

Volusia Growth Management Commission

MEETING MINUTES FOR  
REGULAR MEETING HELD  
Wednesday, July 22, 2009

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

MEMBERS PRESENT

Joan Spinney, Chair  
Gerald Brandon, Vice Chairman  
Steve Katz, Secretary       Excused  
Richard Walton  
Terry Griffiths               Excused  
Danny Allen  
Sandy Lou Gallagher  
Sandy Jones                 Excused  
John Heaphy  
Roger Sonnenfeld  
Rick Tresher  
Mike Thompson             Excused  
James Kerr  
Patricia Heller-Jackson  
Bobby Ball  
Sandra Walters  
Rachel Sieg  
Dwight Lewis               Absent  
Gary Huttman  
Kenneth Kuhar

REPRESENTING

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

NON-VOTING MEMBERS

Sara Lee Morrissey  
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

VGMC Chair Joan Spinney 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.

Chair Spinney announced three member reappointments: Danny Allen, City of DeBary; Rick Tresher, City of New Smyrna Beach; and herself, representing the City of South Daytona.

APPROVAL OF MINUTES

Gerald Brandon made a motion to approve the minutes of the regular meeting held on May 27, 2009; seconded by Gary Huttman. Motion carried unanimously.

PUBLIC HEARING

No matters were scheduled for public hearing.

REMARKS OF INTERESTED CITIZENS

None

REPORTS OF OFFICERS

None

REPORTS FROM CONSULTANTS

Barry Wilcox, MSCW, planning consultant to the VGMC, provided a pending case update.

REPORTS OF COMMITTEES

Gerald Brandon, POP Committee Chair, commented that several procedure review issues are scheduled for discussion later on the agenda. He also stated that the next meeting of the POP

Committee is scheduled for July 28, 2009 at 9:30 a.m. at the Volusia County School Board Facility located at 3750 Olsen Drive in Daytona Beach.

Commissioner Walters and Commissioner Gallagher arrived at approximately 7:05 p.m.

### UNFINISHED BUSINESS

1) VGMC Membership – Mr. Chipok referenced Section 90-45 of the draft rules amendments. He stated that the POP Committee has recommended adopting the language as reflected in the Issue Review Sheet in the agenda package. Mr. Chipok summarized the changes which included: 1) Changing the title of the section to “Appointment & Term of Commission Members”; 2) Adding a statement consistent with the policy that has been in place since the creation of the VGMC that each voting member of the commission shall reside within the jurisdiction that such member represents; and 3) Deletion of the last sentence which read: “The governing body for each governmental entity that appoints a member to the commission shall at any time have the right to remove its appointed member to the commission with or without cause and to appoint a successor member.” The recommendation of the POP Committee serves as a motion and a second.

With respect to deleting the language which would allow a jurisdiction to remove a member with or without cause, Mr. Chipok stated his legal opinion is that under the home rule powers of each jurisdiction, they already have the ability to craft ordinances to that effect and it is not necessary to repeat that in the VGMC rules. He added that if there is no other rule adopted by a particular jurisdiction, then a member’s term of office would be three years and could only be removed for cause consistent with state statute and the VGMC rules of procedure.

Commissioner Huttman asked if it would create a problem in the function and operation of the VGMC if some members were bound under their own jurisdiction’s ordinance relating to membership while other members were not. Mr. Chipok responded that he does not believe there would be a problem. Based on general case law, Mr. Chipok stated that if removal of an appointee is not addressed, the member essentially has a property right in the length of their term. He added, however, that under home rule powers, the jurisdictions have the ability to craft terms of office and appointment and removal criteria as they see fit. Mr. Chipok stated if a jurisdiction has a particular ordinance, then we would have to defer to the local ordinance on that particular appointment issue.

Commissioner Allen raised a question relating to the three-year term and asked if that starts with the date of the members’ appointment. Mr. Chipok explained that if a member is appointed to fill a vacancy created by a prior member, the initial term for that member is to carry out the balance of the existing term. He added that when the VGMC was originally created, it was determined that the three-year terms would be staggered between the jurisdictions to avoid creating a massive turnover and loss of institutional memory in any given year. Mr. Chipok also

added that the VGMC Rules of Procedure address this and states that if a member leaves the commission, a new member will be appointed for the remainder of the existing term.

Commissioner Walton asked for clarification that the issues the commission would be voting on tonight is for the purpose of directing staff in preparing a new draft, and not a final vote by the commission on the individual issues. Mr. Chipok responded affirmatively, adding that once all of the outstanding individual issues are addressed by the commission, staff will prepare a new draft to bring back to the commission for public hearing before forwarding to the Volusia County Council in the form of a Resolution.

Commissioner Brandon also commented that the issues are being individually brought back to full commission for consideration as requested at the original May 27, 2009 hearing.

There was no one present in the audience who spoke on the issue.

There was no further discussion and the motion and second from the POP Committee carried unanimously.

2) Senate Bill 360 – Mr. Chipok referred the members to his memo dated June 18, 2009 which provides an analysis of various aspects of SB 360 that were applicable to growth management in the comprehensive planning context of VGMC's role. He stated that in his review of the bill, his opinion is that SB 360 will not have a direct impact on how the VGMC functions. Mr. Chipok stated that in the long term, the issues raised by SB 360 in regards to transportation concurrency, impact fees and mobility fees will be collectively addressed statewide and that the review analysis the VGMC utilizes will need to be adjusted, but we don't know just how at this time.

Mr. Chipok stated in his opinion, there is no reason to stop our rules amendment process because of SB 360. He stated that SB 360 will affect the entire landscape, however, the small portion of that landscape that VGMC deals with in reviewing consistency will not be affected procedurally in terms of how the commission operates, but the analysis as far as transportation concurrency may be affected somehow and we'll need to work through that. Mr. Chipok added that the impacts from SB 360 are not unique to the VGMC.

Mr. Chipok discussed a change to the Dispute Resolution Section of the 163 process which under SB 360 has changed mediation from being voluntary to being mandatory. He also discussed DULA's (Dense Urban Land Areas) which were created under SB 360. Mr. Chipok listed the local jurisdictions which are considered DULA's based on the definition contained in state statute, which automatically qualifies them as transportation concurrency exception areas. Mr. Chipok added that the Secretary of DCA has taken the position that although a jurisdiction may qualify as a transportation concurrency exception area, concurrency will still apply until steps are taken by the jurisdiction to amend their comprehensive plans and land development regulations accordingly.

Mr. Chipok also informed the commission that the City of Weston has filed a lawsuit and several other cities have joined in, challenging the constitutionality of SB 360.

In conclusion, Mr. Chipok stated that SB 360 will shake out however it shakes out, but for the purpose of moving forward with the rules, SB 360 does not directly affect our daily operating process which is what the commission is currently looking at. Chair Spinney asked if it would impact our staff's review process. Mr. Chipok responded that it may, but how it will impact us is still unknown. Mr. Wilcox addressed the commission on the issue of transportation concurrency. Mr. Chipok also discussed additional provisions of SB 360, including provisions relating to mobility fees and DRI's.

3) Municipal Home Rule Powers Act – Mr. Chipok stated that at the May 27, 2009 hearing, Scott Simpson raised issues relating to the Municipal Home Rule Powers Act. Mr. Chipok referred the commission to a subsequent memo from Mr. Simpson dated June 17, 2009, along with a memo from Mr. Chipok dated June 22, 2009, both of which are in the agenda package. Mr. Chipok stated that on page 2 of his letter, Mr. Simpson stated if the VGMC reviews issues other than consistency determination issues that the VGMC will be violating the Home Rule Powers Act by acting on issues that are exclusively within the power of the local government. Mr. Chipok stated he thinks that Mr. Simpson's comment was related to the criticism that has been leveled against the VGMC that in certain circumstances the VGMC was delving into zoning issues. He stated in his opinion, when VGMC addresses zoning issues, it is typically within the context of a comprehensive plan amendment which can occur in one of two ways.

Mr. Chipok stated that a comprehensive plan land use category is more general, where zoning is more specific. He then discussed the various zoning classifications that can be within one land use and stated from a comprehensive planning standpoint, the analysis has to be done based on maximum impacts. In some instances, the maximum impacts would result in the amendment being inconsistent, however, the jurisdiction may indicate that they do not intend to develop the property to the maximum density allowed under the proposed land use. As a result, the analysis is done based on the lower density and if the amendment can be found consistent based on that limitation, a condition of approval must be placed on the consistency certification which is handled through a resolution. Mr. Chipok stated that it is in these situations when the VGMC sometimes gets into addressing zoning issues at the comprehensive planning stage.

Mr. Chipok then quoted the charter which states "The commission may perform some other directly related duties as the commission from time to time deems necessary". He stated in his opinion, as long as the commission sticks to issues that are directly related to the comprehensive plan amendment we are reviewing as we have tried to do carefully and in a limited fashion over the years, he believes that the commission is within their jurisdiction as established by the charter.

Mr. Wilcox stated that in the past, if a comprehensive plan amendment was not measurable or predictable, in order to avoid declining an application, the VGMC has crafted ways to find an amendment consistent through conditions of approval which sometimes involve zoning issues.

He suggested that the VGMC avoid conditional approvals that put us in the realm of looking at zoning issues. Additionally, Mr. Wilcox stated that we sometimes receive applications that are submitted in such poor shape that it requires numerous conditions that delve into zoning issues as well, such as building heights and setbacks. In those situations, he suggested we may simply need to decline the applications and advise the applicants to bring it back when the issues are addressed. Chair Spinney asked if the proposed rule allowing the ability to withdraw without significant consequences would help address that. Mr. Wilcox responded that under our present rules, even if the jurisdictions work out and address the issues, it often must come to a hearing in order to condition the approval based on the agreements they have reached. He stated that the proposed rules would help that situation and allow the jurisdictions to work out the issues and resubmit without the feeling of being penalized.

Commissioner Sieg asked Mr. Wilcox if he was suggesting that the VGMC not place conditions on any applications. He responded that he felt conditions are appropriate, but that we need to be careful how we use them because conditions can take any form and we need to be sure they are within our scope of review. Referring to a prior VGMC conditional approval, Ms. Sieg asked if we would be getting into zoning issues if the commission put limits on the number of dwelling units. Mr. Wilcox responded that it can in some situations, but you can put a limit on density in the comprehensive plan so that situation is something that VGMC would be capable of doing. He stated the situations he is more concerned with are those that the VGMC obligates itself to look at again, which causes additional expense to the commission as well. Chair Spinney commented that she wouldn't think the jurisdictions would want that either because they want to move on with it. Mr. Wilcox concurred, stating that most of the jurisdictions he has spoken with feel that way as well. He stated that the VGMC doesn't want to get into zoning, the jurisdictions don't want to have to send stuff back to the VGMC, and the simple answer is to make sure that what is being brought to us at the comprehensive planning stage is measurable and predictable.

Commissioner Walters commented in agreement with Mr. Wilcox and stated that over the years the VGMC has pulled and stretched at too many comprehensive plan applications to get to a yes answer. Mr. Chipok commented that the liberalization of the withdrawal policy as proposed in the rules amendments will allow the application to be withdrawn, reworked and resubmitted with those conditions not imposed by the VGMC, but rather coming to us as part of the application. He stated in that scenario, we are reviewing it as part of the jurisdiction's application, instead of a rule VGMC is imposing which requires us to follow up in an enforcement mode and look at the application again.

Getting back to the home rule powers discussion, Mr. Chipok stated that historically he believes we have stayed within our boundaries of only looking at those zoning type matters when they are specifically related to the comprehensive plan issue on the table.

There was no further discussion or direction to staff relating to the Home Rule Powers Act.

4) Rehearings – Mr. Chipok referred the commission to the Rehearing Issue worksheet in the agenda package and stated that this comes back to the commission with no recommendation

from the POP Committee. He stated the issue is whether or not the commission wants to provide a provision allowing for rehearings. If the commission does not wish to allow rehearings, there is proposed language that states such. If the commission does wish to allow rehearings, there is proposed language which is structured on the County's Historic Preservation Board language for how they conduct rehearings which is consistent with case law. Mr. Chipok stated that the only change in the County's language is the last sentence in subsection (d) which states "The commission shall also state whether the rehearing public hearing shall be a trial de novo or be limited to review of the specific issues designated by the commission based on the request for rehearing". He stated he's included that language in there because it is unknown whether the issues you are basing the authority to have the rehearing on are rifle shots or more shot gun which affects the entire application. Mr. Chipok stated if it is a rifle shot, the commission can clearly state that we are only going to look at the one issue. However, if it is something that cuts across the entire application and has an impact in multiple ways, he asked if it was appropriate and fair to limit it to just the one issue. Mr. Chipok stated this is a policy issue for determination by the commission and what he's attempted to do in drafting the language is to create as much flexibility as possible. He stated if the commission has trouble with the last sentence and they decide to delete it, he was comfortable with the remainder of the rule and they could proceed on with that.

Chair Spinney commented in favor of removing the legal language "trial de novo" because she stated it is not a trial. Commissioner Tresher concurred and commented that there is nothing wrong with allowing a rehearing because people make mistakes. He added, however, the purpose of a rehearing is to bring to attention something that was not addressed, considered or missed and that a rehearing is not intended to give a moving parting a second shot. Mr. Tresher stated that a party should come before the commission prepared and give the commission their best argument. If for some reason something was missed or something new arises that the commission should be made aware of, he stated they should ask for a rehearing. He added that he objects to someone coming to the commission to ask for a rehearing just because they do not like the results of the first hearing.

Commissioner Brandon stated the first thing for the commission to consider is whether or not to allow a hearing, and secondly if the commission allows rehearings, whether or not to strike the last sentence in subsection (d) relating to trial de novo.

General discussion ensued relating to the language in the last sentence of subsection (d) and issues relating to the Lady Godiva rehearing which brought forward the issue of addressing rehearings in the VGMC rules.

Commissioner Brandon again stated that the commission first needs to decide whether or not they wish to grant rehearings, before deciding on the proposed language.

Commissioner Huttman asked if there is a cost factor to be considered with a rehearing. Mr. Wilcox commented that from a planning recommendation standpoint, he would like to think they got it right the first time and there would be limited additional review costs. Mr. Chipok added

that if there was surprise or new information, the planning staff would need to review that and include that in the staff recommendation for the rehearing. Therefore, he stated there would be some administrative costs for holding a rehearing, but the purpose of the rehearing would be to reach the correct solution and that a rehearing would be significantly less costly than strictly saying were done and move directly to circuit court.

Commissioner Gallagher suggested with respect to option #2 allowing rehearings that the language be amended to strike out the term trial de novo.

Commissioner Sonnenfeld raised a question about member attendance and voting relating to rehearings. Chair Spinney stated if you are present at a meeting, you must vote. Mr. Chipok affirmed Ms. Spinney's statement and reported that the Attorney General Opinion confirmed that. Discussion ensued relating to members being in attendance at a rehearing that were not in attendance at the original hearing.

Chair Spinney reminded the commission that they first need to decide whether or not they want to grant rehearings. Rachel Sieg made a motion to allow rehearings; seconded by Richard Walton.

Chair Spinney asked if there was further discussion or comment from members of the audience. Suzanne Steiner of Volusia County spoke in opposition of allowing rehearings and stated they are very subjective.

The motion to allow rehearings passed by a vote of 14-1 with Commissioner Sonnenfeld voting in opposition of the motion.

General discussion ensued relating to new information being allowed under the proposed rehearing language. Mr. Chipok confirmed that the rehearing process is a two-step process. The party would be required to timely request a rehearing and its basis for doing so, and the commission would schedule a time to meet to consider the request for rehearing. If the commission grants the rehearing, then a date and time would be established to hear the merits of the case. Commissioner Walton commented that if the commission will first meet to make the determination as to whether or not the rehearing will be granted, then the commission should have the flexibility to determine what type of rehearing to hold based on the facts presented at the request for rehearing.

Commissioner Heller-Jackson asked if there would be any limit on the number of rehearings allowed if granted. Mr. Chipok stated it would be just one.

With respect to the language in subsection (c), Chair Spinney suggested that the first sentence be split into two. Mr. Wilcox also suggested in the first line of subsection (c) that the term "available" follow "...request for rehearing on the next" to avoid a request coming in for a scheduled meeting after the agenda has been noticed.

Commissioner Ball asked about the applicant's options if the commission denied a request for rehearing and whether or not they could appeal or reapply. Mr. Chipok responded that if they were to appeal they would likely appeal the original decision and not the decision to not grant the rehearing, or they have the option to resubmit the same application after six months under the proposed rules amendments.

Mr. Wilcox commented that we are assuming the request for rehearing is from a jurisdiction, but it could also come from an individual or group who was granted standing and the commission should also keep that in mind while drafting the language and making their decision.

Mr. Chipok read revised draft language to the commission for the first sentences of subsection (c) as follows: "The VGMC coordinator shall place the request for rehearing on the next available commission agenda for consideration of such request for rehearing and provide published notice stating the date, time and place that the request for rehearing will be presented to the commission." He stated that the balance of the draft language in subsection (c) would not change. There were no further comments or changes to subsection (c) by the commission members.

With respect to subsection (d), Mr. Chipok stated based on the general comments of the commission, the first sentence would remain the same, but starting with the second sentence, it could be amended to read: "The rehearing public hearing shall be limited to review of the specific issue(s) designated by the commission based on the request for rehearing."

Commissioner Walton asked if the proposed amended language would not allow the commission to rehear everything. Mr. Chipok responded that if the original hearing was based on "A" "B" & "C" and argument is made that "D" & "E" have direct relationships on "A" "B" or "C", then it will be the call of the commission at the time of the rehearing request to determine what they want to consider at the rehearing.

Gerald Brandon made a motion to add Section 90-46 allowing rehearings with the proposed language as amended in subsections (c) and (d); seconded by Sandy Lou Gallagher. For clarification purposes, Mr. Chipok read subsections (c) and (d) as amended into the record. Specifically, subsection (c) will read as follows: "The VGMC coordinator shall place the request for rehearing on the next available commission agenda for consideration of such request for rehearing and provide published notice stating the date, time and place that the request for rehearing will be presented to the commission. Notice of the hearing on the request 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." Subsection (d) will read as follows: "If the commission grants the request, it shall state its reasons for doing so, and set a date, time and place for another public hearing upon due public notice. The rehearing public hearing shall be limited to review of the specific issue(s) designated by the commission based on the request for rehearing."

Motion carried unanimously.

Several members asked about the issue of standing and the information provided in the agenda package. Mr. Chipok stated that was for the purpose of updating the commission on that issue. He added that the POP Committee would be meeting on August 11, 2009 to further discuss the issue of standing and it is anticipated that it will come back to the full commission at the August 26, 2009 regular meeting.

NEW BUSINESS

None

REPORTS AND REQUESTS OF COMMISSION MEMBERS

Commissioner Sonnenfeld asked if it would be possible to post all VGMC applications online. The VGMC Coordinator stated that some applications are large documents submitted in binders and include oversized maps, etc. Mr. Wilcox suggested possibly scanning the application and summaries. Following general discussion, Commissioners Heller-Jackson, Sonnenfeld and Sieg asked that the coordinator email them copies of the applications and summaries for review. Mr. Brandon stated that if an individual commission member wanted more information on any given application, they can contact the coordinator for that.

Commissioner Walters discussed comments made by the Executive Director of VCOG at the June 22, 2009 VCOG Governing Board meeting which related to the VGMC's May 27, 2009 public hearing on the rules amendments.

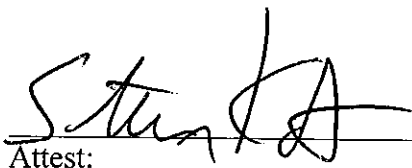
Commissioner Allen stated he attended a City of DeBary Council meeting and they requested he pass on that they adopted a resolution which supports standing for all parties.

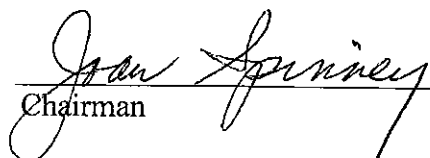
REPORTS AND REQUEST OF COMMISSION CHAIR

None

ADJOURNMENT

The meeting was adjourned at 8:30 p.m.

  
Attest: \_\_\_\_\_

  
Chairman \_\_\_\_\_