STORAGE NAME: h2335.ca
DATE: April 10, 2000

HOUSE OF REPRESENTATIVES
COMMITTEE ON
COMMUNITY AFFAIRS
ANALYSIS

BILL #: HB 2335 **(PCB CA-00-08)**

RELATING TO: Growth Management

SPONSOR(S): Committee on Community Affairs

TIED BILL(S): None

ORIGINATING COMMITTEE(S)/COMMITTEE(S) OF REFERENCE:

(1) COMMUNITY AFFAIRS (PRC) YEAS 10 NAYS 1
(2)
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(4)
(5)

I. SUMMARY:

This bill revises statutes relating to growth management.

This bill streamlines the local comprehensive plan amendment process and revises the requirements to qualify as a small scale amendment. In addition, the bill revises requirements relating to publication of the notice of intent by the Department of Community Affairs.

This bill provides exemptions from the Developments of Regional Impact (DRIs) process for specific types of developments. This bill streamlines the substantial deviation process for DRIs. This bill replaces DRI annual reports with biennial reports, unless otherwise specified in the development order. This bill clarifies that if the optional sector plan demonstration project is repealed, those sector plans are exempted from the DRI process.

This bill revises procedures for challenging development orders.

This bill provides for a study commission.

This bill has a positive fiscal impact on State and local governments. Please refer to the "FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT" section of this analysis.

II. SUBSTANTIVE ANALYSIS:

A. DOES THE BILL SUPPORT THE FOLLOWING PRINCIPLES:

1.	Less Government	Yes [X]	No []	N/A []
2.	Lower Taxes	Yes []	No []	N/A [X]
3.	Individual Freedom	Yes []	No []	N/A [X]
4.	Personal Responsibility	Yes []	No []	N/A [X]
5.	Family Empowerment	Yes []	No []	N/A [X]

For any principle that received a "no" above, please explain:

B. PRESENT SITUATION:

Florida has a system of laws that govern growth management that includes: the Local Government Comprehensive Planning and Land Development Regulation Act of 1985; ss. 163.3161-163.3244, F.S.; chapter 380, F.S., Land and Water Management, which includes the Development of Regional Impact and Areas of Critical State Concern programs; chapter 186, F.S., establishing regional planning councils and requiring the development of state and regional plans; and chapter 187, F.S., the State Comprehensive Plan.

Local Comprehensive Plan

The Local Government Comprehensive Planning and Land Development Regulation Act of 1985, ("Act") sections 163.3161-163.3244, Florida Statutes, (F.S.), establishes a growth management system in Florida which requires each local government (or combination of local governments) to adopt a comprehensive land use plan that includes certain required elements, such as: a future land use plan; capital improvements element; and an intergovernmental coordination element. The local government comprehensive plan is intended to be the policy document guiding local governments in their land use decision-making. Under the Act, the department was required to adopt by rule minimum criteria for the review and determination of compliance of the local government comprehensive plan elements with the requirements of the Act. Such minimum criteria must require that the elements of the plan are consistent with each other and with the state comprehensive plan and the regional policy plan; that the elements include policies to guide future decisions and programs to ensure the plans would be implemented; that the elements include processes for intergovernmental coordination; and that the elements identify procedures for evaluating the implementation of the plan. The original minimum criteria rule for reviewing local comprehensive plans and plan amendments was adopted by the department on March 6, 1986 as Rule 9J-5, Florida Administrative Code, (F.A.C.). In 1999, the department reviewed 12,000 local comprehensive plan amendments.

After a comprehensive plan has been adopted, subsequent changes are made through amendments to the plans. There are generally two types of amendments: 1) amendments to the future land use map that change the land use category designation of a particular parcel of property or area; and 2) text amendments that change the goals, objectives or policies of a particular element of the plan. In addition, every seven years a local government must adopt an evaluation and appraisal report (EAR) assessing the progress

of the local government in implementing its comprehensive plan. The local government is required, pursuant to s. 163.3191(10), F.S., to amend its comprehensive plan based on the recommendations in the report.

Comprehensive Plan Amendment Process

Under chapter 163, the process for the adoption of a comprehensive plan and comprehensive plan amendments is essentially the same. A local government or property owner initiates the process by proposing an amendment to the designated local planning agency (LPA). After holding at least one public hearing, the LPA makes recommendations to the governing body regarding the amendments. Next, the governing body holds a transmittal public hearing at which the proposed amendment must be voted on affirmatively by a majority of the members of the governing body of the local government. Following the public hearing, the local government must "transmit" the amendment to the department, the appropriate regional planning council and water management district, the Department of Environmental Protection, the Department of Transportation and any other local government or state agency that has requested a copy of the amendment.

Next, the decision is made whether to review the proposed amendment. If the local government does not request a review, the department requests that the appropriate water management districts, Department of Transportation and Department of Environmental Protection advise the DCA as to whether the amendment should be reviewed, within 21 days after transmittal of the amendment by the local government. Based on this information, the department decides whether to review the amendment. The department must review the proposed amendment if the local government transmitting the amendment, a regional planning council or an "affected person" requests review within 30 days after transmittal of the amendment. Finally, even if a request by one of the above parties is not made, the department may elect to review the amendment by giving the local government notice of its intention to review the amendment within 30 days of receipt of the amendment.

If review is not requested by the local government, the regional planning council, or any affected person, and the department decides not to review it, the local government is notified that it may proceed immediately to adopt the amendment. If, however, review of the amendment is initiated, the department next transmits, pursuant to Rule 9J-1.009, F.A.C., a copy of the amendment to: the Department of State; the Fish & Wildlife Conservation Commission; the Department of Agriculture and Consumer Affairs, Division of Forestry for county amendments; and the appropriate land planning agency. In addition, the department may circulate a copy of the amendment to other government agencies, as appropriate. Commenting agencies have 30 days from receipt of the proposed amendment to provide its written comments to the department and, in addition, written comments submitted by the public within 30 days after notice of transmittal by the local government are considered by the department as if they were submitted by governmental agencies.

Upon receipt of the comments described above, the department has 30 days to send its objections, recommendations and comments report to the local government body (commonly referred to as the "ORC Report"). In its review, the department considers whether the amendment is consistent with the requirements of the Act, Rule 9J-5, Florida Administrative Code, the State Comprehensive Plan and the appropriate regional policy plan.

After receiving the ORC report from the department, the local government has 60 days (120 days for amendments based on Evaluation and Appraisal "EAR" Reports or compliance agreements) to adopt the amendment, adopt the amendment with changes, or decide that it

will not adopt the amendment. The decision must be made at a public hearing. Within 10 days after adoption, the local government transmits the adopted plan amendment to the department, the commenting agencies, the regional planning council and anyone else who has requested notice of the adoption.

Upon receipt of a local government's adopted comprehensive plan amendment, the department has 45 days (30 days for amendments based on compliance agreements) to determine whether the plan or plan amendment is in compliance with the Local Government Comprehensive Planning and Land Development Regulation Act. This compliance determination is also required when the department has not reviewed the amendment under s. 163.3184(6), F.S. During this time period, the department issues a notice of intent to find the plan amendment in compliance or not in compliance with the requirements of the Act. The notice of intent is mailed to the local government and the department is required to publish such notice in a newspaper which has been designated by the local government.

If the department finds the comprehensive plan amendment in compliance with the Act, any affected person may file a petition for administrative hearing pursuant to ss. 120.569 and 120.57, F.S., within 21 days after publication of the notice of intent. An administrative hearing is conducted by the Division of Administrative Hearing where the legal standard of review is that the plan amendment will be determined to be in compliance if the local government's determination of compliance is fairly debatable. The hearing officer submits a recommended order to the department. If the department determines that the plan amendment is in compliance, it issues a final order. If the department determines that the amendment is not in compliance, it submits the recommended order to the Administration Commission (the Governor and Cabinet) for final agency action.

If the department issues a notice of intent to find the comprehensive plan amendment not in compliance, the notice of intent is forwarded directly to the Division of Administrative Hearing in order to hold a ss. 120.569 and 120.57, F.S., administrative proceeding. The parties to the administrative proceeding include: the department; the affected local government; and any affected person who intervenes. In the administrative hearing, the decision of the local government that the comprehensive plan amendment is in compliance is presumed to be correct and must be sustained unless it is shown by a preponderance of the evidence that the comprehensive plan amendment is not in compliance.

The administrative law judge submits his decision directly to the Administration Commission for final agency action. If the Administration Commission determines that the plan amendment is not in compliance with the Act, it must specify remedial actions to bring the plan amendment into compliance.

Local governments are limited in the number of times per year they may adopt comprehensive plan amendments. Section 163.3187, F.S., provides that local government comprehensive plan amendments may only be made twice in a calendar year unless the amendment falls under specific statutory exceptions which include, for example: amendments directly related to developments of regional impact; small scale development amendments; the designation of an urban infill and redevelopment area; and changes to the schedule of the capital improvements element.

Small Scale Development Amendments

There are two major exceptions to the process for the department's review of comprehensive plan amendments. The first exception applies to a category of comprehensive plan amendments designated by a local government as small-scale

amendments. A small scale development amendment is defined by section 163.3187(1)(c), F.S., as a proposed amendment involving a use of 10 acres or less and where the cumulative acreage proposed for small scale amendments within a year must not exceed: a) 120 acres in a local government that contains areas designated in its comprehensive plan for urban infill, urban redevelopment or downtown revitalization, transportation concurrency exception areas, or regional activity centers and urban central business districts approved pursuant to s. 380.06(2)(e), F.S.; b) 80 acres in a local government that does not include the designated areas described in (a); and c) 120 acres in consolidated Jacksonville/Duval County.

In addition to the above acreage limitations, amendments involving a residential land use must have a density of 10 units per acre or less unless located in an urban infill and redevelopment area.

The major advantage of a small scale amendment is that the adoption of the amendment by the local government only requires one public hearing before the governing board, and does not require compliance review by the department. The public notice procedure for local governments is also more streamlined so that the notice required by a local government for small scale amendments is that of a general newspaper notice of the meeting and notice by mail to each real property owner whose land would be redesignated by the proposed amendment.

While the department does not review or issue a notice of intent regarding the proposed amendment, small-scale amendments can be challenged by affected persons. Any affected person may file a petition for administrative hearing to challenge the compliance of the small scale development amendment with the act, within 30 days of the local government's adoption of the amendment. The administrative hearing must be held not less than 30 nor more than 60 days following the filing of the petition and the assignment of the administrative law judge. The parties to the proceeding are the petitioner, the local government and any intervenor.

The local government's determination that the small scale development agreement is in compliance is presumed to be correct and will be sustained unless, by a preponderance of the evidence, the petitioner shows that the amendment is not in compliance with the act. Small scale amendments do not become effective until 31 days after adoption by a local government. If a small-scale amendment is challenged following the procedure described above, the amendments do not become effective until a final order is issued finding the amendment in compliance with the act.

Currently, s. 163.3187(1)(c)1.e, F.S., prohibits small scale amendments in Areas of Critical State Concern (ACSC). The reasoning for this is so that the Department can ensure they are reviewed for consistency with the principles for guiding development.

Areas of Critical State Concern

In 1972, the Legislature adopted chapter 72-317, Laws of Florida, which created the Environmental Land and Water Management Act of 1972. This act created the areas of critical state concern (ACSC) program and established procedures for increased protection of lands of statewide importance, including wildlife refuges, wilderness areas, and critical habitat of threatened and endangered species.

Once an area was designated as an ACSC principles for guiding development (principles), for that area were adopted. The ACSC designation required that local government land

development regulations (LDRs) and local government comprehensive plans be consistent with the principles. An ASCS designation also subjected local government comprehensive plans and LDRs to review and amendment by the state. Currently, there are three areas in the State that are designated as areas of critical state concern. Those areas are the Florida Keys, the Big Cypress Area, and the Green Swamp Area.

In 1986, the Legislature adopted chapter 86-170, Laws of Florida, created the procedures for coordinated agency review for all permit applications in the Florida Keys area of critical state concern. The Department of Community Affairs, the Department of Environmental Protection, and the Department of Health, along with other state and regional agencies that require permits in the Florida Keys ACSC, to enter into interagency agreements to create a coordinated agency review process.

Section 380.05(6), F.S., currently states that plan amendments to plans for areas of critical state concern shall not become effective until approved by the Department.

Monroe County is located within an area of critical state concern, pursuant to section 380.0552, F.S., and is currently experiencing a critical shortage of affordable housing. Factors cited by the Monroe County Commission as contributing to this shortage include:

- The county's status as an Area of Critical State Concern;
- The geographic uniqueness of Monroe County, including its dependence on bridges and causeways for connection to the mainland;
- Monroe County's Rate of Growth Ordinance (ROGO) that limits the number of new residential units that can be built on a yearly basis based on hurricane evacuation capacity;
- A shortage of areas appropriately zoned to accommodate moderate or high density development;
- The application of one of the state's most restrictive building codes; and
- Cost factors, including the highest median housing cost, the highest cost of living, and the highest construction costs in Florida.

A blue ribbon commission created by the Monroe County Board of County Commissioners, the Blue Ribbon Committee on Affordable Housing, issued a report making a number of recommendations regarding how state law and the rules of the Housing Finance Corporation could be changed to encourage the construction of affordable housing in Monroe county. The report is available by contacting the Monroe County Board of County Commissioners.

Rule 9J-5

In enacting ch. 99-379, L.O.F., the Legislature amended ch. 120, F.S., (the Administrative Procedures Act) to clarify an agency's authority to adopt rules. Subsection (1) of s. 120.536, F.S., as amended, provides that a grant of rulemaking authority is necessary but not sufficient to allow an agency to adopt a rule; a specific law to be implemented is also required. An agency may adopt only rules that implement or interpret the specific powers and duties granted by the enabling statute. No agency shall have authority to adopt a rule only because it is reasonably related to the purpose of the enabling legislation and is not arbitrary and capricious or is within the agency's class of powers and duties, nor shall an agency have the authority to implement statutory provisions setting forth general legislative intent or policy. Statutory language granting rulemaking authority or generally describing the powers and functions of an agency shall be construed to extend no further than implementing or interpreting the specific powers and duties conferred by the same statute.

To ensure compliance with s. 120.536(1), F.S., s. 120.536(2)(b), F.S., required that each agency, by October 1, 1999 provide to the Administrative Procedures Committee a list of each rule or portion of a rule adopted by that agency prior to June 18, 1999 which exceeds the rulemaking authority permitted by s. 120.536, F.S. For those rules of which only a portion exceeds the rulemaking authority permitted by this section, the agency must also identify the language of the rule which exceeds this authority. The Joint Administrative Procedures Committee combined the lists and provided the cumulative listing to the President of the Senate and the Speaker of the House of Representatives. The Legislature must, at the 2000 Regular Session, consider whether specific legislation authorizing the identified rules, or portions thereof, should be enacted. By January 1, 2001, each agency must initiate proceedings pursuant to s. 120.54, F.S., to repeal each rule, or portion thereof, identified as exceeding the rulemaking authority permitted by this section for which authorizing legislation does not exist. By February 1, 2001, the Administrative Procedures Committee must submit to the President of the Senate and the Speaker of the House of Representatives a report identifying those rules that an agency had previously identified as exceeding its rulemaking authority for which proceedings to repeal the rule have not been initiated. As of July 1, 2001, the Administrative Procedures Committee or any substantially affected person may petition an agency to repeal any rule, or portion thereof, because it exceeds the rulemaking authority permitted by this section. Not later than 30 days after the date of filing the petition if the agency is headed by an individual, or not later than 45 days if the agency is headed by a collegial body, the agency must initiate rulemaking proceedings to repeal the rule, or portion thereof, or deny the petition, giving a written statement of its reasons for the denial.

DCA identified, in its October 1, 1999 submission to the Administrative Procedures Committee, one rule which appears to exceed the rulemaking authority permitted by s. 120.536, F.S. The rule identified is Rule 9J-5.002(2)(h), F.A.C., which provides recognition in the comprehensive plan review process where:

> the provision at issue constitutes substantial progress over existing provisions regarding consistency with and furtherance of Chapter 163, Part II, the State Comprehensive Plan, the strategic regional policy plan, and this Chapter [9J-5, F.A.C.], where the existing provisions are in a plan or plan amendment previously found in compliance.

The purpose of the rule is to encourage local governments, who currently have a local comprehensive plan in compliance, to adopt amendments to previously approved plans (which may not be in compliance with all of the provisions of chapter 163, F.S., and/or 9J-5,

F.A.C.), which brings those plans closer to being in compliance with chapter 163, F.S., and/or Chapter 9J-5, F.A.C. This policy is described by the DCA as the "Baby Seal Policy." By analogy, if a local government's original comprehensive plan allows 10 baby seals to be killed, and a proposed amendment would allow 5 baby seals to be killed, the amendment represents progress in the direction of compliance, even though the statute prohibits any baby seals from being killed.

In the case of *Village of Key Biscayne v. Department of Community Affairs*, 495 So.2d 495 (Fla. 3d DCA 1997), the court invalidated a comprehensive plan amendment proposed by the Dade County Commission because the amendment did not comply with the statutory requirement of s. 163.3177(6)(a), F.S., that any comprehensive plan amendment or plan include "specific standards for density or intensity of use," even though the amendment arguably complied with the rules of DCA. The court emphasized that to the extent the rules of DCA permit non-compliance with statutory requirements, such rules are themselves invalid. The department had previously applied Rule 9J-5.002(2)(h), F.A.C., to find a comprehensive plan amendment in compliance that, while not meeting the letter of chapter 163, represented an improvement over provisions previously found in compliance.

Concurrency

The concurrency requirement of the Local Government Comprehensive Planning and Land Development Regulation Act (part II, ch. 163, Florida Statutes) is a growth management tool designed to accommodate development by ensuring that adequate facilities are available as growth occurs. The "cornerstone" of the concurrency requirement is the concept that development should be coordinated with capital improvements planning to ensure that the necessary public facilities are available with, or within a reasonable time of, the impacts of new development. Under the requirements for local comprehensive plans, each local government must adopt levels of service (LOS) standards for certain types of public services and facilities. *See* s. 163.3180, Florida Statutes. Generally, these LOS standards apply to sanitary sewer, solid waste, drainage, potable water, parks and recreation, roads and mass transit. Pursuant to s. 163.3180(2)(c), Florida Statutes, the local government must ensure that transportation facilities needed to serve new development are in place or under actual construction within three years after issuance of the certificate of occupancy. The intent is to keep new development from significantly reducing the adopted LOS by increasing the capacity of the infrastructure to meet the demands of new development.

In 1995, the Legislature provided exemptions to transportation concurrency requirements for local governments if such requirements discourage urban infill development, redevelopment, or downtown revitalization. In order to promote infill development and redevelopment, one or more transportation concurrency management areas may be designated in a local government comprehensive plan.

Developments of Regional Impact

Chapter 380, F.S., includes the Development of Regional Impact (DRI) program, enacted as part of the Florida Environmental Land and Water Management Act of 1972. The DRI Program is a vehicle that provides state and regional review of local land use decisions regarding large developments that, because of their character, magnitude, or location, would have a substantial effect on the health, safety, or welfare of the citizens of more than one county. For those land uses that are subject to review, numerical thresholds are identified in s. 380.0651, F.S., and Rule 28-24, F.A.C.

Under s. 380.06(19), F.S., any proposed change to a previously approved DRI which creates a substantial likelihood of additional regional impact, or any type of regional impact constitutes a "substantial deviation" which requires further DRI review and requires a new or amended local development order. The statute sets out criteria for determining when certain changes are to be considered substantial deviations without need for a hearing, and provides that all such changes are considered cumulatively.

Marinas

At the federal level, as many as five (5) individual agencies including the U.S. Army Corp of Engineers, the Environmental Protection Agency, U.S. Fish and Wildlife Service, National Marine Fishery Service and the Coast Guard may be involved in review of a permit application. At the state level, Environmental Resource Permitting will involve the Department of Environmental Protection (DEP), applicable Water Management District, Fish and Wildlife Conservation Commission and conceivably some local government that has received delegation from the DEP of pollution prevention programs. At the local level it is not uncommon to have both a county and a city involved in the authorizations necessary for actual construction. Below is a summary of permits and applicable laws implicated in marina permitting.

Federal Permitting

The Clean Water Act and the Rivers and Harbors Act of 1899

Pursuant to Section 10 of the Rivers and Harbors Act (33 U.S.C. 403) and Section 404 of the Clean Water Act (33 U.S.C. 1344) any construction or the discharge of materials into waters of the United States requires authorization from the U.S. Army Corp of Engineers. In summary, issuance of a permit requires assurance that applicable water quality standards are maintained, habitat is preserved and endangered and threatened species are protected. The issuance of the permit also requires scrutiny of any cumulative and secondary impacts that may result from the authorization.

Related Federal Acts and Agencies

In the course of permit review under the Clean Water Act, and the Rivers and Harbors Act compliance with the following acts must be shown:

- Section 401 of the Clean Water Act (33 U.S.C. 1341) requires any permittee to obtain certification from the State that the project complies with applicable water quality standards and effluent limitations.

- Section 307(c) of the Federal Coastal Management Act of 1972 (16 U.S.C. 1456(c)) requires an applicant for a permit must provide certification that the marina complies with the State's Coastal Zone Management Program. No permit can be issued until the State concurs in this finding.

- The Fish and Wildlife Coordination Act (16 U.S.C. 661-666C) requires the Corps of Engineers to consult with either the U.S. Fish and Wildlife Service or the National Marine Fishery Service, as appropriate, relative to the protection of habitat and species. Pursuant to any dispute between the agencies over habitat protection, the permit may be denied.

- The Endangered Species Act (16 U.S.C. 1531 et seq.) requires the protection of endangered species and critical habitat. Under the Act, the U.S. Fish and Wildlife Service and National Marine Fishery Service consult with the Corps of Engineers. If either of these agencies determine that a marina project is likely to jeopardize the continued existence of a specie or the destruction of habitat, the permit cannot be issued.

- The Marine Mammal Protection Act of 1972 (16 U.S.C. 1361 et seq.) imposes a perpetual moratorium on the harassment, hunting, capturing or killing of marine mammals. This act also requires consultation with either the U.S. Fish and Wildlife Service or National Marine Fishery Service and assurance that any implicated marine mammal is protected.

State Permitting

Chapter 373, Part IV Florida Statutes, Florida's Water Resources Act

As with the federal government, a single state agency (either the DEP or the appropriate Water Management District) requires an Environmental Resource Permit for any marina facility constructed within waters of the State. Pursuant to Part IV, Chapter 373, F.S., the permit process requires a demonstration of reasonable assurance that the project complies with state adopted water quality standards, preserves habitat and protect endangered and threatened species and avoids cumulative and secondary impacts that may result from the project under review and similar projects being permitted. The process also requires a demonstration that the project is not contrary to the public interest. If a facility is located within or adjacent to specifically designated waters, such as, an Aquatic Preserve the application must demonstrate that the project is clearly in the public interest.

Related Laws

As with the federal process, the permitting agency consults with other state and local agencies with related responsibilities. The laws and agencies are:

- Chapter 376, Coastal Protection. Under this law a marina facility may be required to develop oil spill prevention plans and programs to ensure compliance with water quality standards. This program is generally administered by the DEP.

- Chapter 403, F.S. This law is also administered by DEP and requires compliance with adopted water quality standards for the applicable water body.

- Section 370.12 (2), F.S., the Florida Manatee Sanctuary Act. The Fish and Wildlife Conservation Commission is authorized to adopt rules under Chapter 120 regarding the expansion of existing or construction of new marina facilities and mooring or docking slips involving the addition or construction of five (5) or more powerboat slips. The Commission is also authorized to adopt rules relating to regulation of the operation and speed of motorboat traffic where manatee sightings are frequent and it can generally be assumed that they inhabit the areas in question on a regular and continuous basis. The Commission is also authorized, pursuant to the Administrative Procedures Act, to protect manatee habitat such as, seagrass beds. S. 370.12 (2)(m), F.S. Any permit application within an area inhabited by manatees or other threatened species receives extensive comment from Commission staff and in fact may be denied if the project poses a significant threat and is determined to be contrary to the public interest.

Local Government

County or City Comprehensive Plan and Land Development Regulations

Every county and city in Florida must adopt and enforce a comprehensive plan pursuant to Chapter 163, Part II, F.S. Section 163.3177, F.S., requires that each comprehensive plan contain a conservation element and for those units of government within the coastal zone, a coastal management element. The law requires at minimum, that the conservation and coastal management elements of any comprehensive plan provide for, the continued existence of viable populations of all species of wildlife and marine life. The plan must also provide for the avoidance of irreversible and irretrievable losses of coastal zone resources. Under the plan, each local government develops its own land development regulations.

Every local government with jurisdiction over navigable waters provides extensive scrutiny to any new waterside development including marinas. In addition to outright prohibition of marina construction in many sensitive environmental areas, comprehensive plans, zoning ordinances and other land development regulations usually bring to bear all of the water quality and habitat protection standards that have been referenced previously at the Federal and State level.

Airports

The Florida Airport Managers Association, which represents over 80 publicly owned and operated airports, adopted a resolution at its recent, mid-year meeting advocating modifications to both Chapters 163 and 380, F.S., to replace DRI review of airports with a process that integrates current FAA planning with local government comprehensive plans.

Airport planning and development is subject to a pervasive system of State and Federal oversight as to render the DRI process redundant. It is extremely expensive and time consuming as well to go through the DRI process. Below is a summary of permits and applicable laws implicated in airport permitting.

Local Government

Local Government Comprehensive Plan and Land Development Regulations

Every city and county in Florida must adopt and enforce a comprehensive plan, pursuant to Chapter 163, Part II, F.S. Section 163.3177, F.S., requires that each comprehensive plan contain a future land use element designating the proposed future general distribution, location and extent of lands for public facilities, which airports typically are. The comprehensive plan must also contain a traffic circulation element, which for municipalities having populations greater than 50,000 and counties having populations greater than 75,000, must include as part of the circulation element, or as a separate element, plans for port, aviation and related facilities which are coordinated with the general circulation and transportation elements.

Local governments, in adopting land development regulations to implement their comprehensive plans, are required to include specific and detailed provisions necessary or desirable to implement the plan which shall as a minimum, among other things, insure the compatibility of adjacent uses. Local governments with airports within their jurisdiction are given additional authority and direction concerning land use compatibility. The creation or maintenance of an airport hazard and the incompatible use of land in the vicinity of an

airport have been determined to be public nuisances. Local governments with airport hazards (as defined pursuant to Federal obstruction standards) are given the power and direction to adopt airport zoning regulations to minimize or eliminate the effect of those hazards. Where the airport and the hazard are in different political jurisdictions, the statute requires either interlocal agreement or creation of a joint airport zoning board to address the airport hazard issue. Where a local government has adopted land development regulations pursuant to Chapter 163, F.S., which addresses the use of land consistent with the airport zoning statutes, no land use compatibility regulations pursuant to Chapter 333, F.S., need be adopted.

Given the pervasive level of Federal and State regulation of air commerce and aviation generally, local government authority has in some ways been circumscribed. For example, Section 330.36, F.S., provides that no county or municipality of the State shall license airports or control their location except by zoning requirements. The determination of suitable sites and standards of safety for airports is reserved to the State in accordance with the provisions of Chapter 330, F.S.

State Regulation

There is an extensive system of State oversight of aviation and airport facilities which is vested in the Department of Transportation. Chapter 330, F.S., requires FDOT approval of any airport site. Site approval is conditioned upon satisfaction of a number of items including adequacy of the proposed airport, conformance to standards of safety, compliance with applicable county or municipal zoning requirements, receipt and consideration of comments from nearby airports, property owners and adjacent jurisdictions, and safe air traffic patterns.

The Florida Airport Development and Assistance Act, Chapter 332, F.S., charges the Department of Transportation with the development and improvement of air routes, airport facilities and landing fields. To that end, the Department has implemented aviation system planning to establish an integrated State-wide aviation system. The Department is charged with the development of a State-wide Aviation System Plan which is periodically updated and which analyzes aviation need on a five, ten and twenty year planning horizon. The Aviation System Plan must be consistent with the Florida Transportation Plan and does not preempt local airport master plans which are adopted in compliance with Federal and State requirements. Pursuant to the act, FDOT also provides financial assistance to local sponsors in accordance with its work program. As part of its integrated planning effort, only projects that will contribute to the implementation of the State Aviation System Plan, are consistent with and contribute to the implementation of an airport master plan and are consistent to the maximum extent feasible with the approved local government comprehensive plan, are eligible for State funds.

Federal Oversight

As a practical matter, most aviation development occurs as a function of federal involvement in aviation through federal funding. The Federal Government has a pervasive reach in aviation as a result of the national policy for the promotion and operation of a national plan of integrated airport systems. See, generally, 49 U.S.C., Chapter 471, Airport Development. As a result of the federal interest, a variety of funds have been established for the planning, construction and operation of a system of airports nationwide. These funds are administered by the Federal Aviation Administration within the U.S. Department of Transportation. As with the State funds, federal funds cannot be expended except in conformance with certain planning requirements. The FAA requires as a condition

precedent to funding any activity that the activity be included in an FAA-approved master plan for the airport facility.

The FAA-approved master plan is not a static document. The planning processes require an updated revision to the plan at least every five years. In practice, some airports revise their master plans more frequently and for the larger airports, the master plan is almost in a continual state of revision.

Federal planning and funding decisions for aviation development are subject to review under the National Environmental Policy Act (NEPA). As such, those actions must be reviewed as directed by NEPA and can result in the preparation of an environmental assessment (EA) or environmental impact statement (EIS) in order to implement an aviation project. That review is in addition to, and not in derogation of, local or State review of the activity.

The FAA also administers the National Aviation Noise Policy. See, generally, 49 U.S.C., Chapter 475. This is one area where the Federal interest has preempted State and local regulation in favor of a consistent, coordinated policy for all of the nation's airports. Accordingly, neither the DRI program nor any other local or State regulatory program could have an effect in the area of noise.

Other

While there is a coordinated and extensive interlocking scheme of local, State and Federal regulation of airports and aviation facilities, that scheme does not in and of itself exempt airports from the operation of other local, State and Federal environmental regulatory programs. Those programs continue to apply to proposed activities of airport facilities. For example, the Clean Water Act and the Rivers and Harbors Act of 1899 requires authorization from the U.S. Army Corps of Engineers for any construction or discharge of materials into waters of the United States. (33 U.S.C. 403, 33 U.S.C. 1444). Issuance of a permit under these programs requires assurance that all applicable water quality standards are maintained, habitat is preserved, and endangered and threatened species are protected. Issuance of the permit also requires an analysis of cumulative and secondary impacts that may result from the authorization. In addition, where applicable, the following programs also apply: National Pollutant Discharge Elimination System (NPDES) permitting, Federal Coastal Management Act, Fish and Wildlife Coordination Act and Endangered Species Act.

At the State level, any activity in jurisdictional wetlands requires issuance of an environmental resource permit (ERP) from either DEP or the appropriate water management district. This permit, issued pursuant to Part IV, Chapter 373, F.S., demonstrates reasonable assurance that the project complies with State adopted water quality standards, preserves habitats and protect endangered and threatened species and avoids unacceptable cumulative and secondary impacts. State and Federal regulatory programs concerning the storage and handling of petroleum products and other potentially hazardous materials also apply in full to airport projects.

Petroleum Storage Facilities

Petroleum storage facility planning and development is subject to such a pervasive system of State and Federal oversight as to render the DRI process redundant. It is extremely expensive and time consuming to go through the DRI process. Below is a summary of permits and applicable laws that are implicated in petroleum storage facility permitting.

Local Government Control

Every city and county in Florida must adopt and enforce a comprehensive plan pursuant to Chapter 163, Part II, F.S. If the local government is within the coastal zone, the plan must include a coastal management element which calls for a comprehensive master plan to be prepared by each deep-water port. Inland counties and cities obviously will not have a port master plan, but their comprehensive plans still must address all of the elements outlined in s. 163.3177, F.S. These plans must also contain a traffic circulation element, which for municipalities having populations greater than 50,000 and counties having populations greater than 75,000 must include as part of the circulation element, or as a separate element, plans for aviation, rail, and intermodal terminals which are coordinated with the general circulation and transportation elements. Inland bulk storage facilities are a critical link in the intermodal transportation of petroleum products. They facilitate product movement between ports, pipelines and the truck transportation that supplies fuels to retail consumer outlets. They also link the supply of aviation fuel from ports to major metropolitan airports.

Local governments, in adopting land development regulations to implement their comprehensive plans, are required to include specific and detailed provisions necessary or desirable to implement the plan which shall at a minimum, among other things, insure the compatibility of adjacent uses. Local comprehensive plans give local governments the necessary authority to regulate the placement and compatibility of bulk petroleum storage facilities and to address any traffic impacts of such facilities. Other state and federal regulatory schemes create a pervasive network regulating all other aspects of these facilities. (In many cases, local governments even have authority to carry out tank regulations by delegation of authority from the Department of Environmental Protection under Chapter 376, F.S., discussed below.)

State and Federal Regulations

In Chapter 376, F.S., Pollutant Discharge Prevention and Removal, the storage, transportation and disposal of petroleum products is extensively regulated. The Department of Environmental Protection is given the power and duty to establish rules governing the construction, registration, operation and maintenance of petroleum bulk storage facilities, and the aboveground tanks that comprise these facilities.

Chapter 62-761, F.A.C., which implements Chapter 376, F.S., provides standards for underground tanks and for all aboveground storage tank systems over 550 gallons. These regulations require the registration of each such tank and require that the facility provide financial responsibility sufficient to meet any problems which might arise from a discharge. All storage tanks must be engineered, constructed, operated and maintained according to specific performance standards set out in the rule. Inspection and repair schedules are mandated, as is extensive record keeping and reporting. All such tanks must be appropriately lined, cathodically protected and have secondary containment.

The applicable requirements of various standards setting bodies are incorporated by reference in Chapter 62-761, F.A.C., and made part of the requirements for construction, maintenance and inspection of such tanks. These include standards developed by the American Concrete Institute, the American Petroleum Institute, the American Society of Mechanical Engineers, the American Society for Testing & Materials, the National Association of Corrosion Engineers, the National Leak Prevention Association, the Petroleum Equipment Institute, the Society for Protective Coatings, the Steel Tank Institute, and Underwriters Laboratories. These facilities also are subject to the requirements of the National Fire Protection Association, which prescribes methods of minimizing the risks of fire by placement and diking of the tanks. Chapters 376 and 403, F.S., also provide for civil and criminal liability for any discharges from these facilities and for violations of the rules applicable to them.

Inland bulk storage facilities also must comply with the following:

- Florida and federal regulations governing the discharge of wastewater and/or stormwater under both the state's own regulations and its implementation of the National Pollutant Discharge Elimination System as part of the federal Clean Water Act (33 U.S.C. 1344).

- The Federal Clean Air Act (42 U.S.C. .7401), including Title V, which is administered partially by the state and partially by the federal government, and which controls air emissions from these facilities.

- Any facility constructed in jurisdictional wetlands requires issuance of an environmental resource permit (ERP) from either DEP or the appropriate water management district. This permit, issued pursuant to Part IV, Chapter 373, Florida Statutes requires the applicant to provide assurance that the permitted facility complies with state water quality standards, preserve habitats and protect endangered and threatened species.

- Chapter 62-521.400, F.A.C., Wellhead Protection, restricts the location of aboveground petroleum storage tanks with regard to their proximity to potable water wells.

- Chapter 62-740, F.A.C., Petroleum Contact Water, controls the handling of water which may come into contact with petroleum products at storage facilities.

- Chapter 62-770, F.A.C., Petroleum Contamination Site Cleanup Criteria, provides standards and procedures to be used in the event of a discharge.

Regional Planning Councils

The State of Florida's 67 counties are divided into eleven planning regions, each of which is represented by a Regional Planning Council (RPC). Chapter 186, F.S., provides for the creation of 11 regional planning councils (RPCs) and for the adoption of strategic regional policy plans by the RPCs. The Strategic Regional Policy Plan (SRPP), as required by s. 186.507, F.S., is a long range guide for physical, economic, and social development of a planning district through the identification of regional goals and policies.

The SRPP must contain regional goals and policies for developing a coordinated program of regional actions directed at resolving identified problems and needs. As specified in Rule 27E-5, F.A.C., each SRPP must address, at a minimum, the following areas: Affordable

Housing; Economic Development; Emergency Preparedness; Natural Resources of Regional Significance; and Regional Transportation. These strategic regional policy plans must be consistent with the state comprehensive plan.

State Comprehensive Plan

The state comprehensive plan, chapter 187, F.S., was enacted in 1985, to provide long-range guidance for the orderly, social, economic, and physical growth of the state. The plan includes twenty-six goals covering subjects that include: for example, land use; urban and downtown revitalization; public facilities; transportation; water resources; and natural systems and recreational lands. By October 1st of each odd-numbered year, the Governor's Office is required to prepare any proposed revisions to the state comprehensive plan deemed necessary and present proposed revisions to the Administration Commission. The Administration Commission is then required to review such recommendations and forward to the Legislature any proposed amendments approved by the Commission.

Chapter 98-176, Laws of Florida, required the Governor to appoint a committee to review the comprehensive plan and advise him on changes that were appropriate to include in the biannual review scheduled to occur in 1999. To date, this committee has not been appointed or convened by the Governor.

Sector Plan Demonstration Project

Sector plans are a demonstration project for property consisting of 5,000 or more acres, which emphasize innovative and flexible planning and development strategies. Currently, the statute allows for five projects. Sector plans, once approved, are adopted as amendments to the local comprehensive plan.

Judicial Review of Development Orders

Section 163.3215, F.S., provides for standing to enforce local comprehensive plans through development orders. In addition, challenging procedures are also provided. Under this section, any aggrieved or adversely affected party may maintain an action for injunctive or other relief against any local government to prevent that government from taking any action on a development order that is not consistent with the local government's comprehensive plan.

Development orders that are contested by the developer are subject to quasi-judicial proceedings. These local proceedings are formal and often involve liberal participation of aggrieved parties. The developer's appeal right is by certiorari review in circuit court where the court relies solely on the record as it was established at the local quasi-judicial hearing. The court looks at whether procedural due process was met, whether there was competent substantial evidence to sustain the local decision, and whether the essential requirements of law were satisfied. In a certiorari review, the circuit court acts in an appellate capacity in reviewing the local government decision.

In 1997, the 4th District Court of Appeal, in *Poulos v. Martin County*, 700 So. 2d 163 (Fla. 4th DCA 1997), held that third parties challenging a local government decision regarding a development order are subject to a different method of review by the circuit court. Third party challengers receive the benefit of a "trial de novo," in which the circuit court conducts a completely new trial with all new evidence and potentially new issues raised, even though a quasi-judicial proceeding may have already been held at the local government level. A

de novo review starts the entire review process over and renders the local decision and any previously held local quasi-judicial preceding moot.

Ex Parte Communications

County and municipal governing bodies are administrative bodies which perform mostly legislative acts (e.g., adopting annual budgets and millage rates, and adopting ordinances dealing with a variety of subjects relating to public health, safety, and welfare.) However, these bodies also perform certain acts which are classified as quasi-judicial. BLACK'S LAW DICTIONARY defines quasi-judicial as follows:

Quasi-judicial is "[a] term applied to action, discretion, etc., of public administrative officers or bodies who are required to investigate facts or ascertain the existence of facts, hold hearings, weigh evidence, and draw conclusions from them, as a basis for their official action, and to exercise discretion of a judicial nature."

The present controversy involves the ability of local public officials to communicate with their constituents, particularly when they receive what may be described as *ex parte* communications on pending quasi-judicial matters coming before a board or commission of which an official is a member. BLACK'S LAW DICTIONARY defines *ex parte* as "one side only; by or for one party; done for, in behalf of, or on the application of, one party only." Additionally, a useful description of the meaning of *ex parte* communications in the context of administrative proceedings may be found in the federal Administrative Procedures Act, 5 U.S.C. s. 551(14), which provides in pertinent part that an *ex parte* communication is "an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given . . . ".

Two recent court cases related to *ex parte* communications have placed new restrictions on county and municipal governing body members in the conduct of quasi-judicial proceedings and have brought certain rezoning proceedings formerly and traditionally deemed to be legislative into the quasi-judicial category.

In *Jennings v. Dade County*, 589 So.2d 1337 (Fla. 3d DCA 1991), *rev. denied*, 598 So.2d 75 (Fla. 1992), the Florida Supreme Court examined ex parte communication and held that, although quasi-judicial hearings are not controlled by strict rules of evidence and procedure, they must provide certain minimum standards of due process.

In *Jennings*, the Third District Court of Appeal reviewed prior case law regarding the due process effect of an *ex parte* communication upon a quasi-judicial proceeding. The Court focused on the nature of *ex parte* communication and whether it was material to the point that it prejudiced the complaining party and resulted in a denial of procedural due process. In *Jennings*, the Court created a rebuttable presumption of prejudice. That is, once prejudicial *ex parte* communication affecting a quasi-judicial hearing has been alleged, such prejudice is presumed. The burden then shifts to the respondent to rebut the presumption that the claimant was prejudiced.

In *Board of County Commissioners of Brevard County v. Synder*, 627 So.2d 469 (Fla. 1993), the Florida Supreme Court brought certain types of zoning issues under the category of quasi judicial actions and therefore, subject to the finding in *Jennings* related to ex parte communication received by officials on such matters. In *Synder*, the Court held that "Rezoning action which entails application of general rule or policy to specific individuals, interest or activities is quasi-judicial in nature, subject to strict scrutiny on certiorari review" and that "Although [a] board is not required to make findings of fact in

denying [an] application of rezoning, upon review by certiorari in the circuit court it must be shown there was competent substantial evidence presented to [the] board to support its finding."

As a consequence of the *Jennings* and *Synder* cases, many local public officials have come to believe that they are not able to communicate in certain instances with the constituents that they were elected to represent, and, as a consequence, are experiencing difficulties in the performance of their official duties and responsibilities.

C. EFFECT OF PROPOSED CHANGES:

This bill revises several statutes relating to growth management and creates a study commission.

Study Commission

The bill creates the *Grow Smart Florida Study Commission*, a 25-member committee appointed to review Florida's system of growth management and make recommendations to the Governor, President of the Senate and Speaker of the House by February 1, 2001. The commission shall continue in existence until its objectives are achieved, but no later than February 1, 2001. (Section 20 of the bill)

- The commission is composed of 25 voting members including 10 members appointed by the Governor, 7 members appointed by the Senate President, 7 members appointed by the Speaker of the House, and the Secretary of DCA. In addition, the Secretaries of the Departments of Environmental Protection & Transportation, the Commissioner of Agriculture, and the Executive Director of the Fish & Wildlife Conservation Commission are to serve on the commission as ex-officio nonvoting members.

- The bill creates five specific groupings of interests to be represented in the appointments of the Governor, Senate President and Speaker of the House: (1) Business interests: for example, development; real estate; marine industries; and affordable housing; (2) Environmental interests: for example, environmental justice groups; resource-based conservation groups, and environmental quality and conservation groups; (3) Agricultural Interests: for example, agricultural commodity groups, forestry, and agricultural lending institutions; (4) Local and regional governments: for example, municipalities; counties; special districts; metropolitan planning organizations; and regional planning councils; (5) Growth management and planning specialists: for example, professional planners; attorneys; engineers; and architects. The Governor makes two appointments from each group and the Senate President and Speaker of the House select one appointment from each group, in addition to selecting two members from their respective membership. The appointments must be made by July 1, 2000.

- The commission is directed to study the following issues:
  (1) the roles and responsibilities of the state, regional, and local governments in regards to local government comprehensive plans & amendments;
  (2) the roles, responsibilities, and composition of RPCs and MPOs;
  (3) the role and responsibility of citizens;
  (4) review the DRI process and make recommendations regarding replacing, repealing or reviewing process;

(5) how to improve intergovernmental coordination;
(6) review whether there is adequate protection for property owners from land use decisions; and
(7) review the economic impact of being declared an area of critical state concern.

- The chair of the commission must be elected at the first meeting, required to be held by August 1, 2000, by a majority vote of the membership. At least six public hearings must be held by the committee in different regions of the state to solicit public input. Action of the commission is not binding unless taken by a three-fifths vote of the members present. However, a quorum must be present in order for the commission to take formal action. In addition, the commission is authorized to have technical advisory committees which include non-commission members.

- An executive director is selected by the Governor. In addition, DCA is directed to provide other consultants and staff as needed. The Governor's agencies are directed to assist and cooperate with the commission. The department shall reimburse commission members, and the members of any technical advisory committee that is appointed for travel and per diem expenses.

Local Comprehensive Plan Amendment Process

This bill streamlines the local comprehensive plan amendment process in the following manner: (Sections 8 & 9 of the bill)

- Removes the timing disincentive for local governments to request a waiver of DCA's amendment review by reducing the review time-frames from 90 days to 60 days.

- The time-frames for a request to review the amendment by the regional planning council or an affected person (30 days after transmittal by the local government) are made substantially the same as the time-frames for comments by state agencies and the regional planning councils (30 days after receipt by DCA). Currently, these time-frames are cumulative for a total of 60 days.

- Local government may request a review at the time of transmittal of the amendment rather than 30 days after transmittal.

- Local governments send the amendment package directly to all review agencies at the time of transmittal of the amendment to DCA.

- State agencies and regional planning councils may review the amendment within the initial 30 days after receipt by DCA. DCA administrative rules allow 5 days for DCA to determine the amendment package is complete, verify the amendment has been sent to the appropriate agencies for review, and set the deadline for the 30-day agency review comments.

- DCA has 35 days after receipt of the amendment to notify the local government of its decision to review the amendment. This allows time (5 additional days) for receipt of a request for review and to consider agency comments in the agency's decision to review.

- DCA has 30 days after receipt of the agency comments to issue its Objections, Recommendations and Comments report to the local government for a total of 60 days from receipt of the amendment by DCA.

The bill revises requirements relating to publication of its notice of intent by the Department of Community Affairs in the following manner: (Section 8 of the bill)

- DCA publishes a Notice of Intent (for both "in" and "not in" amendments) in the legal notice or classified ad portion of the newspaper, with no special requirements for the size of the ad or the size of the type.

- At the proposed and adoption public hearings (and between these two hearings), the local government must have a sign-in form for affected persons. Persons who may wish to challenge an amendment may receive a courtesy informational statement by providing their name and address to the local government. The local government includes the list of all such persons with the adoption package that is transmitted to DCA. DCA sends a postcards or a short letter to each person, informing them that the NOI is about to appear in the newspaper.

- DCA is authorized to provide a model for the sign-in form.

- DCA also posts the NOIs on the DCA internet site.

- The 21 days to challenge runs from the date of publication, and is not based upon the date of receipt of the postcard or the date of appearance on the DCA internet site. The present statutory requirement that affected persons establish standing through written or oral comments to the local government during the adoption process would be retained.

The bill makes revisions to the definition of small scale amendment by increasing the threshold of a small scale amendment from 10 acres or fewer to 40 acres or fewer and removing the cumulative effect threshold. Currently, DCA does not review small scale amendments to the comprehensive plan. A small scale amendment is a proposed amendment that involves a use of 10 acres or less. In addition to meeting the acreage requirement, there is a cumulative annual effect restriction. The cumulative annual effect for <u>all</u> small scale amendments can not exceed certain maximum acreage. This amendment increases the total acreage allowed and removes the cumulative annual effect restriction. In addition, the bill eliminates the residential density limitation of 10 units per acre or less, except for residential development within the coastal high hazard area. (Section 9 of the bill)

This bill allows Monroe County and the City of Key West to submit comprehensive plan amendments that involve the construction of affordable housing that meet the criteria in section 420.0004(3), F.S. to use the small scale amendment process. In addition, the amendments are exempt from compliance review under chapter 163, F.S. However, DCA reviews the amendments for consistency with the principles for guiding development applicable to that area and the amendment does not become effective until DCA issues a final order under section 380.05(6), F.S. (Section 9 of the bill)

This bill provides legislative intent with respect to the application of Rule 9J-5, F.A.C., by the agency (rule authorizing language). This section allows the Department to take into account substantial progress over existing provisions in an approved local comprehensive plan when determining consistency with such rule. (Section 6 of the bill)

Developments of Regional Impact (DRIs)

This bill provides exemptions from the Developments of Regional Impact (DRIs) process for marinas, airports, and petroleum facilities. However, even with the exemption from the DRI process, these developments are still required to be consistent with the applicable local comprehensive plan. If the development is not consistent with the local comprehensive plan, then the development must then go through the comprehensive plan amendment process. This bill streamlines the substantial deviation process for DRIs by: (Sections 15 & 16 of the bill)

- Making any change which, cumulatively with prior changes, is less than 100 percent of the numerical thresholds, conclusively not a substantial deviation.

- Increasing the substantial deviation criterion for a multi use DRI from 100 percent to 150 percent [Note: Since this criterion is also used in determining when a project is "essentially builtout," another reference in the bill is changed]

- Clarifying that the 45 days review period and requirement for written comments on proposed changes also apply to simultaneous increases and decreases in approved land uses.

- Making any change which, cumulatively with prior changes, is less than 7 years of buildout extension conclusively not a substantial deviation.

- Eliminating requirement to submit NOPC (notice of proposed change) to the state land planning agency, unless the local government or the regional planning agency determine that the proposed change does not fall under this category and request that the state land planning agency review the proposed changes and allowing DCA to maintain appeal authority if the change is not consistent with specific provisions.

This bill replaces DRI annual reports with biennial reports, unless otherwise specified in the development order. If no development has occurred since the submittal of the previous report allow the developer to submit a letter of no development to satisfy the report requirement. (Sections 15 & 18 of the bill)

The bill revises the threshold for office development by providing that a DRI review must occur for office development of more than 500,000 square feet in counties with a population greater than 1 million. (Section 16 of the bill)

This bill deletes the two-mile band that provides that "any residential development twenty-five percent of which is located within two (2) miles of a county line shall be treated as if it were located in the less populous county." Currently, if the development is within 2 miles, the development is reviewed under the standards and guidelines of the less populous county. The two mile band is not related to resource or public facility impacts, and merely complicates the determination of DRI status for some residential projects. (Section 16)

This bill provides that vested rights, duties or obligations under a development order are not abridged or modified due to this act's removal of that type of development from the DRI process. Marinas, airports, and petroleum storage facilities currently developed under a development order are required to continue to abide by the terms of the development order. In addition, the bill allows any current DRI application for a marina, airport, or petroleum

storage facility to continue to be reviewed upon an election for review. (Section 16 of the bill)

Optional Sector Plan Demonstration Project

This bill clarifies that if the optional sector plan demonstration project is repealed, currently repeal of this section is scheduled for 2001, those sector plans continue to be exempted from the DRI process. (Sections 11 & 15 of the bill)

Judicial Review

This bill revises procedures for challenging development orders, including the elimination of the duplicative de novo review for challenges and encouraging front-end participation by affected parties by: (Section 10 of the bill)

- Allowing for only one full evidentiary hearing on a development order. If a local government provides notice and a point of entry into a quasi-juridical hearing, that hearing must take place as required before the local government or its designee. In addition, the circuit court hearing will be by certiorari which means that the hearing is on the record that was made before the local government. This amendment is needed because the current law allows third party challengers to receive a quasi-judicial hearing before local government and they are not limited in seeking another evidentiary hearing in circuit court. In effect, third party challengers are able to have two evidentiary hearings, whereas developers are only entitled to one hearing.

- Requiring that, if a petition for review is filed, the local government and the applicant must be named and receive notice.

- Eliminating the requirement for a verified complaint because it is time consuming, expensive and has turned out to be more of a bother than it is worth. In its place, the language instead provides that, upon filing of a petition for judicial review, the case is stayed for 30 days so that the dispute can be subject to mandatory mediation. The parties must notify the court of selection of an agreed upon mediator within 10 days and the parties bear equally all costs of mediation. Time frames may be extended only if parties agree in writing. This forces the parties to discuss the dispute before tying up judicial and local government resources.

Ex Parte Communications

This bill creates a new section within the county chapter (ch. 125) and the municipality chapter (ch. 166) of the statutes. The bill provides that no citizen shall be denied their constitutional right to petition their elected officials. In addition, this bill preempts any special act or general law to the contrary. This is an attempt to address the problems arising from the rulings in the Jennings and Synder cases. (Sections 1 & 4 of the bill)

Definition of Development

This bill clarifies the definition of “development” under chapter 163, F.S. by stating those operations that are not considered to involve development which are found in section 380.04(3). In addition, the bill clarifies the definition of development to include “electricity” as one of the utility purpose. (Sections 5 & 14 of the bill)

Agricultural Issues

This bill provides that an agricultural land use category may be eligible for school siting in areas predominately rural. (Section 6 of the bill)

To address some of the issues confronting agricultural property, this bill specifies lands (predominately rural) that are suitable for innovative planning and development strategies. In addition, the bill requires a report from DCA and Department of Agriculture on a program for implementing innovative planning and development strategies for such areas. (Section 6 of the bill)

CS/CS/HB 17 (1999 Session)

This bill provides revisions to CS/CS/HB 17 (1999 Session) by revising provisions relating to the financial incentives which a local government may offer in an urban infill and redevelopment area. The bill also provides requirements for eligibility for the exemption from collecting local option sales surtaxes in such an area. In addition, the bill specifies that the authority of a local government to adopt financial and local government incentives for such areas (urban infill areas) is not superseded by certain language relating to sales tax exemptions. Finally, the bill authorizes the transfer of unused funds between grant categories under the Urban Infill and Redevelopment Assistance Grant Program (Sections 2, 3 & 4 of the bill)

D. SECTION-BY-SECTION ANALYSIS:

Section 1. Creates section 125.595; declares that no citizen's right to petition any elected official shall be denied; and provides that this provision preempts any contrary law.

Section 2. Amends section 163.2517, F.S., (urban infill and redevelopment area designation); revises provisions relating to the financial incentives which a local government may offer in an urban infill and redevelopment area; and provides requirements for eligibility for the exemption from collecting local option sales surtaxes in such an area.

Section 3. Amends section 212.08(13), F.S., (sales tax exemptions), by specifying that the authority of a local government to adopt financial and local government incentives for such areas (urban infill areas) is not superseded by certain language relating to sales tax exemptions.

Section 4. Amends section 163.2523, F.S., (Urban Infill and Redevelopment Assistance Grant Program) by authorizing the transfer of unused funds between grant categories under the program.

Section 5. Amends section 163.3164(6), F.S., (Definitions), by clarifying the definition of "development" by restating those operations that are not considered to involve development which are currently found in section 380.04(3), F.S.

Section 6. Amends section 163.3177, F.S., (Local comprehensive plan elements); provides that an agricultural land use category may be eligible for school siting in areas predominately rural; provides additional legislative intent with respect to application of rule 9J-5, F.A.C., by the Department; allows the Department to take into account substantial progress over existing provisions in an approved

local comprehensive plan when determining consistency with such rule; specifies lands (predominately rural) that are suitable for innovative planning and development strategies; and requires a report on a program for implementing innovative planning and development strategies for such areas.

Section 7. Amends section 163.3180, F.S., (Concurrency), by authorizing local governments to exempt regional activity centers from transportation concurrency requirements.

Section 8. Amends section 163.3184, F.S., (Comprehensive plan and plan amendment process); streamlines local comprehensive plan amendment process; removes the timing disincentive for local governments to request a waiver of DCA's amendment review by reducing the review time-frames from 90 days to 60 days; revises the time-frames for a request by the regional planning council or an affected person for review of an amendment; allows local governments to request a review at the time of transmittal of the amendment rather than 30 days after transmittal; requires local governments to send the amendment package directly to all review agencies at the time of transmittal of the amendment to DCA; provides that state agencies and regional planning councils may review the amendment within the initial 30 days after receipt by DCA; provides that DCA has 35 days after receipt of the amendment to notify the local government of its decision to review the amendment; provides that DCA has 30 days after receipt of the agency comments to issue its Objections, Recommendations and Comments (ORC) report to the local government for a total of 60 days from receipt of the amendment by DCA; revises requirements relating to publication by the agency of its notice of intent; deletes requirement that the notice be sent to certain persons; requires DCA to publish a Notice of Intent in the legal notice or classified ad portion of the newspaper, with no special requirements for the size of the ad or the size of the font; requires local governments to have a sign-in form for affected persons at proposed and adoption public hearings; provides that the local government includes a list of all such persons with the adoption package sent to DCA; provides that DCA sends a postcard or short letter to each person on the sign-in list, informing them that the Notice of Intent is about to appear in the newspaper; and authorizes DCA to provide a model for the sign-in form; requires DCA to post the Notices of Intent on the DCA internet site.

Section 9. Amends section 163.3187, F.S., (Adoption of comprehensive plan amendments); revises the definition of small scale amendment by increasing the threshold of a small scale amendment from 10 acres or fewer to 40 acres or fewer and removing the cumulative effect threshold; allows comprehensive plan amendments for Monroe County and the City of Key West that involve the construction of affordable housing that meet the criteria in section 420.0004(3), F.S., to use the small scale amendment process; provides that amendments are exempt from compliance review under chapter 163, F.S.; provides that DCA still reviews the amendments for consistency with the principles for guiding development applicable to that area and the amendment does not become effective until DCA issues a final order under section 380.05(6), F.S.; and eliminates the residential density limitation of 10 units per acre or less, except for residential development within the coastal high hazard area.

Section 10. Amends section 163.3215, F.S., (Judicial review); eliminates the duplicative de novo review for challenges and encourages front-end participation by affected

parties; allows for only one full evidentiary hearing on a development order; requires a local government to provide notice and a point of entry into a quasi-juridical hearing and that hearing must take place as required before the local government or its designee; provides that the circuit court hearing will be by certiorari; requires that, if a petition for review is filed, the local government and the applicant must be named and receive notice; eliminates the requirement for a verified complaint; provides that, upon filing of a petition for judicial review, the case is stayed for 30 days so that the dispute can be subject to mandatory mediation; requires the parties to notify the court of selection of an agreed upon mediator within 10 days; requires that the parties bear equally all costs of mediation; and allows time frames to be extended only if parties agree in writing.

Section 11. Amends section 163.3245, F.S., (Optional sector plans); provides an exemption from DRI review for approved development within a detailed specific area plan even if this section is repealed; and provides clarifying language.

Section 12. Creates section 166.0498, by declaring that no citizen's right to petition any elected official shall be denied; and provides that this provision preempts any contrary law.

Section 13. Amends section 166.231, F.S., (Municipalities public service tax), by authorizing application of municipal service tax on water service to property in a DRI outside of municipal boundaries under certain conditions.

Section 14. Amends section 380.04, F.S., (Development definition), by clarifying the definition of development to include electricity as an utility.

Section 15. Amends section 380.06, F.S., (Developments of regional impact); increases the substantial deviation criterion for a multi-use DRI from 100 percent to 150 percent; replaces the requirement for an annual report with a requirement for submitting a biennial report, unless otherwise provided in development order; provides that if no development has occurred since last report, then the developer is allowed to submit a letter of no development to satisfy requirement; removes criteria relating to airports, marinas, and petroleum storage facilities from the list of criteria used to determine existence of a substantial deviation; provides that any change which, cumulatively with prior changes, is less than 7 years of buildout extension is not a substantial deviation; provides that any change that, cumulatively with prior changes, is less than 100 percent of specific thresholds is not a substantial deviation; clarifies that the 45 days review period and requirement for written comments on proposed changes also apply to stimulations increases and decreases in approved land uses; eliminates the requirement to submit a notice of proposed change to DCA, unless the local government or regional planning agency requests a review under specific conditions; provides exemptions from the DRI review for petroleum facilities under certain conditions; and provides for maintenance of exemption for optional sector plans.

Section 16. Amends section 380.0651, F.S., (DRI statewide guidelines); removes the thresholds for airports and marinas; revises threshold for office development by providing that a DRI review must occur for office development of more than 500,000 square feet in certain counties; eliminates the two-mile band for residential DRI threshold; provides that vested rights, duties, or obligations are

not abridged or modified due to this act; and provides that any current DRI application for a marina, airport, or petroleum storage facility may continue to be reviewed upon an election for review.

Section 17. Amends section 163.06(3)(g), F.S., (Miami River Commission) to reflect a change in subsection lettering.

Section 18. Amends section 189.415(4), F.S., (Special district reporting) to reflect the change to annual DRI reporting requirements.

Section 19. Amends section 331.303(20) , F.S., to reflect a change in subsection lettering.

Section 20. Creates the "Grow Smart Florida Study Commission" which is a 25-member committee appointed to review Florida's system of growth management and make recommendations to the Governor, President of the Senate and Speaker of the House by February 1, 2001; provides that the commission is composed of 25 voting members including 10 members appointed by the Governor, 7 members appointed by the Senate President, 7 members appointed by the Speaker of the House, and the Secretary of DCA; provides that the Secretaries of the Departments of Environmental Protection & Transportation, Commissioner of Agriculture, and the Executive Director of the Fish & Wildlife Conservation Commission serve on the commission as ex-officio nonvoting members; creates five specific groupings of interests to be represented in the appointments of the Governor, Senate President and Speaker of the House: (1) Business interests; (2) Environmental interests; (3) Agriculture; (4) Local and regional governments; (5) Growth management and planning specialists; requires the Governor to make two appointments from each group and the Senate President and Speaker of the House select one appointment from each group, in addition to selecting two members from their respective membership; requires the appointments to be made by July 1, 2000; provides that the chair of the commission is elected at the first meeting by a majority vote of the membership; requires the first meeting to be held by August 1, 2000; requires at least six public hearings to be held by the committee in different regions of the state to solicit public input; provides that action of the commission is not binding unless taken by a three-fifths vote of the members present; requires a quorum to be present in order for the commission to take formal action; allows for technical advisory committees; requires the commission to study seven specific issues; provides for an executive director who is selected by the Governor; directs DCA to provide other consultants and staff as needed; directs the Governor's agencies to assist and cooperate with the commission; requires DCA to reimburse commission members, and the members of any technical advisory committee that is appointed for travel and per diem expenses; and provides that the commission continues in existence until its objectives are achieved, but February 1, 2001 at the latest.

Section 21. Provides severability clause.

Section 22. Provides effective date of upon becoming a law.

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

N/A

2. Expenditures:

This bill decreases expenditures for the Department of Community Affairs due to the revisions to the publication of notice of intent requirements. In addition, with the department no longer reviewing as many comprehensive plan amendments due to the revised qualifications of a small scale amendment, staffing expenditures for the department should decrease.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

N/A

2. Expenditures:

Local governments should have reduced expenditures due to the revised qualifications of a small scale amendment and the revisions to the judicial review of development order challenges.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The development community may be positively impacted by this bill due to the streamlining provisions relating to comprehensive plan amendments and substantial deviations. These changes decrease the time it takes to have amendments approved, thus saving the development community not only time, but money. In addition, development projects currently subject to a DRI review would be, under this bill, exempt from those provisions thus saving money and time. Finally, the development community and other private sector interests are positively impacted by the revisions to the judicial review of challenged development orders as the review is now a certiorari rather than a de novo review.

D. FISCAL COMMENTS:

None

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

The bill does not require counties or municipalities to spend funds or to take an action requiring the expenditure of funds.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

The bill does not reduce the authority that counties or municipalities have to raise the revenue in the aggregate.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

The bill does not reduce the tax authority that counties or municipalities have to raise revenue in the aggregate.

V. COMMENTS:

A. CONSTITUTIONAL ISSUES:

N/A

B. RULE-MAKING AUTHORITY:

This bill clarifies and provides additional legislative intent with respect to application of rule 9J-5, F.A.C., by the agency.

C. OTHER COMMENTS:

None

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

The Committee on Community Affairs, at its April 5, 2000 meeting, adopted the following amendments to its proposed committee bill:

Amendment #1 by Rep. Turnbull -- This amendment creates a new section within the county chapter (ch. 125) of the statutes. The amendment provides that no citizen shall be denied their constitutional right to petition their elected officials. In addition, this amendment preempts any special act or general law to the contrary. This is an attempt to address the problems arising from the rulings in the Jennings and Synder cases.

Amendment #2 by Rep. Turnbull-- This amendment creates a new section within the municipality chapter (ch. 166) of the statutes. The amendment provides that no citizen shall be denied their constitutional right to petition their elected officials. In addition, this amendment preempts any special act or general law to the contrary. This is an attempt to address the problems arising from the rulings in the Jennings and Synder cases.

Amendment #3 by Rep. Alexander -- This amendment amended section 5 of the PCB. The amendment provides that it is intended that the innovative planning and development program created by this section be given careful consideration. Accordingly, the bill prohibits any nonconsensual residential density reduction on ag., rural, open, open/rural., or equivalent property until July, 2001 in order to provide for the study process and legislative consideration of the recommendations.

Amendment #4 by Barreiro -- This amendment creates a new paragraph (b) of section 163.3180(6) by providing that a local government may grant an exception from the transportation concurrency requirement for an area designated in the comp plan as a regional activity center. The amendment provides the definition of a regional activity center

as the current definition of a regional activity center found in Rule 28-24.014(10(c)2, F.A.C. This rule provides that a regional activity center is a compact, high intensity, high density multi-use area designated as appropriate for intensive growth by the local government.

Amendment #5 by Rep. Sorensen -- This amendment allows comprehensive plan amendments that involve the construction of affordable housing that meet the criteria in section 420.0004(3), F.S., to use the small scale amendment process. In addition, the amendments are exempt from compliance review under chapter 163, F.S. However, DCA still reviews the amendments for consistency with the principles for guiding development applicable to that area and the amendment does not become effective until DCA issues a final order under section 380.05(6), F.S.

Amendment #6 by Rep. Barreiro -- This amendment repeals language in section 11 of the PCB by repealing the exemption from the DRI process for developments in areas which are exempt from transportation concurrency requirements.

Amendment #7 by Rep. Barreiro -- This is a clarifying amendment which provides that there are 25 voting members on the study commission.

Amendment #8 by Rep. Barreiro -- This is a clarifying amendment which provides that the commission should study whether there is adequate protection from local and state government land use decisions.

Amendment #9 by Morroni (Andrews offered) -- This amendment provides that any municipality that has an agreement with a developer of a DRI located outside the municipality boundaries as of 3/31/2000 may levy a water service tax on such property, regardless of its location. This amendment also limits recovery, in the event of a challenge, to monies paid into an escrow account subsequent to such a challenge. This language was brought forward by all three parties involved in the agreement (City of Wildwood, Villages of Lake Sumter, & Sumter County Water). In addition, this language only applies to this specific agreement.

Amendment #10 by Rep. Turnbull -- This amendment amends the Growth management and planner specialists membership category of the commission by removing the requirement that such individuals must represent the private sector.

Amendment #11 by Barreiro -- This is a technical amendment that clarifies that the amendment goes to the appropriate county, rather than the county land planning agency.

Amendment #12 by Kosmas -- This amendment decreases the acreage threshold for a small scale amendment from 40 acres to 20 acres.

Amendment #13 & 14 by Kosmas -- These amendments replace language that was proposed to be deleted in the PCB. The PCB revised the definition of development to exclude work by any utility engaged in distribution or transmission of electricity, gas or water for specific purposes. This amendment returns language that provides the work must be performed on established rights of way.

Amendment #15 by Sorensen -- This amendment adds an additional issue to the charge of the study commission by providing that the study commission must study the economic impact on an area declared an area of critical state concern.

All of the above amendments, with the exception of amendment #12, were adopted by the Committee on Community Affairs. Amendment #12 failed by an 8 to 2 vote.

VII. SIGNATURES:

COMMITTEE ON COMMUNITY AFFAIRS:

Prepared by:	Staff Director:
Laura L. Jacobs, Esq.	Joan Highsmith-Smith