

**DEVELOPMENTS OF REGIONAL IMPACT
AND
PRE-DEVELOPMENT AGREEMENTS
WHAT'S NEW AND WHY**

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1. INTRODUCTION

For the first time in years, there is a lot going on in the DRI area. DCA has two current appeals of DRIs and a third on the way. We have a mess with the statutory 3-year buildout extension which the Legislature intended to be automatic and it will have to be addressed again this Session, DRI affordable housing is in flux and the costs of dealing with transportation, potable water and schools - adequate public infrastructure - are through the roof.

2. CURRENT DCA APPEALS OF DRIs

After two years of challenging only the comprehensive plan amendments which accompanied DRIs (and therefore kept the DRI development orders from becoming effective), DCA has recently flexed its muscle and appealed two DRIs pursuant to s.380.07. We are told a third appeal is on the way.

The first is the Timucuan DRI. This project is about 6,000 acres located north of the Jacksonville International Airport between U.S. 1 and Interstate 95 within the City of Jacksonville. It's a mixed use project and intended to satisfy its transportation concurrency requirements by payment of a proportionate share pursuant to s.163.3180(12). The DO amount comes to \$97.6 Million and \$94.9 of that is for an early construction of a 4-lane divided Braddock Parkway Regional West-East arterial to connect U.S. 1 and I-95. The appeal indicates that the actual proportionate share amount was reduced from \$151.7 Million to \$97.6 due to benefits awarded to the developer for the early construction of Braddock Parkway.

DOT was very much in favor of construction of this parkway six years early. DCA has appealed because the calculation method to reduce the proportionate share amount from \$151.7 Million to 97.6 Million tied to early construction of Braddock has no basis in statute or rule and is inconsistent with the formula adopted in DCA Rule 9J-2.045.

The second grounds for appeal were that there were \$2.7 Million left over after construction of the Braddock Parkway, pursuant to the DO, and the money was to be paid to the City prior to commencement of Phase 2. The City would then get input from DOT and the Northeast Florida Regional Planning Council on how to spend these dollars. The DCA appeal says that the funds or lands contributed must be expressly designated and used to mitigate impacts reasonably attributed to the proposed development. By simply designating the money to be paid to the City prior to a certain phase and requiring the City to get input fails to meet this test and the allocation of the proportionate share is being left to a later process outside of the DO. Rumor has it that DOT considered intervening but decided otherwise.

The second appeal is of the Mariposa DRI in Putnam County. There is also a challenge to the underlying comprehensive plan but we are told the DRI DO takes the proportionate share contribution and uses it to build a road from a regionally significant roadway to the north of the property into the property. The road is not continued through the property to a regionally significant road south of the property. DCA thinks of it as a driveway.

We know of several others that would have been appealed because the underlying comprehensive plan amendments were found not in compliance but for language in the DRI development order that make the DO effective date upon the final effective of the underlying comprehensive plan amendment. Under those circumstances, DCA did not have a legal need to appeal the DO to keep it from going into effect while the comprehensive plan issues were being worked out or litigated.

3. DRI 3-YEAR BUILDOUT EXTENSION

During 2007, the Florida Legislature amended s.380.06(19)(c), F.S., to provide that:

In recognition of the 2007 real estate market conditions, all phase, buildout and expiration dates for projects that are developments of regional impact and under active construction on July 1, 2007, are extended for three years regardless of any prior extension. The three-year extension is not a substantial deviation, is not subject to further development-of-regional-impact review and may not be considered when determining whether a subsequent extension is a substantial deviation under this section.

Sounds pretty simply, right? Local governments did not agree. Several DRI developers throughout the State choose to notify the local government, the applicable RPC and DCA by letter that their respective projects were eligible for this and sought the extension. They also listed any permits under which “active construction” was going on as of July 1 and many included photos. Some local governments, such as Hillsborough County, immediately wrote back that the change had been made and those DRI developers then recorded a Notice of Change in the Public Records. Manatee County required that the Board of County Commissioners adopt a resolution to authorize and direct the Planning Director to memorialize the statutory extensions for each DRI that sought one but treated the action as a legislative mandate. Marion County has not responded and the Withlacoochee Regional Planning Council has said for months that it is seeking direction from DCA.

Pasco County has caused a stir. Pasco has claimed in a series of long memos placed before the County Commission that the Legislature only dealt with the State DRI requirements and that did not stop the locals from imposing other restrictions based on their respective concurrency management systems. Accordingly, Pasco said it would consider such a change but an applicant had to redo the traffic for the 3-year extension and make whatever improvements or mitigation required by the local concurrency management system. This brought everything in Pasco to a halt.

This will be a continuing saga in the Legislature this year.

4. AFFORDABLE HOUSING RULE

Two years ago, the Florida House formed a special interim study on DRI Affordable Housing. It was mainly focused on methodology and, while there was agreement on some points between the players, there was significant disagreement on others such as the assumption that all of the employees of new non-residential do not already have adequate housing.

Under Secretary Thaddeus Cohen, a commitment was made to pull the existing DRI rule which has only been used once and come up with a new rule. At that point the East Central RPC would drop its rule providing for the more usable methodology. DCA has now hired an outside consultant to do a study and is expecting something this year. Early reports are that there will be significant changes. But the DRI developers feel that they have not been adequately consulted during this process. So stay tuned.

5. ADEQUATE PUBLIC FACILITIES

Most DRIs hit the comp plan non-compliance rocks on the underlying land use amendment not being supported by data and analysis showing that there are adequate public facilities such as roads, potable water and schools. The analysis also often includes sewer. But, the one item which has caused the biggest dollar signs to date has been transportation.

Up until this year, a DRI was unable to support a comprehensive plan amendment with a proportionate share mitigation agreement. This was fixed with an amendment to s.163.3177(3)(e), F.S., which states:

At the discretion of the local government and notwithstanding the requirements of this subsection, a comprehensive plan, as revised by an amendment to the plan's future land use map, shall be deemed to be financially feasible and to have achieved and maintained level-of-service standards as required by this section with respect to transportation facilities if the amendment to the future land use map is supported by a:

1. Condition in a development order for a development of regional impact or binding agreement that addresses proportionate-share mitigation consistent with s.163.3180(12); or

2. Binding agreement addressing proportionate fair-share mitigation consistent with s.163.3180(16)(f) and the property subject to the amendment to the future land use map is located within an area designated in a comprehensive plan for urban infill, urban redevelopment, downtown revitalization, urban infill and redevelopment, or an urban service area. The binding agreement must be based on the maximum amount of development identified by the future land use map amendment or as may be otherwise restricted through a special area plan policy or map notation in the comprehensive plan.

Note that DRIs can have the commitments in a binding development agreement or in a DO. A DO is actually a better way to go because you may not be required to put up financial assurances.

Also, in looking at this, note that s.163.3180(12) which used to require that the DRI be mixed use and used to require that the locals adopt a comprehensive plan amendment allowing for a payment of a prop share has been totally changed. You can be an industrial DRI next to a residential project and no comprehensive plan amendment is necessary to allow you to do prop share. You have it as a matter of right but using prop share to support a comprehensive plan amendment is at the discretion of the local government. It reads:

A development of regional impact may satisfy the transportation concurrency requirements of the local comprehensive plan, the local government's concurrency management system, and s.380.06 by payment of a proportionate-share contribution for local and regionally significant traffic impacts, if:

(a) The development of regional impact which, based on its location or mix of land uses, is designed to encourage pedestrian or other nonautomotive modes of transportation;

(b) The proportionate-share contribution for local and regionally significant traffic impacts is sufficient to pay for one or more required mobility improvements that will benefit a regionally significant transportation facility;

(c) The owner and developer of the development of regional impact pays or assures payment of the proportionate-share contribution; and

(d) If the regionally significant transportation facility to be constructed or improved is under the maintenance authority of a governmental entity, as defined by s.334.03(12), other than the local government with jurisdiction over the development of regional impact, the developer is required to enter into a binding and legally enforceable commitment to transfer funds to the governmental entity having maintenance authority or to otherwise assure construction or improvement of the facility.

The proportionate-share contribution may be applied to any transportation facility to satisfy the provisions of this subsection and the local comprehensive plan, but, for the purposes of this subsection, the amount of the proportionate-share contribution shall be calculated based upon the cumulative number of trips from the proposed development expected to reach roadways during the peak hour from the complete buildout of a 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 the adopted level of service, multiplied by the construction cost, at the time of developer payment, of the improvement necessary to maintain the adopted level of service. For purposes of this subsection, "construction cost" includes all associated costs of the improvement. Proportionate-share mitigation shall be limited to ensure that a development of regional impact meeting the requirements of this subsection mitigates its impact on the transportation system but is not responsible for the additional cost of reducing or eliminating backlogs. This subsection also applies to Florida Quality Developments pursuant to s.380.061 and to detailed specific area plans implementing optional sector plans pursuant to s.163.3245.

Note also that DRI traffic has a significance factor of 5%. When you are doing your traffic for a comprehensive plan amendment you will use the significance factor in the local concurrency ordinance not the 5% and usually it will be around 3% but can be at 1%.

Recently we have discovered that modeling and monitoring conditions which are fairly standard in new DRIs have created problems because non-approving local governments do not include the approved trips from the DRI on their concurrency management systems. They continue to permit development on their roads which means that, when the monitoring is done, the DRI must fix roads in other jurisdictions which it thought it had covered with its traffic.

6. ORDER OF ADOPTION

Assuming you work out a proportionate share agreement, make sure that DCA has signed off on the concept (given what we are seeing with Timucuan and Mariposa) and don't just trust in the DOT and local government sign off. Then, your order of adoption will be hugely important. You will be adopting your binding proportionate share agreement (if you have one and your commitments are not in the DO) and a CIE amendment which actually places payment of the dollars in certain years and provides where those dollars are going to come from. You will have a new traffic circulation plan showing those commitments and any future roadway improvements. You will then have your comprehensive plan land use amendment which should reference the density and intensity entitlements within your DRI and not just incorporate the DRI DO itself. Finally, you move to adoption of your DRI DO.

It is not possible to file all of these plan amendments simultaneously with the NOPC or DRI DO if you are doing the concurrent adoption pursuant to s.380.06(6). However, file those you know about and make mention of others which will possibly be required to be filed. You can do the CIE and adequate public facilities changes (including traffic circulation) following the ORC Report which objects to these issues.

7. NEW DRI STATUTORY APPEAL PROCESS

Amendments in 2006 clarified the interplay between s.380.07 - the DRI appeal - and s.163.3215 - comp plan consistency challenges. The existence of those two separate statutory procedures for challenging the DRI development order created the potential for duplicative proceedings and inconsistent results. It occurred where a party was standing under s.163.3215, files a compliant challenging the development order in circuit court while a different party was standing under s.380.07 (usually DCA) files a petition with FLWAC challenging the same development order in an administrative proceeding. Both proceedings were de novo and both generally involved claims of comprehensive planning consistency. Consolidation was not available because the proceedings are in very different forms. The problem was exacerbated by the fact that parties with standing to initiate an action under s.163.3215 often did not have standing to challenge a DRI under s.180.07.

According s.380.07(3) now provides:

Notwithstanding any other provision of law, an appeal of a development order by the state land planning agency under this section may include consistency of the development order with a local comprehensive plan. However, if a development order relating to a development of regional impact has been challenged in a proceeding under s.163.6215 and a party to the proceeding serves notice to the state land planning agency of the pending proceeding under s.163.3215, the state land planning agency shall:

(a) Raise its consistency issues by intervening as a full party in the pending proceeding under s.163.3215 within 30 days after service of the notice; and

(b) dismiss the consistency issues from the development order appeal.

This provision is essentially a limited grant of standing allowing DCA to intervene in a proceeding under s.163.3215 in those cases where the requirements of the statute have been satisfied. Where the procedure is invoked, all comprehensive plan consistency challenges must be determined in a single proceeding under s.163.3215 thereby removing the risk of inconsistent results. Any issues unrelated to the consistency with the local comprehensive plan would remain pending in the s.380.07 proceeding to be determined administratively.

8. ENERGY

The East Central Florida Regional Planning Council which has always had a number of stock provisions in its proposed DOs has recently required, as of a memo dated August 20, 2007, that the following provisions will appear in as recommendations to local governments:

Recommendation #1.

Construction standards shall meet the United States Green Building Council's (USGBC) Leadership in Energy and Environmental Design (LEED) program, the Florida Green Building Coalition, the Green Building Initiative's Green Globes program, or any other nationally-recognized, green building system that is approved by the Department of Management Services DMS (DMS).

Recommendation #2.

Equipment and appliances shall, at a minimum, meet the ENERGY STAR standard.

Recommendation #3.

Construction shall be designed to meet, at a minimum, Water Star standards. (Developed by the SJRWMD)

Recommendation #4.

“Dark skies” measures shall be implemented.

9. CAPITAL IMPROVEMENT ELEMENT

We have already briefly touched on the fact that any traffic or facility mitigation required by the DRI must be included in the five-year CIE. An issue has recently been raised that DRI mitigation must cover all five years of the CIE so, if buildout is in year two, the DRI must still count, for example, background traffic through year five and mitigate for that. This is a pending issue and will be discussed at the presentation.

10. NEW REQUIREMENTS FOR e(2) CHANGES

The statute was changed in 2006 to not require an NOPC for what are referred to as e(2) changes which are the no-brainer changes. It provides:

(e)1. Except for a development order rendered pursuant to subsection (22) or subsection (25), a proposed change to a development order that individually or cumulatively with any previous change is less than any numerical criterion contained in subparagraphs (b)1.-13. and does not exceed any other criterion, or that involves an extension of the buildout date of a development, or any phase thereof, of less than 5 years is not subject to the public hearing requirements of subparagraph (f)3., and is not subject to a determination pursuant to subparagraph (f)5. Notice of the proposed change shall be made to the regional planning council and the state land planning agency. Such notice shall include a description of previous individual changes made to the development, including changes previously approved by the local government, and shall include appropriate amendments to the development order.

2. The following changes, individually or cumulatively with any previous changes, are not substantial deviations:

a. Changes in the name of the project, developer, owner, or monitoring official.

b. *Changes to a setback that do not affect noise buffers, environmental protection or mitigation areas, or archaeological or historical resources.*

c. *Changes to minimum lot sizes.*

d. *Changes in the configuration of internal roads that do not affect external access points.*

e. *Changes to the building design or orientation that stay approximately within the approved area designated for such building and parking lot, and which do not affect historical buildings designated as significant by the Division of Historical Resources of the Department of State.*

f. *Changes to increase the acreage in the development, provided that no development is proposed on the acreage to be added.*

g. *Changes to eliminate an approved land use, provided that there are no additional regional impacts.*

h. *Changes required to conform to permits approved by any federal, state, or regional permitting agency, provided that these changes do not create additional regional impacts.*

i. *Any renovation or redevelopment of development within a previously approved development of regional impact which does not change land use or increase density or intensity of use.*

j. *Changes that modify boundaries and configuration of areas described in subparagraph (b)14. due to science-based refinement of such areas by survey, by habitat evaluation, by other recognized assessment methodology, or by an environmental assessment. In order for changes to qualify under this sub-subparagraph, the survey, habitat evaluation, or assessment must occur prior to the time a conservation easement protecting such lands is recorded and must not result in any net decrease in the total acreage of the lands specifically set aside for permanent preservation in the final development order.*

k. *Changes to permit the sale of an affordable housing unit to a person who earns less than 120 percent of the area median income, provided the developer actively markets the unit for a minimum period of 6 months, is unable to close a sale to a qualified buyer in a lower income qualified income class, a certificate of occupancy is issued for the unit, and the developer proposes to sell the unit to a person who earns less than 120 percent of the area median income at a purchase price that is no*

greater than the purchase price at which the unit was originally marketed to a lower income qualified class. This provision may not be applied to residential units approved pursuant to subparagraph (b)7. or paragraph (i), and shall expire on July 1, 2009.

l. Any other change which the state land planning agency, in consultation with the regional planning council, agrees in writing is similar in nature, impact, or character to the changes enumerated in sub-subparagraphs a.-j. and which does not create the likelihood of any additional regional impact.

This subsection does not require the filing of a notice of proposed change but shall require an application to the local government to amend the development order in accordance with the local government's procedures for amendment of a development order. In accordance with the local government's procedures, including requirements for notice to the applicant and the public, the local government shall either deny the application for amendment or adopt an amendment to the development order which approves the application with or without conditions. Following adoption, the local government shall render to the state land planning agency the amendment to the development order. The state land planning agency may appeal, pursuant to s.380.07(3), the amendment to the development order if the amendment involves sub-subparagraph g., sub-subparagraph h., sub-subparagraph j., sub-subparagraph k., or sub-subparagraph l., and it believes the change creates a reasonable likelihood of new or additional regional impacts.

What does this mean about oldie-goldies and does it lessen problems caused by Bay Point?

11. ISSUES REGARDING MAP H.

To be discussed at presentation.

12. ISSUES REGARDING CHANGES TO DRIS AND WHETHER IT WILL CAUSE LOSS OF CERTAIN RIGHTS BECAUSE OF THE COMPREHENSIVE PLAN.

To be discussed at presentation.

13. ISSUES REGARDING AGGREGATION, INCLUDING MULTIPLE DRIS.

To be discussed at presentation.