

Personnel, Operations & Procedures (POP) Committee  
Volusia Growth Management Commission

MINUTES FOR  
MEETING HELD  
Tuesday, July 28, 2009

Volusia County School Board  
Facilities Services Bid Conference Room  
3750 Olson Drive  
Daytona Beach, FL 32124

The meeting was called to order at 9:33 a.m. by Committee Chair, Gerald Brandon.

The following POP Committee Members were present: Terry Griffiths, John Heaphy, James Kerr, Dwight Lewis, and Sandra Walters.

Also in attendance: VGMC Chair Joan Spinney, VGMC Legal Counsel Paul Chipok, VGMC Planner Barry Wilcox, VGMC Coordinator Merry Smith, and Helen LaValley from the Volusia County School Board.

OLD BUSINESS – Procedure Review Issues

1) Presumption of Consistency/Burden of Proof – Paul Chipok addressed the committee on this issue. Mr. Chipok reviewed his memo dated July 21, 2009 (Exhibit A) which discusses common terms regarding burden of proof. With respect to the term competent, substantial evidence, Mr. Chipok stated that this does not go to the weight of the evidence, but rather the sufficiency of the evidence. He stated when evidence comes in, you need to determine if it is competent, substantial evidence, meaning that it goes forward towards the essence of what it is trying to prove and supports it. With respect to preponderance of evidence, he stated this is the first true standard of weighing the evidence, meaning that more evidence is in favor of than not in favor of. He explained that based on case law, the next standard of clear and convincing evidence can be described as more than a preponderance of the evidence, but less than beyond a reasonable doubt. Reasonable doubt, he stated, is generally a criminal standard and not used in a civil setting.

Commissioner Kerr arrived at 9:37 a.m.

Mr. Chipok stated that historically, there has been reference that the VGMC must move forward and base its decision on the preponderance of (competent, substantial) evidence presented at the hearing. He stated those particular standards have not changed in our rules. Previously, Mr. Chipok stated that our rules did not address burden of proof in terms of who had to prove what. When an application comes in, VGMC staff reviews the application and if they have issues, they would issue a request for information to try and clarify those issues. If the issues are clarified, the application is certified, but if not, it would move forward to a public hearing. Mr. Chipok again stated that basic process has not changed. He also stated that when staff has an issue, they raise the issue and state why they believe it is not consistent with the consistency criteria, and at that point the burden is on the jurisdiction to give us evidence to show why it is consistent. In

essence, he stated that has not changed un the proposed amendments. Mr. Chipok stated our rules previously did not address this issue and that previously the applications were received in a neutral state. Under the proposed language, Mr. Chipok stated the application would be presumed to be consistent which means unless someone gives evidence to show how it is inconsistent, that it should be approved. As a practical matter, he stated when an application comes in, staff will continue to review it against the consistency review criteria and if they have an issue, they will raise it to the applicant and ask for them to show how it is consistent. Mr. Chipok stated if a third party has issues, our rules already address what they need to supply in order to request a public hearing, part of which requires the third party to show where the application is inconsistent. Once that is raised by the third party, Mr. Chipok stated it would behoove the applicant jurisdiction to provide evidence to show how it is consistent. He stated when it goes to public hearing, the commission will hear the evidence on both sides, weigh the competent and substantial evidence, and come up with a decision based on the preponderance of the evidence.

Mr. Chipok stated in his opinion, he does not see any negative impact on the functioning of the VGMC with the language in the proposed draft. From a legal standpoint, Mr. Chipok stated that staff's review and the VGMC process will remain unchanged.

Commissioner Walters asked why the committee is even addressing this issue and commented that we are only looking at this issue because it was raised by VCOG, similar to the other VCOG generated changes proposed. She also commented on the timing of the proposed language being added to the draft amendments, adding that Scott Simpson had proposed language and the change in the draft language did not occur until the April draft, several weeks after an attorney meeting was held. Ms. Walters stated she wanted to see evidence as to why it should be changed from the way it is. Mr. Chipok stated it is a policy decision of the commission.

Commissioner Lewis commented that Mr. Chipok has met with attorneys from the various local jurisdictions in an attempt to clarify and codify the rules, adding that he supports the proposed language.

Ms. Walters asked Mr. Chipok if he met with the attorneys from every one of the jurisdictions. Mr. Chipok responded that there were several attorneys meetings held which were very well attended by the local jurisdictions, including attorneys from Volusia County, Deltona, DeLand, Port Orange, New Smyrna Beach, South Daytona, Orange City, Holly Hill, Oak Hill, and Ponce Inlet. He added that invitations to these meetings were sent to all of the attorneys, as well as the mayors and planning directors. Ms. Walters then commented that not all of the attorneys were there. Mr. Chipok stated he prepared the draft based on input and consensus from the attorneys who had the interest in attending those meetings.

A member of the audience, Alice Jaeger of Ormond Beach, asked who would benefit from the change and spoke in opposition of the change.

Mr. Chipok again stated that through a series of meetings with the attorneys group, the issue was raised and a consensus was reached by them on the draft language which is presently before the committee and commission. He stated this is not his ordinance, it is the commission's ordinance,

and that his role has been to set forth the policy input that has been received from the various sources. He stated this is what is now before the VGMC for discussion, and he would take direction from the VGMC.

Dwight Lewis made a motion to recommend to the full commission to approve the draft language relating to presumption of consistency as contained in the 04-23-2009 draft; seconded by John Heaphy. Motion carried 5-1, with Sandra Walters voting in opposition of the motion.

2) Volusia County School Board Recommendations dated 5/1/09 – Mr. Chipok stated the School Board has requested to list schools as a specific item in subsection (3) of Section 90-37(c). He stated that the present draft already addresses schools in subsection (1) within the definition of infrastructure. Mr. Chipok stated in his opinion the language proposed by the School Board neither adds or takes away anything, and that he believes the language proposed in the 04-23-2009 draft is sufficient, however, if the committee wants to take the extra step and more specifically recognize the schools, they may wish to consider the language proposed by the School Board.

Mr. Brandon raised a question relating to 90-37(a) which includes language relating to evidence established “at the hearing”. He stated that not all applications go to public hearing. Mr. Chipok explained that the language relating to applying conditions in this section implies that the matter is before the commission at a public hearing, since the only way to impose conditions is through a public hearing before the full commission.

Mr. Chipok stated that the School Board comments are on the second page of the agenda item and are highlighted in yellow.

Helen LaValley of the Volusia County School Board addressed the committee. Ms. LaValley stated that the recommendations being made are based on discussion which occurred at the April 22, 2009 VGMC meeting in which she attended. She stated that the School Board recognizes that they are addressed in section (1) above, however, they are recommending that item c. which reads “The extent to which the plan, element, or plan amendment provides for areawide or specific school solutions.” be specifically added since central utility service and transportation solutions are addressed in section (1) and are also specifically called out in items a. & b.

Ms. LaValley stated the proposed change in item e. modifying it to read “units of local government” is simply to be consistent with the amended language in the balance of the draft.

Barry Wilcox commented that items a. through e. in subsection 3) do not appear to be mitigating factors but rather measurements.

Chair Spinney asked if we needed to be concerned about adding a specific section for the School Board when there is another group, specifically the Volusia Soil & Water Conservation District, who has requested to be specifically acknowledged in our rules. Mr. Brandon stated the intent of the School Board’s request is to clarify and specifically spell out that the School Board is part of the process. Mr. Chipok added that the School Board is considered a unit of local government under the proposed definition, and also stated that the original charter language provides the

School Board with a non-voting seat on the commission with the thought that school issues are important and should be part of the process.

Sandra Walters made a motion to recommend adding the language as proposed by the Volusia County School Board in their May 1, 2009 communication; seconded by Dwight Lewis. Motion carried unanimously.

3) Government Staff Members Serving as Members of the VGMC – Mr. Chipok stated that we previously received the Attorney General Opinion (AGO) which stated that members cannot serve in a dual office holding capacity, nor can they be elected officials since that would be dual office holding. Additionally, he stated there are other positions within the local governments that are considered an office for the purpose of dual office holding. Mr. Chipok stated that language has been incorporated into Section 90-45 which specifically addresses that members cannot be elected officials or dual office holders, however, the issue of whether or not a staff member can be a member of the commission has been raised again.

Historically, Mr. Chipok stated that the commission has always had staff members as some members of the board and that it has always been up to the local jurisdictions as to whom they wished to appoint. He stated this is a policy decision for committee and commission discussion.

Chair Spinney suggested leaving the language as it is presently drafted, and commented that the City of South Daytona threatened to sue the VGMC if we try to tell them who they can appoint.

Mr. Brandon commented that he feels over the years that staff members as members of the VGMC have brought a good deal of expertise to the table and he concurred that we should leave the language as presently proposed.

Ms. Walters suggested that the AGO opinion be incorporated into the rules. Mr. Chipok reviewed the proposed Section 90-45 which includes the AGO findings.

Ms. Walters commented that we received numerous comments from sources including elected officials, the City of Edgewater, and members of the public who felt that staff members should not serve on the VGMC.

Dwight Lewis made a motion to keep the draft the language for Section 90-45 as is which does not restrict staff members from being members of the commission; seconded by James Kerr.

Motion carried 5-1, with Sandra Walters voting in opposition of the motion.

4) Definition of Adjacent Jurisdiction -- Mr. Chipok stated that the definition of adjacent jurisdiction has always been in the rules and that the proposed change which reads “Adjacent jurisdiction means a local government whose territorial boundaries are physically contiguous to territorial boundaries of the applicant jurisdiction that has applied to the commission for a certification or certificate.” effectively liberalizes the definition and makes it more inclusive than the present language. He stated there has been no suggested change in the rights of a non-adjacent jurisdiction with the change in the definition of an adjacent jurisdiction. Mr. Chipok

stated the applications will continue to be noticed, a notice will continue to be sent to all non-adjacent jurisdictions by the VGMC office when an application is received, and the process for non-adjacent jurisdictions to submit comments, petition for hearing, etc. is not changing under the proposed rules.

At this time, the committee discussed a letter dated July 22, 2009 from the Town of Ponce Inlet which raised questions relating to the definition of adjacent jurisdiction (see Exhibit B). Mr. Chipok reviewed the comments raised in the letter stating they were concerned that the proposed amendments would diminish the rights of a jurisdiction who is close to but not contiguous to the applicant jurisdiction. He reiterated the fact that the process and rights of non-adjacent jurisdictions have not changed under the proposed rules. Mr. Chipok then reviewed a draft response he prepared to go back to Ponce Inlet to clarify the misconceptions with respect to this matter (see Exhibit C).

Ms. Walters asked for clarification relating to the present and proposed definition of adjacent jurisdiction. Mr. Chipok stated that the present rules state "Adjacent jurisdiction means a local government whose territorial boundaries are physically contiguous to the land to be affected by a comprehensive plan or amendment thereto...", meaning the jurisdiction must touch the land affected by the amendment. Additionally, he stated under the present rules that standing for both adjacent and non-adjacent jurisdictions is a decision made by the commission at the hearing.

Under the proposed amendments, Mr. Chipok explained that to be considered an adjacent jurisdiction, the territorial boundaries of your jurisdiction must touch the territorial boundaries of the applicant jurisdiction. Additionally, he stated an adjacent jurisdiction would automatically have standing under the proposed rules. Mr. Chipok again stated that non-adjacent jurisdictions will continue to have the right to petition for hearing under the same rules that are presently in place, and will still need to be granted standing by the commission as is presently required.

Eric West, a member of the audience, discussed a situation relating to a property within the boundaries of Town of Ponce Inlet and how that would affect who would automatically have standing under the proposed rules amendments.

Ty Harris, also a member of the audience, asked under the proposed rules, if it is the County's amendment application, would all of the cities have automatic standing since they are contiguous to the County, even though it may be an amendment which might be 30 miles or more away from a jurisdiction. Mr. Chipok responded that technically, that may be the case.

James Kerr made a motion to keep the definition of adjacent jurisdiction as contained in the 04-23-2009 draft amendments; seconded by John Heaphy. Motion carried unanimously.

Mr. Chipok asked the committee if they agreed with letter he drafted to go back to the Town of Ponce Inlet. There was a consensus of the committee for Paul to forward the letter to the VGMC office to be put on VGMC letterhead and transmitted under Chair Spinney's signature with copies to all of the individuals who were copied on Ms. Derr's original letter.

5) Member Notice of Applications – This issue was raised by a former member of the commission at the May 27, 2009 public hearing as to why the provision requiring that the applications be sent to all members of the commission would be deleted. Under Section 90-35(c), the present rules state that a notice of the application is to be sent to all members of the commission. Mr. Chipok stated that over the years, that meant that big boxes of documents were being transmitted to 23 commissioners for each application. He stated when the commission last addressed this issue, they indicated they do not need to see every application that comes in and suggested removing that requirement from the rules. Mr. Chipok stated it does not prohibit a member from requesting a copy of an application from the VGMC Coordinator if they so desire, and the administrative staff will accommodate the individual commissioner's wishes on those matters. Rather than having the cost and burden of providing complete copies to each commissioner, the commission suggested deleting that language and handle it on an as-requested basis.

Mr. Brandon commented that it was clear at the previous meeting that the members understood they could request and receive a copy of any application. He suggested that in the interest of time and cost, the commission continue to handle it in this fashion. There was a general consensus of the committee to leave the language as proposed in the 04-23-2009 draft which deletes the requirement to distribute copies to all members of the commission.

6) Expanding POP Membership – Mr. Brandon stated that POP membership is addressed in the commission's internal operating rules and not the consistency certification rules. Mr. Chipok read from Article VI of the Rules of Procedure for Meetings, Membership and Operations which addresses committees. Chair Spinney suggested this would not be the appropriate time to discuss this issue since it is the consistency certification rules that are being addressed.

Ms. Walters stated the expansion of POP committee membership was a recommendation made by her at an earlier meeting. Following brief discussion, it was decided that this issue will be revisited once the consistency certification rules review is concluded.

7) Outreach Program – Ms. Walters stated she raised the suggested at the May 27<sup>th</sup> hearing as she sees a big need for education of local elected officials. Since this issue is not part of the consistency certification rules, it was decided that it will be looked at following the conclusion of the consistency certification rules review.

8) Other Issues – Mr. Wilcox asked if they could revisit item 2) of the agenda relating to the consistency review criteria in Section 90-37(c).

Mr. Wilcox discussed the draft language in Section 90-37(c) and commented that the items listed as 3) a., b., c., & d. are not mitigating measures. He discussed proposed modifications to the section to clarify the specific criteria. Mr. Chipok stated this is the section that contains the review criteria which is critical to the operation of the VGMC. He suggested that Mr. Wilcox prepare a write-up of the proposed changes and bring it back to the committee for consideration at a later date. Mr. Chipok emphasized that the review criteria is the heart of the VGMC operation and we need to be sure the language is not inadvertently changed with unintended consequences.

Sandra Walters made a motion to reconsider the language proposed in Section 90-37(c); seconded by Dwight Lewis. Motion carried unanimously. Mr. Wilcox stated he will prepare a redraft of the section and forward to Mr. Chipok for review. This issue will come back before the POP Committee at a future meeting.

### NEW BUSINESS

1) Approval of Minutes from May 27, 2009 POP Committee Meeting – Sandra Walters made a motion to approve the minutes of the May 27, 2009 POP Committee Meeting; seconded by John Heaphy. Motion carried unanimously.

2) Approval of Minutes from June 23, 2009 POP Committee Meeting – James Kerr made a motion to approve the minutes of the June 23, 2009 POP Committee Meeting; seconded by John Heaphy. Motion carried unanimously.

### OTHER BUSINESS

The committee members discussed an updated Issue Review Tentative Timeline dated 7/28/09 (see Exhibit D). Mr. Chipok stated that we have a fairly contested public hearing to be scheduled for the August 26, 2009 meeting and suggested that all of the items presently listed on the timeline for review by the commission in August be pushed back to the September meeting. There was no opposition to this change expressed by the committee.

Chair Spinney suggested removing item 11) Expanding POP Membership, 12) Create Outreach Program, & 13) Other, from the timeline. There was no opposition to this change expressed by the committee.

Mr. Brandon asked if anyone from the audience wished to speak.

Suzanne Steiner of Volusia County addressed the committee in opposition of the proposed changes relating to burden of proof. She also commented that the procedure review process has gone way over on time and expenses and that the commission has the information they need to move it forward.

Alice Jaeger, Ormond Beach, questioned who benefits from the change in language with respect to burden of proof. She also commented in opposition of staff members being allowed to serve as members of the VGMC.

Ty Harris expressed concern with standing, particularly in the situation that under the proposed rules any application from the County would open the door up for all jurisdictions to have standing.

Eric West, 1501 S. Palmetto, Daytona Beach, expressed concern about the commission going back to the cities for input consensus.

Mr. Brandon stated that although the commission has requested input from the various parties including the cities and members of the public, it has been stated from the beginning that we will review and evaluate all recommendations, however, the commission will decide on its own what direction it wishes to take in terms of the rules amendments.

The VGMC Coordinator reminded the committee of the next POP committee meeting scheduled for Tuesday, August 11, 2009 beginning at 9:30 a.m. in the first floor training room at the Daytona Beach City Hall.

ADJOURNMENT

The meeting was adjourned at 11:10 a.m.

  
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Gerald Brandon, POP Committee Chairman

407-244-5683

PAUL.CHIPOK@GRAY-ROBINSON.COM

## MEMORANDUM

**TO:** VGMC POP Committee **CLIENT-MATTER NO.:** 40080-29

**FROM:** Paul Chipok

**DATE:** July 21, 2009

**SUBJECT:** Burden of Proof Standards

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The following is a listing of common terms regarding burden of proof. The terms are listed in a loose hierarchy of standards of proof from least restrictive to most restrictive.

1. Competent, Substantial Evidence

- Means such evidence as will establish a substantial basis of fact from which the fact at issue can be reasonably inferred or such evidence as is sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached.
- Standard for a reviewing court to access the evidence for its sufficiency not its weight.

2. Preponderance of the Evidence

- Means the greater weight of evidence, such that when weighed with that opposed to it, the evidence supplied has more convincing force and is more probably true and accurate. In other words, evidence which as a whole shows the fact sought to be proved is more probable than not.

3. Clear and Convincing Evidence

- Intermediate standard of proof, more than preponderance of evidence standard used in most civil cases and less than beyond a reasonable doubt standard used in criminal cases.

Exhibit A  
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4. Beyond a Reasonable Doubt

- A criminal standard.
- The guilt of a person charged with a crime must be established beyond a reasonable doubt, whether the evidence adduced at the trial is direct or circumstantial. If a reasonable doubt exists in behalf of an accused, arising from a consideration of all the evidence adduced during the progress of the trial or the lack of such evidence, then a conviction under such conditions and circumstances as a matter of law cannot be sustained.
- Overcoming the presumption of innocence and the showing of guilt beyond a reasonable doubt are not separate stages in the evidentiary process. There is no middle ground or "twilight zone" in the criminal law. The state must establish guilt beyond a reasonable doubt or fail in the prosecution. The legal presumption of innocence applies until that presumption is overcome by evidence showing the accused's guilt beyond a reasonable doubt.
- Human liberty should not be forfeited by conviction under evidence that is not sufficient to convince a fair and impartial mind, to a moral certainty and beyond a reasonable doubt, of the guilt of the accused.

PHC/clr



# Town of Ponce Inlet

4300 South Atlantic Avenue  
Ponce Inlet, Florida 32127

July 22, 2009

Merry C. Smith

Ms. Joan Spinney, Chair  
Volusia Growth Management Commission  
Suite 305  
140 S. Beach Street  
Daytona Beach, FL. 32114

Re: VGMC Citizen Standing Issue

Dear Ms. Spinney:

On July 15, 2009, the Ponce Inlet Town Council unanimously voted 5-0 to express their objection to VGMC removing citizen standing. Within that same conversation amongst council, I brought up another concern that raised a question to diminish citizen standing and local jurisdiction standing if the new amendment below is passed. The new amendment proposes:

*Adjacent jurisdiction* means a local government whose territorial boundaries are physically contiguous to territorial boundaries of the land to be affected by a comprehensive plan or amendment thereto for which an applicant jurisdiction that has applied to the commission for a certification or certificate.

Essentially, there could be issues with a planning action of a local government that is close but not contiguous. A prime example of this would be Daytona Beach Shores and Ponce Inlet. In the rules, a citizen could petition their local government to intervene, however, with the presumption of consistency proposed and if the local government is not immediately contiguous, it seems that standing could be greatly diminished as a result. Therefore, though the Ponce Inlet Town Council has not discussed an official position on this matter at this time, it is my hope the board will consider removing the language changes in the proposed draft that would clearly diminish a non-contiguous local government's right to dispute/appeal a consistency finding of a non adjacent community's land use plan and citizen standing.

Regards,

Kris Derr

Ponce Inlet Town Council, Seat #2

cc: Ponce Inlet Town Council Members  
Ponce Inlet Interim Town Manager  
Planning and Development Dept. Director

Exhibit B  
POP Committee Meeting Minutes  
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[ON VGMC LETTERHEAD]

Kris Derr  
Council Member  
Town of Ponce Inlet  
4300 S. Atlantic Ave.  
Ponce Inlet, FL 32127

Dear Councilwoman Derr:

We are in receipt of your letter of July 22, 2009. We would like to take this opportunity to clarify several issues you raised in your letter.

First, the definition of “adjacent jurisdiction” exists in the current rules. The proposed Rules Revisions expands the current definition to state than an adjacent jurisdiction is “physically contiguous to the territorial boundaries of the applicant jurisdiction.” See Section 90-31.

Second, at Section 90-35(e)(2)c. the proposed Rules Revisions specifically recognized that an adjacent jurisdiction, upon requesting to participate in a public hearing on an application, shall do so as a “party.”

Third, a local government which is not an adjacent jurisdiction may still request a public hearing on an application. This is consistent with the existing rules and has not changed. See Section 90-35(c)(4). Pursuant to Section 90-35(i) of the proposed Rules Revision, a determination of whether the local government will be granted “party status” will be made by the VGMC at the beginning of the public hearing on the amendment. While the codification of this rule is new, this policy has been followed by the VGMC for many years.

Fourth, the issue of whether a local government is granted standing by the VGMC impacts whether the VGMC will challenge the local government’s standing to bring an appeal of a VGMC decision on an application in circuit court. If standing is granted by the VGMC, the VGMC will not contest the local government’s standing to bring an appeal in circuit court.

Fifth, regardless of the result of the policy discussion of whether to allow citizen standing, the way the proposed Rules Revisions affect adjacent jurisdictions and other local governments as outlined above is not anticipated to change.

Thank you for your input into this process. I hope you find the foregoing information useful.

Sincerely,

Joan Spinney  
Chairman  
VGMC

Exhibit C  
POP Committee Meeting Minutes  
July 28, 2009

## VGMC Rules Revisions

### Issue Review Tentative Timeline 7-28-09

Item	Issues:	Date of POP Discussion	Date of VGMC Discussion
(1)	VGMC Membership – Removal with or without cause	June 9, 2009	July 22, 2009
(2)	Senate Bill 360	June 23, 2009	July 22, 2009
(3)	Municipal Home Rule Powers Act		
(4)	Rehearings -- Trial de novo issue		
(5)	Standing Issues (Discussed at June 9, 2009 POP – to be revisited by POP in August)	August 11, 2009	August 26, 2009
(6)	Presumption of Consistency/Burden of Proof	July 28, 2009	August 26, 2009
(7)	School Board recommendations dated 5/1/09		
(8)	Government staff members serving on VGMC		
(9)	‘Adjacent jurisdiction’ definition		
(10)	All members getting notice of applications		
(11)	Expanding membership of POP committee		
(12)	Create outreach program		
(13)	Other		

**Items addressed and no further action is necessary:**

- (2) Senate Bill 360
- (3) Municipal Home Rule Powers Act

**The VGMC has voted on the following items and they are ready for the final draft:**

- (1) VGMC Membership
- (4) Rehearings