

Volusia Growth Management Commission

MEETING MINUTES FOR  
REGULAR MEETING HELD  
Wednesday, August 27, 2008

City Commission Chambers  
Daytona Beach City Hall  
301 S. Ridgewood Avenue  
Daytona Beach, FL

MEMBERS PRESENT

Gerald Brandon, Chairman	
Joan Spinney, Secretary	Excused
Richard Walton	
Stephan Dembinsky	
Danny Allen	
Steve Katz	
Sandy Lou Gallagher	Excused
Sandy Jones	
John Heaphy	Excused
Roger Sonnenfeld	Excused
Rick Tresher	
James Kerr	
Billy Carter	Excused
Patricia Heller-Jackson	Excused
Bobby Ball	
Sandra Walters	
Rachel Sieg	
Tony Cole	
Suzanne Steiner	

REPRESENTING

Ormond Beach  
South Daytona  
Daytona Beach  
Daytona Beach Shores  
DeBary  
DeLand  
Deltona  
Edgewater  
Holly Hill  
Lake Helen  
New Smyrna Beach  
Orange City  
Pierson  
Ponce Inlet  
Port Orange  
Volusia County  
Volusia County  
Volusia County  
Volusia County

NON-VOTING MEMBERS

Sara Lee Morrissey	(not present)
Peter Brown	(not present)

REPRESENTING

Volusia Co. School Board  
SJRWMD

OTHERS PRESENT

Paul Chipok, GrayRobinson, P.A.  
Barry Wilcox, MSCW  
Merry Chris Smith, VGMC Coordinator

CALL TO ORDER

Chairman Brandon called the meeting to order at 7:00 p.m.

ROLL CALL

Roll call was taken and it was determined there was a quorum present.

APPROVAL OF MINUTES

Sandy Jones made a motion to approve the minutes of the regular meeting held on July 23, 2008; seconded by Sandy Walters. Motion carried unanimously.

PUBLIC HEARING

None

REMARKS OF INTERESTED CITIZENS

None

REPORTS OF OFFICERS

None

REPORTS FROM CONSULTANTS

Mr. Chipok reported that the petitioners in the Partin v. VGMC matter filed a motion for costs. He stated that VGMC legal counsel objected to some of the costs and a stipulated settlement agreement in accordance with case law has been reached. Mr. Chipok stated they originally requested approximately \$2,224 in costs, VGMC legal counsel contested \$129 of those costs, and the parties agreed to settle on \$2,095.

With respect to the 5<sup>th</sup> DCA Appeal – Daytona Beach Shores v. Partin – Mr. Chipok reported that the petition had been filed, there was a motion to abate also filed which crossed in the mail with the court issuing an order to show cause, and subsequently the court issued an order that holds the case in abeyance until October 10, 2008. Mr. Chipok stated that a status report or motion for dismissal must be filed by that date. He also reported that a meeting has been scheduled for September 23, 2008 with the various attorneys to discuss potential settlement options.

Commissioner Allen asked Mr. Chipok to clarify that it is Partin who would have to respond to the court's order to show cause. Mr. Chipok stated that Partin was the original petitioner and the judge ruled in favor of Partin. Following that, the City of Daytona Beach Shores filed a petition for writ and Lady Godiva and the VGMC both filed a petition to intervene with the City. He further stated that the court has issued its order to show cause as to why the lower court decision set down for Partin should not be overturned. With that, Mr. Chipok stated the parties have all

agreed to meet in potential settlement discussions to determine if an amicable resolution can be reached without further litigation.

Commissioner Walters stated since the VGMC joined in as a party to the appeal, she assumes we are incurring legal fees. Mr. Chipok responded affirmatively, adding that because the commission decided not to pursue the appeal ourselves but rather filed the motion to intervene, the VGMC did not incur the expense of preparing the brief which is a labor intensive effort.

Barry Wilcox provided an update on pending cases, adding that staff is working on bringing the few older cases from 2005 & 2006 to conclusion. Mr. Wilcox also stated that we have several large cases coming, including a DRI from the City of Edgewater and EAR based amendments from Volusia County.

Mr. Wilcox also reported that staff has systematically been in contact with the jurisdictions to provide updates on outstanding conditions of approval from prior resolutions. He also reported that the required water supply amendments which have been submitted have drawn some attention from the County, but the parties are working diligently to resolve the issues.

Commissioner Sieg asked about pending case #07-048 from the City of DeLand. Mr. Wilcox responded that the City is working with the County on outstanding transportation issues.

#### REPORTS OF COMMITTEES

1) POP Committee – Chairman Brandon reported that the POP committee and staff have been working diligently over the past number of months to address procedural issues and he commended those who have been involved. He reported one of the issues the committee looked at relates to rehearings and that the committee wants to determine if the commission agrees that rehearings should be allowed under our procedures, and if so, they can look at the wording and procedure for putting that in place.

Mr. Chipok stated one of the issues cited by the judge in the Partin v. VGMC ruling was that the commission does not have procedures addressing rehearings. To address this issue, Mr. Chipok had prepared “Issue A” which contains options and potential related language for consideration regarding this matter. Mr. Chipok stated that although he has laid out a tentative rehearing procedure, rather than try to review in detail and finalize any policy language, the POP committee has made a motion to recommend to the commission that procedures be prepared to allow rehearings. Chairman Brandon stated that the POP committee’s recommendation serves as a motion and second.

Commissioner Sieg asked what a trial de novo is. Mr. Chipok responded that it would be a brand new hearing with everything back on the table. Commissioner Walton asked if the procedures would allow for a determination by the commission not to grant a rehearing. Mr. Chipok responded affirmatively, adding that the policy language contained in Option #2 of the rehearing issue is consistent with generalized case law and is based on what the County uses with their Historic Preservation Board. Mr. Chipok further explained that a party would first have to

request a rehearing, and the commission would then review the request for rehearing to narrowly determine if one of the criteria for rehearing is met, such as mistake, surprise, confusion, etc. If the VGMC determines the criteria for rehearing is met, they would then schedule the rehearing for a specific time and date where the merits of the case are considered. Additionally, Mr. Chipok stated under the procedures laid out in Option #2, the commission would determine whether the rehearing would be a trial de novo or limited to the specific issues in which the commission granted the rehearing.

Mr. Chipok indicated our rules state if you are present at a meeting you must vote, and that one of the issues that came out of the Partin case was that the members who voted on the original hearing were not all the same as who voted on the rehearing. Mr. Chipok explained that if the commission should chose to hold a rehearing as a trial de novo, it would eliminate that issue since all of the members present at the rehearing would hear all of the evidence presented.

General discussion ensued relating to the appeal process and also as to whether there should be language included in the rehearing procedures that would limit the number of times a case could be reheard.

Commissioner Dembinsky asked if the appeals court looks to see if the aggrieved party has had the opportunity to go before the original governing board and if that would take one round of appeals from the aggrieved party. Mr. Chipok responded not in his experience, and commented that a rehearing is a way to short-circuit the need to go to an appeal.

Mr. Chipok discussed the court's review during an appeal, stating that the appeals court will not reevaluate the evidence presented, but rather look at the decision by the commission and make a determination of whether there was competent, substantial evidence presented to support the decision.

Commissioner Ball asked what happens if a court determines there was not competent, substantial evidence. Mr. Chipok responded that the judge would quash the decision and remand the matter back to the commission for a new hearing. Mr. Ball also asked if an amendment application could be resubmitted at a future date if the commission denied it originally. Mr. Chipok responded that a decision that is not appealed within 30 days becomes a final action and according to our rules, the applicant must wait 12 months before they can reapply.

Commissioner Tresher commented in favor of a procedure allowing rehearings, adding that it would allow the right to a rehearing if the commission determined the threshold had been met, however, it would not be automatic. Mr. Tresher further commented if a rehearing is granted, he is not in favor of a trial de novo. Mr. Chipok stated it may be difficult to draft one rule to apply to all situations as there may be some circumstances where a trial de novo may be warranted, and others where it should be limited. He added that the initial draft language was prepared to provide that flexibility.

With respect to a motion to allow a rehearing, Commissioner Allen commented that according to Roberts Rules of Order, the motion and second must be made by a member who voted in favor

of the action taken at the prior meeting. Mr. Allen suggested that this be specifically addressed in the rules relating to rehearings.

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Mr. Chipok reiterated the motion on the floor is to pursue crafting rules for rehearing. He also stated the comments made will be useful in preparing the procedure should the commission decide to move forward on the motion.

Commissioner Allen asked if a vote for rehearing would be based on weighted vote. Mr. Chipok responded that our current rules state that weighted votes apply to certification hearings on amendment applications, all other votes are based on simple majority. Unless specifically addressed otherwise, Mr. Chipok stated that at this point in time, if the commission adopts a rehearing rule, the commissions vote on the rehearing would be based on a simple majority vote.

Commissioner Steiner spoke in opposition of allowing rehearings, commenting that she feels it is incredibly subjective and encourages people to come to the hearings unprepared.

Chairman Brandon called the question and the motion carried 11-2 with Commissioners Suzanne Steiner and Tony Cole voting in opposition.

2) Chairman Brandon stated that the POP Committee also discussed procedures relating to ex-parte communications and the committee unanimously voted to recommend procedures which would allow ex-parte communications.

Mr. Chipok stated the commission needs to decide whether or not they wish to allow ex-parte communications and to include a policy in the rules relating to ex-parte communications. Referring to the information contained in "Issue B", Mr. Chipok stated that in Section 2-3 of the Volusia County Code, the county has adopted rules allowing ex-parte communications, which is based upon Florida Statute Section 286.01152. Within that, Mr. Chipok stated, in land use hearings, it provides that ex-parte communications may be allowed. He stated it further provides that specific disclosure is not required in a land use case, but the decision must be based on competent and substantial evidence in the record, irrespective of any communications which may have occurred outside of the hearing.

Mr. Chipok also stated in an informal Attorney General Opinion (AGO) issued in September of 2007, the AGO indicated the same as what was earlier discussed by Mr. Chipok in terms of disclosure and decision, but also stated that the application of the procedures relating to the ex-parte communications is dependent upon the municipality adopting the procedures identical to the ones set forth in Section 286.01152. Mr. Chipok stated if the commission wants to adopt rules allowing ex-parte communications and want to remove the presumption of prejudice by those ex-parte communications, he indicated the commission's option is to adopt a version of Section 286.01152. He added that is what the County has done, and he recommended the commission utilize the proposed language in Option #2 of Issue B if they choose to allow ex-parte communications.

For the record, Mr. Chipok explained that an ex-parte communication is someone approaching a member of the commission on an individual basis, outside of the scope of a public hearing, regarding a pending matter. He also added that commission members should not be soliciting comments.

Chairman Brandon reiterated the motion and second from the POP Committee to allow ex-parte communications as presented in Option #2 to include the Volusia County Code Section 2-3. The motion carried unanimously.

Mr. Chipok clarified that the motion was to include this in the draft rules amendments which are currently being considered. Mr. Chipok stated that he would amend the current draft amendments to include the ex-parte communications. He also added that the current draft amendments are being distributed to all of the local jurisdictions and interested parties to solicit further comment. Commissioner Katz asked how the members should handle ex-parte communications until the rules amendments are adopted and finalized. Mr. Chipok responded that we still do not currently have a rule relating to ex-parte communications and his advice to the members, as it has been in the past, is to avoid them because there is a presumption it is prejudicial.

Mr. Chipok discussed the status of the draft amendments. He stated we are sending the current draft amendments back out to the local jurisdictions and interested parties for additional comments. Once these comments come in, the POP committee will meet to review the comments, which will be followed by a workshop or public hearing, and then to finalize the recommended changes which will need to be adopted by the Volusia County Council to codify Chapter 90 of the Volusia County Code. Commissioner Steiner asked if the County Council could pick it apart and change it. Mr. Chipok responded that yes they could, however, historically they have respected the resolution with the VGMC's recommendation.

Commissioner Sieg asked about the comments concerning government employees serving as members of the commission and how that will be addressed. Mr. Chipok responded that legal staff is preparing an Attorney General Opinion (AGO) relating to this matter, adding that this is an important issue that also deals with concepts such as home rule power and charter government and we want to be sure it is properly presented to the Attorney General so that we get a full and accurate answer.

Chairman Brandon reported that the POP Committee also discussed the distribution of materials and correspondence received in the VGMC office to the members. He explained that in the past we've received correspondence unrelated to the VGMC and the committee discussed what should or should not be distributed to all of the members. Chairman Brandon stated the POP committee agreed that only correspondence relevant to VGMC and local governmental issues that come before the VGMC will be passed along.

Chairman Brandon also reported that the POP Committee will be discussing attendance at committee meetings, however, there was not sufficient time at the earlier meeting so that issue will be addressed at a future committee meeting.

UNFINISHED BUSINESS

1) Consideration of VGMC Resolution #2008-05 adopting Roberts Rules of Order. Chairman Brandon stated at the previous meeting, the commission agreed to adopt the procedures of Roberts Rules of Order to be utilized for any procedures that are not addressed in the VGMC Rules of Procedure. Mr. Chipok read the specific procedure into the record. Commissioner Rachel Sieg moved to approved Resolution #2008-05; seconded by Commissioner Sandy Jones. Motion carried unanimously.

NEW BUSINESS

None

REPORTS AND REQUESTS OF COMMISSION MEMBERS


Commissioner Walters stated she was listening to a recent County Council meeting where VGMC member appointments were scheduled and the Council continued the item indicating the legal department was working on the terms of membership. Chairman Brandon stated our rules indicate member terms are for three years. Commissioner Allen commented they may be trying to match up the member term to follow the elected official's term.

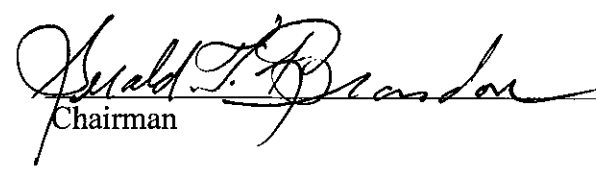
Mr. Wilcox provided the commission with an update on the Map A initiative with VCOG.

REPORTS AND REQUEST OF COMMISSION CHAIR

ADJOURNMENT

The meeting was adjourned at 8:02 p.m.

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Attest:

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Chairman

**ISSUE #A**  
**REHEARING**

Issue: Whether a rehearing of a VGMC Consistency Certification Public Hearing should be allowed.

Background: At the present time the Certification Rules do not address rehearing. This issue must be specifically addressed since Roberts Rules of Order provide a method for rehearing and Roberts Rules of Order have been recommended for incorporation in the VGMC Procedure.

Option #1: Do not allow rehearing.

If this option is taken adopt the following language as a new Subsection 90-35(i):

- (i) If a public hearing on application for a certificate of consistency is held by the commission in accordance with Section 90-35(e) above, the resolution adopted by the commission as a result of such public hearing is deemed to be the final action by the commission on the application and there is no right to a rehearing of such application.

Option #2: Allow rehearing.

If this option is taken adopt the following language (based on Volusia County Code Section 62-9 pertaining to rehearing by the Historic Preservation Board) as a new Section 90-46:

Section 90-46. Rehearings.

- (a) If it is alleged that the commission has overlooked or misapprehended some facts or points of law a rehearing of any decision of the commission may be granted by the commission upon the motion of any substantially affected and aggrieved local government or other substantially affected and aggrieved party which has previously timely intervened pursuant to Sections 90-35 or 90-38. That motion shall be in writing, shall be filed with the VGMC coordinator within ten working days after rendition of the decision by the commission and shall state its grounds.

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- (b) The movant shall serve the motion by certified mail or hand delivery upon the commission chairman and the VGMC coordinator, and the applicant jurisdiction if the movant is other than the applicant jurisdiction.
  - (c) The VGMC coordinator shall place the motion for rehearing on the next commission agenda for consideration of such motion for rehearing together with a notice stating the date, time and place the motion for rehearing will be orally presented to the commission. Notice of the hearing on the motion for rehearing shall be mailed to all substantially affected and aggrieved parties who filed for intervention pursuant to Section 90-35 and 90-38 to the original commission hearing.
  - (d) If the commission grants the motion, it shall state its reasons for doing so, and set a date, time and place for another public hearing upon due public notice. The commission shall also state whether the rehearing public hearing shall be a trial de novo or limited to review of the specific issues designated by the commission based on the motion for rehearing.

**ISSUE #B**  
**Ex Parte Communications**

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Issue: Whether ex parte communications by anyone to members of the commission regarding pending applications should be allowed.

Background: At the present time the Certification Rules do not address ex parte communications.

Option #1: Do not allow ex parte communications.

If this option is taken renumber the existing language of Section 90-36 as subsection (a) and adopt the following language as a new subsection 90-36(b):

- (b) The applicant or his representative or any member of the public shall not meet with, communicate directly with, or have any ex parte communication with any voting member of the commission concerning any application for Certification of Consistency under this article.

Option #2: Allow ex parte communications.

If this option is taken, renumber the existing language at Section 90-36 as subsection (a) and adopt the following language as a new subsection 90-36(b):

- (b) Ex parte communications with voting members of the commission concerning an application for Certification of Consistency under this article shall be governed by Volusia County Code Section 2-3, Access to county officials. For the limited purposes of application of Section 2-3, each voting member of the commission is deemed to be a "county official."

NOTE: A copy of the Volusia County Code Section 2-3 is attached.

**ARTICLE I. IN GENERAL****Sec. 2-1. Administrative code designated.**

Articles II, III and IV of this chapter are the administrative code of the county.

(Ord. No. 94-7, § I, 4-14-94)

**Charter references:** Adoption of administrative code, § 307(4); administrative code generally, § 604.

**Sec. 2-2. Public records.**

(a) *Definition.* For purposes of this section, the term "public records" means all documents, papers, letters, maps, books, tapes, photographs, films, sound recordings or other material regardless of physical form or characteristics, made or received pursuant to law or ordinance or in connection with the transaction of official business by the administrative department, service centers and service groups of the county.

(b) *Custodian.* Under state law, the elected or appointed county officers charged by law with the responsibility of maintaining the office having public records shall be the custodian thereof. In addition, the county manager, under the county Charter, is clerk of the county council and head of the administrative branch of the county government. Based on such provisions, and for purposes of this section only, the county manager shall be the custodian of public records for the administrative departments and divisions of the county. This shall not relieve any person from their responsibility under the general law of the state.

(Ord. No. 76-4, §§ 1--7, 3-18-76; Ord. No. 98-14, § II, 8-6-98; Ord. No. 01-19, § 1, 8-2-01)

**State law references:** Public records, F.S. ch. 119.

**Sec. 2-3. Access to county officials.**

(a) As used in this section, the term "county official" means any elected or appointed officer or employee of the county who recommends or takes quasijudicial action as a member of the county council, other county boards or commissions.

(b) Any person not otherwise prohibited by statute, charter provision or ordinance may discuss with any county official the merits or any matter on which action may be taken by the county council, other county boards or commissions on which the county official is a member. Adherence to the following procedures shall remove the presumption of prejudice arising from ex parte communications with local public officials:

(1) The substance of any ex parte communication with a county official which relates to a quasijudicial action pending before the county official is not presumed prejudicial to the action if the subject of the communication, and the identity of the person, group, or entity with whom the communication took place, is disclosed and made a part of the record before final action is taken on the matter.

(2) A county official may read a written communication from any person; however, a written communication that relates to a quasijudicial action pending before the county official, shall not be presumed prejudicial to the action and such written communication shall be made a part of the record before final action on the matter.

(3) County officials may conduct investigations, make site visits, and receive expert opinions regarding quasijudicial action pending before them. Such activities shall not be presumed prejudicial to the action, if the existence of the investigation, site visit or expert opinion is made a part of the record before final action is taken on the matter.

(4) Disclosure made pursuant to subparagraphs (1), (2) and (3) must be made before or during the public hearing at which a vote is to be taken on such matters, so that persons who have opinions contrary to those expressed in the ex parte communications are given a reasonable opportunity to refute or respond to the communications.

(c) This section does not subject county officials to F.S. ch. 112, pt. 3 (1995), as may be subsequently amended, for not complying with this section.

(d) In a quasijudicial proceeding relating to land use matters held by the county council or other county boards and commissions, hereinafter referred to as the "decision-making body," a person who appears before the decision-making body who is not a party or party-intervenor shall be allowed to testify before the decision-making body, subject to control by the decision-making body, and may be requested to respond to questions from the decision-making body, but need not be sworn as a witness, is not required to be subject to cross-examination, and is not required to be qualified as an expert witness. The decision-making body shall assign weight and credibility to such testimony as it deems appropriate. A party or party-intervenor in a quasijudicial proceeding held before the decision-making body relating to land use matters, upon request by another party or party-intervenor, shall be sworn as a witness, shall be subject to cross-examination by other parties or party-intervenors, and shall be required to be qualified as an expert witness, as appropriate.

(e) In a quasijudicial proceeding relating to land use matters before the county council or other county boards or commissions, hereinafter referred to as the "decision-making body," a person may not be precluded from communicating directly with a member of the decision-making body by application of ex parte communication prohibitions. Notwithstanding subsection (b)(1) through (4), disclosure of such communications by a member of the decision-making body is not required, and such nondisclosure shall not be presumed prejudicial to the decision of the decision-making body. All decisions of the decision-making body in a quasijudicial proceeding relating to land use matters must be supported by substantial, competent evidence in the record pertinent to the proceeding, irrespective of such communications.

(Ord. No. 95-36, § I, 9-7-95; Ord. No. 96-33, § I, 12-19-96)

#### **Sec. 2-4. Legislative findings.**

It is hereby found by the county council of the county, that the provisions of F.S. § 286.0115 (1995), are of material benefit to the people of the county and implement their rights pursuant to section 5, article 1, Florida Constitution, and it is the intent of this section to conform to the provisions of the statute.

(Ord. No. 95-36, § II, 9-7-95)

Secs. 2-5--2-40. Reserved.