The Costs of Evolving Regulation: A Case Study

by

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One of the major activities of government is regulation. Ideally, regulation controls people’s behavior so that the actions of some do not harm others. In keeping with this philosophy, Florida has increasingly regulated land development in the 1980s and 1990s to try to prevent the costs that are often associated with urban sprawl, and to try to protect the environment. The largest single push that Florida has made in the regulation of development came with Florida’s Growth Management Act of 1985. The Act mandated that all local governments develop comprehensive plans for land use, and that these plans be submitted to the state Department of Community Affairs for approval. The development of these local comprehensive plans is a major undertaking, and in response Florida’s local governments developed their own growth management agencies to oversee the process. As a result, in the late 1980s and early 1990s developers faced not only increased regulation, but constantly changing regulation, and that regulatory climate significantly hampered development. This paper presents a case study to illustrate the negative impact of continually evolving regulation.

In April, 1988, a few years after Florida’s Growth Management Act had been passed, DeVoe Moore purchased a site in Tallahassee, Florida, to build what was to become the Tallahassee Antique Car Museum. At the time the site was purchased, it was already in violation of regulations required by the Leon County Environmental Permitting Department, but Mr. Moore was an experienced real estate developer, and based on decades of past experience he believed that the site could be brought into compliance to allow the development to begin. What he did not anticipate was that the regulatory problems would continue on this site not for failure to comply with existing county codes, which were often remedied relatively promptly, but for rules and regulations that seemed to appear out of nowhere. Not only did the rules change with the introduction of state-wide growth management, they put into place a land use bureaucracy that continued to change the requirements imposed on the local developer. A minimum requirement for the smooth operation of a market economy is a stable set of rules established by the state to govern commerce, but with local and state governments increasingly
becoming involved in development plans and commercial and industrial expansion, the rules did not remain stable. Regulatory difficulties would continue to hinder development of this site, eventually involving judicial action and more than ten years of negotiating with the county Environmental Permitting Department.

A History of Site Development

Prior to the developer’s purchase of the property in 1988, the previous owner sought a permit for timbering on March 16, 1987, the first permit requested for the site later occupied by the Antique Car Museum. Three months later, on June 29, 1987, another application was submitted to the Environmental Department for a fill project on the site. On February 16, 1988 an application for another permit for the site, a stormwater and landscape permit, was received by the Department of Environmental Permitting. Part of the stormwater plans included the construction of a pond and a set of corresponding retaining walls to hold the pond’s water. On April 13, 1988, a permit that covered the fill project as well as the construction of the pond retaining walls was approved by the Chief of Environmental Permitting for the Leon County Department of Growth and Environmental Management, ten months after the initial application was received. Six months later, on October 13, 1988, the developer was notified that he was in violation of the permit due to the absence of sediment controls and because “trees designated to be saved are not protected as per approved plans,” according to the Environmental Inspector for Leon County. The County Inspector sent a second letter to the developer on January 13, 1989, repeating the two previous violations of the permit, and also including two other violations that were not previously mentioned in the October letter.

The holding pond permit took ten months to be approved, but approval of the stormwater and landscape permit, first requested in February 1988, took even longer. It was issued February 16, 1989, a full year after the application was submitted, and after the letter of violation on the previous permit was received. Keeping in mind that little to no work can be performed on a site without a permit, the cost imposed by such long delays in issuing permits would have prevented many entrepreneurs from continuing. A third permit was issued on March 20, 1989, allowing the developer to begin construction on the building that would become the Antique Car Museum.
One of the earlier regulatory problems on this site concerned the Environmental Department’s complaint of a lack of sediment controls on the site, which the Department said was a violation of the stormwater and landscape permit. Apparently, the sediment control problem which was first called to the developer’s attention in October 1988 had not been fixed, for, on February 14, 1990, another Environmental Inspector for the County sent the developer a Notice of Violation that sediments had washed off the site, and said that a Stop Work Order, prohibiting any further construction or progress on the project, would be issued if the problem was not fixed in seven days.

The letter detailing the violation notes that “sediments have washed downhill into the neighboring woods,” which should not have been a surprise to the County. A letter dated January 24, 1989, from an engineering firm hired by the developer to oversee the work on the site to the Environmental Planner of the Leon County Department of Public Works, stated “discharge from the [stormwater] facility is to a downhill and narrowing site which is heavily wooded.” There is no indication given why the Environmental Management Department let thirteen months elapse before finding fault with the sediment control system. Regardless, a re-inspection of the site was necessary, including a re-inspection fee, and a Stop Work Order was threatened. Sediment controls were then installed but, on March 14, 1990, the County notified the developer that they were installed improperly and that “sediments that have washed off-site have not been removed or stabilized.”

*Problems with Pond Retaining Wall Design*

As previously mentioned, the stormwater and landscape permit application included plans for the construction of a pond and its retaining walls. The developer applied for a stormwater and landscape amendment to this permit on November 29, 1990, and at that time no request by the County was made for the design of the pond retaining walls. Surprisingly, on December 11, 1990, the developer was asked by the county to submit plans “showing the retaining walls as approved by the Building Inspection Department,” the Department that oversaw the earlier work on the site. The walls in question had been constructed about one and a half years earlier, and the plans had been submitted even earlier, in 1988. In response to this, the developer’s engineer responded to the county by sending revised plans, and noted that “the owner has previously obtained a building permit for this site [89-00629, issued more than one and a half
The retaining walls were constructed approximately two years ago.” The county’s environmental planner then asked, on January 31, 1991, for “information showing that a permit was issued for the retaining walls by Leon County Building Inspection.” The developer’s engineer noted that approval of the original building permit did not require a design of the retaining walls, but that they were built according to standard construction methods for those types of retaining walls. But a February 26, 1991 reply from the county’s environmental planner stated that the earlier permit was for the building only and that a design of the retaining walls was required. No indication was given why the design plans were suddenly needed by the Department, nor why the Department did not just consult the already submitted plans. Another letter from the county on April 15, 1991 notified the developer that the stormwater facility and retaining wall were not constructed according to plans and that the sediment controls still had not been maintained. Another re-inspection was necessary, including payment of inspection fees, after these items had been addressed.

It was noted that the original stormwater and landscaping permit, which included the design of the pond retaining walls, was issued February 16, 1989. A large reason for the regulatory difficulties surrounding this permit was due to its year of issuance. On December 12, 1989, the Board of County Commissioners of Leon County adopted the Leon County Environmental Management Act, effective January 15, 1990, which “provided that all Leon County environmental permits issued prior to the effective date of the Act would expire eighteen months from the effective date of the Act.” The Department of Growth and Environmental Management thus announced that “all environmental permits issued by Leon County prior to January 15, 1990 will expire July 14, 1991, unless an extension is applied for prior to that time…. Once they expire, a new permit will be required for continued development of the property and the applicant must comply with requirements in effect at time of resubmission.” Due to the difficulties encountered during the permitting process, the developer hired an attorney who, in a July 12, 1991 letter to the Leon County Department of Growth and Environmental Management, stated that

Delay has occurred throughout all of 1991 because of problems with changes in the permits which have not been resolved with the County. An application for amendment [on permit 89-0060] has been pending with the County for more than seven months, and it will apparently take further time to iron out remaining problems.
If the permit expires, there will be nothing to amend, and an entire new permit will have to be applied for from the City.

Remaining construction of buildings on the site could probably be finished in less than twelve months, once difficulties with the County over the permit amendment are resolved and the permit amendment issued. However, it is entirely conjectural as to when the County will be sufficiently satisfied to approve the amendment.

There would be much further discussion as to the legitimacy of the stormwater and landscaping permit, and the retaining walls and stormwater facility constructed under it. The resulting delay over rectification of this issue by the County held up construction activity on the site for some time, and threatened to void the building permit for the site because of a six-month inactivity limit on that permit. The developer’s attorney requested of the Chief Building Official for Leon County that the delay caused by the permitting process not be counted as construction inactivity on the building and thus not fall under the six-month time limit, but the county rejected the request, stating “the environmental amendment must be obtained within the ordinance constraints and the construction of the building must proceed within a reasonable timeframe.” As the developer’s attorney noted, construction of the building could have proceeded within a reasonable timeframe, if not for the transitory and unpredictable nature of County environmental regulations.

A further problem with the permitting involved a dispute over whether Leon County or the City of Tallahassee was responsible for the permits for the site due to its location inside the city limits. Thus, now both city and county officials became involved in the project, and both sides questioned who should become involved at certain stages of the permitting process for this project. On August 20, 1991, the developer’s engineer sent a letter to the Environmental Management Officer of the City of Tallahassee, requesting that the city issue a “no objection if Leon County continues in the review of this project” statement. Then, in an August 22, 1991 letter from the Environmental Management Officer to the county’s Chief of Environmental Permitting, the Management Officer states “it would be in the best interest for all concerned for you to continue with review of the project and issuance of permits, if appropriate.” The county official noted in his response, “In reviewing this matter I became aware that you had made a similar written request with regard to this project in May, and we failed to provide a response to you. I apologize for that oversight.” The impact of this three-month “oversight” is significant, not only because of the delay itself, but also because of the six-month inactivity
deadline required under the original building permit. Of course, these costs are borne by the
developer, and the government officials have little incentive to see that permits are issued in a
timely manner or to mitigate any harm that might be caused by the delays.

Perhaps to clear things up, the Leon County Planning Department issued the following
statement on September 24, 1991 in regards to the site:

The above referenced property is exempt from the concurrency and consistency
requirements of the Tallahassee-Leon County 2010 Comprehensive Plan [which
effectively allowed the existing permit to stand, without design of the retaining
walls]. This exemption is granted on the following basis: Active and valid building
permit issued prior to July 17, 1990 or a technically complete building permit
application received by the Environmental Management and Permitting Department
on or before July 2, 1990, and subsequently issued.

Despite these attempts to clarify the status of the design of the retaining walls in the permit, the
site again received a Stop Work Order on December 17, 1991 because “the project’s
conveyance system and western retaining wall have not been constructed according to the
approved environmental permit.” The developer responded with an affidavit on the same day
stating that the design of the retaining wall was not an issue from the time of his first permit on
November 11, 1987 until 1991. He also submitted another copy of the design of the wall, and
asked “for the immediate approval of the amendment and trust that this affidavit will satisfy all
of the outstanding questions pertaining to this project.”

In a further attempt to satisfy the Environmental Department, the design of the retaining
walls as specified in the original plans was verified by a professional engineer on December 20,
1991, by another engineer on March 17, 1992, and by a third engineer on April 6, 1992. The
county was notified of the engineers’ findings, but the county’s Senior Environmental Engineer
replied that the report “raised more issues than it has solved, has created confusion, and has
failed to address the principal outstanding issue,” the integrity of the as-built retaining wall.
The developer then proposed to build a support system for the pond retaining wall, which the
county’s Senior Environmental Engineer approved, noting that the processing of the
amendment and extension applications would proceed after the building of the support system
and “resolution of concurrency issues.” (even though the September 24, 1991 Leon County
Planning Department statement exempted the site from concurrency and consistency
requirements). One of the developer’s engineers verified the construction of the support system on June 17, 1992, and the county’s Senior Environmental Engineer noted his approval the following day.

**Court Involvement**

Because of the problems the developer faced gaining permits for this site, he brought the county’s Director of Environmental Management and Permitting to the Second Circuit Court for Leon County to rectify the problems in granting permission for the permit amendment and extension. The Court, on May 19, 1992, noted that:

4. The Plaintiff is the owner of certain lands ... for which various stormwater, landscape, and tree removal permits were obtained by the Plaintiff prior to adoption of the Act [the Environmental Management Act of January 15, 1990]. Pursuant to the terms of the Act, such permits continued in force until ... July 15, 1991.
5. On July 12, 1991, three days before the expiration date, the Plaintiff filed with the defendant ... applications for extensions of the Plaintiff’s permits for four separate projects....
8. The Act places upon the defendant the clear legal duty to accept and process applications for extension of environmental permits issued prior to the effective date of the Act....
12. The Defendant’s response identifies no lawful reason for his failure to accept and act upon the Plaintiff’s environmental permit extension applications ... and to either approve or deny such applications pursuant to the terms of the Act.

Given this, the Court stated that “the defendant is hereby ordered to accept and to process the permit extension applications of the Plaintiff.”

The County Attorney sent a memo to the County Administrator, on September 24, 1992 stating “we would recommend that the County Administration issue the appropriate permit(s) for the as-built structures on the subject site…. The standard for review as to this particular permit based on its unique circumstances should be the laws in existence at the time of the original approval.” The County Administrator responded four days later and agreed that “the as-built permit be issued to the developer as soon as possible without any additional permit fee.”

**More Problems**
The Court decision seemed to resolve the issues surrounding the processing of the permit amendment and extension, but problems still arose. Another Environmental Inspector for the county notified the developer on January 19, 1994 that the violation of stormwater and landscape permit still had not been resolved since it was first noticed back in April of 1991 or when the Stop Work Order was issued in December of that year. The developer was told that “this matter is being referred to the Leon County Code Enforcement Board for resolution. The date and time of your hearing will be provided to you in a separate notice.” The developer responded on February 4 to the Inspector that the previous inspector had already approved the project in June of 1992. Despite this, a Notice of Violation and Request for Hearing was given on February 23 from the Leon County Code Enforcement Board. The developer was ordered to appear before the Board on March 17, 1994 to answer for the repeat violation. Eventually, the project received a permit amendment on March 11, 1994, and the Enforcement Board ordered the case closed at its regular meeting on March 17, 1994. The developer was assured that all of the permits for the site were still valid.

More inspections were conducted regarding the stormwater and landscape permit in the fall of 1997, where more violations were found in the quality and number of trees and shrubs located on the property. These violations were addressed, and the final environmental inspection approval was granted on May 24, 1999, twelve years after the first permit for the site was sought.

The Antique Car Museum is open today to the public. While DeVoe Moore planned to construct the museum in 1988 when he first purchased the property, he faced eleven years of questioning by the environmental inspectors of Leon County. It would seem that many of the issues in question should have been resolved quite promptly: Though the Court decided that the initial permits, which did not require a design of the pond retaining walls, were still valid after the Environmental Management Act of 1990, several more years passed before the Environmental Department became satisfied with their construction. The site was constantly plagued throughout its history by accusations of improper tree placement, using inferior “grades” of trees, having improper shrub heights, and so forth. At one point, the developer’s engineering firm was ordered not to remove a dead oak tree on the property, and then later was told to install a “root aeration system” for a “severely degraded” oak at the rear of the site. It would seem justifiable for an Environmental Management Department to be concerned with
sediment washing off site and onto a street, but one wonders at the necessity of a county government requiring such stringent arboreal demands on a private commercial property of less than four acres. And it seems questionable that an intergovernmental “oversight,” costing several months of delay, should be held against the landowner.

The regulatory demands placed on DeVoe Moore in the process of building the Antique Car Museum by city and county environmental workers should give pause to those concerned with the future of entrepreneurship. The city and county government have a responsibility to ensure that businesses operating in their jurisdictions do not cause unnecessary environmental harm; businesses have the responsibility to cooperate with permits and regulatory codes enforced by the state. However, the facts in this case seem to indicate that the construction of this facility, while sometimes being found in violation of a few of these codes, was unduly hampered by changing rules and regulatory delay. When the developer was challenged regarding compliance with the regulations, he tried to bring his actions in compliance, as he had the incentive to do in order to complete the project. Meanwhile, the project was forced to comply with the changing regulations, and apparently inconsistent demands from different environmental regulators, who found no infractions during inspections, and then later cited the project for noncompliance and demanded compliance under strictures the initial approved permits did not have to meet.

Concluding Comments

In this particular case, one can see that the developer had to endure substantial regulatory delays before the project could be concluded, that permits were often slow in coming after they had been applied for, that there appeared to be inconsistent application of the regulations, and that the developer at one point went to court in order to clear up his obligations under the rules. The developer did have the resources to complete the project, but many others in this situation might not have been able to do so under such a regulatory burden. Such development is costly, and the cost of development only can be recouped after the development is completed.

More generally, this case illustrates the broader problems that arise with increasing regulation. Of course, more regulation makes compliance more costly, but also, when regulations change, compliance may mean aiming at a moving target. Sometimes only compliance with the original rules is required; other times, new rules must be complied with. In
this case, there was often confusion both on the part of the developer and on the part of the regulators over what rules really applied. Furthermore, the people administering the regulations often appeared unmotivated to keep the process moving smoothly, and seemed to be more interested in creating impediments to completion of the project than facilitating its compliance with the rules.

Progress in a market economy requires entrepreneurial activity to advance the standard of living. Regulation can be an impediment to entrepreneurship, as this case illustrates. Regulation should be designed to prevent some people from acting in ways that impose costs on others, and that provides the justification for environmental regulations such as those discussed above. However, regulation often goes beyond simply preventing the activities of some from harming others, and is used to try to mandate that private individuals use their resources to promote the goals of others. When that happens, regulations create a disincentive to entrepreneurship, and the longer term results harm everyone because regulation then can choke out the entrepreneurial activity that improves the quality of life. Cases such as this one illustrate that the regulatory process can be improved so that regulations can be complied with at lower cost. When citizens are faced with continually changing regulation, and when regulators themselves are uncertain about which regulations must be complied with, entrepreneurship is slowed and the entire economy suffers.