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THE LIMITED STANDING RULE OF CHAPTER 380: SUBSTANTIAL INTERESTS LOST IN THE PROCESS

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Land use controls strike at a sacred institution in the United States: the right of an individual to use and enjoy private property. A legislative constraint on this preeminent right is constitutionally valid only if it satisfies certain procedural and substantive requirements, including most importantly, an opportunity for meaningful judicial review. Access to the courts, as institutionalized by the Florida Environmental Land and Water Management Act (ELMWA or Act)[1] in the development of regional impact (DRI) process is examined here. This critique will focus on the provision in chapter 380 of the Florida Statutes for standing to challenge an action taken by a governmental entity regarding a DRI and will explore the judicial activism which has sustained it.

I. INTRODUCTION

Each state has the power to enact legislation for the promotion of the health, safety, morals, and welfare of its citizens. The scope of this power encompasses regulation of natural resources, among them the use of privately-owned land, both for development and for conservation. Land use decisions have traditionally been made by the local government which has territorial jurisdiction over the property at issue. The State of Florida has delegated authority to establish land use plans and controls to local governments through the state constitution, statutes granting home rule powers, and statutes directly expressing the delegation.[2] However, where a project impacts on an area which spans more than one county, the Florida Legislature has rescinded this exclusive grant of power and apportioned it to three separate levels of government. In evalua-

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1. FLA. STAT. ch. 380 (1983). The chapter addresses the DRI and areas of critical state concern.

The Act was passed with a package of environmental bills in 1972. This spate of legislation was stimulated by a sudden awareness of the impact of uncontrolled development. Florida experienced a severe drought in 1971 which led to scientific testing and analysis to determine the cause of the failure of the aquifer to recharge. It was found that the aquifer was being destroyed by drainage, dredging, and filling of thousands of acres of wetlands and coastal areas. Many new development plans contemplated building communities the size of a small city. Belmont, *Protecting the Public Interest*, 11 STETSON L. REV. 454 (1982).

2. FLA. CONST. art. VIII, § § 1(f),(g), 2(b); FLA. STAT. § 125.01 (1983); *cf.* State ex rel. Volusia County v. Dickinson, 269 So. 2d 9 (Fla. 1972).

tion of a proposed development of regional impact each level, by statutory directive, makes a specific and distinct contribution to the final action taken on the project application.

The traditional regulatory system, whereby each local entity determines land use within its boundaries, simply does not address the problems associated with projects of regional impact. In recognition of this reality, the legislature activated with chapter 380 the authority of the state to oversee local decisions which have regional impact. The autonomy of a local government to establish and enforce land use regulations within its boundaries has been curtailed. The contours of local developments are to be determined not only by the local land use regulations, but by the state land use plan and regional assessment of particular projects as well.[3] The Act represents a momentous collective resolution. First, it holds state interest in planning and managing growth dominant over local authority to define and direct expansion, and second, it establishes a policy to guide land use decisions which embraces the conflicting goals of conservation and development.

As with any important legislation, legal challenges were readied and challengers were poised in anticipation of the opportunity to confront and test the statute. At the threshold was whether chapter 380, which uniquely incorporates state planning with local planning, creates procedural and substantive rights not previously recognized in land use decisions. Not surprisingly, the positions taken on this issue appear to coincide with the interest each group has in either restricting or expanding the express terms of the statute. Whether the issues in the DRI process would be accorded the status of a local zoning matter or exclusively a state planning tool would have far-reaching consequences on property interests.

II. Standing Standards

Recognition of the significant difference between local zoning law and state agency law is a prerequisite for full appreciation of the due process deficiencies created by the standing provision in the ELMWA.

A. Zoning

Zoning decisions in Florida are made at the local level.[4] The zon-

3. *See infra* text accompanying notes 13-46.
4. Fla. Stat. § 125.01(1)(h) (1983).

ing schemes vary slightly from one local unit to another, but there is little difference between them other than in the name of the decisionmaking body: city council, township committee, board of county supervisors, or board of aldermen. The due process requirements applicable to zoning decisions are established on a statewide basis. Each state determines the specific protections provided in its jurisdiction.[5]

Local zoning decisions have historically been divided into two categories by the Florida courts: quasi-legislative decisions and quasi-judicial decisions. The former include acts of broad applicability such as adopting zoning ordinances; the latter include decisions affecting a particular party such as granting a variance. The distinction has important due process ramifications.[6] Both are subject to judicial review, and the burden of proof is on the challenger. Unlike a quasi-judicial action, a quasi-legislative action carries with it a presumption of validity and will be affirmed if it is found to be neither arbitrary nor capricious. In the typical case, quasi-judicial acts are judicially reviewable by common law certiorari to the circuit court. Quasi-legislative decisions are properly brought before the court in an original proceeding for an injunction.[7]

The issue of standing to challenge a zoning action was certified to the Supreme Court of Florida as a question of great public importance in *Renard v. Dade County*.[8] The court separated the potential plaintiffs in a zoning action into three standing standard categories: (1) one who seeks to enforce a valid zoning ordinance must allege special damages different in kind from those suffered by the community as a whole; (2) one who seeks to attack a validly enacted zoning ordinance as an arbitrary and unreasonable exercise of legislative power must have a legally recognizable interest that is adversely affected; and (3) one who seeks to attack an ordinance as void as enacted must be an affected resident, citizen, or

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5. *See* Fasano v. Board of County Commissioners, 264 Ore. 574, 507 P.2d 23 (1973). *Fasano* stressed the importance of legislative guidelines in land use decisions. The burden of proof and standard for judicial review was brought in line with the realities of land use regulation by giving greater protection to the property owner.

6. Thompson v. City of Miami, 167 So. 2d 841 (Fla. 1964); G-W Development Corp. v. Village of North Palm Beach Zoning Bd. of Adjustment, 317 So. 2d 828 (Fla. 4th DCA 1975); Sun Ray Homes, Inc. v. County of Dade, 166 So. 2d 827 (Fla. 3d DCA 1964). *See also* Village of Euclid v. Amber Realty Co., 272 U.S. 365 (1926) (adopting the "fairly debatable" rule, discussed *infra*, text accompanying notes 52-53.).

7. *E.g.*, City of Miami Beach v. Mr. Samuels, Inc., 351 So. 2d 719 (Fla. 1977); *cf.*, Zabel v. Pinellas County Water & Navigation Control Auth., 171 So. 2d 376 (Fla. 1965).

8. 261 So. 2d 832 (Fla. 1972). *See also* Skaggs-Albertson's v. ABC Liquors, 363 So. 2d 1082 (Fla. 1978); Boucher v. Novotny, 102 So. 2d 132 (Fla. 1958).

property owner.

B. The APA

These standing thresholds are considerably more stringent than the access provisions of the Administrative Procedure Act (APA). Chapter 120 of the Florida Statutes provides that any person "substantially affected" by an agency rule is entitled to an administrative hearing to challenge the validity of that rule.[9] Section 120.57 provides for an administrative hearing to a party whose "substantial interests" are determined by agency action.[10] The Supreme Court of Florida in *Florida Homebuilders Association v. Department of Labor & Employment Security*,[11] held that these standing descriptions are so similar that they are essentially equivalent. The definition of substantial interest was supplied by the Second District Court of Appeal in *Agrico Chemical Co. v. Department of Environmental Regulation*.[12] It is satisfied by showing an immediate injury in fact, of a nature which the relevant statute is designed to protect.

C. The ELWMA

A development of regional impact is "any development which, because of its character, magnitude, or location, would have a substantial effect upon the health, safety, or welfare of citizens of more than one county."[13] The ELWMA establishes a uniform procedure for state, regional, and local review of a proposed DRI and provides criteria for approval of the development application. By its terms, a DRI has a significant impact on its surroundings. However, certain third parties who are substantially affected by the DRI, according to APA criteria, are precluded from participation as parties in the process. The courts have repeatedly held that neither an interest in property affected by the DRI nor an interest in the environment satisfies the chapter 380 standing requirements.[14]

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9. FLA. STAT. § 120.56 (1983).
10. FLA. STAT. § 120.57 (1983).
11. 412 So. 2d 351 (Fla. 1982).
12. 406 So. 2d 478 (Fla. 2d DCA 1981).
13. FLA. STAT. § 380.06(1) (1983). For the most recent comprehensive practical guide through the DRI process *see* Frith, *Florida's Development of Regional Impact Process, Practice, and Procedure*, 1 J. LAND USE & ENVTL. L. 71 (1985).
14. *See infra* text accompanying notes 19, 45.

If a developer is uncertain whether a project is a DRI,[15] a binding letter of interpretation (BLI) establishing its status may be requested from the Department of Community Affairs (Department).[16] In the BLI review procedure, the Department conducts an informal proceeding pursuant to section 120.57(2), unless the developer requests a formal hearing pursuant to section 120.57(1).[17] Only the developer is allowed to participate in this agency process, even though the issuance of a BLI is final agency action which binds all interested persons, including the local government, the regional planning council, and other state agencies.[18]

A number of cases have upheld the Department's position that only the developer has substantial interests in the BLI and other parties are not entitled to chapter 120 treatment. For instance, in *South Florida Regional Planning Council v. Florida Division of State Planning*,[19] the court denied a petition filed by the regional planning council for a formal proceeding pursuant to section 120.57(1) to challenge the BLI issued by the state planning agency finding that a proposed development was not a DRI. The court held that section 380.06(4)(a) "in no way provides for the involvement of the regional planning council in the binding letter process; and there is no other provision of the statute that in any way provides a basis for the council's contention that it is entitled to participate in binding letter determinations."[20] Similarly, in *Peterson*

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15. Developments presumed to be a DRI are listed in ch. 27F-2 of the FLA. ADMIN. CODE (formerly FLA. ADMIN. CODE ch. 22F-2). *See* Development of Regional Impact-Guidelines and Standards, Report and Recommendation to the Administration, Dep't of Admin., Div. of State Planning (Jan. 1973). 1985 Fla. Laws ch. 85-55 § 45 (to be codified at FLA. STAT. § 380.065 (1985)) establishes new or modified statewide guidelines and standards, superseding ch. 27F-2, FLA. ADMIN. CODE.

16. FLA. STAT. § 380.06(4) (1983) allows a developer to request a binding letter of interpretation from the Department for any of three reasons:

(a) To determine whether a proposed development is a DRI;

(b) To determine whether the developer has obtained vested rights under § 380.06(18); and

(c) To determine whether a proposed substantial change to a development of regional impact previously vested under § 380.06(18) would divest such rights.

17. The complete process for a binding letter determination is found in R. 9B-16.16 of the FLA. ADMIN. CODE.

18. FLA. STAT. § 380.06(4)(a) (1983). *See* General Dev. Corp. v. Division of State Planning, Dep't. of Admin., 353 So. 2d 1199 (Fla. 1st DCA 1977).

19. 370 So. 2d 447 (Fla. 1st DCA 1979), *cert. denied*, 381 So. 2d 770 (Fla. 1980). *See* Suwannee River Area Council Boy Scouts v. State Dep't of Community Affairs, 384 So.2d 1369 (Fla. 1st DCA 1980); Sarasota County v. Department of Admin., 350 So. 2d 802 (Fla. 2d DCA 1977), *cert. denied*, 362 So. 2d 1056 (Fla. 1978).

20. *South Florida RPC*, 370 So. 2d at 449.

v. Florida Department of Community Affairs,[21] the court denied a neighboring homeowner's standing to participate in the binding letter process. The *Peterson* court stated: "A binding letter only determines whether a proposed development is a DRI; it is not a permit to begin any development activity and does not protect the developer from any state, federal, or local restrictions applicable to its development."[22] The court pronounced that "[t]here is no legislative authority for [third] persons to obtain standing in such proceedings."[23] Third parties have no enforceable right to either enter as formal parties or intervene in the binding letter process.

Upon a determination by the Department that a proposed development is a DRI, the developer must file an application for development approval with the local government, the appropriate regional planning agency, and the Department.[24] The regional planning council will review the application and make recommendations to the local government based on the development's potential impact on (1) the environment and natural resources of the region;[25] (2) the economy of the region;[26] (3) public facilities, including water, sewer, and solid waste disposal;[27] (4) public transportation facilities;[28] (5) available housing;[29] and (6) other criteria for determining regional impact as the regional planning agency deems appropriate.[30]

The recommendations of the regional planning council are forwarded to the local government. The local government will hold a public hearing[31] and issue a development order.[32] A development order may grant, deny, or grant with conditions an application for

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21. 386 So. 2d 879 (Fla. 1st DCA 1980).

22. *Id.* at 880-81. Despite its rule in *Peterson*, two years later the same court in General Dev. Utils., Inc. v. Florida Dep't of Envtl. Reg., 417 So. 2d 1068 (Fla. 1st DCA 1982), held that a letter issued by the Department to General Development Utilities (GDU) constituted final agency action and therefore warranted a point of entry to the administrative process. The letter, advising GDU of results of a wasteload allocation study, was sent for informational purposes only; GDU had not applied for a permit and was not by virtue of the letter being denied a permit.

23. 386 So. 2d at 880.

24. FLA. STAT. § 380.06(9)(a) (1983).

25. FLA. STAT. § 380.06(11)(a)(1) (1983).

26. FLA. STAT. § 380.06(11)(a)(2) (1983).

27. FLA. STAT. § 380.06(11)(a)(3) (1983).

28. FLA. STAT. § 380.06(11)(a)(4) (1983).

29. FLA. STAT. § 380.06(11)(a)(5) (1983).

30. FLA. STAT. § 380.06(11)(a)(6) (1983).

31. FLA. STAT. § 380.06(10)(d) (1983).

32. FLA. STAT. § 380.031(3) (1983).

a development permit.[33] The development order is the final action in a process which began with a binding letter of interpretation, unless the development order is appealed.[34]

If an appeal is filed, it must be received by the Florida Land and Water Adjudicatory Commission (Adjudicatory Commission) within forty-five days after the development order is rendered by the local government.[35] The decisions of the Adjudicatory Commission are subject to review in the district courts of appeal.[36]

The second of two sections in chapter 380 which exclude parties from the DRI process is section 380.07(2). If the local government approves the development application and issues a development order, regardless of any effect it might have on others, only the named parties in section 380.07(2) can appeal the order: the owner, the developer, the regional planning council, and the Department.[37] The owner and the developer are usually the same person, but not always. If the project is approved and the order is not excessively conditioned, the owner or developer is unlikely to file an appeal. Thus, appeal of an order granting approval will be filed, if at all, by the regional planning council and the state land planning agency. Although each body must be responsive to its legislatively defined role under chapter 380, the Act's dual function, to conserve and to develop, permits a wide latitude in those bodies' positions on any issue or any project. In other words, protection of the natural resources may not necessarily be the favored option in any one case. There is no reason to believe that the interest of either agency will coincide with the interest of a substantially affected third party. If an agency and a third party's interest do coincide, there is no guarantee that the agency will pursue a remedy available through an Adjudicatory Commission appeal.

The regional planning council is intended to be the watchdog

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33. FLA. STAT. § 380.031(4) (1983).

34. FLA. STAT. § 380.07(2) (1983).

35. FLA. STAT. § 380.07(2) (1983); FLA. ADMIN. CODE R. 27G-1.01 to -1.11 (1982). In practice the appeal is heard by a hearing officer of the Division of Administrative Hearings pursuant to FLA. ADMIN. CODE R. 27G-1.08(1).

Pursuant to FLA. STAT. §§ 380.031 and 380.07(1), the governor and cabinet sit as the Administrative Commission in their capacity as promulgators of standards and guidelines under the ELWMA, as well as sitting as the Adjudicatory Commission.

36. FLA. STAT. §§ 120.68(1),(2) (1983); 380.07(2) (1983).

37. FLA. STAT. § 380.07(2) (1983) provides:

> Within 45 days after the order is rendered, the owner, the developer, an appropriate regional planning agency by vote at a regularly scheduled meeting, or the state land planning agency may appeal the order to the Florida Land and Water Adjudicatory Commission by filing a notice of appeal with the commission.

and mouthpiece for environmental interests of citizens within a jurisdiction encompassing at least two counties.[38] The State of Florida is divided into eleven planning districts. Each district has within its jurisdiction between three and eleven counties. According to the Florida Regional Planning Council Act of 1980,[39] membership on the council must consist of representatives appointed by each of the member counties in the geographic area covered by the council, representatives from other local governments in the geographic area covered by the council, and representatives appointed by the governor who reside in that geographic area.[40] Generally, the members of the regional planning councils are also members of the local government bodies.

It has been argued that this arrangement is more conducive to interlocal government dealmaking than to regional planning.[41] Local governments tend to be parochial in their interests; motivated by the potential for increased tax revenues from development, they have encouraged rapid growth at the expense of the environment. "Realistically, collections of local government officials in regional guise but ultimately accountable politically only to their local constituencies cannot be expected to produce effective advocacy for state and regional interests."[42]

As the state land planning agency charged with administration and enforcement of the ELWMA,[43] the Department firmly supports the exclusive four party rule.[44] This position has been upheld numerous times by the judiciary[45] and is aptly expressed by the comment that the "DRI review process is primarily a comprehensive land use review technique for large scale development involving primarily two groups—developers on the one hand, and on the other, governmental planners and permitting authorities."[46] Although this conclusion is reasonable on its face, a closer examina-

38. FLA. STAT. § 186.502 (1983).

39. FLA. STAT. §§ 186.501-186.515 (1983).

40. FLA. STAT. § 186.504(2) (1983).

41. *See* T. PELHAM, STATE LAND USE PLANNING AND REGULATION; FLORIDA, THE MODEL CODE AND BEYOND 40-41 (1979).

42. *Id.* at 42.

43. FLA. STAT. § 380.032 (1983).

44. Telephone interview with Linda Loomis Shelley, General Counsel, State of Florida Department of Community Affairs, in Tallahassee, Florida (Apr. 2, 1985) [hereinafter cited as Shelley]. The Department takes the view, not shared by many environmentalists, that the limited standing provision does not hamper protection of natural resources.

45. Caloosa Property Owners v. Palm Beach Bd. of County Comm'rs, 429 So. 2d 1260, 1264 (Fla. 1st DCA 1983).

46. *Id.*

tion of the DRI concept reveals flaws in logic. At best, the limited standing provision of chapter 380 does not serve all of the interests which the chapter purports to protect.

D. The Debate

The standing provision in chapter 380 which lists the four parties who may appeal a development order was the subject of intense debate during the 1985 legislative session. Although it was only one provision of the comprehensive 144-page growth management bill sponsored by Representative Jon Mills, at times it appeared to be the bill's potential death knell.[47]

Two arguments advanced in favor of the limited standing provision are that a DRI does not affect third party local interests and that third party standing would create a "disincentive" for developers to comply with the DRI statute. Those who support third party standing characterize the current statute as a denial of due process and as an impermissible incursion by the legislature into the province of the courts. These opinions represent more than academic differences; they present distinct ordering of priorities.

III. THE CHAPTER 380 MIX

If a development is not a DRI, the regulatory procedures of section 380.06 are not applicable. The developer of such a project need only satisfy the requirements of local government and regulatory agencies with jurisdiction over the proposed development. It is

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47. At passage Fla. CS for HB 287 had grown to 161 pages. In its final form it did not include a standing provision for chapter 380. 1985 Fla. Laws ch. 85-55. Earlier versions of the bill included proposals that § 380.07(2)(c) be amended to read as follows:

> (1) Within 45 days after the order is rendered, any substantially affected person may petition the Florida Land and Water Adjudicatory Commission for permission to bring an appeal from a development of regional impact development order;
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> (2) 'Substantially affected person' means a person who is or will be adversely affected by the proposed development. The alleged adverse affect may be shared in common with other members of the community, but must be greater in degree than other members of the community in general could claim;
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> (3) As a condition precedent to filing the appeal, any person wishing to file an appeal . . . must have participated in the local government hearing, and any issues the person wishes to raise on appeal must have been raised during the local government hearing for the development order; and
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> (4) The person who wishes to appeal shall file a petition with the Florida Land and Water Adjudicatory Commission alleging:
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> (a) facts to establish petitioner's standing; and
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> (b) regional or statewide issues for which review is required to protect an important public interest.

commonplace for a developer to apply for relief from a zoning ordinance through a zoning amendment or variance. When a local government considers a request for relief from a zoning restriction for a particular site, it must essentially choose between denying the change, and possibly diminishing the developer's property rights, or granting the change, and possibly diminishing the neighboring property owners' rights.

A rezoning decision favorable to a developer and offensive to a neighboring landowner may be challenged by the person affected, the neighbor in this example.[48] The County and Municipal Planning for Future Development Act,[49] which can be adopted by a local government at its option, provides that any person aggrieved by a decision of an administrative official regarding land use may appeal to the board of adjustment. Any person aggrieved by the decision of the board of adjustment or any other entity which acts for the local governing body in its regulatory capacity may seek judicial review in circuit court.[50] Review of a local government zoning action is not usually subject to the APA.[51]

The standard of review in the circuit court is referred to as the "fairly debatable" test.[52] The burden is on the challenger to establish by clear and convincing evidence that the local government

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48. *See* Renard v. Dade County, 261 So. 2d 832 (Fla. 1972); Boucher v. Novotny, 102 So. 2d 132 (Fla. 1958); Brown v. Florida Chautauqua Ass'n, 59 Fla. 447; 52 So. 802 (Fla. 1910). In *Boucher* the court denied standing to a neighboring landowner because he could not prove damages "peculiar to himself and differing in kind rather than in degree from the damages suffered by the people as a whole." 102 So. 2d at 135. In *Renard* the court approved the special damages rule from *Boucher* for suits brought to enforce a valid zoning ordinance. 261 So. 2d at 835.

49. FLA. STAT. §§ 163.160-163.3211 (1983).

50. Standing requirements for aggrieved persons were defined by the Supreme Court of Florida in *Renard*. *See supra* note 8 and accompanying text.

51. *See* Sporl v. Lowrey, 431 So. 2d 245 (Fla. 1st DCA 1983) (a city board of adjustment was not an agency within the meaning of the APA; thus appellate review was proscribed by § 163.250); Sweetwater Util. Corp. v. Hillsborough County, 314 So. 2d 194 (Fla. 2d DCA 1975) (board of county commissioners not an agency under APA); Fla. R. App. P. 9.030(c) (the circuit court reviews by appeal final orders of lower tribunals); Fla. R. App. P. 9.020(d) (defines lower tribunal as "the court, agency, officer, board, commission, or body whose order is to be reviewed.").

52. Davis v. Sails, 318 So. 2d 214 (Fla. 1st DCA 1975), discusses the rules of law applicable to zoning. "In order for a zoning ordinance or regulation to be valid, it must have some substantial relationship to the promotion of the public health, safety, morals or general welfare. . . . If the application of a zoning classification to a specific parcel of property is reasonably subject to disagreement, that is, if its application of a zoning classification to a specific parcel of property is reasonably subject to disagreement, that is, if its application is fairly debatable, then the application of the ordinance by zoning authority should not be disturbed by the courts." *Id.* at 217.

action is arbitrary, capricious, or confiscatory. If the challenger fails to meet this burden, the validity of the rezoning decision is fairly debatable and must be upheld.[53] This standard is so burdensome that the likelihood of prevailing is practically nonexistent. Thus, there is a significant impetus for an aggrieved person to find a point of entry into the administrative process through the ELWMA which is less rigorous to the challenger.

In theory, a development of regional impact would not involve local government regulations. However, the DRI process will invariably subsume local government land use regulations. The ELWMA legislation and the interpretative case law both support the contention that local issues, in addition to regional and state issues, are addressed by chapter 380.

The ELWMA expressly provides that any development order regarding a DRI may be appealed to the Adjudicatory Commission.[54] For purposes of the Act, a development order is defined as "any order granting, denying, or granting with conditions an application for a development permit."[55] A development permit is defined to include "any building permit, zoning permit, plat approval, or rezoning, certification, variance, or other action having the effect of permitting development as defined in this chapter."[56] The DRI statute, then, expressly includes local zoning decisions in the administrative process of the Act.

In *General Electric Credit Corporation v. Dade County*,[57] an owner/developer sought review in circuit court of the board of county commissioners' denial of a rezoning application.[58] However, because the property at issue was a DRI, the petition was dismissed for failure to exhaust administrative remedies by first bringing an appeal to the Adjudicatory Commission. The district court affirmed and held that "to the extent that section 380.07, Florida Statutes, provides what we have determined to be the uniform statewide procedure for reviewing development orders, it prevails over the zoning review procedures contained within the

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53. *See* Dade County v. Yumbo, 348 So. 2d 392 (Fla. 2d DCA 1977); Metropolitan Dade County v. Crowe, 296 So. 2d 532 (Fla. 3d DCA 1974); Miles v. Dade County, Bd. of County Comm'rs, 260 So. 2d 553 (Fla. 3d DCA 1972).

54. FLA. STAT. § 380.07(2) (1983).

55. FLA. STAT. § 380.031(3) (1983).

56. FLA. STAT. § 380.031(4) (1983).

57. 346 So. 2d 1049 (Fla. 3d DCA 1977).

58. An action in the circuit court is ordinarily the only means of reviewing a zoning decision. *See supra* note 51 and accompanying text.

Dade County Code."[59] The landowner's contention that an appeal to the Adjudicatory Commission was not mandatory[60] was rejected under the doctrine of exhaustion of administrative remedies.[61]

In *Manatee County v. Estech General Chemical Corp.*,[62] Judge Grimes definitively expressed the relationship between local government zoning and the DRI process by outlining the steps a developer undertakes in compliance with the ELWMA:

> The developer first files an application for a development permit with the local zoning authorities. § 380.06(6). This application must not only request approval for DRI status but must also ask for approval under all applicable local zoning laws because the definition of a development permit includes all requests for zoning approval. § 380.031(3). The local government then considers the applications using the required process and issues a development order which, since it is based on an application for a development permit, must deal not only with the DRI request but also with all local zoning matters. Finally, section 380.07 gives an aggrieved party the right to appeal the development order to the Florida Land and Water Adjudicatory Commission. Again, since local zoning decisions are part of the development order, it is only reasonable to assert that the Land and Water Adjudicatory Commission is to review the local zoning decisions as well as the decision relating to the DRI. This avoids the prospect of the review of interrelated aspects of the same order proceeding concurrently in two forums.[63]

The court concludes from these facts "that indeed the Legislature has changed the review process for local zoning decisions in cases involving development of regional impact."[64]

The DRI process is not triggered by developments which have

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59. 346 So. 2d at 1054.

60. The appellant cited to the permissive language of § 380.07(2), which provides that an owner or developer "may appeal" an order to the Adjudicatory Commission. 346 So. 2d 1053.

61. The doctrine of exhaustion of administrative remedies is an established rule of judicial administration. It requires that "[w]here an administrative remedy is provided such remedy ordinarily must be exhausted before a litigant may resort to the courts." 73 C.J.S. *Public Administrative Law and Procedures* § 38 (1983). Where administrative review of a complaint is available as of right, access to the courts may be denied simply because of the failure to pursue that administrative right. *See* 1 FLA. JUR. 2D *Administrative Law* § 161 (1977).

62. 402 So. 2d 1251 (Fla. 2d DCA 1981).

63. *Id.* at 1254.

64. *Id.* at 1253. *See also* T. PELHAM, *supra* note 41.

only local effects. The procedure is a response to statewide concern over activities that have regional impact. But where there are regional interests, local interests are invariably affected. The First District Court of Appeal has held that only issues of regional or statewide significance, not local zoning issues, are cognizable by the Adjudicatory Commission.[65] The neighboring landowner, who is not eligible to initiate section 380.07 review under the current view, may bring a circuit court action challenging the issuance of a development order. However, the circuit court proceeding is stayed upon the filing of an appeal by one of the named parties in section 380.07(2).[66] Presumably, this stay provision is to ensure conformity with the doctrine of exhaustion of remedies.[67] The paradox is that a party with standing in circuit court, who by definition is not eligible to initiate or to intervene in the administrative appeal, with matters cognizable under *Renard*,[68] is adversely affected by the appeal. An affected person with standing in circuit court is exercising a right derived from private nuisance law,[69] specifically distinguishable from public nuisance law, which absent the provisions of chapter 380 would be unfettered.

The limited entry permitted by the ELWMA is especially significant to third parties such as citizens' environmental organizations who would litigate on behalf of the public interest in the environment. These affected citizens are excluded from both the appeal process under section 380.07(2) of the Act in all cases and from the circuit court under the prudential standing doctrine in most cases.

In *United States Steel Corp. v. Save Sand Key, Inc.*,[70] the Supreme Court of Florida reversed the decision of the Second District Court of Appeal that a person who is entitled to enjoyment of a right, or who directly and personally suffers or is about to suffer an injury, may initiate an action for relief or redress whether such

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65. Friends of the Everglades, Inc. v. Board of County Comm'rs, 456 So. 2d 904 (Fla. 1st DCA 1984).

66. Section 380.07(2) (1983) provides that "[t]he filing of the notice of appeal . . . shall stay any judicial proceedings in relation to the development order, until after the completion of the appeal process." This section raises a constitutional question. FLA CONST art. I, § 21 guarantees that "the courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or *delay*." (Emphasis added). Of course whether the stay provision really serves a legitimate state interest is a point of some controversy. *See supra* notes 44-46 and accompanying text.

67. *Supra* note 61.

68. *Supra* note 8 and accompanying text.

69. *See* Comment, *Public Nuisance: Standing to Sue Without Showing "Special Injury,"* 26 U. FLA. L. REV. 360 (1974).

70. 303 So. 2d 9 (Fla. 1974).

right or injury is special to him or is shared in common with the public generally. In reversing, the court emphasized that a plaintiff must allege an injury different in degree and kind from that suffered by the community as a whole.[71] The plaintiff, Save Sand Key, Inc., was a non-profit citizens' organization formed for the specific purpose of protecting public access to a portion of beach which construction by United States Steel Corporation was blocking off from public use.

However, there is an indication that if the Department or the regional planning council were to appeal a DRI such as the building of high-rise condominiums in the *Save Sand Key* case, a citizens' group could intervene in the appeal. The Supreme Court of Florida, in *Sarasota County v. Boyer*,[72] implicitly recognized the right to intervene by acting on a county's request for a writ of prohibition brought at a hearing initiated by the regional planning council and the Department. The county was not the owner or developer of the land.

However, the right to participate in, but not to initiate an appeal was denounced as wholly inadequate to address the interests of substantially affected third parties because, initially, as intervenors they were restricted to issues as they found them.[73] The rules pertaining to chapter 380 found in the Florida Administrative Code have recently been amended and are more responsive to the argument that third parties have a right to meaningful access to the process. Although to date there are no appellate decisions on the amended rule, it appears that intervenors may now request the Land and Water Adjudicatory Commission to consider issues raised in the proceeding reviewed, even though not raised by the parties to the appeal.[74] Nonetheless, a right of intervention, even with full party status, into a proceeding which does not exist is indeed a hollow right.

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71. *Id.* at 12.

72. 360 So. 2d 388 (Fla. 1978).

73. *See* Appellant's Brief, Caloosa Property Owners v. Palm Beach County Bd. of County Comm'rs, 429 So. 2d 1260 (Fla. 1st DCA 1983).

74. FLA. ADMIN. CODE R. 27G-1.06 (effective Nov. 1, 1984) recognizes the right to intervene in chapter 380 proceedings created by FLA. STAT. § 403.412(5) (1983) (Florida Environmental Protection Act (EPA)).

However, an important caveat for third parties is subsection (3) of the rule. Unless the Adjudicatory Commission specifically allows intervention as a full party with the right to question any phase of the proceeding, intervenors shall "recognize the propriety of the original proceeding." General Counsel for the Department explained that this rule does not, by its terms, allow an intervenor to prohibit a settlement. Shelley, *supra* note 44.

The First District Court of Appeal[75] has recently considered two cases in which neither the regional planning council nor the Department would appeal the local government development order; *Caloosa Property Owners v. Palm Beach County Board of County Commissioners*[76] and *Friends of the Everglades, Inc. v. Board of County Commissioners*.[77] In both cases the court resolutely adhered to its established prudential position against third-party standing.[78]

In *Caloosa*, the Adjudicatory Commission denied standing to a homeowners association comprised of persons who lived or owned property adjacent to an industrial park DRI. The homeowners objected to the approval of the development application because "the extent of the wetlands on the site were understated . . . precious pristine wetlands directly over a recharge area for the turnpike aquifer will be dewatered, poisoned, and destroyed."[79] The First District Court of Appeal stated that the association was not one of the four parties entitled to an appeal pursuant to section 380.07(2) and affirmed the order of the Adjudicatory Commission. The court endorsed the legislative enumeration of persons or entities with the right to appeal a development order as an exclusive provision.

The first of two reasons given by the court for denial of standing was that the legislature was unambiguous in its delineation of the proper parties to appeal, and to permit any other substantially affected party to appeal would contravene that clear statement. The second rationale offered in support of its holding entailed creative judicial activism; the discovery of the right to an expeditious DRI determination.

The court looked to the intent language of section 380.021, which states that the purpose of the Act is to protect the natural resources and environment of the state, as well as to establish an orderly development plan.[80] This section of the statute was inter-

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75. Judicial review of the vast majority of orders from the Adjudicatory Commission is in the First District Court of Appeal because § 120.68(2) vests jurisdiction in the district court where the headquarters of the state land planning agency is located, which is the first district.

76. 429 So. 2d 1260 (Fla. 1st DCA 1983).

77. 456 So. 2d 904 (Fla. 1st DCA 1984).

78. *See* Sarasota County v. Beker Phosphate Corp., 322 So. 2d 655 (Fla. 1st DCA 1975). The court acquiesced to the legislative enumeration of the parties with appeal rights under § 380.07(2) and sanctioned this regulating scheme as appropriate to accomplish the goal of expediting the administrative and judicial processes.

79. Appellant's Brief at 32-33, *Caloosa*. Under the intervention rule previously discussed, these are appropriate issues for adjudication.

80. FLA. STAT. § 380.021 (1983) provides:

preted as a codification of a legislative intent to expedite the DRI process. The court decided that the purpose of the ELWMA was to regulate large scale development; therefore, it primarily involved two groups, "developers on the one hand, and on the other, governmental planners and permitting authorities."[81] The court apparently found that the homeowners' interest could never involve a matter of an environmental impact of regional magnitude. Citing to its opinion in *Suwannee River*,[82] the court explained that the subject of chapter 380 was regional impacts and implied that an adjacent landowner could not as a matter of law assert an interest in a regional impact: " 'regional impact' is concerned with matters affecting the public in general, not special interests of adjoining landowners."[83] The logical extension of this reasoning is that the interest of the owner/developer, which is nothing more than a large special interest, does not satisfy the "regional impact" criterion either.

The opinion pointed out that substantially affected adjacent landowners may seek redress in circuit court if they have a cognizable challenge against the local government action. The court further stated that the lack of standing in chapter 380 does not abrogate affected persons' right to intervene in an administrative proceeding for the protection of the environment.[84] Yet, the ave-

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It is the legislative intent that, in order to protect the natural resources and environment of this state as provided in s. 7, Art. II of the State Constitution, insure a water management system that will reverse the deterioration of water quality and provide optimum utilization of our limited water resources, facilitate orderly and well-planned development, and protect the health, welfare, safety, and quality of life of the residents of this state, it is necessary adequately to plan for and guide growth and development within this state. In order to accomplish these purposes, it is necessary that the state establish land and water management policies to guide and coordinate local decisions relating to growth and development; that such state land and water managment policies should, to the maximum possible extent, be implemented by local governments through existing processes for the guidance of growth and development; and that all of the existing rights of private property be preserved in accord with the constitutions of this state and of the United States.

81. 429 So. 2d at 1264.

82. 384 So. 2d at 1369.

83. *Supra* note 79.

84. *Id.* In light of the *Caloosa* facts, the court's opinion on intervention is dictum. However, it reveals a practical flaw in the theory that the limited standing rule will expedite the developer's enjoyment of his property rights.

The substantially affected citizen prevented from initiating an appeal of a development order—and unable to intervene in a DRI appeal because one is never filed—will undoubtedly have a point of entry into administrative proceedings which are required for obtaining a variety of permits from the Department of Environmental Regulation, and from other

nues which these gratuitous statements suggest, as has been explained, do not provide for full or adequate redress.

In *Friends*,[85] the Adjudicatory Commission denied standing to two environmental organizations which were raising regional issues of environmental impact involving a DRI at Port Bougainville, located on Key Largo. Construction of Port Bougainville began in 1973. As a result of a subsequent foreclosure, the City National Bank of Miami acquired title to the property. In 1981 the plans for the project were altered, and the local government approved the changes without complying with the chapter 380 procedure for determination of whether the changes amounted to a substantial deviation from the original DRI proposal.[86]

The Department enjoined construction until a substantial deviation determination could be made according to the requirement of the statute. The developer, the local government, the regional planning council, and the Department negotiated an agreement. The agreement allowed the developer to proceed without going through another DRI review if the amended development plans submitted to the local government did not differ significantly from draft plans given prior tentative approval by the regional planning council and the Department. The amended development plan was approved by the local government. Not surprisingly, the regional planning council and the Department declined to appeal the order which was the product of their negotiations. The First District Court of Appeal once again denied standing to the substantially affected third parties based on the express language of section 380.07(2) and the expedited review theory.[87] In justifying its policy against third party standing, the court went further than it had in *Caloosa*:

> In exchange for the developer's subjection to additional review,

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regulatory agencies.

Environmental attorney and lobbyist Casey Gluckman explained that substantially affected persons excluded from the DRI process are angered and frustrated by the absence of a forum in which they might seek redress for their complaints. When these parties are granted standing as being substantially affected by a regulatory permit issued for the DRI, they pursue and assert their claims with great vigor. Hence, the *Caloosa* premise is dysfunctional. Interview with Casey Gluckman, in Tallahassee, Fla. (Mar. 18, 1985).

85. 456 So. 2d 904.

86. *See* FLA. STAT. § 380.06(17)(a) (1983). A substantial deviation is "any change to the previously approved development of regional impact which creates a reasonable likelihood of additional adverse regional impact, or any other regional impact created by the change not previously reviewed by the regional planning agency."

87. *Friends*, 456 So. 2d at 915.

> 'red tape' and expense, he is promised expeditious action. The right to an expedited review, we believe, is insured by limiting standing to appeal the DRI decision of the local government to the individuals and groups enumerated in section 380.07(2).[88]

Whether a "right" to expeditious review actually has significance or foundation in the law is questionable. Moreover, such a "right" would clearly be procedural and, when balanced against the substantive right of other parties to access to the courts, it is outweighed.[89] Nonetheless, concern over streamlining the DRI process is pervasive in land use regulation and commentary.[90] Understandably, the courts respond to that popular business concern by creating an obstacle to entering into the process even for those substantially affected third parties.

The "right" to expeditious review is an outgrowth of the theory that the purposes of the DRI process can be better effectuated by enticing developers to refrain from avoiding the process rather than by charging the government with rigorous enforcement of the Act. Public debate over the DRI process, whether it involves developers, conservationists, or state representatives, invariably touches upon "creating incentives" or "removing disincentives" from the process. The following example is representative of the primary problem which has plagued the DRI process and led to the incentive creation philosophy. Assume a development of 1000 units falls within the jurisdiction of the Act, and, therefore, is subject to the time consuming and expensive ordeal that the DRI process is

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88. *Id.* at 910. The court derives this new "right" to expedited review from an opinion by one of the principal drafters and advocates of the ELWMA. Gilbert Finnell stated that one of the major policies that the legislature intended to emphasize in the Act is that the decisionmaking process should provide for expeditious decisions on development applications. *Id.* at 908, citing Finnell, *Coastal Land Management in Florida*, 1980 AM. BAR FOUND. RESEARCH J. 303.

Four deficiencies with this analysis are that: (a) chapter 380 contains a purpose section, 380.021, and it contains no such language; (b) it is a well-established rule of statutory construction that the court will not look to legislative intent when the statute is clear on its face; (c) the appeal of a development order is filed after the bulk of the decisions on development applications have been made; and (d) a circuit court action is stayed pursuant to § 380.07(2) when an administrative appeal is filed. Following the appeal process the developer will be subject to the circuit court action. Furthermore, there is the regulatory permitting process to contend with which can be very time consuming.

89. FLA. CONST. art. I, § 21. The courts shall be open to every person for redress of any injury.

90. *See* Earl, Tarr & Smith, *Environmental Law: Streamlining the Review of Proposed Development Under the Environmental Land and Water Management Act*, 35 U. MIA. L. REV. 925 (1981); Final Report of the Environmental Land Management Study Committee (Feb. 1984) [hereinafter cited as Elms II].

known to be. If the project is split in half, with each a 500-unit development under a different corporate subsidiary, both may escape the requirements of the Act. As a result, instead of one well-planned 1000-unit development, there are two potentially poorly-planned 500-unit developments adjacent to one another. The cumulative effects of many small, inadequately planned projects is certain to have detrimental regional and state impacts of the sort that the ELWMA is intended to prevent.

One obvious solution to the problem is to actively enforce the ELWMA, bringing to bear the powers inherent in the government.[91] For instance, in the example above this might mean "piercing the corporate veil" and subjecting both developments to the process as if they were one.[92] However, for a myriad of reasons not the least of which has been a profoundly under-financed and under-staffed state land planning agency, potential developments of regional impact have not been aggressively monitored and development orders for developments of regional impact are not aggressively enforced.

The solution favored by the Department has been to work with the developer, to use the DRI process as a bargaining tool to coerce developers into building better-planned developments.[93] An article by Gilbert Finnell[94] explains that "negotiations begin long before an application for development approval is filed, and the developer may make early changes to facilitate favorable action on the application. Additional changes may be suggested or required at each level." The Department relies less on enforcement and more on cooperation and communication with developers to protect the environment.[95]

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91. The Department of Environmental Regulation treats attempts to create piecemeal dredge and fill projects by determining the total scope of a project. *E.g.* FLA. ADMIN. CODE R. 17-12.090.

According to the Elms II Report the DRI process affects less than 10% of all development. Elms II, *supra* note 90.

92. The 1985 Florida Legislature responded to the problem of piecemeal sub-threshold development in 1985 Fla. Laws ch. 85-55 § 46 (to be codified at FLA. STAT. § 380.0651(4) (1985)). An aggregation criteria rule, based on Department recommendations, is to be adopted by the Administration Commission no later than March 1, 1986. In addition to common ownership or majority interest, the development must share either proximity, infrastructure, advertising or management, or be a part of a "unified plan of development." *Id.*

93. *E.g., Friends*, 456 So. 2d 904.

94. Finnell, *Coastal Land Management in Florida*, 1980 AM. BAR FOUND. RESEARCH J. 303, 381.

95. *Friends*, 456 So. 2d at 906. *See* Pelham, *DRI Agreements: A New Technique for Implementing Chapter 380*, 56 FLA. B. J. 51 (1982). 1985 Fla. Laws ch 85-55 § 43 (to be

Incentive approach zealots believe it is imperative that third party standing never be allowed in chapter 380.[96] Their fear is that third party standing will needlessly delay the already time consuming process, making it even less attractive to developers. This notion is frequently characterized by complaints like: "If every little old lady in tennis shoes is allowed standing, it will kill the process." Apart from the ageist and sexist connotations in this argument, it is offensive because it is misleading. The law is well-established that only substantially affected citizens have standing in chapter 120 administrative proceedings. It is equally as important to establish that all substantially affected persons have standing in all administrative actions.

A. The Precedence of Chapter 120

Chapter 380 involves administrative agency action from a binding letter determination through the final order from the appeal to the Adjudicatory Commission. Even the local government, when it acts pursuant to chapter 380, is deemed to be an agency.[97] Yet only certain sections of chapter 380 are subject to the Administrative Procedure Act in chapter 120 of the Florida Statutes.[98]

In *Caloosa*,[99] the homeowner association, arguing for standing, asserted that chapter 120 supersedes or implicitly repeals section 380.07(2). In support of its position, the association cited to section 120.72(1)(a), which states that it is the express intent of the legislature that chapter 120 supersede all other provisions in the Florida Statutes relating to rulemaking, agency orders, administrative adjudicatory or licensing procedure, or judicial review or enforcement of administrative action to the extent that such provisions conflict with chapter 120.[100] The court rejected this argument,

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codified at FLA. STAT. § 380.06(8) (1985)) specifically empowers the Department to authorize preliminary development agreements.

96. Such practitioners traditionally argue that if citizens are allowed standing under chapter 380, developers will spare no expense in avoiding the process.

97. FLA. STAT. § 380.031(6)(c) (1983). It is important to note, however, that the definitions of "agency" in §§ 380.031(6) and 120.52(1) are entirely independent.

98. For example, FLA. STAT. § 380.032(2) (1983), which gives the Department the authority to promulgate rules to implement the Act, provides in subsection (2)(b) that any substantially affected party may request the Administration Commission (governor and cabinet) to review a rule adopted by the Department.

99. Caloosa Property Owners v. Palm Beach County Bd. of County Comm'rs, 429 So. 2d 1260 (Fla. 1st DCA 1983).

100. *See* FLA. STAT. § 120.72(1)(a) (1983). For an in depth examination of the topic *see* Means, *Repeals By Implication in Florida: A Case Study*, 7 FLA. ST. U.L. REV. 423 (1979).

holding there was no demonstrated intent to repeal section 380.07(2) and expressed general judicial reluctance to repeal statutes by implication.[101] The court also held that the Adjudicatory Commission did not need to apply for an exemption from the standing provision of chapter 120[102] "because by virtue of section 380.07 the legislature has in part exempted the Commission from the requirements of chapter 120."[103]

The result of this circuitous reasoning sustains the inconsistencies and inequities which were precisely what the legislature intended to cure in enacting the APA. In an article on statutory repeal under the APA, Earnest Means, former Director of the Florida Statutory Revision Committee, states: "It is difficult to imagine language better calculated to bring about statewide uniformity of administrative procedures."[104] Means distinguishes certain statutory procedural provisions as two-tiered adjudication systems and characterizes those statutes as providing administrative review rather than administrative adjudication. Since "administrative review was not one of the named elements of administrative procedure for which the Act mandated replacement,"[105] those statutes, even if in conflict with chapter 120, would still survive.

Thus, the First District Court of Appeal in *Caloosa* may have been correct in ruling that section 380.07(2) was not affected by the APA. However, the true two-tiered procedure provides for a review in the nature of an appellate court review. The statutes which incorporate it do not limit standing and do not present the legal problems that section 380.07(2) does. In any event, the binding letter determination is a different situation. It is agency action and it has substantial effects upon third parties. Under the *Caloosa* regional impact rationale, the binding letter process is not subject to section 120.57 proceedings. Unless it can be held as a

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101. *Caloosa*, 429 So. 2d at 1265.

102. *See* FLA. STAT. § 120.63 (1983). The APA provides a mechanism for exemptions for its requirements provided the agency petitioning has established an alternative consistent with the APA where the APA rule conflicts with federal rules, the exemption would permit payment of federal funds, or the APA rule is so impractical that it defeats the purposes of the agency.

103. 429 So. 2d at 1266.

104. Means, *supra* note 100. In construing the effect of the APA on other statutes, the First District Court of Appeal has reached a different result. That court held in State ex rel. Dep't of Gen. Servs. v. Willis, 344 So. 2d 580 (Fla. 1st DCA 1977), that review of final administrative orders must be governed by the APA. *See also* Todd v. Carroll, 347 So. 2d 618 (Fla. 4th DCA 1977).

105. Telephone interview with Ernest Means, attorney-author of APA Revision Bill in Tallahassee, Fla. (Mar. 20, 1985).

matter of law that no third party is substantially affected, the binding letter process would be subject to the APA because there is no two-tiered administrative review otherwise available.[106]

B. The Compromise

The standing reforms proposed to date have been tailored in such a fashion as to dissipate those fears that "little old ladies in tennis shoes" will be tying up the process. A proposed standing provision before the 1985 Florida Legislature most favorable to the environmentalists would have created a stricter threshold than the standard of chapter 120, but does provide a mechanism for entry into the DRI process.[107]

Based on a report by the Elms II Committee,[108] the provision would limit standing to persons who participate in the hearings at the local level. Additionally, it would require that the affected parties file a petition requesting a right to appeal with the Adjudicatory Commission, which may or may not be granted. However, if the petition were rejected, that decision would be reviewable under section 120.68.[109]

The Elms II Committee position is more restrictive than that in the APA decisional law.[110] According to the report, standing would be accorded to those "who are or will be adversely affected by the proposed development. The alleged adverse effect may be shared in common with other members of the community, but must be greater in degree than every other member of the community could claim."[111] Thus, injury in fact is not enough; the injury must be greater than that which the community at large suffers. This threshold is higher than that required in the APA, but lower than

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106. *Supra* note 20 and accompanying text.

107. H.B. 287 (Fla. 1985). *See supra* note 47.

108. The Elms II committee was created pursuant to Exec. Ord. No. 82-95 issued by Governor Bob Graham on August 23, 1982. The committee was charged with making recommendations to improve the effectiveness of ch. 380 in regard to balancing environmental protection and economic concerns. *See* Elms II, *supra* note 90. The individuals chosen to be committee members can be readily separated into the environmental or developer camp. The obvious outcome, indeed the anticipated result, of this committee design was to reach a workable middleground acceptable to the polarized concerns represented. Although this objective should not be eschewed, it should be seen for what it is, a political compromise.

109. Elms II, *supra* note 90, at 90. Charles Lee, Vice President of the Florida Audubon Society and outspoken proponent of citizen standing, supports this proposal. He believes that it "provides a safeguard against frivolous appeals." Telephone interview, Charles Lee, in Maitland, Fla. (Mar. 20, 1985).

110. *Supra* notes 9-12 and accompanying text.

111. Elms II, *supra* note 90, at 90.

that required in a zoning action.[112]

C. *The Section 403.412 Alternative*

An alternative vehicle for third parties, including those who are not "specially injured" or "substantially affected," is in section 403.412, Florida Statutes. This statute allows actions to be initiated by any citizen or citizens' group. It has the potential to provide for effective monitoring assistance to the state and regional agencies.

The Florida Environmental Protection Act[113] expressly confers on the citizens of Florida a cause of action to compel a governmental agency to comply with its duty to enforce regulations designed to protect the natural resources of the state and to enjoin any person, governmental agency, or authority from violating such laws, rules, or regulations.[114] In an alternative attempt to achieve redress, appellants in *Friends* sought to compel the Department to take an appeal to the Adjudicatory Commission pursuant to section 403.412(2).[115]

This presented an issue of first impression. The court recognized that section 403.412 confers a substantive cause of action for citizens to institute suit for the protection of their environment without a showing of "special injury," but the court interpreted the requirement in section 403.412(2), which allows the agency thirty days following receipt of a complaint to act,[116] as a condition precedent and in lieu of the special injury rule. The court emphasized that administrative agency actions are generally not to be interfered with by the judiciary. Hence, the complaint failed to state a cause of action because it fell short of alleging collusive action on the part of the developer, the regional planning council, and the Department.[117] The court held that section 403.412(2) is only applicable to enjoin patent violations of environmental laws, "or such palpable abuse of authority which may be said to be commensurate with illegality."[118] The statutory scheme of chapter 380 and the dearth of rules for the state land planning agency vest the Depart-

112. *Supra* note 48 and accompanying text.
113. FLA. STAT. § 403.412 (1983).
114. FLA. STAT. § 403.412(2)(a) (1983).
115. 456 So. 2d 904.
116. *Id.* at 912.
117. *Id.* at 914.
118. *Id.* Environmental groups are generally not financially able to use § 403.412 because of the chilling effect of the mandatory attorney's fees provision in subsection (2)(f).

ment with an extraordinary amount of discretion. It would seem unlikely that a third party would ever be able to show that the Department acted arbitrarily, capriciously, or in derogation of its duties under the Act.

Although the decision of the court made invoking subsection (2) of section 403.412 practicably infeasible, it may unwittingly have resolved that section 403.412 is applicable to chapter 380.[119]

D. Separation of Powers

Prior to 1956, the Florida Legislature had ultimate control of judicial rulemaking, but with the adoption of article V, section 2 of the Florida Constitution of 1968,[120] the power to adopt rules for practice and procedure in all courts was vested in the supreme court. Coupled with the separation of powers provision found in article II, section 3 of the Florida Constitution,[121] legislative incursion into the exclusive rulemaking powers of the supreme court is absolutely precluded.

In a leading case, *Avila South Condominium Association v. Kappa Corp.*,[122] the Supreme Court of Florida held unconstitutional a statute that attempted to legislate standing. The court found that a statute which names the parties who have standing is procedural, not substantive, and therefore is not valid. The distinction between substantive rights and procedural rights is often difficult to draw.

The viability of section 403.412 was challenged under this doctrine. That part of the statute which grants standing to plaintiffs without the necessity to allege and prove special injury was found by the trial court to be unconstitutional as an impermissible invasion by the legislature into the rulemaking powers of the judiciary.

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119. The Elms II Report proposes amending the language of § 403.412 to include "land" in the inventory which currently includes "air, water, and other natural resources."

In Morrill v. Edward Ball Wildlife Found., No. 401 (Fla. 2d Cir. Ct. July 2, 1973) *aff'd*, No. U-29 (Fla. 1st DCA May 12, 1974), cited in Comment, *The Florida Environmental Protection Act of 1971: The Citizen's Role in Environmental Management*, 2 FLA. ST. U.L. REV. 763 (1974), the definition of natural resources was at issue. The judge held that wildlife and fish are not natural resources.

120. FLA. CONST. art. V, § 2(a). This section provides: "The supreme court shall adopt rules for the practice and procedure in all courts. . . ."

121. FLA. CONST. art. II, § 3 provides: "The powers 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."

122. 347 So. 2d 599 (Fla. 1976).

But the Supreme Court of Florida in *Florida Wildlife Federation v. Department of Environmental Regulation*[123] upheld the constitutionality of section 403.412, holding that it created a new cause of action.

The third party in *Caloosa* charged that section 380.07(2) was unconstitutional based on a similar separation of powers theory. The First District Court of Appeal dismissed this challenge as having been settled by *Florida Wildlife*.[124] In fact, whether the ELWMA creates new substantive rights or provides a new procedural overlay on existing rights is unclear. Until 1983 the case law was settled that chapter 380 merely shifted certain land use litigation from the circuit court to the Adjudicatory Commission.[125] However, in *Caloosa*, the court stated that chapter 380 created a new cause of action.[126]

The supreme court looked to the definitive opinion on the subject, *In re Rules of Criminal Procedure*,[127] to determine whether the statute at issue in *Avila* was procedural or substantive. Justice Adkins' explanation of the difference between procedural rules and substantive rules offers invaluable guidance:

> Practice and procedure encompass the course, form, manner, means, method, mode, order, process or steps by which a party enforces substantive rights or obtains redress for their invasion. "Practice and procedure" may be described as the machinery of the judicial process as opposed to the product thereof. . . . Substantive law includes those rules and principles which fix and declare the primary rights of individuals as respects their persons and their property. As to the term "procedure," I conceive it to include the administration of the remedies available in cases of invasion of primary rights of individuals. The term "rules of practice and procedure" includes all rules governing the parties, their counsel and the Court throughout the progress of the case from the time of its initiation until final judgment and its execution.[128]

Adherence to this characterization of the distinction between procedure and substance leads unavoidably to the conclusion that section 380.07 is procedural. This does not necessarily mean, how-

123. 390 So. 2d 64 (Fla. 1980).
124. *Caloosa*, 429 So. 2d at 1267.
125. *Supra* notes 65-67 and accompanying text.
126. *Supra* note 124.
127. 272 So. 2d 65 (Fla. 1972).
128. *Id.* at 66.

ever, that section 380.07(2) is a violation of article V, section 2. The Florida Constitution prohibits the legislature from adopting rules for practice and procedure in all *courts*. Section 380.07 specifies the parties who have standing to appeal to the Adjudicatory Commission; it does not name the parties who have standing to seek review in the district court or take a case of original jurisdiction to the circuit courts. Nonetheless, it is important to keep in mind that if none of the four named parties in section 380.07 appeal the development order to the Adjudicatory Commission, the DRI issues will never be subject to review by the district court because there will be no Adjudicatory Commission order. The substantially affected third party is limited in circuit court to arguing issues of special injury[129] subject to the oppressive "fairly debatable" rule. As a practical matter, by restricting standing in chapter 380, the legislature has limited standing in the courts.

IV. CONCLUSION

The State of Florida is plagued by inherent conflict in its desire to encourage development and its cognizance of the precarious future of our sensitive natural environment. "Growth management" and "protection of our precious natural resources" are phrases bandied about by legislators at every opportunity, while legislation is passed that significantly undercuts effective, private monitoring and enforcement of environmental laws.[130]

The purpose of chapter 380 is to protect the natural resources and environment of the state. When a particular development

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129. *Supra* note 8 and accompanying text.

130. However, the 1985 legislature amended the Local Government Comprehensive Planning Act of 1975, FLA. STAT. ch. 163 (1983), to increase citizen participation in the development and implementation of local government comprehensive plans. Any "affected person," defined as a person who resides, owns property, or owns or operates a business in the jurisdiction of the local government whose plan is at issue, may challenge the Department's determination that a plan is consistent with the Act. *See* 1985 Fla. Laws ch. 85-55 § 8 (to be codified at FLA. STAT. § 163.3184 (1985)).

Any "substantially affected person," as that term is defined in relation to chapter 120, may challenge a local government land use regulation as inconsistent with the approved local plan. 1985 Fla. Laws ch. 85-55 § 14 (to be codified at FLA. STAT. § 163.3202 (1985)). To achieve standing to challenge an action of local government approving or disapproving an individual project, a plaintiff must show a legally cognizable interest that is adversely affected. A person may be affected in a manner which is shared with the rest of the community, but must be affected to a greater degree than the community at large. The standing provision comports with the Supreme Court of Florida holding in Citizens Growth Management Coalition v. City of West Palm Beach, 450 So. 2d 204 (Fla. 1984), except that the act includes a broad list of legally cognizable interests which the plan is developed to protect. 1985 Fla. Laws ch. 85-55 § 18 (to be codified at FLA. STAT. § 163.3215 (1985)).

poses a threat so great to the environment that its impact will be felt on a regional or statewide level, the developer must compile environmental impact studies before the local government may approve the development application.

A development order issued by the local government can be appealed under section 380.07(2) by only four parties: the owner, the developer, the regional planning council, and the state land planning agency. All other interested persons are denied standing as a matter of law. Thus, the opportunity for legal challenges depends not on the subject matter, but on the identity of the complainant. A developer who has only a prospective, speculative economic interest in the outcome of the DRI process is granted standing, while a party who has an immediate, real property interest in the effect of the DRI is not accorded standing to challenge the DRI order. The "right" of the owner/developer to an expeditious DRI review found in the statute by the courts is dominant over any interests of substantially affected third parties. This patently disparate treatment is acceptable to, and in some cases embraced by the government as a necessary incentive to implement chapter 380.

The judiciary, with a few noted exceptions, has failed to bring chapter 380 in line with the traditional legal rationales germane to standing.[131] The *Caloosa* court, in particular, demonstrated considerable agility in fashioning an innovative rationale to support its conclusions. The basis for limited standing is the preconceived conclusion that substantially affected parties will obstruct the pro-

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131. The policy reasons behind the special injury requirement were founded in equity and were designed to protect a defendant against a multiplicity of actions. It evolved into an obstacle preventing recovery for an injury actually sustained or for protection from a future injury if the injury was or would be suffered in common with the community. However, causes of action pertaining to injury to the environment or natural resources do, by their nature, involve equivalent harm to many.

United States v. SCRAP, 412 U.S. 669 (1973), and Sierra Club, Inc. v. Morton, 405 U.S. 727 (1972), held that an injury to many is no less deserving of judicial review than is a special injury. However, injury in fact must be present to insure that the plaintiff will have a sufficient personal stake in the outcome of the case. In *Sierra Club*, a claim that construction of a recreation area in a national forest would violate federal laws was initially denied because the Sierra Club claimed standing as a "representative of the public." The Supreme Court allowed standing on an amended complaint which alleged that some of the Sierra Club members used the forest and would be injured by the construction. Similarly, in SCRAP, an environmental group gained standing when it alleged that members of the group who "breathe the air" and "use the forests, rivers, streams, mountains, and other natural resources" in the Washington area were injured. The Court stated "to deny standing to persons who are in fact injured simply because many others are also injured would mean that the most injurious and widespread government actions would be questioned by nobody." *SCRAP*, at 688.

cess and that their interests and rights are not equal to those of the developers.

It is not necessary for efficient and ordered administration to demonstrate this favoritism; only those who actually have the requisite threshold interest would be permitted access. However, the court must recognize that a regional impact will have an impact on at least one particularized local interest and that all substantially affected parties have an interest in orderly development.

Many Floridians are committed to the state constitutional policy of protecting natural resources and scenic beauty. In fact, approximately 200,000 Floridians petitioned for standing to protect the environment in 1984.[132] Floridians effectively participating in environmental regulatory schemes can provide an invaluable aid to the monitoring and enforcement efforts of the state land planning agency. In the long range this may be the most important incentive to development because it is unlikely that Florida will continue to attract new residents and vacationers if our natural resources have been devastated.[133]

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132. The Clean Up '84 campaign provides evidence of the frustration spawned from the legislative and judicial limitations of access to the courts by those who have an interest in protecting the environment and conserving natural resources. Over 200,000 Floridians signed petitions to place a constitutional amendment on the ballot.

Clean Up '84 was an effort to amend the Florida Constitution to establish a right to a healthful environment and the right to know if that healthful environment has been endangered. It would have established natural water, air, and wildlife as a public trust and granted standing to each person, governmental or private, to enforce these rights against all other persons through legal proceedings. It would have provided an advantage over § 403.412 to citizen advocates since it contained no mandatory attorney's fees provision or bond requirement.

133. *See* Belmont, *supra* note 1 for an excellent discussion of these impacts to the fate of the Florida environment.