The Flexible New Approach to DRI Aggregation

Since the inception of the development of regional impact (DRI) process in 1972, the State Land Planning Agency has struggled with the problem of how to define a "development" for purposes of determining whether it should be subjected to DRI review. Recently, the legislature adopted new criteria to be used by the Department of Community Affairs (DCA) in determining when two or more ostensibly separate developments should be considered one —or be "aggregated" — in order to determine whether the combined projects should undergo DRI review.[1]

No longer are there hard and fast rules. Instead, there is a flexible, subjective approach to determining aggregation for developments to which these new criteria apply. As a result, developers, landowners, and lenders must take special care in assessing projects to determine the potential applicability of F.S. Ch. 380. They also must learn to live with a great deal more uncertainty about the status of their projects.

Prior to these changes, Ch. 28-11 of the Florida Administrative Code prescribed the circumstances under which DCA could aggregate ostensibly separate developments. Adopted by the Administration Commission in 1986 as directed by the legislature,[2] the rules required the existence of each of four factors in order for developments to be aggregated.[3] Those factors were: (1) Evidence of common ownership or majority interest in the developments; (2) a master plan governing the developments; (3) voluntarily shared infrastructure such as roads or drainage systems; and (4) physical proximity to one another. Absent any one of these factors, aggregation could not be mandated.

On January 8, 1988, DCA Secretary Thomas Pelham requested that the Governor and Cabinet revise the 1986 rules because the rules did not ensure that

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ostensibly separate, but obviously integrated developments are reviewed under the DRI process.[4] In the six-page memorandum in which he made this request, Secretary Pelham identified three "flaws" in the 1986 rules. He subsequently proposed revisions to the statute authorizing aggregation, and ultimately the legislature enacted Ch. 88-164, Laws of Florida, which sets forth a more discretionary approach to determining when developments may be aggregated.

Developers, landowners, and lenders must heed this new statute and the new rule which implements it.[5] If ostensibly separate developments are "physically proximate" and subject to a "unified plan of development," they must be aggregated to determine whether they are subject to DRI review.

Certain developments are exempt from this new regimen. Foremost among these are developments authorized to commence development prior to September 1, 1988, but only when all developments with which such a project might be aggregated also were authorized prior to that date. In addition, a development may not be aggregated with an approved DRI, although that development may be considered a DRI in its own right or a substantial deviation from the DRI project under F.S. §380.06(19). Two or more developments which have or will obtain DRI development orders may not be aggregated with one another. Completion of any project with vested development rights under Ch. 380 is not subject to aggregation with another development.[6]

New Criteria for DRI Aggregation

• *Physical Proximity*

The 1988 statute establishes "physical proximity" of developments as the one mandatory prerequisite to aggregate two or more developments in all cases.[7] The 1986 rules also required physical proximity, but narrowly defined the term so that developments would be physically proximate only if their boundaries were coterminous or they were separated only by a publicly owned park or road, railroad, canal or similar right-of-way that did not prevent access between the projects.[8]

Under the new definition, developments generally will be considered physically proximate if they are within one-fourth mile of each other in urban areas or one-half mile of each other in rural areas. This more expansive definition has particular significance for downtown developers and large landowners. Indeed, large landowners interested in selective development of their property should note that developments will be considered physically proximate when they are as much as two miles apart if they are separated by property owned or controlled by a person who owns a "significant legal or equitable interest" in the developments sought to be aggregated.[9]

- *Unified Plan of Development*

The other requirement for aggregation is a determination by DCA that the projects are subject to a "unified plan of development."[10] The 1986 rules also required such a determination, but it was to be based on three mandatory components — physical proximity, shared infrastructure and a master plan.[11] The 1988 legislation eliminates the three-part test for a unified plan and replaces it with a "Chinese menu" of five criteria. The existence of any two criteria entitles DCA to determine the existence of a unified plan and, therefore, to aggregate physically proximate developments.

Ownership, Control or Management

The first criterion on the "Chinese menu" is whether the same person has ownership, control or management over certain aspects of the developments.[12] The 1985 statute had required "common ownership or majority interest" in the developments in all cases.[13] These terms were defined to include only a fee simple interest, a leasehold in excess of 30 years, or more than 50 percent ownership in the developments, and in all cases the requisite interest had to be held by the same person at the time physical development of the projects began or when a master plan was submitted for them.[14]

Secretary Pelham argued that this tightly drawn definition "ignores the fact that common ownership or majority interest may have existed at other times" relevant to determining whether the projects were in fact a unified development.[15] In other words, by arranging ownership interests, developments could avoid the DRI process.

The 1988 legislation and new implementing rule relax the "common ownership or majority interest" factor in three ways. First, they make this criterion nonmandatory. Second, they do not state any time when the requisite interests must have existed. And third, they cover more interests relevant to determining the existence of a unified plan.

"Common ownership or majority interest" was reformulated as "a significant legal or equitable interest" in the developments.[16] As defined by DCA in the new rule,[17] this term now means more than a 25 percent interest, or an option to obtain such as interest, in a fee simple estate, a leasehold of more than 30 years, a life estate, the mineral rights in a mining development, or "similar equitable beneficial, or real property interests" in the developments.[18]

Other interests may satisfy this first criterion on the "Chinese menu." Regulators may rely on "retained or shared control of the developments," or "common management of the developments controlling the form of physical development or disposition of parcels."[19] The new rule does not define either of these two formulations, leaving their meanings to be fleshed out on a case-by-case basis. However, developers should be aware that this criterion may be met as a result of deed restrictions for parcels they sell to others in their projects. The use of the same managers, project planners and other consultants, or sales or leasing agents may also amount to the required control.

From the onset of review of the 1986 rules, developers, landowners, and lenders were concerned that the financing of separate developments by the same lender not be a basis for aggregation. The statute addresses that concern by providing that, in determining whether one person holds the requisite interests in the developments, regulators may not consider the fact that "the same lender has a financial interest, including one acquired through foreclosure, in two or more parcels, so long as the lender is not an active participant in the planning, management or development of the parcels in which it has an interest."[20]

Closeness in Time

The second criterion that may be used to determine the existence of a unified plan of development is whether there exists a "reasonable closeness in time" between the completion of up to 80 percent of one development and the submission to a governmental agency of a "master plan" or a series of plans or drawings for another development indicating "a common development effort" for the two projects.[21]

Under the new rule, the occurrence of these two events within five years will satisfy the criterion. The rule prescribes the circumstances which constitute "the completion of 80 percent or less" of a residential, a nonresidential, or a mixed-use development.[22] However, in determining the degree of completion of a development, regulators may not consider the sale of unimproved parcels in which the seller does not retain "significant control of the future development of the parcels."[23]

Of particular importance in application of this criterion is a provision excluding from aggregation any "activities" leading to adoption of a local government comprehensive plan element or amendment under F.S. Ch. 163.[24] Accordingly, maps, diagrams, or other plans submitted by a developer to any governmental agency as part of the local planning process may not be considered when DCA determines whether a master plan was submitted for the developments to be aggregated. This exclusion was intended to foster landowner participation in the planning process.

Submitted Master Plan

The third criterion is whether a "master plan or series of plans or drawings" covering the developments was submitted to one of six enumerated governmental entities.[25] Under the 1986 rules, a "master plan" could be found in one of two ways from documents submitted to a local government — either from drawings or diagrams which depicted an integrally planned project or, in jurisdictions in which no drawings were required for development approval, from recorded or legally binding written representations establishing the form of development or disposition of parcels.[26] Secretary Pelham argued that this formulation prevented DCA from aggregating developments in jurisdictions which did not require either master plans graphically depicting a project or recorded or legally binding instruments.[27]

The 1988 legislation carries forward the essence of the 1986 rules. However, neither the statute nor the new rule defines "master plan," allowing DCA wide latitude in what submitted documents it considers to be a master plan for aggregation purposes.

Certain instruments have been excluded from consideration as a submitted master plan. First, all materials not submitted to one of the prescribed governmental entities are excluded from consideration by definition. This exclusion protects internal plans, conceptual drawings, and sales plans. Second, materials submitted to a local government as part of the local comprehensive planning process may not be considered a "master plan" under the comprehensive planning activities exclusion. Otherwise, the purpose of the legislature in adopting the exclusion —promoting landowner involvement in the comprehensive planning process — would be defeated.

In addition, in establishing the existence of a submitted master plan, DCA may not rely solely on a master drainage plan or a utility's master utility plan, if it was required by the Public Service Commission or a general-purpose local government.[28] The existence of such plans may buttress a finding that another document constituted a submitted master plan, but neither a drainage plan nor a required utility master plan may itself serve as such a plan for aggregation purposes.[29]

Shared Infrastructure

The fourth criterion, and one of the most troublesome, is whether the developments voluntarily share infrastructure "indicative of a common development effort or . . . designated specifically to accommodate the developments sought to be aggregated."[30] Secretary Pelham identified the counterpart provision of the 1986 rules as "the most abused" provision.[31] One abuse cited by him occurred when developers would persuade a local government to "require" them to share infrastructure—mandate that subdivision roads connector drainage plans not conflict—as a condition of development approval. On the other hand, developers argued that such cooperation fosters good planning.

The 1988 legislation eliminates this means of circumventing aggregation because under it DCA may aggregate developments without relying on shared infrastructure. Moreover, it specifies the only six governmental entities which may "require" the sharing of infrastructure so that it may not be considered for purposes of aggregation. This list does not include such entities as community development districts and other special-purpose local governments which regulators may consider an alter ego for developers until control passes to individual landowners.

The new rule narrows the prior exclusions. It provides that infrastructure-sharing required by a local comprehensive plan, local ordinance or state statute or rule does not satisfy this aggregation criterion. However, it is ambiguous on whether infrastructure-sharing required by an individual zoning action or development permit is still protected if it is not based on a explicit provision of a statute, rule, ordinance, or plan. The prior exclusion for the sharing of parks has been limited,[32] as has the prior exclusion for publicly financed drainage or stormwater management facilities.[33]

Of particular significance in evaluating this criterion is the exclusion for drainage improvements not designed to accommodate development activities listed in F.S. §380.0651(3) and F.A.C. Ch. 28-24, or "which are not designed specifically to accommodate the developments sought to be aggregated."[34] This exclusion will prevent drainage improvements intended for agricultural operations over a large tract of land, whether owned by one or more landowners, from being used as a basis for aggregation in the event discrete parcels are subsequently developed.

The fifth criterion for a unified plan of development is whether there is a "common advertising plan or promotional scheme" covering the developments. This criterion will cover sales brochures and similar materials which depict the two developments as one and are used to promote sales or leases.[35]

The new aggregation statute and rule contain a number of traps for the unwary, which could raise the prospect that developers, landowners, and lenders are in the DRI process even without the intention to jointly plan and develop projects. Actual implementation of the discretionary rule will rest with the DCA. If the language of the statute and rule is interpreted literally, a lender who forecloses on a property within physical proximity to another development in which it is participating might find that its activities constitute the active "planning, management, or development of the parcels."[36] If the lender actively participates, he has satisfied one of the two criteria necessary to demonstrate a unified plan of development and thus, given physical proximity, two of the three total criteria necessary to aggregate the projects.

Sharing infrastructure is another way in which developers, landowners, and lenders may face DRI aggregation. For example, developers previously could donate parks and, if they were shared with a physically proximate development, this sharing would not be considered for aggregation purposes.[37] Now, sharing under such circumstances may be a basis for aggregation. Accordingly, a developer with more than one project should be cautious with any park donations, because if the park is shared by more than one of his projects, it may constitute voluntary infrastructure-sharing. And, if DRI aggregation is possible, a developer may wish to ensure that any publicly financed drainage or stormwater improvements are not designed solely to serve his projects.

In light of the uncertainties and new restraints, one significant feature of the new rule is provision of two existing but now formally identified mechanisms by which a developer may ask DCA whether two or more developments are subject to aggregation. The developer may seek a binding determination similar to binding letters of interpretation authorized by Ch. 380 for determinations of development status and vested rights or may seek an informal, nonbinding "clearance letter."[38]

The new statute also contains one innovation that may enable developers to provide infrastructure for their developments without subjecting them to aggregation. The statute authorizes DCA to enter into binding "nonaggregation agreements" under which two or more developers may jointly plan, donate, finance, build or use infrastructure without that activity being a basis for aggregation.[39] The developers must demonstrate that the infrastructure by the agreement is in the public interest, and it must subsequently be determined to be consistent with local comprehensive plan and land development regulations. This provision provides a mechanism for developers to undertake needed infrastructure without placing their projects in jeopardy of aggregation.

Conclusion

The flexibility of the 1988 aggregation statute and its implementing rule means developers, landowners, and lenders must think through each step of the development process with the prospect of aggregation in mind. When appropriate, they should consider entering into nonaggregation or potential DRI responsibility agreements with other developers. They also may wish to seek guidance from DCA under the new procedures for determining aggregation status. □

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[1] FLA. STAT. §380.0651(4) (Supp. 1988).
[2] FLA. STAT. §380.0651(4) (1985).
[3] F.A.C. RULE 28-11.003.
[4] Memorandum from Thomas G. Pelham, Secretary, Department of Community Affairs, to the Administration Commission, Jan. 8, 1988, p. 6 (hereinafter cited as Pelham Memorandum).
[5] F.A.C. RULE 9J-2.0275 (effective February 2, 1989).
[6] FLA. STAT. §380.0651(4)(c)4. (Supp. 1988). If all developments to be aggregaged were authorized prior to September 1, 1988, the provisions of F.A.C., Ch. 28-11 govern aggregation. F.A.C. RULE 9J-2.0275(3).
[7] FLA. STAT. §380.0651(4) (Supp. 1988).
[8] F.A.C. RULE 28-11.002(6).
[9] F.A.C. RULE 9J-2.0275(2)(a). These distances are to be measured as the crow flies, with urban and rural areas defined by certain U.S. census maps specified in the rule.
[10] FLA. STAT. §380.0651(4) (Supp. 1988).
[11] F.A.C. RULE 28-11.003(c).
[12] FLA. STAT. §380.0651(4)(a)1-3 (Supp. 1988).
[13] FLA. STAT. §380.0651(4) (1987).
[14] F.A.C. RULE 28-11.002(1)(a)-(c).
[15] Pelham Memorandum, *supra* note 4, at 3.
[16] FLA. STAT. §380.0651(4)(a)1.b. (Supp. 1988).
[17] The 1988 legislation vests rulemaking authority on aggregation in DCA. The 1985 statute gave this power to the Governor and Cabinet, as the Administration Commission.
[18] F.A.C. RULE 9J-2.0275(2)(b)1.-5. A lessor's interest under a lease or more than 30 years is not "a significant legal or equitable interest." *Id.*
[19] FLA. STAT. §380.0651(4)(a)1.a., c. (Supp. 1988).
[20] *Id.* §380.0651(4)(b)3.
[21] *Id.* §380.0651(4)(a)2. The statute appears to exclude certain master drainage plans and required utility plans from consideration as "master plan." *See infra* note 29 and accompanying text.
[22] F.A.C. RULE 9J-2.0275(2)(c).
[23] FLA. STAT. §380.0651(4)(b)2. (Supp. 1988).
[24] *Id.* §380.0651(4)(b)1.
[25] *Id.* §380.0651(4)(a)3. A "master plan" under this criterion must have been submitted to an entity specified by statute while a "master plan" under the second criterion may be a plan submitted to any "governmental agency." *Compare id. with id.* §380.0651(4)(a)2.
[26] F.A.C. RULE 28.11.002(4).
[27] Pelham Memorandum, *supra* note 4, at 4.
[28] FLA. STAT. §380.0651(4)(a)3. (Supp. 1988).
[29] The statute does not specify whether such plans may serve as "master plan" for purposes of establishing the criterion on "reasonable closeness in time." For consistency, the term "master plan" should be used as a term of art throughout the statute; therefore, a required utility master plan or a master drainage plan should not serve as a master plan under the second criterion either.
[30] FLA. STAT. §380.0651(4)(a) 4. (Supp. 1988).
[31] Pelham Memorandum, *supra* note 4, at 5.
[32] *Compare* F.A.C. RULE 9J-2.0275(2)(e)2. *with* F.A.C. RULE 28-11.002(7)(b).
[33] *Compare* F.A.C. RULE 9J-2.0275(2)(e)3. *with* F.A.C. RULE 28-11.002(7)(c).
[34] FLA. STAT. §380.0651(4)(b)4. (Supp. 1988).
[35] *Id.* §380.0651(4)(a)5.; F.A.C. RULE 9J-2.0275(2)(f).
[36] FLA. STAT. §380.0651(4)(b)3. (Supp. 1988).
[37] F.A.C. RULE 28-11.002(7)(b).
[38] F.A.C. RULE 9J-2.0275(4).
[39] FLA. STAT. §380.0651(4)(e) (Supp. 1988).