CITY, COUNTY AND LOCAL GOVERNMENT LAW SECTION

The Agenda

Special Edition THE FLORIDA BAR July 2009

Senate Bill 360 Version 2.0: Growth Management for the 21st Century?[1]

by Susan L. Trevarthen and Chad S. Friedman

INTRODUCTION

In 2005, Governor Jeb Bush made his mark on growth management by signing into law Senate Bill 360. The bill strengthened various aspects of the Growth Management Act, including a renewed emphasis on the financial feasibility and effectiveness of capital improvement planning and new mandates for public school concurrency and water supply planning. The bill was steered through the Florida Legislature by Senator Mike Bennett(R), of Bradenton.

Senator Bennett, in a nod to history, ensured that the principal growth management bill he sponsored in 2009 was none other than number 360. Known as the "Community Renewal Act" (referred to herein as the "Act"), it was signed into law by Governor Charlie Crist on June 1, 2009. Portions of it became effective immediately. This "son of SB 360" is another major change to Florida growth management law, but moves in a completely different direction.

The Act recedes from or delays some of the 2005 requirements, while creating exemptions from state-mandated transportation concurrency mandates and all development of regional impact (DRI) review for "dense urban land areas" (DULAs) that contain the majority of the state's population in an effort to spur economic development. While the Act contemplates the future creation of a statewide mobility fee, there is no guarantee that one will be adopted by a future Legislature and no certainty as to its methodology or components. The Act also provides for extensions of certain Water Management District (WMD) and Department of Environmental Protection (DEP) permits for two years, as well as related local development orders and building permits.

This article will first provide a detailed summary of the growth management-related provisions of the Act and then offer a preliminary analysis of its impacts. This analysis is being prepared shortly following the enactment of this Act, while its provisions are being widely debated. With time and implementation, its far-reaching implications will become clearer.

SUMMARY OF KEY PROVISIONS

I. Permit Extensions (lines 1251 – 1302)

Similar to years past, the Legislature

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Chair's Report

by James L. Bennett

City, county and local government lawyers will be professionally challenged in a year dominated by budget issues, complex client demands and legislative answers to the economic downturn. The City County and Local Government Law Section of the Florida Bar stands ready to help its members competently and confidently meet those challenges. Now more than ever we know that we need to identify ways to effectively and efficiently serve the emerging needs of our members.

Under the topic of legislative answers, this special edition of the Agenda is provided in expedited fashion to help our members familiarize themselves with SB 360, the Community Renewal Act now signed into law by Governor Crist. Board certified section member Susan L. Trevarthan together with Chad Friedman have taken a critical look and that legislation and provides us with a detailed and insightful romp through this new take on growth management.

INSIDE:

recognized the tough economic times, and has automatically extended certain permits for two years. (The Legislature has not indicated that this provision should be codified.) Included in the extension are DEP and WMD permits with expiration dates from September 1, 2008 through January 1, 2012. DRI buildout dates and commencement and completion dates for mitigation associated with phased projects are also similarly extended.

There is an important difference in this year's extension; the Legislature attempted to extend locally issued development orders and building permits, while prior extensions were limited to DRI approvals. A sentence provides that "any local government-issued development order or building permit" is "similarly extended," but the paragraph is poorly worded and its scope and meaning is unclear.

In order to take advantage of these extensions, permit holders must notify the government that issued the permit of their intent and their anticipated timeframe to do so, in writing, no later than December 31, 2009. Please note that there are some limited circumstances in which a permit extension does not apply, including permits under programmatic or general Army Corps of Engineers permits, permits in significant noncompliance with the permit conditions, and extensions that would delay or prevent compliance with a court order.

The extended permits are subject to the laws that were in effect at the time that they were issued, unless there is an immediate threat to public health or safety. This vesting provision also applies to any permit modification that lessens the environmental impact.

A final section preserves the authority of local governments to require the owner of the property to maintain and secure the property in a safe and sanitary condition in compliance with applicable laws during the extension.

II. Definitions in Section 163.3164, F.S. (lines 217-264 and lines 902-908)

The term "existing urban service area" has been renamed as "urban service area" and the meaning of the term has been expanded. An urban service area now means:

> (a) a built up area where public facilities and services, including but not limited to roadway and central water/sewer facilities, currently exist or are committed in the first three years of the capital improvement schedule of the plan; and
>
> (b) for those counties that are "dense urban land areas" (see below), the nonrural area of a county with a charter rural area designation, or areas identified in the comprehensive plan as urban service areas or urban growth boundaries on or before July 1, 2009.

The term "**dense urban land area**" or "DULA" or was added and defined. It means:

> (a) a municipality that has an average of at least 1,000 people per square mile of land area and a minimum total population of at least 5,000;
>
> (b) a county, including its municipalities, which has an average of at least 1,000 people per square mile of land area; or
>
> (c) a county, including its municipalities, which has a population of at least 1 million.

The preliminary list of "dense urban land areas" was released on July 1, and includes Miami-Dade, Broward, Palm Beach, Orange, Seminole, Hillsborough, Pinellas, and Duval Counties, as well as the cities within these counties and many more municipalities across the state. However, the Act specifies that the publication of this, the first of annual lists to be released, on the Department of Community Affairs (DCA) website by July 8, 2009 makes the designation legally effective. See ***http://www.dca.state.fl.us/***. The Act also requires that any local government that changes its boundaries must file a copy of the revision to its charter and a statement as to its effect on population and land area with the Office of Economic and Demographic Research, so that the annual lists of "dense urban land areas" will be accurate.

III. Transportation Concurrency in Section 163.3180(5), F.S. (lines 303-308 and 475-656)

a. Transportation Concurrency Exception Areas (lines 496-656)

The Legislature finds that transportation concurrency has not worked for urban centers, and that a range of transportation alternatives is essential for these areas. As such, the Act creates automatic transportation concurrency exception areas (TCEAs) for "dense urban land areas" as follows:

> (a) a municipality that qualifies as a "dense urban land area;"[2]
>
> (b) an "urban service area" that has been adopted into the local comprehensive plan and is located within a county that qualifies as a "dense urban land area;" and
>
> (c) a county, with its municipalities, which has a population of at least 900,000 and qualifies as a "dense urban land area," but does not have an "urban service area" designated in the local comprehensive plan.

Municipalities and counties that are not "dense urban land areas" are given the option of amending their comprehensive plans to designate a TCEA in the following areas:

> (a) Urban infill (s. 163.3164);
>
> (b) Urban infill and redevelopment (s. 163.2517); or
>
> (c) "Urban service areas" (s. 163.3164).

Municipalities that are not "dense urban land areas" are also given the option of amending their comprehensive plans to designate a TCEA in the following additional areas:

> (a) Community redevelopment areas (s. 163.340); or
>
> (b) Downtown revitalization areas (s. 163.3164).

There are two exceptions from the Act for South Florida counties. Broward County obtained an exception from the automatic TCEA so that its transit concurrency provisions would remain effective. See lines 542-550. (Reportedly, these provisions are being considered models for the mobility fee concept addressed later in the Act.)[3] Miami-Dade County also received an exception from the automatic TCEAs. See lines 551-555 (any county that has exempted more than 40 percent of the area inside the "urban service area" from transportation concurrency for the purpose of urban infill).[4]

It should also be noted that local governments that do not qualify for the Act's TCEAs continue to have the option to create a TCEA under existing law by satisfying several requirements and conditions, with a few modifications by this Act. However, it is unclear whether any city or county will be unable to qualify for a TCEA under the very generously-defined categories above, let alone how many or where they may be located.

b. Home Rule Regulation of Transportation Impacts (lines 638-640)

The Act does provide for preservation of home rule in relation to its transportation concurrency provisions. The automatic designation of a TCEA "does not limit a local government's home rule power to adopt ordinances or impose fees." It is unclear whether and to what extent the benefit provided by this language has been cancelled out by the provision at line 303, as described below in III.c.

c. Map Amendments Deemed to Meet Level of Service (lines 303-308)

When reviewing comprehensive plan amendments within TCEAs, the planning requirement to achieve and maintain level-of-service standards for transportation is deemed to be met. Further analysis of this provision is necessary, including its potential conflict with the "home rule" provision described in III.b. above.

d. Preservation of Existing Transportation Mitigation Agreements (lines 640-644)

The Act provides that an automatic TCEA "does not affect any contract or agreement entered into or development order rendered before the creation of the TCEA, except for previously approved or pending Developments of Regional Impact within "dense urban land areas" that are eligible to be abandoned or rescinded in accordance with the new Section 380.06(29)(e). Therefore, existing developments and conditions of approval should be unaffected by the adoption of this new law.

e. Mobility Fee (lines 645-656 and 1219-1250)

It is important to recognize that there is no guarantee that a future Legislature will adopt the mobility fee and, even if they do, it will take time for it to be implemented across the state. The Act merely requires OPPAGA to submit a report to the Florida Legislature by February 1, 2015, on how the SB 360 TCEAs have been implemented and what effects they have had on mobility and congestion. In addition, the Act directs DCA and the Florida Department of Transportation (FDOT) to establish a methodology for implementing a mobility fee to replace transportation concurrency. The agencies must file a joint report on the mobility fee methodology study by December 1, 2009, including recommended legislation and a plan to implement the mobility fee as a replacement for transportation concurrency.

(The Act addresses the mobility fee concept at greater length in Section 13, but does not specify that this language should be codified. See lines 1219-1250. It is somewhat repetitive of lines 645-656, but also requires that the joint report mentioned above include "an economic analysis of the implementation of the mobility fee, activities necessary to implement the fee, and potential costs and benefits at the state and local levels and to the private sector.")

f. Waiver of Transportation Concurrency for Certain OTTED-certified Projects (lines 657-670)

Certain job creation projects certified by the Office of Tourism, Trade and Economic Development may receive a waiver of transportation concurrency.

IV. Capital Improvements Element in Section 163.3177(3), F.S. (lines 270-297)

The deadline for "hard" financial feasibility review of the capital improvements schedule was extended to December 1, 2011. This affects all of the concurrency facilities and services, including potable water, wastewater, drainage, parks, solid waste, public schools and water supply.

V. Intergovernmental Coordination Element in Section 163.3177(6), F.S. (lines 336-341 and line 918)

The intergovernmental coordination element (ICE) used to be allowed to specify a voluntary dispute resolution procedure, using either the process provided through the regional planning councils in Section 186.509, F.S. or some other local process for intergovernmental disputes relating to planning and growth management issues. The Act now makes the regional process mandatory and mandates that the ICE specify it. In addition, if the dispute resolution process under Section 186.509, F.S., is invoked, mediation or a similar process is now required.

VI. Public School Facilities Element in Section 163.3177(12), F.S. (lines 408-471) and163.3180(13), F.S. (lines 688-803)

In 2005, the Legislature mandated that school concurrency apply in all local governments by December 1, 2008, unless they were exempt or subject to a waiver under Florida law. The Act modifies school concurrency waivers for low growth areas slightly.

Penalties for noncompliance were revised. Previously, local governments were prohibited from amending their comprehensive plans to increase residential density, while school boards were subject to potential monetary sanctions from the Administration Commission. The Act removes the plan amendment penalty, and subjects both local governments and school boards to potential monetary sanctions for noncompliance.

School concurrency levels of service were modified. If a school district includes portable/relocatable classroom capacity in its inventory of student stations, those classrooms count as available capacity for the first three years of school concurrency implementation if they were purchased after 1998 and meet standards for long-term use. Some have suggested that the "first three years" refers to a one-time, three year requirement to ease the initial implementation of school concurrency, while others have interpreted this language to apply to the first three years of the five-year plan on a continuing basis.

Finally, the list of proportionate share mitigation options was enlarged. Construction of a charter school that complies with the requirements of Section 1002.33(18), F.S. was added.[5] This list of options is not mandatory. The options available in a particular local government must be specified in the school interlocal agreement and the public school facilities element.

VII. Impact Fees in Section 163.31801, F.S. (lines 806-815)

The 90-day delayed effective date for impact fee ordinances does not apply if the effect of the ordinance is to "decrease, suspend or eliminate" the fee. Under the Act, the 90-day notice requirements now appears to apply to "increased" fees as well as new fees. This is somewhat problematic, as some local governments' ordinances provide for automatic increases in the fee amounts (for example, tied to some cost of living index), without such a notice provision.[6]

VIII. Security Cameras in Section 163.31802, F.S. (lines 818-829)

The Retail Federation was successful in getting this preemption of local government authority added to the Act. It prohibits locally adopted standards for security cameras for lawful businesses that require the expenditure of money to enhance local police services.[7] It provides that the section shall not affect security requirements for publicly operated facilities, including any private businesses operating within those facilities.

IX. Concurrent Processing of Zoning and Comprehensive Plan Amendments in Section 163.3184, F.S. (lines 845-853)

The applicant can request to have the local government consider a zoning change that "would be required to

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properly enact the provisions of any proposed plan amendment" transmitted concurrently with the plan amendment. Any approval of the zoning change is contingent on the plan amendment being found in compliance or otherwise becoming effective.

X. Exceptions to the Twice a Year Plan Amendment Cycle in Section 163.3187, F.S. (lines 857-885)

The exception for the Capital Improvements Element update was reworded, and a new exception was created for any amendment that designates an "urban service area" as a SB 360 TCEA and area exempt from Development of Regional Impact review.[8]

Interestingly, this section also deletes the following sentence: "Nothing in this subsection shall be deemed to require favorable consideration of a plan amendment solely because it is related to a development of regional impact." See lines 872-874. This was not necessary to accomplish the changes described above. It should not result in a change of the law, but it could be argued that it evidences a legislative intent that a plan amendment related to a DRI is somehow entitled to preferential treatment.

XI. Alternative State Review Process, aka the "Pilot Process," in Section 163.32465, F.S. (lines 888-899)

This process was created originally for Broward and Pinellas Counties, their municipalities, and a few additional cities. The Act expands it to cover plan amendments to designate an "urban service area" in any local government's jurisdiction. It shortens the review process, removes the requirement for an Objections, Recommendations and Comments Report from DCA, and changes the standard of review for challenges to local government decisions on plan amendments.

XII. Density of Unincorporated Residential Areas in Section 163.3202, F.S. (lines 1600-1605)

The Act creates a new requirement for land development regulations (LDRs) under state law. LDRs shall "maintain the existing density of residential properties or recreational vehicle parks if the properties are intended for residential use and are located in unincorporated areas." The plain meaning of the provision seems to prohibit density reductions or increases within unincorporated areas, but others have suggested that the intent was to provide only a floor and not a ceiling as to density. The prohibition is not absolute, as it would not apply to properties within a coastal high hazard area under s. 163.3178 or where the county determines that there is not sufficient infrastructure to serve the property.

XIII. Developments of Regional Impact in Section 380.06 (lines 931-1218)

a. Transportation Methodology for DRI (lines 931-955)

For those developments that will continue to be subject to DRI and concurrency review, the levels of service in the transportation methodology must be the same levels of service used to evaluate concurrency in accordance with Section 163.3180, F.S.

b. DRI Exemptions in Section 380.06(24) (lines 956-1144)

This existing list of DRI exemptions is slightly modified. Subsection (24)(n) is deleted. Language is added regarding what happens when a use is exempt under this section, but is part of a larger project that is subject to DRI review. See lines 1100-1109. The impacts of the exempt use must be included in the DRI review unless it involves an OTTED funding agreement providing an Innovation Incentive of at least $50 million.

c. DRI Exemptions for "Dense Urban Land Areas" in Section 380.06(29) (lines 1145-1218)

The Bill creates a new subsection (29), and mirrors the TCEA provisions above to exempt developments within a "dense urban land area" from Development of Regional Impact (DRI) review. See definitions in section II. above.

In DRI exemption areas, an existing DRI can terminate the DRI Development Order if all of the mitigation requirements have been satisfied. A pending DRI application in these areas is permitted to opt out of DRI review. If it does, any related comprehensive plan amendment will continue to be exempt from the twice a year plan amendment cycle

If a local government is designated as a "dense urban land area" and somehow subsequently loses this status, the Act provides that any development that has a "complete, pending application for authorization to commence development" may remain exempt from DRI review if the developer is "continuing the application process in good faith or the development is approved." The Act further specifically provides that it does not limit or modify the rights of any person to complete an approved DRI.

Exempt development orders for projects must be mailed to DCA if they exceed 120 percent of any DRI threshold that would otherwise be applicable, and DCA can appeal such orders if they are inconsistent with the comprehensive plan. See lines 1192-1200.[9] These DRI exemptions do not apply to Areas of Critical State Concern (s. 380.05), the Wekiva Study Area (s. 369.316), or within two miles of the Everglades Protection Area (s. 373.4592(2)).

ANALYSIS OF KEY ISSUES

The Act removes the primary state-mandated procedures and mechanisms by which developers are currently required to address the transportation impacts of their projects on the areas in which they develop, while likely increasing congestion. Although it leaves in place the other concurrency mandates for sewer, water, water supply, parks, drainage and solid waste, the transportation concurrency mandate has frequently had the most impact on development. While many urban areas have already been exempt for many years from traditional transportation concurrency, through pre-existing statutory procedures for creating exception areas, the removal of the DRI program represents a major change even for these areas. The Act attempts to address the loss of intergovernmental coordination through the DRI program by requiring the adoption of mandatory regional mediation procedures as part of the Intergovernmental Coordination Element of local comprehensive plans. However, some regions have already started talking about developing interlocal agreements and other locally derived mechanisms for dealing with cross-jurisdictional impacts and with coordination of multi-agency reviews.

The repeal of transportation concurrency and the permit extensions are two areas of the Act that raise the most questions regarding implementation and implications, and are discussed in greater detail below.

I. Repeal of State Mandate for Transportation Concurrency

The Act's repeal of state-mandated transportation concurrency in dense urban land areas raises several issues of interpretation and implementation. As such, these local governments will want to consider how to proceed. There are several options to consider.

Legislators and development inter-

ests have suggested that the Act requires these governments to accept their newly granted freedom from state-mandated transportation concurrency in their jurisdictions and move towards a mobility fee. They point to the legislative intent and the creation of specific exemptions for Miami-Dade and Broward Counties as support for their position. After all, if the Act had no impact unless an affected local government chose to accept it, there would have been no need to include these exemptions. See, e.g., analysis of the bill for the Florida Chamber of Commerce, at *http://www.onevoiceforflorida.com/media/f390470c-baa7-43ba-ba1f-573a0196461d.pdf*. These interests also point to the broadened scope of the alternative state review process in the Act, to cover amendments to create urban service areas, and suggest that it is illogical that dense urban land areas must go through the regular plan amendment approval process to become automatic TCEAs while urban service areas do not.

On the other hand, as DCA Secretary Pelham has also noted, each of the dense urban land area governments has a legally effective comprehensive plan and code of ordinances requiring the enforcement of transportation concurrency. Simply ignoring these valid local laws might expose these governments to third party challenges to the consistency of their development orders with their comprehensive plans and codes. In other words, the Act appears not to be completely self-executing, and to require local government action to repeal existing local concurrency laws if such repeal is desired. Moreover, Secretary Pelham has also noted that the Growth Management Act has always been a minimum criteria statute, and local governments have always had the ability to adopt stricter regulations and policies. Continued local concurrency in the absence of a state mandate for concurrency should be considered a stricter regulation, unless and until the Legislature were to actually prohibit local governments from adopting concurrency (as they could, for example, in connection with the possible shift to a mobility fee in 2010). Finally, Secretary Pelham has also noted, his agency's interpretation of the Act will receive deference, as DCA has special expertise and is the agency responsible for enforcing the Growth Management Act.

The fact that the Act fails to require local governments to repeal local concurrency laws suggests that the dense urban land areas have a policy choice. If these governments seek to repeal transportation concurrency or to develop new and different regulations of transportation, they will need to amend their existing plans and codes. If they want to leave in place their existing regulations, they might simply rest on their existing regulations. It is unclear whether any advantage might be gained by adopting a resolution of intent to preserve the existing regulations or by re-adopting them or adopting modified versions of them. Consideration should be given whether such readoption or revision would open the local government to new liabilities under the Harris Act, Chapter 70, Fla. Stat., which only applies to regulations adopted after 1995.

Over the last ten years or so, local governments were required to make strong commitments to mix uses, provide for public parking and transit, and undertake other investments and strategies to assure continued mobility in order to get a TCEA approved under pre-existing statutory provisions for TCEAs. There could be some interesting interpretation issues related to the overlap of a pre-existing TCEA (which usually covers only a portion of the jurisdiction) and a potential jurisdiction-wide TCEA in a single jurisdiction. A dense urban land area may want to decline to expand its existing TCEA, perhaps to preserve the more focused incentive in a downtown, a community redevelopment area or other area where the local government seeks to target development. Will the local government be able to repeal all of its policies and programs that were required for the original TCEA, and do only the minimum necessary to comply with the requirements at lines 526-541 to provide "strategies to support and fund mobility?"

The Act explicitly recognizes the home rule authority of local governments in relation to the new TCEAs. Ever since the adoption of the Growth Management Act, Florida local governments have become accustomed to basing their land use regulatory efforts on statutory mandates. But the Florida Constitution as interpreted by the Florida courts provides extremely broad home rule authority to municipalities and charter counties, to regulate to protect and promote the public health, safety and welfare in a manner not inconsistent with general law.

However, the impact of the home rule provision is limited by the language deeming a map amendment to meet level of service. A possible interpretation is that an application for a land use map amendment can no longer be denied on the basis of transportation issues. Alternatively, the provision seems to leave the door open for the enforcement of long range transportation policies in the comprehensive plan and regulations that would be applied at rezoning or later in the development approval process. Litigation is likely over all these issues of interpretation and implementation of the Act.

Within two years of a TCEA being designated under the Act, affected local governments "shall" adopt comprehensive plan amendments and transportation strategies "to support and fund mobility" within the TCEA.[10] This is reportedly intended to tie into the mobility fee concept discussed above, but no resources are provided in this Act for local governments to comply with this mandate. This potentially places dense urban land area governments in the uncomfortable position of being forced to raise local taxes or other local sources of revenue to fund the transportation facilities and functionality that may be demanded by their constituents and to address this requirement to fund mobility. The Legislature recognized this possibility by including in the Act language necessary under the Florida Constitution for an unfunded mandate.[11] If governments do not comply, they are subject to potential monetary sanctions from the Administration Commission. In these times of constrained resources, it is going to be a challenge for many cities and counties to start "funding mobility," and it is unclear whether the available regulatory tools will be sufficient to address the need.

A major reason that transportation concurrency has not been as successful as it could have been is that the state failed to fund the backlog of infrastructure needs for decades. This Act potentially removes the developer's role in funding mobility in dense urban land areas, at least as a matter of state law. Local governments' options for raising revenues are far more constrained than those of state government, particularly at this point in the economic cycle and in light of property tax reform and declining tax bases. While the 2008 Legislature provided for Transportation Concurrency Backlog Authorities, the effect of adopting one is to deem the backlog financially feasible and financed for purposes of transportation concurrency, and to allow development to proceed without the payment of proportionate share mitigation. Under this Act, the issue is no longer concurrency, and it is not clear whether the money raised by such authorities can be used to fund the multi-modal mobility improvements contemplated by this Act.

Many property owners have already been seeking entitlements for as much

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development as they might ever want for their properties, because Hometown Democracy is on the ballot in 2010. That rush to entitle is likely to be amplified in those jurisdictions that repeal transportation concurrency, as property owners seek to take advantage of the exemptions before they may be changed by a future Legislature and before any mandatory mobility fee kicks in.

II. Permit Extensions

The Act's language regarding permit extensions is immediately effective and contains a December 31, 2009 deadline for permit holders to notify local governments of their intent to take advantage of the extension. The language is poorly worded and likely to be the subject of litigation. For example, it is unclear whether this provision applies only to those projects that were approved prior to September 1, 2008. Although that was reportedly the intent of some of those who had sought the inclusion of this language, the final language appears to allow the extension of permits approved this year, if they expire in the relevant timeframe and an extension is sought by December 31, 2009.

It is also unclear whether mention of a "similar" extension for local development orders and building permits refers only to such local approvals that are related to DEP or WMD permits that are eligible for extension. The structure of the language suggests that only those local development orders and building permits related to a DEP or WMD permit meeting the requirements above are extended. DCA Secretary Pelham, originally took this position in a June 12, 2009 briefing on the bill. The briefing is available at *https://www.techknowlogy.com/DCA_ReplaysJune.html* and the related slides are at *http://www.dca.state.fl.us/fdcp/dcp/Legislation/2009/ImpSB360.pdf*.

However, DCA later released a position statement clarifying that they did not believe that they had jurisdiction over this language and limited their interpretation to the language affecting DRIs. See *http://www.dca.state.fl.us/fdcp/dcp/Legislation/2009/SB360PolicyStatement.cfm*. Some have taken the position that the two sentences are not linked, and that all local development orders and building permits have been extended by this language. See analysis at *http://www.onevoiceforflorida.com/media/f390470c-baa7-43ba-ba1f-573a0196461d.pdf*.

Reportedly, some governments are considering dealing with the uncertainty by enacting a local amendment to the Florida Building Code providing the two-year extension contemplated by the Act, and amendments to their local codes to similarly extend local development orders. If the local government desires to enable a broad range of extensions, this approach allows it to do so clearly and without exposure to potential challenges.

On the other hand, if the local government does not want to facilitate the broader range of extensions and just wants to follow the letter of the statute, its options are less clear given the ambiguities noted above. Many governments are considering preparing a form to be submitted by all those seeking extensions, and requiring the payment of a fee to defray the cost of proper processing. Doing so will allow these extensions to be properly documented and avoid future disputes regarding the status of permits and development orders, which is a benefit to both the local government and to the permit holder.

If a local government has already adopted some sort of blanket extension of building permits or development orders, it may want to consider whether to repeal it or to amend that local extension to dovetail with the statute. If the local and state extensions are not harmonized in some fashion, there could be confusion regarding the status of individual permits and development orders in the future.

CONCLUSION

Senate Bill 360, version 2.0, is the most significant revision to the 1985 Growth Management Act in many years. Local government attorneys are faced with a wide range of difficult interpretation and implementation issues, and the potential for many of them to be mooted by additional legislation in the 2010 Legislative Session or by a constitutional challenge to the Act. Litigation is likely over all of the issues of interpretation identified above, and may come from developers or from third parties. Local government attorneys are working together through the Florida League of Cities and Florida Association of Counties now to address these issues, and share the approaches that are taken around the state.

Endnotes:

[1] Just before adoption, the Act (CS/CS/SB 360, Chapter 2009-96, Laws of Florida) was amended to include the affordable housing bill provisions. This analysis only addresses the growth management changes, and not the affordable housing provisions beginning at line 1303 of the Act. The Act can be reviewed, with the line numbers referenced in this summary, at http://www.flsenate.gov/data/session/2009/Senate/bills/billtext/pdf/s0360er.pdf.

[2] It has been suggested that over half of the state's municipalities will qualify for the automatic TCEA.

[3] Broward has two concurrency districts, within the southwest and northwest portions of the County, which opted out of transit concurrency and continued to be governed by traditional transportation concurrency. The Act appears to create an automatic TCEA for these two districts.

[4] This amendment appears to leave the County's long-standing traditional TCEA in place over most of eastern Miami-Dade County and keep the western portions of unincorporated Miami-Dade County under transportation concurrency. Although the municipalities within Miami-Dade County appear to independently qualify for an automatic TCEA (see line 498), a possible interpretation of this exception is that it would also apply to the municipalities within Miami-Dade County that are not located in the County's pre-existing TCEA.

[5] Thus, any Florida charter school could qualify, not just those that comply with the State Requirements for Educational Facilities.

[6] Another bill affecting impact fees was enacted, was signed into law, and becomes effective on July 1, 2009. House Bill 227 states that "in any action challenging an impact fee, the government has the burden of proving by a preponderance of the evidence that the imposition or amount of the fee meets the requirements of state legal precedent" and that a reviewing court "may not use a deferential standard."

[7] This provision was apparently adopted in response to Broward County's attempt to require security cameras and the Town of Cutler Bay's Ordinance requiring

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security cameras.

[8] The DRI section of the Act only exempts dense urban land areas from DRI, but this provision seems to presume that a local government that adopts an urban service area as a TCEA, but is not a dense urban land area, can also be exempt from DRI review.

[9] The term "project" is undefined. DCA Secretary Pelham has stated that this provision should be applied using all of the statutes and rules applicable to DRI determinations, apparently including the aggregation rule.

[10] In recent presentations, DCA has suggested that this obligation should be interpreted to apply to those governments covered by the dense urban land area definition, whether or not they proceed to repeal their existing concurrency regulations. However, such an interpretation seems inconsistent with the theory that the SB 360 TCEAs have no impact unless a local government chooses to implement them by amending its plan and code.

[11] However, the Legislature failed to get the required two-thirds vote in each house for a proper unfunded mandate. The Act also violates the single subject requirement. A number of cities and counties, led by the City of Weston, are currently considering whether to file a challenge to the Act on this basis.

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September 11, 2009
Tampa Airport Marriott
General Meeting

October 22, 2009
The Peabody Hotel
Orlando

January 2010
(Date TBA)

May 6, 2010
Don CeSar Hotel
St. Pete Beach

SEMINAR SCHEDULE

35th Annual Public Employment Labor Relations Forum
October 22-23, 2009
The Peabody Hotel
Orlando

Sunshine Law, Public Records, and Ethics Seminar
February 12, 2010
University Center Club
Tallahassee

2010 Certification Review Course
May 6, 2010
Don CeSar Beach Resort
St. Pete Beach

Land Use Seminar
May 6, 2010, Don CeSar Beach Resort
St. Pete Beach

33rd Annual Local Government Law in Florida
May 7-8, 2010, Don CeSar Beach Resort
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