CARLTON FIELDS

Changes to Florida Growth Management, Environmental and Natural Resource Laws Made By The 2012 Florida Legislature

March 23, 2012

Please note that many of the bills discussed below are currently under review by Governor Scott and are subject to his veto authority. To check the ultimate status of these bills, please visit the Legislature's website and select the Enrolled (ER) version of the bill. **GROWTH MANAGEMENT HB 0979 - Developments of Regional Impact**

- This bill makes a number of changes to the Development of Regional Impact (DRI) program. A DRI is a development that has a substantial adverse impact on regional resources that effect citizens of more than one county. However, a DRI is not necessary in Dense Urban Land Areas, as defined in section 380.006, Fla. Stat. *See* Chapter 2009-96, L.O.F. Currently, there are eight counties and 238 cities in Florida that meet the definition of a Dense Urban Land Areas.

- The bill specifies that DRI review is not necessary for those projects not within Dense Urban Land Areas that would ordinarily be required to undergo DRI review if the developer undergoes the coordinated (longer) comprehensive plan amendment process. Additionally, an agreement must be entered between the developer, Department of Economic Opportunity (DEO), and the local government. The DEO must agree that the project has an agreement providing for a tax refund for qualified target industries and that the local government has a staff capable of assessing the impacts of the development. The local government has almost complete discretion as to whether to say yes or no and must give 21-day notice of specific information to adjacent local governments.

- This DRI exemption does not apply within the boundaries of designated areas of critical concern by the Wekiva Study Area or within two miles of the boundary of the Everglades Protection Act.

- The bill also requires Regional Planning Council (RPC) reports to contain recommendations consistent with the standards of state permitting agencies and water management districts and requires that reviewing agencies' recommendations are consistent with applicable statutes, rules, and ordinances of the local government with jurisdiction. RPCs are similarly precluded from commenting on or recommending affordable housing mitigation unless the council has adopted an affordable housing policy as part of its Strategic Regional Policy Plan. These limitations on RPCs and their reports may be long term impacts of the bill because practitioners in this area are used to unlimited comments and recommendations.

- The bill provides that a change to a DRI development order is not a substantial deviation and does not have to go through the notice of proposed change process if the changes do not increase external peak hour trips and do not reduce open space or conservation/preservation areas unless permitted by other language in the statutes. The ultimate interpretation of this bill depends on the DEO, but the current discussion focuses on whether this language would even exempt a project that would otherwise be a substantial deviation under other sections of the statute.

- This bill allows a DRI to be rescinded if all the required mitigation will be completed under an existing permit or equivalent authorization issued by an agency, provided the permit or authorization is subject to enforcement through administrative or judicial remedies.

- Finally, at the end of the Session, language was added to provide for application and potential approval of a comprehensive plan amendment by an owner that meets very specific requirements as an agricultural enclave. The owner must apply by a certain date, and approval must be given unless a local government can show by clear and convincing evidence that the project will be a danger to the public health, safety, and welfare.

- Effective date July 1, 2012.

HB 7081 - Growth Management Glitch Bill In 2011, the Legislature passed the first major rewrite of the growth management laws in 26 years. Because of the vast number of changes, it was likely that a number of adjustments would be required, including those that fixed cross references, updated outdated language and removed provisions throughout the statutes that were made obsolete. These were not controversial. However, an amendment dealing with regional planning councils quickly became controversial and was modified. It now authorizes a RPC to provide consulting services to a private developer or land owner for a project if not serving in a review capacity in the future. However, statutorily mandated services may be provided by the RPC regardless of its review role. Increasingly, more rural local governments are asking RPCs to prepare studies and reports even for

private development initiatives. The bill also addresses the following items:

- Grandfathers local government charter provisions in effect on June 1, 2011 relating to a local initiative or referendum process for the approval of development orders and comprehensive plan or map amendments. These were prohibited by statute last year and the Town of Yankeetown, which already had a requirement in its charter to require such a referendum, sued over the constitutionality of the statute. This amendment settles that legislation and there are approximately four local governments that will be affected: Yankeetown, Miami Beach, Key West, and Longboat Key.

- Requires that comments by military installations be considered by local governments in a manner consistent with Section 163.3184, Fla. Stat. Last year's Community Planning Act, Chapter 2011-139, L.O.F., was clear that the comments were non-binding. The military thought more attention should be paid to these comments and so this language balances interests.

- Removes criteria exempting certain municipalities from being signatories to the school interlocal agreement as a prerequisite to implementing school concurrency because school concurrency is now optional. The bill also restores criteria to exempt certain municipalities from being parties to the school interlocal agreement. Extends the time for the DEO and the Administration Commission to issue recommended and final orders since the time built into the statute last year was considered unworkable and substitutes the time in Section 120.569, Fla. Stat. It also provides a time requirement for the state land planning agency to issue a notice of intent (20 days) for a plan amendment adopted pursuant to a compliance agreement. Additionally, the bill clarifies that local governments have 10 working days to transmit amendments.

- Deletes the required annual report by DEO related to the optional sector plan pilot program, which is now defunct, and establishes a new statewide sector plan program.

- Requires that population projections for municipalities and unincorporated areas of a county must reflect the proportional share of the total county population and total county population growth. Effectively, this requires a minimum amount of land use be set aside in a municipality's comprehensive plan proportional to its share of a county's population growth. This was prompted by a county's refusal to do so.

- Requires each special district to submit a public facilities report to local governments within which it is located with specified information on district facilities. This must be updated every seven years prior to the local's EAR.

- Updates DRI rescission in Section 380.115, Fla. Stat., to add those exemptions in Section 380.06(24), Fla. Stat.

- Effective date – upon coming law.

HB 4003 – Growth Policy Act

- This bill simply repeals a program for urban redevelopment that hasn't been funded in several years. It is mentioned here solely because of its title, which always gets everyone's attention.
- Effective Date – July 1, 2012.

HB 7041 - Department of Economic Opportunity Glitch Bill

- This glitch bill is limited to governmental reorganization. Last year in Chapter 2011-142, Laws of Florida, the Department of Community Affairs (DCA), the Agency for Workforce Innovation, and the Office of Tourism and Trade and Economic Development were merged into the DEO. The DCA became DEO Division of Community Development and this law merely addresses glitches caused by the merger of very long statutes. It was non-controversial.
- Effective Date – upon becoming law.

MISCELLANEOUS AFFECTING GROWTH MANAGEMENT HB 1013 – Residential Construction Implied Warranties

- This bill makes clear the legislative intent on residential construction warranties in response to *Lakeview Reserve Homeowners v. Maronda Homes, Inc.*, a case decided by the Fifth District Court of Appeals. There, the court ruled that the warranties of fitness and merchantability or habitability also apply to off-site improvements for a new home including streets, driveways, roads, sidewalks, drainage facilities, or any other improvement or structure that does not immediately and directly support the fitness, merchantability, and habitability of the home itself. This changed Florida case law and Florida became the only state in the United States with implied warranties this broad. It is currently on appeal to the Florida Supreme Court, but development interests became very concerned about the unsettling nature of having this potential decision as precedent. The Legislature made it clear that, while those warranties continue, they apply only to the new home itself and not to off-site improvements. Other legal recourse is available if there are problems with the off-site improvements.
- Effective Date – July 1, 2012.

Affordable Housing

- There was no specific bill on this issue, but it is mentioned simply because, while the State collected $98 million in documentary stamp tax revenue, which was supposed to be funneled into affordable housing, the Legislature opted to sweep all the money into general revenue to help fill a budget hole of nearly $2 billion. This will be the fourth consecutive year that the State has not funded the State Housing Initiative Partnership Program. Additionally, there was an attempt to bring the Florida Housing Finance Corporation into the state budget in an effort to gain more accountability and control over the private entity's finances. The plan to reorganize the board was jettisoned during budget negotiations but the Office of Program Policy Analysis and Governmental Accountability was directed to audit the corporation and report to the Legislature this coming year.

HB 213 – Foreclosures

- **Did not pass** but was intended to speed up the process, which takes 675 days for a typical foreclosure to make it through Florida courts. The bill would have allowed all lien holders, such as apartment complexes and condo associations to begin foreclosure proceedings and set a way for banks to declare properties abandoned. It also would have limited mediation meetings. It passed the House but was heard only in committee in the Senate and never made it to the floor in the final days.

HB 1197 – Agriculture

- Deals with a number of activities under this heading.
- Because local governments are increasingly regulating beekeeping, the Legislature declared that activity preempted to the Department of Agriculture and Consumer Services (DACS). Local governments no longer have authority to regulate it.
- An exemption was provided from payment of local government stormwater permit fees for farms.
- After last year's controversy over the Florida Citrus Commission (Commission) legislation, the Commission was given a lot of authority back and the executive director no longer has to seek Senate confirmation.
- Additionally, agricultural fruit harvest equipment and loaders were added to the list of farming equipment exempted from the state motor fuel tax.

- The most controversial part of the bill, and the reason why a number of entities are seeking a veto, is language added to allow the dyeing of animals. The stated rationale was Florida's loss of a number of dog shows to other states that allowed hair coloring. But the language would also include the coloring of baby rabbits, chicks, and ducklings, which has been outlawed for a number of years.

- Effective date – July 1, 2012.

ENVIRONMENTAL **CS/CS/CS/CS HB 503 – Environmental Regulation** This significant environmental permitting bill does the following:

- Prohibits the local government from conditioning the approval of processing or issuing for development permit after July 1, 2012 on an applicant's obtaining a permit or approval form from any other state or federal agency. However, the local government may require that the applicant cannot start work without those additional required permits.

- Authorizes the DEP to issue a coastal construction permit in advance of the issuance of any incidental take authorization as provided under the Endangered Species Act and its implementing regulations if the permit and authorization include a condition requiring that authorized activities not begin until the incidental take authorization is issued.

- Includes entities created by special act or local ordinance (this would include some special districts) or interlocal agreement between counties and municipalities for purposes of DEP's and Water Management Districts' (WMDs) reduced or waived permit processing fees.

- Expands the use of Internet-based self-certification services for certain exemptions and general permits issued by DEP and WMDs if the expansion is economically feasible. Even if not, DEP and WMDs are directed to identify appropriate permits.

- Exempts injection wells authorized under State Underground Injection Control Program from permitting under Part III of Chapter 373, Fla. Stat.

- Requires action on permit applications within 60 days of receipt of last timely requested material. This reduces the duration of the process by one-third.

- Precludes state agencies from delaying action because of pending approval from other local state or federal agencies similar to the local government limitation in the first bullet.

- Provides for DEP to obtain and expand State Programmatic General Permit (SPGP) from the federal government for certain U.S. activities and waters governed by the Clean Water and Rivers and Harbors Act. DEP authorized to work with the U.S. Army Corps of Engineers (ACOE) on this for those activities in U.S. waters that will have minimal adverse environmental impacts. Conditions must be at least as protective of the environment and natural resources as existing state law under Part IV of Chapter 373, Fla. Stat.

- Authorizes DEP and WMDs to implement voluntary SPGP for all dredge and fill activities impacting three areas or less of wetlands or other surface waters subject to agreement with ACOE, again, if SPGP is at least as protective as Part IV of Chapter 373, Fla. Stat.
- Revises voluntary site cleanup program by raising priority ranking scores from 10 or less to 29 or less to increase qualifying sites. The bill also provides that expenditures associated with program deductibles, copayments, and contamination assessment report do not apply to expenditures under low-scored site initiative within the Inland Protection Fund.
- Provides that the transfer of title for petroleum contaminated site to a child of the owner or corporate entity created by the owner to hold title does not disqualify this site from financial assistance. The bill provides that those previously denied may apply.
- Provides expedited permitting for any inland multi-modal facility receiving and/or sending cargo to and from Florida ports.
- Authorizes certain zones of discharge to groundwater for existing installations.
- Limits the circumstances under which DEP can revoke certain air and water pollution permits issued to stationary installations:
  - Permitholder submits false or inaccurate information in the application for the permit;
  - Permitholder refuses lawful inspection of the facility authorized in the permit;
  - Permitholder fails to submit operational reports or other information required by department rule, which directly relate to the permit and has refused to correct or cure such violations when requested to do so; and,
  - Permitholder violates law, department orders, rules, or permit conditions which directly relate to the permit.
- Expands population cap from 7,500 to 10,000 for eligibility to apply for grants under Small Community Service Construction Act.
- Provides that sludge from waste treatment works that meets exemption requirements for industrial byproduct is not a solid waste.
- Allows byproduct from the creation of the waste-to-energy that is recycled to count toward the county recycling goal. The rate at which waste-to-energy counts toward the state goal goes from two tons to 1.25 tons. Directs DEP to allow waste-to-energy facilities to maximize acceptance and processing of nonhazardous and liquid waste.
- Exempts new solid waste disposal areas at an already permitted facility from having to be specifically authorized in the permit if monitored by an existing or modified groundwater modeling plan.

- Extends the duration of permits (20 years) issued to solid waste management facilities that are designed with leachate control systems and those without a leachate control system to every 10 years if certain conditions were met. The 20-year duration applies to applications for operating or construction permits or renewals on or after July 1, 2012.
- DEP to adopt rule requiring owners/operators of solid waste management facilities to provide financial assurances if DEP orders corrective action.
- Provides a general permit for construction, alteration, and maintenance for stormwater management system of less than 10 acres.
- Creates regional action teams for expedited permitting and comprehensive plan amendments that are identified to allow location and expansion of companies that create at least 50 jobs that pay high wages.
- Expands the definition of blended gasoline to define the term alternative fuel (includes biomass) and authorizes the sale of unblended fuels for a long list of exemptions, including but not limited to, planes and boats or where a warranty would be voided by use of blended gasoline.
- Provides that holders of valid permits or other authorizations are not required to make payments to authorizing agencies for use of extensions granted under Sections 73 and 79 of Chapter 2011-139 and makes prohibition on fees retroactive to June 2, 2011.
- In 2011, the Legislature allowed a notice to the local government or agency of certain permits and development orders that expired between January 1, 2012 and January 1, 2014. Notice had to be given by December 31, 2011. This bill extends the notice deadline an additional year to December 31, 2012. The same limits to total years of extension apply.
- Effective July 1, 2012.

HB 13 – Sovereignty Submerged Lands This bill provides lease requirements for private residential docks and related structures on sovereign submerged lands. Specifically, the bill does the following:

- Extends the maximum term from an initial standard lease for successive renewals to 10 years from the five year maximum currently provided by rule, and requires inspection by the DEP at least once every 10 years instead of every five years.
- Requires standard lease contracts to disclose all applicable lease fees as established by the Board.
- Exempts multi-family docks and structures that require a lease from paying a fee on minimal amounts of sovereignty submerged lands that are leased to reflect the same-size exemption currently in place for single-family docks.

- Specifies that lessees whose upland property qualifies for a homestead exemption are not required to pay a lease fee on revenue derived from the transfer of fee simple or beneficial ownership.
- Specifies that the Board and DEP are not prohibited from imposing additional application fees, regulatory permitting fees, or other lease requirements as otherwise authorized by law.
- Effective date – July 1, 2012.

CS/CS HB 313 – Premises liability

- This bill allows private property owners who provide outdoor recreational opportunities on their properties to enter into written agreements with the state, as opposed to formal leases, and still receive the benefit of limitation of liability for what happens on their property.
- It also provides a limitation of liability to private property owners who make their properties available to specific persons as opposed to the general public for the purpose of hunting, fishing, or wildlife viewing. To limit liability, the landowner must provide notice of the liability limits to the person or persons using the land. The property owner must not derive any profit from patronage of the property for outdoor recreational purposes; however, reimbursement of reasonable costs and expenses such as positing the signs may be included in the agreement.
- Effective date – July 1, 2012.

CS HB 639 – Reclaimed Water

- This is one of the first bills to address the regulation and use of reclaimed water. It defines both reclaimed water and the reclaimed water distribution system. It reaffirms state policy that reclaimed water is an alternative water supply and eligible for such funding, and memorializes specific contract provisions for the development of reclaimed water as an alternative water supply.
- To many, one of the more important parts of the bill is that it gives utilities producing reclaimed water much more control over the water itself and prohibits water management districts from requiring a permit for reclaimed water or directing the utilities to provide water to certain customers to whom the reclaimed water must be directed. However, if the proposed use includes surface or ground waters, a consumptive use permit for those uses may include conditions governing their use in relation to feasibility or use of reclaimed water.
- The bill requires the DEP and each water management district to initiate rulemaking on “impact offsets” and “substitution credits” and to adopt revisions to the water resource implementation of the rule.
- Effective date – July 1, 2012.

CS HB 691 – Beach Management This bill renames Part 1 and Part 2 of Chapter 161, Fla. Stat. as the Denis L. Jones Beach and Shore Preservation Act in honor of a senator who pioneered interest in this area. Over the past few years, a Beach Management Working Group was established. It made a number of recommendations regarding streamlining and transparency. The bill provides:

- Reasonable assurance is demonstrated if the permit applicant provides competent substantial evidence that is based on plans, studies, and credible expertise that accounts for naturally occurring variations that might be reasonably expected.
- DEP is authorized to issue coastal construction permits in advance of incidental take authorizations under the Endangered Species Act and regulations if authorization includes requirement that authorized activities can not begin until incidental take authorization issued.
- DEP to adopt rules to address standard mixing zone criteria and anti-degradation requirements for beach management and inlet by-passing permits that involve excavation and replacement of sediment.
- If DEP requests additional information on application, it must cite statutory and rule provisions. It cannot use guidelines to enforce requirements.
- Provides for simplification and expedited permitting process for periodic maintenance for previously permitted and constructed beach nourishment and inlet management process.
- DEP must maintain active project listings by fiscal year on website for transparency.
- Two additional permit exceptions are created for geotech, geophysical, and cultural resource data, including surveys, acoustic sound, sampling and coring and oceanographic instrument deployment.
- Effective date – July 1, 2012.

CS HB 1117 – Conservation of Wildlife

- The bill allows 16 zoos and aquariums that are accredited by the Association of Zoos and Aquariums of Florida to seek authorization from the Board of Trustees of the Internal Improvement Trust Fund and the appropriate water management district to use state lands to conduct enhanced research on rarely seen animals like giraffes and elephants. The research could include husbandry, reproductive biology, androchronology, behavioral health and ecology of native and non-native animal and bird species. Projects involving carnivorous mammals or primates are prohibited. The bill specifies that a detailed description of the proposed project include containment facilities and a plan to ensure timely recovery of escaped animals.
- Effective date – July 1, 2012.

CS HB 1383 – Fish and Wildlife Conservation Commission

- This bill follows up on Chapter 2011-166, Laws of Florida, which established the Law Enforcement Consolidation Task Force (Task Force) to evaluate law enforcement activities and assets of the DACS, DEP, and the Fish and Wildlife Commission (FWC) and determine if duplication of law enforcement functions exist. As a result of the Task Force's work, the DEP Division of Law Enforcement, DACS Office of Agricultural Law Enforcement Officers assigned to the Conservation of Recreational Lands Program, and the investigator responsible for commercial aquaculture violations will be merged into the FWC Division of Law Enforcement.
- Effective date – July 1, 2012.

CS HB 1389 – Water Storage and Water Quality Improvements

- The bill expresses legislative intent to encourage public-private partnerships for water storage and water quality improvements on agricultural lands.
- The bill specifies that any agreement to store water on private lands must include a baseline condition to determine the extent of wetlands and other surface waters on the property. The bill then specifies that during and after expiration of any agreement, the extent of wetlands and other surface waters on the property will be the baseline condition. Essentially, the bill provides for the ability of a public entity to provide storage for public water onsite for both storage and water quality improvements on private property. Historically, the private entity would then be subject to additional wetlands requirements. This bill seeks to remove that concern of private land owners.
- Effective date – July 1, 2012.

HB 4123 – Federal Environmental Permitting

- The bill repeals Section 373.4144(2), Fla. Stat., which directs the DEP to file a report with the President of the Senate and Speaker of the House proposing both federal and state statutory changes that will be necessary to accomplish consolidation of state and federal wetland permitting programs.
- Effective date – July 1, 2012.

CS HB 7003 – Statewide Environmental Resource Permitting

- The bill directs the DEP to adopt statewide Environmental Resource Permit (ERP) rules in coordination with WMDs. Once adopted, the WMDs and delegated local governments are directed to implement the rules without rulemaking except to conform existing rules.

- The bill specifies that these new statewide ERP rules are to be based on existing DEP and water management rules, except that the DEP can: 1) reconcile differences and conflicts to achieve a consistent statewide approach; 2) account for different physical or natural characteristics, including special basin considerations, of individual WMDs; and, 3) implement additional permit streamlining measures.
- Grandfather clauses are included for ongoing activities that will not be subject to the new rules. The bill requires DEP staff oversight and training to ensure statewide consistency in implementing the ERP rules.
- DEP is instructed to commence rulemaking no later than October 1, 2012.
- Effective date – July 1, 2012.

HB 7051 – Numeric Nutrient Criteria

- This deals with the Numeric Nutrient Criteria rule adopted by the DEP that is the subject of an administrative rule challenge proceeding before the Division of Administrative Hearings (DOAH). To give some context, EPA originally adopted rules that would apply to Florida and their effective date was extended by EPA because of vocal concerns about the fiscal impact on Florida governments and businesses. DEP then moved forward to develop its own rules, which were approved by the State's Environmental Regulatory Commission last year. The DEP rules cannot take effect until ratified by the Legislature and this bill states that legislative ratification of the DEP rules is not required in this instance. The bill further requires that the DEP rules be immediately provided to EPA for review. This review has occurred. The EPA has indicated that it will approve these rules depending on the results of the challenge. The hearing has occurred and a ruling will be issued in approximately 60 days.
- Effective date - February 16, 2012 (Governor has signed this bill)

HB 1263 – Septic Tanks

- This bill repeals the statewide requirement for septic tank inspections and, where problems are found, mitigation. It became a particularly controversial issue in Northwest Florida. Instead, local governments with first magnitude springs are required to have such inspections unless the local government opts out by a super majority vote and provides information on that opt out to the Department of Health.
- Effective Date – Upon becoming law.

SB 1998 – Senate Transportation Budget Conforming Bill

- This bill provides an expedited hearing process for legal challenges dealing with state environmental permits on ports. The immediate issue was a legal challenge to the Port of Miami permit, but there will be others in the future.
- Effective date – July 1, 2012.

SB 1986 – Water Management District Budget Conforming Bill

- Last year, WMDs were brought into the budget of the Florida Legislature. This year, they have been released to a certain extent in that the preliminary budgets of water management districts must be submitted to the House and Senate. This bill creates 373.535, Fla. Stat., to require each WMD to submit a preliminary budget by January 1 for Legislative review. It then requires the preliminary budget to include certain information and authorizes the President of the Senate and Speaker of the House to submit comments regarding the preliminary budget to the WMD by March 1. Each WMD must respond to the comments no later than March 15, and the preliminary budget review by the Legislature will be the basis for developing each WMD's tentative budget for the next fiscal year. If no action is taken by the Legislature by July 1, WMDs may independently develop tentative budgets. However, the bill provides criteria for the Legislative Budget Committee (LBC) to use in approving the tentative budget and authorizes the LBC to reject certain district budget proposals.
- Removes a provision requiring the maximum property tax revenue for water management districts to revert to the amount authorized for the prior year if the Legislature does not set the amount.
- Removes maximum revenue limitation for the 2011-2012 fiscal period.
- Provides Legislature is authorized to set property tax rate.
- Requires five-year water resource development work programs to describe the district implementation strategy and funding plan for water resource, water supply, and alternative water supply development components of each approved regional water supply plan.
- Authorizes the governing board of a water management district to provide group insurance for its employees and employees of another water management district.
- Effective October 1, 2012.

NATURAL RESOURCES **SB 268 – Trails and State Lands**

- This allows businesses and groups to sponsor trails and put their advertisements at trail heads only. Additionally, while the bill identifies seven trails, it authorizes DEP to negotiate agreements for other trails.
- Effective date – July 1, 2012.

HB 5001 – Florida FY 2012-13 Budget Provides as follows:

- $8.3 million for Florida Forever
- $40 million for Everglades restoration
- $5 million for Northern Everglades, which is property north of Lake Okeechobee
- $10 million for beach and sand restoration programs
- $4.8 million for debt service toward a $50 million waste water treatment program in the Keys
- $5.6 million for the St. Johns River restoration project.
- $125 million for petroleum contamination sites
- $4.8 million for Lake Apopka restoration
- Effective date - July 1, 2012, or upon becoming law, whichever occurs later.

Resources *Lakeview Reserve Homeowners v. Maronda Homes, Inc.*, 48 So.2d 902 (5th DCA 2010). This report was compiled in substantial part using public records data from the Florida Senate and the Florida House of Representatives.