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COMMENTS TO THE SOUTH MIAMI-DADE WATERSHED COMMITTEE CONCERNING THE PROPERTY RIGHTS ISSUE

December 1, 2005

Recently, the Committee was provided information by its consultants on the issue of private property rights, and received comments from interested persons on that issue. We have considerable expertise on this legal issue and offer for the Committee's consideration, the following perspective on this issue.

The "Property Rights" Interim Work Product (Kieth & Schnars June 2005)

The legal review concludes that the Study does not create legal exposure under Federal or State "takings" law. Studies, by themselves to not impact property rights and thus this is a clearly correct determination. The report does a good job of analyzing even those cases which could apply to planning efforts, and explains that the courts give government significant leeway to plan and consider potential regulatory changes that might have takings implications. The consultant's legal analysis is straight-forward and accurate. The basics of the law on property rights is currently subject to little debate, and the report accurately reports the most recent judicial rulings. It is difficult to imagine that there could be an alternative or different view or presentation of the law.

The real question is whether the implementation – through government planning, development, permitting or other actions – of any of the Study's recommendations might constitute a "taking". As the Study has not yet proceeded to the recommendation stage, final conclusions on this point cannot yet be drawn. However, as a result of the previously completed tasks, the potential range and nature of the Study's potential recommendations are known, and reasonable conclusions can be drawn about how private property rights might impact the substance of Study's ultimate recommendations.

The paper clearly and accurately makes it clear that Miami-Dade County has significant leeway to enact whatever recommendations will emerge from the Watershed Study, without running afoul of private property rights. Indeed, while the paper appropriately did not attempt to speculate and address the property rights implications of potential recommendations, only the most drastic of potential Study recommendations would violate private property rights. As discussed in the attached article, recently published in the Florida Bar News, the following is true of property rights as granted by Florida and federal law:

- A landowner has no right to an increase in allowable land uses. Thus, County actions that simply do not increase densities, move the UDB or otherwise increase the type and amount of development currently allowed on land will not violate private property rights.
- Actions to decrease density or use on private land do not violate property rights unless they have such an adverse impact on land values that virtually all economically viable use has been "taken". While this is not a "bright line" test, it is fairly clear that under the US and Florida Constitutions, this point is not reached until land values are diminished by around 80%. In Florida, the "Harris Act" may be interpreted in the future to set that threshold at a lesser reduction (say 60-75%), that is not at all clear, and would be a very conservative estimate. The bottom line is that, unless the County implements the Study by reducing densities by half or more, there will be no property rights issues. It should be noted that the County could even reduce densities to almost, and including nothing, as long as it granted "transferable" development rights to the land, which could provide value to the land based on their resale value.
- Similarly, if the County were to implement the Study with regulations that increase environmental protections, set-asides, impact fees or other measures which increased the restrictions on the use of land or the amount of reimbursement the owner must provide to offset the cost of public services and facilities, there would be no property rights violation unless the requirement was not reasonably related to the actual impacts of the development or was for an invalid reason. Preventing urban sprawl, environmental or neighborhood values, drinking water supplies, traffic congestion, aesthetics, and recouping public costs and other issues have consistently been found to be valid bases for regulations.
- If it is determined that existing regulations allow development that is adverse to the needs of the region, as explained in the Study or otherwise, the County can enact a temporary moratorium on permitting for the time it takes to amend the regulations to resolve the deficiencies. Moratoriums of up to 6 years have been upheld, although the law is that the moratorium must be reasonable in duration relative to the issue being addressed during its pendency.
- One of the areas where property rights law provides much more room for government to increase public protections is in the area of impact and other fees or exactions. The constitution allows government to recoup all of the public costs for services and facilities generated by land use and development on private land, impact fees are typically only a fraction of actual costs.

Comments on Public Comments on Property Rights Issue

The Report of Proceedings for the September 22, 2005 reports comments by interested parties that raise concerns about the property rights implications of the Study. Mr. Swakon writes that property rights "are affected by planning", and appears to be suggesting that this study may be trying to justify the taking of property rights, or perhaps that the study itself is violating property rights. (Report of Proceedings at page 8).

Similarly, Ms. Burton argues that the planning process itself does "have a direct impact on property rights", based on the legal theory of "zoning in progress", and seems to suggest that the mere discussion of potential changes in land use plans or regulations is wrong because it might have an adverse impact on the market. Finally, she argues that one of the planning mechanisms being discussed by the Committee – Transferable Development Rights – may be a "sham" because of political difficulty in getting cities to approve of the higher densities necessary to make TDRs economically useful to their holder.

These arguments, or concerns are not at all well – taken or supported by property rights, although Ms. Burton does raise one valid point and we agree that there should be a comprehensive effort to identify specific infill locations and increase allowable densities in those areas, to be achieved through the use of TDRs.

The argument that conducting a planning study, and considering a range of planning or regulatory changes is a taking of private property simply has no support in the law. As discussed in the consultants property rights paper, this is not the law. If it were, as the courts have recognized, government would be paralyzed. For these reasons, the commenter' point is unclear. Are they suggesting that the committee and study should not exist? Are they suggesting that there should be not even be discussion or consideration of any changes to any rules which might be perceived as making it more difficult or costly to develop land in the study area, or which might reduce the amount of profit to be derived from such development? No such suggestion can be taken seriously. Indeed, the notion that planning and analysis of potential regulatory changes should be avoided because it may violate property rights must be viewed in the context of the law that government can in fact adopt regulations which severely reduce the allowable use or density of land without violating property rights.

Frankly, it is not responsible to suggest that there is anything invalid about this study relative to property rights, or to suggest that players in the real estate market should somehow be protected against valid government planning functions and regulatory decisions designed to protect the public interest. Property rights protect landowners from government action that takes away so much of their existing uses and value that it is unfair. They do not guarantee profit, subjective expectations, or protect speculative business decisions. Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1978); Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962); Graham v. Estuary Properties, Inc., 399 So.2d 1374 (Fla. 1981), *cert. denied*, *sub. nom.,* Taylor v. Graham, 454 U.S. 1083 (1981).

The legal concept of "zoning in progress" does not apply to the circumstances related to this Study. It does not apply to studies. The "zoning in progress" concept is a defense that local governments may assert against a legal claim of vested rights when a landowner sues to avoid having to comply with a zoning regulation. Such cases arise when someone applies for zoning approval under the existing set of regulations, but after a change to those regulations is already formally "in progress". In Smith v. City of Clearwater, 383 So.2d 681 (Fla. 2d DCA 1980), rev. den. 403 So.2d 407, the court stated

that an applicant is entitled to a permit under existing regulations only if the proposed regulation that would preclude the intended use is not "pending" when application is made. A proposed government action is deemed "pending" if there are active and documented efforts by those authorized to develop and prepare the proposed regulatory change, and the local governing board or planning board is aware of these efforts. Smith, supra, at 685. See also Franklin County v. Leisure Properties, Ltd., 430 So. 2d 475 (Fla. 1st DCA 1983), rev. den. 440 So.2d 352 (ordinance deemed pending on vote of county commission to advertise notice of intent to consider zoning change). The "zoning in progress" theory does not apply to comprehensive plan changes, because the Growth Management Act provides that a comprehensive plan is not effective until adopted. Gardens Country Club, Inc. v. Palm Beach County, 590 So.2d 488 (Fla. 4th DCA 1991)(citing Sections 163.3194(1)(b) and 163.3197, Fla. Stat.)

In summary, the "zoning in progress" concept does not give any legal status to potential zoning changes being analyzed in a study that have not been the subject of a local governing body's direction to staff to begin the formal process of adoption, and it does not apply at all to potential comprehensive plan changes.

As to Ms. Burton's comment about Transferrable Development Rights, they are *potentially* a silver bullet for the issue of property rights versus community protection. This is so because they allow even complete prohibition on development on private land while still providing the landowner *value* that can be bought and sold in a private market. For this reason, they have consistently been found by the Courts to be completely consistent with private property rights. See e.g. Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1978); Glisson v. Alachua County, 558 So.2d 1030 (Fla. 1st D.C.A. 1990), *rev. den.*, 570 So.2d (Fla. 1990). Ms. Burton's point is correct that they work and provide actual value to the landowner *only if they are really of value in the relevant market.* They will not work, and will have little or no value, unless owners/ developers of land in the preferred development areas (typically called "receiving areas") are not given away "free" through plan amendments and rezonings. They will work where the political will exists (and this will can be written into a comprehensive plan)[1] to preclude density increases unless they are accomplished through the use of TDRs. If that is the adopted policy, and it is implemented, then such applicants will have the need and incentive to purchase TDRs from those who own them. We strongly urge the Committee to recommend, as part of its final report, certain specified infill areas where density should be increased ("receiving areas"), and that – to avoid a windfall to those landowners and a wipeout for those where you are recommending little or no development – the allowable increases in density be based on the purchase of TDRs from owners in the "sending" areas.

In conclusion, there is nothing about Constitutional or statutory property rights that inhibits this Committee's work or the range of options available to the County (except for those that drastically reduce *existing* allowable uses) for protecting the south Miami-Dade Watershed.

[1] By way of example, the Palm Beach County Comprehensive Plan contains a policy precluding density increases in certain areas unless accomplished through the use of TDRs.