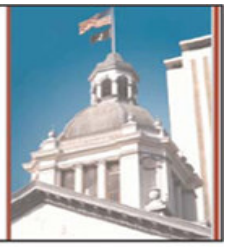
CARLTON FIELDS
ATTORNEYS AT LAW

Capitol Report
Government Affairs and Lobbying



July 22, 2009

# Florida's Revised Growth Management Law Aims to Stimulate the Economy

*The controversial revisions to the growth management law do not remove transportation concurrency and the state's development of regional impact process for all local governments.*

*This* Capitol Report *explains how the bill provides incentives to direct development back to the state's urban areas where infrastructure is in place.*

*By Darrin F. Taylor, Certified Planner*
*Carlton Fields Government Consultant*

Senate Bill 360 – entitled the Community Renewal Act and now codified as Ch. 2009-96, Laws of Florida – was signed into law by Governor Charlie Crist on June 1. This bill enacts significant changes to Florida's growth management laws with an expressed intent to stimulate the state's economy. The bill provides incentives to direct new development back to the state's urban areas where infrastructure is in place, thereby discouraging sprawling development patterns.

However, following several editorials in the state's major newspapers, you may think SB 360 removed transportation concurrency and the development of regional impact (DRI) process statewide. This is not the case.

There are many other misconceptions and questions that have been raised since the passage of this bill. This *Capital Report* is intended to provide answers to some of these questions and present a detailed explanation of the bill, and provide guidance to local governments and impacted developers. In that course, this *Report* relies upon the interpretation of the bill by Dept. of Community Affairs (DCA) Secretary Tom Pelham in relation to how it will be implemented.

However, due to the complexity and the level of change initiated by SB 360, there are many policy decisions that the state and local governments will need to make before we can fully understand the bill's ramifications. Therefore, we will continue to provide clients updated information regarding its implementation.

## The Purpose of Senate Bill 360

Faced with an economic downturn and the need to quickly stimulate the economy, the Legislature undertook an early consideration of significant changes in growth management laws. Representatives from the planning, environmental and business communities (including the DCA) all testified that some level of change was needed to help direct growth and development to urban areas. Transportation concurrency was cited as the main obstacle to directing growth to the state's urban areas. Exempting urban areas from the DRI process was also seen as a major incentive.

To provide relief to all local governments, the Legislature removed two prohibitions on comprehensive plan amendments. Those restrictions were related to public school facility planning (sanctions removed) and the capital improvements schedule (deadline extended until December 12, 1011).

## Dense Urban Land Areas

SB 360 created a new term in growth management law called "dense urban land areas" or DULAs. To become a DULA, a municipality or a county must have at least 1,000 persons per square mile and a minimum population of 5,000. The 1,000 persons per square mile standard is derived from the US Census' definition for an urbanized area. For a county to qualify as a DULA, all municipalities and the unincorporated areas are combined to establish the density per square mile statistic. If a county qualifies as a DULA, then all municipalities in the county also qualify as a dense urban land area. DULAs are established annually and additional annexations may affect the designation.

The major incentives in SB 360 – exemption from state mandated transportation concurrency and DRI review – are given to DULAs as specified below. For a designated municipality, the incentives automatically apply to the entire jurisdiction. For a designated county, the incentives are automatic but are limited to its current urban service area.

The definition of urban service area also changed in SB 360 (which will be discussed later), but the bill grandfathered the adopted urban service areas and urban growth boundaries within designated communities.

An exemption to the 1,000 persons per square mile standard is given to a county and its municipalities with a combined population of at least 1 million people. Currently, Broward, Dade, Hillsborough, Orange and Palm Beach are the only counties with a population of at least 1 million people. All of those counties, except Palm Beach, already meet the 1,000 persons per square mile standard.

The Office of Economic and Demographic Research had until July 1 to determine which local governments met the DULA criteria and the DCA posted the list on July 8, 2009. The list of designated communities, attached to this *Capital Report*, includes 238 out of 411 municipalities and eight counties (Broward, Duval, Hillsborough, Miami-Dade, Orange, Palm Beach, Pinellas and Seminole). All local governments will be re-evaluated annually. If a local government annexes additional land, it must notify the Legislature of the amount of land and the impact on population. Annexations are the most likely reason for a municipality to lose its DULA designation.

### *What This Means to You*

- *The SB 360 incentives automatically apply for the entire boundary of a designated city, but are limited to the existing urban service area of a designated county. If you have property in one of the eight designated counties and are considering using the incentives mentioned, then you need to ensure that you are located within the urban service area for the incentives to apply.*
- *The DULA designation is re-evaluated annually. The law will result in local governments and developers closely monitoring proposed annexations to ensure that the designation is not jeopardized by decreasing the density per square mile statistic below 1,000 people.*

## Urban Service Areas

SB 360 revises the definition of an urban service area (USA). The new definition is a built up area where public facilities, such as central water, sewer and roads, are in place or are committed in the first three years of the capital improvement schedule. This definition is more restrictive than the current definition by limiting the USA to built-up areas and excluding areas that are planned for services in the comprehensive plan's planning timeframe. However, for the eight designated counties, the definition grandfathers the adopted urban service areas or urban growth boundaries in the comprehensive plan. It also includes the non-rural area of a county which has adopted into the county charter a rural area designation.

Non-designated municipalities and counties also have the opportunity to utilize the SB 360 incentives but in limited areas. These local governments may adopt a plan amendment to designate a USA that meets the new definition. The local government must also designate where the TCEA and DRI exemption would apply, in order to take advantage of those incentives.

### *What This Means to You*

- *All non-DULA local governments have the option to designate a USA for the purposes of creating a TCEA and DRI exemption area but its application is limited to built-up areas where water, sewer and roads are in place or are committed in the first three years of the capital improvement schedule.*
- *Development proposed in Orange, Palm Beach, Broward, Miami-Dade, Duval, Seminole, Pinellas and Hillsborough can take advantage of the SB 360 incentives in the larger/grandfathered urban service areas or urban growth boundaries.*

## Transportation Concurrency

Most of the questions regarding SB 360 are related to transportation concurrency. As a point of clarification, the Legislature did not remove all transportation concurrency in the state. The Legislature did establish automatic TCEAs in designated DULAs only. However, the DCA interprets the law as only removing state mandated concurrency, but leaves intact locally adopted concurrency provisions.

The DCA takes the position that a local government must amend its comprehensive plan in order to implement the concurrency exemption; otherwise the policies remain in effect. All DULAs must meet new requirements to change their concurrency requirements to "mobility" requirements by July 8, 2011. For all other local governments, SB 360 gave the option of establishing a TCEA, but only in limited areas.

For a designated municipality, the TCEA applies to the entire jurisdiction. For a county, the TCEA is limited to the USA as defined in the bill. There are three exceptions added for Pinellas, Broward and Miami-Dade Counties. For Pinellas County the TCEA boundary applies to the entire jurisdiction because Pinellas does not have a USA in the comprehensive plan. For Broward, the TCEA does not apply to its transportation concurrency districts because mobility programs are already in place. For Miami-Dade, the TCEA does not apply because the county has already exempted more than 40 percent of the area inside its urban service area from transportation concurrency for the purpose of infill development.

A non-designated municipality can establish a TCEA under the new requirements within a USA that meets the new definition, an urban infill area, a community redevelopment area, and/or an urban infill and redevelopment area. A non-designated county can establish a TCEA under the new requirements within a USA that meets the new definition, an urban infill area, and/or an urban infill and redevelopment area. A comprehensive plan amendment is required to establish a TCEA within a non-designated local government.

One of the reasons SB 360 has created so many questions is because the TCEA is established in advance of the local government developing land use and transportation strategies to implement the exception area. SB 360 gives local governments two years from the TCEA designation (or July 8, 2011 for local governments on the initial list) to adopt the required strategies. Those strate-

gies must support and fund mobility within the exemption area, including alternative modes of transportation.

The DCA interpretation slows the clock for local governments, allowing them to remain under their current concurrency requirements up to two more years. Most will, but we are advised that some jurisdictions, notably Orange County takes our legal position that all concurrency – state and local concurrency rules within its existing USA is now gone.

The DCA interpretation also leaves in place the requirements for analyzing and supporting comprehensive plan amendments because any comprehensive plan amendment must be internally consistent with the comprehensive plan requirements as adopted including transportation concurrency.

As a downside, the DCA interpretation limits a local government's opportunity in the short term to implement the concurrency exemption as an economic stimulus tool as amending the comprehensive plan would require at least a year from conception to completion.

Finally, SB 360 is viewed as reinforcing the local government's home-rule powers on how to address concurrency, thereby strengthening the local government's authority to determine its own destiny. Nothing limits the local government's home-rule power to adopt ordinances or impose fees. It also does not affect any contract, agreement or development order entered into before the creation of the TCEA unless a DRI developer wants to rescind its DRI pursuant to s.380.115(1).

It is clear that SB 360 does not relieve local governments, and thus developers, from having to address mobility in the TCEA. The local government has a maximum two-year window to determine how mobility will be maintained in the exception area and must consider more than the movement of automobiles in determining how adequate capacity will be achieved.

SB 360 also clarifies the level of service to be achieved in a TCEA. If the TCEA has been designated and maintained in accordance with s. 163.3180(5), then the comprehensive plan and plan amendments shall be deemed to achieve and maintain the level of service standards for transportation.

SB 360 also modified the current TCEA requirements (not under 360). The existing provisions require that a local government consult the DCA and Dept. of Transportation (DOT) to determine the impact of the proposed TCEA on SIS facilities. Under SB 360, the local government must also consider the impact to regionally significant transportation facilities as well.

Finally, for a project certified for job creation under subsections 288.0656 or 403.973, F.S., any city or county, after consultation with the DOT, may allow for a waiver of transportation concurrency for the project's impacts. The DCA has stated that a local government does not need to adopt a comprehensive plan amendment in order to utilize this concurrency waiver.

### *What This Means to You*

- *The DCA's interpretation of the TCEA designation does not restrict a local government's home-rule powers. Local government have many options for addressing mobility, including retaining the current concurrency requirements for up to two more years.*
- *A designated community has a two-year window to develop land use and transportation strategies including funding mobility. A designated local government must adopt these strategies into its comprehensive plan.*
- *Developers in a designated community will need to be pro-active, meeting with staff to determine any changes about how transportation will be analyzed and the mitigation required. However, do not be surprised if local governments keep the requirements currently in place for two more years.*
- *If you have a project in a designated community, you may be called upon to do more than previously required. Local governments are laying off staff in response to budget shortfalls, so your team may be required to help develop the land use and transportation strategies required for the TCEA. This is not limited to smaller local governments. Layoffs are occurring in many jurisdictions across the state.*

## Developments of Regional Impact

The Legislature automatically exempted from DRI review all new projects within a DULA with some limited exceptions. For a designated municipality, the exemption applies to the entire jurisdiction. For a designated county, the exemption is limited to the USA, except for Pinellas County where the exemption applies county-wide.

Similar to TCEAs, local governments *not* designated a DULA have the option of establishing DRI exemption areas within their comprehensive plans through a plan amendment. Municipalities may establish DRI exemption areas in urban infill, community redevelopment, downtown revitalization, urban infill and redevelopment and USA or urban service boundaries as defined. The same applies for counties within an urban infill, urban infill and redevelopment and USA as defined by the law change.

The DRI exemption does not apply for areas of critical state concern, within two miles of the Everglades Protection Area, and in the Wekiva Study Area. If a project in the DRI exemption area is 120 percent of the existing DRI thresholds, then the development order must be sent to the DCA which may appeal the development order, only if it is inconsistent with the local comprehensive plan. If a project is located partially outside of the DRI exemption area, then the entire project must undergo DRI review.

Any previously approved DRIs within an exemption area are still in effect, but the developer has the option to seek a rescission of the development order pursuant to s. 380.115(1), F.S. If the developer has mitigated for all development built-to-date, then the local government must rescind the development order.

For projects currently seeking DRI approval, the developer has the option to remain in the DRI process, or withdraw from the process. If a comprehensive plan amendment is required, then the amendment is exempt from the twice per year limitation on plan amendments for the year following the effective date of the DRI exemption. .

If a local government loses its DULA status, then any pending development approvals with a complete application may continue under the DRI exemption as long as the project is seeking approval in good faith or is approved.

There are two additional changes in SB 360 for DRIs. First, the level of service in the DRI transportation methodology must be the same level of service used to evaluate concurrency in accordance with s.163.3180, F.S. For most areas of the state, this does not result in a methodology change. Second, the impacts of a project that has an established funding agreement with the Governor's Office of Tourism, Transportation and Economic Development for over $50 million are exempt from DRI review, even if the project is located within a DRI. This is the new "medical city" within the Lake Nona DRI in Orange County

### *What This Means to You*

- *For developers, the main advantage of the DRI exemption is the removal of costly extra jurisdictional impacts from the review. Developers can focus an impact analysis on the local government where the project is located. The exemption also removes costly agency review and the uncertain requirement for a DRI-level affordable housing analysis. For local governments, especially counties, this lack of accounting for extra-jurisdictional impacts is of great concern.*
- *A project that would have exceeded 120 percent of the DRI threshold must submit its development order to the DCA for review. The DCA may appeal the development order only if it finds it to be inconsistent with the comprehensive plan. For a project that meets this threshold, the development team and local government staff should carefully review the comprehensive plan provisions including consistency with the Intergovernmental Coordination Element. We believe the DCA will look to enforce the intergovernmental coordination provisions, especially where the local government requires such coordination. Expect to hear from the DCA if organized groups have fought the project on comprehensive plan consistency grounds.*

- *We anticipate that most DRIs in the pipeline within a DULA will choose to withdraw their application. SB 360 allows any accompanying comprehensive plan amendment to continue out of cycle if the amendment is transmitted within a year from the exemption.*
- *We recommend that all DRIs within a DULA be reviewed to determine whether a rescission is the best option. To rescind, the DRI must have mitigated for all impacts up to the level of development currently built. If this is the case, the local government must rescind.*
- *To rescind a DRI, the local government must agree that all mitigation has occurred up to the level of development built. This will require some discussions with the local government. Also, for older DRIs, it may be difficult to determine what mitigation was required for the development currently built.*
- *Before a rescission is pursued, the developer needs to analyze the underlying land use in the comprehensive plan and the accompanying zoning. Many DRIs are designated as "DRI" on the future land use map which could create an issue for the local government and may necessitate a comprehensive plan amendment. Entitlement and mitigation vesting issues should also be carefully considered before a rescission is pursued.*

## Comprehensive Plan Amendments

The Legislature addressed two major obstacles for comprehensive plan amendments in SB 360. First, the deadline for local governments to adopt a financially feasible capital improvements schedule update was extended to December 1, 2011. This removes the prohibition on comprehensive plan amendments until 2011. Local governments are still required to adopt annual updates but there is no penalty until December 2, 2011.

Second, for school concurrency, the Legislature removed the prohibition to amending the future land use map if the local government has not addressed public school requirements. Instead, the DCA can ask the local government and school board to establish cause for failing to act, and may take the matter to the Administration Commission.

In addition to removing the prohibition on plan amendments, SB 360 expanded options for addressing school concurrency. The waiver from school concurrency was expanded to permit a waiver even if the growth rate exceeds 10 percent, if the student enrollment is less than 2,000 students, and the tenth year capacity rate for the school district will not exceed 100 percent capacity. SB 360 also permits, for the first three years of school concurrency implementation, the use of portable facilities to be included as part of school capacity, provided the portables were purchased after 1998 and they meet the standards for long-term use pursuant to s.1013.20, F.S.

Finally, the construction of a charter school that complies with s. 1002.33(18), F.S. is considered acceptable mitigation for an impact on public school capacity.

Here is a list of additional changes in SB 360 for comprehensive planning:

- The Intergovernmental Coordination Element must provide a dispute resolution process for addressing intergovernmental disputes;
- A glitch in the definition of "in compliance" was addressed by deleting a reference to adopting an educational facilities element;
- A local government must allow a rezoning to move forward concurrently with a comprehensive plan amendment if requested by the applicant at the time of application. The rezoning is contingent on the comprehensive plan or plan amendment being transmitted and becoming effective;
- Amendments to designate an urban service area as a TCEA and to designate an area exempt from DRI review are exempt from the twice-per-year limitation on comprehensive plan amendments;
- All local governments may use the alternative state review process in s.163.32465, F.S. to designate an urban service area pursuant to the new definition.

## Two-Year Extension of Permits

The Legislature provided a two-year extension to many permits issued in the state that expire between September 1, 2008 and January 1, 2012. This includes an extension of DRI development phasing and improvements.

Specifically, permits issued by the Dept. of Environmental Protection or a water management district (issued under Chapter 373 Part IV, F.S.), and a local government-issued development order or building permit, or build-out dates and build-out date extensions previously granted under s. 380.06(19) (c) F.S., that meet the dates above are extended and renewed for a period of two years following its date of expiration. This includes a two year extension of commencement and completion dates for any required mitigation so the improvement takes place in the same timeframe as originally permitted.

In order to qualify for an exemption, the permit holder or authorized agent must notify the authorizing agency in writing by December 31, 2009, identifying the authorization for which the permit holder intends to use the extension and the anticipated timeframe for acting on the authorization.

Permit extensions do not apply to permits issued by the Army Corps of Engineers, a permit in significant noncompliance with the conditions of the permit as established through a warning letter, formal enforcement or other equivalent action, or an extension that would delay compliance with a court order.

Permits extended under SB 360 continue to be governed by the rules in effect at the time the permit was issued, except when it can be demonstrated that the rules in effect at the time the permit was issued would create an immediate threat to public safety or health.

### *What This Means to You*

- *A developer has until the end of 2009 to claim the two-year extension. The developer or its agent must notify the local government or permitting agency in writing to extend any eligible permits. The developer can not use this extension if it fails to notify the permit agency in writing by December 31, 2009.*
- *To be eligible, the permit must expire between September 1, 2008, and January 1, 2012.*
- *We recommend you also record a document in the public records establishing that you used the two-year permit extension, for a development order, phasing or build-out extensions.*
- *The extension of state permits is limited to those issued under Chapter 373 Part IV, F.S. such as ERP permits.*
- *The local government permits eligible for an extension are more open ended than the extension of state permits.*

## Impact Fees

SB 360 allows a local government to decrease, suspend or eliminate an impact fee with less than 90 days notice. The Legislature also amended requirements for challenging an impact fee. In HB 227, the Legislature established in any action challenging an impact fee, the local 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 or this section.

## Mobility Fees

Part of the rationale for suspending transportation concurrency was the need to transition to a mobility fee system. The Legislature is eager to take up this issue in the 2010 Session and has directed the DCA and the DOT to develop a joint report on a mobility fee methodology study by December 1, 2009. The report is to include recommended legislation and a plan to implement the mobility fee as a replacement for transportation concurrency.

### *What This Means to You*

- *Mobility fees will be a major issue in the 2010 Session. It will be important to monitor what is recommended in the mobility fee report to the Legislature.*
- *At this point, it is not certain how the program will be implemented. Nor is it known whether it will be implemented state-wide or phased, what funding options and cost sharing will occur or what the cost of the fee will be. We will monitor this issue for our clients as we enter the next session.*

## Other Changes in SB 360

The Legislature has prohibited local governments from adopting or maintaining an ordinance or rule that establishes standards for security cameras requiring a business to expend funds to enhance the services or functions provided by local government unless specifically provided by general law. This does not limit the ability of a local government to adopt standards in publicly operated facilities (such as airports and port facilities), including private businesses operating within public facilities

The Legislature has also required local governments to submit a copy of the revision of the charter boundary article through annexation or contraction to the Office of Economic and Demographic Research along with a statement of the population census effect and the affected land area. This is in response to the requirement for the state to determine annually whether a local government qualifies for dense urban land area status.

Finally, SB 360 includes affordable housing provisions. As a compromise on the last day of the session, a separate affordable housing bill was added. This resulted in a glitch regarding changes in density in rural areas.

The law change requires local government land development regulations to "maintain the existing density of residential properties or recreational vehicle parks, if the properties are intended for residential use and are located in the unincorporated areas that have sufficient infrastructure, as determined by a local governing authority, and are not located within a coastal high-hazard area under s.163.3178".

We do not believe this is a prohibition of increasing residential density in unincorporated areas, but this glitch could be used as a rationale to challenge a project. This provision will most likely be amended in the next legislative session

## Conclusion

This summary is our best interpretation on the implications of SB 360 based upon our review of the law, discussions with other practitioners and the interpretations provided by the DCA. There are many decisions and clarifications that will occur throughout the year that will shed further light on these issues.

A legal challenge has been filed by some local governments, led by the City of Weston, questioning whether the legislation is constitutional. In addition, under the DCA interpretation, each designated local government has the authority under home-rule powers to determine how to implement the statute, especially the concurrency provisions.

Finally, the DCA and the DOT are required to move forward through the end of this year in developing a unified strategy for implementing a mobility fee system in the state. We will continue to monitor the progress of decisions made on behalf of our clients on both the state and local level, and report the major trends we see occurring. ■

*Darrin F. Taylor* *is a Certified Planner and Government Consultant in Carlton Fields' Tallahassee Office. He has a range of experience in urban and regional planning from both a state and local perspective. Darrin works closely with attorneys to resolve comprehensive plan/plan amendments, DRI and zoning issues. He has extensive experience in community-based planning, working with citizens to identify solutions to planning issues; and he is an expert witness in the areas of comprehensive and land-use planning. Contact Darrin at dtaylor@carltonfields.com or 850.425.3398.*