

Tallahassee

MEMORANDUM

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**Discussion of Items of Interest Concerning
Uniform Community Development Districts
Under Ch. 190, F.S., as Amended**

For your background information, I respectfully address various matters of interest and answer often-asked questions about Community Development Districts as follows (for ease of selective reading, the questions are set forth in bold):

a. **WHAT IS A COMMUNITY DEVELOPMENT DISTRICT UNDER CHAPTER 190, FLORIDA STATUTES? WHAT IS IT NOT?**

Answer: It is an independent local government of substantially limited and highly specialized single purpose.

It is distinguished from, and is not, a general purpose local government (county or city). It does not have home rule power. It cannot regulate development. It is not a mere "financing" mechanism. It is not the "alter ego" of a developer. It is not a "quasi-development". It is not a "quasi-government". It is not a glorified homeowners' association. It is not an MSTU. It is not an MSBU. It is not a dependent special district.

a. **WHAT IS ITS SINGLE PURPOSE?**

b.

c. Answer: Its single purpose is to provide basic systems, facilities and services (infrastructure) to community developments. It is a local government with power to manage its single purpose by planning, constructing, implementing and maintaining infrastructure over time. It also has certain related financing tools which it uses only to carry out its management functions.

d.

e.

f. **HOW DOES THE DISTRICT CARRY OUT ITS SINGLE PURPOSE?**

Answer: It uses the general and special powers in its charter.

The district has a variety of **general powers** (to hire professional staff; to lease as lessor and lessee; to enter into interlocal government agreements; and otherwise to manage and finance the short term and long term provision of basic systems, facilities and services to community developments through the exercise of specifically enumerated special powers).

The district has a variety of **special powers** provided through (1) **management** (planning, construction, implementation, and short term and long term maintenance and upkeep) and (2) **financing** (the levy of: (a) user-based and non-lienable revenue or service charges which may be used to amortize revenue bonds; (b) liable non-ad valorem special assessments to improve property with special benefits which may be used to amortize special assessment bonds; and (c) liable ad valorem taxes which may be used to amortize general obligation bonds subject to severe and strict limitations and regulations).

The district manages and finances certain basic systems, facilities and services (infrastructure) for community developments. Essentially, these terms apply to the full meaning of the term basic infrastructure, not just capital facilities.

Such basic infrastructure includes a list of automatically available special powers: the provision of roads, water, sewer, street lights, water management and control (drainage) and certain "concurrency" projects (in Sections 190.012 (1)(e), 189.415(2) and (6) and 163.3177, F.S.) as may be required by the County in a development order on the development or by interlocal agreement between the County and the district.

The basic infrastructure also includes a list of certain optional special powers, if agreed to by the County, subsequently, on petition by the district, including: mosquito control, parks and recreation, security and related powers.

WHAT ARE THE LIMITS ON THESE SPECIALIZED POWERS USED TO CARRY OUT THE SINGLE PURPOSE?

Answer: There are substantive and procedural limits.

1) **Substantive limitations.** They are essentially whatever the County determines will be the use of the land. That is, the district shall only exercise its general and special powers subject to and not inconsistent with, the land use, permitting and development provisions of state, regional and County government. The district cannot do anything that is inconsistent with the local government comprehensive plan and all related and applicable land development regulations. These County determinations shall always apply, including changes over time. The district is simply a benign alternative public infrastructure-delivery mechanism, or "tool", that the Legislature has provided specifically for use by County government, landowners and developers.

2) **Procedural limitations.** These limits include noticed meetings; government-in-the-sunshine; public records; conflicts of interest; ethics; standards of accountability for non-feasance, misfeasance and malfeasance of public officials; competitive bidding; consultants competitive negotiations act; strict elections provisions; a host of reports and documents to be sent to state and local governments; and a variety of notices to all prospective purchasers of land and to all residents and landowners within the boundaries of the district regarding operations, and the related financing of the district.

See question XXII.

a. **MUST THE DISTRICT EXERCISE ALL OF ITS POWERS OR IS IT FLEXIBLE ENOUGH TO EXERCISE A VARIETY OF ITS POWERS IN CONCERT WITH THE COUNTY AND OTHER ALTERNATIVES, DEPENDING UPON PARTICULAR SITUATIONS?**

Answer: It is flexible.

First, the district is not bound to exercise its automatic powers. The term "automatic" is not a mandate to use them; rather, it is authorization to use them subject to and not inconsistent with the limitations listed above.

Second, the community development district is a long term infrastructure management tool (with related financing powers). With each basic system, facility or service to be provided, there are always several questions: (a) who will own the

facility? (b) who will construct it? (c) who will maintain it? (d) who will finance its construction, maintenance and ownership? The district can do none, some or all of these for each particular system, facility or service. See question VI.

a. **WHAT ARE THE ALTERNATIVES TO USING THIS SINGLE-PURPOSE SPECIALIZED AND LIMITED COMMUNITY DEVELOPMENT DISTRICT?**

Answer: There are two basic alternatives to this public alternative, the community development district form of local government: 1) purely private alternatives (private utility companies, private partnerships, private equity, private business organizations, homeowner's associations, neighborhood associations, or a combination of these); and 2) other public alternatives (the County or city itself where the land designated for community development is located; the County through a dependant special district; actual management by the County but with the specific related County financing through specialized municipal service taxing or benefit units which are not special districts).

Note the community development district (CDD) public alternatives typically flexible enough to coincide all three alternatives; they are not mutually exclusive. Use of the district simply adds more choices per each system, facility or service. See question V above.

a. **DO CONSUMERS PAY TWICE WHEN PURCHASING PROPERTY WITHIN COMMUNITY DEVELOPMENTS WHICH ARE SERVICED BY COMMUNITY DEVELOPMENT DISTRICTS?**

Answer: Yes, but not for the same thing.

They pay twice for ascertainable value for purchase price and for service to property purchased.

The term "pay twice" implies two payments for the same thing or for unascertainable value. There are two payments but not for the same thing and never for unascertained value.

If one pays the purchase price for a lot and dwelling unit in a community development where a community development district provides for the basic infrastructure to that lot (utilities, streets, street lights, drainage, etc.), the additional and subsequent annual payments for basic infrastructure do not constitute paying twice for the same thing.

The price for the lot and dwelling unit is a function of the market place.

Every purchaser of a lot and dwelling unit in every community development, whether there is or is not a community development district, shall pay always for two things:

- 1) the purchase price of the lot and dwelling unit, an amount determined in the market place; and
- 2) the initial and continual annual costs of systems, facilities and services provided to that property, whether by a government or private enterprise.

The reality is that payment must be made for these two things, whether there is or is not a community development district.

The community development district improves the value of the property, helps in the marketing of the development and can justify higher purchase prices for the lots and high quality amenities but also lower long term annual assessments. If there is no district, the lot price could be higher or lower, but the separate improvements, if any, affecting value would not come from the district.

If there is no community development district, or any other special purpose district, then the following options are available:

- i. the lot price will also include payment for some of the initial costs, if not all of the initial costs of basic systems, facilities and services to the lot;
- ii.
- iii. some of the initial and all of the ongoing annual costs for roads, water, sewer, drainage, street lights and other amenities will be paid by the owner of the lot to either the County (directly with or without an MSTU or MSBU; and indirectly, to a dependent district) or to some private company or entity (the developer; a homeowner's association; etc);
- iv.
- v. a combination of the above.
- vi.
- vii. If there is a community development district, it provides infrastructure to the lots within a community development, and it constitutes a fourth alternative to the above.
- viii.
- ix. With or without a community development district, the following is noteworthy:
- x.

- xi. a. the purchase price of the lot and dwelling unit will always be a function of the market place; and
- xii.
- xiii. b. the amount and quantity of "extra" amenities and services provided to the lot varies.
- xiv. c. There is no "magic", but there is:
- xv. (a) more and specific disclosure, both: (1) before the lot sale; and also (2) as to each annual assessment for the infrastructure;
- (b)
- (c) the potential that systems, facilities and services to be provided and maintained may be more expensive, but: a) at high levels of quality; b) over long term; c) resulting often in lesser annual assessments to pay for them; d) all fully disclosed; and e) unrelated to the value of the lot.
- (d)
- (e) If tax-free municipal bonding is used by the district, there is an up-front margin of difference between conventional rates of borrowing money and municipal bond financing which then affords the option to:
- (f)
 - 1. invest in higher quality and more expensive infrastructure;
 - 2. save and use as "profit";
 - 3. pass on to the consumer; or
 - 4. a combination of two or all three of these options.

a. **DOES THE LAW PERMIT SUBDIVISION DEVELOPERS TO FORM A TAXING DISTRICT FOR THEMSELVES?**

Answer: No.

Developers are not allowed to form community development districts. Such districts were, by law, created by the Legislature for the use of: 1) the County; 2) the initial landowners (who may also be a developer); and 3) the ultimate residents.

The Legislature has already written and thereby actually created the charter of these districts. It is a uniform charter in the general law (§190.006 - §190.041, F.S.) and cannot be modified by anyone other than the Florida Legislature.

Only the Governor and Cabinet, by rule, or the Board of County Commissioners or a City Commission, by ordinance, may take the charter created by the Legislature and "establish" it on the proposed property.

Note, even under Ch. 189, F.S., new independent districts may be created by special act. But, they are not districts established under Ch. 190, F.S. They, too, however, must conform to uniform and basic requirements in general law (Chapter 189, F.S.). The statute does not define "petitioner". Anyone may petition, including the County.

a. **ARE COMMUNITY DEVELOPMENT DISTRICTS MERE "FINANCING MECHANISMS" FOR THE DEVELOPER? MAY THEY ASSIST THE DEVELOPER IN FINANCING?**

Answer: 1) No; 2) Yes, but only to fund the infrastructure management duties of the district.

To use community development districts as mere financing mechanisms for anyone, including either the developer or the County, is to abuse the concept and to equate it to a dependent district or to a municipal service taxing unit (MSTU) and benefit unit (MSBU) of counties.

Municipal service taxing and benefit units are financing mechanisms available only to counties. Some counties allow developers to use them as financing mechanisms for infrastructure. They are not special districts, they require County management and accountability and they affect county financing.

1. What are the millage limitations on a county only (no use of a dependent district; no use of an MSTU)?

According to F.S. 200.071(x) and Art. 7 sect. (9)(b) of the Fla. Const., no ad valorem tax millage shall be levied against real property and tangible personal property by counties in excess of 10 mills, except by voted levies.

2. What are the millage limitations and how are they affected if the county also sets up a dependent district which levies a property tax?

The millage of any dependent special district created under F.S. §125.01 must be included within the millage limitations established in F.S. §200.071. The only exception to this rule is in F.S. §200.91, which permits a referendum to increase millage for a period not to exceed 2 years.

3. What are the millage limitations and how are they affected if the county decides not to set up a dependent district but rather decides to provide the system, facility, or service itself and to finance the infrastructure with its own alternative financing mechanism (MSTU) to levy a county property tax to pay for it?

According to 200.071(3), any county which, through one or more MSTUs, provides services or facilities of the kind commonly provided by municipalities, may levy an ad valorem tax millage in excess of the designated 10 mill limit but not to exceed 20 mills. Thus, through one MSTU or several MSTU(s), a county can collect up to 20 mills, but can never exceed that amount. MSTU's affect County millage and related finance ratings.

On the other hand, a uniform community development district under Ch. 190, F.S., is a limited and highly specialized single purpose local government which by law is designed for use by both the County and the landowner (and ultimately the residents), and which: 1) exists for long term, economic, focused and pin-pointed management of basic infrastructure for community developments; and 2) which can finance these governmental powers through certain financing powers, none of which affect County financing.

Its financing powers are valid only if they fund the infrastructure management purposes of the district. They include the levy of service charges, special assessments or property taxes, all of which may be used to pay back tax-free municipal bonds, but only if, the legitimate management purpose of the district government is funded. MSTU's, MSBU's and dependent districts are for financing; community development districts are for management of infrastructure delivery.

If a community development district is used, at least two major entities receive benefits: 1) the County (because infrastructure is "off the balance sheet" of the County's capital improvements budget, is at the same time provided for in the County's capital improvements element and capital improvements program for planning and other management purposes); and 2) the developer (because the developer is not the district, and a margin of difference can result in the provision of certain high-quality facilities which must, at a minimum, meet the requirements of the County and which otherwise may not have been available; it is also "off the balance sheet" of the developer).

- a. **WHAT ARE THE SAFEGUARDS OR CHECKS AND BALANCES, IF ANY, TO ENSURE THAT RESIDENTS AND LANDOWNERS IN A COMMUNITY DEVELOPMENT WHICH IS SERVED BY A COMMUNITY DEVELOPMENT DISTRICT WILL NOT PAY MORE THAN THEIR FAIR SHARE OF SPECIAL ASSESSMENTS TO PAY FOR SYSTEMS, SERVICES AND FACILITIES?**

Answer: There are many powerful and effective checks, balances and constraints on the levy and collection by the district of special assessments to ensure that only a fair share is paid. A discussion and listing follows.

If the district chooses to levy non-ad valorem special assessments, there are two requirements of a legal, valid and Constitutional special assessment which ensure that residents and landowners pay no more than their fair share. These requirements are (1) the property which is subject to a special assessment must receive a special and peculiar benefit; and (2) the duty to pay the special assessment must be apportioned fairly and reasonably among all of the properties assessed.

These two requirements for special assessments substantially decrease any possibility for their abuse. All decisions on the use of special assessments are made by the board of directors of the district and are subject to Government-in-the Sunshine Laws and take place at noticed meetings. All landowners receive notice of proposed special assessments.

In addition, there are also extensive checks and balances on the special assessment process: (1) I have already mentioned that all decisions made by the board of directors of the district must obey the Government in the Sunshine Laws and all meetings of the board must be noticed; (2) a schedule of annual meetings must be filed annually with the applicable local general-purpose government along with financial reports required in sections 218.32 and 218.34, Florida Statutes (1991), complete descriptions of any outstanding bonds, and a map of the district. §189.417, Fla. Stat. (1991); §189.418, Fla. Stat. (1991); (3) districts are also required to have an annual post audit of financial records and file an existing public facilities report with any improvements made or planned. §11.45, Fla. Stat. (1991); §189.415(2-6), Fla. Stat. (1991); (4) anyone who makes a purchase of real property within the district receives notice that the district itself has the authority to levy both taxes and special assessments. §190.048, Fla. Stat. (1991); (5) the district must take affirmative action to disclose fully and continually all information relating to public financing and maintenance of improvements to real property undertaken by the district. §190.009, Fla. Stat. (1991); (6) every August, property-owning taxpayers are provided with TRIM notices which include a notice that special assessments may be levied. §200.069, Fla. Stat. (1991); (7) taxpayers also are noticed about their right to attend the key meeting prior to the board adopting a decision to impose a special assessment; and (8) the uniform method for the levy, collection, and enforcement of special assessments contained at section 197.3632, Florida Statutes (1991), requires that notice be given to all affected property owners of any proposed, and then actually assessed, special assessments on a form contained in section 197.3635, Florida Statutes (1991). There is an initial notice of intent to use the uniform special

assessment collection process and thereafter, every year, between 1 June and 15 September, a notice of roll adoption. See §197.3632, F.S., and Rule 12D-18, Fla. Admin. Code. During the first levy, the notice for roll adoption is in the newspaper and by registered mail.

All of the above protections ensure that the process to levy a special assessment is highly visible, fair, reasonable and accessible.

As a result, a check and balance against the imposition of a special assessment exists.

Affected taxpayers also have the ability to file a lawsuit against the district contesting its authority to levy a particular special assessment. The special assessment is then tested to see if it meets the two requirements for a valid special assessment which I described above: that the property assessed is specially benefitted and the assessment is apportioned fairly and reasonably among all the properties assessed.

If bonds are issued and if they are to be paid for by the special assessments, then additional noticed hearings and circuit court validation proceedings are required.

a. **IS ESTABLISHMENT OF A UNIFORM COMMUNITY DEVELOPMENT DISTRICT NEEDLESS PROLIFERATION, DUPLICATION AND FRAGMENTATION OF COUNTY LOCAL GOVERNMENT SYSTEMS, FACILITIES AND SERVICES?**

Answer: No.

If the procedures for processing a petition to establish a community development district under §190.005, F.S., are followed by the petitioner and the County, and if all of the relevant, material and germane factors required by law are considered in a fair and reasonable manner, then the following occurs:

(1) with a decision not to establish the district, then there is no proliferation, no duplication and no fragmentation; and

(2)

(3) with a decision to establish the district, then, as a matter of law, it is not needless proliferation because the provisions of Ch. 190, F.S., shall have been followed. Conversely, if not, then establishment would be needless proliferation.

(4)

(5) Accordingly, any non-arbitrary, reasonable and fair decision pursuant to Ch. 190, F.S., which may result in establishment of a brand-new uniform community

development district, is not needless proliferation, duplication and fragmentation of local government services.

(6)

(7) The law says, in §190.002(1)(a), F.S., in pertinent part, that:

(8)

there is a need for uniform, focused and fair procedures in state law to provide a reasonable alternative for the establishment, power, operation and duration of independent districts to manage and finance basic community development services...

and that:

an independent district can constitute a timely, efficient, effective, responsive and economic way to deliver these basic services, thereby providing a solution to the state's planning, management and financing needs for the delivery of capital infrastructure in order to service projected growth without overburdening other governments and their taxpayers.

The law further says that:

It is the policy of this state that the needless and indiscriminate proliferation, duplication and fragmentation of local general purpose government services by independent districts is not in the public interests,....

§190.002(2)(a), F.S.

The law provides, however, that:

Independent districts are a legitimate alternative method available for use by the private and public sectors, as authorized by state law, to manage and finance basic services for community developments. (Emphasis supplied.)

Accordingly, the law provides that it is the intent and purpose of the Florida Legislature:

...to authorize a uniform procedure by general law to establish an independent special district as an alternative method to manage and finance basic services for community development....

§190.002(3), F.S.

It is specifically provided in law that:

The process of establishing such a district pursuant to uniform general law be fair....

§190.002(2)(d), F.S.

It is also the expressed policy by general law the State of Florida in the State Plan to:

Allow the creation of independent special taxing districts which have uniform general law standards and procedures and do not overburden other governments and their taxpayers while preventing the proliferation of independent special taxing districts which do not meet these standards.

§187.21(b)2, F.S.

This expressed state policy has been specifically followed by several general laws, including Ch. 190, F.S. Agencies of the State of Florida have been appropriated money to carry out these provisions. Accordingly, this expressed policy binds all county comprehensive plans and related land development regulations, §187.101(2), F.S.

The direct legal consequence of these expressed provisions of law is that if a community development district is established by following the procedures of Ch. 190, F.S., and if there is no abuse of discretion by the decision-making body, then its establishment is not needless proliferation, duplication and fragmentation of county government facilities.

a. **IS THE PROCESS FOR ESTABLISHING A DISTRICT UNDER CHAPTER 190, F.S., A PLANNING AND PERMITTING DECISION FOR COMMUNITY DEVELOPMENT APPROVAL?**

Answer: No.

The purpose of Ch. 190, F.S., is to separate the legitimate policy decision about who provides infrastructure to a community development from the fundamentally different permitting and planning decision about whether there ought to be a community development and what its conditions of approval are. See item XV above.

Section 190.002(2)(d), F.S., provides as the expressed policy of the State of Florida:

That the processing of establishing such a district pursuant to uniform general law be fair and based only on factors material to managing and financing the service-delivery function of the district, so that any matter concerning permitting or planning of the development is not material or relevant.

See similar language in the expression of legislative intent and purpose in §190.002(3), F.S.

In other words, the law of Florida preempts to the County (and State) all decisions concerning whether there ought to be a development and related permitting, planning and land development regulation of a community development.

The preemption section, §190.004(3), F.S., directly and specifically requires that the district's activity shall not be inconsistent with the County decisions about development and land use. This provision also makes clear the establishment of the district "as provided in this act is not a development order within the meaning of Chapter 380." It also provides that all governmental, including county, planning, environmental and land development laws, regulations, and ordinances apply to the development of the land regardless of whether a district is there or not.

Moreover, the board of supervisors of the district shall affirmatively exercise all of their special powers (roads, water, sewer, drainage, street lights, mosquito control, recreation, parks, etc.) "subject to the regulatory jurisdiction and permitting authority of all applicable governmental bodies, agencies and special districts having authority with respect to any area included" within the boundary of the district. §190.012, F.S.

- a. **IS THERE ANYTHING THAT HAS TO BE "PROVED UP" OR ARE THERE ANY REGULATORY STANDARDS OR CRITERIA THAT MUST BE "MET" AND "PROVED" BEFORE A COMMUNITY DEVELOPMENT DISTRICT IS ESTABLISHED?**

Answer: No.

The use of standards and criteria which have to be "met" and "proved" are for permitting and planning of developments.

None of that information is relevant, material or germane to the totally and legally different question of whether a community development district should be setup (as an alternative way to provide for some or all of the basic infrastructure to an otherwise permitted and regulated community development).

Essentially, the decision whether to establish a community development district is not a permitting or licensing procedure. There is no permit or license required to establish a district. It would make no sense: the district is itself a local government and must be created and established through mechanisms other than permitting or licensing. The district is not a development. Accordingly, neither administrative or quasi-executive licensing or permitting functions shall apply.

Also, the district is not set up pursuant to any "trial-type" adjudicatory hearing resulting in an administrative order. It is not the result of a controversy which requires a quasi-judicial, substantial interest advocacy hearing. The establishment of the community development district is not by order. It is not the result of a litigated battle between parties resulting in an order.

- a. **BECAUSE ESTABLISHING DISTRICTS UNDER CH. 190, F.S., IS NOT AN EXECUTIVE OR JUDICIAL PROCEDURE, AND DOES NOT RESULT IN A LICENSE, PERMIT OR ORDER, HOW THEN IS THE DISTRICT CREATED AND ESTABLISHED?**

Answer: First, the uniform charter of the district has already been created. It has been created by the Florida Legislature in a general law and consists of §190.006 - §190.041, F.S. Pursuant to §190.005, F.S., no one, neither the Governor and Cabinet nor any county or city, may modify, delete, add to or otherwise change that charter. Any community development district anywhere in Florida, of any size, operates pursuant to the same uniform charter created by the Florida Legislature.

Second, the decision by the County (or by the Governor and Cabinet if the land area for the district is 1,000 acres or more) is whether to take the charter created by the Legislature and "breathe life into it" with regard to certain land areas within the County for certain community developments. This process is called "establishment."

It does not involve creation of anything. The Legislature already did the creating. Neither does it involve issuing an order or granting a license or permit.

Rather, this process is a simple policy decision which must be based upon consideration of relevant and material information about whether to take the uniform charter and let it operate as a brand-new government in a certain locale, providing facilities to community development. Since it is a policy decision, based upon fair determination of germane relevant and material information, then it is legislative in nature.

If the decision is by the Governor and Cabinet, it is a quasi-legislative decision resulting in a rule. Rules are general statements of policy which are quasi-legislative in nature.

If the decision is by a county or city, then it is not quasi-legislative; rather, it is fully and completely legislative under home rule law and Article VIII of the Florida Constitution of 1968. This legislation is in the form of a duly-considered ordinance.

Unless the County can be shown to have abused its discretion and acted in an arbitrary or capricious manner, its decision can hardly be successfully challenged in a court action. In this regard, it is most unlike an order, permit or license, all of which may be appealed or challenged on the basis of fact-finding related to absolute standards, criteria and requirements.

None of these concepts applies to the policy decision by ordinance or rule to establish a community development district. The only law which applies is whether there is a sufficient and adequate record of relevant and material information which is reasonably and fairly considered, meeting substantive and procedural due process requirements in a non-arbitrary and non-capricious manner.

This practical legislative reality is pro-county. While it puts a duty on both the petitioner and the County to work together to provide a fair and reasonable proceeding with a record that shows all relevant and material information was duly considered, it still puts a premium on the position of the County and forces the petitioner to deal in good faith directly and comprehensively with the County, even if the establishment is by the Governor and Cabinet by rule.

Chapter 190, F.S., has listed six (6) specific "factors" which shall be "considered" before voting to establish a community development district. Notice that the term "consider" is literal and under no circumstances can be construed to mean "proving" or "meeting" any "criteria" or "regulatory standards" or any other "standards". The factors are simply six (6) subjects as to which information must be adduced for

consideration by the Board of County Commissioners in making an informed and fair policy decision whether to establish the district.

- a. **MUST EACH OF THESE FACTORS, WHEN CONSIDERED IN THE LIGHT OF ALL RELEVANT AND MATERIAL INFORMATION, BE "ANSWERED" OR "ADDRESSED" IN THE AFFIRMATIVE IN ORDER TO VOTE TO ESTABLISH A DISTRICT? THE CONVERSE QUESTION IS, IN ORDER TO DENY THE ESTABLISHMENT OF A DISTRICT, MUST THE FACTORS BE ANSWERED IN THE NEGATIVE?**

Answer: The answer is no, to both questions.

The key is a fair, reasonable, non-arbitrary and informed decision based only on information that is germane, relevant and material to the six (6) factors. For example, a district may not necessarily be deemed the "best" of all the "alternatives" to provide infrastructure; but, for legitimate policy reasons, the Board of County Commissioners may still want to establish the district. The reverse may also be true.

This discretion shall not be abused, shall not be arbitrary, shall not be capricious and must be fair and reasonable.

- a. **UNDER WHAT CIRCUMSTANCES MAY THE SIZE OF THE COMMUNITY DEVELOPMENT (TO WHICH THE PROPOSED COMMUNITY DEVELOPMENT DISTRICT WOULD PROVIDE BASIC INFRASTRUCTURE) BE SUFFICIENT (NEITHER TOO LARGE NOR TOO SMALL) TO BE AMENABLE TO THE DISTRICT?**

Answer: The circumstances are to be determined on a petition-by-petition basis limited to the consideration of relevant, material and germane information used to address the six applicable factors in the statute. There is no statutory minimum or maximum. There is no statutory threshold.

First, the question about "size" generally evokes consideration of information about all six (6) factors in §190.005(1)(e)1 - 6, F.S. In particular, however, it requires consideration of information about the following three (3) factors, in the order listed:

1. information addressing factor number 3, whether the area of land within the proposed district is of sufficient size, is sufficiently compact and is sufficiently contiguous to be developable as one functional interrelated community;

2. information addressed to factor number 6, whether the area that will be served by the district is amenable to separate special district-government; and
3. information addressing factor number 5, whether the district is the best alternative available for delivering community development services and facilities to the area that will be served by the district.

Second, it is also important to consider information about the following directly-related provisions of the Florida Legislature:

1. the expressed finding that the public interest is served by such a district that can carry out long range planning, management and financing for systems, facilities and services to be provided to community developments under one coordinated entity, §190.002(1)(c), F.S.; and
2. the expressed policy in the State Plan that if established by general law so as not to overburden existing taxpayers and if it does not constitute needless proliferation, duplication or fragmentation of general purpose local government services, then such districts ought to be allowed, §187.201(21)(b)2, F.S.

Accordingly, this analysis is directed toward the three particular factors and two expressions of state findings and policy enumerated above. This discussion is also based on the assumption that information about the remaining statutory factors will be sufficient on the record (that the petition is true and correct; that there is no inconsistency with state and local plans; and that the systems, facilities and services of the district are not incompatible with the capacity and uses of any existing local and regional community development systems, facilities and services).

Third, accordingly, there are several subjects of inquiry which ought to be analyzed by the developer and the County in the light of germane, relevant and material information:

1. Whether there is inconsistency with applicable provisions of state and local government comprehensive planning and land development regulations.
2. Whether there is incompatibility with any regional or local community development systems, facilities and services (including the existing legal reality and future factual reality of

water, sewer and irrigation services by the dependent County District).

3. Whether the land area is of sufficient size, contiguity and compactness to work as a functionally interrelated community development.
4. Whether there is any problem with the economies of scale to prevent the proposed community development district from planning and constructing, and financing the planning and construction, of any of the basic infrastructure the district is authorized to provide under §190.012, F.S., both the automatic and optional special powers?
5. Whether there is anything about the size which would prevent the district from planning, implementing, maintaining, and financing especially long term the authorized systems, facilities and services which may be provided by the district?
6. Whether there is anything about the size of the land which would prevent or impede the exercise of the voting franchise, either property-based or qualified-electors based?
7. Whether there is anything about the size of the land area that would prevent the district from participating in the delivery of a "project" if deemed appropriate and required by the County for purposes of concurrency delivery mechanisms, within or without the boundaries of the district, pursuant to an amended condition of development approval in the future or a future interlocal agreement between the County and the district?
8. Whether there is anything about the location of the land area which may affect a determination of whether it is of sufficient size?
9. Whether there is anything about the physical boundaries of the proposed land area which could affect the determination of the sufficiency of the size of the land.
10. Whether there is anything about the size of the land area and its relative location which would hinder the use of an independent district to constitute the single entity to coordinate long range planning, management and financing and long term upkeep and

operations of any of the authorized systems, facilities and services of the district?

11. Whether there is anything about the size of the land area of the proposed district that could result in overburdening of the taxpayers of the County, both existing and future?
12. Whether there is anything about the size of the district, and in the light of the findings, policies and considerations discussed in this analysis, which would render the land area not amenable to being governed (receiving the planned, constructed, implemented, managed, maintained and financed basic infrastructure) by the community development district under Ch. 190, F.S.?

(NOTE: The term "separate special-district government" means a uniform community development district as defined in §190.003(6), F.S., and with the general and special powers provided in and throughout Ch. 190, F.S. In other words, the factor does not ask whether the land area is amenable to being governed by a county, city or other entity; rather, the factor addresses the question of whether the land area is amenable to governance by this particular district with its single purpose and limited array of highly specialized powers, all of which are in a statutory charter and are subject to, and shall not be inconsistent with, the County's land use and development regulation decisions.

In that context, the statute then asks whether the land is so amenable. The statute does not define the term "amenable". However, the same term appears with regard to the formation of new municipal corporate entities in §165.061(1)(a), F.S., wherein it is provided that the area for the proposed new city must be compact, contiguous and amenable to separate municipal government. That statute does not define the term "amenable" either. The most appropriate dictionary, Webster's New Collegiate Dictionary (1977), is "readily brought to yield or submit". More appropriately, the synonym "tractable" applies. The most appropriate of the definitions of "tractable" is "easily...managed.". There is no appropriate case law discussion of the use of the term "amenable" for either municipal incorporation or establishment of community development districts. There are hardly any guidelines on the use of this terminology in the appropriate legislative committees of the Florida House and

Florida Senate when they review special acts for brand-new communities or districts.

However, the term "amenable" is longstanding in statutory law. Based upon the statutory context of the term and the most appropriate synonym, the best meaning to use with regard to establishment of districts is whether the land area to be serviced by the district is tractable, that is, easily managed by a special district government of the nature of community development districts under Ch. 190, F.S.)

13. Whether there is anything about the size that renders the district, as compared to other reasonable alternatives, no longer the best alternative?
14. Other local considerations so long as they are relevant and material as limited by Ch. 190, F.S.

a. **DOESN'T THE LANDOWNER (WHO MAY ALSO BE THE DEVELOPER) ACTUALLY AND EXCLUSIVELY CONTROL THE DISTRICT DURING THE EARLY YEARS?**

Answer: No.

a. From a technical and legal viewpoint, the landowners initially elect the members of the board of supervisors of the district. This legal point means, in reality, that the "constituency" served by the public officials of the board of supervisors of the district, elected on a one-acre, one-vote franchise basis, is the landowners. Accordingly, if one person is the only landowner, then one is the constituency of the full board. This relationship is not legal, actual or exclusive control of district functions; it is a political constituency and a psychological perception of control. In the real world, it seems like control. There is loyalty. It works to some practical degree. It is practical. It is also legal and constitutional. See, State of Florida v. Frontier Acres Com. Develop., 472 So.2d 455 (Fla., 1985). But, it is not legal control of the board because the board members are public officials (see below) and the district is substantively and procedurally limited regardless of who elects the board (see question IV).

Later, when the election franchise changes to one-person, one-vote, during the statutory charter's transitional period, some of the board members will be elected by popular franchise and a few may still remain with a property-based franchise, so that the constituency will be mixed. Subsequent to that time, when the

formula plays itself out, then the entire constituency will consist of qualified electors who are residents within the boundaries of the district, totally unrelated to ownership of property. Throughout all this time (6 to 10 years) the board members are public officials.

Some, if not all, of these board members may also serve as agents or employees of the developer. The law provides that, in this limited event, there is no conflict of interest under both Chapter 190, F.S., and Chapter 112, F.S.

Caveat: Even those members of the board of supervisors who are agents or employees of the developer, and regardless of whatever sense of loyalty they may feel to either the landowning constituency or the employer, or both, they remain, as a matter of law, public officials. As such, they are subject to standards to which other local public officials are subject, including the consequences of malfeasance, nonfeasance or misfeasance of office. This mere statutory elimination of a conflict of interest in such a limited situation is not an elimination of the duty to be ethical and to do the job as public officials. Moreover, these officials will be subject to all other conflict of interest laws and to the government-in-the-sunshine law of Florida, pursuant to which they shall be prohibited from discussing district business when not at a noticed meeting of the board; they shall not discuss the business of the district other than at such noticed and public meetings; even if they are also agents or employees of the developer, and notwithstanding the limited exemption from conflict of interest law, they shall not be able to discuss district business when in a private non-noticed meeting to discuss development business. It is difficult to draw that line; but, there is a duty to act in good faith and to err, if there is error, on the side of conservancy. The line is there as a matter of law. It is actionable in a court of competent jurisdiction.

In addition, those officials must react to comprehensive detailed and professionally-staffed agendaed and noticed action items.

Therefore, the mere fact during the initial years that a landowner may appoint and then elect the initial board of supervisors does not mean that the landowner will be able, necessarily, under the law to "control" their decisions.

b. The law explicitly, in several sections, mandates that the activity of the board of supervisors (regardless of how elected, and regardless of whether any one or more of them is an employee of the landowner or the developer), shall be:

(i) Not inconsistent with all applicable state and county development policies and decisions, including the conditions of a development order (§190.004 (3), F.S.); and

(ii) Subject to all applicable state and county development policies and decisions, including the conditions of a development order (§190.012,F.S.).

c. The legal theory and public policy behind a community development district established and operating pursuant to Chapter 190, F.S., are that it exists as a management tool, with specifically related financing powers, for:

(i) Carrying out of state and county growth management and land development policy, which always remains the legitimate purview of state and county government; and

(ii) Carrying out, at one and the same time, and in coinciding fashion, the critical timing, phasing, and marketing requirements involved in the private marketing of the new community, which always is the legitimate purview of private development, not of government.

It is not a blending of government and private development; rather, it is a coinciding and management of the essential interests and duties of both County and developer during the critical timing of regulated infrastructure management with market-driven decisions.

a. **ARE THERE ANY BENEFITS TO A COUNTY OR CITY FROM A COMMUNITY DEVELOPMENT DISTRICT? IF SO, PLEASE IDENTIFY AND DISCUSS.**

Answer: Yes. There are many.

They are generic to the Legislation (Chapter 190, F.S.) and to the history of why the Legislature created the uniform charter and establishment procedures.

Such benefits to counties include:

1. The District is not the development and therefore shall not require any additional development-regulatory responsibility or work regarding the development by the County.

2. The District, as a special purpose, local government, is required by law at all times to be "subject to," and not to function "inconsistent with," all state and county laws and policies which govern the actual use and development of the (development name). Therefore, there is no competing or conflicting interest between the County and the proposed District; rather their interests and duties are

compatible. When the development has its development order and related permits and approvals, the proposed District will serve the County as a development-condition "compliance monitoring" mechanism. The District can be used by the County to detect "early on" any failure, whether inadvertent or deliberate, to comply with those conditions of a development order which the District would provide (such as the bridge, roads, habitat maintenance and so on). The District is a special purpose local government which has a legal duty to do its work in the sunshine at noticed meetings. Therefore all the business of complying with the conditions of all development orders on (development name) will be discussed openly and in advance of any decision. These benefits do not exist without the District. If there is no District, the County would learn of violations of conditions of development approval regarding the installation of basic services either as they occur or after they occur, never before they occur. With the District such problems can be caught "early on" and eliminated.

3. As a special local government, the District has a lot of managing and financing powers which enhance the intrinsic value of the land and the development, thereby further enhancing tax revenue for the County Commission and the school board from the development. The District has a propensity to enhance intrinsic value over and above what would result if there were no District for any development.

4. Use of the District eliminates needless duplication and proliferation of Districts and municipal service taxing units and municipal service benefit units.

5. Establishment of the District eliminates needless fragmentation of County services because the District is a separate unit but which must act subject to and consistent with County policies and land use requirements.

6. The citizens who live in the District, and who will move into the development to be serviced by the District, shall also benefit. That is, the District shall never pass on profits to people who purchase property within the District. The District cannot make a profit because it is government, not a private company. The County gets political benefit from this point. If a private utility were used instead of a District, then the constituents would have to pay their share of passed on profit from the utility company.

7. The District does not pass on any federal or state income taxes to those people who move into the District. If there were a private utility, then taxes would also be passed on to the consumers who are within the (development name) development project. This point should be important to the County Commissioners.

8. The District shall not and cannot impact County millage (whereas dependent Districts and municipal service taxing units count toward the County millage).

9. These Districts have traditionally never levied property taxes nor issued general obligation bonds to be paid back by the property taxes. But if it were at some future date to do so, the law is clear that there will never be any adverse impact on County bonding and County bond ratings. Moreover, if the District were to default, regarding any general obligation or other bonds, the law is unequivocal that the County is not and shall not be liable.

10. If the County Commissioners are concerned about anything which could speed up the creation of a brand new municipality (municipal incorporation) in a rapidly urbanizing unincorporated area of the County, then the District is an important tool for the County. Districts tend to do such a good job in providing basic infrastructure that there is never any need or temptation on behalf of the residents to incorporate into a municipality. Use of Community Development Districts can delay significantly and often times continually prevent municipal incorporation in unincorporated areas. The Districts are allies of the County.

11. The District, as a practical matter, and also as a matter of law, is a "growth management tool." The statutory law designed the District to be available not only to a private developer but also specifically to the County. That is, since the law preempts to the State of Florida and to the County the control of all growth and development of the land where the District would be located, and since the District is by law subject thereto, and shall not act inconsistent therewith, the District then becomes an "alternative mechanism" for the management of growth on (development name) for the County benefit.

12. The District can also serve the County as a "concurrency management mechanism." The District is a potential concurrency management mechanism because:

a. The District, either through an agreement with the County or through terms of the development order, may provide improvements to satisfy concurrency, either on-site or off-site.

b. The District must file reports annually with the County to demonstrate how it plans, manages, and finances the provision of basic facilities which would be subject to concurrency.

c. The County may then "use and rely" on these reports from the District in the County comprehensive plan (especially in the capital improvements element and related capital improvements programs and budgets, all based upon the future land use element).

d. If the County does decide to "use and rely" on the District reports (as described above) and because the District must comply with all applicable development orders and related land development regulations on the development, then the County would have a legal basis to ensure that District services are being provided to satisfy concurrency.

13. The County would not incur the kinds of problems which in effect are bad public policy when homeowners associations are used to provide basic systems, facilities and services to the development.

Homeowners associations, after all, are amateurish. They are volunteer driven. They are not public in nature, and they deal only with common property. Therefore, homeowners associations do not have a duty to focus in a professional, independent and public manner on delivery of infrastructure for the proposed development. Moreover, homeowners associations are not reliable producers of revenue and collectors of that revenue to pay for the infrastructure. Finally, they do not have proven and reliable records as managing entities.

On the other hand, the Community Development District is composed of a board of directors which hires a professional manager to see to it that the District's public duties and responsibilities are carried out in a limited, focused and pin-pointed manner. Districts simply do not have the distractions of amateurs that plague homeowners associations. Furthermore, Districts have long-range planning and horizons within which to manage and implement basic systems, facilities and services. Because Districts are public entities, they have enforceable, efficient and fair mechanisms for the collection of revenue to pay for installing, constructing,

implementing, maintaining and managing public services and systems. Districts are more accountable than homeowners associations.

14. The alternative of a Community Development district has more effective and pin-pointed management, which is a significant benefit to the County regarding the development. There are only three basic alternatives available to any proposed development of land for delivering basic systems, facilities and services. These alternatives are:

a. The County itself or the County through dependent Districts which are controlled by the County or through the municipal service taxing units or municipal service benefit units (which are simply County financing mechanisms), all at significant financial and administrative burden to the County and political costs to the County commission;

b. Private companies, partnerships, corporations, or private equity, such as a private utility company or a homeowners association, all of which are basically limited to short-term thinking and management as a practical matter;

c. The Uniform Community Development district, which coincides the benefits of a public entity with the marketing flexibility of a private developer, is compatible with the protection from public policy considerations reflected in the conditions of the development order. All three of these alternatives must comply with the development order.

Why is the district a benefit to the County? Because the County can basically "have its cake and eat it too". That is, the District is "off the balance sheet" of the County capital improvements budget but within the requirements of the County's development order, comprehensive plan, capital improvements element, capital improvements program and related matters.

The District has focused, pin-pointed and specialized professional responsibilities and duties which are legally limited to providing infrastructure at sustained quality with enhanced value over the long-term. The District also has long-term planning and implementation horizons. These horizons are longer than that of a County or city which are limited by 5-year capital improvements programs or 4-year re-election terms. But these horizons are also longer than private companies who are limited by quarterly and annual profit statement perspectives.

15. The District will be able to manage over the long-term any habitats and conservancy areas.

- a. **WHEN MIGHT IT BE APPROPRIATE NOT TO ESTABLISH A PARTICULAR
COMMUNITY DEVELOPMENT DISTRICT? SHOULD THE COUNTY HAVE A
POLICY?**

Answer: When it is or is not appropriate to establish a particular community development district is to be determined first by the petitioner (who is sometimes a land owner, a developer, or some other entity) and then by the establishing county or city government (or state if the land area is large enough). The key is a process of information gathering and review with regard to the six factors in the statute leading to the policy decision. In my opinion, the key line of inquiry regarding the six factors is twofold: (1) Is the land area for the proposed community development itself sufficiently compact, contiguous and of sufficient size; and (2) is the land area of the proposed community development amenable to being governed by a community development district regarding provision of infrastructure? These two lines of inquiry require information to assess regarding economies of scale, enclaves, and other matters that would render the managing and financing of infrastructure inappropriate or impossible.

Rather than delineating specific examples, it might be better for the county to adopt a policy. Caveat: No such policy should be absolute because the Board of County Commissioners may, given a specific set of circumstances, wish to establish a district or to refrain from establishing a district, notwithstanding the policy. Put another way, policies are made to have legitimate, well-reasoned, non-arbitrary, information-based exceptions. For example, the land area of a proposed community development (whether it is residential, commercial, recreational or industrial), may be too small even to be a development in one location of the county but of sufficient size in another location. Flexibility and reasoned decisions based upon full disclosure of relevant information are essential.

KvA/kmf