

Volusia Growth Management Commission

MEETING MINUTES FOR  
REGULAR MEETING HELD  
Wednesday, February 23, 2011

County Council Chambers  
Thomas C. Kelly Administration Center  
123 W. Indiana Avenue  
DeLand, FL

MEMBERS PRESENT

Gerald Brandon, Chairman  
Steve Katz, Vice Chairman (Excused)  
Dwight Lewis, Secretary  
Richard Walton  
Terry Griffiths  
Danny Allen  
Sandy Lou Gallagher (Excused)  
Jason Floyd  
John Heaphy  
Roger Sonnenfeld  
Rick Tresher  
Robert Storke  
Alan Redinger  
Debbie Connors  
Joan Spinney  
Dwight Lewis  
James Wachtel  
Kenneth Kuhar (Excused)  
Gary Huttman  
David Michael Halpin

REPRESENTING

Ormond Beach  
DeLand  
Volusia County  
Daytona Beach  
Daytona Beach Shores  
DeBary  
Deltona  
Edgewater  
Holly Hill  
Lake Helen  
New Smyrna Beach  
Orange City  
Ponce Inlet  
Port Orange  
South Daytona  
Volusia County  
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, VHB Miller Sellen  
Merry Chris Smith, VGMC Coordinator

### CALL TO ORDER

VGMC Chairman Gerald 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.

Chairman Brandon announced that Ponce Inlet's representative Don Romanik recently resigned from the Commission as he has been appointed to serve as a member of the Town Council of Ponce Inlet. Mr. Brandon welcomed Alan Redinger who was appointed by Ponce Inlet to fill the unexpired term of Mr. Romanik.

### APPROVAL OF MINUTES

Debbie Connors made a motion to approve the minutes of the regular meeting held on November 17, 2010 as presented; seconded by Joan Spinney. Motion carried unanimously.

### PUBLIC HEARINGS

- 1) Consideration of VGMC Resolution #2011-01, Apportionment of Voting Weight

Paul Chipok, legal counsel to the VGMC, addressed the commission. Mr. Chipok explained that pursuant to the Charter, there is a weighted vote requirement on all comprehensive plan amendments which must be revised each year based on the annual population figures.

Dwight Lewis made a motion to approve VGMC Resolution #2011-01, Apportionment of Voting Weight; seconded by Debbie Connors. Motion carried unanimously.

- 2) Consideration of Standing as a Party for Pacetta Group based on Petition for Public Hearing/Petition to Intervene submitted by CobbCole on behalf of petitioners Pacetta Group pursuant to Sections 90-35 and 90-38, Volusia County Code, relating to VGMC Application No. 10-022

Mr. Chipok read a statement of procedure into the record which would apply to both the item of standing and the comprehensive plan amendment review which will also be considered by the commission. He also discussed the commission's scope of authority and reviewed the criteria by which the commission will determine consistency.

Witnesses planning to speak were sworn in by the VGMC Coordinator.

Mr. Chipok addressed the commission relating to the issue of standing. He explained that pursuant to Section 90-35 of the VGMC rules, a person claiming to be an affected party can

request a public hearing within 21 days of the date the application notice is published in the newspaper. Mr. Chipok stated that the Pacetta Group filed a timely petition and the issue currently before the commission is whether or not the Pacetta Group is a substantially affected party. In addition, he stated that they also filed a Motion to Intervene, but without their request for a public hearing, there may not have been a proceeding before the commission tonight. Regardless of that distinction, Mr. Chipok stated that under basic due process argument for standing under these types of procedures, utilizing case law and the Renard standard there are essentially two components to consider: 1) Is the person seeking standing in close proximity to the comprehensive plan amendment area; and 2) Are they affected to some degree greater than the general public by the comprehensive plan amendment. Mr. Chipok reminded the commission that at this point, we are only looking at whether they have standing as a substantially affected party, and not looking at the merits of the proposed comprehensive plan amendment.

Mr. Chipok stated his analysis found that the comprehensive plan amendment has a direct affect on approximately 17 acres of property owned by the Pacetta Group. In his opinion, Mr. Chipok stated the Pacetta Group is affected by the comprehensive plan amendment. In addition, Mr. Chipok stated that since the amendment contains a component with what they can do with the uses on their property, he stated his opinion is that the Pacetta Group has a degree of effect greater than the general public.

Michael Woods, CobbCole law firm, 351 E. New York Avenue, DeLand, and representing the Pacetta Group addressed the commission. Mr. Woods concurred with Mr. Chipok's analysis on the matter of standing. He stated that Policy 4.1.5 of the proposed amendment applies directly and solely to the Pacetta Group property. Mr. Woods explained that the effect of the amendment places into the comprehensive plan a prohibition of the use of dry boat storage facilities on the property, and he stated that under the Renard standard, the amendment has a greater effect on the Pacetta Group than the general public.

Cliff Shepard, Attorney for the Town of Ponce Inlet, addressed the commission. Mr. Shepard stated that the Renard standard has no application to this matter as Renard relates to a zoning matter while this relates to the consistency of the proposed comprehensive plan amendment to comprehensive plans of adjacent jurisdictions. In addition, Mr. Shepard stated the issues raised by the Petitioner are internal disputes and that it is beyond the scope of the VGMC to address internal disputes between a City and its residents. He also commented on various court cases and avenues taken by the Petitioner to administratively challenge the amendment.

Mr. Shepard then made a power point presentation, a copy of which is on record at the VGMC office. Mr. Shepard stated there is no way you can be an intervenor when you are also the petitioner. He pointed out that Section 90-38 of the VGMC rules states that "Persons other than the original parties to a pending application..." are those that can intervene. Mr. Shepard stated that since Pacetta Group is the original party, they cannot be an intervenor. He stated there is an important legal reason which deals with the standard of appeal as to why the commission should deny the Petition to Intervene.

With respect to the issue of standing, Mr. Shepard stated that the VGMC is not in the business of regulating disputes between a property owner and the City that regulates them. He also quoted the duties of the commission as stated in the Charter as well as other provisions of the Consistency Certification Rules, pointing out that no jurisdictions objected to policy 4.1.5 of the proposed amendment. Mr. Shepard stated that citizens of an applicant jurisdiction have other avenues of redress, and he commented on other venues the petitioner has already taken with respect to their objections. He requested that the commission deny standing to the petitioner.

In response to Mr. Shepard's presentation, Michael Woods addressed the commission relating to the commission's jurisdiction and role in reviewing comprehensive plan amendments. Mr. Woods also commented that is arguable as to whether the prohibition proposed in policy 4.1.5 should be included as a comprehensive plan or zoning policy, but added that the Town has chosen to include the policy in the comprehensive plan which subjects it to a heightened level of review which includes the VGMC. Mr. Woods also stated that the Town has the burden of proof to show that the proposed amendments are consistent with the comprehensive plans of adjacent jurisdictions.

Commissioner Walton asked Mr. Woods about the distinction made by Mr. Shepard concerning the issue of intervention. Mr. Woods stated the petition was filed to exhaust all remedies that are available to them.

As a point of clarification, Mr. Chipok discussed the status of the comprehensive plan amendment. He stated that the commission received one amendment package which contains multiple components. Mr. Chipok stated that one of the sections deals with policy 4.1.5 which the Pacetta Group is concerned with, and another section deals with utilities supply which the City of Port Orange had concerns with. He stated through various correspondence, the City of Port Orange's concerns have been resolved in the form of a condition as proposed in the resolution. Mr. Chipok reminded the commission that they can conditionally approve an amendment, however, only through a resolution which requires a public hearing. He stated that regardless of the course of action taken by the commission with respect to the Pacetta Group, the commission must move forward with a public hearing on the overall application to address the proposed conditions which address the City of Port Orange's concerns.

Commissioner Storke asked if the commission would be voting just on the issue of standing, and not on the issue of intervention. Mr. Chipok responded that in his opinion, they have requested standing to participate as a party, and that the distinction between whether it is an initial party or an intervenor party is not that much of a distinction for this commission. He stated that regardless of whether they are granted standing as an initial party or intervenor party, they have to prove that they are a substantially affected party. Mr. Chipok stated that we rely on the Renard standard by way of analogy in determining: 1) Does the comprehensive plan amendment affect the person(s) seeking to become a party; and 2) Does it affect them to a degree greater than the general public.

Commissioner Tresher asked if there is a legal distinction between standing as an intervenor and standing as a petitioner. Mr. Chipok stated with regard to standing, the commission is only determining standing for purposes of the ability to participate as a party before the VGMC. Under VGMC rules, he stated once you are granted party status, you would be entitled to file an appeal of the VGMC proceeding and the VGMC would not challenge the ability to file the appeal in circuit court. Mr. Chipok stated that even if standing is denied by the VGMC, a person would not be prohibited from filing an appeal. In that situation, he stated our first course of action would be to challenge the standing in circuit court.

With respect to the distinction between initial party and intervenor, Mr. Chipok stated the VGMC rules allow a substantially affected party to request a public hearing within 21 days of the published notice of application. Under Section 90-38, once a public hearing has been declared, anyone may move forward and request to be a party in the proceeding which if granted, would give them a right to file an appeal of the proceeding whereby the VGMC would not challenge their right to file an appeal. Mr. Chipok stated the standard for granting standing whether as an initial party or as an intervenor is undistinguishable at this point in time since both would fall back on the Renard standard.

Referencing Partin v. Lady Godiva, Commissioner Tresher stated that the VGMC has dealt with the issue of citizen standing in the past and asked if there is any legal precedent on prior VGMC actions in deciding whether or not to grant standing in this case. Mr. Chipok responded that he does not believe any prohibitions on standing came out of Partin v. Lady Godiva, and he further discussed the utilization of the Renard standard. With respect to the question of precedence, Mr. Chipok stated his opinion is that the commission has to decide each standing case on its own merits.

Commissioner Wachtel asked about the other court cases relating to this matter that were mentioned by Mr. Shepard, and whether or not those cases dealt with standing or the merits of the comprehensive plan amendment. Mr. Chipok responded that he is not intimately familiar with the other cases since we focus on the comprehensive plan amendment and the issue of whether it is consistent with the surrounding communities. He stated from his limited understanding of the other cases, the issue dealt with the comprehensive plan amendment language within Policy 4.1.5 which limits the usage of dry boat storage on the overlay zone created by that policy, and not the issue of standing.

Commissioner Walton raised a question relating to the location of the Pacetta Group property. Mr. Chipok stated the Pacetta Group property is nearly 17 acres located within the Town of Ponce Inlet and the overlay zone created by Policy 4.1.5 affects the majority, if not all, of the Pacetta property.

Commissioner Allen raised a question relating to an earlier comment that this relates to zoning. Mr. Shepard responded that this is a comprehensive plan amendment and that the Renard standard being applied deals with zoning. He also commented that the property within the overlay district was purchased after the restriction was already in place in the LUDC, and he also



spoke regarding various other legal remedies the petitioner has sought out. Michael Woods commented in response to Mr. Shepard's comments, stating that this issue is now at the comprehensive plan amendment level.

Joan Spinney made a motion to deny standing; seconded by Dwight Lewis.

Commissioner Tresher stated that we are currently only dealing with whether or not Pacetta Group has a right to participate and that the merits of the comprehensive plan amendment will be considered later. He commented that if we do not grant them standing, it will be appealed, we will again go down the long road of litigation, and they will cite Partin v. Lady Godiva as to why they should have received standing. Commissioner Tresher stated he felt we should grant the petitioner standing and then decide the issue based on the merits of the application.

Chairman Brandon stated that we have to follow our own rules regarding standing and that Mr. Chipok had spelled out the standard of review for determining standing.

Commissioner Lewis commented that he felt the issues are beyond the scope of the VGMC. Mr. Tresher stated that would relate to the merits of the application which can be determined at the time the commission hears the comp plan amendment. Commissioner Spinney commented that this is an internal matter within the Town of Ponce Inlet and does not belong in front of the VGMC.

Following a roll call vote, the motion to deny standing failed with a 7-9 vote. (See roll call vote labeled Exhibit 1.)

Richard Walton made a motion to approve standing; seconded by Rick Tresher. Following a roll call vote, the motion carried with a 9-7 vote. (See roll call vote labeled Exhibit 2.)

3) Consideration of VGMC Application No. 10-022, Town of Ponce Inlet large scale amendment application (VGMC Resolution #2011-02)

Mr. Chipok reviewed the order of the hearing and then turned it over to VGMC Planning Consultant Barry Wilcox.

Barry Wilcox, planning consultant to the VGMC, addressed the commission and provided a power point presentation, a copy of which is on record at the VGMC office. Mr. Wilcox discussed the proposed amendments, noting that they are all text amendments. He also reviewed Policy 4.1.5 as it is presently in the comprehensive plan, as well as the proposed changes to the policy, noting that the language which prohibits dry dock storage does not change.

Mr. Wilcox stated that the City of Port Orange provides water and sewer services to Ponce Inlet and there is an interlocal agreement in place regarding utility service. He stated that Port Orange had objected to the language originally proposed and asked that the Ponce Inlet revise the language to be more consistent with Port Orange's comprehensive plan.

Mr. Wilcox reviewed the consistency criteria and findings. He stated that Ponce Inlet and Port Orange have amicably agreed to revise the language relating to Policy 1.2.2, adding that this issue is the only recommended condition of approval.

With respect to natural resources, Mr. Wilcox stated that the allegation by the petitioner is that removal of dry boat storage in Policy 4.1.5 violates the Manatee Protection Plan, which the County authored and is the interpreter thereof. Mr. Wilcox discussed portions of Phase II of the Manatee Protection Plan (MPP) which addresses boat facilities, boat ramps, marinas, etc. Quoting from the MPP, he stated the intent of that plan is to "minimize watercraft related manatee mortalities by establishing requirements for siting, developing, revitalizing or expanding boat facilities". Mr. Wilcox also quoted from Section B.4. of the MPP which states "The provisions of this plan will not preempt or nullify any other more restrictive federal, state, or local regulations that apply." He discussed boat slip aggregation and stated that it is up to the individual jurisdictions to determine what type of facilities they want and where they want them located, adding that the only prohibition would be if a jurisdiction exceeded the total permitted boat slips for their jurisdiction. In this case, Mr. Wilcox stated that the County has not indicated that Ponce Inlet has exceeded their total permitted boat slips, nor did the County issue any comments on the amendment application. He further stated that in telephone conversations with the County, they have stated they do not feel the proposed amendments violate the MPP.

Mr. Wilcox then discussed Section 90-37 of the VGMC Consistency Certification rules which addresses reviewing the comprehensive plan amendments as a whole in terms of determining consistency. He stated he understands that what Ponce Inlet is trying to accomplish has to deal with the compatibility of use on the Pacetta property with surrounding properties, and the preservation of the historic nature of the area in general.

In closing, Mr. Wilcox stated that staff recommends approval of the amendment application conditioned with the agreed upon language between Port Orange and Ponce Inlet. With respect to the balance of the amendment package, he stated staff finds that Ponce Inlet has provided reasonable assurance based upon competent, substantial evidence that all other portions of the proposed amendment are consistent with the comprehensive plans of adjacent or substantially affected other local governments.

Commissioner Sonnenfeld commented that the prohibition of dry dock storage exists in the current comprehensive plan and is not changed under the proposed amendments. Mr. Wilcox stated that Policy 4.1.5 was adopted by the Town in a prior amendment package. He stated the VGMC did not receive any comments at that time and it was letter certified by the VGMC. Commissioner Walton asked if the current language as previously adopted was accepted by DCA. Mr. Wilcox stated there was no objection by DCA to Policy 4.1.5 in the previous amendment package or the one currently proposed. Mr. Sonnenfeld commented that there is no net effect to the petitioner with respect to dry boat storage under the current and proposed language.

Commissioner Allen asked if notice was given to the residents of Ponce Inlet when the amendment was previously reviewed and certified by VGMC. Mr. Chipok responded affirmatively and reviewed the specific notice requirements pursuant to Chapter 163 of the Florida Statutes.

Commissioner Storke raised a question regarding the proposed change in language of Policy 4.1.5 which eliminates the phrase 'ensure access to the riverfront by both pedestrians and bicyclists'. Mr. Storke commented that it seems counterproductive to the increase in multi-modal transportation options that the County is trying to establish. Mr. Wilcox responded that he does not believe the intent was to eliminate pedestrian and bicycle access, but rather to provide for more specific reasons for creating the overlay district.

Cliff Shepard of Shepard, Smith & Cassady P.A. then addressed the commission on behalf of the Town of Ponce Inlet. Mr. Shepard first responded to Commissioner Storke's question, explaining that the change to the language regarding pedestrian and bicyclist access has to do with litigation where it has been alleged that the Town is trying to use private property for public use.

Mr. Shepard stated that he and his partner had prior conversations with County staff members with whom they expected to be present at the hearing to testify. He stated he had just learned earlier in the day that County staff would not be present at the hearing, but that they would be submitting a letter to VGMC. Upon arrival at the meeting, he learned that the County had not submitted a letter to the VGMC. Mr. Shepard stated that in a telephone conversation yesterday, County staff members Georgia Zern and Becky Mendez stated in unequivocal terms that the proposed amendment is not in any way a violation of the Manatee Protection Plan and that it met all of the criteria for VGMC certification.

Mr. Shepard quoted from the Manatee Protection Plan which states: "The provisions of this plan will not preempt or nullify any other more restrictive federal, state, or local regulations that apply." He also stated that all of the property purchased in the overlay district was purchased after the Land Use Development Regulation was put in place in 2004 which did not permit dry boat storage as a use.

Mr. Shepard stated that no adjacent jurisdiction has objected to the amendment either time it has been proposed. He also stated that DCA has neither objected nor commented on Policy 4.1.5. Mr. Shepard stated it is difficult to understand how a private property owner of their own jurisdiction can be granted standing by the VGMC, adding that there is no doubt the Pacetta Group will appeal if the commission certifies the amendment.

Mr. Shepard called Virginia Cassady of the law firm of Shepard, Smith & Cassady to testify. Michael Woods objected as to the inappropriate nature of having the representative of the Town of Ponce Inlet to cross-examine a partner in order to establish competent and substantial evidence on the record. Mr. Chipok stated that the commission is here to follow general due



process standards and not as a court to rule on objections. He added that if either party has objections, it is appropriate for them to state those for the record.

Ms. Cassady testified as to her employment and background relating to the subject amendment. She also testified to telephone conversations she had with County staff members Becky Mendez and Georgia Zern, and stated that neither expressed any concern with respect to the consistency of Policy 4.1.5 of the Ponce Inlet comprehensive plan with the comprehensive plan and Manatee Protection Plan of Volusia County, and more specifically, the issue of prohibiting dry boat storage in the overlay district.

Mr. Shepard then called Gary Comfort, a resident at 85 Ocean Way Drive, Ponce Inlet, to testify relating to Exhibit H of the Second Response to Petition previously submitted to the VGMC by Ponce Inlet. Mr. Comfort testified to his background and involvement with the Town of Ponce Inlet, including serving as member of the Town Council from 2005 to 2007. He also testified to his involvement and communications with various staff members of Volusia County dating back to 2005 relating to the County's Manatee Protection Plan, in which he stated there was no concern expressed by the County with respect to restrictions on dry boat storage. Mr. Comfort specifically referenced email communications with Kelli McGee of Volusia County (Exhibit H of the Town's Second Response to Petition).

Commissioner Sonnenfeld asked Mr. Shepard who from Volusia County was expected to attend tonight's hearing. Mr. Shepard stated based on conversations yesterday, he understood that Ms. Mendez and Ms. Zern were both planning to attend. Ms. Cassady testified that she received a call earlier today from a legal assistant to Asst. County Attorney Jamie Seaman indicating that due to a requirement of the County Manager, no County employee would be able to testify before the VGMC this evening. She also testified that later in the afternoon, she received a call from Becky Mendez stating they would not be at the meeting, but a letter would be sent from the County. Ms. Cassady stated the letter was never received. Mr. Shepard also discussed his communications relating to this issue.

Mr. Chipok addressed the commission stating that since the Manatee Protection Plan was a key factor in this proceeding, he wanted to be sure we coordinated with the County on this effort. Since receiving the original application in July, 2010, he has received repeated assurances that County staff would be present for the hearing. He stated that he learned today through Mr. Shepard that County staff would not be in attendance. Mr. Chipok stated that he also understood a letter would be forthcoming, however, he received an email late today from the County indicating a letter would not be sent by the County and they stand mute on the matter.

Commissioner Sonnefeld stated the staff report seems to indicate that VGMC staff had conversations with County staff and that the County staff stated the proposed amendment does not conflict with the MPP or the County's comprehensive plan. Mr. Wilcox responded that he had contacted the County within 30 days of receiving the application to see if they intended on commenting on the application. He stated the County advised they would not be commenting on the application as they did not feel it was inconsistent with their comprehensive plan.

Additionally, Mr. Wilcox stated he had several subsequent conversations with Ginger Adair and Becky Mendez from the County, and each time they confirmed that they did not feel it was inconsistent with the County comprehensive plan or MPP. Mr. Wilcox further stated that it is not common to receive a letter from a jurisdiction who does not raise objections to an application, although he was under the impression that County staff would be present at the hearing.

Michael Woods of the CobbCole law firm then addressed the commission on behalf of the Pacetta Group and requested the commission deny certification of the amendment, particularly as it applies to Policy 4.1.5 relating to dry boat storage. Mr. Woods generally discussed the impact to his client, the pending litigation and the role of the commission. He stated the Town of Ponce Inlet has the burden of proof to provide competent and substantial evidence on the record that it is consistent and in furtherance of the policies of adjacent comprehensive plans. Mr. Woods stated the only evidence on the record thus far is the hearsay evidence raised by Ms. Cassady. He commented that in all the time they've been working on this, he finds it hard to believe that the Town could not get a comment or determination from the County in advance of tonight's hearing.

Mr. Woods then asked Mr. Wilcox to discuss the difference between zoning and comp plan amendments, and what issues the VGMC reviews. He also asked Mr. Wilcox questions relating to the policy that was adopted by the Town in 2008 and the VGMC review process which occurred at that time. Mr. Woods pointed out that when the original 2008 application was transmitted to VGMC, it did not include a policy relating to the prohibition of dry boat storage, however, it was included upon adoption by the Town. Mr. Wilcox stated that it is not uncommon for changes to occur between transmittal and adoption, and we ask that the jurisdictions provide the adopted version which staff reviews to ensure that the adopted amendment doesn't change the circumstances under which the original amendment application was certified. Mr. Woods raised questions concerning notice requirements and the level of VGMC review relating to subsequent documentation received from jurisdictions for changes which may have occurred during the adoption process. Referring to Section 90-37(i) of the Consistency Certification Rules, Mr. Chipok stated that after a consistency certification is issued, whether it is letter certified or certified by resolution through a public hearing, the jurisdictions have a continuing obligation to send the VGMC any additional information relating to the comprehensive plan, such as the adoption ordinance. He stated that when a jurisdiction provides the VGMC with the adoption ordinance, our typical practice is for staff to review it and perform an analysis to determine whether there are more impacts in the adopted version than in the certified version. If there are not, Mr. Chipok stated typically a letter will go into the file stating there are no additional impacts. If there is a potential for additional impacts, he stated a public hearing would be called and the matter would be brought before the full commission.

Mr. Woods continued to question Mr. Wilcox regarding the existence of Policy 4.1.5 in the Town's current comprehensive plan, burden of proof issues, and dry vs. wet boat storage. He also asked Mr. Wilcox what competent and substantial evidence was on the record relating to the staff report which indicated that Volusia County and VGMC staff found that the amendment was

consistent with the County's comprehensive plan and MPP. Mr. Wilcox responded that he had verbal communications with County staff who confirmed that the amendment was consistent, and he pointed out that the County did not issue any objections to the application. He also stated that he independently reviewed the amendment and found that there weren't any inconsistencies.

Mr. Woods then quoted from a June 30, 2009 deposition of Ashley Porter of DCA, and submitted a copy of the deposition into the record. Referring to pages 3, 4, 5 & 6 of his letter dated July 15, 2010, Mr. Woods questioned Mr. Wilcox relating to competent and substantial evidence on the record relating to consistency with the County's MPP.

Chairman Brandon called for a brief break at 9:32 p.m. The commission reconvened at 9:42 p.m.

Mr. Woods then briefly questioned Mr. Comfort and Ms. Cassady.

In closing, Mr. Woods stated the comp plan amendment directly impacts his client and he contends that the Town has not met its burden to prove that Policy 4.1.5 is consistent with policies in the Volusia County comprehensive plan and Manatee Protection Plan.

Commissioner Huttman raised a question relating to whether Policy 4.1.5 was included in the original transmittal of the application. Mr. Woods stated that he contends the original transmittal predated the referendum which added the prohibition to the policy at adoption. Mr. Shepard stated that this refers to the 2008 amendment, and that the amendment currently before the VGMC is the 2010 amendment.

Commissioner Walton asked Mr. Woods if he was aware of any objections from the County on this issue. Mr. Woods commented on the authority of County staff to determine consistency and replied that he did not have anything from the County stating they had an objection.

Mr. Shepard addressed the commission stating that the VGMC has heard competent and substantial this evening, specifically from Mr. Wilcox. He stated that Mr. Wilcox testified that he did an independent evaluation of consistency of the proposed amendment with the County's comprehensive plan, which Mr. Shepard stated is competent, substantial evidence. Mr. Shepard also stated that when no objection is received from a jurisdiction, the VGMC has a policy to accept that the jurisdiction finds it consistent.

There being no one further to speak on this issue, Chairman Brandon closed the public hearing.

Rick Tresher made a motion to approve the amendment; seconded by Joan Spinney.

Commissioner Walton commented on the issue of standing, stating that he voted to approve standing based on precedence set by prior actions of the VGMC in allowing citizens standing.

Mr. Chipok provided a brief summary of the proposed Resolution #2011-02 which would find the amendment package consistent with a condition addressing specific language being added to the sanitary sewer policy 1.2.2. Mr. Chipok also asked for clarification that the motion was to adopt Resolution 2011-02 as submitted. Commissioner Tresher confirmed his motion is to approve Resolution 2011-02 as submitted.

In light of the discussions which occurred at the hearing, Commissioner Walton asked Mr. Chipok if the paragraph on page 7 of the resolution which states "It is important to note that Volusia County is responsible for interpretation of the MPP and has stated that the Town's proposed amendment is consistent with the MPP as well as the County's comprehensive plan." should still be part of the resolution. Mr. Chipok responded that the County made oral representations to staff that the amendment is consistent with the County's comprehensive plan. He also quoted portions of Section 90-35(e)(4) and 90-37(g) relating to presumption of consistency and ability to intervene, pointing out that Volusia County neither issued any comments/objections, nor petitioned to intervene. Mr. Chipok stated he feels confident leaving the language in the resolution.

There being no further discussion, Chairman Brandon called the question on the motion to approve Resolution 2011-02 as submitted. The motion carried unanimously.

#### REMARKS OF INTERESTED CITIZENS

None

#### REPORTS OF OFFICERS

Chairman Brandon stated that he, Paul & Merry attended the County Council meeting on February 17, 2011 and an update will be provided later in the meeting.

#### REPORTS FROM CONSULTANTS

Legal Update: Mr. Chipok reported that on February 17, 2011 the Volusia County Council discussed the proposed rules amendments with the draft date of 10-01-2009. Referring to a memo to the VGMC members dated February 21, 2011 from Chairman Brandon (a copy of which is attached to the minutes as Exhibit #3), he stated the County Council looked at ten areas of the proposed amendments for either revisions or approval as submitted. Mr. Chipok stated that based on discussions that occurred through the County Attorney, the County Council agreed that any amendments to the VGMC Consistency Certification Rules are a legislative act of the County Council, and that the County Council has full and final authority to act on that.

Mr. Chipok read from Section 202.3 of the County Charter which in part states: "Rules...and amendments thereto, shall be proposed by the commission and shall not become effective until adopted by ordinance approved by a two-thirds vote of the entire membership of the council." Mr. Chipok stated that his opinion of this charter provision means that the VGMC proposes rules



through a resolution to the County Council, and the County Council has the authority to vote the rules up or down. He stated if they vote down the rules, they can send them back to the VGMC and the VGMC could work on the rules and resubmit them to the County. Mr. Chipok stated the County's position is that it is their Code of Ordinances and they can amend the rules any way they wish.

Mr. Chipok raised four options the VGMC can consider:

- 1) Do nothing and accept their interpretation that they can amend their code any way they wish;
- 2) Bring a declaratory judgment to ask the court exactly what authority the County Council has to amend the VGMC regulations;
- 3) Let the County Council proceed with the proposed amendments but state at the public hearing that we disagree with their interpretation of the amount of authority they have and we reserve the right in the future to object to any unilateral revisions to the consistency rules; or
- 4) Send a resolution to the County withdrawing the 10-01-2009 draft from consideration by the County, and then relook at the rules based on the discussion and comments from the recent County Council meeting.

Commissioner Spinney asked Mr. Chipok to explain why the rules amendments are sent to the County Council for approval. Mr. Chipok discussed the process which occurred relating to the currently proposed rules amendments and explained that some of the amendments are simply to provide clarity, while other issues have raised controversy. He then quoted the specific language from the Charter which states "Rules of procedure for the commission's consistency review and for the manner in which this section is to be enforced and implemented, and amendments thereto, shall be proposed by the commission and shall not become effective until adopted by ordinance approved by a two-thirds vote of the entire membership of the council."

Several commission members commented that the Charter does not give the County the right to change the rules or what is proposed. Mr. Chipok stated his interpretation is that the consistency certification rules are the VGMC rules and the mechanism for implementing or amending them is through a resolution to the County Council at which time they can either approve or deny the VGMC's recommendation.

Chairman Brandon suggested looking at withdrawing the 10-01-2009 draft from County consideration to avoid conflict. Commissioner Spinney raised concern with the second recommendation of the County which would remove the language which requires the commission certification to be a prerequisite of any final hearing. Mr. Chipok responded that elsewhere in the Charter, and also in the rules, it specifically states that no comprehensive plan amendment shall become effective until there is a VGMC certification. He stated that the jurisdictions also have specific DCA timelines for adoption, and in situations where VGMC is working with the jurisdiction to address outstanding issues, we have stated that they can adopt prior to VGMC certification provided the adoption ordinance by the local government states that



the comprehensive plan amendment is not effective until they have VGMC certification. Mr. Chipok stated this is something that we have tried to work with the jurisdictions in the past in order to accommodate other timing requirements. Chairman Brandon stated he feels the VGMC should withdraw the prior resolution and then decide what the commission wants to do moving forward.

Mr. Chipok stated that he spoke with Deputy County Attorney Jamie Seaman who stated she is attempting to get a new draft based on the County Council's direction out within the next couple of weeks and to give an approximate 2 week comment period for VGMC and all the municipalities, and then create a final form of the ordinance for the April 21<sup>st</sup> County Council agenda.

Commissioner Huttman commented that regardless of how anyone feels about the comments or actions of the County Council with respect to this issue, he does not feel it would advance the VGMC to engage in a battle. He also asked Mr. Chipok if he discussed the four proposed VGMC options with Ms. Seaman. Mr. Chipok responded that Ms. Seaman defers to the judgment of the County Attorney who has a very strong opinion that it is within the County Council's full legislative discretion to do what they want with their code.

General discussion ensued relating to withdrawing the prior resolution and whether or not the County would accept the withdrawal or whether they would continue to move forward. Mr. Chipok commented that a new resolution to the County Council withdrawing the previous resolution, and stating that the VGMC will submit something at a later date, would show a sign of good faith on VGMC's part that we are trying to work this through the system and not through the courts. He also stated that at this point in time we have sent the County a resolution which is a proposal by the VGMC pursuant to the Charter, and if we send a second resolution withdrawing that proposal, then the County would have nothing to act upon.

Commissioner Tresher suggested taking the County recommendations back to the POP Committee to make whatever small changes are acceptable, but anything that is really egregious just leave as is and then send the changes back to the County. Commissioner Lewis concurred, stating he felt we should send the County a letter thanking them for their recommendations, advise them we are withdrawing our proposal and that we'll rework our rules amendments taking into consideration their recommendations.

Based on the discussions, Mr. Chipok suggested that he draft a resolution withdrawing the 10-01-2009 proposed rules amendments and schedule it on the March 23, 2011 agenda for consideration by the VGMC.

Commissioner Spinney commented on issues such as membership being addressed within the consistency certification rules, adding that these items are not related to consistency and don't belong in those rules but rather in the VGMC internal operating rules. Mr. Chipok stated that it appears the County Attorney is of the strong opinion that all of the VGMC rules should be incorporated into the County Code.

Commissioner Walton commented there are a number of proposed changes in the rules amendments that need to be implemented and he asked if the rework of the proposed rules will require the entire proposal to again go through the lengthy hearing process. Mr. Chipok suggested that if we withdraw the prior proposed amendments and they come back to the VGMC to be reviewed, that the commission separate the amendments so that those changes that all agree are procedural can be moved forward in a new resolution back to the County Council. He stated the issues that are more philosophically difficult can then be further reviewed by the commission.

There was a general consensus of the commission directing staff to draft a resolution which would withdraw the prior proposed rules amendments and schedule it for full commission consideration at the March 23, 2011 regular meeting.

Mr. Chipok provided an update on the two pending litigation cases. With respect to the Edgewater-Restoration litigation, Mr. Chipok provided a history on this matter and stated the plaintiffs have filed with the 5<sup>th</sup> DCA to appeal their lack of standing determination by the circuit court. He stated our answer brief is due on March 7, 2011 and it is currently being worked on.

With respect to the Volusia County Farmton amendment, Mr. Chipok stated there have been very positive settlement discussions between Miami Corp, the County and DCA. At this point, he stated it is anticipated there will be settlement and remedial amendment documents for the VGMC to consider at the March 23, 2011 meeting. Mr. Chipok also stated it is expected that the County Council will consider the settlement agreement at their April 7, 2011 meeting, and then schedule a formal adoption hearing as required by Chapter 163 at a later date.

#### Planning Update:

Mr. Wilcox provided a brief update on the pending cases and advised the Commission that we expect to take the City of New Smyrna Beach EAR based amendments to hearing at the March meeting.

#### REPORTS OF COMMITTEES

POP Committee: No report.

Budget Committee: Committee Chairman Dwight Lewis reported that the Budget Committee had met prior to the regular meeting to review the proposed 2011-12 budget. He stated the proposed budget was included with the regular meeting agenda package for review and that this item will be scheduled for a vote by the full commission at the next regular meeting.

#### UNFINISHED BUSINESS

None

NEW BUSINESS

None

REPORTS AND REQUESTS OF COMMISSION MEMBERS

None

REPORTS AND REQUEST OF COMMISSION CHAIR

Chairman Brandon announced that Terry Griffiths would be leaving the Commission and this was his last meeting. Mr. Brandon thanked him for his service on the VGMC.

ADJOURNMENT

The meeting was adjourned at 10:45 p.m.

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

  
Chairman \_\_\_\_\_

## VGMC ROLL CALL VOTE

Date: 2-23-11

MOTION: Motion by Joan Spinney to deny standing; seconded by Dwight Lewis.

	Member	City Population	Percentage	Vote Yes No	
DAYTONA BEACH	Richard Walton	64,488	12.77%		X
DAYTONA BEACH SHORES	Stewart Cruz	5,227	1.03%		X
DeBARY	Danny Allen	18,614	3.69%		X
DeLAND	Steve Katz	27,144	5.37%	--	
DELTONA	Sandy Lou Gallagher	84,385	16.71%	--	
EDGEWATER	Jason Floyd	21,511	4.26%		X
HOLLY HILL	John Heaphy	12,936	2.56%	X	
LAKE HELEN	Roger Sonnenfeld	2,874	0.57%	X	
NEW SMYRNA BEACH	Rick Tresher	23,473	4.65%		X
OAK HILL	Vacant	1,989	0.39%	--	
ORANGE CITY	Robert Storke	10,325	2.04%		X
ORMOND BEACH	Gerald Brandon	40,587	8.04%		X
PIERSON	Vacant	2,662	0.53%	--	
PONCE INLET	Alan Redinger	3,281	0.65%		X
PORT ORANGE	Debbie Connors	56,402	11.17%		X
SOUTH DAYTONA	Joan Spinney	13,515	2.67%	X	
UNINCORPORATED AREA*		115,637	22.90%*		
	Dwight Lewis		4.58%	X	
	James Wachtel		4.58%	X	
	Gary Huttman		4.58%	X	
	Kenneth Kuhar		4.58%	--	
	Michael Halpin		4.58%	X	
<b>TOTAL:</b>		<b>505,050</b>	<b>100.0%</b>		

Affirmative votes required: 9

Total weighted vote required: 36.22%

RESULT: Motion failed on a 7-9 vote; affirmative votes totaled 24.12% of the weighted vote.

## VGMC ROLL CALL VOTE

Date: 2-23-11

MOTION: Motion by Richard Walton to approve standing; seconded by Rick Tresher.

	Member	City Population	Percentage	Vote Yes No	
DAYTONA BEACH	Richard Walton	64,488	12.77%	X	
DAYTONA BEACH SHORES	Stewart Cruz	5,227	1.03%	X	
DeBARY	Danny Allen	18,614	3.69%	X	
DeLAND	Steve Katz	27,144	5.37%	--	
DELTONA	Sandy Lou Gallagher	84,385	16.71%	--	
EDGEWATER	Jason Floyd	21,511	4.26%	X	
HOLLY HILL	John Heaphy	12,936	2.56%		X
LAKE HELEN	Roger Sonnenfeld	2,874	0.57%		X
NEW SMYRNA BEACH	Rick Tresher	23,473	4.65%	X	
OAK HILL	Vacant	1,989	0.39%	--	
ORANGE CITY	Robert Storke	10,325	2.04%	X	
ORMOND BEACH	Gerald Brandon	40,587	8.04%	X	
PIERSON	Vacant	2,662	0.53%	--	
PONCE INLET	Alan Redinger	3,281	0.65%	X	
PORT ORANGE	Debbie Connors	56,402	11.17%	X	
SOUTH DAYTONA	Joan Spinney	13,515	2.67%		X
UNINCORPORATED AREA*		115,637	22.90%*		
	Dwight Lewis		4.58%		X
	James Wachtel		4.58%		X
	Gary Huttman		4.58%		X
	Kenneth Kuhar		4.58%	--	
	Michael Halpin		4.58%		X
<b>TOTAL:</b>		<b>505,050</b>	<b>100.0%</b>		

Affirmative votes required: 9

Total weighted vote required: 36.22%

RESULT: Motion carried on a 9-7 vote; affirmative votes totaled 48.30% of the weighted vote.





## Volusia Growth Management Commission

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TO: VGMC Members

FROM: Gerald T. Brandon, VGMC Chairman

DATE: February 21, 2011

RE: VGMC Rules Amendments – County Council Discussion

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On February 17, 2011, Paul, Merry & I attended the Volusia County Council meeting where the Council discussed the amendments to the Consistency Certification Rules as recommended and transmitted by the VGMC in late 2009.

Based on the discussion that occurred, the Council agreed that any amendments to the VGMC Consistency Certification Rules are a legislative act that the County Council has full and final authority to act upon. With respect to the VGMC proposed amendments dated 10-01-2009, the Council voted on a number of modifications and directed County staff to redraft the ordinance, distribute it to the local municipalities and VGMC, and then bring back to the County Council.

Attached you will find the specific direction given by the Council as we understood it. I've also included a copy of the color coded version of the VGMC proposed amendments. I'll look forward to discussing this item at our next meeting.

The following items were discussed by the County Council and all were given unanimous approval by the County Council directing County staff to approve/modify the proposed amendments/ordinance as follows:

- 1) "Definition of Adjacent Jurisdiction" (referenced on pages 1 & 9)

APPROVE AS PROPOSED.

- 2) "Clean up" language contained in the proposed amendments (generally shown in "orange" and "purple" throughout)

APPROVED with the condition that the sentence (reference 90-35(f), page 10, second from last sentence in the first paragraph) be deleted. It reads "The commission certification shall be a prerequisite to any final public hearing on a comprehensive plan amendment by the applicant local government."

- 3) "Request for Additional Information (RAI)" language (generally in purple on page 8):

APPROVE with the understanding that proposed changes to DCA timelines may require a revisit.

- 4) "Ex parte Communications" – addition of definition (page 11, Section 90-36 (b))

APPROVE AS PROPOSED.

- 5) "Rehearings" – (page 18, Section 90-46)

APPROVE AS PROPOSED.

- 6) "Unit of Local Government" – (page 2)

APPROVE without "School Board of Volusia County", including reference on page 12, 90-37(a) "units of local government".

- 7) "Membership" – (page 18, Section 90-45)

APPROVED addition of the proposed language with the following changes:

- All members' terms are for 2 years, and run consistent with the election.
- Add that members to serve "at will" of the appointing jurisdiction.
- Strike the recommendation that current sitting staff members are grandfathered. A staff member currently sitting as a commissioner may finish out his/her existing term.

- 8) “Weighted Vote” – This is addressed in the VGMC Rules of Procedure and not the proposed rules:

RECOMMENDATION: Add that ALL votes of the VGMC are based on weighted vote, not just determinations of consistency.

- 9) “Consistency Review Criteria” (Section 90-37, page 12 forward):

RECOMMENDATIONS:

- Change the current language that reads “causes or may reasonably anticipated to cause” to “will produce substantial impacts”
- With respect to natural resources, it is proposed that “natural resources” are further defined to those areas that are designated as “protected areas”.

- 10) “Standing” or “Substantially Affected Party” (page 11, Section 90-35(i)):

RECOMMENDATION:

Define that a “substantially or affected party” is limited to a resident, property owner or business owner of the applicant jurisdiction or adjacent jurisdiction.