[9] to endangering wildlife[10] to a myriad of social, economic and other problems.[11] In Florida specifically, the sprawl of residential and agricultural land has whittled the delicate Everglades down to roughly half its original size, a harm that the Federal and Florida Governments are trying to undo.[12] A report generated for the former Department of Community Affairs (DCA) explains that sprawl not only generates

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services. (III) Promotes walkable and connected communities and provides for compact development and a mix of uses at densities and intensities that will support a range of housing choices and a multimodal transportation system, including pedestrian, bicycle, and transit, if available. (IV) Promotes conservation of water and energy. (V) Preserves agricultural areas and activities, including silviculture, and dormant, unique, and prime farmlands and soils. (VI) Preserves open space and natural lands and provides for public open space and recreation needs. (VII) Creates a balance of land uses based upon demands of the residential population for the nonresidential needs of an area. (VIII) Provides uses, densities, and intensities of use and urban form that would remediate an existing or planned development pattern in the vicinity that constitutes sprawl or if it provides for an innovative development pattern such as transit-oriented developments or new towns as defined in s. 163.3164.

6. *Id.* § 163.3184(9)(b).

7. *See* David L. Powell, *Growth Management: Florida's Past as Prologue for the Future*, 28 FLA. ST. U. L. REV. 519, 535 (2001) (citing Governor's Task Force on Urban Growth Patterns, Final Report (1989)) (further citations omitted).

8. This Note does not focus on whether urban sprawl is inherently good or bad for the state of Florida; rather, it focuses on the fact that the Florida Legislature stated that it intended to use these statutes to discourage urban sprawl, but actually did the opposite. Because of Florida's history of trying to deter urban sprawl, and the Legislature's statement that it wishes to discourage urban sprawl, this Note works off the assumption that urban sprawl should be discouraged in Florida.

9. Reid Ewing et al., *Relationship Between Urban Sprawl and Physical Activity, Obesity, and Morbidity*, AM. J. HEALTH PROMOTION, Sept./Oct. 2003, *available at* http://smartgrowth.umd.edu/research/pdf/EwingSchmidKillingsworthEtAl_SprawlObesity_DateNA.pdf.

10. Reid Ewing & John Kostyack, *Endangered by Sprawl: How Runaway Development Threatens America's Wildlife*, NAT'L WILDLIFE FED'N, SMART GROWTH AM. & NATURESERVE (2005).

11. *See, e.g.*, Patrick Gallagher, *The Environmental, Social, and Cultural Impacts of Sprawl*, 15 NAT. RES. & ENV'T 219 (2001); Robert H. Freilich & Bruce G. Peshoff, *The Social Costs of Sprawl*, 29 URB. LAW. 183 (1997).

12. *See, e.g.*, Robert Walker, *Urban Sprawl and the Natural Areas Encroachment: Linking Land Cover Change and Economic Development in the Florida Everglades*, 37 ECOLOGICAL ECON. 357 (2001).

significant costs through the creation of roads, sewer lines, and water lines, but can also lead to problems, such as depriving lower income families or individuals of access to community resources, facilities, and services.[13] Urban sprawl also increases traffic congestion, time spent in traffic, and energy consumption.[14] In a time of state and personal budget cuts, expenditures on items such as new roads and gas for personal cars gain even greater significance.

Although the stated intent of the Legislature was to discourage urban sprawl,[15] the new statutes actually allow and even encourage forms of development that were previously considered urban sprawl. The eight factors effectively eviscerate the thirteen primary indicators and the definition, making it easier to develop further away from existing urban areas. By including both a definition of urban sprawl and the thirteen primary indicators, the Legislature has failed to present a clear picture of what urban sprawl actually looks like. This creates confusion about whether the definition or the thirteen primary indicators controls the determination of urban sprawl, giving developers plenty of wiggle room to get approval for projects that would have been considered sprawl in the past. Overall, the Legislature has not only drafted a rule that fails to prevent urban sprawl, but may actually encourage it.

This Note will use a series of hypothetical situations to highlight some of the shortcomings in the statute as enacted. It will also cover some of the history of defining urban sprawl, the process by which a comprehensive plan or comprehensive plan amendment gets approved, and how the new statute functions with regard to discouraging urban sprawl. Ultimately, the loopholes created by the Legislature render the thirteen primary indicators useless in many circumstances. In this way, the Florida Legislature accidently encouraged urban sprawl . . . again.

I. THE HISTORY OF DEFINING URBAN SPRAWL

Although a definition of urban sprawl is new to the Florida Statutes, it had been defined in several other places before the adoption of the CPA. Urban sprawl had been defined in one case as "the extension of urban-type development into rural, agricultural, or other underdeveloped or sparsely developed lands in a haphazard development pattern in which land uses are not functionally related to

13. Reid Ewing, *Characteristics, Causes, and Effects of Sprawl: A Literature Review*, 5 URB. ECOLOGY 519, 525-26 (2008).

14. *Id.* at 527-28.

15. FLA. STAT. § 163.3177(6)(a)(9) (2011) (stating "The future land use element and any amendment to the future land use element shall discourage the proliferation of urban sprawl.").

each other."[16]

A technical memo issued by DCA in 1989 defined urban sprawl as "scattered, untimely, poorly planned urban development that occurs in urban fringe and rural areas and frequently invades lands important for environmental and natural resource protection."[17]

Additionally, the Florida Administrative Code defined urban sprawl as:

> urban development or uses which are located in predominantly rural areas, or rural areas interspersed with generally low-intensity or low-density urban uses, and which are characterized by one or more of the following conditions: (a) The premature or poorly planned conversion of rural land to other uses; (b) The creation of areas of urban development or uses which are not functionally related to land uses which predominate the adjacent area; or (c) The creation of areas of urban development or uses which fail to maximize the use of existing public facilities or the use of areas within which public services are currently provided. Urban sprawl is typically manifested in one or more of the following land use or development patterns: Leapfrog or scattered development; ribbon or strip commercial or other development; or large expanses of predominantly low-intensity, low-density, or single-use development.[18]

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16. Home Builders & Contractors Ass'n of Brevard, Inc. v. Dep't of Cmty. Affairs, 585 So. 2d 965, 968 (Fla. 1st DCA 1991). *Home Builders* also explained that the most common patterns of urban sprawl are the ribbon pattern, leapfrog pattern, and concentric circle pattern. *Id.* at 968-69.

17. *See* Fla. E. Coast Indus., Inc. v. Fla. Dep't of Cmty. Affairs, 1994 WL 1027591, 677 So. 2d 357 (Fla. 1st DCA 1996) (Fla. Div. Admin. Hrgs. Feb. 18, 1994) (upholding a proposed rule defining urban sprawl in 9J-5).

18. FLA. ADMIN. CODE ANN. r.9J-5.003(134) (2010) (repealed 2011).

> In the ribbon pattern, development not functionally or proximately related to other non-urban development in the area extends in ribbons or strips along certain roads and away from urban development.
>
> In the leapfrog pattern, development not functionally or proximately related to other non-urban development in the area leaps from urban development so as to leave significant amounts of rural, agricultural, or other undeveloped or sparsely developed land between existing urban development and the scattered leapfrog development. The concentric circle pattern is similar except that the development not functionally or proximately related to other non-urban development in the area assumes the pattern of concentric circles, such as along rural roads bypassing an urban area, and is characteristically more exclusively low-density residential.

So although the Florida Statutes have never defined urban sprawl, Florida officials have attempted to describe the term in other contexts.

II. THE PROCESS FOR EVALUATING A COMPREHENSIVE PLAN OR PLAN AMENDMENT

One of the changes between the CPA and the Growth Management Act was an alteration of the process for approving a comprehensive plan amendment. Under the CPA, the state's land planning agency, The Department of Community Planning (DCP), has substantially less power and a much smaller scope of permissible subjects on which it may comment than the state land planning agency (at that time, DCA) had under the Growth Management Act.

A. *Under the Growth Management Act*

Until the CPA was created in 2011, the thirteen primary indicators of urban sprawl were found in the infamous Rule 9J-5 of the Florida Administrative Code.[19] Local governments would submit proposed comprehensive plans or plan amendments to DCA and other state agencies.[20] To determine if a plan amendment would create urban sprawl, DCA would examine a plan amendment to see if it "trip[ped]" or "trigger[ed]" any of the thirteen primary indicators.[21] If so, DCA would then consider the extent to which the tripped indicators showed that the amendment did not discourage sprawl, or in other words, induced sprawl.[22] If DCA decided that an amendment did induce sprawl, then it looked at development controls in the comprehensive plan or in the proposed amendment itself to see if the controls offset the inducement of sprawl.[23] If DCA found the offset to be insufficient, then the amendment was found not to be consistent with the state comprehensive plan of discouraging urban sprawl.[24] Although possible, it was unlikely that tripping only a few indicators would lead to a finding or urban sprawl.[25]

Other state agencies had thirty days from receiving the amendment

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Home Builders, 585 So. 2d at 968-69.

19. FLA. ADMIN. CODE. ANN. r.9J-5.006(5).

20. FLA. STAT. § 163.3184(3) (repealed 2011).

21. Sierra Club v. Dep't of Cmty. Affairs, No. 03-0150GM, 2006 WL 1674277, at *29 (Fla. Div. Admin. Hrgs. June 16, 2006).

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.* at 30.

to review plan amendments and submit their comments to DCA.[26] DCA had sixty days after receiving the amendment to review the changes and the comments of other agencies.[27] DCA also had the power to raise objections to issues under other agencies' areas of expertise.[28] DCA then consolidated its findings[29] and the findings of the other agencies into a report called the Objections, Recommendations, and Comments (ORC Report).[30] Next, DCA transmitted the ORC Report back to the local government, after which the local government had 60 or 120 days to adopt or adopt with changes the proposed amendment, depending on the type of amendment.[31] Then DCA had another chance to review it for compliance with the comprehensive plan based on its earlier written comments to the local government or any changes made by the local government to the comprehensive plan.[32] DCA then entered a notice of intent stating whether it planned to find that the plan or amendment was in compliance or not in compliance with the comprehensive plan.[33] If DCA entered a notice of intent to find the amendment in compliance, then an affected person[34] could file a petition, and an administrative law judge would approve the amendment if the local government's determination of compliance was fairly debatable.[35] If DCA entered a notice of intent to find the amendment not in compliance, then an administrative hearing was held to determine compliance. The local government's decision of compliance was to be sustained unless it was shown by a preponderance of the evidence that the plan or plan amendment did not comply.[36] DCA also had the opportunity to mediate at this stage.[37]

In summary, under the old Growth Management Act, DCA had two chances to review amendments and had broad powers to make objections, recommendations, and comments on a variety of issues relating to the proposed comprehensive plan or plan amendment. In

26. FLA. STAT. § 163.3184(4) (repealed 2011).

27. *Id.* § 163.3184(6)(c).

28. *Id.* Telephone Interview with James Stansbury, DCP Community Planning Team (Southeast Team), Nov. 15, 2011 [hereinafter Stansbury Interview].

29. FLA. STAT. § 163.3184(6)(c) (repealed 2011).

30. *Id.* § 163.3184(6)(c) (stating that the state land planning agency shall issue a report giving its objections, recommendations, and comments regarding the proposed amendment, giving rise to the name of the report).

31. *Id.* § 163.3184(7)(a).

32. *Id.* § 163.3184(7)(b).

33. *Id.* § 163.3184(8).

34. The definition of an affected person included the local government, and required that the person have already objected to the amendment prior to this stage. *Id.* § 163.3184(1)(a). That is still true in the CPA.

35. *Id.* § 163.3184(9)(a).

36. *Id.* § 163.3184(10)(a).

37. *Id.* § 163.3184(10)(c).

some cases, DCA also had the chance to mediate. Administrative law judges also determined compliance in hearings following the local government's determination of compliance.

B. *Under the Community Planning Act*

In the same 2011 amendments that created the CPA, the Legislature also formed the Department of Economic Opportunity to serve in the place of several state agencies, including DCA. The functions of DCA were transferred into DCP within the Department of Economic Opportunity. DCP is now the state land planning agency.[38] But that was not the only change.

The Community Planning Act has two main review processes for amendments to the comprehensive plan: State Coordinated Review and Expedited State Review.[39] The State Coordinated Review process is similar to the review process under the old Growth Management Act.[40] There are, however, a few noteworthy changes. First, DCP has only five days after the local government submits the amendment package to review it for "completeness,"[41] rather than the forty-five days under the Growth Management Act to review it for compliance. Also, the plan or plan amendment goes into effect upon DCP's notice of intent, rather than after the entry of an administrative order, and if challenged, when DCP or the Administrative Commission[42] enters a final order determining compliance.[43]

Under Expedited State Review, state agencies have thirty days to review the plans and send their comments to the local government and DCP.[44] DCP must also complete its comments within those thirty days. Note that this is half the time the land planning agency had under the old rules, and does not allow DCP extra time to review the other agencies' comments before completing its report. Moreover, the statute limits DCP's comments to "important state resources and facilities that are outside the jurisdiction of other commenting state agencies."[45] (Recall that under the old rules, DCA could comment on concerns under the purview of other state agencies if it felt it was necessary.[46]) DCP

38. *Laws of Florida*, ch. 2011-142; http://www.oppaga.state.fl.us/ profiles/6110/.

39. FLA. STAT. § 163.3184. There is also a small-scale review process for qualifying plan amendments. *Id.* § 163.3184(2)(b).

40. *Id.* § 163.3184(4) (repealed 2011); Stansbury Interview, *supra* note 28.

41. FLA. STAT. § 163.3184(3)(c)(3).

42. The "Administrative Commission" means the Governor and the Cabinet, who act on the majority vote of the Governor and at least three other members. *Id.* § 163.3164(2).

43. *Id.* § 163.3184(3)(c)(4).

44. *Id.* § 163.3184(3)(b)(2).

45. *Id.* § 163.3184(3)(b)(4)(h).

46. *Id.* § 163.3184(2); Stansbury Interview, *supra* note 28.

may also comment on countervailing planning policies and objectives served by the amendment that balance against adverse impacts.[47] Additionally, the statute no longer directs that DCP assess the sprawl indicators in light of land uses, local conditions, development controls, and innovative and flexible planning and development strategies.[48]

Even though DCP is limited to commenting on important state resources and facilities, DCP considers urban growth part of that category.[49] So DCP may still comment on urban growth, but the eight factors will control its reasoning. DCP will also use input from the other agencies in applying the primary indicators and factors,[50] but does not have the same scope of power as it did under the Growth Management Act.

After DCP has submitted its comments to the local government, the local government has 180 days to hold a second public hearing regarding the adoption of the plan amendments. If the local government fails to do so, the amendments are deemed to have been withdrawn.[51] Plan amendments adopted by the local government are then sent back to the commenting state agencies, including DCP, which mainly checks for completeness of the plan amendment package.[52] The agencies then have just five days to notify the local government of any deficiencies.[53] The adopted amendment becomes effective thirty-one days after DCP informs the local government the package is complete. In the case of a timely challenge, the amendment does not become effective until DCP or the Administrative Commission enters a final judgment stating the amendment is in compliance.[54]

Overall, under the CPA, DCP has less time and more limited ability to comment than DCA did under the Growth Management Act. Additionally, the Administrative Commission, rather than an administrative judge, decides if an amendment complies with the comprehensive plan in the event of a disagreement.

III. THE NEW STATUTE–HOW IT [DOESN'T] WORK

Although the new statute does not explicitly say in what order to proceed or which part controls, it is clear that the eight factors are the

47. FLA. STAT. § 163.3184(3)(b)(4)(h).

48. Linda Loomis Shelley & Karen Brodeen, *The Home Rule Redux: the Community Planning Act of 2011*, 85 FLA. B.J. 49 (2011).

49. Stansbury Interview, *supra* note 28.

50. *Id.*

51. FLA. STAT. § 163.3184(3)(c)(1).

52. *Id.* § 163.3184(3)(c)(3).

53. *Id.*

54. *Id.* § 163.3184(3)(c)(4).

first step in determining what constitutes urban sprawl and are the controlling part of the statute. If four of the eight factors are met, the amendment will not be deemed urban sprawl. If an amendment does not meet four of the eight factors, then it is not clear whether the definition or the thirteen primary indicators is the next step. The opaqueness of the statute ultimately creates four overlapping categories of plan amendments, allows development that was traditionally considered urban sprawl to be determined to discourage urban sprawl, and may require some amendments that look less like urban sprawl to go though more steps to get that determination.

A. *Step 1: The Eight Factors*

The eight factors are clearly the most powerful part of the statute, and the guillotine that killed the thirteen primary indicators. If any four of the eight factors are met, then the future land use element or plan amendment *shall be determined to discourage the proliferation of urban sprawl.*[55] "Shall" leaves little room for doubt:[56] if the four factors are met, regardless of how many of the thirteen primary indicators are triggered, or whether the project fits the definition of urban sprawl found in section 163.3164(51), it will be determined to discourage urban sprawl.[57]

Although the Notes of Decisions and Legislative History reveal little about the intent of the Legislature, the Final Bill Analysis of HB 7207 (the bill that became the CPA) promulgated by the Florida House of

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55. *Id.* § 163.3177(6)(a)(9)(b).

56. *See, e.g.*, Neal v. Bryant, 149 So. 2d 529, 532 (Fla. 1962) (stating that "shall" has a mandatory connotation unless it is in regards to an immaterial matter or matter of convenience rather than substance). *Compare* Allied Fid. Ins. Co. v. State, 415 So. 2d 109, 110-11 (Fla. 3d DCA 1982) (stating that "shall" is mandatory unless it will lead to a ridiculous conclusion).

57. In fact, on January 24, 2012, the Florida Division of Administrative Hearings Promulgated a Recommended Order stating

> whatever the outcome with regard to urban sprawl of the application of the thirteen indicators in section 163.3177(6)(a)9.a. . . . the determination in this proceeding under section 163.3177(6)(a)9.b., controls. This means that even had the application of the 13 Indicators resulted in a finding that the [local plan] does not discourage urban sprawl, the incorporation of four of the listed factors in the [local plan's] development pattern or urban form leads to an ultimate determination under the statute that the [local plan] discourages the proliferation of urban sprawl.

Herrin v. Volusia County, 2012 WL 256233, No. 10-2419 GM, No. 11-2527GM (Fla. Div. of Admin. Hearings, Jan. 24, 2012) (consolidated cases). For the final order, see 2012 WL 1303679, DOAH No. 11-2627GM, Final Order No. DEO-12-021 (Fla. Div. of Admin. Hearings, Mar. 29, 2012).

Representatives sheds a small ray of light on the subject.[58] On the subject of urban sprawl, the Final Analysis provides critical insight into the Bill.

1. Effect of the Bill

This bill provides a definition of urban sprawl and incorporates, from rule 9J-5, FAC, the thirteen primary indicators that a plan or plan amendment does not discourage urban sprawl. In addition, this bill adds eight indicators that a plan or plan amendment discourages urban sprawl. If the future land use element or a plan amendment achieves four of these eight indicators within its development pattern or urban form it will be determined to discourage the proliferation of urban sprawl.[59]

The use of the phrase "will be determined" signifies that the eight indicators control the finding. In other words, this also shows that if a project meets the definition of urban sprawl, or triggers a significant number of the primary indicators, but also meets four of the eight factors, then it is not considered urban sprawl. It is clear that the eight factors control. So the first step for developers and practitioners will be to try to meet any four of the eight factors. If they can achieve that, then they need not go further. The project is not urban sprawl.

That is precisely how the Legislature encouraged urban sprawl—by creating an enormous loophole that renders the thirteen primary indicators useless. Here is an example.

2. Hypothetical #1

Suppose Developer #1 wants to purchase land to create a "new urbanist" community. He buys the land very cheap from a developer who originally purchased it to create a series of subdivisions, but was unable to construct them before the economic recession. Infrastructure is not installed. This land is seven miles from the nearest town, and in between the new development and the town is agriculture land (but because of the work the seller did on it, the land purchased has not been used for agriculture for many years). Developer #1 is unconcerned with the distance; he plans to mix uses (both commercial and residential) in

58. *Final Bill Analysis*, Representative Aubuchon, at 5, http://www.myfloridahouse.gov/Sections/Documents/loaddoc.aspx?FileName=h7207z.EAC.DOCX&DocumentType=Analysis&BillNumber=7207&Session=2011. However, the document clearly states "this document does not reflect the intent or official position of the bill sponsor [author of the analysis] or the House of Representatives." Therefore, it is unlikely that any court would use this document to find legislative intent.

59. *Id.* (emphasis added).

his new community, and strives to create a walkable/bikable community. He intends to construct everything to the LEED platinum level, and so will promote conservation of water and energy. Because the land will not intrude on existing agriculture and is not currently used for agriculture, it preserves agricultural areas surrounding it. Moreover, his design is ring-shaped, with a large open park in the center. His plans, however, do not meet the criteria to be called a "new town" under the community planning act[60] because it will not have enough office/commercial space to provide a full range of public services, and will not include all major land use categories.

According to the statute, this meets four of the eight factors—III, IV, V, and VI of § 163.3177(6)(a)(9)(b)—and so is determined to discourage urban sprawl *even though it is seven miles from the nearest town.* A look at the thirteen primary indicators reveals that it arguably triggers factors II, III, VI, VII, VIII, IX, X, and XII. But the thirteen primary indicators do not matter at all in this case—DCP never gets to that step. The project met four of the eight factors, so it is not urban sprawl. This type of development was historically called leapfrog or isolated urban sprawl; now it is deemed to discourage urban sprawl.

These small developments are not unheard of. Take, for example, the Town of Tioga near Gainesville, Florida. Town of Tioga is a master-planned community that touts "green living" and mixed uses as highlights of the community.[61] But despite its claim of being "located in the heart of Gainesville, Florida," it is actually about four miles outside of the nearest border of the Gainesville city limits.[62] Although it does have a long list of shops and offices, necessities such as grocery stores and insurance companies are notably lacking.

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60. FLA. STAT. § 163.3164(32) (stating "New town" means an urban activity center and community designated on the future land use map of sufficient size, population, and land use composition to support a variety of economic and social activities consistent with an urban area designation. New towns shall include basic economic activities; all major land use categories, with the possible exception of agricultural and industrial; and a centrally provided full range of public facilities and services that demonstrate internal trip capture. A new town shall be based on a master development plan.).

61. Town of Tioga, http://www.townoftioga.com/our-town/out-town/green-living (last visited June 12, 2012).

62. This information was gathered using

1) Gainesville City Limits, which can be found at http://www.cityofgainesville.org/LinkClick.aspx?fileticket=FZIaNI5bLx8%3D&tabid=127 (last visited June 12, 2012);

2) the address provided for the Tioga Town Center, at http://www.tiogatowncenter.com/location.php; and

3) Google Maps (www.googlemaps.com) (last visited June 12, 2012).

3. Hypothetical #2

Developer #2 wants to redevelop an older (not historic) neighborhood that has become neglected and partially condemned by the city. The unfortunate combination of a hurricane and disrepair caused extensive damage, and most of the residents took the insurance money and left several years ago. The neighborhood is within city limits and in a mainly residential area. The nearest grocery store and gas station are just over a mile away. The neighborhood has a small park in the center, and the existing utility and water infrastructure needs repair as a result of the hurricane damage. The roads also need work.

Developer #2 wants to rebuild the neighborhood into single family homes with no mixed uses. Replacing and updating the infrastructure will be expensive, and bringing the roads up to usable standards will not only be expensive, but will not benefit anyone but the residents. Developer intends to replace the park with more homes instead of upgrading the park. He has no special plans to promote the conservation of water or energy.

Unfortunately for Developer #2, he has not met four of the eight factors. At most, he has met factors I, II, and V just by being in a previously developed area. But without more, his project is one factor short of being determined to discourage urban sprawl even though he is inside city limits in an area that needs rejuvenation. On its face, this project seems like it should be declared "not urban sprawl," especially when compared with the project from *Hypothetical #1*. But that is not the case. However, DCP may still decide that this project does not encourage urban sprawl. The purpose of this hypothetical is to illustrate that the CPA does not particularly encourage infill and redevelopment.

B. *Step 2: The Thirteen Primary Indicators and the Definition*

The shortfalls of the CPA do not end with the institution of the eight factors. If the future land use element or plan amendment does not meet the four factors, the complexities compound. Just because a plan or amendment does not discourage urban sprawl according to the eight factors, that does not mean it will be found to encourage urban sprawl. To make that determination, DPC looks at the thirteen primary indicators and the definition. The thirteen primary indicators are provided to help identify when an amendment does not discourage urban sprawl, but the statute does not indicate how many factors must be triggered in order for an amendment to be said to encourage urban sprawl. Nor does it prevent a project from going forward even if all the primary indicators are present. It is not clear what role the definition plays in considering the thirteen primary indicators. And it is unclear

whether the definition or the thirteen primary indicators should be examined first, or what to do if an amendment meets either the definition, or the primary indicators, but not the other.

So even if an amendment does not trigger four of the eight factors, it may still not be urban sprawl if it fails to significantly trigger any of the thirteen primary indicators or meet every element of the definition. Developers may argue that even if an amendment triggers some of the thirteen primary indicators, if it does not meet every element of the definition it should not be considered urban sprawl. Similarly, even if it meets the definition, a developer may argue that it does not trigger enough of the thirteen primary indicators to be considered urban sprawl.

Moreover, note that section 163.3177(6)(a)(9)(a) says that the thirteen factors are to be considered "within the context of features and characteristics unique to each locality in order to determine whether the plan amendment [meets any of the thirteen primary indicators]." Section 9(b) does not contain any such charge—the eight factors may be considered in isolation.

It is an established rule of statutory construction that courts must presume that the Legislature has a purpose for everything it enacts, and that it had some purpose in using the particular language used in the statute.[63] Further, courts must give statutes their plain and obvious meaning,[64] and it must be assumed that the legislative body knew the plain and ordinary meaning of the words.[65] Moreover, different sections of a statute must be read in harmony with one another.[66] Additionally, different wording in different parts of the statute mean the Legislature intended a different meaning for those sections.[67] Despite all these rules, it is still not clear how to reconcile the two competing statute sections to determine what constitutes urban sprawl, even in absence of the eight factors. The inclusion of the eight factors complicates interpretation

63. *See, e.g.*, State v. M.M., 407 So. 2d 987, 990 (Fla 4th DCA 1981) (stating "[i]n the interpretation of a statute, it will be presumed that the legislature intended every part thereof for a purpose, and that it had some purpose in introducing the particular language used in an enactment.") (quoting Fla. Jur. 1st Statutes § 118).

64. *See, e.g.*, State v. Buckner, 472 So. 2d 1228, 1229 (Fla. 2d DCA 1985) (declaring "in the absence of a statutory definition, we shall assume the common or ordinary meaning of the word."); State v. Little, 400 So. 2d 197, 198 (Fla. 5th DCA 1981) (stating "[i]f the legislature uses a word without defining it then its common or ordinary meaning applies.").

65. *See, e.g.*, Rinker Materials Corp. v. City of N. Miami, 286 So. 2d 552, 553 (Fla. 1973); Brooks v. Anastasia Mosquito Control Dist., 148 So. 2d 64, 66 (Fla. 1st DCA 1963).

66. *See, e.g.*, Heart of Adoptions, Inc. v. J.A., 963 So. 2d 189, 199 (Fla. 2007); § 118, 48A Fla. Jur 2d Statutes.

67. *See, e.g.*, Maddox v. State, 923 So. 2d 442, 446 (Fla. 2006) (citing as a rule of statutory construction "[t]he legislative use of different terms in different portions of the same statute is strong evidence that different meanings were intended.") (citations omitted).

even more.[68]

Confusion exists not only between the definition and the primary indicators, but also in the definition itself. As discussed above, the Legislature is assumed to know the meanings of the words used in a statute. [69] Moreover, unless context dictates otherwise, the word "and" is presumed to be used as a conjunction.[70]

The Community Planning Act defines urban sprawl as being characterized by low density, automobile-dependent development with either a single use or multiple uses that are not functionally related, requiring the extension of public facilities and services in an inefficient manner, *and* failing to provide a clear separation between urban and rural uses.[71] Here is a scenario in which a development will be high density, but still meets the other criteria of sprawl based on the definition. It will likely trip many of the thirteen primary indicators; however, the decision of whether the definition or the thirteen primary indicators controls may lead to different outcomes.

1. Hypothetical #3

For the purposes of this hypothetical, details are not important. Imagine that Developer #3 wants to create a high-density development. This development is automobile dependant, and has no mixed uses. It does not have a clear separation of urban and rural uses. It requires the extension of public facilities. Under the plain language of the definition, because of the word "and," this might not be urban sprawl because it is high-density. Simply by omitting any one of the 5 factors listed in the definition, an amendment may escape classification as urban sprawl. However, it is likely that this hypothetical development would trip more than one of the thirteen primary indicators.

It is in this scenario that the statute becomes most opaque. If DCP or the Administrative Commission looks to the definition first, it may

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68. *See* Appendix 1 for a chart comparing elements and issues addressed by each of the three relevant parts of the statute.

69. *See supra* note 61; American Bankers Ins. Group v. United States, 408 F.3d 1328, 1332 (11th Cir. 2005).

70. *American Bankers*, 408 F.3d at 1332 (also stating "The word 'and' is therefore to be accepted for its conjunctive connotation rather than as a word interchangeable with 'or' except where strict grammatical construction will frustrate clear legislative intent."). Note the frustration of intent must be great for the court to read "and" as "or"—the court cited the example of *Peacock v. Lubbock Compress Co.*, 252 F.2d 892, 893–95 (5th Cir. 1958) (construing "and" in the phrase "an employer engaged in . . . the ginning and compressing of cotton" as meaning "or" because "it is an acknowledged undisputed fact . . . that compressing is an operation entirely removed from ginning and that the two *are never carried on together.*") (emphasis in *American Bankers*)).

71. FLA. STAT. § 163.3164(51) (2011).

decide that the development is not urban sprawl because it does not meet all the listed criteria. However, if it looks to the thirteen primary indicators first, then it may decide that it is urban sprawl. If it looks at both, it is unclear.

2. Final Analysis

Ultimately, the statute has created four categories of amendments:

(1) Urban Sprawl by Definition
(2) Urban Sprawl by the Thirteen Primary Indicators
(3) Not Urban Sprawl by the Eight Factors
(4) Not Urban Sprawl because it does not adequately trigger either the thirteen primary indicators or the definition.

There will certainly be overlap between the categories, especially between categories one and two. And only Category Three provides any real certainty. See *Figure 1*, below. The numbers in parentheses are the categories listed above.

Figure 1

	Has few primary indicators	**Has many primary indicators**	**Fits Definition**	**Doesn't Fit Definition**
Has 4 of 8 factors	Not Urban Sprawl (3)	Not Urban Sprawl (3)	Not Urban Sprawl (3)	Not Urban Sprawl (3)
Does not have 4 of 8 factors	[Probably] Not Urban Sprawl* (4)	[Probably] Urban Sprawl* (2)	May be Urban Sprawl* (1)	[Probably] Not Urban Sprawl* (4)

**Depends on how the DCP or Administrative Commission decides to weigh the definition against the thirteen primary indicators*

The silver lining of the statute is the obvious attempt to discourage urban sprawl. The Legislature has made evident by writing the provisions discussed here that the legislative intent is to discourage urban sprawl. In going forward, this intent will guide judges trying to interpret the statute,[72] potentially resulting in more projects being rejected for encouraging urban sprawl. The catch here is that courts will

72. *See* Bordan v. E.-European Ins. Co., 921 So. 2d 587, 595 (Fla. 2006) (stating "[i]t is a fundamental principle of statutory interpretation that legislative intent is the "polestar" that guides this Court's interpretation.") (citing State v. J.M., 824 So. 2d 105, 109 (Fla. 2002)).

not resort to statutory construction where the plain language of the statute is clear and unambiguous,[73] such as the "shall be determined" language preceding the eight factors. In order to even get to the intent stage, the developer must first fail the four-of-eight factors test.

However, because there are two sections of the statute (the definition and the thirteen primary indicators) that illustrate what urban sprawl is, DCA or Administrative Commission may conceivably use either one to strike down a project as urban sprawl. Of course, it also means that either one may be used to uphold a project as not encouraging urban sprawl.

Another positive facet of the statute is that if the Administrative Commission or the DCP looks at the thirteen primary indicators, they are likely to use precedent from when the thirteen primary indicators were in Rule 9J-5,[74] which may lend some stability to the process. Further, because the thirteen primary indicators are the same as they appeared in 9J-5, it is more likely that amendments that were considered urban sprawl under 9J-5 will also be considered urban sprawl under the CPA. Similarly, amendments which were not urban sprawl under 9J-5 are unlikely to be considered urban sprawl now. In short, because the language is the same, and the state land planning agency is essentially the same, the analysis of the thirteen primary indicators should also be essentially the same. The difficulty lies in determining what weight to give the thirteen primary indicators compared to the eight factors and the definition, and how the Administrative Commission will treat the process and the statutes.

However, the negatives outweigh the positives in this case. Although the Community Planning Act provides flexibility, that flexibility comes at the high price of uncertainty.[75] There are no hard and fast rules about what does not discourage urban sprawl, only about what does.

The hypotheticals above show the darkest side of the statute—that it is incomplete and uncertain. The statute does not cover the "pop-up" villages like the one in *Hypothetical #1*, and does not go out of its way to promote infill like in *Hypothetical #2*. In fact, it promotes, in a way, classic urban sprawl in the isolated or leapfrog form.[76] Depending on the area to be developed, it may be easier for developers to create new

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73. *Id.* (stating "when the statute is clear and unambiguous, courts will not look behind the statute's plain language for legislative intent or resort to rules of statutory construction to ascertain intent.") (citations and internal punctuation omitted).

74. However, this is an open question—it is not yet clear if the Administrative Commission and DCP will rely on that precedent. Telephone Interview with David Powell, accomplished attorney at Hopping, Green, and Sams, Sept. 2011.

75. Charles Pattison, *E.R. Bartley Lecture Series*, Oct. 27, 2011 (stating that consumers like flexibility with certainty, but that the CPA provided flexibility with uncertainty).

76. *See supra* note 15.

communities that have traditionally been considered sprawl than to create urban infill. And this statute gives those projects the green light.

While overall the language may be helpful for developers by giving them a more definite standard as to what is not urban sprawl, in doing so, the Legislature has essentially created an impressive escape hatch to get around the thirteen primary indicators and the definition.

As a practical matter, there is an order in which practitioners should present their arguments. First, they should make every effort to meet four of the eight factors listed in § 163.3177(6)(a)(9)(b). Upon failure of step one, practitioners may try to show that although the amendment does not discourage urban sprawl according to the eight factors, it does not encourage urban sprawl either, under the thirteen primary indicators or the definition. How that will play out is as of yet uncertain.

CONCLUSION

The Florida legislature has stated that is wishes to discourage urban sprawl. Given the vast number of social, economic, and environmental problems linked to urban sprawl, this decision is not surprising, especially in Florida, where the unique landscape has already been damaged by the effects of urban sprawl. However, the CPA as enacted, essentially only pays lip service to this goal by stating it wants to deter sprawl at the same time opening the door for developments that have been considered urban sprawl in the past. This legislation fails to achieve its own stated goal.

The eight factors enacted by the Legislature changed urban growth language and the thirteen primary indicators from tools to toys, from means to limit urban sprawl to something to be played with by developers. By including the eight factors, which by the plain language of the statute control a determination of whether something is not urban sprawl, the Legislature has opened a mile-wide loophole that allows development that has traditionally been considered urban sprawl to be classified as actually discouraging urban sprawl. Moreover, if a plan amendment does not meet four of the eight factors, the process does not get any simpler. The confusion about the interplay between the thirteen primary indicators and the definition only leads to more ambiguity. Ultimately, the muddle of possibilities created by the statutory language creates uncertainty and fails to discourage urban sprawl. In fact, the Florida Legislature has accidently encouraged urban sprawl once again.

Appendix 1

A Comparison of Elements in the Definition, the 13 Primary Indicators, and the 8 Factors

	Definition	13 Primary Indicators	8 Factors
Density	✓	✓	
Automobile Dependent	✓		*
Functional Relation of single or multiple uses	✓	*	
Public Facilities and services	✓	✓	✓
Clear separation of urban/rural uses	✓	✓	
Substantial Distance		✓	
Radial, Strip, Isolated, or Ribbon Pattern		✓	
Protection and Conservation of Natural Resources		✓	✓
Protection of Agriculture		✓	✓
Time/money/energy of providing/ maintaining services		✓	
Mixed Use	*	✓	✓
Infill		✓	
Accessibility of linked uses		✓	
Open Space		✓	✓
Multimodal Transportation			✓

Balance of uses based on demand			✓
Innovative Development Pattern			✓

*Similar considerations.

A few notes on this image:

Only one category, public facilities, is considered in all three parts of the statute.

While many elements are mentioned in more than one place (for example, density is mentioned in both the definition and the primary indicators), the statutory language is rarely the same between the definition, the thirteen primary indicators, and the eight factors. Statutory construction rules require that separate parts of the same statute that have different wording must be given different meanings. *See, e.g. Maddox v. State*, 923 So.2d 442, 446 (Fla. 2006) (citing as a rule of statutory construction "[t]he legislative use of different terms in different portions of the same statute is strong evidence that different meanings were intended.") (citations omitted).

Similarly, although some categories seem alike, (for example, "automobile dependant" and "multimodal transportation"), statutory construction again requires that separate parts of the same statute that have different wording must be given different meanings. *Id.*