IN THE FIFTH DISTRICT COURT OF APPEAL
STATE OF FLORIDA

CASE NO. 5D12-1982

THE TOWN OF PONCE INLET, a Florida municipality,

Appellant,

v.

PACETTA, LLC., a Florida limited liability company, DOWN THE HATCH, INC., a Florida corporation, and MAR-TIM, INC., a Florida corporation,

Appellees.

ON APPEAL FROM A NON-FINAL ORDER ENTERED IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT IN AND FOR VOLUSIA COUNTY, FLORIDA

BRIEF OF AMICI CURIAE AMERICAN PLANNING ASSOCIATION, FLORIDA CHAPTER, AND FLORIDA LEAGUE OF CITIES, INC. IN SUPPORT OF THE TOWN OF PONCE INLET

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AMICI CURIAE IDENTITIES AND INTERESTS IN THE CASE

The Florida Chapter of the American Planning Association ("APA-Florida") is a state-wide, not-for-profit organization founded in 1978 to advance the art and science of planning at all governmental levels. APA-Florida represents approximately 3000 professional planners, planning officials and citizen planners involved on a day-to-day basis in formulating planning policies, reviewing development proposals and preparing development regulations for their communities. Its membership has adopted policies on professional planning issues, including support of the state planning law that establishes the comprehensive plan as the primary legislative policy document to protect the community's growth and development needs, and support of the critical role of citizen participation in all stages of the planning process. APA-Florida's interests are expressed in Issues I-III herein.

The Florida League of Cities, Inc. ("the League") is a voluntary organization whose membership consists of municipalities and other units of local government rendering municipal services in the State of Florida. Under its Charter, its purpose is to work for the general improvement of municipal government and its efficient administration, and to represent its members before various legislative, executive, and judicial branches of government on issues pertaining to their general and fiscal welfare. The League supports the legislative process established in the planning

statute so that municipal legislative bodies may faithfully accomplish their important legislative planning duties in directing the growth and development of the municipality. The League's interests are expressed in Issues I-II herein.

SUMMARY OF ARGUMENT

The lower court impermissibly found that a conceptual development plan, which was never the subject of a development application, is vested for development by means of equitable estoppel even though it is inconsistent with the adopted Comprehensive Plan. The lower court decision ignores the law which provides that the local adopted comprehensive plan is the polestar for all land development approvals. The decision also disregards the critical legislative role of the Town Council as the final policy-maker for the Town. Finally, the decision disenfranchises the citizenry from their role in the comprehensive planning process and instead encourages the approval of development proposals out of the "sunshine" and contrary to the Florida statutes and Florida Constitution.

ARGUMENT

I. The Town Comprehensive Plan Precludes the Lower Court's Decision

Florida was one of the early states in the nation to elevate the comprehensive plan to be the "constitution" for community growth and development, and the state courts since 1975 have faithfully honored the state legislative intent that all development and development regulations must be consistent with the adopted

comprehensive plan. Given this well-established law, Pacetta could not have "in good faith" relied upon any action by Town officials that was inconsistent with the adopted comprehensive plan. The lower court's finding that Pacetta has a right to develop in direct violation of the Town's adopted comprehensive plan is unprecedented and unjustified, and should be overturned.

Almost twenty years ago, the Florida Supreme Court acknowledged the state of Florida's leadership role in reforming land use decision-making by requiring that zoning and development be consistent with an adopted comprehensive plan. *Bd. of County Commissioners v. Snyder*, 627 So. 2d 469, 472-473 (Fla. 1993) traces the evolving recognition that local zoning decisions needed the rationalizing influence of a comprehensive plan:

> Professor Charles Harr, a leading proponent of zoning reform, was an early advocate of requiring that local land use regulation be consistent with a legally binding comprehensive plan which would serve long range goals, counteract local pressures for preferential treatment, and provide courts with a meaningful standard of review. Charles M. Harr, "*In Accordance With A Comprehensive Plan,*" 68 Harv.L.Rev. 1154 (1955). ...Reacting to the increasing calls for reform, numerous states have adopted legislation to change the local land use decision-making process. As one of the leaders of this national reform, Florida adopted the Local Government Comprehensive Planning Act of 1975. Ch. 75-257, Laws of Fla. This law was substantially strengthened in 1985 by the Growth Management Act. Ch. 85-55, Laws of Fla.

Id. at 472.

The 1975 Act initiated the requirement that land development regulations and development orders must be consistent with the comprehensive plan, and the 1985 Act carried that requirement forward.[1] The most recent legislative overhaul of the state planning act continues to maintain the hallmark consistency requirement. The 2011 Community Planning Act provides that:

> It is the intent of this act that adopted comprehensive plans shall have the legal status set out in this act and that no public or private development shall be permitted except in conformity with comprehensive plans, or elements or portions thereof, prepared and adopted in conformity with this act.

Section 163.3161(6), Fla. Stat. (2011); Section 163.3161(5), Fla. Stat. (1985). Similarly, the planning statute has provided specifically since 1985 that:

> After a comprehensive plan, or element of portion thereof, has been adopted in conformity with this act, all development undertaken by, and all actions taken in regard to development order by, governmental agencies in regard to land covered by such plan or element shall be consistent with such plan or element as adopted...(and) (a)ll land development regulations enacted or amended shall be consistent with the adopted comprehensive plan, or element of portion thereof....

Section 163.3194(1), Fla. Stat. (2011); Section 163.3194(1), Fla. Stat. (1985).

As explained in the influential case *Machado v. Musgrove*, 519 So. 2d 629, 632 (Fla. 3d DCA 1987), "(t)he plan is likened to a constitution for all future

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[1] Sections 163.3161(5) and 163.3194(1), Fla. Stat. (1975); Sections 163.3161(5) and 163.3194(1), Fla. Stat. (1985). The 1985 Act was the basis for a national planning model. See Meck, *The Legislative Requirement that Zoning and Land Use Controls Be Consistent with an Independently Adopted Comprehensive Plan*, 3 Wash. U. J. L. & Poly 295 (2000).

development within the governmental boundary." This is because, in part, "(t)he purpose of the statute is to accomplish, *inter alia,* orderly growth, protection of resources and stability of land use throughout the state" (omitting citations). *Id.* [2] To accomplish these purposes, the statute requires the local government comprehensive plan to provide:

> ...the principles, guidelines, standards, and strategies for the orderly and balanced future economic, social, physical, environmental, and fiscal development of the area that reflects community commitments to implement the plan and its elements. These principles and strategies shall guide future decisions in a consistent manner and shall contain programs and activities to ensure comprehensive plans are implemented.

Section 163.3177(1), Fla. Stat. (2012).

The comprehensive plan thus provides the polestar for prudent public and private investment in the community, ensuring that growth is orderly and supportive of important community resources. It avoids the *ad hoc*, development-by-development approvals characterized by communities that do not plan comprehensively. It also helps to avoid the short term pernicious influence of either well- funded development interests or politically connected interest groups.

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[2] *Machado* first established that the standard for judicial review of the consistency of a development order with the comprehensive plan is "strict scrutiny," later adopted in *Snyder*. "Strict scrutiny is thus the process whereby a court makes a detailed examination of a statute, rule or order of a tribunal for exact compliance with, or adherence to, a standard or norm. It is the antithesis of a deferential review." *Machado*, 519 So. 2d at 632; *Snyder*, 627 So. 2d at 475. This strict standard of review emphasizes and reaffirms the critical role of the comprehensive plan as the community's primary governing law for land development.

The primacy of the local comprehensive plan in guiding the community's future growth and development is well established, and was most recently explained by this Court in *Citrus County v. Halls River Development, Inc.*, 8 So. 3d 413, 420-421 (Fla. 5th DCA 1999):

> A local comprehensive land use plan is a statutorily mandated legislative plan to control and direct the use and development of property within a county or municipality. The comprehensive plan is similar to a constitution for all future development within the governmental boundary... 'all development undertaken by, and all actions taken in regard to development orders by, governmental agencies in regard to land covered by such plan' must be consistent with that plan. (omitting citations).

This Court thus found that the Halls River developer, **even though mistakenly granted a development permit by the County**, could not establish a vested right to its intended multifamily condominium, because the County's comprehensive plan, "which enjoys legal primacy regarding allowable land use, prohibited the property's use as a multifamily condominium." *Id.* at 422. See also *Palm Beach Polo, Inc. v. Village of Wellington*, 918 So.2d 988 (Fla. 4th DCA 2006); and *Holmes v. Marion County*, 960 So.2d 828 (Fla. 5th DCA 2007).

Here, unmistakably, the Town's Comprehensive Plan did not permit the Pacetta development. Pacetta's principal was aware of the 2003 Comprehensive Plan's limitations for the development of his properties even before he purchased them. (A:8746-8749; 8760-8761). He was aware that the Comprehensive Plan prohibited new marinas or the expansion of existing marinas, and limited

commercial development to 35 feet in height and 5,000 square feet in building floor area. (A:7297-312). Throughout the preparation of Pacetta's conceptual plans for the development, its consultants were aware of the Comprehensive Plan restrictions and that Pacetta could apply for a comprehensive plan amendment to enable the development. (A:10207-10; A:10197-99, 10213).

Clearly, Pacetta's development plans were speculative, dependent on the necessary amendment of the Comprehensive Plan and the Town zoning. Pacetta did not apply for those approvals, and did not apply for approval of its conceptual development. (A:2066-96; 2234-35; 6137-72; 10197-99; 10213). Instead, Pacetta and its agents claim that they relied on discussions with the Town about the proposed development, much of them private and confidential, and on the Town's **initial** steps toward amending its comprehensive plan to accommodate Pacetta's proposal. (A:18-19; 20-21). They could not in good faith have believed that they were entitled to a development that was inconsistent with the adopted plan; indeed, Pacetta's expert planner testified at trial that there was never a time during his involvement with the mixed-use project that it was legal in the Town. (A: 10225).

Even if Pacetta was simply *mistaken* to believe that negotiations, and not an actual plan amendment, were enough to entitle its proposed development, a mistaken belief is insufficient under law to invoke equitable estoppel. As *Citrus County* explains, "most importantly, the doctrine of estoppel does not generally

apply to transactions that are forbidden by law or contrary to public policy." 8 So. 3d at 422. Such a claim of reliance, even if allegedly made in good faith by experienced land development professionals, ignores the clear planning law.

The lower court disregarded the long-standing law in Florida by finding that the *Citrus County* case, and all other precedent regarding the primacy of the comprehensive plan, is not controlling over Pacetta's claim of equitable estoppel. (A:8-9). At the same time, the lower court recognized that there is no precedent for using the concept of equitable estoppel to create a vested right to the enactment of a comprehensive plan amendment. (A:7). The decision effectively judicially compels the plan to be amended to accommodate the "delightful" development proposed by Pacetta,[3] contrary to the law. Indeed, the decision is the antithesis of comprehensive planning as governed by Florida law.

II. The Lower Court's Decision Impermissibly Disregards the Town Council's Legislative Powers.

The local government decision whether or not to amend its comprehensive plan is a quintessential legislative decision, requiring that the elected body follow the statutory requirements of the state planning statute. The lower court impermissibly ruled that preliminary discussions of a conceptual development plan and the first reading of a plan amendment ordinance are sufficient to bind the

[3] "...a delightful mixed use planned waterfront development was to be approved by the Town sometimes referred to as the Village of Ponce Park." (A:3).

elected body to the final amendment of the comprehensive plan. This ruling disregards the statutory mandate, and the power and duty of Town elected officials to make the ultimate legislative decision whether or not to amend the comprehensive plan.

Martin County v. Yusem, 690 So.2d 1288 (Fla. 1997), settled the question of whether a comprehensive plan amendment is a legislative decision, on a question certified to be of great public importance. The landowner, Yusem, requested an amendment to the county comprehensive plan, which the county commission approved on first reading and transmitted to the state as required by the state planning act. After the state review, the county commission took up the amendment on second reading and **denied** the amendment. Key to the Florida Supreme Court's decision was the Court's analysis of the nature of the comprehensive plan as a legislative statement of policy. The Court explained:

> ...the review of the proposed amendment here required the County to engage in policy reformulation of its comprehensive plan and to determine whether it now desired to retreat from the policies embodied in its future land use map for the orderly development of the County's future growth. The County was required to evaluate the likely impact such amendment would have on the County's provision of local services, capital expenditures, and its overall plan for growth and future development of the surrounding area. The decision whether to allow the proposed amendment to the land use plan to proceed to the DCA for its review and then whether to adopt the amendment involved considerations well beyond the landowner's 54 acres.

690 So.2d at 1294 (adopting Judge Pariente's dissent in *Martin County v. Yusem*, 664 So.2d 976, 981 (Fla. 4th DCA 1995)). *Accord, Coastal Dev. of N. Florida, Inc. v. City of Jacksonville Beach*, 788 So. 2d 204 (Fla. 2001).

As in *Yusem*, here the Town adopted the plan amendment on first reading, but decided against final approval on second reading. Like Martin County, the Town was faced with the question of "whether it desired to retreat from the policies embodied in its future land use map...involving considerations well beyond the landowner's (acres)." This was an important legislative decision for the Town that only the Town legislative body could make.

Yusem further explains that the legislative nature of the plan amendment decision is consistent with the state statutory system of comprehensive planning, to ensure that larger policy goals of the state are considered:

> Our conclusion that amendments to comprehensive plans are legislative decisions is further supported by the procedures for effecting such amendments under the Act. Amendments to comprehensive plans are evaluated on several levels of government to ensure consistency with the Act and to provide ordered development. The Act provides for a two-stage process for amending a comprehensive plan: transmittal and adoption. In the first stage, the local government determines whether to transmit the proposed amendment to the Department for further review. If the local government transmits the proposed amendment, the process moves into the second stage. The Department, after receiving the amendment, provides the local government with its objections, recommendations for modifications, and comments of any other regional agencies. **At this point, the local government has three options: (1) adopt the amendment; (2) adopt the amendment with changes; or (3) not adopt the amendment.**

> Upon adoption of the amendment by the local government, the Department again reviews the amendment. After this review and an administrative hearing, if an amendment is determined not to be in compliance with the Act, the State Comprehensive Plan, and the Department's minimum criteria rule, then the matter is referred to the Administration Commission....This integrated review process ensures that the policies and goals of the Act are followed. The strict oversight on the several levels of government to further the goals of the Act is evidence that when a local government is amending its comprehensive plan, it is engaging in a policy decision.

690 So.2d at 1294 (omitting citations; emphasis added). The Town's proposed amendment followed the same process. As noted by *Yusem*, the statute allows the legislative body on second reading the choice of whether to adopt, modify, or simply not to adopt the proposed amendment. In this case, the Town Council decided not to adopt the amendment, as was its prerogative.

The lower court's premise in this case is that the Town officials had gone so far in their discussions with Pacetta that they could not turn back after the Town Council approved the amendment on first reading. This premise short-circuits the legislative process established in the Act, and in fact would make a nullity of the statutory process should the lower court's decision be upheld. The purpose of a second hearing requirement, even without the state review process required by the planning act, is precisely to allow further reflection and consideration by the elected body after greater public input. See, e.g., *Neumont v. State*, 967 So. 2d 822, 829 (Fla. 2007) ("The purpose of the public hearings that section 125.66(4)(b)

requires is to provide a forum for public comment so that proposed ordinances may be modified after input from citizens who may be affected by the ordinance.").

The lower court's premise also permits town staff persons effectively to make legislative decisions for the Town Council although the staff does not have the delegated authority to make law. "A city's legislative body cannot delegate its legislative function by investing unbridled discretion in a private property owner or administrative agency." *County of Volusia v. City of Deltona*, 925 So. 2d 340, 345 (Fla. 5th DCA 2006). Individual Town council members also cannot bind the Town Council to a legislative decision. See, *Turk v. Richard*, 47 So. 2d 543, 544 (Fla. 1950) ("The governing body of a municipality can act validly only when it sits as a *joint* body at an authorized meeting duly assembled pursuant to such notice as may be required by law; for the existence of the council is *as a board of entity* and the members of the council can do no valid act except as an integral body"). Even if the Town Council itself had made a promise to change the status quo and to amend the plan to lift the plan's limitations affecting the proposed conceptual development, which it did not, such a promise would be equivalent to "contract zoning" which this Court has recognized cannot equitably estop the Town. *Morgran v. Orange County*, 818 So.2d 640 (Fla. 5th DCA 2002).

Additionally, the lower court's premise that the legislative mind cannot change between first and second reading of a comprehensive plan amendment

ignores the long-standing principle of judicial deference accorded to legislative decisions, grounded in the constitutional separation of powers. "As a general principle, the Legislature has the responsibility to make the laws and the courts must interpret and apply them." *Chiles v. Phelps,* 714 So.2d 453 (Fla. 1998); *Local No. 234 of United Ass'n of Journeymen & Apprentices of Plumbing & Pipefitting Indus. of United States & Canada v. Henley & Beckwith, Inc.,* 66 So.2d 818 (Fla. 1953). The Town's legislative decision not to amend its comprehensive plan has the presumption of validity and will be upheld if it is "fairly debatable" and there is any legitimate reason to support it.[4] *Coastal Dev. of N. Florida,* 788 So. 2d at 205; *Yusem*, 690 So.2d at 1294-1295; *Section 28 Partnership, Ltd. v. Martin County,* 642 So.2d 609, 612 (Fla. 4th DCA 1994), *review denied,* 654 So.2d 920 (Fla.1995).

Finally, the lower court's decision that the discussions between Pacetta and the Town's officials created an equitable estoppel[5] has a pernicious and counter-productive result for the relations between local governments and developers. A

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[4] "The fairly debatable standard of review is a highly deferential standard requiring approval of a planning action if reasonable persons could differ as to its propriety. In other words, an ordinance may be said to be fairly debatable when for any reason it is open to dispute or controversy on grounds that make sense or point to a logical deduction that in no way involves its constitutional validity." *Yusem,* 690 So.2d at 1295.

[5] The lower court's decision is unclear as to when during the discussions the vesting actually occurred, making it even more difficult for a town to know when, if it all, "understanding and expectations" ripen into an estoppel. (A:4-5, 27.)

prudent developer will consult with the local government when preparing a land development proposal, especially if the existing comprehensive plan and land development regulations do not allow the development as a matter of right. A local government, especially its planning and management staff, ordinarily will expect to advise an potential applicant of the regulatory constraints and will advise the potential applicant about perceived improvements to the potential development. The negotiations continue even after an application is filed, especially if the required Town action on the application is a legislative decision, as here, and not a quasi-judicial decision. *Jennings v. Dade County*, 589 So. 2d 1337, 1340 (Fla. 3d DCA 1991) (lobbyist's ex-parte communications in a *quasi-judicial* variance proceeding can violate due process).

The discussions and negotiations can result in a better result for both the developer and the local government. As recognized in *St. Johns River Water Management District v. Koontz*, 77 So.3d 1220, 1231 (Fla. 2011), penalizing the local government for such discussions with the threat of financial consequences if the negotiations fail by the time of the final decision injures both sides:

> ... agencies will opt to simply deny permits outright without discussion or negotiation rather than risk the crushing costs of litigation. Property owners will have no opportunity to amend their applications or discuss mitigation options because the regulatory entity will be unwilling to subject itself to potential liability. Land development in certain areas of Florida would come to a standstill.

> We decline to approve a rule of law that would place Florida land-use regulation in such an unduly restrictive position.

The course of the proceedings between the Pacetta entities, the Town staff and individual officials were not actions that Pacetta can reasonably claim to rely upon for purposes of equitable estoppel. Rather, they were the preliminary, non-binding discussions between the parties that were not legislative, final action.

III. The Decision Below Disenfranchises Citizens from their Important Role in Comprehensive Planning

The state planning act incorporates a robust citizen participation component in the comprehensive planning process. The lower court's decision would allow development rights to vest through pre-amendment negotiations between town staff and officials, contrary to the statutory rights of citizens to participate in the comprehensive planning process. The result is to disenfranchise citizens from their statutory role in the planning process, and to encourage the conduct of public business outside of the sunshine in violation of state law.

The state planning act includes a separate section specifically address to the importance of public participation in the planning process. See Section 163.3181, Fla. Stat. (2012). [6] This requirement for full public participation has been mandated

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[6] "(1) It is the intent of the Legislature that the public participate in the comprehensive planning process to the fullest extent possible. Towards this end, local planning agencies and local governmental units are directed to adopt procedures designed to provide effective public participation in the comprehensive

since 1975 as an integral and consistent legislative recognition of its importance in comprehensive planning. [7]

The legislative intent is carried forward in the requirements that a local planning agency make recommendations to the governing body after "hearings to be held after public notice," and shall meet only in public meetings (Section 163.3174), and the Town Council hold at least two public hearings, at least one at the transmittal phase, and at least one at the adoption phase (Section 163.3184). As part of its attention to encouraging public participation, the statute also allows liberal standing for the public to challenge the consistency of local development orders with the comprehensive plan. *Parker v. Leon County*, 627 So.2d 476, 480 (Fla. 1993); *Putnam County Envt'l Council, Inc. v. Bd. of County Comm'rs of Putnam County*, 757 So.2d 590 (Fla. 5th DCA 2000) (The statute liberalized standing and "demonstrate[d] a clear legislative policy in favor of the enforcement

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planning process and to provide real property owners with notice of all official actions which will regulate the use of their property. The provisions and procedures required in this act are set out as the minimum requirements towards this end.

(2) During consideration of the proposed plan or amendments thereto by the local planning agency or by the local governing body, the procedures shall provide for broad dissemination of the proposals and alternatives, opportunity for written comments, public hearings as provided herein, provisions for open discussion, communications programs, information services, and consideration of and response to public comments."

[7] *See* Section 163.3181, Fla. Stat. (1975); Section 163.3181, Fla. Stat. (1985).

of comprehensive plans by persons adversely affected by local action.") The legislative intent is clear that the plan must be adopted, amended and implemented by a fully transparent public process in order to achieve its public purposes.

The lower court's decision that a course of discussions and negotiations between Town staff and officials and developer representatives, much of it out of the sunshine of public comment and debate, can create an estoppel frustrates the legislative intent and disenfranchises the citizenry from their rightful participation in the planning process. The Final Order describes "important meetings," beginning with meetings in 2005 between the Town attorney, planners and other decision-makers where the Town staff and two individual council persons were advised of the "confidential" assemblage of property and concept plan. (A:18). At some time later the conceptual plan ceased being confidential and was the subject of other meetings where town officials "had input" into the project. (A:19). But it is undisputed that conceptual plan was never formalized by Pacetta as an official application (A:2372—2374; 10216-10217; 10222-10225), and the Final Order does not identify any public meeting at which the conceptual plan was the subject of the formal approval process in a noticed public hearing.[8] Indeed, as late as the 2008 second reading on the comprehensive plan amendment, Pacetta's counsel

[8] It is undisputed that a new mixed-use zoning district as well as changes to the existing Riverfront Overlay District zoning, which was created prior to the Pacetta land purchases (A:1263-1266) would also be necessary in order for the Pacetta conceptual plan to be considered for approval by the Town Council. (A:36).

advised the Town Council that "he cannot and will not promise that the Johnsons are committed to (the conceptual) plan" (A:5076).

In this context, the lower court decision to find an equitable estoppel reduces the citizen participation requirements of the planning statute to a meaningless exercise. Nothing that the citizens may say at a public hearing regarding the conceptual plan would overcome the alleged rights gained by the developer through his multiple discussions with the Town officials outside of a public meeting. This not only incapacitates citizens from their planning act rights, it is contrary to Florida law regarding the rights of the public to participate in their local government decision-making.

As noted in *Kirkland v. State*, 86 Fla. 64, 81 (1923):

> Every meeting of any board, commission, agency or authority of a municipality should be a marketplace of ideas, so that the governmental agency may have sufficient input from the citizens who are going to be affected by the subsequent action of the municipality. The ordinary taxpayer can no longer be led blindly down the path of government, for the news media, by constantly reporting community affairs, has made the taxpayer aware of governmental problems. Government, more so now than ever before, should be responsive to the wishes of the public. These wishes could never be known in nonpublic meetings, and the governmental agencies would be deprived of the benefit of suggestions and ideas which may be advanced by the knowledgeable public.
>
> Also, such open meetings instill confidence in government. The taxpayer deserves an opportunity to express his views and have them considered in the decisionmaking process.

Section 286.011(1), Fla. Stat. (2012) requires that all meetings in which official acts are to be taken are to be open to the public, and no "resolution, rule or formal action shall be considered binding except as taken or made at such meeting." The Florida Constitution also requires this. Fla. Const. Art. I, Section 24. Florida Courts recognize that the public meetings law is critical to the success and legitimacy of government action. For example, *Bd. of Pub. Instruction of Broward County v. Doran*, 224 So. 2d 693, 699 (Fla. 1969) advises:

> The right of the public to be present and to be heard during all phases of enactments by boards and commissions is a source of strength in our country. During past years tendencies toward secrecy in public affairs have been the subject of extensive criticism. Terms such as managed news, secret meetings, closed records, executive sessions, and study sessions have become synonymous with 'hanky panky' in the minds of public-spirited citizens. One purpose of the Sunshine Law was to maintain the faith of the public in governmental agencies. Regardless of their good intentions, these specified boards and commissions, through devious ways, should not be allowed to deprive the public of this inalienable right to be present and to be heard at all deliberations wherein decisions affecting the public are being made.

This principle was reaffirmed in *Wood v. Marston*, 442 So. 2d 934, 938 (Fla.1983):

> We note that the Sunshine Law was enacted in the public interest to protect the public from "closed door" politics and, as such, the law must be broadly construed to effect its remedial and protective purpose. This Court has consistently refused to permit governmental entities to carry out decision-making functions outside the law. (omitting citations)

The Final Order finds the Town actions to be binding on the Town, and vests the Pacetta conceptual plan, although the actions that allegedly vested the proposal

were conducted outside of public meetings. Even if the meetings were conducted with the intent to bind the Town, which they were not, such meetings cannot be official action of the Town without being contrary to the letter and intent of the state's sunshine law.

The lower court's vesting decision disregards the rightful place of the public in the Town's comprehensive planning process, while at the same time finding that the Town, and thus the Town taxpayers, are liable for damages under the Bert J. Harris Act and the federal and state Constitutions. The decision is contrary to the planning statute and the Sunshine Law and should be overturned.

CONCLUSION

The lower court's decision ignores controlling law regarding the primacy of the local adopted Comprehensive Plan; the role of the legislative body as the final local decision-maker on the Comprehensive Plan; and the critical role of public participation, fully in the sunshine, in the adoption of the Plan. If allowed to stand, it will either encourage the very activity that the comprehensive planning statutes were meant to avoid – *ad hoc* development decisions made as a result of backroom dealing – or will discourage useful pre-approval discussions between potential developers and local governments for fear of financially ruinous consequences to the local government. The decision should be overturned.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on September 17, 2012, a true copy of the foregoing has been furnished on the following by Electronic Mail:

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief was prepared in Times New Roman, 14-point font, in compliance with Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

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