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The Incipient Incompatible Use Policy

The administrative law practitioner faces unique challenges in his or her daily practice, not the least of which involves identifying and understanding incipient agency policy. Incipient agency policy constitutes agency practice which has developed over the course of time for dealing with certain recurrent issues or problems, but which is not subject to formal rulemaking in any statute or administrative rule. Early judicial interpretations of Florida's Administrative Procedure Act of 1974 encouraged the refinement of agency practice through incipient policy,¹ and a 1992 legislative enactment now *requires* agencies to adopt incipient policies as rules where they represent an "agency statement of general applicability that implements, interprets, or prescribes law or policy."² Despite this legislative enactment, one such incipient policy continues to impact the area of state lands-regulation—the "incompatible use policy."

The incompatible use policy (IUP) is used by the Governor and Cabinet sitting as the Trustees of the Internal Improvement Trust Fund (trustees) (and its staff and advisory boards) in the management of certain state-owned lands. Specifically, the IUP contains the criteria by which the trustees currently evaluate applications for alternative uses of state-owned "natural resource lands,"³ including utility and pipeline easements crossing such state-owned uplands as state parks, forests, and preserves.

Origins

Like most incipient policies, the IUP has developed with the agency over a period of years. Therefore, the precise origin of the IUP is unclear. The IUP

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by Richard S. Brightman
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apparently began as a series of ad hoc management directives from the trustees to staff. These directives were codified by staff into the current IUP language, which was then submitted to and approved by the trustees on August 9, 1988. Although derived in part from current rules regulating uplands,⁴ the IUP itself has never been adopted as a rule pursuant to F.S. §120.54.

Effect

The four prongs of the IUP are laid out in detail in paragraph one of the policy. Simply stated, in order for the trustees to authorize the use of state-owned "natural resource lands" for an "incompatible use,"⁵ the IUP requires that:

1) The use is *in* (as opposed to "not

contrary to") the public interest.

2) The use is not incompatible with the primary purpose for which the lands are held or were acquired.

3) There is no practicable alternative which would have less impact on natural resource lands.

4) The applicant must provide a "net positive benefit"⁶ to the land. This net positive benefit is over and above any payment for use of the land, and can take virtually any form acceptable to the trustees.

Prong One: Public Interest Test

In order to be approved under the IUP, proposals for alternative uses of natural resource lands must be "in" the public interest as opposed to "not contrary to" the public interest. "Public interest" is defined in the trustees' rules as a balancing of the social, environmental, and economic costs and benefits of a proposed use of state lands.⁷ This is a subjective test to begin with, and experience demonstrates it is much harder to prove that a private use of state lands is affirmatively "in" as opposed to "not contrary to" the public interest. Moreover, the trustees' own rules require proposed uses of state-owned uplands and sovereignty submerged lands (other than within aquatic preserves) must only be "not contrary" to the public interest in order to gain approval.⁸ Uses of sovereignty lands must be "in" the public interest only when the lands are located within aquatic preserves.⁹ Thus, the IUP affords a heightened public interest test for alternative use of natural resource lands over and above what is required for other state-owned uplands. This heightened test is akin to the more stringent public interest test applicable within aquatic preserves, as compared to other sovereignty submerged

lands not located within aquatic preserves.

Prong Two: Incompatible With the Primary Purpose

The second prong of the IUP is confusing due to the use of the word "incompatible," which is the same word used in the name of the policy. The word apparently has different implications in its two uses. Used in the first sense, virtually all private uses are "incompatible uses" for purposes of the overall applicability of the IUP. Many of these same uses, however, are not "[i]ncompatible with the primary purpose for which the lands are held or were acquired," for purposes of complying with the second prong of the IUP. In order to understand this distinction, the second prong of the IUP must be seen as having two purposes. First, a determination must be made as to whether the proposed alternative use will have "an unacceptable adverse effect" on the natural resource lands. If so, the proposed alternative use cannot be approved. If not, however, the second prong of the IUP is an evaluation of the extent to which the proposed alternative use will adversely affect the natural resource lands, or will "interfere with the public recreational use and enjoyment of" the natural resource lands. In practice, this determination ends up being the predicate for determining the magnitude of the "net positive benefit" which is required under the fourth prong of the IUP.

Prong Three: No Practicable Alternative

Under the third prong of the IUP, alternative uses of natural resource lands will be approved only when no practicable alternative exists. In practice, this criterion is used to limit intrusions into natural resource lands, requiring avoidance of those lands by alternative uses where practicable. Avoidance is not practicable where the alternative use is for the benefit of the natural resource land itself (such as where an electric or telecommunications line is intended to serve a ranger station or concession stand within the boundaries of natural resource lands). In some cases, avoidance can also be shown not to be practicable where substantially greater environmental impact would result from going around a

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natural resource land rather than going through it. Additional costs associated with avoidance of a natural resource land are generally not taken into account when determining whether avoidance is practicable.

Prong Four: Net Positive Benefit

Even where an alternative use of a natural resource land is in the public interest, is not incompatible with the major purpose for which the lands are held or were acquired, and there is no practicable alternative, the fourth prong requires a net positive benefit before the alternative use can be approved. Net positive benefit:

- Is some form of compensation *over and above* the market value of the affected parcel (which must be paid in any case);
- Must benefit the same natural resource land affected by the alternative use; and
- Must mitigate for the effects of the alternative use, resulting in an overall increase in the productivity or the ecological value of the natural resource land.

In practice, the types of net positive benefit are limited only by the trustees' (and other managing agencies') imagination. We have seen net positive benefit take the form of requirements for the purchase and donation of out parcels, establishment of trust funds for management activities and scientific investigations, requirements for alternative users to actually perform management activities, and requirements for the donation of funds or heavy equipment to be used by the managing agency for the "benefit" of the affected natural resource lands.

The current IUP imposes *significant* burdens upon private linear facilities seeking to cross "natural resource lands." In some cases, facilities providing essential public functions, such as utilities, water and sewer service providers, telecommunications, cable television, and natural gas and petroleum pipelines, may be denied access to "natural resource lands" for failure to meet the stringent terms of the IUP. If something similar to the IUP is applied to Florida greenways and rail-to-trails properties, there is the possibility of conservation corridors crossing the entire state from which such facilities could be excluded.

Administrative IUP Revision

Revision of the IUP is currently being explored in a number of administrative forums. The Department of Environmental Protection's (DEP) Task Force on Transportation/Transmission Crossings of State-Owned Lands, the Greenways Commission, and the Ecosystem Management Implementation Strategy (EMIS) all may play a role in determining the ultimate fate of the IUP.

Task Force for Transportation/Transmission Crossings of State Lands

DEP has set up the Task Force on Transportation/Transmission Crossings of State-Owned Lands to review the current IUP along with other state lands issues. The task force is the result of DEP's ongoing efforts to review and improve its rules following its creation through the merger of the Department of Environmental Regulation and the Department of Natural Resources. The task force appears to be the initial focus of administrative IUP revision.

The task force has government and private members. It is currently examining the application and planning process for state-lands crossings as well as the net positive benefit concept. Whether and how it would affect substantive changes to the IUP is still a matter of speculation. DEP could seek to promulgate the task force's ultimate recommendations as rules. Alternatively, the trustees could adopt the task force's recommendations as amendments to the current IUP, which would maintain the IUP as an incipient policy.

Although DEP's Office of Greenways Management had originally embarked

on developing similar guidelines for the somewhat narrower issue of linear facility crossings of greenways and rails-to-trails lands, it deferred this responsibility to the task force. A "greenway" is a linear corridor of protected open space that is managed for resource conservation, recreation, or environmental education purposes.¹⁰ The purpose of the Florida Rails-to-Trails program is for the state to acquire abandoned railroad rights-of-way for public recreational use.¹¹ As such, greenways and rails-to-trails lands share the same linear quality. The linear nature of these lands and their potential for enormous statewide impact may warrant special consideration by the task force.

Greenways Commission

The Greenways Commission, an executive commission made up of various government and citizen members, *could* also play a role in developing guidelines for alternative use crossings of greenways. The commission was established by executive order of Governor Chiles in January 1993.¹² One of the commission's primary overall charges was to recognize 150 greenways statewide by Florida's sesquicentennial, March 3, 1995 (that's one greenway for each year of statehood), creating a linked network of reserves, parks, and "greenspaces."¹³ In addition to identifying the greenways, the commission may also address issues of greenways *management*, which could include alternative use requests. The commission provided a report to the Governor on these issues, on December 15, 1994, which included recommending necessary legislative initiatives. The commission may play an important role in developing alternative use request guidelines if it so chooses. To date, however, the commission has focused on mapping activities and creating guidelines for identifying greenways.

Ecosystem Management Implementation Strategy

On yet another front, DEP is in the process of developing an Ecosystem Management Implementation Strategy. The EMIS represents a new direction in the management, regulation, planning and acquisition of state lands based upon long-range planning and the protection of large-scale ecosystems. Toward that end, several individual subcommittees composed of both public and private participants have

been created. These subcommittees have each submitted final reports and recommendations on implementing the EMIS. These recommendations are in the process of being reconciled in an attempt to produce a coherent EMIS strategy by the middle of 1995.

Some of the individual subcommittees's recommendations have addressed state lands management issues and the IUP policy. The Public Lands Management Subcommittee recommended expanding the current IUP to account for resource values and ecosystem concerns by prohibiting alternative uses which diminish the function of the ecosystem or the intrinsic value of the resource. The Role of Private Landowners Subcommittee final report encouraged the co-location of public infrastructure corridors as well as the creation of a state corridor system.

Whether such recommendations will be incorporated into the final EMIS strategy is uncertain. Nonetheless, the EMIS process has the potential to significantly impact the IUP.

The current IUP is, at best, difficult and expensive to meet. At worst, it is

impossible to comply with, denying access to vast areas of state lands for utility, telecommunications, pipeline and other necessary linear facilities. As the Save Our Rivers/Preservation 2000 Program proceeds to add large chunks of land to the category of "natural resource lands," the problem will only worsen. Applying the IUP to greenways and rails-to-trails properties would further exacerbate the situation.

The current process of administrative revision appears to have centered on the task force. It is certainly time to revisit the IUP, perhaps focusing on compatible uses instead of incompatible uses, but in a proper administrative forum—the bright light of a F.S. §120.54 rulemaking. There is no contesting the fact that the IUP is an "agency statement of general applicability that implements, interprets, or prescribes law or policy," and *must* be adopted as a rule pursuant to F.S. §120.535. Such a rulemaking may come out of the work of the task force, but in any event must be undertaken to unify the potentially disjointed efforts of the task force, the Greenways Com-

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mission, and the EMIS process. The goal must be to develop an alternative use crossings policy which makes practical sense and applies to *all* lands owned or managed by the state. Short of developing a coherent and fair policy through the administrative process, the job of revising the IUP will necessarily fall to the legislature in the 1995 session. □

¹ See, e.g., *McDonald v. Department of Banking & Finance*, 346 So. 2d 569, 580-81 (Fla. 1st D.C.A. 1977).

² FLA. STAT. §120.535 (1993).

³ "Natural resource lands" are defined as: "those lands acquired with funds from the CARL Trust Fund, LATF or EEL program and lands managed as state parks, state recreation areas, state archeological sites, state historic sites, state preserves, state sanctuaries, state wilderness areas, state forests, state owned wildlife management areas, and state owned beaches." Trustees, *Incompatible Use Policy* §3(b) (August 9, 1988) (hereinafter, Trustees, *IUP*).

This definition includes virtually all state-owned uplands, but does not include most sovereignty submerged lands. The IUP is,

thus, applicable to crossings (utility lines, pipelines, etc.) of submerged lands only when these lands are within one of the listed management units, such as a state park.

⁴ FLA. ADMIN. CODE r. 18-2.004.

⁵ "Incompatible use" is defined as: "Any use of natural resource lands that would jeopardize the integrity of the natural resource, or diminish the primary utility of such lands relative to the purpose for which they were acquired." Trustees, *IUP* §3(c).

For example, any use in a state park which does not relate to the purpose for which the land was acquired (e.g., hiking, biking) would technically be an incompatible use.

⁶ "Net positive benefit" is defined as: "[A]ny effective action or transaction which promotes the overall characteristics of a particular parcel of natural resource lands. It is compensation over and above the market value of the affected parcel to offset any requested use or activity which would preclude or effect, in whole or in part, current or future uses of the natural resource lands. Net positive benefit shall not be solely monetary compensation, but shall include mitigation and other consideration related to environmental or management development or restoration that produce a new or modified environment that is more

productive or is ecologically more valuable." Trustees, *IUP* §3(e).

⁷ See FLA. ADMIN. CODE r. 18-2.003(38) (relating to state-owned uplands), and r. 18-21.003(40), (relating to sovereignty submerged lands).

⁸ FLA. ADMIN. CODE r. 18-2.004(1)(a), r. 18-21.004(1)(a).

⁹ FLA. ADMIN. CODE r. 18-20.004(1)(b).

¹⁰ Executive Order No. 93-40, Preamble (January 22, 1993).



¹¹ FLA. STAT. §260.0141 (1993).

¹² Executive Order No. 93-40 (January 22, 1993). The commission has four committees charged with handling separate aspects of the greenways project. The coordinating staff for these committees is 1000 Friends of Florida. Other governmental agencies may also provide support assistance.

¹³ Executive Order No. 93-40, §3 (January 22, 1993).



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This column is submitted on behalf of the Environmental and Land Use Law Section, David S. Dee, chair, and Sid F. Ansbacher, editor.