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An Introduction to Agreements Used in Land Development

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During the land development process, some issues between a developer and regulators can be addressed in a written agreement or contract. These agreements may be used to resolve both procedural questions and substantive issues. In any project, some types of agreements will be suitable and others will not, depending upon the developer's strategy, the regulators' attitudes, the issues involved in the project and other considerations. Here is a summary of various types of agreements that are authorized by Florida law or commonly used during the land development process.

Development Agreements

The most widely used tool is the "development agreement" authorized by the Florida Local Government Development Agreement Act, §§ 163.3220-.3243, Fla. Stat. With this agreement, a developer and a local government enter into a contract by which typically the developer agrees to provide certain infrastructure and the local government agrees to certain densities and intensities of land use. The terms must be consistent with the local comprehensive plan and land development code.

A chapter 163 development agreement allows a city or county to insulate certain development approvals against future planning and regulatory changes. Thus, the agreement provides greater predictability and stability for a developer as an inducement to provide front-end financing for public facilities needed for his or her project.

Generally, the duration of a development agreement is limited to 30 years but an unlimited number of extensions possible. There are very narrow circumstances under which a local government may abrogate a term of a developer agreement in order to protect the public health, safety and welfare. In addition, changes in state law may supersede a development agreement in limited circumstances. The state land planning agency, the Department of Economic Opportunity ("DEO"), is not required to be a signatory to a development agreement.

Development agreements have become a staple of land development since they were authorized in 1986. The limitation on the "contract zoning" doctrine implicit in the development agreements statute was intended to provide greater stability than was previously possible under Florida law for long-term projects which require major upfront infrastructure commitments by the developer.

163 Planning Agreements

In order to resolve growth management issues, local governments may enter into agreements with landowners, developers or other governmental agencies, to achieve some purposes of the state's planning laws. § 163.3171(4), Fla. Stat. These chapter 163 planning agreements have not been widely used yet but are expressly authorized to address requirements for intergovernmental coordination between local governments and other public entities. *Id.*; § 163.3177(6)(h), Fla. Stat. They also are intended to be a vehicle to implement "innovative planning and development strategies" for coastal and environmentally sensitive lands, urban infill areas, urbanizing areas, urban redevelopment areas and rural and agricultural lands. For example, they may be used to implement sector plans within multiple jurisdictions, § 163.3245(2), Fla. Stat. The agreements may also be used to allow a city to adopt an extra-jurisdictional comprehensive plan amendment and then annex property.

§ 380.032(3) Agreements

These agreements, called "380 agreements," are a tool that may be used to address substantive and procedural issues in the development-of-regional-impact ("DRI") program. They were one of the first types of contract utilized in growth management. Signatories typically include the developer or landowner and DEO and may include the applicable local governments.

These agreements can be utilized for a wide range of purposes because the statutory authority for them is so broad and flexible. The Legislature has authorized DEO to enter into any "agreements with any landowner, developer, or governmental agency as may be necessary to effectuate the provisions and purposes of this act or any rules promulgated hereunder." § 380.032(3), Fla. Stat.

DEO's predecessor agencies used this power sparingly but took an expansive interpretation of it, using it to deal with planning issues as well as regulatory matters. Agreements have been entered into to decide the timetable for filing applications for multi-phase projects, to agree what portions of a site will be developed and preserved, and to address vested rights issues. One key advantage of this provision is its flexibility.

Preliminary Development Agreements

A preliminary development agreement ("PDA") is a tool to begin actual development while a proposed project is still undergoing DRI review. § 380.06(8), Fla. Stat. A developer and DEO may enter into a PDA that allows some development on a DRI-scale project prior to final approval. However, only a portion of the project may be developed under authority of a PDA. DEO must concur that the lands to be developed are "suitable for development" and are served by "adequate public infrastructure." All other permits and approvals for the project must be obtained, and the developer proceeds at his or her own risk.

The developer must submit an application for DRI approval for the entire project within three months of signing the PDA with DEO, although extensions may be granted by DEO. Consequently, a PDA would only be available and worthwhile after a developer knew exactly what he or she wanted to develop and was prepared to start moving through the DRI review and approval process.

Aggregation Agreements

Because some developers in the past have sought to evade DRI review by claiming their project was really several small projects that did not rise to DRI status, the DRI program includes a rule called "aggregation." Under it, several ostensibly separate projects may be combined for DRI purposes, if the projects are within certain distances and have a "unified plan of development." § 380.0651(4)(a), Fla. Stat.

Aggregation can have drastically adverse consequences for sub-threshold projects and should be avoided at all costs. However, the Legislature has agreed that sometimes the public is well-served by several developers jointly planning and providing infrastructure. Accordingly, DEO and two or more developers may enter into an "aggregation agreement" allowing the developers to jointly plan, share and use public facilities and services without inadvertently providing a basis for their projects to be aggregated for DRI purposes. § 380.0651(4)(e), Fla. Stat.

Aggregation agreements have been rarely used but may authorize developers to pool impact fees or impact fee credits or use other mechanisms to finance infrastructure. Local government approval is required, and the arrangement must be in the public interest and not merely to benefit the specific projects. The utility of an aggregation agreement was brought into question by 2011 legislative changes which eliminated the joint sharing of infrastructure as a basis for DRI aggregation.

Conclusion

Florida law authorizes a diverse set of binding agreements to address discrete issues during the land development process. While each kind of agreement has limitations -- and the underlying legal rules are always different when you enter a contract with the government -- these tools should be kept in mind. Utilization of any of these tools must be based upon an analysis of specific issues after a detailed development plan and strategy has been prepared.

September 22, 2011