



GUNSTER
FLORIDA'S LAW FIRM FOR BUSINESS

Growth Management in Florida

A New Direction

A Special Summary White Paper

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Growth Management in Florida - A New Direction

Introduction

In 2011, the way in which we manage growth in Florida changed; it did not, as some would have us believe, go away. Growth management in Florida still exists. It is streamlined. It has fewer unnecessary levels of review. It is less costly to the state and to property owners and developers. But, it still exists in a meaningful way.

The stated purpose in making the changes is to manage (as opposed to control, as was previously stated) future development “consistent with the proper role of local government.” The intent is to “focus the state role in managing growth under this act to protecting the functions of important state resources and facilities.” The legislature further clarified that all planning, including comprehensive planning, be applied “with sensitivity for private property rights and not be unduly restrictive, and property owners must be free from actions by others which would harm their property or which would constitute an inordinate burden on property rights as those terms are defined in s. 70.001(3)(e) and (f).”

House Bill 7207 encompasses 349 pages, revising multiple sections of the Florida statutes. Many of the amendments cover two text changes – the change of the name of the act from the “Local Government Comprehensive Planning and Land Development Regulation Act” to the “Community Planning Act,” and removing of the twice per year limitation on comprehensive plan changes. Because there were multiple references to the old name and the now former limitation, those references needed to be removed. The questions are: (1) What does it change? and (2) What does that mean for growth management in Florida?

The answer to the first question is long and not unsubstantial. As noted, the bill is quite lengthy. More, there are some interrelated changes that should not be read individually. Therefore, to answer some of the most critical issues, below is a summary of some of the issues (e.g. traffic concurrency, developments of regional impact) that are impacted by the statutory change. This is not exhaustive, but covers major areas important to landowners and developers in Florida.

The second question cannot readily be answered today. However, there are some things that are certain. First, local governments have more control over what goes on in their jurisdiction, where only they are impacted. Second, there is increased opportunity for local government cooperation without state intervention, except in those circumstances where the state can show that critical state resources (e.g. intermodal transportation systems and the everglades) are impacted. Third, the cost to obtain development approvals and to develop property should decrease, thereby allowing more cost effective commercial and industrial development, making Florida a more competitive market for new business. Finally, it allows existing development orders to remain in place so that we can maintain a supply of known quantity development as the markets make it feasible to again develop property.

Definitions

The applicable definitions under the now titled Community Planning Act have changed in some respect. While the legislature statutorily repealed Rule 9J-5, some of the definitions from this rule are now incorporated into the statute, either verbatim or with some modification. The verbatim definitions incorporated are: Capital Improvements, Compatibility, Density, Flood Prone Areas, Goal, Intensity, Level of Service, Objective, Policy, Seasonal Population, and Suitability. The modified 9J-5 definitions are: Affordable Housing, Coastal Area, Deep Water Ports, New Town, and Urban Sprawl.

In addition to definitions added from rule 9J-5, the legislature modified some existing definitions and added others. Those modified are: Public Facilities, Sector Plan, and Urban Service Area. Those newly added definitions are: Adaptation action area or adaptation area; Antiquated Subdivision, Internal Trip Capture, and Transit Oriented Development.

Finally, the legislature removed definitions based on their no longer being applicable or otherwise being defined in a specified portion of a statute: Financial Feasibility and Dense Urban Land Area.

Adoption and Amendment of Comprehensive Plans

The critical change in the structure of the adoption and amendment of comprehensive plans is the element of state review. The new structure recognizes that not every amendment, whether by text or by size, requires approval of the state. However, there is still state review of every plan and amendment, though specific and limited time frames for these reviews to allow for amendments to proceed are in place. Changes were made to both substance and process.

Substance

All counties and municipalities are still required to maintain a comprehensive plan. Municipalities formed after the effective date of the law must prepare a comprehensive plan, as has always been the case. In the event a plan is not created, however, there is no longer a facility for a regional planning counsel to prepare and adopt those plans.

The Legislature revised what is required to be in a comprehensive plan. Going forward, more elements are optional than required, leaving it up to the local government to devise their own rules. Fundamental to the plan is the principles, guidelines, standards, and (newly added) strategies for economic, social, physical, environmental, and fiscal development that (newly added) "reflects community commitments to implement the plan and its elements." The Legislature also added directives as to the purpose of the plan and what it should accomplish.

"All mandatory and optional elements of the comprehensive plan and plan amendments shall be based upon relevant and appropriate data and analysis." To be based upon such data and analysis, the plan must "react to it in an appropriate way and to the extent necessary indicated by the data available on that particular subject at the time of adoption." Further, the data must be from professionally accepted sources. The plan must also be based on resident and seasonal population estimates derived from the University of Florida's Bureau of Economic and Business Research or generated by the local government based on professionally accepted methodology; however, the plan must be based on "at least the minimum amount of land required to accommodate the medium projections" from the UF data for at least a 10 year planning period, unless limited under Section 380.05, F.S. Of note, the Legislature removed from this section the requirement that the plans be "financially feasible."

The required elements of every comprehensive plan are: Capital Improvements Element, Future Land Use Element, Transportation Element, Sanitary Sewer, Solid Waste, Drainage, Potable Water, and Natural

Groundwater Recharge Element, Conservation Element, Recreation and Open Space Element, Housing Element, Coastal Management Element (for those governments identified in Section 380.21, F.S.), and Intergovernmental Coordination.

Other elements of a Comprehensive Plan are allowed as optional, with little direction on what those elements may be. Therefore, a local government may adopt an element related to education or agriculture, for example. The allowance of these options is consistent with the purpose of more local government control over their own plans.

Where a plan is "in compliance," nothing in the new statutory scheme requires changes until such time as the Evaluation and Appraisal Report as required by Section 163.3191, F.S.

Procedure

The first change in the procedure of adoption or amendment of comprehensive plans comes in the definitions that are added for "reviewing agencies," which are identified as the state land planning agency, the applicable regional planning council, the applicable water management district, the Department of Environmental Protection, the Department of State, the Department of Transportation, the Department of Education (where public schools are implicated), the commanding officer of any affected military installation, the Fish and Wildlife Conservation Commission and Department of Agriculture and Consumer Services (for county plans and amendments), and the county in which a municipality is located (for municipal plans).

The review process for most plan amendments will follow an "expedited state review process" (discussed below), except those that are small scale amendments, in areas of critical state concern, propose a rural land stewardship area, propose a sector plan, are EAR based amendments, or are new plans (the exceptions, other than small scale amendments, follow the "state coordinated review process," discussed below).

The "expedited state review process" applies to local amendments that are not also small scale amendments. The process begins with an initial public hearing, after which the amendment or amendments, along with supporting data and analysis, are to be transmitted to the applicable "reviewing agencies," as well as any local government or governmental agency that has asked in writing. Those receiving the amendment or amendments may provide comments within 30 days from receipt; however, state agency comments are limited to important state resources and facilities that will be adversely impacted if the amendment is adopted. In the event a state agency provides comments, that agency must specify how the amendment will make the alleged adverse impact and identify how it can be eliminated, reduced, or mitigated. If not resolved, those comments can form the basis of the agency to challenge to the amendment.

The comments from state agencies are limited to specific subject matter areas within the purview of the state agency. The Department of Environmental Protection may comment on air and water pollution, wetlands and other surface waters of the state, federal and state-owned lands and interests in land (e.g. state parks, greenways and trails, and conservation easements), solid waste, water and waste water treatment, and Everglades ecosystem restoration. The Department of State may comment on historic or archeological resources. The Department of Transportation may comment only on issues within its jurisdiction as related to transportation resources and facilities of state importance. The Fish and Wildlife Conservation Commission may comment on issues related to fish and wildlife habitat and listed species and their habitat. The Department of Agriculture and Consumer Services may comment on agriculture, forestry, and aquaculture matters. The Department of Education may comment on public school facilities. The applicable Water Management District may comment on flood protection and floodplain management, wetlands and other surface waters, and regional water supply issues. The state land planning agency may comment on important state resources and facilities outside the jurisdiction of other state reviewing agencies as well as on countervailing planning policies and objectives served by the amendment or amendments that should be balanced against potential adverse impacts to state resources and facilities.

Regional planning councils, counties, and municipalities comments are also limited. A regional planning council must limit its comments to adverse effects on regional resources or facilities that are identified in the strategic regional policy plan and to extrajurisdictional impacts that would be inconsistent with a comprehensive plan of an affected local government in the region. A county may only comment to

the extent of the relationship and effect of the proposed amendment or amendments to the county plan. Municipal comments may only relate to the relationship and effect of the proposed amendment or amendments on that municipalities plan.

A second public hearing, the adoption hearing, takes place in the same manner as previously directed. However, if 180 days pass from the local government's receipt of agency comments and there is no adoption hearing, the amendments are deemed withdrawn, unless extended by agreement with notice to the state land planning agency and any affected persons who provided comments on the amendment or amendments. This 180 day time limit is not applicable to amendments that are part of a Development of Regional Impact. Within 10 days after adoption, any amendments and the supporting data and analysis must be sent to the state land planning agency and any other agency providing comments. Within five business days of receipt, the state land planning agency must notify the local government of any deficiencies.

An amendment becomes effective, unless timely challenged, 31 days after the state land planning agency notifies the local government that the plan amendment package is complete. A complete package contains a "full, executed copy of the adoption ordinance or ordinances; in the case of a text amendment, a full copy of the amended language in legislative format with new words inserted in the text underlined, and words deleted stricken with hyphens; in the case of a future land use map amendment, a copy of the future land use map clearly depicting the parcel, its existing future land use designation, and its adopted designation; and a copy of any data and analysis the local government deems appropriate." If timely challenged, the amendment becomes final upon the issuance of a final order determining it to be in compliance.

The "state coordinated review process" applies where a new plan is adopted, amendments are in a designated area of critical state concern, propose a rural lands stewardship, propose sector plans, or are amendments following the required evaluation and appraisal report. Similar to current practice for virtually all amendments, the state land planning agency is responsible for plan review, coordination, and preparation and transmission of comments to the local government. The process for this review is similar to the existing process, though streamlined in some cases.

A local government continues to transmit the proposed plan or amendments after an initial public hearing, now to all of the defined, appropriate "reviewing agencies." In such transmittal, the local government must "clearly indicate on the cover sheet that [the] plan amendment is subject to the state coordinated review process of s. 163.3184(4)."

The applicable reviewing agencies, other than the state land planning agency, have 30 days from receipt of the plan or amendment to provide any comments to the state land planning agency. Any written comments from the public are now submitted directly to the local government. The state land planning agency, "if [it] elects to review a plan or plan amendment" (implying that such review is not required), has 60 days to issue its objections, recommendations and comments. These objections, recommendations, and comments relate to whether the plan or amendment is in compliance and whether it will adversely impact any important state resources and facilities; any objection regarding the important state resources or facilities must state with specificity how they will be adversely impacted and identify measures that would eliminate, reduce, or mitigate such impacts.

Upon receipt of the report from the state land planning agency, the local government "shall review the report" and any written comments from other persons, agencies, or governments and hold its second public hearing on adoption. If this adoption hearing is not held within 180 days after receipt of the report, any amendments are deemed withdrawn unless the government and state land planning agency have agreed to an extension or the amendment is related to a Development of Regional Impact. Within 10 days after adoption, the local government is to transmit the amendment and supporting data and analysis to the state land planning agency and any other agency or local government that provided timely comments. The state land planning agency then has 5 business days to notify the local government of any deficiencies.

Following receipt of the complete package (completeness being defined in 163.3184(4)(e)(3)), the state land planning agency has 45 days to determine if the plan or amendment is in compliance with the Community Planning Act. The compliance determination, barring a substantial change in the plan or amendment, is limited to those issues raised in the report. The state land planning agency must, in that 45 day time period, issue its notice of intent to find the plan or amendment in compliance or not in compliance and post a copy on its website, such publication being prima facie evidence of compliance with the publication requirement. The plan or amendment is immediately effective upon the publication of the notice of intent, unless a timely challenge is made, in which case it only becomes effective upon the Administration Commission's final order finding it in compliance.

Innovation

The legislature has added a new section to Chapter 163, Section 163.3168, titled Planning Innovations and Technical Assistance. The purpose of this section is to encourage innovation in planning that will "promote a diverse economy and vibrant rural and urban communities, while protecting environmentally sensitive areas." Local governments are encouraged to apply innovative planning tools such as visioning, sector planning, and rural land stewardships that will address future development areas, urban service area designations, urban growth boundaries, and mixed-use, high-density development in urban areas. The state land planning agency is required to help communities find creative planning solutions to foster "vibrant, healthy communities, while protecting the functions of important state resources and facilities," using direct and indirect technical assistance.

Concurrency

As proposed by this legislation, concurrency will undergo major changes. The only concurrency elements which will be required on a state-wide basis are now sanitary sewer, solid waste, drainage, and potable water. Parks and recreation, schools, and transportation facilities are deleted as state-wide concurrency requirements. No additional public facilities may be made subject to concurrency on a state-wide basis without approval by the legislature. However, as is the case today, local governments may extend concurrency requirements to additional public facilities within their jurisdictions. If they do so, however, the local government comprehensive plan must provide "the principles, guidelines, standards, and strategies, including adopted levels of service, to guide its application." Both optional and required concurrency elements the local government comprehensive plan must demonstrate that the adopted levels of service can reasonably be met. This means that the infrastructure needed to insure that the adopted level of service standards are achieved must be specifically identified.

If a local government chooses to require transportation concurrency, new standards exist. Certain of these standards are required while others are only encouraged. The following are required:

- The local government Comprehensive Plan must provide the principles, guidelines, standards, and strategies, including adopted levels of service, to guide its application.
- Local governments shall use professionally accepted studies to evaluate the appropriate levels of service.
- Local governments shall use professionally accepted techniques for measuring levels of service when evaluating potential impacts of a proposed development.
- A Comprehensive Plan that imposes transportation concurrency shall contain appropriate amendments to the Capital Improvement Element which shall identify the facilities necessary to meet adopted levels of service during a five year period.

- Local governments that implement transportation concurrency must:
 - Consult with the DOT when proposed plan amendments affect facilities on the strategic intermodal system
 - Exempt public transit facility from concurrency
 - Allow an applicant for a DRI, rezoning or other land development permit to satisfy the transportation concurrency requirements of the local Comprehensive Plan by entering into a binding Proportionate Share agreement (see discussion below).

If a local government applies transportation concurrency in its jurisdiction, the following standards are encouraged:

- Develop policy guidelines and techniques to address potential negative impacts on special categories of future development such as urban infill and redevelopment, urban service areas, facilities with special part-time demands on the transportation system, developments with de minimis impacts, and developments which may be “community desired types of development” such as redevelopment or job creation projects.
- Develop tools and techniques to compliment the application of transportation concurrency such as long term strategies to facilitate multimodal solutions; adoption of area-wide levels of service which are not dependent on any single road segment; exempting or discounting impacts of locally desired developments such as development of urban areas, job creation and mixed use projects; assigning secondary priority to vehicle mobility and primary priority to insuring a safe, comfortable, and attractive pedestrian environment; establishing multimodal level of service standards that rely permanently on non-vehicular modes of transportation; and reducing impact fees or local access fees to promote development within urban areas, multimodal transportation districts, mixed use developments, or affordable work force housing.
- Coordinate with adjacent local governments for the purpose of using common methodologies for measuring impacts on transportation facilities.

The law contains provisions allowing an applicant to enter into a binding agreement to pay for or construct its proportionate share of required improvements. The contribution or construction must be sufficient to accomplish one or more “mobility improvements” that will benefit a regionally significant transportation facility. Further, the local government must provide a means by which the landowner will be assessed a proportionate share of the cost of providing the transportation facilities necessary to serve the proposed development. Applicants shall not be held responsible for the additional cost of reducing or eliminating deficiencies. When an applicant contributes or constructs its proportionate share, a local government may not require payment or construction of transportation facilities whose cost would be greater than a development’s proportionate share of the improvements necessary to mitigate the development’s impact.

The proportionate share contribution is to be calculated based upon the number of trips from the proposed development expected to reach roadways during the peak hour from the stage or phase being approved, divided by the change in the peak hour maximum service volume of roadways resulting from construction of an improvement necessary to maintain or achieve the adopted level of service, multiplied by the construction cost at the time of development payment, of the improvement necessary to maintain or achieve the adopted level of service. This formula is to be applied only to those facilities that are determined to be “significantly impacted” by the project traffic under review. Importantly, if any road is determined to be transportation deficient without the project traffic under review, the costs of correcting that deficiency shall be removed from the project’s proportionate share calculation. In other words, the development’s proportionate share “shall be calculated only for the needed transportation improvements that are greater than the identified deficiency”. In addition, any trips assigned to a toll finance facility shall be eliminated from the analysis. The applicant must also receive a credit on a dollar-for-dollar basis for impact fees, mobility fees, and other transportation concurrency mitigation requirements, paid or payable in the future for the project.

Before December 15, 2011, the Department of Transportation is to develop and submit to the President of the senate and the Speaker of the House a report on recommended changes to or alternatives to the proportionate share calculation. The recommendations, if any, must ensure that development contributions to mitigate impacts are assessed in a predictable, equitable and fair manner and must be developed in consultation with developers and representatives of local governments.

School concurrency is no longer required. If a local government elects to make school concurrency a local requirement, there are standards the local government must meet. The more significant of these are:

- A developer may proceed with a project notwithstanding a failure to satisfy school concurrency if certain conditions are met, including a proportionate share plan for the cost of providing the necessary facilities.
- The administrative framework for enforcing school concurrency is simplified by the deletion of a number of existing provisions.

Some of the concepts found in HB 7207 – for example, proportionate share and multimodal transportation districts – are already found in various parts of Florida Statutes. The legislature refined, amended, reorganized, and in many cases simplified these concepts.

Transportation Element

All comprehensive plans are required to contain a Transportation Element, as is currently the case. However, the transportation element is designed to largely supplement or replace the previously required Traffic Circulation Element and maintains its focus on “mobility issues” instead of vehicular circulation systems.

“The purpose of the Transportation Element shall be to plan for a multi-modal transportation system that places emphasis on public transportation systems, where feasible.” [emphasis added] The new legislation dictates that each local government’s Transportation Element must address traffic circulation, including maps or map series showing the “general location of the existing and proposed transportation system features.” The Element must also reflect data, analysis and associated “principles and strategies” relating to existing transportation levels of service and system needs, the availability of transportation facilities and services, growth trends and travel patterns and interactions between land use and transportation. Existing and projected intermodal deficiencies and needs, the projected transportation system levels of service and system needs based on the future land use map, and the projected integrated transportation system must be identified. Of particular importance, the element includes a requirement to demonstrate “how the local government will correct existing facility deficiencies.”

Local governments within a Metropolitan Planning Area designated as an MPO must also address “all alternative modes of travel such as public transportation, pedestrian and bicycle travel.” This may include aviation, rail, seaport facilities, and intermodal terminals. The new legislation also requires that municipalities having populations great than 50,000 and counties having populations greater than 75,000 include mass transit provisions, including public transit services.

Finally, the new legislation deletes the former requirement that traffic circulation elements incorporate transportation strategies to address reduction in greenhouse gas emissions.

The intent seems to be to broaden the requirements of the local government’s comprehensive plan relating to transportation such that the emphasis is on multi-modal transportation systems rather than merely a motor vehicle traffic circulation element. The previous Traffic Circulation Element requirements paid lip service to multi-modal planning but in fact was primarily directed toward vehicular (primarily automobile) transportation issues.

Future Land Use Element

All local government comprehensive plans are required to contain a future land use element. This is not new. But, the requirements of this element and the data upon which it is to be based has been changed from the previous version of the statute. These changes are discussed herein.

Comprehensive plans now must identify the approximate acreage and the general range of density or intensity of use for the gross land area in each existing land use category and establish the long-term end toward which the land use programs and activities are ultimately directed. In doing so, the projected residential and seasonal population (more specifically than "population" as previously stated) of the area is to be considered. However, energy efficient land use patterns is no longer included. The plan must now consider the need to modify land uses and development patterns within antiquated subdivisions.

The future land use element must now include criteria to: encourage preservation of recreation and commercial waterfronts for water dependent uses in coastal areas, encourage schools proximately located to urban residential areas where possible, coordinate uses with topography and soil conditions as well as available facilities and services, ensure protection of natural and historic resources, provide for compatibility of adjacent land uses, and provide guidelines related to mixed use developments. The overriding purpose is to "provide a balance of uses that foster vibrant, viable communities and economic development opportunities and address outdated development patters, such as antiquated subdivisions." In doing so, the plan should allow real estate markets to provide adequate choices for permanent and seasonal residents and businesses.

The element and any amendments must discourage urban sprawl. The law then identifies the thirteen primary indicators that urban sprawl is not discouraged, the applicability of which are to be determined based on the unique characteristics of each area. These criteria range from promoting, allowing or designating significant areas as low density to failure to protect and conserve natural resources or agricultural activities. Similarly, the law identifies eight criteria that, where four or more are met, are determined to discourage the proliferation of urban sprawl. These range from directing economic growth in a manner that is not adverse to and protects natural resources and ecosystems to promotion of water and energy.

The future land use element of all plans must include a land use map that specifies distribution, extent, and location of certain uses. These are: residential, commercial, industrial agricultural, recreational, conservation, educational, and public. Further, where applicable, the land use map must identify: historic district boundaries and historically significant properties, transportation concurrency management or exception area boundaries, multimodal transportation district boundaries, and mixed use categories. In addition, certain natural resources or conditions must be shown where applicable: existing and planned public potable water wells, cones of influence, and wellhead protection, beaches and shores (including estuarine systems), rivers, bays, lakes, floodplains, and harbors, wetlands, minerals and soils, and coastal high hazard areas.

Any amendments to the future land use map must be based on an analysis of: availability of facilities and services, suitability for its proposed use (considering the character of the undeveloped land, soils, topography, and natural and historic resources on site), and the minimum amount of land required as determined by the local government.

Developments of Regional Impact

The legislative changes governing Developments of Regional impact primarily relate to the thresholds for what constitutes a DRI, what amounts to a substantial deviation from the DRI, and when a DRI is “essentially built out.” In addition, the legislature provided that a local government may deny a DRI because of local issues, e.g. that the proposal is inconsistent with a plat restriction that the local government does not want to remove.

DRI Thresholds

Certain projects are exempt from DRI review and others subject to a statewide standard. In both cases, the legislature has made some changes.

The following changes were made to the statutory exemptions for DRI review:

- The exemption for Rural Lands Stewardships was limited to the new statutory provisions for them and the requirements of a binding agreement with impacted jurisdictions and the Department of Transportation and for a proportionate share agreement have been removed;
- An exemption was added for proposed solid mineral mines and proposed additions, expansions, or changes to existing mines, subject to certain requirements set forth in the exemption;
- An exemption was added to eliminate DRI review where the revised thresholds are not met even where there were agreements in place among local governments, regional agencies, or the state land planning agency, or in a comprehensive plan; and
- The exemption for projects within Dense Urban Land Areas was modified to conform with the new definition of Dense Urban Land Area.

The following changes were made to the DRI statewide standards in Section 380.0651(3) and (4), F.S.:

- The legislature removed the standards for multi-screen movie theaters of at least 8 screens and 2,500 seats;
- The legislature removed the standards for Industrial plants, industrial parks, and distribution, warehousing or wholesaling facilities;
- The legislature removed the standards for Hotel or motel development;
- The aggregation requirement where two or more developments are represented to be separate was changed to require three, instead of two, of the identified criteria, and the criteria of shared infrastructure were removed.

Substantial Deviations

The thresholds for changes to a DRI that amount to a “substantial deviation,” and therefore more state level review, were increased in many areas. They are:

- An increase in parking spaces at an attraction or recreational facility was increased to 15% or 500 spaces, whichever is greater;
- An increase in the number of spectators that can be accommodated at an attraction or recreational facility was increased to 15% or 1500 spectators, whichever is greater;
- An increase in land area for office development was increased to 15%;
- An increase of gross floor area of office development was increased to 15 percent or 100,000 gross square feet, whichever is greater; and

- An increase in commercial development was increased to 60,000 square feet of gross floor area or parking spaces for customers of 425 cars or 10 percent, whichever is greater (the 10 percent increase did not change).

Further, the statutory four year extension (discussed below) does not constitute a substantial deviation and cannot be considered when determining whether subsequent extensions are substantial deviations.

In addition, some changes were removed entirely from consideration of a “substantial deviation.” These are: Increased industrial development; An increase in mined area; and an increase in hotel or motel rooms.

Essentially Built Out

A development of regional impact is essentially built out when “all mitigation requirements in the development order have been satisfied, all developers are in compliance with all applicable terms and conditions of the development order except the buildout date, and the amount of the proposed development that remains to be built is less than 40 percent of any applicable development-of-regional-impact threshold.” This is substantially similar to the previous version of the law, except that the percentage has been moved from 20% to 40%, allowing more DRI’s to meet the definition if all other important factors are still met.

Agricultural Enclaves

The definition of an Agricultural Enclave has not changed (it has been renumbered from sub-section 33 to sub-section 4). Where a property meets the definition of an agricultural enclave, the owner is permitted to apply for a comprehensive plan amendment. Such an amendment is clothed with a presumption that it is not urban sprawl so long as it includes land uses and intensities of use consistent with industrial, commercial, or residential area surrounding the property. This presumption can be rebutted by clear and convincing evidence.

Rural Lands Stewardships

The encouragement for counties to designate rural lands stewardship areas as overlays in the future land use map was removed from Section 163.3177. However, an entirely new section on rural lands stewardships was added. This section provides all of the rules for rural lands stewardships. Further, the legislature believed that it included all that was required and specifically provided that rulemaking is not authorized.

Environmental Impacts (Conservation Element)

In addition to the consideration of environmental impacts in other elements of planning, e.g., in the preparation of the land use map, all comprehensive plans must include a conservation element. The element must identify and analyze rivers, bays, lakes, wetlands including estuarine marshes, groundwater, and springs, including information the quality of the resource available, floodplains, known sources of commercially valuable minerals, areas known for erosion problems, and areas that are recreationally and commercially important for fish or shellfish, wildlife, marine habitat, and vegetative communities, including forests. Further, known pollution problems, including hazardous waste, and potential for conservation, recreation, use, or protection of these resources will be identified.

The conservation element must include principles, guidelines and standards that provide long-term goals and: (1) protect air quality, (2) conserve, appropriately use, and protect the quality and quantity of water sources and waters flowing into estuarine waters or the ocean, (3) provide for emergency water conservation sources in accordance with the plans of the applicable water management district, (4) conserve, appropriately use, and protect minerals, soils, and native vegetation from destruction by development, (5), conserve, appropriately use, and protect fisheries, wildlife and its habitat, and marine habitat, and restricts activities known to adversely affect the survival of endangered and threatened wildlife, (6) protect existing natural reservations that are identified in the recreation and open space element, (7) maintain cooperation with adjacent governments to conserve, appropriately use, or protect unique vegetative communities within multiple jurisdictions, (8) manage hazardous waste to protect natural resources, and (9) direct future land uses that are incompatible with protection and conservation of wetlands and their functions away from wetlands.

Development Agreements

Development Agreements are designed to provide assurances to property owners in the future use and development of their property. In order to provide additional assurances, the legislature extended the available term of a development agreement from 20 years to 30 years. The legislature further removed the requirement that each annual review of development agreements during years six through ten be put into a written report and submitted to the parties and the state land planning agency, and likewise the related requirement of the land planning agency adopting rules for such a report. Similarly, the requirement that the development agreement be submitted to the state land planning agency and related provisions have been removed.

Extension of Development Approvals (including Developments of Regional Impact)

In both 2009 and 2010, the legislature provided an option to owners to extend certain development permits. There were issues with those previous provisions and the real estate market continued to remain weak. Therefore, the legislature provided additional extensions and clarity in HB 7207. The legislature provided that any permit extended under Section 14 of Chapter 2009-96, as reauthorized by Section 47 of Chapter 2010-47, Laws of Florida is extended and renewed for an additional two years beyond the previously extended expiration date. "This extension is in addition to the 2-year permit extension provided under section 14 of chapter 2009-96, Laws of Florida, as reauthorized by section 47 of chapter 2010-147, Laws of Florida." Such an extension applies to any required mitigation associated with a phased construction project so that mitigation takes place in the same timeframe relative to the phase as originally permitted. However, where a permit was already extended for four years, this additional extension does not apply.

To avail itself of this extension, a permit holder must notify the authorizing agency in writing by December 31, 2011; in doing so, it shall identify the authorization for which it intends the extension and the anticipated timeframe for acting on the authorization. Further, similar to the previous extensions, this does not apply to programmatic or regional general permits issued by the Army Corps of Engineers, where the permit holder is in significant noncompliance with conditions of the permit (so long as this is established by a warning letter or notice of violation, enforcement action, or equivalent action by the permitting authority), or where the extension would delay or prevent compliance with a court order.

Separately, though using virtually the same language, the legislature provided these same extensions, with the same limitations, to permits issued by the Department of Environmental Protection or water

management district pursuant to part IV of chapter 373, F.S. which has an expiration date from January 1, 2012 to January 1, 2014; this includes “any local government-issued development order or building permit including certificates of levels of service.”

Developments of regional impact may also be extended. At the option of the developer, all commencement, phase, buildout, and expiration dates for projects that are currently valid DRIs are extended for four years, in this case without regard to previous extensions. Associated mitigation requirements are similarly extended unless, prior to December 1, 2011, the government notifies the developer, where that developer has commenced construction within a phase for which mitigation is required, that the government has entered into a contract for construction of a facility with funds to be provided from the developers mitigation funds for the phase as specified in the development order or other written agreement with the developer. To avail itself of this allowed extension, the developer must notify the local government in writing by December 31, 2011.

Challenges to Plans and Amendments

Any affected person (the definition of which did not change) may file a Petition for Administrative hearing pursuant to the Florida Administrative Procedure Act. The petition has a jurisdictional time limit of 30 days from adoption of a plan amendment and that state land planning agency is no longer permitted to intervene.

The state land planning agency may file a Petition for Administrative hearing challenging whether the plan or amendment is “in compliance.” This challenge must “clearly state the reasons for the challenge” and must be filed within 30 days (if under the expedited state review process) or 45 days (if under the state coordinated review process) after the agency notifies the local government that the plan amendment package is “complete.” The challenge, in the case of an expedited state review, is limited to the comments provided by the reviewing agencies, and only after the state land planning agency determines that important state resources or facilities will be adversely impacted. Further, the Petition must state with specificity how that impact will occur. In the event that the state land planning agency issues a Notice of Intent to find a plan or amendment not in compliance with the Community Planning Act, the Notice is to be forwarded to the Division of Administrative Hearings for proceedings. In such a case, no new issues may be alleged to find the plan or amendment not in compliance unless included in a pleading within 21 days after the Notice is issued, unless the party seeking to introduce the new issues establishes good cause, which does not include excusable neglect.

Depending on the challenge, the standard of proof is different:

- In the case of a challenge by an affected person, the plan or amendment is in compliance if the compliance determination was fairly debatable.
- Where the state land planning agency challenges a plan or amendment, there is a presumption that the local government’s decision is correct unless shown by a preponderance of the evidence that the plan is not in compliance.
- Where the question in a petition filed by the state land planning agency is internal consistency, the local government’s decision is upheld if it was fairly debatable.
- In a question of the determination that an important state resource or facility is adversely impacted, the state must prove its case by clear and convincing evidence.

Depending on the Administrative Law Judge’s recommendation, the post hearing process differs. If the plan or amendment is recommended to be found “not in compliance,” the recommended order is sent to the Administration Commission for entry of a final order, which is to be entered within 45 days or receipt of the recommended order. If the Administrative Law Judge recommends a finding of “in compliance,” the

recommended order is sent to the state land planning agency. If the state land planning agency disagrees with the recommendation, it shall, within 30 days, refer the recommended order and its determination to the Administration Commission for final agency action; however, if the state land planning agency agrees with the recommended order, it must issue a final order within 30 days of receipt of the recommended order.

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