CHAPTER 7

PROTECTION TECHNIQUES

This chapter contains a discussion of potential corridor management and protection techniques for Florida Scenic Highways. The local government's comprehensive plan, considered the "constitution" of local land use planning, will be the starting and focal point of a corridor management plan. The chapter begins with a discussion of comprehensive plan issues and follows with an explanation of protection techniques that are applicable to scenic highway implementation. The local government may select from a broad range of protection/management techniques, from acquisition of land or interests in land, voluntary associations or development agreements, to zoning and land use regulations, based on the goals, objectives and policies of the local comprehensive plan. The remainder of this chapter offers an explanation of issues affecting the legality and defensibility of the comprehensive plan.

DISCLAIMER

The following discussion of land use planning and management techniques and accompanying examples should not be viewed as legal advice applicable to a particular situation. The Florida Department of Transportation does not endorse or recommend any particular approach to implementing a corridor management plan. The purpose of the discussion below is to briefly introduce various issues and approaches that may be useful regarding scenic highways; it is not a complete analysis of the law that may be applicable in a particular situation. You should consult with legal counsel before taking any specific action regarding a corridor management plan, rather than relying solely on the material in this chapter.

7.1 LOCAL GOVERNMENT COMPREHENSIVE PLANS

In Florida, local government comprehensive plans combine planning and regulatory functions. The plan is the controlling law. Consequently, comprehensive plans are the primary mechanism by which local governments both plan for and regulate land use and development within their jurisdictions. One Florida court has described the local comprehensive plan as the "constitution" for land use planning in Florida. A legally enforceable comprehensive land use plan (prepared and adopted pursuant to the ***Local Government Comprehensive Planning and Land Development Regulation Act, Chapter 163, Florida Statutes)*** allows local governments to exercise their police powers.

Comprehensive plans are legally enforceable documents, and all development and land use are

undertaken according to these plans. All proposed development within a local government's jurisdiction must demonstrate consistency with the local comprehensive plan. A particular use is consistent with the comprehensive plan if it is "compatible with and further[s] the objectives, policies, land uses, and densities or intensities in the comprehensive plan and if it meets all other criteria detailed by the local government," ***Fla. Stat. §163.3194(3)(a) (1995)***.

The consistency requirement ensures the goals, objectives and policies of the local comprehensive plan, such as a scenic highway designation, will be implemented in land use decision-making. Local comprehensive plans are implemented through local ordinances called Land Development Regulations (LDRs) which must be consistent with the comprehensive plan. LDRs set out specific requirements for the development of land. The local comprehensive plans, in turn, must demonstrate consistency with state minimum guidelines. Prior to their adoption by local governments, comprehensive plans are reviewed by the State for consistency with State requirements. In this way, Florida's growth management policies offer a planning mechanism that has the advantages of local-level planning as well as the comprehensiveness and consistency of a state-wide program.

It is likely that some scenic highway corridors may extend through a number of jurisdictions. Any comprehensive, multi-jurisdictional program can potentially suffer from piecemeal enforcement and planning as the program crosses jurisdictional boundaries. ***Florida's Growth Management Act*** effectively resolves this problem by requiring each local plan to address intergovernmental coordination. The required intergovernmental coordination element ensures multi-jurisdictional concerns, such as scenic highways, do not suffer from piecemeal local planning. These intergovernmental coordination requirements would apply to management of a scenic highway corridor.

7.2 SCENIC HIGHWAYS APPLICABILITY

Based on current Florida law and judicial decisions, local government comprehensive plans are the most comprehensive and defensible means to implement scenic highway corridor management plans. Whether the area chosen for protection is of cultural, historical, archeological, recreational, natural or scenic significance, such features are subject to a local government's general police powers that may be exercised to protect public health, safety and welfare.

Appropriate elements of a scenic highway corridor management plan incorporated into a local government comprehensive plan offer both the flexibility to tailor the program to local conditions and the ability to choose the most suitable regulatory techniques. Factors that would impact scenic highway regulations, such as development patterns, economic pressures and public support, are better addressed at the local, rather than state or national level.

At a minimum, the following elements of a Corridor Management Plan should be adopted into the appropriate local government comprehensive plan:

- Corridor Vision
- Corridor Identified on a Map
- Goals, Objectives and Strategies

Current plans can be amended to incorporate scenic corridors, or communities can use the Evaluation and Appraisal Report (EAR) process to update their plans to include scenic corridors.

Fundamental to the scenic corridor designation is the supporting data and analysis required under the ***Growth Management Act***. To fulfill these requirements, specific data are required to support a particular designation. Other sections of this manual address the criteria for each intrinsic resource (cultural, historical, archeological, recreational, natural or scenic) and indicate the kind of data needed to support a designation. These supporting data allow the corridor to be incorporated into Florida's current growth management policy structure.

Several of the required and optional comprehensive plan elements (See ***Section 163.3177, Florida Statutes***) may be useful in implementing a scenic corridor designation. They are as follows:

- **The Community's Vision Statement** - Many jurisdictions now prepare vision statements to provide a conceptual basis for their Comprehensive Plans. Scenic corridors can be referenced within this statement as part of the community's historic, environmental, or cultural values.

- **Plan Elements** - A scenic corridor may be implemented through some or all of the local comprehensive plan elements required by ***Section 163.3177***, including, for example:
  - The Future Land Use Plan Element - Land use categories, such as conservation or open space, may be used to protect the corridor's scenic resources; a historic district designation may be used to protect historic resources in or near the corridor; additionally, the corridor should be depicted on the Future Land Use Map.

  - Transportation - This element could incorporate standards to protect the capacity and function of a scenic highway.

  - Conservation, and Recreation and Open Space - These elements could include policies to protect the resources of the corridor and to plan for public use of the resources.

  - Coastal Zone - This element may be used to implement a scenic corridor associated with a coastal roadway; historic preservation is also a requirement of this element.

Regardless of the chosen element for scenic corridor inclusion, the LGCP should provide cross-references between the goals, objectives and policies for that element. Each community should determine the element that is most appropriate for their particular scenic corridor(s).

In a pilot ***Conservation and Development Plan (CDP) for South Walton County***, two scenic corridors were included. One is a coastal, scenic/environmental corridor on a county road; the other a commercial/environmental corridor along a U.S. Highway. The Conservation and Development Plan (CDP) provided language that:

- Establishes that corridors should be eligible for state and national scenic highway designation.

- Addresses corridor management planning and local designations by an advisory committee.

- Provides specific features of the corridors:
  - length, width and corridor setbacks
  - vista/view maintenance
  - sign controls
  - specific features for protection
  - special design guidelines

- Incorporates special design review processes and procedures.

The CDP language outlined above provides guidance for the formulation of Land Development Regulations (LDRs) and the Corridor Management Plan.

7.3 PROTECTION TECHNIQUES FOR IMPLEMENTING SCENIC HIGHWAYS

There are a number of techniques available to local governments to implement corridor management plans. The local government's selection from will depend upon its objectives and the degree of control necessary to meet those objectives. In some cases, governments may choose to employ a combination of several techniques in implementing scenic highways plans. The following is a summary and brief description of some of the techniques that might have application in implementing scenic highways plans. For organization and clarity, these techniques have been grouped under three headings; *Regulatory Techniques, Public and Private Agreements,* and *Acquisition of Interests.*

7.3.1 Regulatory Techniques

One manner in which a local government may implement a scenic highways plan is through land development regulations. ***Florida's Growth Management Act*** does not limit the range of regulatory techniques available to local governments, but, rather, encourages the

use of innovative land development regulations to implement local government comprehensive plans. Thus, there may be any number of variations on the techniques listed below, and the list should not be considered to be exhaustive. These regulatory techniques are presented here in two categories: Zoning and Other Techniques.

Zoning

- **Traditional Euclidian Zoning and Overlay Zoning** - The starting point for any discussion of land use regulation is traditional "Euclidian" zoning, which is widely used in Florida. Traditional zoning is based upon division of a jurisdiction into land use districts. Each district has detailed development standards ranging from permitted land uses to building height, setbacks and fencing requirements. The hallmark of traditional zoning is the uniformity of uses within each district. This characteristic limits the usefulness of traditional Euclidian zoning for a scenic highways program, as a scenic highway corridor may traverse numerous zoning districts. It is possible, however, for local government to create a specialized zoning district solely within and for a scenic highway corridor.

A variation of traditional zoning that may be the most useful for a scenic highway corridor is the overlay zone. As the name indicates, an overlay zone is an additional designation that is placed on top of and lies over existing designations. These zones are depicted on the zoning map. An overlay zone supplements the underlying, existing zoning regulations with additional requirements. This zone is used to address location restrictions, such as development in floodplains or environmentally sensitive areas. An overlay zone could be used in a similar manner to establish regulations, design standards or other special conditions for designated scenic highway corridors where it is unnecessary to change the underlying land use regulations and where supplementing those regulations would suffice. For example, the City of Tallahassee and Leon County have designated overlay zones or districts to protect significant, historic tree-lined corridors.

Due to the specialized nature of overlay zones with design guidelines, a separate review board may be used. Typically, the review board is comprised of local landowners and design professionals, such as architects, landscape architects, planners, engineers, interior designers, real estate professionals, and development or environmental interests. The review board is given specific powers and duties to approve individual projects for color, materials, height, location and architectural design, depending upon the guidelines. A recent example of this method involves the Mirimar Beach Parkway Scenic Corridor in South Walton County, where an independent design review board was implemented.

This review process is driven by specific guidelines and the board may approve, deny, or approve with conditions. The board approves site plans, architectural plans and construction documents. The board also can approve variances from the guidelines if conditions warrant. Even though this is a special design process, there should be ample public notice for owners of adjoining property.

The most fundamental way to protect or enhance intrinsic resources is the preparation of special guidelines. These guidelines ensure that the corridors develop at the highest level of quality, protection and enhancement. Guidelines should be defined by at least five basic issue areas:

- Function - Clearly state the purpose of the corridor
- Form - Establish unique districts or sub-areas
- Character - Identify overall intrinsic characteristics
- Quality - Orient guidelines and standards to ensure quality
- Success - Establish a system of organization, finance and enforcement

Once these issues have been addressed, the specific design guidelines can be prepared to cover specific elements such as architecture, signage, landscaping and site development standards.

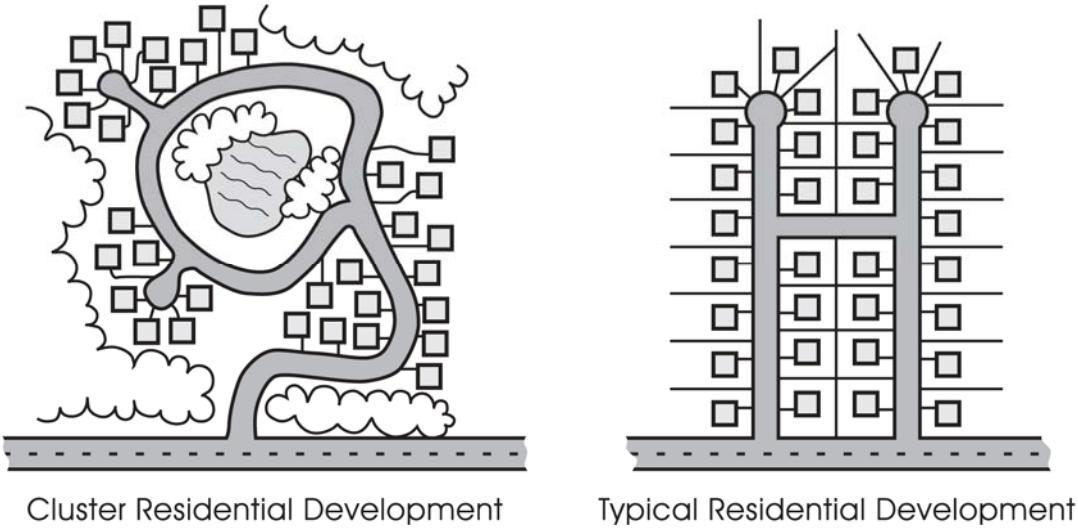
- **Special Permits and Incentive Zoning** - Special permits, also referred to as special exceptions or conditional uses, may be used to single out development that requires closer scrutiny to insure that it is compatible with a particular location. Thus, a special permit could be required for all development, or certain types of development, proposed to be located along or adjacent to a scenic highway corridor. Such regulation would allow local governments to review individual projects and to impose special conditions, such as increased buffers or access limitations, in order to ensure compatibility along the scenic highway corridor. Local governments could also deny approval if compatibility cannot be ensured.

Special restrictions associated with a corridor management plan, such as increased buffers and other tailored design criteria, may also be achieved through incentive zoning. Under incentive zoning, developers are offered incentives, usually increased density or intensity, if they agree to voluntarily comply with certain criteria. For example, a developer may be offered increased density for agreeing to cluster multi-family units on the least sensitive portion of a site and to preserve large areas in open space. Because this development technique is voluntary, there is no assurance that developers will participate. A real advantage to this approach, however, is that the local government is insulated from legal challenges to the regulation.

In the absence of special permits and/or incentive zoning, certain specific developments could still be subject to site-specific regulatory techniques such as Planned Unit Development (PUD), development agreements, and Developments of Regional Impact (DRI). The DRI is uniquely suited to protect scenic corridors since it deals with regional and statewide significance. If a corridor goes through a DRI, the development order can be conditioned to address specific features of the scenic corridor. Such conditions might

include view protection, corridor enhancement and right-of-way reservation. The DRI provides positive, long-term maintenance of the corridor. Likewise, the PUD approach may have usefulness since DRIs typically apply only to large projects, which constitute a relatively small portion of development.

· **Cluster Zoning** — Clustering is a technique allowed within certain zoning districts to cluster the allowable units into a portion of the site. The remaining portion is retained in open space or some other form of protection. The scenic corridor application would maintain viewsheds and protect unique, cultural, historical, archeological, recreational, natural or scenic resources.



Cluster Residential Development Typical Residential Development

Other Techniques

· **Planned Unit Developments** — *Planned Unit Development* (PUD) is an innovative type of land development that treats large tracts of land as a single unit containing a mixture of uses. While they allow flexibility in zoning and often result in developments with greater open spaces than traditional zoning, PUDs may have a limited impact in the area of scenic highways. PUDS typically involve the development of large tracts of land, and, accordingly, account for only a small percentage of total developments. Where an applicant developer seeks to develop a large tract of land along or adjacent to a scenic highway, however, the PUD process may provide the local government with an additional technique to incorporate some site design specifications into the development.

A community may incorporate the PUD as a process, an actual zoning district or as an overlay to a base zone. In any of the approaches, PUD's provide excellent potential for scenic corridors, with site planning and roadway location being oriented towards protection of the intrinsic resources along scenic corridors.

· **Selected Area Plan (SAP)** — An innovative comprehensive plan approach called a Selected Area Plan can be employed to protect a scenic corridor. A SAP allows large scale property owners to prepare a coordinated plan for land use and transportation. Two recent SAPs developed in Polk and Lake Counties involve programs for special boulevards and corridors to be implemented through a property owners association, capital improvements programming and impact fees. In both plans, preserving and enhancing certain roadway features was highlighted as a key element to overall plan goals. Such a technique also encourages public/private cooperation in preserving scenic corridors.

· **Transferable Development Rights (TDR)** — It is fundamental that a government must allow every landowner a reasonable beneficial use of his/her property. This "property right" is guaranteed by both the Florida and United States Constitutions. Preserving large areas of open space or restricting alteration of historic structures in a scenic highway corridor could lead to a situation in which a landowner could claim a deprivation of constitutional rights. As a defense against such claims, many local governments allow landowners to transfer development rights from a restricted parcel to other land or to sell such rights.

It must be noted this technique is complex and can be very difficult to implement. There are few successful examples of TDR programs in Florida or in the nation. For example, to ensure transferred rights have value, the local government must identify adequate receiver sites and maintain the current density on such sites below the maximum allowed so transfers have value to the landowner. Local governments must establish a transfer system that ensures a permanent public record of transfers so arms-length purchasers of property will know certain development rights have been permanently lost. A full discussion of a TDR system is beyond the scope of this manual. In the limited context of a scenic highway corridor, however, these issues would be more manageable than on a jurisdiction-wide basis.

· **Sign Regulations** — Because the viewshed and visual elements are an integral part of establishing and maintaining a scenic highway corridor, assuring travelers a high quality visual experience is an important component of a Corridor Management Plan (CMP). Managing and regulating the location, appearance and existence of signage, as part of a corridor's visual experience, may be a provision for establishing and protecting a scenic highway corridor.

The ***Federal Highway Beautification Act (FHBA)*** affects regulation of signage on the Interstate system and the Federal-aid primary highway system, ***23 U.S.C. § 131***, and must be consulted when planning a scenic corridor that includes such roads. The principal mandate of the FHBA directs that States make pro-vision for the "effective control" of all signs within 660 feet of the nearest edge of the right-of-way in urban areas and all signs within the limits of visibility in rural areas. "Effective control" means prohibiting the construction of new signs in these identified areas except for directional and official signs; signs advertising the sale or lease of property on which they are located; signs advertising a business located on the property; landmark or historic signs; and signs advertising "free

coffee" for travelers. ***23 U.S.C. § 131(c)***. As discussed below, if a lawfully constructed yet nonconforming billboard currently exists along the Interstate or Federal-aid primary system, it cannot be "amortized" or otherwise removed pursuant to the FHBA or state implementing laws without paying the owner(s) just compensation. ***23 U.S.C. § 131(g)***.

Certain types of signs are treated differently under these requirements. New outdoor signs may be constructed on industrial or commercial land within the controlled zones along Federal Interstate and Federal-aid primary systems but must comply with the size, height, and spacing requirements set forth in a federal-state agreement to implement the FHBA. ***23 U.S.C. § 131(c) & (d)***. These requirements for sign control are required as part of maintaining "effective control" of outdoor advertising and, as such, are requirements that the State must take responsibility for and enforce. A local government considering a scenic highway should ascertain the zoning along the identified roadway(s) as an early consideration.

The State of Florida has complied with the mandate of the FHBA by enacting ***Chapter 479, Florida Statutes***. This Chapter implements the FHBA and is, in fact, more expansive in scope and more restrictive in regulation than the FHBA in most aspects. For instance, the FHBA affects regulation of signage along only the Federal Interstate system and the Federal-aid primary highway system. On the other hand, ***Chapter 479*** regulates signage along the State Highway System, in addition to signage along the Interstate and Federal-aid primary systems. Further, ***Chapter 479*** requires that every person who engages in outdoor advertising must obtain a license for that business, and must obtain a sign permit for every outdoor sign erected within the controlled zone (with certain limited exceptions).

The FHBA formerly provided that States with a scenic byway program may not allow the erection of any sign on any Interstate or Federal-aid primary highway designated scenic, except for those public service or on-site signs specified in ***23 U.S.C. § 131(c)***. Florida has a scenic highways program. (***See Fla. Stat. § 335.093.***) Thus, state-designated scenic highways that are also federal highways have inherent, federal prohibitions on the placement of signs. Congress has revised this section and inserted an exception to allow States to exclude from state or federal scenic byways designation any segment of a scenic road that it determines to be inconsistent with the state's criteria for designating scenic highways. ***S. 440, 104th Cong., 1st Sess. § 314 (1995)***. Under this revision, states may determine that certain areas along designated scenic highways are "commercial" or "industrial" and, therefore, should be excluded from the scenic designation and its outdoor sign prohibition. It should be noted that the federal statute **allows**, but does not **require** that commercial or industrial areas be excluded from signage regulations. It is strongly recommended that signage regulations adopted as part of a scenic highway corridor management plan apply throughout the corridor regardless of the underlying zoning, wherever cultural, historical, archeological, recreational, natural or scenic resources are visible.

As noted above, where off-premise signs along the controlled zone of Interstate or Federal-aid primary highways are already in existence and were erected lawfully under state law,

they cannot be removed without paying the owner(s) thereof "just compensation." Courts have consistently held that the FHBA requires this payment for what has been deemed a taking. The FHBA and Chapter 479 both include provisions requiring such payment. ***23 U.S.C. § 131(g); Fla. Stat. § 479.24***. Accordingly, the FHBA does not give to local governments any special ability to address and eliminate certain existing signage along the Interstate and Federal-aid primary systems for purposes of a scenic highways designation. However, under the ***FHBA*** and ***Chapter 479***, local governments may use other methods of compensation to remove off-premise or on-premise signs. Under Chapter 479, the State may institute eminent domain proceedings to provide "just compensation" for outdoor sign removal. ***Fla. Stat. § 479.24(3)***. Those signs located along interstate or federal-aid primary highways not covered by the requirement of the FHBA for "just compensation," and signs along other roadways determined to be scenic may also be removed through amortization. ***See Lamar Advertising Associates v. City of Daytona Beach, 450 So. 2d 1145 (Fla. 5th DCA), petition for review denied, 458 So. 2d 272 (Fla. 1984)***. The period of amortization must be reasonable, and will depend on such factors as whether the land on which the sign is located has another economically viable use, the depreciation and "life expectancy" of a sign, and the salvage value of the sign. ***See Naegele Outdoor Advertising v. City of Durham, 844 F.2d 172, 178 (4th Cir. 1988)***.

The State has provided that local governments may enact their own sign ordinances so long as the provisions are at least as stringent as those in ***Chapter 479***. ***Fla. Stat. § 479.155***. Carefully drafted, content-neutral local sign ordinances have been upheld by Florida Courts. For example, the Court in ***E.B. Elliott Advertising Company v. Metropolitan Dade County, 425 F.2d 1141 (5th Cir. 1970)***, considered and upheld an ordinance that prohibited commercial signs from being located within 200 feet of an expressway and placed restrictions on commercial signs located within 600 feet of any expressway. Similarly, in ***Hav-a-Tampa Cigar Co. v. Johnson, 5 So. 2d 433 (Fla. 1941)***, the Court upheld a prohibition on signs being placed within fifteen feet of the outside boundary of a public highway. Such ordinances placed reasonable restrictions on the time, place, and manner in which such signs could be displayed and did not regulate signs on the basis of content. Thus, any regulation made part of a corridor management plan should address the size, location, and lighting of signs along scenic highways.

Importantly, "point-of-sale" or on-site signs, meaning those that were attached to property and advertised services or products available on that property, were excluded from the restrictions considered and upheld by the Courts. ***See E.B. Elliott, 425 F.2d 1144 n.1***. Because of this exclusion, the bounds of permissible regulation of point-of-sale signs were not ruled on by the Court in the above cases. A local government should distinguish between on-site and off-site signs in drafting any sign regulation(s). ***Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981); City of Lake Wales v. Lamar Advertising Ass'n, 414 So. 2d 1030, 1032 (Fla. 1982)***. While they are subject to certain protection as commercial speech under the First Amendment, on-site signs may nonetheless be validly regulated if the ordinances are content-neutral and narrowly drawn to accomplish the legitimate end of protection of the scenic viewshed.

· **Historic Preservation** — Historic preservation laws and ordinances have been enacted at the Federal, State, and local levels. The National Historic Preservation Act of 1966 sets forth the federal guidelines for preservation of historic places. The Florida Legislature enacted ***Chapter 267, Florida Statutes***, as the State's mechanism for ensuring the integrity and continued existence of historic sites. The Legislature also enacted ***Chapter266, Florida Statutes***, which establishes historic preservation boards in designated areas of the State.

The basic purpose of historic preservation is reflected in its name: that is, to preserve historic properties and resources for present and future generations. Historic properties and resources may include buildings, sites, engineering works, and other objects with intrinsic historical or archeological value. Pursuant to state and federal law, agencies are directed to take into account such properties and resources when state action or assistance may detrimentally impact them, and to avoid or mitigate these impacts to the greatest degree feasible.

Where an identifiable area contains a number of historic properties, a local government may designate that area as a historic district. Such a district may be subject to more stringent zoning and land use designations in order to preserve the character of the area. An overlay zone, as discussed previously, may be useful in establishing a historic district. Scenic highways can provide important and impressive linkages between historic sites, and through historic districts. A scenic highway, for instance, can function as a trail, with historic sites providing attractive stops along that trail. A scenic highway can also have as its destination a historic site or district. In either of these situations, choosing and establishing a scenic highway so that it complements and uses existing historic sites may enhance the enjoyment and attraction of the highway.

7.3.2 Public and Private Agreements

In addition to regulatory techniques that may be used for a scenic highways program, agreements among and between private and public entities may also further program goals. These agreements may take various forms.

· **Intergovernmental Agreements** — Pursuant to ***Section 163.01, Florida Statutes***, local governments are permitted to enter into interlocal agreements. Interlocal agreements are contracts between local governments that allow those governments to exercise jointly any power, privilege, or authority that all of the governments share in common and might exercise separately. Interlocal agreements are meant to coordinate the most efficient use of services and facilities between and among adjoining jurisdictions.

An interlocal agreement may create a new entity that would, in turn, implement the interlocal agreement. This separate entity may issue bonds in certain limited circumstances, and may exercise the power of eminent domain if (1) the entity is wholly owned by the municipalities and/or counties of this State and (2) that power is expressly delegated to it in the interlocal agreement.

Interlocal agreements could be particularly important and useful for a scenic highways program, as a scenic highway corridor will more than likely traverse two or more adjoining jurisdictions. An interlocal agreement would allow the governments of these jurisdictions to work jointly and cooperatively in exercising any of the powers granted to each individually. Further, a separate legal entity created by an interlocal agreement could perform many of the functions necessary for the operation of a scenic highway corridor, such as enforcement of restrictions along the corridor, assessments to maintain the corridor, and perhaps even acquisition of rights in the land adjacent to the corridor. Finally, as discussed in the Special Districts section that follows, an interlocal agreement might be used to establish an independent special district that could implement a scenic highway corridor.

· **Development Agreements** — ***Sections 163.3220 through 163.3243, Florida Statutes***, establish the procedures and parameters for development agreements between governments and applicant developers. Pursuant to this Act, a local government and a developer may enter into a development agreement that sets forth the manner in which a certain development may proceed. This agreement must set forth, in some detail, the specifics of the proposed development, and may be adopted, amended, or revoked only after public notice and hearings. A development agreement must be consistent with the local government's then-existing comprehensive plan and land development regulations, but may have a duration of up to ten years. In other words, with certain enumerated exceptions, a development agreement may "lock-in" a development against certain regulations at a certain time.

Development agreements have a limited role in a scenic highways program. Such agreements could lend some certainty to development along a scenic corridor, as they would provide for development over a set period of time.

· **Special Districts** — A special district is a local unit of special-purpose, as opposed to general purpose, government within a limited boundary. Special districts provide a funding and maintenance mechanism for a limited number of services or functions. Such districts are governed by ***Chapter 189, Florida Statutes***, which provides uniform provisions for the creation and operation of special districts.

Special districts are characterized as either dependent or independent. Dependent special districts are created by an ordinance of a county or municipality having jurisdiction over the area affected. These districts cannot cover more than one county (unless the district is wholly within the boundaries of a municipality), and must be either composed of or at the control of the members of the governing body of a single municipality or county. Such a special district may levy and collect ad valorem taxes only if authorized by general law or special act (such as the district's charter). However, the ad valorem tax is added to the county's or municipality's millage, and together, the ad valorem tax may not exceed a ten mill cap.

Other funding may include service charges, special assessments, or taxes within such a district only. Dependent special districts may have various powers, such as entering contracts, acquiring, owning, leasing, and operating properties, improving streets, and entering into interlocal agreements.

Independent special districts are defined as all special districts that are not dependent special districts. These districts may be created only by the Legislature, the Governor and Cabinet, and, in certain limited instances, local governments. Local governments can create special districts pursuant to interlocal agreements under ***Part I, Chapter 163, Florida Statutes.***

The law governing special districts is relatively complex, and may change with every Legislative session. Accordingly, especially careful attention must be paid to the creation and operation of any special district. The Department of Community Affairs, Division of Housing and Community Development, contains the Special District Information Program. This program is a clearinghouse for records, reports, and information about Florida's special districts, and is a valuable resource for any local government(s) considering a special district.

A special district for a scenic highways program would be useful if created pursuant to an interlocal agreement. In this manner, a multi-county independent special district with certain funding abilities could oversee the protection of a scenic highway. The independent district, since it has its own "governmental powers," is the preferred form of special districts for a scenic corridor. Such a district may more effectively implement the various other techniques for a scenic highway's protection and enhancement.

· **Community Development Districts (CDD)** — Another variation of special districts is the community development district authorized in ***Chapter 163 Florida Statutes***. This mechanism al-lows large scale developments (typically DRIs) to utilize tax free bonds to construct and maintain a full system of public improvements, including roadways. If a scenic corridor is associated with a CDD, the corridor can be maintained and protected over the term of the program.

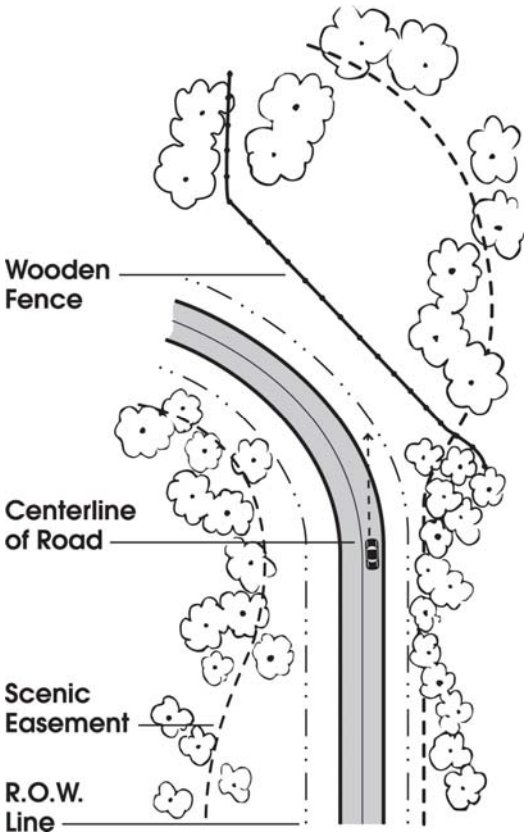
· **Deed Restrictions** — A basic agreement to further a scenic highway corridor would be to impose deed restrictions in the properties along and adjacent to the scenic highway. These restrictions could impose development standards and limitations for that property.

7.3.3 Acquisition of Interests

Another technique that a local government may employ in establishing and protecting scenic highway corridors is the acquisition of interests. This technique has the local government becoming the owner of land or interests in land along the corridor, and has a number of variations. Likewise, a private nonprofit land trust, working in partnership with the local government, may acquire interests in land along the corridor.

· **Scenic or Conservation Easements** — ***Section 704.06, Florida Statutes***, sets for the procedures for the acquisition, creation, and enforcement of conservation easements. Conservation easements can be used to retain land in its natural, scenic state, thereby protecting its physical appearance. Regarding scenic highways specifically, such easements may be used to prohibit the placement of buildings or billboards on the scenic corridor.

Such easements are perpetual and run with the land, and may be created in the form of an easement, restriction, covenant or condition. These easements may be acquired in the same manner as other property interests, but cannot be acquired through condemnation or other eminent domain.



· **Fee Simple Acquisition of the Scenic Corridor** — The local government may also acquire, in fee simple, the corridor, or portions thereof, adjacent to the scenic highway right-of-way in order to protect the designated corridor.

· **Land Trusts** — Land trusts and land banks are other techniques that could be used to implement a scenic highway corridor. Both techniques involve, at the outset, the local government obtaining fee simple to a tract of land. In the case of a scenic highway, the tract of land would, of course, be the scenic corridor or some portion thereof. After acquiring the land, the government can transfer the land to private interests in several ways.

The local government could enter into long term leases of the property to private interests and act as “trustee” of the land for the duration of the lease. The government may also choose to sell the land from its land bank and, as part of the sale, may impose stringent conditions on allowable development of the land. In both cases, the government would exercise control over the type of development that could occur on the land.

For a scenic highway corridor, this technique would have the advantage of the local government having a considerable amount of control over all of the land in the corridor. The downside, as with many of the acquisition techniques, is that the cost of such a program could be prohibitive.

· **Land Exchanges**— Land trades are quite similar to transferable development rights. In a land trade, a developer trades one parcel of land for another. For a scenic highway corridor, this would involve a developer trading land along the scenic corridor for land in another location. This other land would presumably be owned or acquired by the local government, which entity would also negotiate the trade.

7.4 THE PROPERTY RIGHTS BILL OF 1995

In 1995 the Florida Legislature, adopted the ***Private Property Rights Protection Act***. The Act will apply to all laws, rules, regulations or ordinances adopted after May 11, 1995, the date that the legislative session ended. Every local government that adopts land use regulations or amends its comprehensive plan to establish a scenic high-way corridor and to implement a corridor management plan must consider the potential effects of the 1995 Private Property Rights Protection Act. The Act consists of two parts. Part one creates a new cause of action in circuit court. The Act states:

when a specific action of a governmental entity has inordinately burdened an existing use of real property or a vested right to a specific use of real property, the property owner of that real property is entitled to relief, which may include compensation for the actual loss to the fair market value of the real property caused by the action of government.

Part two is entitled the ***"Florida Land Use and Environmental Dispute Resolution Act."*** It creates a non-judicial process that begins with mediation by a special master and proceeds to a non-binding recommendation by the special master if mediation is unsuccessful.

Because this Act creates a completely new cause of action, and because there has been no actual experience with the Act or judicial interpretation of its many provisions, it is impossible to predict how the Act will affect scenic highway designations or corridor management plans. Part one of the Act raises the greatest concern because of the possibility that a local government could be liable for damages to a landowner on the grounds that a scenic highway regulation that limits development of a scenic area, or restricts redevelopment of a historic structure, "inordinately burdens" a landowner's property. The term "inordinate burden" is defined by the Act to mean that:

an action of one or more governmental entities has directly restricted or limited the use of real property such that the property owner is permanently unable to attain the reasonable, investment-backed expectations for the existing use of the real property or a vested right to a specific use . . . .

The term "existing use" is defined in the Act to include both actual, present activities and non-existent, "reasonably foreseeable, nonspeculative land uses which are suitable for the subject real property." Thus, it is possible that a landowner who wishes to make some use of land in a scenic highway corridor that is inconsistent with the corridor management plan

could claim that the corridor management plan is an inordinate burden on his property. The Act includes an exemption for any government actions "which relate to the operation, maintenance, or expansion of transportation facilities." Though it could be argued that scenic highway programs could claim the benefit of this exemption, the scope of this exemption is not clear.

7.5 CONSTITUTIONAL ISSUES

A recent Florida Supreme Court case involving a roadway corridor designation and regulations restricting land uses in that corridor seems comparable to the issues surrounding scenic highway designations and the corridor management plan approach. The case demonstrates that a scenic highway corridor and management regulations properly adopted according to a comprehensive plan are likely to stand up against a constitutional challenge.

In ***Palm Beach County v. Wright, 641 So. 2d 50 [Fla.1994]*** the Florida Supreme Court considered the constitutionality of a comprehensive plan thoroughfare map which designated corridors for future roadways. Palm Beach County's Comprehensive Plan contained a thoroughfare map in its Traffic Circulation Element. The Comprehensive Plan's Traffic Circulation Element directed the County to "provide for the protection and acquisition of existing and future right-of-way consistent with the adopted Thoroughfare Right-of-Way Protection Map." According to the Traffic Circulation Element, the Map was "designed to protect identified transportation corridors from encroachment by other land use activities." In keeping with the consistency requirement, all development in the County was required to be consistent with the transportation right-of-way designated on the Map. The Map defined transportation corridors along specified roadways throughout the county and in other locations designated for future roadway construction. Additionally, the Land Use Element of the Comprehensive Plan prohibited land use activity within any roadway designated on the Map that would impede future construction of the roadway.

The Plaintiff in ***Wright*** contended that the Map "was not a valid police power regulation furthering the county's planning function for future growth[,] that it did not substantially advance a legitimate state interest," and that adoption of the map constituted a temporary taking of the Plaintiff's property within the right-of-way corridor. The Florida Supreme Court immediately rejected the argument that a per se taking of the Plaintiff's property had occurred upon adoption of the map.1 In assessing the constitutionality of the thoroughfare map, the court noted the important planning functions served by the Map. The court concluded that "there can be no question that the planning for future growth must include designation of areas where roads are likely to be widened and future roads are to be built." The court held that the Map was constitutional.

1 The Court recognized that, as applied to certain property, the Thoroughfare Map could constitute a taking. This challenge, however, can be brought against any regulation. An "as applied" takings challenge usually arises when a property owner applies for and is denied a development permit, whereupon a court would engage in an ad hoc balancing analysis to determine whether a taking occurred.

The Florida Supreme Court listed several characteristics of the thoroughfare map important to its finding: (1) the Thoroughfare Map only limited development to the extent necessary to ensure compatibility with future land use, and did not prohibit the issuance of all development orders; (2) the Thoroughfare Map was not recorded and could be amended twice a year; (3) the road locations shown on the Thoroughfare Map had not been finally determined; and (4) the Thoroughfare Map, while perhaps incidentally adversely affecting property values, was not solely for the purpose of freezing property values. Characteristics (1), (2), and (4) would apply with equal force to a scenic highway corridor.

Although the Palm Beach County Thoroughfare Map concerned the designation of future roads and a scenic highway Corridor Management Plan generally addresses existing roads, the ***Wright*** case is important because it provides guidance for any regulatory measures seeking to limit development within a transportation corridor. The Palm Beach County Thoroughfare Map limited development within a particular corridor that was inconsistent with the future roadway. A scenic highway Corridor Management Plan would likely limit development within a certain corridor that would be inconsistent with the corridor's aesthetic character, vision and goals. Three of the four factors identified by the Florida Supreme Court which distinguished the Thoroughfare Map from the unconstitutional map of reservation statute are important considerations for implementing Corridor Management Plans. The ***Wright*** decision demonstrates that comprehensive plans add a critical component of legitimacy to aesthetic land use regulations undertaken along a transportation corridor.

There is no Florida case that reviews the public purposes of a scenic highway designation in a similar manner. Florida courts have historically held, however, that zoning which protects the aesthetics of a community is a legitimate exercise of the government's police power. (***See, e.g., City of Lake Wales v. Lamar Advertising Ass'n, 414 So. 2d 1030 (Fla. 1982***) upholding a sign ordinance that separately classified off-site advertising signs and on-site signs, and restricted the size of off-site signs solely on the base of aesthetics.)

7.6 KEY POINTS

In this chapter, the following key points were presented:

- ***The Local Comprehensive Plans*** are the primary controlling laws by which local governments plan and regulate their land uses.

- ***Regulatory Protection Techniques***, such as zoning, transferable development rights and historic preservation allow a local government to regulate land development and uses.

- ***Public and Private Agreements*** permit government agencies and other entities to work together toward a shared goal or outcome.

- ***Acquisition*** involves the direct ownership, through easements, trusts, or purchase of land by the local government.