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"Essential Economic Development Law for Redevelopers"

Brenna M. Durden
(904) 353-6410
bdurden@llw-law.com

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Big Development Agreements

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- Florida Statutes Sections 163.3220-163.3243 (2010), known as the "Florida Local Government Development Agreement Act" (the Development Agreement Statute), sets forth the procedures and requirements a local government must comply with in order to approve the "development agreements" authorized by the Act.

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- The Development Agreement Statute specifically provides that "any local government may, by ordinance, establish procedures and requirements . . . to consider and enter into a development agreement" under the Statute. Fla. Stat. § 163.3223.

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- There is some confusion in the legal community regarding whether it is necessary that a local government enact ordinances implementing the Development Agreement Statute in order to enter into agreements that would enjoy the protections provided in the Statute. Robert M. Rhodes, The Florida Local Government Development Agreement Act, Fla. Bar. J. 81 (Oct. 1988); Juergensmeyer, Development Agreements-Chapter 29, Fla. Land Use Law (2nd ed.) 5.
- Brenna's advice: Adopt enabling legislation.

- The Development Agreement Statute requires that Development Agreements contain the following in order to meet the requirements of the Statute:

  - "A legal description of the land subject to the agreement, and the names of its legal and equitable owners." Fla. Stat. § 163.3227(1)(a).

- "The duration of the agreement." Fla. Stat. § 163.3227(1)(b).
- "The development uses permitted on the land, including population densities, and building intensities and height." Fla. Stat. § 163.3227(1)(c).

- "A description of public facilities that will service the development, including who shall provide such facilities; the date any new facilities, if needed, will be constructed; and a schedule to assure public facilities are available concurrent with the impacts of the development." Fla. Stat. § 163.3227(1)(d).

- "A description of any reservation or dedication of land for public purposes." Fla. Stat. 163.3227(1)(e).
- "A description of all local development permits approved or needed to be approved for the development of the land." Fla. Stat. § 163.3227(1)(f).

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- "A finding that the development permitted or proposed is consistent with the local government's comprehensive plan and land development regulations." Fla. Stat. § 163.3227(1)(g).

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- "A description of any conditions, terms, restrictions, or other requirements determined to be necessary by the local government for the public health, safety or welfare of its citizens." Fla. Stat. § 163.3227(1)(h).

- "A statement indicating that the failure of the agreement to address a particular permit, condition, term, or restriction shall not relieve the developer of the necessity of complying with the law governing said permitting requirements, conditions, term or restriction." Fla. Stat. § 163.3227(1)(i).
- A development agreement may contain a "performance schedule" (phasing of development).

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- Before entering into the agreement, the local government must conduct two public hearings with notice published in a newspaper 7 days prior to each meeting. The notice must include the location of the land subject to the agreement, the proposed uses, population densities and building intensities and height. One of the meetings can take place before the local planning agency. Fla. Stat. § 163.3225.

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- A "Development Agreement" duration may not exceed 30 years. Fla. Stat. § 163.3229.
- Originally 10; extended to 20 years several years ago. Changed in 2011 Legislation Session to 30 years and added language allowing extension beyond 30 year period by mutual consent of governing body and developer.
- Public hearing required to extend.

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Periodic Review of Development Agreements - § 163.3235

- Local government to review land subject to Development Agreement to determine if good faith compliance with terms of Development Agreement once every 12 months.
- 2011 Legislature deleted requirements for a written report, submittal of any information to DCA or parties, and adoption of rules by DCA regarding contents of the reports.

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- A "Development Agreement" under the Statute is not effective until it has been properly recorded within 14 days after the Agreement has been executed in the public records of the county where the development will take place.
- 2011 Legislature deleted other requirements triggering effectiveness review by DCA and additional 30 days after having been received by DCA. Fla. Stat. § 163.3239.

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Enforcement - § 163.3243, Fla. Stat.

- Any Party
- Aggrieved or adversely affected person/163.3215(2), Fla. Stat.
- Action for Injunctive relief – to enforce terms or to challenge compliance of Development Agreement with Development Agreement Statute.

Cases

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- Combs v. City of Naples, 834 So.2d 194 (Fla.2d DCA 2002). Trial court erred in applying the condition precedent provisions of Fla. Stat. 163.3215(4). Owners of property who received notice of Development Agreement hearing and neighborhood association representing area where owners received notice had standing. However, Plaintiff who was merely resident of City did not have sufficient interest to confer standing.

- Leon County v. G.J. Gluesenkamp, 873 So.2d 460 (Fla. 1st DCA 2004). Where County was enjoined by Court from issuing building permits in separate suit, County did not breach development agreement which provided County would issue building permits. (Basic assumption of contract is that law will not come into existence that makes performance impracticable.)

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Agreements Not Based On Development Agreement Statute

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- Even without the Development Agreement Statute, a local government still has the authority to enter into agreements related to development. The Development Agreement Statute specifically provides that it "shall be regarded as supplemental and additional to the powers conferred upon local governments by other laws and shall not be regarded as in derogation of any powers now existing." Fla. Stat. § 163.3220(5). Therefore, it is reasonable that the Development Agreement Statute does not provide the only authority for local governments to enter into agreements with developers. Juergensmeyer at 5.

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- Under the concept of "Home Rule," municipalities "may exercise any power for municipal purposes, except as expressly prohibited by law." Fla. Stat. § 166.021(1); Fla. Const. Art. VIII, § 2(b). Counties have essentially the same authority, pursuant to Fla. Stat. § 125.01(1).

- Therefore, a local government may enter into agreements with developers so long as such agreements are not expressly prohibited by law or violate the Florida or U.S. Constitutions or a local government's charter.

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- While there is no express prohibition against such agreements in Florida law or the United States or Florida Constitutions, some agreements with developers have been invalidated because they constituted an unconstitutional delegation of the local government's police powers.

- Several cases have addressed whether certain agreements with developers constituted invalid delegations of local governments' police power to rezone, finding that a local government may not expressly contract to rezone property. Turkey Creek v. City of Gainesville, 570 So. 2d 1055, 1058 (Fla. 1st DCA 1991); New Products Corp. v. City of North Miami, 241 So. 2d 451, 452 (Fla. 3d DCA 1970); (see also Hartnett v. Austin, 93 So. 2d 86 (Fla.1956).

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- Chung v. Sarasota County, 686 So. 2d 1358, 1360 (Fla. 2d DCA 1996) (finding zoning settlement agreement was illegal even though it required the County to conduct hearings because the County had essentially made its decision on the zoning by signing the contract).

- Morgran Company, Inc. v. Orange County, 818 So.2d 640 (Fla. 5th DCA 2002)(finding agreement by County to "support and expeditiously process" rezoning application was void because County contracted away its final zoning authority).

- However, courts have approved zoning contracts in which the local government is only obligated to do what it can lawfully accomplish or that the local government will still go through the hearing process. Rolling Oaks Homeowners' Ass'n., Inc. v. Dade County, 492 So. 2d 686, 687 (Fla. 3d DCA 1986); Molina v. City of Boynton Beach, 526 So. 2d 695, 696 (Fla. 4th DCA 1988); Housing Auth. v. Richardson, 196 So. 2d 489, 493 (Fla. 4th DCA 1967).

- There have also been several cases in which contracts have been upheld which related to land swaps and infrastructure between local governments and private parties. Florida East Coast Ry. Co. v. City of Miami, 79 So. 682, 684-85 (Fla. 1918); Broward County v. Griffey, 366 So. 2d 869, 870-71 (Fla. 4th DCA 1979).
- But see P.C.B. Partnership v. City of Largo, 549 So.2d 738 (Fla. 2d DCA 1989).

- Contract upheld between a county and a private party to allow the private party to enforce lot clearing and code enforcement liens. County Collection Service, Inc. v. Charnock, 789 So. 2d 1109, 1112 (Fla. 4th DCA 2001).

- Decisions invalidating contracts dealing with entirely different circumstances: City of Belleview v. Belleview Fire Fighters, Inc., 367 So. 2d 1086, 1088 (Fla. 1st DCA 1979) (city could not contract away total control of fire protection services); City of Safety Harbor v. Clearwater, 330 So. 2d 840, 841-42 (Fla. 2d DCA 1976) (cities could not contract away their annexation power).
- County of Volusia v. City of Deltona, 925 So.2d 340 (Fla. 5th DCA 2006). Numerous restrictions in a pre-annexation agreement related to City's future decision-making authority, such as annexing contiguous lands, etc.

- Alachua County v. Florida Rock Industries, Inc., 834 So. 2d 370 (Fla. 1st DCA 2003). A county may no longer enforce a developer's agreement made with a private party after city annexes land and adopts comprehensive plan that includes land because county no longer has jurisdiction.

Tax Increment Financing

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- In Florida, "TIF" is a method of funding public investments in community redevelopment areas by capturing an amount equal to a portion of any increase in ad valorem tax revenues generated within the CRA boundary above the revenue which existed in the "base year."
- TIF is not a tax revenue – only an amount equal to a portion of increase in revenues, if any.
- A "mere measure."

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Miami Beach, 1980 – Florida Supreme Court established that:

- Preservation and enhancement of the tax base constitutes a valid public purpose.
- Tax increment financing did not violate the Florida Constitution.
- No referendum was required to issue redevelopment bonds.
- Taxes specifically levied to pay debt service were to be excluded from the calculation of the amount of revenues to be appropriated.

Calculating the Tax Increment

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General Formula

The general formula used to calculate increment revenue is:

$$I = r(0.95n-i)$$

where: I = the increment revenue
r = the tax rate millage in the current year
0.95 = 95% of the assessed valuation for the current year
i = the assessed valuation in the base year

Example

Base year value = $42.28 Million.
Current year value = $661.79 Million.
Current millage rate = 3.694.

Therefore…
I = .003694 x (.095% (661.79 million - $42.28 million)) = $2.17 Million

Tax Increment Amount appropriated and transferred to the Tax Increment Trust Fund to use for redevelopment projects.

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What TIF Funds Can Be Used For

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All uses proposed for the TIF must be set out in and comply with the adopted Redevelopment Plan, and generally include the following:

- Acquisition of property.
- Demolition and removal of buildings.
- Relocation expenses associated with the acquisition and clearance of property.
- Affordable housing programs.
- Construction of streets, utilities, parks, playgrounds, public areas in convention facilities, parking facilities, and other improvements necessary to implement the plan.
- Disposition of property.
- Voluntary or compulsory repair and rehabilitation of buildings or other improvements.
- Payment of debt service on loans or tax increment revenue bonds obtained for the purpose of implementing and approved purpose.
- Community policing innovations.
- Administrative and planning expenses associated with planning and implementing the redevelopment program.

See generally § 163.370 and 163.387(6), Fla. Statutes.

What TIF Funds Cannot Be Used For

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- Construction or expansion of administrative buildings or police or fire stations is not permitted unless the taxing authorities agree to allow it, or unless the construction or expansion is contemplated as part of a community policing innovation.
- Construction, repair or alteration of any public capital improvements or projects if previously scheduled to be constructed within 3 years of the adoption of the redevelopment plan pursuant to an approved CIP/Schedule, unless and until:
  - The projects have been removed from the CIP/Schedule and 3 years have elapsed since the removal; OR
  - The projects were identified in the CIP/Schedule to be funded in whole or part by Redevelopment Trust Funds.
- General government operating expenses unrelated to the planning and carrying out of the redevelopment plan.

See generally § 163.370, Fla. Statutes.

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Other Requirements for TIF

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- On last day of FY, any money which remains in Trust Fund after payment of expenses for such year, shall be:
  - Returned to taxing authority (proportionate);
  - Used to reduce indebtness;
  - Deposited into escrow account for purpose of later reducing debt; OR
  - Appropriated to a specific redevelopment project which must be completed within 3 years from date of appropriation.
- Audit of Trust Fund and report by independent CPA each FY with copy by registered mail to each taxing authority.

See generally § 163.387, Fla. Statutes.

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Eminent Domain and Disposition of Lands

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- Chapters 2006-11 and 2006-307, Laws of Florida
- Prevention/Elimination of slum or blighted areas and preservation or enhancement of tax base not public uses or purposes for which private property may be taken by eminent domain and do not satisfy the public purpose requirement of Section 6(a), Art. X, Florida Constitution (taking must be for a public purpose).

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- However, counties and cities may acquire property by eminent domain within a CRA in accordance with § 73.013 and 73.014, Florida Statutes, or other general law.
- Reminder: Properties may be acquired by purchase, lease, option, gift, grant, bequest, devise or other voluntary method of acquisition.

Section 73.014, Florida Statutes

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- No entity may exercise power of eminent domain for purpose of preventing/abating/eliminating a public nuisance, slum or blight conditions and such purposes are not valid pubic purposes.
- Code enforcement/elimination of public nuisances acceptable to extent such ordinances do not authorize takings by eminent domain.

Disposal of Real Property Acquired by Eminent Domain

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Section 73.014, Florida Statutes:

- Applies to any petitions for condemnation filed on or after May 11, 2006, by any condemning authority.
- No land may be conveyed to a "natural person or private entity by lease or otherwise" except in accordance with the following:

- Ownership or control may be conveyed for:
  - Common Carrier services/systems;
  - Roads, ROW's, other means open to public for transportation or toll roads;
  - Public or Private Utilities (electric, gas, water, wastewater, stormwater, pipeline, telephone or similar services)
  - Public Infrastructure
  - Incidental portion of public property/facility occupied for provision of goods and services to public.

- No restrictions, after public notice and competitive bidding (unless otherwise provided by general law) if less than 10 years since acquisition, AND:
  - Declared surplus;
  - Prior owner given opportunity to repurchase at same price.
- No restrictions, after public notice and competitive bidding (unless provided by general law) if MORE than 10 years since acquisition.

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- No impact on limitations regarding internet, cable, etc., found in § 350.81(2)(j), Florida Statutes.
- Provisions not applicable if owner conceded to taking in order to retain ability under a 1033 exchange.

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Section 163.380, Florida Statute sets forth general disposition requirements for lands not acquired by eminent domain.

- Value, uses, improvements
- If less that Fair Market Value – notice and public hearing
- Notice – 30 days prior to execution
- RFPs
- If closed military base, then local procedures for disposition control.

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Thank you Florida Redevelopment Association!

Brenna M. Durden
Lewis, Longman & Walker, P.A.
245 Riverside Avenue, Suite 150
Jacksonville, Florida 32202
(904) 353-6410
bdurden@llw-law.com
www.llw-law.com

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