EVALUATION OF ISSUES
ARISING FROM
ANTIQUATED PLATTED LANDS WORKSHOPS
HELD BY
DEPARTMENT OF COMMUNITY AFFAIRS

PREPARED BY:

Diana M. Parker
4212 B Brewster Road
Tallahassee, Florida
August 28, 1986

ANTIQUATED PLATTED LANDS WORKSHOPS
ISSUES AND EVALUATIONS

In 1985, the Florida Legislature appropriated certain funds for the study of antiquated platted lands and subdivisions within the state and appointed the Department of Community Affairs (DCA) to conduct the study. As part of the study, the Department held a series of 6 workshops to discover the types and extent of platted lands problems in Florida. The workshops were conducted as an open discussion session in which each attendee was encouraged to present problems and solutions observed by him. Because the majority of the attendees represented a local governmental agency, the problems and solutions dealt greatly with the lack of specific legislative authority and inadequate statutory provisions.

The participants identified several statutes which cause or contribute to the problems and which they believe need to be modified to eliminate or reduce the types and numbers of problems. This report will contain a short discussion of the participants' conceptions of the statutory problems, a synopsis of the relevant portions of the statutes and an evaluation of the suggested changes.

I. LACK OF SPECIFIC LEGISLATIVE AUTHORITY

One of the major problems identified by the workshop participants is the lack of specific legislation giving local governments the authority to handle platted lands problems. (For purposes of this report, the term "local governments" includes county and municipal governments.) They complained that local agencies are hesitant in

their attempts to resolve some of the problems because they do not believe their legislative authority or police power will extend to cover their actions.

Legislative authority - the power to enact ordinances and regulations - is generally conferred on a county or municipality by the state legislature. The power may be expressly granted by statute, or necessarily or fairly implied in or derived from the express powers, or deemed essential to the accomplishment of the goals and purposes of the governmental entity.[1] Section 125.01, F.S. (1985), expressly confers on counties the power to adopt ordinances and resolutions necessary for the exercise of its powers. Section 125.86 (2) and (7), F.S. (1985), gives charter counties the authority to adopt ordinances and resolutions necessary for the governance of the county and of county-wide effect for the health, safety and welfare of the residents. Section 166.021 (3), F.S. (1985), grants municipalities the power to enact legislation on any subject so long as the subject matter is not already pre-empted to the state or county, restricted by special or general law, or in direct conflict with existing statutes.

Police power is an inherent part of the state government's powers and includes the right to command certain action of its citizens for the "public good."[2] (Public good encompasses the protection and enhancement of the health, safety, morals and general welfare of the community, its residents and resources.) The police powers of Florida are held by its legislature and passed on to the local governments through its statutes and Constitution.[3] Chapter 125, F.S. (1985), sets forth the powers and duties of non-charter and charter counties. Chapter 166, F.S. (1985), sets out the powers and authority of municipalities. The powers enumerated in these

statutes are to be construed liberally in most instances to achieve the goals and intent of the laws - the promotion of a better society and protection of the people, resources and community standards.

It is from delegated police power that local governments receive their authority to regulate land use and growth through ordinances enacted by the local legislatures. Zoning laws cannot be enacted nor enforced without specific legislative authority from the state.[4] The power to zone allows the local government to control land uses, plan for future growth and establish development standards and priorities.[5] This power enables the local governments to determine the use and development of all lands within its jurisdiction, even if that use conflicts with the use desired by the land owners.

Under the Local Government Comprehensive Planning and Land Development Regulation Act, Section 163.3161, et seq., F.S. (1985), municipalities and counties are given the powers to plan for future growth, to adopt a comprehensive plan to guide future development and growth, to adopt appropriate land development regulations to implement the comprehensive plans and to establish and maintain administrative procedures and instruments to carry out the purposes of the act. The expressed intent of the act is to strengthen the "roles, processes and powers of local governments" to plan for and control future development and growth.[6] The stated purposes of the act are to encourage the most appropriate use of the land and its resources and its consistency with public health, safety, and welfare; to deal effectively with possible future problems of use and development; to prevent overcrowding of land and to preserve and promote the public health, safety, and general welfare.[7]

The powers and purposes of Section 163.3161 should give the local governments sufficient authority to enact ordinances and regulations to resolve the local platted lands problems. Ordinances to promote and/or control traffic growth management, distribution of population and protection of the environment have been upheld as properly within a local government's legislative authority.[8] However, any ordinances or regulations adopted must relate to the general welfare of the community, must be fair and reasonable in the circumstances and applicable to all under similar circumstances.[9]

Zoning has been used nation-wide to control the development of private property to lessen adverse impacts on the environment and community since 1926 when the U.S. Supreme Court upheld zoning principles and practices.[10] The use of zoning power by local governments in Florida has been challenged and upheld in a number of cases. The courts have held that a zoning ordinance having a substantial relationship to the public health, safety and welfare is a valid use of the zoning power.[11]

Despite this solid authority, many participants expressed concern that their actions might infringe upon the legal property rights of the land owners. Private property rights are established in the state and federal Constitutions and are founded in common law. One of the Constitutional rights guarantees the land owner that he will not be deprived of his property for a public purpose without receiving "just compensation."[12] Additionally, under common law principles of real property, an owner has the right of free use of his property so long as he does not infringe upon the rights of others. Despite these guarantees, it is an accepted principle of

law that an owner's property rights and the use of his property can be regulated by the government for the public good.[13] But when that regulation deprives the owner of all use of his property, the government has effected a "taking" and owes the owner compensation for the wrong.[14]

Generally, the courts will invalidate the ordinance responsible for the taking rather than require the government to compensate the owner. This practice was addressed recently by the Florida Supreme Court in its discussion of the proper remedy for invalid zoning ordinances and premit denials or revocations.[15] In 1982, the court held that a person challenging the unconstitutionality of a statute authorizing specific agency action must exhaust all administrative remedies before removing the case to a state court. In 1984, it held if the court determines that the agency action in the denial or revocation of a permit was proper, then the party can bring a separate action for damages through inverse condemnation. Later, the court stated that a zoning ordinance is invalid if it is confiscatory because it cannot be both reasonable and confiscatory, and no action for inverse condemnation would be necessary for proper relief. If, however, a statute authorizes a permit denial which is confiscatory, a separate condemnation action is the proper remedy. Although these cases appear to limit taking challenges to situations of statutes authorizing confiscatory permit denials, there is federal and state law which supports inerim takings resulting from invalid zoning. It is termed "interim" because it covers only the damages arising from the landowners inablity to use the property for the period of

time that the ordinance was in effect. Interim and full takings are determined by the same factors and will be addressed herein as simply "taking".

Governmental officials believe that establishing a larger minimum lot size or the rezoning to lower density will trigger a series of taking challenges. In Florida, the courts apply a 6-factor test to the circumstances of each case to determine whether a taking has occurred.[16] Three of the six factors relate to the validity of the regulation enacted by the local government. The test examines the regulation and its application to determine if it is being applied arbitrarily, if it promotes and protects the health, safety, morals and welfare of the public and if it prevents a public harm. If the ordinance is shown to be reasonably related to the health, safety and welfare of the community and is not being arbitrarily applied, it will be declared valid and upheld by the courts.[17] The local governments should have no difficulty in justifying an increased minimum lot size or downzoning. They can point to the magnitude of the problems associated with the development of antiquated platted lands and the adverse impacts on the environment and community if no action is taken.

Another problem they foresee arising from a downzoning or change in minimum lot size is the issue of the developer's "vested rights." Vested rights is a term applied to the owner/developer's right to develop the property without regard to the current zoning or development regulations. This rights arises by express statutory or regulatory grants (i.e., "grandfathering") and by the common law doctrines of vested rights and equitable estoppel.

The issue of vested rights must be evaluated from 2 standpoints: 1) the rights arising from statutes or ordinances, and 2) the rights arising under the common law principles of vested rights and equitable estoppel.

In Florida, there are several statutory provisions which address the vested rights of large scale developments.[18] Generally, these provisions recongize or grant the developer existing rights to develop the property as originally planned. Chapters 380 and 163, F.S. (1985), contain provisions that nothing in the "act(s) shall limit or modify the rights" of any developer who is continuing to develop a previously approved development of regional impact (DRI) or a developer meeting the specific criteria set out in Subsection 380.06(20). Subsection (20) lists specific circumstances and criteria that will determine the vesting of rights of previously approved DRIs and other developments previously reviewed and determined not to be DRIs. This criteria includes the vestment of rights of any person to complete any development that was authorized prior to July 1, 1973 by one of the following means: 1) registration of a subdivision pursuant to Chapter 498 (Land Sales Practices); 2) recordation pursuant to local subdivision plat law; 3) a building permit or other authorization to commence development on which there has been reliance and a change of position; or 4) other vested or legal right that has arisen by the developer's reliance on prior regulations which "in law" should prevent a local government from changing the regulations to his detriment. This last condition

recognizes the developer's rights to develop the property even if his actions do not fall within the first three categories, because it would be inequitable and unfair to deny them.[19]

Subsection 380.06(20)(a) gives vested rights, without the requirement of reliance or change in position, to those developers who received "approval pursuant to local subdivision plat law, ordinances or regulations of a subdivision plat by formal vote of a county or municipal governmental body . . ." between August 1, 1967 and July 1, 1973. However, anyone claiming those rights were required to notify the Department in writing before January 1, 1986, or lose the rights on June 30, 1986. Proper notification and any commencement of development showing reliance and change of position is sufficient for the purposes of this statute to vest the developer's rights until June 30, 1990. Additionally, any conveyance of or agreement to convey property to the local government or state as a prerequisite to receiving an approved rezoning will be construed as an act of reliance sufficient to vest development rights if the rezoning was passed.

Development rights can vest through the doctrines of equitable estoppel and vested rights. In common law, equitable estoppel and vested rights are distinct principles of law. But Florida courts have used the two doctrines interchangeably because the same conclusion will be reached regardless of the doctrine applied.[20] In land use law, the estoppel theory is generally the doctrine used as the foundation for the developer's claim of vested rights. In estoppel, the government will be "estopped" from following its detrimental course of action and the developer will be allowed to proceed with development.

The estoppel theory is based on the principle of fairness and must be determined on a case by case basis. Estoppel will be granted by the courts if the owner can show that he, in good faith and upon act or omission of the government, made a substantial change in his position or incurred extensive obligations and debts in the furtherance of the development of his property.[21] (Please note that the case law interpreting the doctrine of equitable estoppel requires a substantial change while Section 380.06 (20) requires only a change in position.) For an estoppel situation to arise, the owner's good faith reliance and change in position must have been induced by a governmental act or omission and the expectation of the government that he would so act.

Thus, the finding of equitable estoppel is based on two issues - the government's conduct and the owner's conduct. Each issue must be evaluated independently and then jointly to obtain a complete picture of the factual circumstances surrounding the claim. If any element is missing from the owner's claim, there is no foundation for estoppel, even if the government's conduct was improper.

Generally, the government's acts or omissions are found in the issuance of permits or other authorization to begin development, including "existing zoning, rezoning, conditional use permits, building permits, foundation permits and a letter from a town clerk."[22] Other actions include plat approval, granting a variance,[23] land purchases contingent upon obtaining a rezoning,[24] unfair dealings,[25] inaction by government under a duty to act and certain statements by governmental officials designed to induce developer reliance.[26] However, in at least one case, plat approval was not sufficient for the developer's rights to vest.[27]

Developer conduct must demonstrate the good faith reliance to his detriment on the governmental action or omission. Good faith requires the compliance with law and a mutual understanding of the relevant facts.[28] Courts have held that a developer who does not disclose full facts in his request for permits has not acted in good faith and cannot support a claim of estoppel.[29] Additionally, a developer's actual or constructive knowledge of a proposed or pending zoning change prior to the time he commences development may be sufficient to invalidate his claim of estoppel.[30]

Further, a developer must substantially change his position or incur extensive obligations and expenses in reliance on the governments actions. Usually, each case is assessed on its individual facts to determine if there has been a substantial change of position. Large sums of money expended in the preparation of land for construction, including engineering, survey and architectural fees, and planning expenses have been held sufficient to satisfy the substantial reliance requirement.[31] In limited circumstances, the purchase of land,[32] negotiations for the purchase of land and the arrangements for financing have been sufficient.[33] A recent case held that final governmental approval of the development was not required in certain circumstances. In that particular case, the developer attempted to rely on a rezoning, which was granted only after the developer negotiated, planned and fulfilled the county's requirements activities which took longer than one year to accomplish. The court held that a government may not ignore a developer's rights, when it has knowledge that he has exhaustively complied with the extensive requirements of the development processes, despite the fact that final approval had not been granted for the development.[34]

Because the majority of platted lands in Florida are believed to be owned by individuals, the issue of vested rights of single lot owners must be addressed. An overview of the caselaw discussed above demonstrates that some action toward the development of the lot must be taken by the owner before the question of vested rights can arise. Development rights will not vest simply because the owner has purchased or held the property for a number of years. It is a principle of land use law that owners do not have the right to rely on existing zoning when they purchase property.[35] And the mere contemplation of a particular land use is not protected by the courts as a vested right because no actual use of the property has yet begun.[36] There is no foundation for a claim of equitable estoppel because there is no fulfillment of the required elements discussed above. There is also no statutory vesting afforded by the previously discussed statutes because they apply to DRIs and large scale developments previously determined not to be DRIs. Even though the subdivision might be a DRI by current standards, the platted lots therein held in individual ownership will be developed on an individual basis, will not be required to undergo a DRI review to receive development premits and,thus, should not be entitled to DRI vesting protections. Research reveals that the question of the expansion of the DRI vested rights provisions to include an individual lot owner has not come before a court for interpretation and determination.

The last issue in this section to be considered is whether a developer can be "divested" of his development rights. Several fact situations which might override clearly vested rights include: 1) changes to development plans or substantial deviations in the plans; 2) failure to pursue timely development of construction after a permit is issued; 3) illegal conduct by the developer; and 4) an overriding state, regional or other public interest or benefit.[37]

Under subsection 380.06(19), F.S. (1985), a developer can lose his development rights by attempting to change the approved development plan. If the change creates a "reasonable likelihood" of additional regional impact or an impact not previously reviewed by the regional planning agency, a substantial deviation occurs and the development must undergo additional DRI review.[38] The Legislature enumerated threshold criteria which, if met or exceeded by the proposed changes, require the additional DRI review.[39] Any changes not meeting or exceeding the requirements are presumed not to be a substantial deviation and are not required to undergo further review. However, that presumption can be rebutted.[40]

The previous discussion of the elements of equitable estoppel reveals that illegal conduct and failure by the developer to properly pursue development of his property have resulted in judicial decisions in favor of the local government and a denial (divestment) of the developer's vested rights.[41]

Further, a local government might not be estopped from enacting or enforcing adverse zoning or revoking development rights if it can

show that "some new peril to the (public) health, safety, morals or general welfare . . . "[42] has arisen between its first affirmative actions and the subsequent challenged ones. Although the Florida Supreme Court does not recognize the "new peril" doctrine used by other states, it does recognize related concepts supporting the exercise of police power to protect the health, safety, morals and general welfare of the public.[43] Thus, circumstances in which the public health or safety is placed in jeopardy by the continuation of the development could preclude a finding a estoppel. Otherwise the local governments must observe set standards of fair dealing with prospective developers.

To determine whether estoppel would be precluded, one Florida court adopted a balancing test which weighs the "significant deleterious effect upon public policy" against the "injustice (against the developer) which would result from a failure to uphold an estoppel."[44] If the adverse public effect outweighs the injustice, an estoppel of the government would be precluded and the developer would lose his development rights.

In conclusion, the participants' arguments and concerns, although valid, could be overcome with a proper enactment and a valid purpose of zoning and land use regulations, pursuant to their existing statutory powers. Certain large scale developments, whether or not DRIs, have their legal rights protected by statute and the local governments must strictly construe those provisions in favor of the developers pursuant to principles of statutory construction. Single lot owners are protected by Constitutional and common law rights. However, all these rights can be limited or modified by

regulations enacted through an exercise of delegated power, so long as the regulation is properly enacted and has a valid purpose. A valid purpose is the promotion and protection of the public health, safety, morals and general welfare. If challenged, the demonstration of the problems associated with the development of the platted lands and their adverse impact on the public good should be sufficient for a judicial determination that the regulations furthers a valid governmental purpose.

Although current statutory authority can be expanded to include platted lands problems, the local governments would benefit from the enactment of specific enabling legislation. The identification of specific legislative intents, purposes, goals and delegated powers would provide definite legal and procedural guidelines and moral support to the local governments in their efforts to address platted lands problems. This enactment can result from new legislation or from the modification of existing powers and authority. The State should consider the modification of Section 163.3161. F.S. (1985) to include the recognition of platted lands problems and the local governments' right to handle the problems through their planning and zoning powers.

II. PLATS AND RECORDING

Many participants cited aggravation of platted lands problems caused by the current platting (Chapter 177, F.S.) and recording (Chapter 28, F.S.) statutes. The problems include: 1) no provisions for mandatory replat or deplat of undeveloped old or substandard subdivisions; 2) discretionary recording of approved plats; 3) no record of contract for deed sales; and 4) no requirement that the Clerk of the Circuit Court notify the local planning departments of lot splitting.

They alleged that the recording provisions of the platting statute are vague and have been interpreted as mandatory or discretionary, according to the dictates of the governing body. When interpreted as discretionary, the local governmental agencies, particularly planning departments, do not receive the necessary information to keep their records current and to plan consistently for future provision of necessary infrastructure and community services. No mandatory deplat or replat provisions for old or substandard plats means that local governments may have to permit development of the subdivisions, even though substandard in design or without adequate infrastructure or provision therefor. By not being informed by the Clerk's office of deeds recording lot splits, the planning departments are again unable to keep their records current and adequately plan for the future provision of infrastructure and community services. In large land sales, many of the transactions are held in contracts for deed, which are not required to be recorded with the county. Without the information contained in

the contracts for deed, the local agencies cannot obtain a true picture of the potential development status of an area, cannot locate owners or prepare for future development.

The platting statute, Chapter 177, F.S. (1985), sets out the definitions, criteria and requirements regarding the platting and recording of subdivisions of land. The intent is to establish some minimum platting standards, and to give local governments powers to further regulate and control platting through local ordinances and regulations.[45]

Despite the stated intent, participants stressed the statute did not give them specific authority to mandate the deplatting or replatting of existing undeveloped substandard plats. Section 177.101 addresses the vacation and annulment of plats but specifies that the action must be requested by all of the owners of the land. Section 163.280, F.S. (1983), repealed 1985, gave the local governments limited authority to initiate the vacation of an old plat. Although the local governments had this authority, there appears to be very few instances of its use, unless the vacations were not challenged by the owners. Orange County used the provisions in its attempt to deplat an old subdivision which had been platted in the 1960's and had only 3 of 38 lots sold. Upon receipt of the notice from the County, the owner quickly sold enough lots to exceed the 10 percent minimum before the scheduled public hearing. The County proceeded to vacate the property. When the action was challenged by the owner, the court held that the owner's action of selling the lots removed the subdivision from the provisions of the statute.

Thus, the County had no authority to proceed with the vacation. The reasoning in this decision could be very important to the use of powers if the statute or a similar one were to be reinstated.

Local governments might be able to use their police powers and the right to zone to mandate these deplats and replats. The action would fall within the intent of the statute for the local governments to use local ordinances and regulations to further control the platting and subdivision of lands. It may also require approval by Florida's judiciary before it could achieve state-wide use, which could take several years to accomplish.

In addition to the lack of mandatory deplat or replat, the statute contains some vague provisions concerning plat recording. Before recording, the plat must: 1) be accompanied by a title opinion or certification of ownership,[47] 2) include the dedication of all public areas and rights-of-way,[48] 3) contain the name of the subdivision,[49] 4) be approved by the appropriate governing body,[50] and 5) be prepared in conformance with Section 177.091 to include such information as a complete legal description, dedication information, local and size of all public rights-of-way, consecutively numbered lots and blocks, identification of all contiguous properties, and survey data.

When properly recorded, plats meeting these statutory requirements eliminate some of the problems the participants are currently experiencing with old recorded and unrecorded plats. However, not all local governments interpret the language of Sections 177.091 and .111 to require the recording of new plats. These communities will

continue to experience platted lands problems until the recording of all plats becomes mandatory.

A reading of Sections 177.091 and .111 illustrates why recording is not deemed mandatory by some local governments. The pertinent portions are: "Every plat of a subdivision OFFERED for recording shall conform . . . "" (§177.091) (emphasis added) and "After the approval by the appropriate governing body required by §177.071, the plat shall be recorded by the Circuit Court Clerk or other recording officer UPON SUBMISSION THERETO of such approved plat . . ." (§177.111) (emphasis added). Another provision requiring the recording of DOT right-of-way maps does not contain any equivocating language but clearly mandates the recordation of the maps.[51] This dichotomy of language in the same statute adds to the weight of the interpretation that recording plats is not mandatory. This position has also been greatly advanced by a 1975 Attorney General's Opinion in which it is stated that a clerk can record an approved plat only after payment of the statutory filing fee.[52] It continues that a party receiving plat approval has NO legal obligation to pay the fees once the approval is obtained. (emphasis added). As a result of this opinion, many governing bodies have interpreted the opinion to mean that the developer has no legal obligation to record his plat. If, however, he voluntarily records, then the plat must meet all the criteria of the statute.

A question then arises whether the statutory language in Chapter 28, Records and Recording, F.S. (1985), is strong enough to require the recording of approved plats. The pertinent portions of

that statute are:

(1) The Clerk of the Circuit Court shall be the recorder of all instruments that he may be required or authorized by law to record . . .

(3) The Clerk of the Circuit Court shall record the following kinds of instruments presented to him for recording . . .

(g) any other instruments required or authorized by law to be recorded.

(5) Plats, maps and drawings as required in Chapters 177, 253, and 337. [53]

In spite of the mandates contained in these provisions, Chapter 28 addresses specifically the duties and responsibilities of the Clerk with regard to recording instruments and documents. It is easily seen that the Clerk's requirement to record extends only to those items presented to him and only upon payment of the recording fees. Thus, if the document is not presented to him for recording or the recording fee is not paid,[54] there is no recordation of that document regardless of these statutory requirements. The responsibility of presenting a document for recording lies with the party having an interest in the recordation, not the Clerk.

Any document dealing with the ownership, transfer or encumbrance of, or claim against real property or any interest therein is required to be recorded by the Clerk.[55] ALthough this statute covers deeds, mortgages, liens and the like, it does not require the recordation of contracts for deed (also known as installment land contracts). One of the major problems cited at the workshops was that there is

no record of contract for deed sales. Any attempts at land reassembly or readjustment necessitates the contact of lot owners, which cannot be accomplished without current ownership records.

Why then is a contract for deed not recorded when it appears to affect the ownership or interest therein of a piece of property? For many years, contracts for deed were considered at law to be contractual arrangements[56] and, thus, were viewed under principles of contract law, not property law. It is only recently that Florida courts have begun to realize the sum, substance and intent of a contract for deed to be a security device or a mortgage in the sale of land.[57]

A contract for deed arrangement arose initially as a means for ingenious lenders to avoid repossession expenses or mortgage foreclosure proceedings when a Buyer defaulted on the land purchase.[58] Under this type of arrangement, the Buyer automatically forfeits his equitable interest in the lands and all installments paid can be retained by the Seller as liquidated damages or as a penalty for failing to perform the contract.[59] The Buyer generally is not entitled to a refund or restitution of any monies paid - regardless of the amount - because of the terms of the contract. Because it was a legal contract between the parties, with terms supposedly bargained for, the courts would not interfere.

In isolated incidents as far back as 1957, [60] Florida courts began to recognize the arrangement as a security device employed by the Seller for the specific purpose of securing payments of money. They began to view the contracts through principles of property law

rather than contract law. They found that a Buyer's equitable interest in a contract for deed to be analogous to that of a mortgagor's equity of redemption which protects the Buyer from outright loss of all interest in case of default.[61] The arrangement was also evaluated by the courts and found to fall within Chapter 697, Florida Statutes, titled Instruments Deemed Mortgages and the Nature of a Mortgage. Section 697.01 establishes the rule that any device given for the purpose of securing the payment of money is deemed a mortgage and is treated as scuh in the event of a default.[62] In a default, the Buyer is entitled to a mortgagor's equity of redemption and subject to the protection of the courts, which requires the Seller to undertake some form of legal action to re-acquire the property.[63]

It is also a well established principle that a typical contract for deed is intended to take the place of a purchase money mortgage and falls within the provisions of Section 697.01.[64] That section sets out that any instruments deemed and held mortgages "shall be subject to the same rules of foreclosure and to the same regulations, restraints and forms as are prescribed in relation to mortgages."[65] Literal interpretation of this section indicates that a contract for deed as a mortgage must be: recorded pursuant to Section 695.01, acknowledged pursuant to Section 695.03, and prepared in conformance with Section 695.24. (Chapter 695 sets out the criteria and requirements of recording conveyances of real estate.) The requirement that the contract be properly acknowledged as a mortgage satisfies the requirements of Section 696.01, which mandates proper acknow-

ledgement of all contracts for the sale or purchase of property before it can be recorded. Because most Sellers do not want a contract for deed to be recorded, it is very easy to prepare the document in a form that is not proper for recording.

After reviewing the caselaw and pertinent statutes, it is still unclear why contracts for deed have not been included in the mortgage statute. Judicial decisions are strictly interpretations of the facts and circumstances in light of the prevailing laws - be it legislative, administrative or common law. Simply because a judicial interpretation extends the protection or coverage of a statute to a include an item not previously considered does not mean that the legislature is under an obligation to automatically update or amend the statute to conform to the opinion. That is how the issues of contracts for deed now stand.

A similar problem caused by the lack of current ownership information arises from deed transfers of undeveloped lots, lot splits and land sales under unrecorded plats. Although the Clerk is required to notify the County Property Appraiser daily of all recorded transfers of property,[66] there is no like provision for notification of the planning departments. Lack of notification means that the departments are unable to evaluate the proposed growth of the community and to adequately plan for future provisions of facilities and services in the comprehensive plans and budgets.

The following solutions to the problems discussed above are desired by the workshop participants. They especially want legislation that requires:

(1) The platting of any subdivision of land, whether a simple lot split or a multiple lot development.

(2) The recording of all plats and contracts for deed with a copy of the plat attached to each document.

(3) The deplat or replat of old or substandard plats by local government mandate.

(4) The Clerk of the Circuit Court to inform local planning departments of all lot splits and transfers of undeveloped platted property.

Most of these solutions can be accomplished by the simple modification of existing statutes. For instance, changing the definition of subdivision contained in Section 177.031(18) to reduce the minimum platting requirement to two (2) lots and to include a lot split as a subdivision of land would accomplish their desire. However, the work load on county officials and representatives would increase drastically. Such a change would likely require the employment of additional personnel to assist the public and to monitor each subdivision of property. This solution may be self-defeating when comparing the benefits to the additional problems, work load and expense generated by the modification.

Requiring the recordation of all plats simply means the rewriting of Sections 177.091 and .111 to replace the discretionary language - "offered/upon submission" - with language mandating the recording. Chapter 177 should require the presentation of the document and the payment of the filing fees and property taxes, as required in Chapters 28 and 193. The approval and recordation of every plat will increase

the work load and expense in those counties not already requiring it. To be truly effective, however, these modifications need to be retroactively applied. Although the modifications might prevent a recurrence of the problems being experienced from unrecorded plats, there is no guarantee the laws can be applied to existing old plats. Courts, typically, do not like ex post facto laws - laws which are designed for retroactive application- particularly where there are penalties for non-conformance. Usually they will find the law to be unconstitutional or an invalid use of authority and render it void. In addition, there is no record of previously approved but unrecorded plats and usually no easy means to detect them. Searching out these old plats will add even more expense and work to the local governments' employees. Thus the solution may not be as effective and efficient as hoped for.

As discussed above, typical contracts for deed are deemed by the courts to be mortgages under Section 697.01, F.S. (1985), and thus are required to be treated accordingly. Adding contracts for deed to the pertinent provisions of the recording (Chapter 28) and mortgage (Chapter 697) statutes would advance and support the concept that the contracts are mortgages and security devices. It would also provide the local governments with access to ownership information and assist them in planning for the future. Again, the retroactive application of this provision may not be sustained by the courts, thus reducing the value of this remedy for currently existing problems.

Local governments need to be able to mandate the deplat or replat of old or substandard plats. The proper use of that authority would enable them to address existing and potential problems without having to wait for a request from the owners as in Chapter 177. This authority could be obtained by the revision and reinstatement of Section 163.280, F.S. (1983). The statute would have to be modified to establish a definite cut-off date beyond which any new sales would be subject to inferred knowledge that the plat might be vacated and the vacation upheld. The authority would be useless if every owner could avoid its application by last minute sales as happened in Maselli vs. Orange County.[67] In the opinion, the dissent argues that the date of notice to the owner of the county's actions should be the cut-off date because the owner's rights have been fully protected by the 5+ years in which to sell the lots. This modified statute would not necessarily entail the employment of new personnel or additional expense. The problematic subdivisions would be evident from maintenance records, the capital improvements portion of the local comprehensive plan and general planning and zoning records.

The last solution under this section is that the Clerk of the Circuit Court be required to inform the local planning departments of all lot splits and transfers of undeveloped property. This can be accomplished easily by amending Section 695.22, F.S. (1985) or Chapter 28 to include the requirement. To conform to this provision, the county and local planning departments would have to expand their staffs and budgets. However, the Clerk is already required to notify

the Property Appraiser, so a duplicate list could easily be sent to the planning departments. This would mean the departments would have to sort through the entries to extract what was needed for their records.

Some of the solutions desired by the workshop participants in response to the problems discussed in this section are simply not feasible when the result is compared to the expense, work load and additional problems generated. The feasibility of other solutions will not be known until it has been in effect long enough for results to be evident.

III. REAL ESTATE SALES

The lack of disclosure to the buyers of the current and future development status of the lot or subdivision is another of the local governments' problems. When the buyers are not informed by the sellers or their representatives that the lot or subdivision is lacking facilities or any provision for them, they buy the property fully expecting the local government to provide them. This lack of disclosure also applies to the current and proposed zoning and future growth plans of the community. Many buyers purchase unsuitably zoned property with the expectation of having it rezoned to permit their proposed development. This practice not only plays havoc with the local government's budget and future development plans, but, in some instances, ends up with the parties in court.

Officials complain that current statutory provisions governing the practice of real estate do not require that realtors be familiar with or actively promote the planned growth of their communities. Also, there is no statute which specifically requires the seller or his realtor to make a full disclosure of the possible development problems to potential buyers.

Chapter 475, Real Estate Brokers, Salesmen and Schools, of the Florida statutes was enacted to regulate these professions to assure the minimum competence of their practitioners. The statute establishes a Real Estate Commission empowered to enact laws and regulations, to discipline practitioners and to foster their education. It mandates pre-licensure education and examination and fosters the education by sponsoring, conducting, prescribing and approving real

estate courses concerning legal, ethical and business principles.[68] The statute also establishes an Education and Research Foundation and Foundation Advisory Committees for the Commission.[69] The foundation's duties include: the creation and promotion of "educational projects to expand the knowledge of the public and real estate licensees in matters pertaining to Florida real estate;"[70] the study of all areas "that relate directly or indirectly to real estate or urban or rural economics . . .;"[71] and the preparation of "information of consumer interest concerning Florida real estate and to make the information available to the public and appropriate state agencies."[72]

The Commission determines the topic, content and number of courses to be undertaken and passed by aspiring practitioners before the initial real estate licenses can be issued. The Legislature set the minimum number of classroom hours 63 for salesmen and 72 for brokers.[73] A continuing education requirement of 14 hours must be fulfilled before a renewal license is issued.[74]

Contact with the Division of Real Estate reveals that no in-depth study of planning or growth management objectives is demanded of the practitioners.[75] The Commission requires that at least one 3-hour course on Markets, Planning and Zoning be taken by all salesmen. is course gives only basic information on planning and zoning and concentrates on its effect on marketing and sales. The degree to which any additional information is imparted to the students is dependent upon the instructor's knowledge and understanding of the subject. Any practitioner desiring to take an in-depth course in

planning or growth management would be allowed to do so as part of his continuing education requirement.[76]

No change in the criteria or course materials relating to planning or growth management principles is foreseen by the Division in the near future. When informed of some of the platted lands problems being attributed to the real estate industry, Mr. Hoeck, Education Director, expressed great interest in the program and studies. He indicated the Division's willingness to re-evaluate their course requirements after reviewing the platted lands study materials.[77] In fact, prescribing a more in-depth study of planning and growth management objectives would fulfill several of the intents and duties of the Commission and Foundation.[78] Without an understanding of the principles and objectives of these subjects, a realtor cannot be expected to actively support the program and to educate his clients.

Is a realtor, with or without planning and growth management education, required to divulge material facts to the transaction to a buyer? Only if the realtor is acting as an intermediary between the seller and buyer.[79] Otherwise, he has a fiduciary duty to make a prompt disclosure to <u>his principal</u> (buyer or seller) of all facts which might be material to the nature of the transaction.[80] This duty has not been extended by statute or opinion to include the opposite party (generally the buyer) because of the contractual relationship existing between the first party and the realtoy. In most commercial transactions, both parties are represented by realtors, attorneys and other knowledgeable persons.

Frequently, it is the small land sale - purchase of a home or homesite - in which only party (seller) is represented by a realtor.

It is these small land sales situations that local governments are complaining about. They believe their problems would be eliminated if all realtors were under statutory duty to inform all buyers of all factors affecting the development of the subject property. These factors must include the local government's future plans for the land and surrounding area and the presence of infrastructure or provision therefor. Real estate practitioners should have to take at least one general course in principles of growth management and a course on the local comprehensive plan and growth objectives for all counties in which they transact business. These course materials must be passed by each practitioner before county certification and occupational licenses can be issued.

The local governments want Chapter 475 amended and modified to include these new duties. Additionally, they want the statute to contain provisions requiring the realtors to certify before a notary public that they have complied with the full disclosure provision. The certification should occur at closing and the document should contain a statement of the adverse factors disclosed to the buyer. The document should be acknowledged as true by the buyer and attached and recorded with the deed. The certification and recordation wold entail the additional modification and amendment of Chapter 695, Record of Conveyances of Real Estate, and Chapter 28, Clerks of the Circuit Court, of the 1985 Florida statutes.

Although Mr. Hoeck expressed the Division's interest and support, the local governments do not believe their problems can be adequately addressed by simple modification of real estate course materials. They want legislative recognition of the problems and a legislative mandate that the real estate industry will follow the steps discussed above to support the local governments' efforts. Because of its interest and the support it can bring to bear on the study, it is recommended that the Division of Real Estate be included in the discussion and preparation of proposed legislation.

Educating realtors and mandating full disclosure to buyers is only a partial solution. The public should be educated concerning the local government's role in planning future growth and should be informed of the future plans for their community. This, too, may not resolve the problems because many people are not interested in anything governmental or political until it affects them personally. Most governmental or political motives are highly suspect in the view of the public. This means that the worst possible meanings and interpretations are attributed to stated and unstated motives. The public needs to accept a more realistic picture of local and state governments.

FOOTNOTES

[1] 12 Fla. Jur.2d, Counties and Municipal Corporations, §80

[2] 12 Fla. Jur.2d, Counties and Municipal Corporations, §55

[3] Pelham and Thomas, State Land-Use Planning and Regulation, page 11, (Lexington Books 1979)

[4] 12 Fla. Jur.2d, Counties and Municipal Corporations, §55

[5] Rhodes, Robert M., "Vested Rights: Balancing Private Property Rights and the Public Interest in a Changing Multilevel Regulatory Environment", pgs 21-22, CLE Publication, The Florida Bar (1984)

[6] Section 163.3162(2), F.S. (1985)

[7] Section 163.3162 , F.S. (1985)

[8] Graham vs. Estuary Properties, Inc., 399 So.2d 1374 (Fla. 1981); City of Indialantic vs. McNulty, 400 So.2d 1227 (Fla. 5th DCA 1981);

[9] Dade County vs. Moore, 266 So.2d 389 (Fla. 3rd DCA 1972); Fox vs. Town of Bay Harbor Islands, 450 So.2d 559 (Fla. 3rd DCA 1984); and Graham vs. Estuary Properties, supra.

[10] Village of Euclid vs. Ambler Realty Co., 272 U.S. 365 (1926).

[11] See note 9 and S.A. Healy Co. vs. Town of Highland Beach, 355 So.2d 813 (Fla. 3rd DCA 1978).

[12] Fifth (5TH) and Fourteenth (14TH) Amendments of the U.S. Constitution.

[13] Euclid, supra.

[14] S.A Healy Co. vs. Town of Highland Beach, supra and Dade County vs. National Bulk Carriers, Inc., 450 So.2d 213 (Fla. 1984).

[15] Key Haven vs. Board of Trustees of Internal Improvements Fund, 427 So.2d 153 (Fla. 1982); Albrecht vs. State of Florida, 444 So.2d 8 (Fla. 1984); and Dade County Vs. National Bulk Carriers, Inc.. supra.

[16] Graham vs. Estuary Properties, supra.

[17] See note 9 and cases cited therein.

18 Sections 380.0555(6); 380.06(4), (9), (19) and (20); 380.065(8) and 163.3167(9), F.S. (1985). City of Ft. Lauderdale vs. State of Florida, 424 So.2d 102 (Fla. 1st DCA 1982).

19 For example: Town of Largo vs. Imperial Homes Corp., 309 Sol2d 571 (Fla. SDCA 1975) in which town approved rezoning request to permit highrise development knowing that developer's purchase of the land was contingent on the rezoning. After developer had spent $379,000 for the land and begun development processes, town attempted to downzone the property. Court held that the city's knowledge that developer would rely on the rezoning to its detriment was sufficient grounds to estop the downzoning.

20 13 Stetson Law Review 1, 2 (1983)

21 See: City of Hollywood vs. Hollywood Beach Hotel, 283 So.2d 867 (Fla. 4th DCA 1973).

22 13 Stetson Law Review at 7 and 8 and cases cited therein.

23 Town of Longboat Key vs. Mizrak, 467 So.2d 488 (Fla. 2DCA 1985).

24 Town of Largo vs. Imperial Homes, supra.

25 Hollywood Beach Hotel vs. City of Hollywood, 329 So.2d 10 (Fla. 1976); City of Lauderdale Lakes vs. Corn, 427 So.2d 239 (Fla. 4th DCA 1983).

26 See note 22

27 Walker vs. Indian River County, 319 So.2d 596 (Fla. 4th DCA 1975).

28 13 Stetson Law Review at 4

29 Id.

30 Id.

31 13 Stetson Law Review at 12

32 Town of Largo vs, Imperial Homes, supra.

33 City of Gainesville vs. Bishop, 174 So. 100 (Fla. 1st DCA 1965).

34 Board of County Commission vs. Lutz, 14 So.2d 815 (Fla. 3rd DCA 1975).

35 See: City of Miami Beach vs. 8701 Collins Ave., 79 So.2d 428 (Fla. 1954); Pasco County vs. Tampa Development Corp., 364 So.2d 850 (Fla. 2DCA 1978); and Florida Companies vs. Orange County, 411 So.2d 1008 (Fla. 5th DCA 1982).

36 11 Land Use and Environmental Law Review 533, 539 (1980).

37 Rhodes, supra at note 5.

38 Section 380.06(19)(1), F.S. (1985). See aslo General Development Corp. vs. State of Florida, 353 So.2d 1199 (Fla. 1st DCA 1978).

39 Section 380.06(19)(b), F.S. (1985).

40 Section 380.06(19)(d)(1), F.S. (1985).

41 See notes 27 through 30.

42 Hollywood Beach Hotel vs. City of Hollywood, supra., and Dade County vs. Rosell Construction, 297 So.2d 46 (Fla. 3rd DCA 1974).

43 13 Stetson Law Review at 18

44 Killearn Properties, Inc. vs. City of Tallahassee, 366 So.2d 172, 179 (Fla. 1st DCA 1979).

45 Section 177.011, F.S. (1985).

46 Maselli vs. Orange County, __So.2d ___, 11 FLW 1185 (Fla. 5th DCA May 22, 1986).

47 Section 177.041, F.S. (1985).

48 Section 177.081, F.S. (1985).

49 Section 177.041, F.S. (1985).

50 Section 177.071, F.S. (1983).

51 Section 177.131(1) - "The circuit court clerk of a county shall record in the public land records of the county any map prepared and adopted by the Department of Transportation or any other governmental entity as its official right-of-way map after the same has been approved by the appropriate governmental authority. . . ."

52 75 AGO 10 (1975).

53 Section 28.222, F.S. (1985).

74 Section 475.182(1), F.S. (1985).

75 August 19, 1986, telephone conversation with Charles J. Hoeck, Education Director, Division of Real Estate, Orlando, Florida.

76 Id, and $475.182(1), F.S. (1985).

77 See note 75.

78 See notes 69 through 72.

79 Section 475.17(1)(a); Kline vs. Pyms Suchman Real Estate Co., 303 So.2d 401 (Fla. 2DCA 1974); Bush vs. Palermo, 443 So.2d 104 (Fla. 4th DCA 1983); and Alpert, supra, at Section 2:3.

80 Gerber vs. Keyes Co., 443 So.2d 199 (Fla. 3rd DCA 1983).

54 75 AGO 10 (1975).

55 Section 28.222(3)(a), F.S. (1985).

56 28 University of Florida Law Review 156, 157 (1975).

57 Id.

58 Id.

59 28 University of Florida Law Review 156, 158-9 (1975).

60 Thomas vs. Thomas, 96 So.2d 771 (Fla. 1957) (a deed absolute on its face is a mortgage when executed to secure the payment of money).

61 Mid-State Investment Corp. vs. O'Steen, 133 So.2d 455 (Fla. 1st DCA 1961).

62 See: Alpert, Jonathan L., Florida Real Estate, Section 7:4, (Lawyers' Co-op Publishing Co., 1985) and cases cited therein.

63 Huguley vs. Hall, 157 So.2d 417 (Fla. 1963); First Mortgage Corp. vs. DeGive, 177 So.2d 741 (Fla. 2DCA 1965); Ricard vs. Equitable Life Assurance Society, 462 So.2d 592 (Fla. 5th DCA 1985).

64 Adkinson vs. Nyberg, 344 So.2d 614 (Fla. 2DCA 1977); Hoffman vs. Semet, 316 So.2d 649 (Fla. 4th DCA 1975); Cingue vs. Buschlen, 442 So.2d 1034 (Fla. 3rd DCA 1983).

65 Section 697.01(1), F.S. (1985).

66 Section 695.22, F.S. (1985).

67 11 FLW 1185 (Fla. 5th DCA May 22, 1986).

68 Section 475.04,F.S. (1985).

69 Section 475.045, F.S. (1985).

70 Section 475.045(b)(1), F.S. (1985).

71 Section 475.045(b)(3), F.S. (1985).

7 Section 475.045(b)(8), F.S. (1985).

7 Section 475.017(2), F.S. (1985).