CARLTON FIELDS

ATTORNEYS AT LAW

2009
Florida Legislature
Post-Session Report

Attorneys at Law with offices at:

- **Atlanta**
One Atlantic Center
1201 W. Peachtree Street,
Suite 3000
Atlanta, GA 30309-3455
866.755.9191

- **Miami**
4000 International Place
100 SE Second Street
Miami, FL 33131-2114
800.486.0140

- **Orlando**
CNL Center at City Commons
450 S. Orange Avenue, Suite 500
Orlando, FL 32801-3336
888.849.9191

- **St. Petersburg**
One Progress Plaza
200 Central Avenue, Suite 2300
St. Petersburg, FL 33701-4352
888.821.9191

- **Tallahassee**
215 S. Monroe Street, Suite 500
Tallahassee, FL 32301-1866
888.224.9191

- **Tampa**
4221 W. Boy Scout Boulevard,
Suite 1000
Tampa, FL 33607-5780
888.223.9191

- **West Palm Beach**
CityPlace Tower
525 Okeechobee Boulevard,
Suite 1200
West Palm Beach, FL 33401-6350
888.659.9191

- **Website**
www.CarltonFields.com

GROWTH MANAGEMENT, ENVIRONMENTAL, NATURAL RESOURCES, REAL PROPERTY, & TRANSPORTATION

▪ HB 73
Permit Process for Economic Development

This bill creates s. 380.0657, F.S., the "Mike McHugh Act", an expedited permitting process for economic development projects. It requires the Department of Environmental Protection or the appropriate water management district to adopt programs to expedite the processing of environmental resource permits and wetland resource permits. This streamlining process is specifically targeted for economic development projects that have been identified by a municipality or county as meeting the definition of "target industry business". It provides for a mandatory pre-application review process and it specifies the time period in which permits must be issued.

▪ CS/CS/HB 167
Energy-efficient Appliance Rebate Program

This bill directs the Florida Energy and Climate Commission (Commission) to develop and administer a consumer rebate program for energy-efficient residential appliances consistent with federal guidance or regulations. The commission is authorized to adopt rules designating eligible appliances, rebate amounts, and the administration of the issuance of rebates. The commission may also enter into contracts or agreements to administer this new section.

The bill appropriates $150,000 to the commission from the General Revenue Fund for FY 2009-2010. The release of the appropriation to the commission is contingent upon submission of a report by the commission to the Legislative Budget Commission certifying that the creation of Florida's rebate program meets the federal requirements, including those of the American Recovery and Reinvestment Act of 2009. Pursuant to current federal law, in order to implement the rebate program and receive federal funding, the state must show that it will use the allocation to supplement, but not supplant, funds made available to carry out the state's program. The federal allocation may be used to pay up to 50 percent of the cost of establishing and carrying out the state rebate program. The U.S. Department of Energy is currently developing guidelines for state rebate programs to be eligible for funding under the American Recovery and Reinvestment Act of 2009. The commission estimates that Florida's share of the federal funding will be about $18 million.

▪ CS/CS/HB 227
Impact Fees; Burden of Proof

This bill amends s. 163.31801, F.S., dealing with impact fees. This bill creates a "preponderance of the evidence" standard of review for challenges to impact fees. The language places the burden on the government to prove by a preponderance of the evidence that the imposition or amount of the impact fee meets the requirements of state legal precedent or the statute governing impact fees. In addition, the bill precludes the court from using a deferential standard.

▪ CS/CS/SB 360
Growth Management

This bill amends a number of provisions of law with the goal of stimulating economic development, promoting development in urban areas, and providing for affordable housing.

➢ *Urban Service Areas*

The bill amends s. 163.3164, F.S., to change "existing urban service area" to "urban service area" and to redefine the term to include built-up areas where public facilities and services, including central water and sewer and roads are already in place or are committed within the next three years. The definition also grandfathers-in existing urban service areas or their functional equivalent within counties that qualify as dense urban land areas. This definition is important because for counties that are dense urban land

areas, the area within the urban service area will become automatically exempt from transportation concurrency and development-of-regional impact review.

➢ *Dense Urban Land Areas*
A definition of a "dense urban land area" is created.

The definition includes:

- A municipality that has an average population of at least 1,000 people per square mile and at least 5,000 people total;
- A county, including the municipalities located therein, which has an average population of at least 1,000 people per square mile; and
- A county, including the municipalities located therein, which has a population of at least 1 million.

Those jurisdictions that qualify as dense urban land areas will be ascertained by the Office of Economic and Demographic Research, and the designation will become effective upon publication on the state land planning agency's website. To support the Office of Economic and Demographic Research, municipalities that change their boundaries will be required to send the boundary changes and information on the population effect to the Office of Economic and Demographic Research.

➢ *Capital Improvements Element*
The bill changes the deadline to submit the CIE financial feasibility element and the implementation of the associated penalty from December 1, 2008 to December 1, 2011.

➢ *School Concurrency*
The bill changes the penalties triggered when a local government or a school board fails to enter into an approved interlocal agreement or fails to implement school concurrency. The local government will be subject to the penalties set forth in s. 163.3184(11)(a) and (b), F.S., and the school board will be subject to penalties set forth in s. 1008.32(4), F.S. The bill gives a waiver from school concurrency when student enrollment is less than 2,000 even if the growth rate is more than 10 percent. The bill specifies that school districts must include certain relocatables as student capacity for purposes of school concurrency and that the construction of charter schools counts as mitigation for school concurrency.

➢ *Transportation Concurrency Exception Areas*
The bill amends s. 163.3180, F.S., to designate the following areas as transportation concurrency exception areas (TCEAs):

- A municipality that qualifies as a dense urban land area;
- An urban service area that has been adopted into the local comprehensive plan and is located within a county that qualifies as a dense urban land area; and
- A county, such as Pinellas and Broward, that has a population of at least 900,000 and qualifies as a dense urban land area, but does not have an urban service area designated in its comprehensive plan.

A municipality that does not qualify as a dense urban land area may designate the following areas in its comprehensive plan as transportation concurrency exception areas:

- Urban infill as defined in s. 163.3164(27), F.S.;
- Community redevelopment as defined in s. 163.340(10), F.S.;
- Downtown revitalization as defined in s. 163.3164(25), F.S.; U
- Urban infill and redevelopment as defined in s. 163.2517, F.S.; or
- Urban service areas as defined in s. 163.3164(29), F.S.

A county that does not qualify as a dense urban land area may designate in its comprehensive plan as transportation concurrency exception areas:

- Urban infill as defined in s. 163.3164(27), F.S.;

- Urban infill and redevelopment as defined in s. 163.2517, F.S.; or
- Urban service areas as defined in s. 163.3164(29), F.S., or urban service areas under s.163.3177(14), F.S.

TCEAs are not created for designated transportation concurrency districts within a county, such as Broward County, that has a population of at least 1.5 million that uses its transportation concurrency system to support alternative modes of transportation and does not levy transportation impact fees. TCEAs are also not created for a county such as Miami-Dade that has exempted more than 40 percent of its urban service area from transportation concurrency for purposes of urban infill.

Any local government that has a transportation concurrency exception area under one of these provisions must, within 2 years, adopt into its comprehensive plan land use and transportation strategies to support and fund mobility within the exception area, including alternative modes of transportation. If the local government fails to adopt such a plan it may be subject to the sanctions set forth in s. 163.3184(11)(a) and (b), F.S.

If a local government uses s. 163.3180(5)(b)6., F.S., the existing method of creating TCEAs, it must first consult the state land planning agency and the Department of Transportation regarding the impact on the adopted level-of-service standards established for regional transportation facilities as well as the Strategic Inter-modal System (SIS).

Subsection (10) of s. 163.3180, F.S., is amended to provide an exemption from transportation concurrency on the SIS for projects that the local government and the Office of Tourism, Trade, and Economic Development (OTTED) agree are job creation programs as described ins. 288.0656, F.S. (for REDI projects), or s. 403.973, F.S. (expedited permitting).

The bill clarifies that the designation of a transportation concurrency exception area does not limit a local government's home rule power to adopt ordinances or impose fees. The bill further clarifies that the creation of a TCEA does not affect any contract or agreement entered into or development order rendered before the creation of the transportation concurrency exception area except for developments of regional impact that choose to rescind under s. 380.06(29)(e), F.S.

The Office of Program Policy Analysis and Government Accountability must study the implementation of TCEAs and corresponding local government mobility plans and report back to the Legislature by February 1, 2015.

The bill contains a statement that within TCEAs the local government will be deemed to achieve and maintain level-of-service standards. It also includes a statement that level-of-service standards transportation for development of regional impact purposes must be the same as for transportation concurrency.

➢ *Comprehensive Plan Amendments*
The bill requires local governments to make concurrent zoning and comprehensive plan changes upon the request of an approved application. The bill also exempts urban service areas from the twice a year restriction on plan amendments and gives them expedited review.

Any local government may use the alternative state review process to designate urban service areas as defined in s. 163.3164(29), F.S.

➢ *Development of Regional Impact Exemptions*
Section 380.06(29), F.S., is added to exempt developments from the development of regional impact process in the following areas:

- Municipalities that qualify as a dense urban land area;
- An urban service area that has been adopted into the local comprehensive plan and is located within a county that qualifies as a dense urban land area; and

- A county, such as Pinellas and Broward, that has a population of at least 900,000 and qualifies as a dense urban land area, but does not have an urban service area designated in its comprehensive plan.

Developments that meet the DRI thresholds and are located partially within a jurisdiction that is not exempt still require DRI review. DRIs that had been approved or that have an application for development approval pending when the exemption takes effect may continue the DRI processor rescind the DRI development order. Developments that choose to rescind are exempt from the twice a year limitation on plan amendments for the year following the exemption. In exempt jurisdictions, the local government would still need to submit the development order to the state land planning agency for any project that would be larger than 120 percent of any applicable DRI threshold and would require DRI review but for the exemption. The state land planning agency would still have the right to challenge such development orders for consistency with the comprehensive plan.

If a local government that qualifies as a dense urban land area for DRI exemption purposes is subsequently found to be ineligible for designation as a dense urban land area, any development located within that area which has a complete, pending application for authorization to commence development may maintain the exemption if the developer is continuing the application process in good faith or the development is approved. This section does not limit or modify the rights of any person to complete any development that has been authorized as a DRI. An exemption from the DRI process does not apply within the boundary of any area of critical state concern, within the boundary of the Wekiva Study Area, or within 2 miles of the boundary of the Everglades Protection Area.

➢ *Intergovernmental Coordination*
The bill requires the intergovernmental element of a local government's comprehensive plan to have a dispute resolution process and requires unresolved disputes to go through mandatory mediation.

➢ *Ordinances Levying Impact Fees*
Section 163.31801(3)(d), F.S., is modified to allow a local government to decrease, suspend, or eliminate an impact fee without waiting 90 days.

➢ *The Definition of "In Compliance"*
Section 163.3184, F.S., is amended to delete the modifying language that should have been deleted with the reference to s. 163.31776, F.S., when the statute was revised in 2006.

➢ *Security Cameras*
The bill creates a new section of law that prevents local governments from requiring that a business expend funds for security cameras. This does not limit the ability of a county, municipality, airport, seaport, or other local governmental entity to adopt standards for security cameras.

➢ *Mobility Fee Study*
The bill requires the Department of Transportation and the Department of Community Affairs to continue their mobility fee studies with the goal of developing a mobility fee that can replace the existing transportation concurrency system.

The mobility fee should be designed to:

- Provide for mobility needs,
- Ensure that development provides mitigation for its impacts on the transportation system in approximate proportionality to those impacts,
- Fairly distribute the fee among the governmental entities responsible for maintaining the impacted roadways, and
- Promote compact, mixed-use, and energy-efficient development.

The bill requires the Department of Community Affairs and the Department of Transportation to submit to the Legislature no later than December 1, 2009, a final joint report on the mobility fee methodology study, complete with recommended legislation and a

plan to implement the mobility fee as a replacement for the existing local government adopted and implemented transportation concurrency management systems. The final joint report shall also contain an economic analysis of implementation of the mobility fee, activities necessary to implement the fee, and potential costs and benefits at the state and local levels and to the private sector.

➢ *Extension of Permits*

The bill creates an undesignated section of law to provide a retroactive 2-year extension and renewal from the date of expiration for:

- Any permit issued by the Department of Environmental Permitting or a Water Management District under ch. 373, part IV, F.S.,
- Any development order issued by the DCA pursuant to s. 380.06, F.S., and
- Any development order, building permit, or other land use approval issued by a local government which expired or will expire on or after September 1, 2008 to January 1, 2012. For development orders and land use approvals, including but not limited to certificates of concurrency and development agreement, the extension applies to phase, commencement, and build-out dates, including a build-out date extension previously granted under s. 380.016(19)(c), F.S.

The conversion of a permit from the construction phase to the operation phase for combined construction and operation permits is specifically provided for. The completion date for any mitigation associated with a phased construction project is extended and renewed so the mitigation takes place in the appropriate phase as originally permitted. Entities requesting an extension and renewal must notify the authorizing agency in writing by December 31, 2009, and must identify the specific authorization for which the extension will be used.

Exceptions to the extension are provided for certain federal permits, and owners and operators who are determined to be in significant non-compliance with the conditions of a permit eligible for an extension. Permits and other authorizations which are extended and renewed shall be governed by the rules in place at the time the initial permit or authorization was issued. Modifications to such permits and authorizations are also governed by rules in place at the time the permit or authorization was issued, but may not add time to the extension and renewal.

➢ *State Allocation Pool – Private Activity Bonds*

The bill limits the Florida Housing Finance Corporation's access to the State Allocation Pool for private activity bonds permitted to be issued in the state under the Internal Revenue Code to the amount of the initial allocation authorized under s. 159.804, F.S. After the initial allocation, the corporation may not receive more than 80 percent of the amount remaining in the state allocation pool on November 16th of each year. The corporation may also not receive more than 80 percent of any additional amounts that become available during each year. However, the limitation does not apply to the distribution of the unused allocation of the state volume limitation to the corporation as provided in s. 159.91(2)(b), (c), and (d), F.S.

➢ *Community Land Trusts*

Section 193.018, F.S., is created to provide for the assessment of structural improvements, condominium parcels, and cooperative parcels on land owned by a community land trust and used to provide affordable housing. A community land trust must be a nonprofit entity that qualifies as a charitable entity under s. 501(c)(3) of the Internal Revenue Code and must have as one of its purposes the acquisition of land to be held in perpetuity for the primary purpose of providing affordable housing. The responsibility of the community land trust to convey structural improvements, condominium parcels, or cooperative parcels to persons or families who are income-qualified for affordable housing is codified in statute. The structural improvements or parcels being conveyed must be subject to a ground lease of at least 99 years, and the ground lease must contain a formula that limits the resale amount. The community land trust retains the first right of purchase at the time the structure or parcels are sold.

For purposes of assessing improvements or parcels conveyed subject to a ground lease, the property appraiser must assess based on the resale restrictions and limited uses contained in the lease. A lease, an amendment or supplement to the lease, or a memorandum documenting the restrictions contained in the lease are deemed land use regulations during the term of the lease if such lease or documents are recorded in the official public records of the county in which the affected property is located.

➢ *Ad Valorem Tax Exemption for Affirmative Steps Taken to Provide Affordable Housing*
The bill amends s. 196.196, F.S., to provide that property owned by an exempt organization qualified as a charitable organization under s. 501(c)(3) of the Internal Revenue Code is used for a charitable purpose and is exempt from ad valorem taxes if the organization has taken affirmative steps to prepare the property for use as affordable housing for income-qualified persons. Affirmative steps include environmental or land use permitting activities, creation of architectural plans or schematic drawings, land clearing or site preparation, construction or renovation activities, or other similar activities that demonstrate a commitment of the property to providing affordable housing.

If property granted an exemption and is transferred for purposes other than the provision of affordable housing, or if the property is not actually used as affordable housing within 5 years after the exemption is granted, the property appraiser must record a tax lien against the property, and the property owner is subject to taxes otherwise due and owing for failure to use the property for the purpose for which the exemption is granted. The organization owning the property is subject to the taxes otherwise due and payable as a result of the failure to use the property for the exempt purpose. Interest on such taxes at 15 percent per annum and the organization is further subject to a penalty of 50 percent of the taxes owed. The 5-year limitation may be extended if the property continues to the affirmative steps to develop the property for affordable housing.

➢ *Affordable Housing – Limited Partnership*
Section 196.1978, F.S., is amended to extend the affordable housing property ad valorem tax exemption to property that is held for the purpose of providing affordable housing to income- qualified persons. If the property is owned by a Florida-based limited partnership, the sole general partner of which is a not-for-profit corporation, or if the property is owned by a nonprofit entity that is a not-for-profit corporation qualified as charitable under s. 501(c)(3) of the Internal Revenue Code, and that is in compliance with the Revenue Procedure Low-Income Housing Guidelines as published by the Internal Revenue Service. Any property owned by a limited partnership which is disregarded as an entity for federal income tax purposes will be treated as if owned by its sole general partner.

➢ *Land Acquired for Residential Housing Projects*
The bill amends s. 212.055, F.S., to provide that the expenditure of local government infrastructure surtaxes to acquire land which will be used for a residential housing project is an authorized use of the surtax under specified conditions. At least 30 percent of the housing units in the project must be affordable to specified individuals and families and the land the project is constructed on must be owned by a local government or a special district that has entered into an interlocal agreement with a local government to provide such housing. The local government or the special district may enter into a ground lease with any entity for the construction of the residential housing project on land acquired from the expenditure of local infrastructure surtax proceeds.

➢ *Maintaining Density*
Section 163.3202, F.S., is amended to provide that local land development regulations that contain specific and detailed provisions necessary to implement a local comprehensive plan must also maintain the density of residential property or recreational vehicle parks if the properties are intended for residential use and are located in unincorporated areas that have sufficient infrastructure as determined by a local governing author-

ity. The properties and parks must not be located within a coastal high-hazard area.

➢ *Florida Housing Finance Corporation*
The bill revises the State Apartment Incentive Loan Program (SAIL) and the State Housing Initiatives Partnership Program (SHIP) to clarify program purposes and to allow the use of SAIL dollars for moderate rehabilitation of housing units. Projects that include green building principles, storm-resistant construction, or other elements to reduce long-term maintenance costs are projects eligible to apply for and receive SAIL funding.

The Florida Housing Finance Corporation is authorized to create criteria for contractor preference for developers and general contractors domiciled in the state, or for developers and general contractors regardless of domicile who have substantial experience in developing or building affordable housing through the corporation's programs. In determining substantial experience, the corporation must consider whether the developer or general contractor has completed at least five developments using funds provided by or administered by the corporation.

The Florida Housing Finance Corporation, other agencies that receive funds under the SHIP program, local housing finance agencies, and public housing authorities are directed to coordinate with the Department of Children and Families, and the department's agents and community-care providers to develop and implement strategies and procedures that will increase affordable housing opportunities for young adults leaving the child welfare system.

The bill makes clarifying revisions to certain definitions and provides that eligible housing for purposes of the SHIP program includes manufactured housing installed in accordance with the installation standards for mobile and manufactured homes contained in rules of the Department of Highway Safety and Motor Vehicles. Local affordable housing advisory committees are authorized to propose local housing incentive strategies in the triennial evaluation of how local governments are implementing affordable housing. Local governments are authorized to use SHIP dollars to provide a one-time relocation grant of up to $5,000 to tenants of rental properties who are evicted because the property has gone into foreclosure without the tenant's knowledge. Income-restriction exemptions for Monroe County are reinstated and retroactively applied so that housing awards may be made to Monroe County residents whose income exceeds 120 percent of the area median income.

With respect to local housing distributions, the Florida Housing Finance Corporation is authorized to distribute funds on a quarterly or more frequent basis, subject to the availability of funds. The corporation may withhold up to $5 million in funds distributed from the Local Government Housing Trust Fund to provide funding to counties and cities to purchase properties subject to a SHIP lien on which foreclosure proceedings have been instituted, and may withhold an additional $5 million to provide additional funding to counties and cities in a state of emergency. Not more than 20 percent of SHIP funds provided to counties and eligible cities maybe used for manufactured housing. Finally, school districts in areas of critical state concern are authorized to use certain property that provides affordable housing for teachers to also provide housing for essential services personnel.

▪ HB 393
Viera Stewardship District, Brevard County

The Viera Stewardship District (District) is an independent special district in Brevard County, Florida. The District consists of approximately 14,000 acres. The District's charter grants the District the powers, functions, and duties under chs.189 (Special District; General Provisions) and 190 (Community Development Districts), F.S. The District was created to provide community development systems, facilities, services, projects, improvements, and infrastructure to the area. HB 393 excludes approximately 38 acres and adds less than one acre to the District. The bill also calls for a referendum, within 90 days after becoming law, by a majority vote of the landowners within the district including the additional territory.