County comprehensive plan, incorporating changes

Number: INFORMAL

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Mr. David A. Hallman
Walton County Attorney
161 East Sloss Avenue
DeFuniak Springs, Florida 32433

Dear Mr. Hallman:

On behalf of the Walton Board of County Commissioners, you ask whether the county commission correctly interpreted its local comprehensive plan as not automatically incorporating periodic changes by the federal government of the 100-year flood plain.

According to your letter, the Walton County comprehensive plan refers to the Federal Emergency Management Agency's designation of lands within the 100-year flood plain in determining the permissible density for development.[1] This provision was adopted in November 1996. You state that in 2000, the Federal Emergency Management Agency amended its flood maps increasing the areas designated as flood-prone. A question has arisen as to whether the comprehensive plan permits the county to incorporate the revised flood plain maps of the federal government, thereby changing the allowable density of development on private property without any action by the county commission.

Section 16.01(3), Florida Statutes, authorizes this office to render opinions regarding the interpretation of state law. As discussed in this office's Statement Concerning Attorney General Opinions, a copy of which is enclosed, opinions generally are not issued on questions requiring an interpretation only of local codes, ordinances or charters rather than the provisions of state law. Instead such requests are usually referred to the attorney for the local government in question.[2] Nor does this office generally comment upon actions that have already been taken by a public body. Your inquiry involves the interpretation of the Walton County comprehensive plan and the validity of action taken by the county commission. Accordingly, this office must decline to formally comment upon this matter.

Informally, however, and in an effort to be of assistance, this office would note that there is a body of Florida case law stating that it is an unconstitutional delegation of legislative power for the Legislature to adopt future legislative or administrative actions of jurisdictions outside Florida. For example, in *State v. Rodriguez*,[3] the court stated:

"In *Florida Industrial Commission v. State,* 155 Fla. 772, 21 So.2d 599 (1945), we held that the Legislature may approve and adopt provisions of federal statutes and administrative rules made by federal administrative bodies, which provisions are in existence and in effect at the time the Legislature acts. We went on to say, however, that to adopt in advance any federal act or ruling of any federal administrative body which may be adopted in the future would amount to an unlawful delegation of legislative authority. More recently, in *Department of Legal Affairs v.*

Rogers, [329 So. 2d 257 (Fla. 1976)], wherein the 'Little FTC Act' was challenged upon several grounds, one of which being that the Legislature intended to incorporate future holdings of a federal administrative body, this Court stated:

'Another aspect of the issue of delegation of legislative authority concerns the question of whether the legislature by the subject act intended to incorporate future (subsequent to the effective date of the statute) decisions of the Federal Trade Commission and federal court decisions. To preserve the constitutional validity of the act, we would have to say that the legislative enactment intended only decisions made prior to its enactment. [Citations omitted.]'"

Three years later, the Florida Supreme Court in *Adoue v. State*,[4] again stated that a legislature may adopt existing but not future legislation or administrative rules of jurisdictions outside of Florida:

"The legislature may, as it has in the past, adopt the regulatory and statutory standards of the federal government, but these standards must be in existence at the time of the adoption. Any attempt to incorporate a law as part of this state's body of laws prior to its creation by the appropriate federal authority is an unconstitutional delegation of the legislative power. *Florida Industrial Commission v. State,* 155 Fla. 772, 21 So.2d 599 (1945)."

In *Adoue*, however, the Court concluded that the statute making it unlawful for a person to bring into the state any controlled substance unless possession of the controlled substance was authorized by statute or the person was licensed to do so by the appropriate federal agency, did not constitute an unlawful delegation of legislative authority. The Court concluded that the state's comprehensive drug abuse act enumerated at length the substances which were controlled, described in detail the criminal offenses relating to these substances, and delineated those persons who were excluded from criminal liability. The Court held that the exclusion of those persons holding controlled substances pursuant to a federal license did not delegate substantive lawmaking ability to the federal government any more than it delegated that ability to a medical practitioner who was also excluded: "The conduct proscribed by the statute involved here has been completely defined by the Florida legislature; the range of criminality does not change in the future with shifting federal standards."[5]

Three years after *Adoue*, the Florida Supreme Court in *Eastern Air Lines, Inc. v. Department of Revenue*,[6] upheld adjustments made to the fuel price which was based on the percentage change in the average monthly gasoline price component of the Consumer Price Index, stating:

"Here, the legislature is merely setting forth the manner in which the department is to determine the appropriate total motor fuel and special fuel retail price. The department is directed with precision how to make such a determination. *We think the language of Welch and Freimuth should be interpreted to apply to statutes which incorporate federal statutes or administrative rules which substantively change the law, and not to a statute which incorporates a federal index to provide aid in making a ministerial determination*." (e.s.)

In the instant inquiry, the incorporation of the new flood plain adopted by FEMA into the county's comprehensive plan would apparently have the effect of changing the allowable density for development for lands not included within the flood plain at the time the comprehensive plan was

adopted and subjecting lands to substantially lower building densities. Such a change would appear to be substantive in nature. However, it is the responsibility of the county to interpret its own code provisions. I hope, however, that the above informal comments, which should not be considered to be a formal opinion of this office, may be of assistance to the county in resolving this matter.

Thank you for contacting the Florida Attorney General's Office.

Sincerely,

Joslyn Wilson
Assistant Attorney General

JW/t

Enclosure
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[1] According to your letter, the county comprehensive plan was adopted by Ordinance 1996-25. The relevant provisions are contained in Policy C-3.2.3, paragraph 2. While the comprehensive plan has been subsequently amended, you state that the provisions in paragraph 2 of Policy C-3.2.3 have not been amended.

[2] The statement regarding Attorney General Opinions is also available on this office's website at: www.myfloridalegal.com.

[3] 365 So. 2d 157, 160 (Fla. 1978). *And see Presbyterian Homes of Synod v. Wood*, 297 So. 2d 556 (Fla. 1974) ("sliding scale" depending upon future federal action is contrary to court's holdings to the effect that a state statute cannot adopt in advance a future and unknown federal act or regulation); *Freimuth v. State*, 272 So. 2d 473, 476 (Fla. 1972); *State v. Welch* 279 So.2d 11 (Fla. 1973) (statute declaring it was the Legislature's intent to include under that chapter "all drugs controlled by the drug abuse laws of the United States, now or in the future," in addition to those specified under Florida law unconstitutional for attempting to incorporate by reference future legislative and/or administrative actions of jurisdictions outside Florida); *Florida Industrial Commission v. State ex rel. Orange State Oil Co.*, 21 So. 2d 599, 603 (Fla. 1945) ("It is within the province of the legislature to approve and adopt the provisions of federal statutes, and all of the administrative rules made by a federal administrative body, that are in existence and in effect at the time the legislature acts, but it would be an unconstitutional delegation of legislative power for the legislature to adopt in advance any federal act or the ruling of any federal administrative body that Congress or such administrative body might see fit to adopt in the future.").

[4] 408 So. 2d 567 (Fla. 1981).

[5] *Id.* at 570.

[6] 455 So. 2d 311 (Fla. 1984), *appeal dismissed*, 474 U.S. 892, 106 S. Ct. 213, 88 L. Ed. 2d 214 (1985). *And see Gallagher v. Motors Ins. Corporation*, 605 So. 2d 62 (Fla. 1992), in which the

Court determined that the incorporation of future enactments of foreign jurisdictions into the formula for measuring Florida's retaliatory tax was entirely consistent with the recognized objective of such taxes -- affecting the taxing policies of other jurisdictions:

"It is true that we have consistently held that it is an Unconstitutional delegation of legislative power for the legislature to adopt future legislative or administrative actions of jurisdictions outside Florida. *See, e.g., Eastern Air Lines, Inc. v. Dept. of Revenue*, 455 So. 2d 311, 314 (Fla. 1984), *appeal dismissed,* 474 U.S. 892, 88 L. Ed. 2d 214, 106 S. Ct. 213, 54 U.S.L.W. 3251 (1985); *State v. Welch,* 279 So. 2d 11 (Fla. 1973); *Freimuth v. State,* 272 So. 2d 473, 476 (Fla. 1972). However, in this case, incorporation of future enactments of foreign jurisdictions into the formula for measuring Florida's retaliatory tax is entirely consistent with the recognized objective of such taxes -- affecting the taxing policies of other jurisdictions. It is only logical that if the tax is to achieve its intended purpose, it must operate in relation to both current and future enactments and policies of other jurisdictions that burden Florida insurers. It follows that incorporation of future enactments of a foreign insurer's state of domicile as a reference point for determining the retaliatory tax due from that insurer in no way substantively changes the law. The legislature has merely set forth the manner, consistent with the underlying legislative objective, by which the Department of Revenue is to determine the tax due under section 624.429. *See Eastern Air Lines*, 455 So. 2d at 316. This is conceptually no different than the statutory provision which was upheld in *Eastern Air Lines* wherein the legislature directed the Department of Revenue to measure a change in fuel tax burden by as-yet-unpromulgated versions of the federal Consumer Price Index. 455 So. 2d at 316; *See also Gindl v. Department of Education,* 396 So. 2d 1105 (Fla. 1979) (upheld statutory provision that required a computation based on the most recent publication of the Florida Price Level Index)."