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HOUSE OF REPRESENTATIVES
COUNCIL FOR SMARTER GOVERNMENT
ANALYSIS

BILL #: CS/HB 1609

RELATING TO: Local-Government Development Orders

SPONSOR(S): Council for Smarter Government and Representative Bennett

TIED BILL(S): None

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

(1) LOCAL GOVERNMENT & VETERANS AFFAIRS (SGC) YEAS 11 NAYS 0
(2) COUNCIL FOR SMARTER GOVERNMENT YEAS 11 NAYS 0
(3)
(4)
(5)

I. SUMMARY:

THIS DOCUMENT IS NOT INTENDED TO BE USED FOR THE PURPOSE OF CONSTRUING STATUTES, OR TO BE CONSTRUED AS AFFECTING, DEFINING, LIMITING, CONTROLLING, SPECIFYING, CLARIFYING, OR MODIFYING ANY LEGISLATION OR STATUTE.

This bill makes available to owners, developers, and applicants the same methods available to third parties to appeal and challenge the consistency of a development order with a local comprehensive plan. The bill allows local governments to establish a special master process to address quasi-judicial proceedings associated with development order challenges. If a local government establishes such a process, the bill provides that the sole method by which an aggrieved and adversely affected party may challenge any decision of a local government granting or denying an application for a development order, which materially alters the use or density or intensity of use on a particular piece of property, on the basis that it is not consistent with the comprehensive plan is by a petition for certiorari filed in circuit court no later than 30 days following rendition of a development order or other written decision of the local government, or when all local administrative appeals are exhausted, whichever occurs later.

If a local government enacts a special master process, third parties would lose their right to a "trial de novo." Instead, third parties, as well as owners, developers, and development order applicants' appeal right would be by certiorari review. If a local government does not establish a special master process consistent with the requirements of the bill, then all aggrieved or adversely affected parties, including third parties and owners, developers, and applicants for development orders, would have the same right to maintain a de novo action for declaratory, injunctive or other relief against any local government to challenge any decision of local government granting or denying an application for, or to prevent such local government from taking any action on, a development order which materially alters the use or density or intensity of use on a particular piece of property which is not consistent with the comprehensive plan.

This bill has no direct fiscal impact on state or local government.

II. SUBSTANTIVE ANALYSIS:

A. DOES THE BILL SUPPORT THE FOLLOWING PRINCIPLES:

1.	Less Government	Yes []	No []	N/A [X]
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:

Background – Growth Management System

The Local Government Comprehensive Planning and Land Development Regulation Act of 1985, ("Act") ss. 163.3161-163.3244, 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; 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, DCA 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 DCA on March 6, 1986 as Rule 9J-5, Florida Administrative Code, (F.A.C.).

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.

Land Development Regulations

Section 163.3202, F.S., requires each county and each municipality to adopt and enforce land development regulations that are consistent with and implement their adopted comprehensive plan. Such regulations must contain specific and detailed provisions necessary or desirable to implement the adopted comprehensive plan and must at a minimum:

- Regulate the subdivision of land;
- Regulate the use of land and water for those land use categories included in the land use element and ensure the compatibility of adjacent uses and provide for open space;
- Provide for protection of potable water wellfields;
- Regulate areas subject to seasonal and periodic flooding and provide for drainage and stormwater management;
- Ensure the protection of environmentally sensitive lands designated in the comprehensive plan;
- Regulate signage;
- Provide that public facilities and services meet or exceed the standards established in the capital improvements element required by s. 163.3177, F.S., and are available when needed for the development, or that development orders and permits are conditioned on the availability of these public facilities and services necessary to serve the proposed development. Not later than 1 year after its due date established by the state land planning agency's rule for submission of local comprehensive plans pursuant to s. 163.3167(2), F.S., a local government shall not issue a development order or permit which results in a reduction in the level of services for the affected public facilities below the level of services provided in the comprehensive plan of the local government.
- Ensure safe and convenient onsite traffic flow, considering needed vehicle parking.

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 must, at a minimum, ensure the compatibility of adjacent uses.

Review of Development Regulations

Section 163.3213, F.S., defines "land development regulation" to mean:

> an ordinance enacted by a local governing body for the regulation of any aspect of development, including a subdivision, building construction, landscaping, tree protection, or sign regulation or any other regulation concerning the development of land. This term shall include a general zoning code, but shall not include a zoning map, an action which results in zoning or rezoning of land, or any building construction standard adopted pursuant to and in compliance with the provisions of chapter 553.

The section authorizes a substantially affected person within 12 months after final adoption of a land development regulation to challenge the regulation on the basis that it is inconsistent with the local comprehensive plan. Prior to instituting such a challenge, a substantially affected person must file a petition with the local government outlining the facts on which the petition is based and the reasons that the substantially affected person considers the land development regulation to be inconsistent with the local comprehensive plan. The local government has 30 days after the receipt of the petition to respond. Thereafter, the substantially affected person may petition DCA not later than 30 days after the local government has responded or at the expiration of the 30-day period which the local government has to respond. The local government and the petitioning, substantially affected person may by agreement extend the 30-day time period within which the local

government has to respond. The petition to DCA must contain the facts and reasons outlined in the prior petition to the local government.

DCA is required to notify the local government of its receipt of a petition and must give the local government and the substantially affected person an opportunity to present written or oral testimony on the issue and must conduct any investigations of the matter that it deems necessary. These proceedings are informal. Not later than 60 days after receiving the petition, DCA must issue its written decision on the issue of whether the land development regulation is consistent with the local comprehensive plan, giving the grounds for its decision.

If DCA determines that the regulation is consistent with the local comprehensive plan, the substantially affected person may, within 21 days, request a hearing from the Division of Administrative Hearings, and an administrative law judge must hold a hearing in the affected jurisdiction no earlier than 30 days after DCA renders its decision. The section provides that the adoption of a land development regulation by a local government is legislative in nature and may not be found to be inconsistent with the local plan if it is fairly debatable that it is consistent with the plan.

If DCA determines that the regulation is inconsistent with the local comprehensive plan, it must, within 21 days, request a hearing from the Division of Administrative Hearings, and an administrative law judge must hold a hearing in the affected jurisdiction not earlier than 30 days after DCA renders its decision.

If the administrative law judge finds the land development regulation to be inconsistent with the local comprehensive plan, the order must be submitted to the Administration Commission for imposition of sanctions. An administrative proceeding under this section is the sole proceeding available to challenge the consistency of a land development regulation with a comprehensive plan adopted under this part.

Consistency of Development Orders with Local Comprehensive Plan

Section 163.3194, F.S., requires all development, both public and private, and all development orders approved by local governments to be consistent with the adopted local comprehensive plan. Section 163.3194(1)(a), F.S., provides:

> A development order or land development regulation shall be consistent with the comprehensive plan if the land uses, densities or intensities, and other aspects of development permitted by such order or regulation are compatible with and further the objectives, policies, land uses, and densities or intensities in the comprehensive plan and if it meets all other criteria enumerated by the local government.

Section 163.3164(7), F.S., defines "development order" to mean any order granting, denying, or granting with conditions an application for a development permit. Subsection (8) defines "development permit" to include any building permit, zoning permit, subdivision approval, rezoning, certification, special exception, variance, or any other official action of local government having the effect of permitting the development of land.

Review of Development Orders

Development orders that are contested by the applicant are subject to quasi-judicial proceedings. These local proceedings are formal and often involve 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.

Section 163.3215, F.S., provides for standing to enforce local comprehensive plans through development orders. 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. "Aggrieved or adversely affected party" is defined to mean:

> any person or local government which will suffer an adverse effect to an interest protected or furthered by the local government comprehensive plan, including interests related to health and safety, police and fire protection service systems, densities or intensities of development, transportation facilities, health care facilities, equipment or services, or environmental or natural resources. The alleged adverse interest may be shared in common with other members of the community at large, but shall exceed in degree the general interest in community good shared by all persons.

Suit under this section is the sole action available to challenge the consistency of a development order with a comprehensive plan adopted under this part. Prior to institution of an action pursuant to this section, the complaining party must first file a verified complaint with the local government whose actions are complained of setting forth the facts upon which the complaint is based and the relief sought by the complaining party. The verified complaint must be filed no later than 30 days after the alleged inconsistent action has been taken. The local government receiving the complaint is required to respond within 30 days after receipt of the complaint. Thereafter, the complaining party is authorized to institute the action authorized in this section. However, the action must be instituted no later than 30 days after the expiration of the 30-day period which the local government has to take appropriate action. Failure to comply with this requirement does not bar an action for a temporary restraining order to prevent immediate and irreparable harm from the actions complained of. In any action under this section, no settlement may be entered into by the local government unless the terms of the settlement have been the subject of a public hearing after notice as required by this part. Finally, in any suit under this section, the Department of Legal Affairs is authorized to intervene to represent the interests of the state.

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. The court found that s. 163.3215, F.S., must provide for a de novo proceeding because the time frame for filing the action is at odds with that set forth in the Florida Rules of Appellate Procedure, which provides a 30 day deadline for filing such actions. The court found that reading s. 163.3215, F.S., to authorize the invocation of the circuit court's certiorari jurisdiction more than 30 days after the agency action being challenged would make the section unconstitutional. Accordingly, under the court's ruling, third party challengers receive 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 proceeding moot.

Growth Management Study Commissions

In July 2000, Governor Bush issued Executive Order 2000-196 appointing a twenty-three member Growth Management Study Commission to review Florida's growth management system in order to "assure that the system meets the needs of a diverse and growing State and to

make adjustments as necessary based on the experience of implementing the current system." The 23-member study commission included representatives of local government, the development community, agriculture, and the environmental community. The commission conducted 12 meetings throughout the state to hear citizen comment, expert opinion, and deliberate on the question of how to adjust Florida's system of growth management. There was general consensus among members of the commission, as well as members of the public, that the current system of local comprehensive planning in Florida has fallen short of addressing problems associated with growth, including: traffic congestion, school overcrowding, loss of natural resources, decline of urban areas and conversion of agricultural lands.

In its final report entitled "A Livable Florida for Today and Tomorrow," the Growth Management Study Commission set forth 89 recommendations for reforming Florida's growth management system. Some of these recommendations are addressed by this bill. They include:

Recommendation 26: For those local governments that choose to adopt a special master process (see Recommendations 31 and 32), include the following. Require public notice at application, or within 15 days of application, to be user friendly. Local governments should modify formal public hearing notices so they clearly identify in plain language the nature of the amendments or applications under consideration. Place conspicuous signs on-site. These signs shall be consistent with local sign ordinances. The signs shall advise an interested party on how to get a copy of the full cost accounting, if applicable. This requirement shall apply to all applications for development orders and site-specific future land use map amendments requiring a public hearing. Specifically, notice shall be by publication and shall be by mailed notice to other property owners as required by law. The notice must tell people the dates of public hearings, and contact information for the appropriate governmental department, how to initiate the quasi-judicial process and the time frames for doing so. Local governments should explore additional forms of notice beyond traditional legal notices in local newspapers. These include putting notices on utility bills and approaching church groups, civic groups, civic organizations, and community centers. The initiator of the amendment must bear the cost.

- Local governments should be encouraged to develop citizen involvement plans which articulate how citizens will be made aware of the growth management process and how to participate in the process. The Department of Community Affairs should develop technical assistance documents that detail how to conduct successful, ongoing citizen involvement processes. Included as part of this technical assistance should be guidelines for developing and implementing a system to measure citizen satisfaction with the planning process and whether they view the process as furthering the established common community outcomes.

- Local governments will encourage applicants for a development order to involve citizen groups and surrounding owners to allow for information and to express any concerns regarding the project.

Recommendation 29: There should be a uniform proceeding to address challenges to a development order's consistency with the comprehensive plan and challenges to a development order's consistency with the land development regulations.

Recommendation 30: Combining plan and regulation consistency challenges for development orders into the one new action is not intended to abolish the right to seek other declaratory relief, including declarations of unconstitutionality, in independent and separate actions as allowed by current law.

Recommendation 31: Local governments should be encouraged to establish a special master process to address quasi-judicial proceedings associated with development order challenges.

Recommendation 32: Local governments would establish the special master process by adoption of a local ordinance, which would include the following minimum provisions:

- notice by publication and by mailed notice to other property owners as required by law simultaneous with the filing of application for development permit, as defined by s. 163.3164, F.S. The notice must delineate that aggrieved or adversely affected persons have the right to request a quasi-judicial hearing and include a provision as to how to initiate the quasi-judicial process and the time frames for doing so. Once a local official (i.e., planning director) has recommended approval, approval with conditions, or denial and the report is issued, any aggrieved or adversely affected party would have a specified number of days to request a special master. The request for a special master need not be a full-blown petition or complaint. The local government shall include an opportunity for an alternative dispute resolution process and may include a stay of the formal hearing for this purpose;

- an opportunity to participate in the process for an aggrieved or adversely affected party which provides a reasonable time to prepare and present a case;

- an opportunity for reasonable discovery prior to a quasi-judicial hearing;

- a hearing before an independent special master who shall be an attorney with at least five years experience and who shall, at conclusion of the hearing, recommend written findings of fact and conclusions of law;

- at the hearing all parties shall have the opportunity to respond, present evidence and argument on all issues involved that are directly related to the development order and to conduct cross-examination and submit rebuttal evidence;

- the standard of review applied by the special master shall be in accordance with Florida law; and

- a hearing before the local government which shall be bound by the special master's findings of fact unless the findings of fact were not based on competent substantial evidence. The governing body may modify conclusions of law. Provided, however, that the governing body shall be authorized to correct a misinterpretation of the local government's comprehensive plan or land development regulations without regard to whether the misinterpretation is labeled as a finding of fact or a conclusion of law.

- no ex parte communication relating to the merits of the matter under review shall be made to the special master. No ex parte communication relating the merits of the matter under review shall be made to the governing body after a time to be established by the local ordinance, but no later than receipt of the recommended order by the governing body.

The Commission received compelling testimony on two distinct types of review regarding citizen appeal challenges to development orders and plan amendment approvals. It heard the advantages and disadvantages of de novo (gives citizens the right to raise new issues not considered during testimony before elected officials) and certiorari (appeals would only be heard on the record created before elected officials - no additional information could be considered) reviews. The Legislature should consider these differences and make its determination concerning the appropriate type of review.

Recommendation 33: Upon adoption of the ordinance with the minimum provisions for a special master process, there would be a review at the Circuit Court level of final action of any development order.

Recommendation 34: The special master process would be paid for through a reasonable surcharge on all development permits or in another manner determined by a local government.

Recommendation 35: The standard of review and burden of proof will be in accordance with Florida law.

Recommendation 36: A local government may elect to not use the special master process. However, a new statutory cause of action would be made available (i.e., petitioner would choose either de novo or cert review). In the event there is more than one petition, the Court shall be encouraged to consolidate the cases. Additionally, if there is more than one petition and one of the petitioners elects de novo review, all petitions will be subject to de novo review. A petitioner will have 30 days from the rendition of the development order to file for either de novo or certiorari review. The burden of proof would be in accordance with Florida law, and discovery would be handled using the Florida Rules of Civil Procedure. Persons would be allowed to seek Chapter 86, F.S., relief to the extent currently available.

Recommendation 37: Any petitioner that elects de novo review would waive all objections to the adequacy of the hearing before the local government.

Recommendation 38: Regardless of whether a local government used the special master process, the verified complaint provisions of s.163.3215, F.S., would be deleted and the time schedule in s.163.3215(4), F.S., would be revised to make clear that a challenger has a certain amount of time from the date of the rendition of the local decision, in accordance with the Florida rules of court to file an action in circuit court for the appropriate review, as provided by statute.

Recommendation 39: Regardless of whether a local government used the special master process, a petitioner may join as part of the same action a claim or complaint for injunctive relief which the circuit court may hear and grant as part of its certiorari review.

Recommendation 40: The provisions of section 163.3215(1), F.S., should be amended as follows: Any aggrieved or adversely affected party may maintain an action for declaratory and injunctive or other relief against any local government to reverse any decision of local government regarding an application for or to prevent such local government from taking any action on a development order, as defined in s. 163.3164, F.S., which materially alters the use or density or intensity of use on a particular piece of property that is not consistent with the comprehensive plan or land development regulation adopted under this part.

Recommendation 41: A developer/applicant shall have the same remedies available to challenge the consistency of a development order with the comprehensive plan as a third party and shall be a party to any action filed by a third party against a development order.

C. EFFECT OF PROPOSED CHANGES:

This bill substantially revises current methods for challenging the consistency of a local-government development order with a local-government comprehensive plan. The bill adds the owner, developer, or applicant for a development order to the definition of an “aggrieved or adversely

affected party" to make available to such parties the same methods as are available to third parties to appeal and challenge the consistency of a development order with a local comprehensive plan.

The bill allows local governments to establish a special master process to address quasi-judicial proceedings associated with development order challenges, by adoption of a local ordinance. If a local government establishes such a process meeting the minimum requirements included in the bill, then the bill provides that the sole method by which an aggrieved and adversely affected party may challenge any decision of a local government granting or denying an application for a development order, as defined in s. 163.3164, F.S., which materially alters the use or density or intensity of use on a particular piece of property, on the basis that it is not consistent with the comprehensive plan is by a petition for certiorari filed in circuit court no later than 30 days following rendition of a development order or other written decision of the local government, or when all local administrative appeals, if any, are exhausted, whichever occurs later.

If a local government enacts a special master process, third parties would loose their right to a "trial de novo," in which the circuit court conducts a completely new trial with all new evidence and potentially new issues raised. Instead, third parties as well as owners, developers, and development order applicants' appeal rights would be by certiorari review in circuit court where the court relies solely on the record as it was established at the local quasi-judicial hearing. If a local government does not establish a special master process consistent with the requirements of the bill, then all aggrieved or adversely affected parties, including third parties and owners, developers, and applicants for development orders, would have the same right to maintain a de novo action for declaratory, injunctive or other relief against any local government to challenge any decision of local government granting or denying an application for, or to prevent such local government from taking any action on, a development order which materially alters the use or density or intensity of use on a particular piece of property which is not consistent with the comprehensive plan.

A local government ordinance establishing a special master process must include the following minimum provisions:

- Notice by publication or by mailed notice to other property owners as required by law simultaneous with the filing of an application for development review, excluding building permits. The notice must tell people how to initiate the quasi-judicial process and the timeframes for doing so. The request for a special master need not be a full-blown petition or complaint. The local government may include an opportunity for an alternative dispute resolution process;

- A clear point of entry consisting of a written preliminary decision, at a time and in a manner to be established in the local ordinance, with the time to request a quasi-judicial hearing running from the issuance of the written preliminary decision; the local government, however, is not bound by the preliminary decision. A party may request a hearing to challenge or support a preliminary decision;

- The local process must provide an opportunity for participation in the process by an aggrieved or adversely affected party, allowing a reasonable time for the party to prepare and present a case for the quasi-judicial hearing.

- The local process must provide at a minimum an opportunity for the disclosure of witnesses and exhibits prior to hearing, and an opportunity for the depositions of witnesses to be taken.

- The local process may not require that a party be represented by an attorney in order to participate in a hearing.

- The local process must provide for a quasi-judicial hearing before an impartial special master who is an attorney who has at least 5 years' experience and who shall, at the conclusion of the hearing, recommend written findings of fact and conclusions of law. The special master must have the power to swear witnesses and take their testimony under oath, to issue subpoenas and other orders regarding the conduct of the proceedings, and to compel entry upon the land. The standard of review applied by the special master in determining whether a proposed development order is consistent with the comprehensive plan shall be strict scrutiny in accordance with Florida law.

- All parties must have the opportunity to respond, to present evidence and argument on all issues involved which are related to the development order, and to conduct cross-examination and submit rebuttal evidence. Public testimony must be allowed.

- (The local process must provide for a duly noticed public hearing before the local government at which public testimony is allowed. At the quasi-judicial hearing the local government is bound by the special master's findings of fact unless the findings of fact are not supported by competent substantial evidence. The governing body may modify the conclusions of law if it finds that the special master's application or interpretation of law is erroneous. The governing body may make reasonable interpretations of its comprehensive plan and land development regulations without regard to whether the special master's interpretation is labeled as a finding of fact or a conclusion of law. The local government's final decision must be reduced to writing, including the findings of fact and conclusions of law, and is not considered rendered or final until officially date-stamped by the city or county clerk.

- An ex parte communication relating to the merits of the matter under review may not be made to the special master. An ex parte communication relating to the merits of the matter under review may not be made to the governing body after a time to be established by the local ordinance, which time must be no later than receipt of the recommended order by the governing body.

- At the option of the local government, the process may require actions to challenge the consistency of a development order with land development regulations to be brought in the same proceeding.

Upon adoption of the ordinance with the minimum provisions for a special master process, there is certiorari review at the Circuit Court level of final action of any development order. If a local government chooses not to adopt a special master process, there is de novo review, for all parties, at the Circuit Court level of final action of any development order.

In addition, the verified complaint provisions of 163.3215, F.S., are deleted.

D. SECTION-BY-SECTION ANALYSIS:

Section 1. Section 163.3215, F.S., is amended. New subsection (1) is added to state that subsections (3) and (4) provide the exclusive methods for an aggrieved or adversely affected party to appeal and challenge the consistency of a development order with a comprehensive plan adopted under this part. The subsection declares the local government that issues the development order is to be named as a respondent in all proceedings under this section. The subsection

provides that subsection (3) shall not apply to development orders for which a local government has established a process consistent with the requirements of subsection (4). The subsection also is amended to allow local governments to decide which types of development orders will proceed under subsection (4), and to provide that subsection (3) will apply to all other development orders that are not subject to subsection (4).

New subsection (2) defines "aggrieved or adversely affected party". The definition is consistent with the definition in current subsection (2), except that new subsection (2) declares the term includes the owner, developer, or applicant for a development order.

Existing subsection (1) is renumbered subsection (3) and amended to revise current language authorizing any aggrieved or adversely affected party to maintain action for injunctive or other relief against any local government to prevent such local government from taking any action on a development order which materially alters the use or density or intensity of use on a particular piece of property that is not consistent with the comprehensive plan adopted under this part. The revision adds declaratory relief to injunctive or other relief available through an action under this section, clarifies that an action under this subsection is a de novo action, and adds actions to challenge any decision of local government granting or denying an application to the actions available. Subsection (3) is further amended to require an action under this section to be filed no later than 30 days following rendition of a development order or other written decision, or when all local administrative appeals, if any, are exhausted, whichever occurs later.

Current subsection (2), which defines an "aggrieved or adversely affected party", is deleted. Current subsection (3) is deleted to repeal an obsolete provision.

A new subsection (4) is added. The subsection provides that if a local government elects to adopt or has adopted an ordinance establishing, at a minimum, the requirements listed in this subsection, the sole method by which an aggrieved and adversely affected party may challenge any decision of local government granting or denying an application for a development order, as defined in s. 163.3164, F.S., which materially alters the use or density or intensity of use on a particular piece of property, on the basis that it is not consistent with the comprehensive plan adopted under this part, is by an appeal filed by petition for writ of certiorari filed in circuit court no later than 30 days following rendition of a development order or other written decision of the local government, or when all local administrative appeals, if any, are exhausted, whichever occurs later.

The subsection provides that an action for injunctive or other relief may be joined with the petition for certiorari, and states that principles of judicial or administrative res judicata and collateral estoppel apply to these proceedings.

The subsection lists the minimum components of the local process as follows:

(a) The local process must make provision for notice of an application for a development order that materially alters the use or density or intensity of use on a particular piece of property, including notice by publication or mailed notice consistent with the provisions of s. 166.041(3)(c)2.b. and c. and s. 125.66(4)(b)2. and 3., F.S., and must require prominent posting at the job site. The notice must be given within 10 days after the filing of an application for development order; however, notice under this subsection is not required for an application for a building permit or any other official action of local government which does not materially alter the use or density or intensity of use on a particular piece of property. The notice must clearly delineate that an aggrieved or adversely affected person has the right to request a quasi-judicial hearing before the local government for which the application is made, must explain the conditions precedent to the appeal of any development order ultimately rendered upon the application, and must specify the location where written procedures can be obtained that

describe the process, including how to initiate the quasi-judicial process, the timeframes for initiating the process, and the location of the hearing. The process may include an opportunity for an alternative dispute resolution.

(b) The local process must provide a clear point of entry consisting of a written preliminary decision, at a time and in a manner to be established in the local ordinance, with the time to request a quasi-judicial hearing running from the issuance of the written preliminary decision; the local government, however, is not bound by the preliminary decision. A party may request a hearing to challenge or support a preliminary decision.

(c) The local process must provide an opportunity for participation in the process by an aggrieved or adversely affected party, allowing a reasonable time for the party to prepare and present a case for the quasi-judicial hearing.

(d) The local process must provide at a minimum an opportunity for the disclosure of witnesses and exhibits prior to hearing, and an opportunity for the depositions of witnesses to be taken.

(e) The local process may not require that a party be represented by an attorney in order to participate in a hearing.

(f) The local process must provide for a quasi-judicial hearing before an impartial special master who is an attorney who has at least 5 years' experience and who shall, at the conclusion of the hearing, recommend written findings of fact and conclusions of law. The special master must have the power to swear witnesses and take their testimony under oath, to issue subpoenas and other orders regarding the conduct of the proceedings, and to compel entry upon the land. The standard of review applied by the special master in determining whether a proposed development order is consistent with the comprehensive plan shall be strict scrutiny in accordance with Florida law.

(g) At the quasi-judicial hearing all parties must have the opportunity to respond, to present evidence and argument on all issues involved which are related to the development order, and to conduct cross-examination and submit rebuttal evidence. Public testimony must be allowed.

(h) The local process must provide for a duly noticed public hearing before the local government at which public testimony is allowed. At the quasi-judicial hearing the local government is bound by the special master's findings of fact unless the findings of fact are not supported by competent substantial evidence. The governing body may modify the conclusions of law if it finds that the special master's application or interpretation of law is erroneous. The governing body may make reasonable interpretations of its comprehensive plan and land development regulations without regard to whether the special master's interpretation is labeled as a finding of fact or a conclusion of law. The local government's final decision must be reduced to writing, including the findings of fact and conclusions of law, and is not considered rendered or final until officially date-stamped by the city or county clerk.

(i) An ex parte communication relating to the merits of the matter under review may not be made to the special master. An ex parte communication relating to the merits of the matter under review may not be made to the governing body after a time to be established by the local ordinance, which time must be no later than receipt of the recommended order by the governing body.

(j) At the option of the local government, the process may require actions to challenge the consistency of a development order with land development regulations to be brought in the same proceeding.

Current subsection (4), which requires an action under this section to be preceded by a verified complaint with the local government, is deleted.

Current subsection (7), which requires that in any suit under this section, a public hearing be held prior to any settlement, is amended to replace the word "suit" with "proceeding" and to reference proceedings under subsections (3) or (4).

Current subsection (8), which provides that in any suit under this section, the Department of Legal Affairs may intervene to represent the interests of the state, is amended to replace the word "suit" with "proceeding" and to reference proceedings under subsections (3) and (4).

A new subsection (9) is added to provide that subsections (3) and (4) do not relieve the local government of its obligations to hold public hearings as required by law.

Section 2. An effective date of June 1, 2002, is provided.

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

Local governments may experience reduced expenditures due to the revised qualifications relating to small-scale amendments and the revisions to the judicial review of development order challenges.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

Under the bill, if a local government establishes a special master process to address quasi-judicial proceedings associated with development order challenges, property owner and developer interests could be positively impacted by the revisions to the judicial review of challenged development orders as the review would be a certiorari rather than a de novo review. Conversely, if a local government does not establish such a process, the bill grants the same opportunity (de novo review) to all parties involved.

Under the bill's provisions, if a local government establishes a special master process to address quasi-judicial proceedings associated with development order challenges, third parties would loose their right to a "trial de novo," in which the circuit court conducts a completely new trial with all new

evidence and potentially new issues raised. Instead, third parties as well as owners, developers, and development order applicants' appeal right would be by certiorari review in circuit court where the court relies solely on the record as it was established at the local quasi-judicial hearing.

Citizens are positively impacted by this bill as it allows for earlier citizen involvement in the process. Local governments are required to include in their citizen participation procedures several requirements that improve the current citizen participation requirements.

D. FISCAL COMMENTS:

None.

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

A. APPLICABILITY OF THE MANDATES PROVISION:

This 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:

This bill will not reduce the authority of countries and municipalities to raise total aggregate revenues.

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

This bill does not reduce the total aggregate percent of state tax shared with counties or municipalities.

V. COMMENTS:

A. CONSTITUTIONAL ISSUES:

N/A

B. RULE-MAKING AUTHORITY:

N/A

C. OTHER COMMENTS:

As discussed in the "Effects of Proposed Changes" section of the analysis, if a local government does not establish a special master process consistent with the requirements of the bill, then all aggrieved or adversely affected parties, including third parties and owners, developers, and applicants for development orders, would have the same right under subsection (3) of s. 163.3215, F.S., to maintain an action for declaratory, injunctive or other relief against any local government to challenge any decision of local government granting or denying an application for, or to prevent such local government from taking any action on, a development order which materially alters the use or density or intensity of use on a particular piece of property which is not consistent with the comprehensive plan.

As discussed in the "Present Situation" section of the analysis, in *Poulos v. Martin County*, 700 So. 2d 163 (Fla. 4th DCA 1997), the court found that s. 163.3215, F.S., must provide for a de novo

proceeding because the time frame for filing the action is at odds with that set forth in the Florida Rules of Appellate Procedure, which provides a 30 day deadline for filing such actions. The court found that reading s. 163.3215, F.S., to authorize the invocation of the circuit court's certiorari jurisdiction more than 30 days after the agency action being challenged would make the section unconstitutional.

As discussed in the "Effects of Proposed Changes" section, this bill deletes current subsection (4), which requires an action under this section to be preceded by a verified complaint with the local government. In addition, existing subsection (1) of s. 163.3215, F.S., is renumbered (3) and amended to require an action under this section to be filed no later than 30 days following rendition of a development order or other written decision, or when all local administrative appeals, if any, are exhausted, whichever occurs later.

The effect of these changes essentially is to eliminate the primary basis for the court's decision in *Poulos v. Martin County* finding that s. 163.3215, F.S., provides for de novo proceedings. However, the bill also amends existing subsection (1) of s. 163.3215, F.S., which is renumbered (3), to refer to an action under this subsection as a de novo action.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

On February 26, 2002, the Council for Smarter Government considered and passed HB 1609 as a council substitute, incorporating a strike-everything amendment adopted by the Committee on Local Government & Veterans Affairs adopted by the committee at its February 21, 2002, meeting. CS/HB 1609 differs from the original filed bill in the following ways:

- CS/HB 1609 makes technical and clarifying changes to the bill.
- CS/HB 1609 provides that the local government must be one of the respondents in all proceedings in s. 163.3251, F.S., but not necessarily the only one.
- CS/HB 1609 allows local governments the discretion to have an alternative dispute resolution process instead of mandating one.
- CS/HB 1609 limits "discovery" to "reasonable discovery," provides that the local process may not require that a third party be represented by an attorney, and grants by law affirmative authority to the special master to issue subpoenas and other orders regarding the conduct of the proceedings
- CS/HB also clarifies that under subsection (3) of s. 163.3215, F.S., as amended, the action is a de novo action.

VII. SIGNATURES:

COMMITTEE ON LOCAL GOVERNMENT & VETERANS AFFAIRS:

Prepared by:	Staff Director:
Thomas L. Hamby, Jr.	Joan Highsmith-Smith

AS REVISED BY THE COUNCIL FOR SMARTER GOVERNMENT:

Prepared by:	Council Director:
Thomas L. Hamby, Jr.	Don Rubottom