IN THE SUPREME COURT
STATE OF FLORIDA

SANTA ROSA COUNTY, FLORIDA

Appellant

v.

CASE NO.: 84-85,545

ADMINISTRATION COMMISSION, DIVISION OF ADMINISTRATIVE HEARINGS, DON W. DAVIS, in his capacity as Hearing Officer for the Division of Administrative Hearings, and DEPARTMENT OF COMMUNITY AFFAIRS,

Appellees.

SANTA ROSA COUNTY'S INITIAL BRIEF ON THE MERITS

KENNETH G. OERTEL
Fla. Bar ID #128808

M. CHRISTOPHER BRYANT
Fla. Bar ID #434450

OERTEL, HOFFMAN, FERNANDEZ
& COLE, P.A.
Post Office Box 6507
Tallahassee, Florida 32314-6507
(904) 877-0099

and

THOMAS V. DANNHEISSER
Fla. Bar ID #323942

County Attorney
Santa Rosa County
801 Caroline Street, S.E.
Suite J
Milton, Florida 32570-5978

Attorneys for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FLORIDA STATUTES

FLORIDA ADMINISTRATIVE CODE

OTHER

STATEMENT OF THE CASE AND THE FACTS

Santa Rosa County (the "County") seeks review of the opinion of the First District Court of Appeal in Santa Rosa County v. Administration Commission, et al., _____ So. 2d _____, 19 F.L.W. D1965 (Fla. 1st DCA, Opinion filed September 14, 1994). The opinion affirmed entry of a summary judgment in a Leon County Circuit Court suit for declaratory relief filed by the County. The District Court held that the County lacked standing to bring the declaratory judgment action.

The County's declaratory judgment action challenged the constitutionality of certain comprehensive planning statutes (Part II of Chapter 163, Florida Statutes) and rules (found in Rule 9J-5, Fla. Admin. Code) applied by the Department of Community Affairs ("the Department"). Pursuant to the Local Government Comprehensive Planning and Land Development Regulation Act (the "Act"), Sections 163.3161, et seq., Florida Statutes, local governments--municipalities and counties--are required to prepare comprehensive plans ("comp plans") conforming with the requirements of the Act and submit them to the Department for review.

The following chronology of events concerning the County's planning efforts is described in the County's Complaint for Declaratory Judgment [at R. 165-66].[1] As required by the Act, the County submitted a proposed comp plan to the Department for written

---

[1] Citations to the record are based on the same record that was before the First DCA, with the same record numbering system used there.

comment on April 2, 1990. On July 10, 1990, the Department provided the County with its objections, recommendations and comments regarding the County's comp plan. Subsequently, the County adopted its comp plan by ordinance on September 13, 1990. On November 21, 1990, the Department issued its "Statement of Intent to Find the Comprehensive Plan Not in Compliance" with Department Rule 9J-5, and Chapter 163, Florida Statutes. On December 5, 1990, the Department filed its Petition with the Division of Administrative Hearings for a determination that the County's comp plan did not comply with Chapter 163, Florida Statutes. Among the inconsistencies, the Department alleged:

a. The County's comp plan failed to discourage urban sprawl as required by Rules 9J-5.006(3)(b)7 and 9J-5.011(2)(b)3, and was inconsistent with other requirements of Rule 9J-5.006(3)(b);

b. The Coastal Element of the County's comp plan was inconsistent with Section 163.3177(6)(g), Fla, Stat., and Rule 9J-5.012; and

c. The County's comp plan was inconsistent with several provisions of the West Florida Regional Policy Plan, in violation of Sections 163.3177(10)(a) and 163.3184(1)(b), Fla. Stat. [R. 166]

On November 27, 1991, the County filed a Complaint for Declaratory and Injunctive Relief in Santa Rosa County Circuit Court, seeking in part to have a declaration as to the constitutionality of the statutes and rules being applied to the

County in the administrative comp plan case. [R. 161-184] The lawsuit was filed in the Circuit Court of the First Judicial Circuit in and for Santa Rosa County, Florida, and was later moved to circuit court in Leon County. [R. 1-7]

The County's Complaint sought declaratory judgment on the following issues:

a. The validity and constitutionality of several provisions of Rule 9J-5, which require that local government comp plans contain provisions which discourage the proliferation of "urban sprawl" and achieve other land use goals;

b. The constitutionality of provisions of Section 163.3184, Fla. Stat, which authorize the Administration Commission to withhold legislative appropriations to the County, to direct state agencies not to undertake certain infrastructure activities in the County, and allow DNR and the Board of Trustees of the Internal Improvement Trust Fund to withhold permit and consent of use approvals if it is determined that the comp plan is inconsistent with the Coastal Element requirements of Rule 9J-5;

c. The validity and constitutionality of provisions of Rule 9J-5 and Sections 163.3184 and 163.3177, Fla. Stat., that require that comp plans be consistent with Regional Policy Plans; and

d. The validity of parts of Rule 9J-5.012, which set out requirements for what a comp plan must contain in its Coastal Element. [R. 166-67]

After denial of various motions to dismiss the Complaint, the case was reassigned from Circuit Judge George Reynolds to Circuit Judge Ralph Smith. The Department then filed its Motion for Summary Judgment, alleging among other things that the Department and Santa Rosa County had settled the administrative litigation concerning compliance of the comp plan, and that the civil litigation in this case was thus moot, as there was no present need for a declaratory judgment. The motion was granted on the grounds of mootness due to the settlement. [R. 497] The County's Motion for Rehearing on the entry of summary judgment was subsequently denied [R. 567-570], and the district court appeal followed.

The rationale of the trial court's decision to grant summary judgment was that, as long as Santa Rosa County and the Department of Community Affairs had settled their administrative dispute regarding whether the County's comp plan was in compliance with the Act, the County had no entitlement to an adjudication of the validity of the law which dictated what must be contained in such plans. [R. 499]

The Department's Motion for Summary Judgment stated in its first section a list of "Undisputed Material Facts." [R. 345-54] The facts were really no more than a short procedural history of growth management planning. Nowhere in the list was any reference to any settlement agreement between the County and the Department relating to the administrative comp plan case. However, in section II.B., paragraph 35 of the Motion, the Department argues:

> Santa Rosa County has no current, concrete dispute regarding enforcement of Chapter 163, Part II, or any rules promulgated under the Act. In fact, it has already settled with the Department and will avoid sanctions altogether if it follows through on the terms and conditions of its settlement agreement . . . .

[R. 357] (emphasis added) Although the statement highlighted that the existence of a settlement is the total foundation for the Summary Judgment, the Department acknowledged that even if a settlement had been reached, that is no guarantee that the case is over or that County will avoid sanctions.

The Summary Judgment entered below assumed that the parties had reached a final settlement and the case is not subject to continued litigation:

> On June 24, 1992, a settlement agreement was entered into between the County and DCA, which resolved the disputes between the parties arising out of or related to the comprehensive plan adopted by the County.

[R. 499] As was admitted by the Department through an affidavit of Department Secretary Linda Loomis Shelley, and as argued in the Motion for Summary Judgment, the settlement agreement is no guarantee of finality and by itself does not resolve the disputes between the parties. Rather, the County must amend its comprehensive plan to the satisfaction of the Department, and the rules the Department will use to evaluate the amendments are some of the ones being challenged by the County. If the amendments were deemed by the Department as not "in compliance," the case would go to a DOAH hearing, and the statutory provisions being challenged

would supply the sanctions applied to the County for non-compliance. Further, the settlement agreement referenced in the Summary Judgment did not settle all disputes between the parties.

The County filed a Motion for Rehearing on the trial court order granting summary judgment, and included as a Supplement to that motion copies of six petitions filed in the administrative comprehensive plan case by persons who had achieved party status and who objected to the plan as originally enacted. [R. 533-64] None of those third parties had reached any settlement with the County or DCA, and each of them could still have forced that case through final hearing on the original plan. Thus, regardless of the settlement stature of the County and Department, other parties existed in that case who had not settled.

Following the County's Motion for Rehearing, the trial court essentially repeated its ruling in the Summary Judgment, but added:

> In its Motion for Rehearing, Santa Rosa County alleges that it still needs a declaration because it will have future problems in complying with Chapter 163 and Rule 9J-5. This Court lacks jurisdiction to entertain hypothetical disputes which may or may not occur in the future nor does this Court have jurisdiction to give advisory opinions.

[R. 569] No mention was made of the outstanding petitions, or of any case that was cited by the County in support of the argument in its Motion for Rehearing that the circuit court has jurisdiction.

The only fact which existed in the record is that a Settlement Agreement dated June 24, 1992, exists, but the factual implications of the document are hotly contested. The basis for the Summary

Judgment was the "fact" that all disputes in the administrative case are resolved by the settlement, and nowhere has that fact been proven. Indeed, indications **from the Department** were that the settlement is but another step in the ongoing and continuous process of adoption and amendment of the County's Comprehensive Plan.

In denying the County's Motion for Rehearing on Summary Judgment, the trial judge touched on but did not expressly rule on the issue of standing. The trial judge stated that:

> There was a close question as to whether Santa Rosa County, as a political subdivision, had standing to offensively challenge the constitutionality of certain statutes and rules, Department of Education v. Gerald Lewis, 416 So. 2d 455 (Fla. 1982). The Court concluded that Santa Rosa County's tenuous standing was predicated on its present and ongoing dispute with DCA, in which the administrative proceeding was then pending before [DOAH Hearing Officer] Don Davis.

[R. 568-569] The court order concluded by stating that there was "no longer an actual controversy . . . nor . . . a bona fide, present need for the declaration" [R. 569]; in other words, deciding that the case was moot.

On appeal, the First District Court of Appeal reversed the trial court on the mootness issue, finding that the law being challenged will have a recurring effect because of the ongoing nature of the planning process and the County's continuing obligations under the planning statutes and rules. The appellate court also recognized the "wide public interest" evoked by the

County's suit because of the applicability of the challenged statutes and rules to every county in Florida. Santa Rosa County v. Administration Commission, 19 F.L.W. at D1966-1967.

The District Court held, however, that the County lacked standing to challenge the statutes and rules, applying a rule that legislation affecting the duties of state officers and agencies is presumed valid, and that such parties do not have standing to assert otherwise. 19 F.L.W. at D1967. The District Court agreed with the County that compliance with the challenged act would "increase[ ] the cost of governance," and acknowledged the County's argument that the challenged provisions presented the potential for the loss of legislative appropriations to the County. Id. Nevertheless, the appellate court held that these actual and potential fiscal impacts did not bring the County within the recognized exception to the above stated general rule: the exception being that public officers and agencies charged with managing public funds can challenge statutes affecting such funds.

The District Court did certify the following question to this Court as a question of great public importance:

> DOES A COUNTY HAVE STANDING TO CHALLENGE BY A DECLARATORY ACTION THE CONSTITUTIONALITY OF A STATUTE OR RULE WHICH INDIRECTLY REQUIRES THE COUNTY TO EXPEND PUBLIC FUNDS IN ORDER TO COMPLY WITH THE MANDATES OF SUCH STATUTE OR RULE, AND FURTHER PROVIDES FOR A POTENTIAL LOSS OF REVENUE TO THE COUNTY IN THE EVENT OF NONCOMPLIANCE?

Id. The County timely filed its Notice to Invoke the Discretionary Jurisdiction of this Court on October 14, 1994. The Notice raised

as bases for jurisdiction both the certified question and a conflict between the First District's ruling and a decision of another District Court of Appeal or of the Supreme Court on the same question of law. In its timely filed jurisdictional brief, limited solely to the conflict basis of jurisdiction, the County explained the conflict between the District Court's ruling and this Court's opinion in City of Pensacola v. King, 47 So. 2d 317 (Fla. 1950).

Pursuant to the briefing schedule established by this Court's order of October 21, 1994, the County hereby submits its initial brief on the merits.

SUMMARY OF THE ARGUMENT

County governments in Florida have the power and duty to plan for and regulate growth and land use within the county. The power to plan has both a constitutional and a statutory basis, and it involves the exercise of discretion and judgment by the County's legislative body, its board of county commissioners. Santa Rosa County has standing to challenge the constitutionality of statutes and rules which constrain the County's exercise of its planning discretion and judgment.

The general rule that public officers and bodies lack standing to challenge statutes affecting their duties is based on the ministerial, administrative nature of such officers' duties. For this reason that general rule is not applicable to counties seeking to challenge statutes affecting the legislative task of comprehensive plan adoption and amendment. Unlike executive officers and agencies, who should carry out without question the duties created for them by legislatures, the County as a planning agency is fulfilling a legislative task. The County should be allowed to challenge planning statutes and rules in order to protect the exercise of legislative discretion by a board answerable to the citizens affected by such legislative action.

Even if the general rule prohibiting challenges to statutes and rules were deemed applicable to counties exercising legislative functions, an exception to this rule exists where the public body is charged with the control and disbursement of public funds. This

exception applies to the County in the planning arena in two distinct ways.

First, preparing, adopting and amending a comprehensive plan requires the expenditure of County funds. The County is required to hold hearings, gather and analyze data, perform surveys and studies, prepare maps, and print and distribute copies of the plan and plan amendments. All of these actions cost money, and the County must incur these costs in engaging in planning. Incurring such costs has been deemed sufficient by this Court and other Florida courts to create an exception to the general rule and allow constitutional challenges to statutes, even where it was only possible and not certain that such costs would have to be incurred.

Second, the statutes which Santa Rosa County sought to challenge can result in loss of significant funding sources to the County, in the event its plan is deemed not in compliance with planning statutes, rules, and a regional policy plan. These funding sources include tax revenue sharing, state money for infrastructure development and improvement, and various grant moneys. By allowing an executive branch agency (the Administration Commission) to withhold state funding, and thus reorder legislative funding priorities, the statutes in question violate the separation of powers doctrine of the Florida Constitution. Even if the County could not normally affirmatively challenge the constitutionality of these statutes, it is entitled to raise such issues defensively when the County's compliance with the statute is placed at issue; that is exactly what the County attempted to do here, in the only

forum (circuit court) in which such issues could be decided. The County has a right to protect and preserve public funds available to it which the subject statutes and rules place in peril.

ARGUMENT

I. SANTA ROSA COUNTY IS ENTITLED TO CHALLENGE PORTIONS OF CHAPTER 163, FLORIDA STATUTES, AND RULE 9J-5, FLORIDA ADMINISTRATIVE CODE, BECAUSE OF THE CONSTRAINTS THEY IMPOSE ON THE COUNTY PLANNING PROCESS.

Section 125.01(1)(g), Fla. Stat., authorizes the legislative and governing body of a county to "prepare and enforce comprehensive plans for the development of the county." This planning function along with others, is granted "to the extent not inconsistent with general or special law." Section 125.01(1), Fla. Stat. Part II of Chapter 163 gives to counties the "power and responsibility" to plan for their future development and growth, and, specifically, to "adopt and amend comprehensive plans . . . to guide their future development and growth . . . ." Section 163.3167(1), Fla. Stat.

The Florida Constitution grants to non-charter counties such as Santa Rosa County "such power of self-government as is provided by general or special law." Art. VIII, § 1(f), Fla. Const. A non-charter county's board of county commissioners may enact "county ordinances not inconsistent with general or special law." Id.

In recognition of a county's right to plan, the Florida Legislature expressed its intent in adopting Chapter 163:

> It is the intent of the Legislature that the repeal of [prior comprehensive planning statutes] shall not be interpreted to limit or restrict the powers of municipal or county officials, but shall be interpreted as a recognition of their broad statutory and constitutional powers to plan for and regulate

> the use of land. It is, further, the intent of the Legislature to reconfirm that [the provisions of the Act] have provided and do provide the necessary statutory directions and basis for municipal and county officials to carry out their comprehensive planning and land development regulation powers, duties, and responsibilities.

Section 163.3161(8), Fla. Stat. (emphasis added). Section 163.3191, Fla. Stat., titled "Evaluation and appraisal of comprehensive plan," at subsection (1) states:

> The planning program shall be a continuous and ongoing process. The local planning agency shall prepare periodic reports on the comprehensive plan, which shall be sent to the governing body and to the state land planning agency at least once every five years after the adoption of the comprehensive plan. . . . It is the intent of this act that adopted comprehensive plans be periodically updated through the evaluation and appraisal report.

(Emphasis added.) Section 163.3194, Fla. Stat., contains provisions on the legal status of a comprehensive plan. After a plan is adopted in conformity with Chapter 163, "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." Section 163.3194(1)(a), Fla. Stat.

From now until the laws are repealed or amended, Santa Rosa County and her residents will have to comply with Chapter 163 and Rule 9J-5 in implementing the County's comp plan, and in all plan amendment proceedings. The rules and statutes challenged by Santa Rosa County in this case go far beyond requiring the adoption of a plan, mandating inclusion of certain elements, and establishing

procedures for the adoption and amendment of plans. The challenged statutes and rules constrain the County's exercise of discretion in making its substantive planning decisions by requiring that certain policies be implemented, regardless of whether the County and its residents agree with them.

For example, Rule 9J-5.006(3)(b)8 (formerly (3)(b)7) requires that the future land use element of local comp plans contain objectives and goals which "discourage the proliferation of urban sprawl." Santa Rosa County's plan, when reviewed by the Department, was found to be not in compliance with this rule.

Discouraging "urban sprawl," a term not defined in rule or statute, is also required by the Department in the comp plan element relating to sewer, waste, and water. Rule 9J-5.001(2)(b). Other substantive goals required in comp plans by Rule 9J-5 include encouraging redevelopment (Rule 9J-5.006(3)(b)2) and eliminating "inconsistent" land uses (Rule 9J-5.003(3)(b)3). Santa Rosa County sought to challenge these rules in its declaratory judgment action, both as exceeding the Department's statutory grant of rulemaking authority in violation of the separation of powers doctrine, and as violating Santa Rosa's constitutional home rule powers.

The County also sought to challenge the statute and rule requirements that comp plans be consistent with regional policy plans; see Section 163.3177(10)(a) and 163.3184(1)(b), Fla. Stat., and Rule 9J-5.021, Fla. Admin. Code. Regional policy plans are adopted by regional planning councils, consisting of representatives of counties and municipalities within the region,

as well as gubernatorial appointees. Section 186.504, Fla. Stat. In Santa Rosa County's case, the County is only one of seven counties with members on the Council, and yet the Council can usurp the County's planning power by essentially having veto power over the County's comp plan. By requiring consistency of county comp plans with regional policy plans, other counties and municipalities, through their representatives on the Council, can restrict a county's exercise of its planning discretion and judgment. In Santa Rosa County's situation, its comp plan was initially found by the Department to be inconsistent with the West Florida Regional Policy Plan.

The Department also initially found the County's comp plan inconsistent with Rule 9J-5.012, by not directing growth away from "known or predicted coastal high-hazard areas," and by not limiting public expenditures that "subsidize development in coastal high-hazard areas." Rules 9J-5.012(3)(b)5 and 6, Fla. Admin. Code. Santa Rosa County sought to challenge in its declaratory judgment action the Department's exceedance of its statutory authority for these rules, in violation of separation of powers, and the usurpation of the County's home rule powers.

The challenged rules will continue to influence and distort the growth of the County, contrary to the County's planning intent. And because of the existence of statutory sanctions for producing a plan found by the Department to be not in compliance with statutes, rules, and a regional policy plan, the County has little choice but to comply.

The sanctions created in the statute for having a non-compliant plan are significant ones. They include the loss of state funds for vital infrastructure development, including roads, bridges, and water and sewer systems, as ordered by the Governor and Cabinet, sitting as the Administration Commission. Section 163.3184(11)(a), Fla. Stat. This Court has previously invalidated a statute which granted to the Administration Commission the power to reorder funding priorities set by the Florida Legislature. In Chiles v. Children A, B, C, D, E, and F, 589 So. 2d 260 (Fla. 1991), this Court held that Section 216.221, Fla. Stat., violated the separation of powers doctrine found in Article II, Section 3 of the Florida Constitution, by allowing the executive branch to reduce legislative appropriations and restructure legislative funding priorities. Santa Rosa County is entitled to present this same claim of unconstitutionality to the trial court in this case.

Of course, the merits of the County's challenge to the constitutionality of the statutes and rules are not before this Court. The significance of the constraints they impose on the County's exercise of planning discretion, however, should weigh in favor of the County having standing to at least present its argument to the trial court. The District Court's ruling that Santa Rosa County lacks standing should be reversed, and the case remanded for further trial court proceedings on the declaratory judgment action.

II. SANTA ROSA COUNTY HAS STANDING TO CHALLENGE STATUTES AFFECTING ITS DUTY AND AUTHORITY TO ADOPT A COMPREHENSIVE LAND USE PLAN BECAUSE THAT IS A LEGISLATIVE DUTY, NOT A MINISTERIAL OR ADMINISTRATIVE FUNCTION.

As discussed in Argument Point I of this Brief, a county's duty and authority to develop, amend, and implement a comprehensive land use plan has a firm constitutional and statutory basis. Despite this basis, the First District Court, in this case, found that Santa Rosa County lacked standing to challenge the statutes and rules restricting the County's exercise of its planning authority.

The First District relied on those cases which follow the general rule that public officers and agencies are prohibited from challenging the constitutionality of statutes affecting their duties. The cases cited by the District Court include Department of Revenue v. Markham, 396 So. 2d 1120 (Fla. 1981) and Graham v. Swift, 480 So. 2d 124 (Fla. 3rd DCA 1985). However, in these cases, and in earlier cases which establish the general rule, the duties of the officers affected were ministerial, administrative duties.

In Department of Revenue v. Markham, supra, this Court held that the Broward County property appraiser lacked standing to challenge a Department of Revenue rule declaring household goods and personal effects of non-permanent Florida residents to be taxable. This Court noted that property appraisers "had a clear statutory duty to comply with the prescribed Department of Revenue

regulations governing the taxability of household goods." 396 So. 2d at 1121.

In Graham v. Swift, supra, the Third District held that a member of the Monroe County Commission lacked standing to challenge rules of the Administration Commission containing revised Principles for Guiding Development for the Florida Keys Area of Critical State Concern (ACSA"). Designation of ACSC's is an extraordinary measure employed when certain environmental, natural, historical or archaeological resources are threatened by uncontrolled development, Section 380.05, Fla. Stat., necessitating restrictions on and oversight of local land development regulations. Since such areas are only established when local regulation of development has proven to be inadequate to protect such resources, removal of local government's authority to challenge guidelines is reasonable. Santa Rosa County's regulation of development is not inadequate, and no such resources demanding extraordinary protection have been shown; the removal of local planning discretion that accompanies ACSC designation is not warranted here.

Examination of cases which preceded Department of Revenue v. Markham and Graham v. Swift reveals the reason for the general rule prohibiting challenges to statutes by public officers, and lays the foundation for understanding why the rule should not apply here. In Barr v. Watts, 70 So. 2d 347 (Fla. 1953), this Court held that the State Board of Law Examiners lacked standing to challenge the constitutionality of a statute which provided that "persons of

specified qualifications shall be entitled to take the bar examination." In reaching its holding, this Court acknowledged that:

> . . . the Legislature has the power to prescribe qualifications for admission to the practice of law in this state, concurrent with that of the Supreme Court. And if the Legislature has such power, then the Respondents [Board of Law Examiners] have no alternative except to administer the law in accordance with the legislative mandate. This is so because of the well established rule that a ministerial officer, charged with the duty of administering a legislative enactment, cannot raise the question of its unconstitutionality without showing that he will be injured in his person, property, or rights by its enforcement [citation omitted] or that his administration of the Act in question will require the expenditure of public funds [citation omitted].

70 So. 2d at 350 (emphasis added). This Court proceeded to explain the reason for this rule, and the "chaos and confusion" that would result if the rule did not exist:

> The people of this state have the right to expect that each and every . . . state agency will promptly carry out and put into effect the will of the people as expressed in the legislative act of their duly elected representatives. The state's business cannot come to a stand-still while the validity of any particular statute is contested by the very board or agency charged with the responsibility of administering it . . . .

70 So. 2d at 351 (emphasis added). Stated another way, state legislators are elected policy-makers, who assign duties and responsibilities to executive branch agencies through statute. Officers and employees of such agencies should carry out those

duties, not question them. The indians should not question their chiefs; the privates, and even their lieutenants, should not question the generals.

But county commissioners are policy-makers, too. They are duly elected representatives who make up a legislative body. Adoption and amendment of a comprehensive land use plan has become one of the most crucial functions of county commissioners, and can be the defining issue for voters in county elections. The county planning function is not a ministerial one; it involves the exercise of judgment and discretion, after a great deal of fact-finding, research and analysis.

More recent cases from this Court and other courts reiterate that executive officers lack standing to challenge legislative acts. These cases also serve to illustrate that it is the administrative nature of these officers' functions that renders it inappropriate for them to challenge statutes describing their duties.

In Department of Revenue v. Markham, 396 So. 2d 1120 (Fla. 1981), discussed supra, this Court held that the property appraiser of Broward County lacked standing to challenge the imposition of ad valorem taxes on household goods and personal effects of nonresident homeowners:

> Since the property appraisers . . . had a clear statutory duty to comply with the proscribed Department of Revenue regulations governing the taxability of household goods, they clearly lacked standing for declaratory relief in their governmental capacities.

396 So. 2d at 1120. Department of Revenue v. Markham was relied upon by the First District Court of Appeals in its opinion in Miller v. Higgs, 468 So. 2d 371 (Fla. 1st DCA 1985), where it ruled that a county property appraiser lacked standing to challenge the validity of a statute taxing leasehold interests in government-owned property which are used for non-governmental purposes. These rulings, and particularly the quoted excerpt from Department of Revenue v. Markham, highlight the difference between the property appraiser cases and the instant case.

Property appraisers carry out an executive or administrative function pursuant to statutes adopted by the legislature and rules adopted by the Department of Revenue. It is not up to property appraisers to determine what property is subject to appraisal and taxation; that is a legislative, law-making function. The property appraiser's job is to carry out the laws established by others.

By contrast, the initial adoption and periodic review and amendment of comprehensive plans are legislative activities. See, Board of County Commissioners of Brevard County v. Snyder, 627 So. 2d 469, 474 (Fla. 1993); Lee County v. Sunbelt Equities, 619 So. 2d 996 (Fla. 2nd DCA 1993); and Machado v. Musgrove, 519 So. 2d 629, 631 (Fla. 3rd DCA 1987) ("A local comprehensive land use plan is a statutorily mandated legislative plan . . . ."). (Limited, parcel-specific rezonings or comp plan amendments, on the other hand, are quasi-judicial decisions; Snyder.) The passage and amendment of this local legislation is not the mere application of state-legislated policy to a given set of facts; it is the creation of

land use policy by the legislative body of the county--its board of county commissioners.

In adopting comprehensive plans, local governments do not merely implement state policy. The intent section of the growth management act itself appears to recognize the discretion inherent in the act of planning:

> . . . [I]t is the purpose of this act to utilize and strengthen the existing role, processes, and powers of local governments in the establishment and implementation of comprehensive planning programs to guide and control future development.
>
> . . .
>
> It is the intent of the legislature that the repeal of [prior comprehensive planning statutes] shall not be interpreted to limit or restrict the powers of municipal or county officials, but shall be interpreted as a recognition of their broad statutory and constitutional powers to plan for and regulate the use of land. . . .

Section 163.3161(2) and (8), Fla. Stat. (Emphasis added.) The scope of the act is stated to include the following:

> The several incorporated municipalities and counties shall have power and responsibility:
>
> (a) To plan for their future development and growth.
>
> (b) To adopt and amend comprehensive plans, or elements or portions thereof, to guide their future development and growth . . . .

Section 163.3167(1), Fla. Stat. Clearly, then, in practice and in intent, comprehensive planning is not a ministerial act or process.

County commissions, which must carry out the powers and duties of planning, should not be prohibited from challenging statutes and rules which constrain their exercise of discretion, or which punish them for that exercise of discretion by withholding revenue sharing and other state funds.

Santa Rosa County does not object to the requirement that it engage in comprehensive planning. Comprehensive planning assures that the County's resources in providing infrastructure and services to new growth will not be spread too thin. But it is the County, and not the Department, who is in the best position to develop a plan which guarantees the wisest uses of County resources, and which achieves growth objectives which are in the best interest of the County and its citizens.

To give the County the power and duty to develop a comprehensive plan, but to then hold back for use by an executive branch agency a veto power over that plan, is inconsistent with constitutional and statutory rights of self-government. The public policy basis for prohibiting ministerial officers from challenging their legislatively-defined duties, as discussed by this Court in Barr v. Watts, supra, does not apply to a County's attempt to challenge constraints on its discretionary legislative power. Santa Rosa County may or may not ultimately prevail in its challenge, but it is at least entitled to its day in court to challenge the statutes and rules at issue.

III. THE SANTA ROSA COUNTY COMMISSIONERS HAVE STANDING TO CHALLENGE PORTIONS OF CHAPTER 163 AND RULE 9J-5 BECAUSE THE STATUTES AND RULE AFFECT PUBLIC FUNDS.

The lawsuit for Declaratory Judgment filed in this case was at the behest of the Santa Rosa County Commissioners in their positions as public officials. As discussed in Argument Point II of this Brief, the role fulfilled by the County Commissioners in the planning process is a legislative one, not a ministerial one, so the legal doctrine that state officers and agencies must presume legislation affecting their duties to be valid should not apply. However, even if that doctrine is applicable, it is subject to the long-standing and well settled exception that, where public officers are charged with control and disbursement of public funds, they have such an interest in the matter as to be able to challenge the constitutionality of a statute affecting public funds.

The basic reasoning behind the "public funds" exception was summarized by this Court in Barr v. Watts, 70 So. 2d 347, 351 (Fla. 1953):

> . . . when the public may be affected in a very important particular, its pocket-book, ... the necessity of protecting the public funds is of paramount importance, and the rule denying to ministerial officers the right to question the validity of the Act must give way to a matter of more urgent and vital public interest.

In this case, the Santa Rosa County Commissioners have filed suit to challenge a statute which directly and indirectly affects the

County's public funds. As a result, the County, through its Commission, can serve the vital public interest of protecting County funds by challenging the statutes and rules in question.

A. Santa Rosa County has standing to challenge statutes which require the expenditure of County funds.

As alleged in its complaint for declaratory relief, the County will continue to be subject to the requirements of the comprehensive planning act. The First District Court so acknowledged in its opinion in this case. Some of the financial burdens imposed on the County requiring to undergo comprehensive planning include:

-- **Mapping Land Use**. Preparation of maps designating future land use, groundwater recharge areas, wetlands, water bodies, soil types, and other existing and proposed features (Section 163.3177(6)).

-- **Data Analysis, Surveys and Studies**. Gathering and analyzing data and preparing surveys and studies upon which the comp plan shall be based (Section 163.3177(8)).

-- **Mapping Coastal Areas**. Preparation of a land use and inventory map of existing coastal uses, showing (among other features) wildlife habitat, wetlands and areas subject to coastal flooding (Section 163.3178(2)).

-- **Notice, Distribution of Copies, and Hearings**. Publishing notice of pan adoption and amendments, "broad dissemination" of copies of the pan proposals and alternatives, and holding public hearings (Section 163.3181 and Rule 9J-5.004(2)).

These represent just a few of the direct, out-of-pocket costs of complying with the growth management act and rules. These costs, which must be incurred by counties, far exceed in amount or certainty the kinds of costs recognized by this Court and other Florida appellate courts as sufficient to allow public officials to challenge statutes.

For example, in Arnold v. Shumpert, 217 So. 2d 116 (Fla. 1968), Orange County questioned the constitutionality of a law which authorized the County to waive sovereign immunity by purchasing liability insurance. The question arose in the context of separate wrongful death and personal injury action against Orange County, involving the County's allegedly negligent operation and maintenance of a traffic light. In response to the argument that the Board of County Commissioners lacked standing to contest the act's validity, this Court reasoned:

> Since the Commissioners would have to expend public funds to pay the insurance premiums, this special rule would appear to give them the necessary standing to question the constitutionality of the Special Act.

Id. at 119-20. Note that the act in question authorized, but did not require, the purchase of liability insurance.

At issue in City of Pensacola v. King, 47 So. 2d 317 (Fla. 1950), was a statute which authorized the Railroad and Public Utilities Commission to determine certain territorial limits over which the City of Pensacola would have control of all auto transportation companies operating motor vehicles, except taxicabs.

This Court held that, in order for the Commission to make the determination under the statute, the Commission may have to hold a hearing, a process which necessarily requires the expenditure of public funds. Id. at 319. The possibility of having to expend funds to hold a hearing was enough to give the Commission standing to attack the validity of the statute. Id.

In State ex rel. Harrell v. Cone, 177 So. 854 (Fla. 1937) the secretary of the State Board of Administration, who was also the comptroller, challenged the constitutionality of a statute allowing for the distribution of monthly payments to the county Road and Bridge Fund for the construction of state roads within the county. In that case, since the comptroller was involved in disbursement of public funds, he had standing to attack the statute. Id.

In State ex rel. Florida Portland Cement Co. v. Hale, 176 So. 577 (Fla. 1937), the State Road Department was challenging a statute involving inspection of imported cement. Id. at 581. Conducting inspections entailed the expenditure of public funds. Id. According to this Court, an officer charged with the duty of expending public funds may challenge the constitutionality of a statute dealing with expenditures of public funds. Id. at 585. Since public funds were expended, the State Road Department had standing to challenge the statute. Id.

In each of these cases, the expenditure of funds for routine acts of governance, whether actually required or only possibly incurred, was found sufficient to afford standing to the public officials in question. The First District Court in the instant

case, however, refused to recognize the County's similar expenses (paying consultants, holding hearings, and others) as sufficient:

> Our review of the case law . . . indicates that such increased cost of governance . . . does not fit within an exception to the general rule prohibiting public officers and agencies from challenging a law they are bound to apply.

Santa Rosa County v. Administration Commission, 19 F.L.W. at D1967. The First Districts' opinion conflicts with City of Pensacola v. King, and the other cases discussed supra, where the increased costs of governance have been held sufficient to afford standing to challenge.

A more recent case involving the standing of an officer charged with the disbursement of funds to challenge a legislative enactment was Department of Education v. Lewis, 416 So. 2d 455 (Fla. 1982). In that case, the state comptroller was a defendant in a declaratory judgment action challenging the constitutionality of a proviso in the 1981 appropriations bill. The proviso prohibited funding to a postsecondary school that recognized or assisted certain groups or organizations. This Court stated that the comptroller, "as the state's chief officer for the disbursement of funds," had standing to challenge the act. Id. at 459. This was so even though the issue of constitutionality would be raised by the comptroller only defensively when the statute's operation and the comptroller's duties under it were raised by a person suing the comptroller. Id. at 458.

The right to defensively raise the constitutionality of the statutes and rules as in Lewis applies to Santa Rosa County. The

Department raised the issue of the County's compliance with statutes and rules by its "Statement of Intent to Find the Plan Not in Compliance," which it filed with the Division of Administrative Hearings. But a DOAH Hearing Officer cannot adjudicate the constitutionality of a statute, Department of Revenue v. Young American Builders, 330 So. 2d 864 (Fla. 1st DCA 1976), or of an adopted rule, Department of Environmental Regulation v. Leon County, 344 So. 2d 297 (Fla. 1st DCA 1977). Further, at the time Santa Rosa's comp plan was reviewed by DCA and found to be not in compliance, Section 163.3177(9)(k), Fla. Stat., expressly prohibited rule challenges to Rule 9J-5, so Santa Rosa was without an administrative remedy to show that the rule constituted an invalid exercise of delegated legislative authority. Santa Rosa County proceeded to the appropriate forum--circuit court-- to raise the defense of unconstitutionality. Santa Rosa's standing and ability to raise the constitutional issues should be recognized.

B. Santa Rosa County has standing to protect sources of County revenue which are placed at risk by operation of the challenged statutes and rules.

The cases discussed supra base standing on the actual or potential out-of-pocket costs of complying with a statute in question. Other cases, equally applicable to Santa Rosa County, base standing on the right of public officers to protect sources of revenue.

In Green v. City of Pensacola, 108 So. 2d 897 (Fla. 1st DCA 1959), the state Comptroller was found legally entitled to "question the constitutionality" of the special act which purports to exempt the City of Pensacola from the payment of gross receipts tax on the sale of natural gas. The First District reached that conclusion after noting the Comptroller's statutory duty to collect such tax from municipalities; the special act in question "impaired, if not rendered impossible," the Comptroller's ability to perform those duties. 108 So. 2d at 900.

Without discussion, the Fourth District Court of Appeal recognized the standing of a county property appraiser to challenge a statute establishing a "just valuation" of zero for property tax purposes for structures not substantially completed on January 1. Markham v. Yankee Clipper Hotel, Inc., 427 So. 2d 383 (Fla. 4th DCA 1983), pet. for review denied 434 So. 2d 888 (Fla. 1983). The property appraiser's interest is, presumably, in preserving and enhancing the assessed value of taxable property, so as to protect his county's sources of ad valorem tax revenue. The only case cited by the Fourth DCA in finding standing for the property appraiser in Markham v. Yankee Clipper was Department of Education v. Lewis, supra.

Counties are subject to sanctions under the Act if their comp plans are found by the Department to be not in compliance with the Act, and are not subsequently brought into compliance. The Governor and Cabinet, sitting as the Administration Commission, can order state agencies to withhold funds for roads, bridges, and

water and sewer systems within the County's boundaries. Section 163.3184(11)(a), Fla. Stat. In other words, the Administration Commission can reorder funding priorities for local infrastructure development as set by the Florida Legislature, in apparent contravention of the separation of powers doctrine and this Court's ruling in Chiles v. Children A, B, C, D, E, and F, 589 So. 2d 260 (Fla. 1991).

The Administration Commission can also order the withholding of revenue sharing funds; community development block grant funds; recreation development assistance grants; and funds for beach erosion control, hurricane protection, and beach preservation, restoration, and renourishment. Section 163.3184(11)(a) and (b), Florida Statutes.

These funds are potentially significant sources of revenue for the County. The County has a right to protect these revenue sources, and to protect its ability to compete for grant funding. The "public funds" exception to the general rule concerning public office challenges to statutes applies to allow the County to exercise its rights and bring the Declaratory judgment action below.

CONCLUSION

Chapter 163, Fla. Stat., and Fla. Admin. Code Rule 9J-5, limit how Santa Rosa County, and all Florida counties and municipalities, can exercise their legislative discretion and judgment in the field of land use planning. The statute and rules require Santa Rosa County to expend great sums of money in formulating and adopting a comprehensive land use plan. The Act calls for a county to forfeit legislative appropriations should the Administration Commission find the plan not in compliance with the statute and rule. Thus, Chapter 163 and Rule 9J-5 have great impact on the public funds of Santa Rosa County, and can be challenged by Santa Rosa County. That portion of the District Court of Appeal's ruling in this case that Santa Rosa County lacks standing to challenge the subject statutes and rules should be reversed, and Santa Rosa County should be allowed to resume its circuit court challenge to the constitutionality of the subject statutes and rules.

Respectfully submitted,

THOMAS V. DANNHEISSER
County Attorney
Santa Rosa County
801 Caroline Street, S. E.
Milton, FL 32570-5978
(904) 623-0135

OERTEL, HOFFMAN, FERNANDEZ
& COLE, P.A.
Post Office Box 6507
Tallahassee, FL 32314-6507
(904) 877-0099

KENNETH G. OERTEL
Fla. Bar ID #128808

M. CHRISTOPHER BRYANT
Fla. Bar ID #434450

Attorneys for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by United States Mail to:

Stephanie M. Callahan
Assistant General Counsel
Department of Community Affairs
2740 Centerview Drive
Tallahassee, FL 32399-2100

Richard Grosso
1000 Friends of Florida
P. O. Box 5948
Tallahassee, FL 32314-5948

this 15th day of November, 1994.

M. Christopher Bryant
Attorney