Akerman Practice Update

FLORIDA LAND USE & ENTITLEMENTS

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Next Generation of Growth Management Laws Passes Florida Legislature

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The 2011 Session definitely lived up to expectations with respect to major growth management legislation. The "Community Planning Act" was finally passed as HB 7207 after having been debated in the last days of session as HB 7129. This landmark legislation significantly limits the role of state agencies and should shorten the time needed to process plan amendments. It revises or removes some of the key hurdles for many development projects, including demonstrated "need" and state-mandated concurrency for transportation, schools, and parks and recreation facilities. The Act also incorporates substantial changes to Chapter 380 that should result in fewer projects being required to go through the Development of Regional Impact (DRI) process. In addition, the legislation provides approval extensions for some projects.

Although details continued to be tweaked and provisions added until the final days of the session, the legislation that was adopted was largely consistent with the Proposed Committee Bill 11-04, introduced in the House Community and Military Affairs Subcommittee in March. The bill must still go to the Governor for approval, but given his expressed concerns on the state's role in growth management, there is little chance he will veto it. It will take effect immediately upon becoming law.

This is extensive and far-reaching legislation that rewrites major portions of the statute and modifies others. The following summary highlights some of the major features.

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Comprehensive Plan Requirements

- Rule 9J-5, Florida Administrative Code (the "Minimum Criteria Rule"), is repealed, but limited portions are incorporated into the statute. The rule was in need of revision and updating to reflect statutory changes over the years and its repeal will render this unnecessary and will arguably provide local governments with more flexibility in applying the statute.
- State-mandated concurrency for transportation, public school facilities, and parks and recreation is repealed. This allows local governments to choose whether to retain concurrency for these facilities in their plans. Local repeal of concurrency requires a comprehensive plan amendment, which is not subject to state review.
- Requirements for optional transportation and school concurrency are added to the statute, including the requirement to allow "pay-and-go" for transportation concurrency using proportionate share mitigation.
- The methodology for proportionate share mitigation and its application are defined to ensure that development is not required to pay for existing deficiencies or more than its proportionate share, to address issues regarding mitigation for cumulative impacts, and to ensure dollar-for-dollar credit for impact fees and other mitigation paid.
- The requirement for a public school facilities element, which was added to the statute in 2005, is repealed.
- The "demonstrated need" criterion is revised to focus on accommodating, rather than limiting growth. The new language states, "The amount of land designated for future land uses should allow the operation of real estate markets to provide adequate choices." The Act specifically requires that the future land use element "…accommodate at least the minimum amount of land required to accommodate the medium projections of the University of Florida's Bureau of Economic and Business Research for at least a 10-year planning period," unless otherwise limited under the Areas of Critical State Concern program. Many plan amendments seeking increases in density and intensity have been found not in compliance by DCA based on the "need" issue and the legislative change will therefore remove a major obstacle for many projects, particularly those in greenfield areas.
- Urban sprawl indicators, which were previously found in Rule 9J-5, are incorporated into statute. There is also a methodology for determining whether an amendment discourages sprawl.
- The financial feasibility requirement for local plans is repealed. The requirement has been criticized as unrealistic and the deadline for compliance has been

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postponed by the legislature in past sessions. Under the Act, improvements needed within the next 5 years must be identified, listed as funded or unfunded, and given a level of priority for funding.

- There is a significant reduction in requirements for Evaluation and Appraisal Reports (EARs). Every 7 years, the local government must now simply evaluate whether amendments are necessary to reflect changes in state requirements since the last update and notify the state land planning agency in writing of its determination. Needed plan amendments must be transmitted within 1 year and failure to submit the letter or to update the plan results in a prohibition on plan amendments until the local government complies.
- Numerous changes are made in requirements for the Rural Land Stewardship Area (RLSA) and Optional Sector Plan programs, including:
  - Removal of pilot status for the sector plan program and of the two-stage plan amendment process. A plan amendment is required only at the initial stage of adoption of the "long-term master plan." The detailed specific area plan is done by local ordinance.
  - Removal of the requirement for a preliminary agreement with the state land planning agency prior to designating an RLSA.
- Local referendum processes for development orders or local plan amendments are prohibited. This precludes local Hometown Democracy-type initiatives.

Comprehensive Plan Process

- The "expedited state review process" will be used for most comprehensive plan amendments throughout the state. The expedited process requires that proposed plan amendments be transmitted to the reviewing agencies, who may provide comments to the local government within 30 days. After adoption, there is another 30-day period within which the state or third-parties can file challenges. No Objections, Recommendations and Comments (ORC) Report or Notice of Intent is issued. The expedited process reduces the minimum state review period by approximately two months.
- Certain amendments must use the "state coordinated review process", which is similar to the plan review process currently in place. It is to be used only for plan amendments that:
  - are in an area of critical state concern
  - propose a rural land stewardship area or sector plan
  - update a comprehensive plan based on an evaluation and appraisal report
  - adopt a new plan for a newly incorporated municipality
- State agency comments on plan amendments are limited to important state resources and facilities that will be adversely impacted by the amendment.

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The bill defines what subjects each agency may address. Local government can challenge whether the state comment is based on an important state resource or facility. Comments by regional planning councils and by other local governments are also limited under the bill.

- The twice-per-year limitation on large-scale plan amendments is repealed. This provides local governments flexibility in the processing of amendments and could thereby reduce the time needed to obtain approvals.
- Local governments must adopt plan amendments (except those related to DRIs) within 180 days of receiving agency comments or the amendment is deemed withdrawn. The deadline may be extended with concurrence from affected parties. While there has been a deadline for adoption of plan amendments (in most cases 60 days after receiving the Department of Community Affairs' Objections, Recommendations, and Comments Report), there has been no penalty for going beyond the deadline and many adoption hearings have been delayed considerably, sometimes for years.
- The small-scale amendment cycle is revised to include a higher annual total acreage and fewer restrictions, adding flexibility in the use of small-scale plan amendments.
- The standard of review for challenges is changed: For third party challenges, the plan amendment (including small-scale amendments) is determined to be in compliance if "fairly debatable." For state land planning agency challenges, the local government determination is presumed to be correct, unless shown not in compliance by a "preponderance of the evidence."

Developments of Regional Impact

- The criteria and thresholds for DRIs are revised, reducing the number of projects that must go through the DRI and substantial deviation processes. Changes include:
  - Solid mineral mines, industrial use, hotels and motels and multi-screen movie theaters are exempted from the DRI process.
  - The substantial deviation criteria for commercial, office, and attraction/recreation facilities are increased.
  - If other criteria are also met, a DRI can be determined to be essentially built-out if the amount of proposed development remaining to be built is less than 40% (rather than 20%) of any applicable DRI threshold.
  - Voluntary sharing of infrastructure is removed from the aggregation criteria and 3 (instead of 2) aggregation criteria must be met to establish a unified plan of development when assessing a project against DRI review thresholds.

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- The dense urban land area (DULA) criteria are moved from Chapter 163 to Chapter 380 and some of the provisions refined. The DULAs, established by Chapter 2009-96, Laws of Florida, are no longer relevant to Chapter 163 since state-mandated transportation concurrency is repealed under the new Act. The DRI exemptions in DULAs remain relevant and in place.

Extensions

- A 4-year extension is granted to valid DRIs that is not a substantial deviation, does not count against the substantial deviation threshold when considering subsequent extensions and is not subject to additional DRI review. The developer must notify the local government in writing by December 31, 2011 in order to exercise the extension. If construction on a phase has commenced, mitigation requirements for that phase are not extended if the local government notifies the developer by December 1, 2011 that those mitigation funds have already been committed to a construction project.
- Additional 2-year extensions are granted for certain permits and other authorizations. One of these extensions includes permits and authorizations with expiration dates from January 1, 2012 through January 1, 2014, which were not eligible under previous legislative extensions. The holder of the permit or authorization must notify the authorizing agency in writing by December 31, 2011 in order to exercise the extension(s). The extensions provided in the Act cannot be used in conjunction with extensions under Chapter 2009-96, Laws of Florida (SB 360) or 2010-147, Laws of Florida, to exceed a total of four years. One of the 2-year extensions cannot be combined with the 4-year extension granted by the Act to DRIs.

Other Changes

- The maximum duration of development agreements is increased from 20 to 30 years unless extended by mutual consent.
- The state land planning agency must review pending not-in-compliance cases within 60 days of the Act's effective date and determine whether to dismiss or amend the state's petition consistent with application of the new requirements of the Act. If the state land planning agency determines the petition should be amended, it must do so within 30 days of that determination or the case will be dismissed. The effect of this provision is a retroactive application of the legislation to pending cases.

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Governmental Reorganization

The Legislature also approved Governor Scott's plan to abolish the Department of Community Affairs (SB 2156). Assuming the legislation is not vetoed, it will send the various divisions and functions into a variety of different state agencies. The Division of Community Planning, which oversees comprehensive planning and DRIs, will be placed in a new Department of Economic Opportunity, along with the Division of Housing and Community Development and the Florida Housing Finance Corporation. The Division of Emergency Management will be transferred to the Executive Office of the Governor. The Florida Building Commission will be housed with the Department of Business and Professional Regulation. Other DCA programs will be transferred to the Department of Environmental Protection.

The Community Planning Act is an far-reaching and landmark piece of legislation that, if not vetoed, will substantially revise Florida's complex growth management laws. Many of the basic requirements and features of the current law will remain, but the changes will provide opportunities for existing, pending and new development projects and will allow local governments more flexibility and control at the local level.

Akerman can assist development interests and local governments in understanding and taking advantage of these new opportunities. Akerman also offers a full array of lobbying services to represent clients' interests with regulatory agencies and in the legislative arena.

For more information, please contact a member of our Florida Land Use & Entitlements practice.

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