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Pelham: State Land-Use Planning and Regulation

Julian Conrad Juergensmeyer

STATE LAND-USE PLANNING AND REGULATION. By Thomas G. Pelham.* Lexington, Mass.: Lexington Books. 1979. Pp. 212. $22.95.

*Reviewed by Julian Conrad Juergensmeyer***

Fortunately, at least for Floridians, the title of Professor Pelham's book is at best non-communicative and perhaps even misleading. The subtitle "Florida, the Model Code and Beyond" is more helpful. For non-devotees of Florida land use control law, even the subtitle needs amplification. "Florida" means Florida's Environmental Land and Water Management Act,[1] Florida's Local Government Comprehensive Planning Act,[2] and Florida's State Comprehensive Planning Act.[3] "Model Code" means the American Law Institute's Model Land Development Code.[4] "Beyond" refers generally to projections of the future of the Florida statutes but more particularly to discussions of comparable statutes in Oregon, Wyoming and Colorado.[5]

Well-titled or not, Professor Pelham has produced a detailed, in-depth analysis of Florida's regulation of developments of regional impact, areas of critical state concern, and state and local comprehensive planning. Additionally, he has provided extremely helpful comparisons between the Model Land Development Code, the Florida statutory provisions and the comparable statutory provisions in other jurisdictions. The analysis is commendable in scope, detail and presentation. Also, the book has been updated and is suitable for use as a manual by practitioners and planners. Unfortunately, it has not been published in looseleaf form or in a format capable of pocket supplementation.

Lest the reader uninterested in *Florida* land use control law read no further or lose all interest in Professor Pelham's book, the justification for nationally marketing a book focused on Florida's land regulation and planning statutes must be noted. In reverse of the adage, Florida's history of land use legislation demonstrates that the state was the last by which the new was tried and the first to cast the old aside. In 1939, Florida became the last state to adopt the first model land use control statute, the Standard State Zoning Enabling Act.[6] Yet in 1972, when the American Law Institute's Model Land Development Code was in draft form, Florida enacted, with modifications, Article 7 of the Model Code,[7] probably the most innovative and controversial part. Titled the Environ-

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*Thomas G. Pelham is currently Associate Professor of Law at Southern Methodist University. Member of The Florida Bar.

**Professor of Law, University of Florida.

1. FLA. STAT. ch. 380 (1979) (as amended by 1979 Fla. Laws, ch. 79-73).

2. FLA. STAT. §§ 163.3161-.3211 (1979).

3. FLA. STAT. §§ 23.011-.0191 (1977) (as amended by 1978 Fla. Laws, ch. 78-287).

4. ALI MODEL LAND DEVELOPMENT CODE (1975 Draft).

5. For discussion of the Oregon and Wyoming legislation, see T. PELHAM, STATE LAND USE PLANNING & REGULATION 151-69 (1979). The Colorado statute and its administration are discussed primarily in chapter 2.

6. U.S. DEPARTMENT OF COMMERCE, ADVISORY COMMITTEE ON ZONING, A STANDARD STATE ZONING ENABLING ACT (rev. ed. 1926).

7. Professor Pelham points out that "[a]lthough conventional wisdom has it that Florida enacted Article 7 of the Model Code . . . [the Environmental Land and Water Management Act] is in reality the battered product of an intense legislative struggle which stripped it of

mental Land and Water Management Act,[8] this statute combines two different approaches to land use regulation. First, land designated as an area of critical state concern is deemed to merit state regulation and protection. The other approach recognizes that regional or state planning authorities should be involved because the development is of regional impact [DRI].[9]

Also in 1972, by enacting the Local Government Comprehensive Planning Act,[10] Florida became one of the first states to legislatively require the preparation of a state comprehensive plan. The Florida State Comprehensive Planning Act[11] created the Division of State Planning, and designated the Governor as Florida's chief planning officer. In 1975, Florida joined the small number of states requiring all local government units to prepare and adopt comprehensive plans with consistent land use regulations.[12] Considering the combination of state regulation with the tremendous volume of local land use legislation concerning zoning, subdivision control, and such innovative approaches as impact fees, planned unit developments, and phased growth control regimes, it is easy to agree with Professor Pelham's assertion that "Florida is truly the nation's chief land-use laboratory" and therefore "merits microscopic scrutiny."[13]

One of Professor Pelham's major themes is that the much discussed quiet

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regional vitality and infused it with ambiguity and confusion. The Florida version of DRI, devoid of any express provision for regionally beneficial development, is a mere remnant of its ALI counterpart." T. PELHAM, *supra* note 5, at 193.

8. FLA. STAT. ch. 380 (1979).

9. As Professor Pelham acknowledges, his analysis of the DRI portion of the Act contained in chapters 1 and 3 of the book are based upon Pelham, *Regulating Developments of Regional Impact: Florida and the Model Code*, 29 U. FLA. L. REV. 789 (1977), and the areas of critical concern discussion contained in chapter 5 of the book is based on Pelham, *Regulating Areas of Critical State Concern: Florida and the Model Code, II*, 18 URBAN L. ANN. (1979). Both discussions are, of course, updated and revised.

For other discussions of the Act, see J. JUERGENSMEYER & J. WADLEY, FLORIDA LAND USE RESTRICTIONS, ch. 23 (Looseleaf) [hereinafter cited as FLORIDA LAND USE RESTRICTIONS]; J. JUERGENSMEYER & J. WADLEY, FLORIDA ZONING — ATTACKS AND DEFENSES, §§ 1-9 (1st ed. 1980) [hereinafter cited as FLORIDA ZONING — ATTACKS AND DEFENSES]; Dean, *Updating the DRI Process*, 53 FLA. BAR J. 249 (1979); Finnell, *Saving Paradise: The Florida Environmental Land and Water Management Act of 1972*, 1973 URB. L. ANN. 103 (1973); Commentary, *American Law Institute Model Land Development Code: A Critique (Part II)*, 29 LAND USE L. & ZONING DIG. 4 (1977).

10. FLA. STAT. §§ 23.011-.0191 (as amended by 1978 Florida Laws, ch. 78-287). For primary discussion of the Act, *see* T. PELHAM, *supra* note 5, at ch. 7.

11. FLA. STAT. §§ 163.3161-.3211 (1979). For detailed discussion of this statute see T. PELHAM, *supra* note 5, at ch. 7. For other discussions of the Act, *see* FLORIDA LAND USE RESTRICTIONS, *supra* note 9, at ch. 4; FLORIDA ZONING — ATTACKS AND DEFENSES, *supra* note 9, at §§ 1-8; O'Connell, *Status Report: Local Government Comprehensive Planning Act of 1975*, 3 FLA. ENVT'L & URB. ISSUES 8 (Feb. 1977); Bartley, *Local Government Comprehensive Planning Act of 1975*, 3 FLA. ENVT'L & URB. ISSUES 1 (Oct. 1975).

12. FLA. STAT. § 163.3194 (1979) provides in part: "After a comprehensive plan . . . has been adopted in conformity with this act, all development undertaken by, and all actions taken in regard to development orders by, governmental agencies in regard to land covered by such plan or element shall be consistent with such plan or element as adopted. All land development regulations enacted or amended shall be consistent with the adopted comprehensive plan or element or portion thereof.

13. *See* T. PELHAM, *supra* note 5, at 6.

revolution in land use control has become "quiescent."[14] He supports this thesis by noting that no major state land use laws have been enacted since 1975,[15] with many states attempting to repeal or at least limit the land use statutes that were passed in the sixties and early seventies.[16] In addition, Professor Pelham refers to the lack of great success attributable to the Florida acts.[17] Indeed, if the quiet revolution in land use control is definable as activity at the state government level, the author proves his point by focusing on the present status of the Florida legislation. The development of the regional impact avenue for guaranteeing the infusion of state and regional considerations in local land use matters appears to have resulted in little more than extra paper work and legal costs for developers, and the shifting of local political squabbles to the Cabinet.[18] The effect has been the reformulation of development plans to avoid the threshold levels that invoke the DRI process.[19]

More importantly, the areas of critical state concern provisions of Florida's Environmental Land and Water Management Act as originally enacted have been declared unconstitutional. The Florida supreme court held that those provisions violate the nondelegation and separation of powers concepts established by Florida's new constitution.[20] The legislature's attempt to recast the areas of critical state concern portion of that Act is correctly envisioned by Professor Pelham as inadequately responsive to the supreme court's objection to the original legislative enactment and therefore unlikely to withstand constitutional attack.[21] What Professor Pelham fails to emphasize is that the new

14. *Id.* at 3. The so-called "Quiet Revolution" in land use control was best explicated in F. BOSSELMAN & D. CALLIES, THE QUIET REVOLUTION IN LAND USE CONTROL (1971). One of the key tenets of the "revolution" was a reversal of the complete decentralization of controls and the triumph of local interests which has characterized zoning. The reversal was generally conceived as requiring greater exercise of land use control power at state and regional levels. The previously discussed provisions for state and regional roles contained in Article 7 of the ALI MODEL LAND DEVELOPMENT CODE were typical examples.

15. T. PELHAM, *supra* note 5, at 3. "From 1961 to 1975, a veritable flood of state land-use legislation swept across the country from Hawaii to Maine to Florida to Oregon to Minnesota to Colorado. But by the mid-1970's, the flow of such state legislation had slowed to a trickle. With the exception of the California Coastal Act of 1976, no major state land-use laws have been enacted since 1975. Proposals for such legislation recently have been rejected in several states, and concerted efforts have been made to repeal newly enacted land-use legislation in some states. Moreover, diffusion of such legislation to other states in the foreseeable future probably will proceed at a much slower rate than in the previous decade." *Id.*

16. *Id.*

17. *See generally id.* at ch. 8.

18. *Id.* at 194.

19. *Id.* at 195.

20. Askew v. Cross Key Waterways, 372 So. 2d 913 (Fla. 1978).

21. The Florida supreme court, in *Cross Key Waterways* declared the critical areas definition section of the Environmental Land and Water Management Act, [ELWMA] FLA. STAT. § 380.05(2)(a), (b) (1975), to be unconsititutional as violative of the non-delegation doctrine "because they reposit in the Administration Commission the fundamental legislative task of determining which geographic areas and resources are in greatest need of protection." 372 So. 2d at 919; see K. DAVIS, ADMINISTRATIVE LAW TREATISE §§ 3.1-.15 (2d ed. 1978) for a general discussion of the non-delegation doctrine. The court specifically rejected the relaxed non-delegation doctrine advocated by Davis and proclaimed strict adherence to the Florida constitutional mandate of non-delegation of powers among different bodies of government. 372

So. 2d at 919; see K. DAVIS, ADMINISTRATIVE LAW TREATISE §§ 3.1-.15 (2d ed. 1978) for a general of the state government shall be divided into legislative, executive, and judicial branches. *No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein.*" (emphasis added). The Florida legislature, in direct response to *Cross Key Waterways*, amended the critical areas section of the ELWMA in May 1979 in an effort to rectify the non-delegation problem. 1979 Fla. Laws, ch. 79-73.

Pelham takes the position that the Florida legislature failed to remove the non-delegation doctrine as a potential barrier to future critical area designations. T. PELHAM, *supra* note 5, at 125. He feels that the amendments are "largely cosmetic", resting upon a "weak" form of legislative review, and cannot be said to be constitutional until reviewed by the Florida supreme court. *Id.* at 126-27. In fact, he states that if the court adheres to the principles enunciated in *Cross Key Waterways*, challenges to future critical area designations are likely to result in invalidation of the entire statutory scheme for managing critical areas. *Id.* at 127-28.

Interestingly, the lower court's concern regarding the political aspects of legislative delegation of critical area identification and management to the executive branch (under the pre-1979 statute) is discussed in detail. Cross Key Waterways v. Askew, 351 So. 2d 1065, 1068-80 (Fla. 1st D.C.A. 1977), *aff'd*, 372 So. 2d 913 (1978). According to Pelham, "the lower court's primary concern was not delegation of legislative regulatory power over land use to an administrative agency but the distribution of that power between state and local governments." T. PELHAM, *supra* note 5, at 124. A similar concern is reflected in the Florida supreme court opinion, but the court "carefully cloaked its apprehension in the terminology of the non-delegation doctrine." *Id.* By adopting the shield of the non-delegation doctrine, the supreme court, without expressly discussing political considerations, guaranteed that any power reallocations between state and local governments would be made by the legislature.

The legislature attempted to thwart operation of the non-delegation doctrine by significantly amending the offending legislation. 1979 Fla. Laws, ch. 79-73. Criteria for assessing priorities among competing resources were incorporated into expanded definitions of areas of critical state concern. FLA. STAT. § 380.05(2) (1979). However, the fulcrum of the amendatory legislation is a new provision which requires "legislative review" of rules adopted by the Administration Commission designating an area of critical state concern and the principles for guiding development in those areas. *Id.* § 380.05(1)(c). Pertinent provisions of the statute relating to "legislative review" state that: "A rule adopted by the commission pursuant to paragraph (b) designating an area of critical state concern and principles for guiding development shall be *submitted to the President of the Senate and the Speaker of the House for review* no later than 30 days prior to the next regular session of the Legislature. *The Legislature may reject, modify, or take no action* relative to the adopted rule. *Id.*" (emphisis added).

Pelham feels the new statutory provision may be unconstitutional because the legislature, since it is not required to take any action relative to rules promulgated by the Administration Commission, will neither directly designate the critical area in advance nor indirectly designate the area through official ratification of the administrative rules. T. PELHAM, *supra* note 5, at 127. The underlying theory of the "legislative review" provision is one of implied legislative ratification. If the theory of implied ratification is valid, the amendatory legislation should withstand the non-delegation attack of *Cross Key Waterways*. Nevertheless, Pelham offers three arguments to refute the implied ratification theory:

(1) The legislature has always had the inherent power to repeal or modify enabling legislation. However, this fact did not save either of the two administratively designated critical areas in *Cross Key Waterways*.

(2) The "legislative review" provision is ambiguous and does not establish a deadline by which the legislature must reject or modify designation and guideline proposals of the Administration Commission.

(3) The legislation ignores the realities of the legislative process. In effect, legislators could be prevented from registering opposition to the designation or guidelines via parliamentary maneuvers. Implying confirmation from a failure to veto is even more difficult if one legislative house votes to reject a designation rule while the other takes no official action. *Id.*

legislative provisions concerning areas of critical state concern, if constitutional, greatly decrease the role of the state government and concomitantly increase local governmental land use control.[22]

Regarding the legislative "realities" argument, Pelham ignores the fact that it is equally applicable to any statutory requirement that might mandate affirmative legislative ratification of administrative designations. In light of the apparent desire of the legislature to give vitality to the concept of protecting areas of critical state concern, the legislative option of rejecting the proposed administrative designations, despite legislative "realities", would seem far more preferable than requiring affirmative ratification (and almost certain defeat of any proposal).

While Pelham definitely feels the amendatory legislation might fail judicial review under the non-delegation doctrine, he also states that "if the court yields to the legislative will and upholds the constitutionality of the new designation procedure, the other delegation problems inherent in the regulatory and adjudicatory phases of the original Florida critical areas process will also be eliminated." *Id.* at 128.

22. One of the criticisms of the old statute was that it did not provide for an implementation program for an area that had been designated a critical area of state concern. Nicholas & Crawford, *The Florida Keys: A Case Study of Critical Area Designation*, 3 FLA. ENVT'L & URB. ISSUES 8 (June 1976). Amendatory legislation enacted in May 1979 incorporated provisions for resource planning and management committees that undermine local government complaints about non-involvement in the desigation process. *See* FLA. STAT. § 380.045 (1979). "The objective of the committee shall be to organize a voluntary, cooperative resource planning and management program to resolve existing, and prevent future, problems which may endanger those resources, facilities, and areas described in § 380.05(2) within the same area under study by the state land planning agency." *Id.* § 380.045(1).

The Governor appoints the members of the resource planning and management [hereinafter RPM] committee which must exist for at least six months. *Id.* § 380.045(2). The RPM committee shall include, but not be limited to, representation from each of the following:

(1) Elected officials from local governments in the area under study,

(2) Planning offices of each local government within the area under study,

(3) State land planning agency,

(4) Any other agency under Chapter 20 which the Governor feels would be relevant to the compilation of the committee,

(5) Water management district, if appropriate, and,

(6) Regional planning council, all or part of whose jurisdiction lies within the area under study. *Id.*

"The state land planning agency shall, to the greatest extent possible, provide technical assistance and administrative support to the committee." *Id.* Thus, the state, through its executive agencies and the RPM committee, is attempting to guide local governments in the designation process. Furthermore, "[t]he state land planning agency and any applicable regional planning agency shall, to the greatest extent possible, provide technical assistance to local governments in the preparation of land development regulations for areas of critical state concern." *Id.* § 380.05(7). Theoretically, if the RPM committee is successful in organizing a voluntary, cooperative RPM program, the local governments could avoid having a critical area designation imposed by the state.

The framework of the critical area section of the Florida Environmental Land and Water Management Act of 1972 is geared toward deference to local governments. The RPM committee provides local governments with the opportunity to formulate a voluntary, cooperative program to avoid state critical area designation. *Id.* § 380.045. However, if a critical area designation is ultimately adopted by the state, the legislation effectively defers any question of land development regulation to the local governments during the first 180 days following adoption. *Id.* § 380.05(5)-(6). In addition, there are liberal provisions for local governments to amend or rescind land development regulations. *Id.* § 380.05(11). Most importantly, the critical area designation terminates no later than three years after adoption of the regulations once local governments prove they can operate under and enforce the approved land development regulations. *Id.* § 380.05(15).

The fate of the Florida State Comprehensive Planning Act of 1972[23] provides further proof of the revolution's quiescence. After six years of work, the Florida State Comprehensive Plan was finally accepted by the Governor and submitted to the Florida legislature. In June 1978, the legislature approved the plan only as an *advisory* document.[24] One year later, the Florida legislature abolished the Division of State Planning and transferred its few powers and duties to existing state agencies.[25]

Another very serious problem, and one to which Professor Pelham gives only sporadic attention, is the interrelationship of Florida's land use planning and control statutes. The relevance of the state plan to DRIs and areas of critical state concern is unclear. The interrelationship of DRIs and ACSCs is unclear, and the relationship of LGCPA plans to the State Plan and to DRIs and ACSCs is not explained in the statutes which purport to be completely independent of each other for most purposes.[26]

Even more troublesome is the problem created by the County and Municipal Planning for Future Development Act of 1969[27] which Professor Pelham, as well as recent sessions of the Florida legislature, has chosen to totally ignore. This Act was Florida's first planning statute and the only act which seeks to coordinate planning provisions with the prime land use control tools, zoning and subdivision control. The Act, entirely optional, was intended to encourage units of local government to plan by giving them clear zoning and subdivision control powers which were previously uncertain. Although the original purpose of the Act is outdated now that the Local Government Comprehensive Planning Act of 1975 requires planning, the County and Municipal Planning Act was not repealed. The Act is used because of the specificity of the provisions concerning zoning and subdivision control. The obvious overlap with the LGCPA has caused considerable confusion and its optional nature further confounds those who find the County and Municipal Planning Act back to back in the Florida statutes with the Local Government Comprehensive Planning Act.[28] Some authorities argue that the County and Municipal Planning Act should be repealed.[29] Others completely misunderstand and fail to note its

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23. The Florida State Comprehensive Planning Act of 1972, FLA. STAT. §§ 23.011-.0191 (1977) (as amended by 1978 Florida Laws, ch. 78-287).

24. 1978 Fla. Laws, ch. 78-287, § 2.

25. The Division of State Planning and the Bureau of Comprehensive Planning. The Department of Community Affairs was given responsibility for 10-year site plans, areas of critical state concern, and developments of regional impact. The Office of the Governor was given supervision of environmental impact statements and A-95 clearinghouse functions. *See* FLORIDA LAND USE RESTRICTIONS, *supra* note 9, at § 4.02.

26. For a discussion of the "interrelationship" of the statutes in question, see generally FLA. ZONING — ATTACKS AND DEFENSES, *supra* note 9, at §§ 1-10.

27. FLA. STAT. §§ 163.160-.315 (1979).

28. FLA. STAT. ch. 163 (1979) contains both acts. The County and Municipal Planning for Future Development Act is §§ 163.160-.315 and the Local Government Comprehensive Planning Act of 1975 is contained in §§ 163.3161-.3211. The reviewer knows of no explanation of why the two acts were put together.

29. *See* Martin, *Comprehensive Planning by Local Governments in Florida: A Problem of Inconsistency*, 53 FLA. BAR J. 173 (1979).