

PAPPAS METCALF JENKS & MILLER

PROFESSIONAL ASSOCIATION
ATTORNEYS AT LAW
245 RIVERSIDE AVENUE • SUITE 400
JACKSONVILLE, FLORIDA 32202
Telephone: (904) 353-1980
Telecopier: (904) 356-1018
www.pmjmlaw.com

JOHN R. CAMPBELL
G. TODD COTTRILL
SPENCER N. CUMMINGS
THOMAS M. JENKS
W. WILLIAM LI
JOHN G. METCALF

FRANK E. MILLER
ZACHARY W. MILLER
M. LYNN PAPPAS
STACI M. REWIS
MARCIA PARKER TJOFLAT
KATHRYN F. WHITTINGTON

MEMORANDUM

To: Interested Clients

Date: May 7, 2009

Re: Senate Bill 360

On May 1st, 2009, the Florida House and Senate passed Senate Bill 360, known as the Community Renewal Act (the "Act"). The Act exempts certain densely populated urban areas from Chapter 163 transportation concurrency requirements and the Development of Regional Impact ("DRI") process. The Act also provides for extension of development orders and environmental permits for two (2) years by written notice **NOT LATER THAN DECEMBER 31, 2009** and extends the date on which local governments must submit the capital improvement elements of their comprehensive plans to the state to December 1, 2011. The law also implements programmatic changes for affordable housing. This memorandum does not address the affordable housing aspects of the Act. A summary of those provisions will follow.

This memorandum summarizes the provisions of the Act which, if signed into law by Governor Crist, will change the procedures and costs associated with developing land within areas closer to and within Florida's urban cores. There are many subtleties to the Act so careful examination of all particular points is necessary to understand its application.

I. Transportation Concurrency Exception

The stated goal of the Act is to encourage development away from suburban and rural areas and into urban areas, which have been made too expensive for development due, in part, to current transportation concurrency requirements.

If the Act is signed into law certain high density urban areas described below will automatically be exempt from the transportation concurrency process while the local government will have the option to designate certain high density urban areas, also described below, as exempt. This memorandum will refer to both the automatic transportation concurrency exception areas and the optional transportation concurrency exception areas created by the Act as Fla. Stat. §163.3180(5)(b)(1-3) as "NEW TCEAs."

The process for designating NEW TCEAs requires less oversight by the state and less requirements under the comprehensive planning system than the process under which local

governments may currently create areas exempt from transportation concurrency. That process, which is amended by the Act, is also discussed in this section.

A. NEW TCEAs

NEW TCEAs, are either automatically designated by the Act or the Act authorizes a municipality or county to designate certain areas as NEW TCEAs.

The Act requires that within 2 years of an area being designating as a NEW TCEA the local government must adopt in its local comprehensive plan land use and transportation strategies to support and fund mobility within the NEW TCEA. The act does not define exactly what “transportation strategies to support and fund mobility” should include.

With respect to enforcement, which is less vague, if the Department of Community Affairs finds that the local government had insufficient cause for failing to adopt the strategies in its comprehensive plan within the 2 year period, it will submit its findings to the Administration Commission, which may impose any of the sanctions listed in Fla. Stat. §163.3184(11)(a-b) against the local government.

For proposed land use changes within all transportation concurrency exception areas maintained in accordance with Fla. Stat. §163.3180(5), the Act states that comprehensive plans and comprehensive plan amendments, “[S]hall be deemed to meet the requirement to achieve and maintain the level-of-service standards for transportation.” This confirms that local governments receive a pass from financial feasibility requirements for transportation as to NEW TCEAs. Fla. Stat. §163.3180(5) encompasses both the section which governs the designation of NEW TCEAs and other transportation concurrency exception areas.

Transportation concurrency districts cannot be designated as NEW TCEAs, if they are located within counties with a population of at least 1.5 million and that have implemented a transportation-related concurrency assessment to support alternative modes of transportation, including but not limited to, mass transit, and which do not levy transportation impact fees within the concurrency district.

The Act also prohibits NEW TCEAs in any county that has exempted more than 40 percent of the areas inside the urban service area from transportation concurrency for the purpose of urban infill. It appears the caveats found in this and the preceding paragraph to currently only apply to Miami-Dade and Broward County, likely due to existing TCEAs in those jurisdictions.

Automatic

The Act states that three areas are automatically NEW TCEAs. These areas are:

- Municipalities that qualify as a dense urban land area under Fla. Stat. §163.3164. The Act amends Fla. Stat. §163.3164 dense urban land areas under as, “(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 the municipalities located therein, which has an average of at least 1,000 people per square mile of land area; or (c) A county, including the municipalities located therein, which has a population of at least 1 million.”

- Urban service areas as defined in Fla. Stat. §163.3164 that have been adopted into the local comprehensive plan and located in a county designated as a dense urban land area under Fla. Stat. §163.3164. The Act defines urban service areas rather broadly as “[B]uilt up areas where public facilities and services, including but not limited to, central water and sewer capacity and roads are already in place or are committed in the first 3 years of the capital improvement schedule” and the “non-rural” areas within counties qualifying as a dense urban land area (under Fla. Stat. 163.3164), which have adopted into the county charter a rural area designation or areas identified in the comprehensive plan as urban service areas or urban growth boundaries on or before July 1, 2009 as urban service areas..
- A county, including the municipalities located within, which has a population of at least 900,000 and qualifies as a dense urban land area under Fla. Stat. 163.3164 but does not have an urban service area (which is not defined by reference to a statute) designated in its local comprehensive plan.

Optional

The Act allows a municipality that does not qualify as a dense urban land area under Fla. Stat. §163.3164 to designate in its comprehensive plan the following areas as NEW TCEAs:

- Urban infill, under Fla. Stat. §163.3164 is defined as, “[T]he development of vacant parcels in otherwise built-up areas where public facilities such as sewer systems, roads, schools, and recreation areas are already in place and the average residential density is at least five dwelling units per acre, the average nonresidential intensity is at least a floor area ratio of 1.0 and vacant, developable land does not constitute more than 10 percent of the area.
- Community redevelopment areas, under Fla. Stat. §163.340 defined as, “[A] slum area, a blighted area, or an area in which there is a shortage of housing that is affordable to residents of low or moderate income, including the elderly, or a coastal and tourist area that is deteriorating and economically distressed due to outdated building density patterns, inadequate transportation and parking facilities, faulty lot layout or inadequate street layout, or a combination thereof which the governing body designates as appropriate for community redevelopment. For community redevelopment agencies created after July 1, 2006, a community redevelopment area may not consist of more than 80 percent of a municipality.”
- Downtown revitalization areas, under Fla. Stat. §163.3164. Fla. Stat. §163.3164 does not specifically define downtown revitalization areas, but does define downtown revitalization as “the physical and economic renewal of a central business district of a community as designated by local government, and includes both downtown development and redevelopment.”
- Urban infill and redevelopment under Fla. Stat. §163.2517, which sets forth the criteria for a local government to designate an area as urban infill and redevelopment.
- Urban service areas under Fla. Stat. §163.3164 (as defined above) or areas within a designated urban service boundary under Fla. Stat. §163.3177(14).

The Act allows a county that does not qualify as a dense urban land area under Fla. Stat. §163.3164 to designate in its local comprehensive plan the following areas as NEW TCEAs:

- Urban infill, defined in Fla. Stat. §163.3164 (complete definition above).
- Urban infill and redevelopment under Fla. Stat. §163.2517.
- Urban service areas under Fla. Stat. §163.3164 (as defined above)

B. Other Transportation Concurrency Exceptions

Local governments that do not have a NEW TCEA, either automatically created under the Act or created by the local government pursuant to the Act, may grant an exception from the transportation concurrency requirements under certain circumstances and within certain areas which is consistent with the current law.

A local government may grant a transportation concurrency exception to a project if it is otherwise consistent with the comprehensive plan and is a project that promotes public transportation or if it is located within an area designated in the comprehensive plan for:

- Urban infill development (no reference to a statutory definition).
- Urban redevelopment (no reference to a statutory definition).
- Downtown reutilization (no reference to a statutory definition).
- Urban infill and redevelopment under Fla. Stat. 163.2517.
- An urban service area (no reference to a statutory definition) specifically designated as a transportation concurrency exception area, which includes lands appropriate for compact, contiguous urban development, which does not exceed the amount of land needed to accommodate the projected population growth at densities consistent with the adopted comprehensive plan within the 10-year planning period, and which is served or is planned to be served with public facilities and services as provided by the capital improvements element.

In order to designate an area as a transportation concurrency exception area, which is not a NEW TCEA;

- The local government must both (1) adopt into the comprehensive plan and (2) implement long-term strategies to support and fund mobility within the area designated as a transportation concurrency exception area, including strategies to deal with alternative modes of transportation. Also the plan amendment must demonstrate how such strategies will support the purpose of the exception and how mobility within the designated exception area will be provided and be accompanied by data and analysis supporting the local government's determination of the boundaries of the transportation concurrency exception area.

- Such strategies must address urban design; appropriate land use mixes, including intensity and density; and network connectivity plans needed to promote urban infill, redevelopment, or downtown revitalization.

The Act amends this section to state that before designating an area as a transportation concurrency exemption area, other than a NEW TCEA, the Department of Community Affairs and the Department of Transportation must be consulted by the local government to assess the impact that the proposed exception area is expected to have on the adopted level-of-service standards established for regional transportation facilities identified pursuant to Fla. Stat. §186.507 and roadway facilities funded in accordance with Fla. Stat. §339.2819. The local government must also establish a plan for mitigation of impacts to the Strategic Intermodal System including, if appropriate, access management, parallel reliever roads, transportation demand management, and other measures

II. DRI Process

The Act amends the DRI process under Fla. Stat. §380.06, allowing for certain developments to be completely exempt from the DRI process if they are located in some of the same areas which the Act designates or allows the local government to designate as NEW TCEAs.

A. DRI Exemptions

The Act specifically exempts from the DRI review process:

- Any proposed development within a municipality which qualifies as a dense urban land area, as defined in Fla. Stat. §163.3164
- Any proposed development within a county which qualifies as a dense urban land area, as defined in Fla. Stat. §163.3164, and is located within an urban service area, as defined in Fla. Stat. §163.3164, which has been adopted into the comprehensive plan.
- Any proposed development within a county, including the municipalities located therein, which has a population of at least 900,000, which qualifies as a dense urban land area, as defined in Fla. Stat. §163.3164, but which does not have an urban service area designated in the comprehensive plan.

Under the Act, developments within a municipality that does not qualify as a dense urban land area under Fla. Stat. §163.3164 are exempt from the DRI process if they are located within areas designated in the comprehensive plan as:

- Urban infill, as defined in Fla. Stat. §163.3164.
- Community redevelopment, as defined in Fla. Stat. §163.340.
- Downtown revitalization, as defined in Fla. Stat. §163.3164.
- Urban infill and redevelopment under Fla. Stat. §163.2517
- Urban service areas, as defined in Fla. Stat. §163.3164, or areas within a designated urban service boundary under Fla. Stat. §163.3177(14).

Under the Act, developments within a county that does not qualify as a dense urban land area under Fla. Stat. §163.3164 are exempt from the DRI process if they are located within areas designated in the comprehensive plan as:

- Urban infill, as defined in Fla. Stat. §163.3164
- Urban infill and redevelopment under Fla. Stat. §163.2517.
- Urban service areas, as defined in Fla. Stat. §163.3164, or areas within a designated urban service boundary under Fla. Stat. §163.3177(14).

The Act expressly states that the DRI process exemptions created do not apply to areas:

- Within the boundary of any area of critical state concerned designated pursuant to Fla. Stat. §380.05.
- Within the boundary of the Wekiva Study Area as described in Fla. Stat. §369.316
- Within 2 miles of the boundary of the Everglades Protection Area as described in Fla. Stat. 373.4592(2)

B. Other Changes to the DRI Process

If a previously approved DRI is located within any of the areas listed in the preceding paragraphs of this section, the DRI development order will continue to be effective, but the developer has the option to be governed by Fla. Stat. §380.115(1). Under these provisions, the DRI may continue or be rescinded if mitigation is complete. If the DRI continues, it allows for modification percentage thresholds to be doubled and other thresholds to be increased by ten percent (10%).

If an application is pending for a DRI which is planned to be located in any of the same areas listed in the previous section, the application will be governed by Fla. Stat. §380.115(2), which allows the application to opt for DRI status.

A DRI partially outside any of the exemption areas listed above must still undergo the DRI process.

If a local government that qualifies as a dense urban land area under this subsection is subsequently found to be ineligible for designation as a dense urban land area, any development located within that area which has a complete, pending application for authorization to commence development may maintain the exemption if the developer is continuing the application process in good faith or the development is approved.

III. Other Growth Management Changes

Aside from the NEW TCEA designation and the DRI process exemptions, the Act also:

- Extends by two years permits that have an expiration date of September 1, 2008, through January 1, 2012 issued by the Department of Environmental Protection or any water management district. The extension also applies to any local

government-issued development orders, building permits or build out dates and buildout date extensions previously granted under s.380.06(19)(c) . This extension does 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. The holder of a valid permit or other authorization that is eligible for the extension needs to notify the authorizing agency in writing no later than December 31, 2009, identifying the, “specific authorization for which the holder intends to use the extension and the anticipated timeframe for acting on the authorization.”

- Provides exception to the twice-a-year limit on plan amendments to designate an urban service area as a TCEA and plan amendments to designate an area exempt from the DRI review process.
- Allows comprehensive plan amendments designating urban service areas to be conducted under the expedited procedures available under the Alternative State Review Process Pilot Program under Fla. Stat. §163.32465.
- Requires that the intergovernmental element of a local comprehensive plan provide for a dispute resolution process as established pursuant to Fla. Stat §186.509.
- Removes the prohibition against amending the comprehensive plan for not addressing public school requirements. Instead, the Department of Community Affairs can ask for cause for failure to address requirements from local government and school board and submit the matter to the Administrative Commission, which may impose on the local government any of the sanctions in Fla. Stat. §163.3184(11)(a).
- Extends the compliance date for local governments to submit their capital improvement elements to the Department of Community Affairs from December 1, 2008 to December 1, 2011.
- Allows the Department of Community Affairs to allow for a projected 5-year capital outlay full-time equivalent student growth rate to exceed 10 percent when the projected 10-year capital outlay full-time equivalent student enrollment is less than 2,000 and the capacity rate for all schools within the school district in the 10th year will not exceed the 100-percent limitation.
- For the purposes of school concurrency, allows construction of charter schools to counts as mitigation.
- Allows local governments to decrease impact fees without waiting 90 days.
- Requires that the level of service methodology for DRIs be the same as for concurrency.
- If requested by an applicant, requires the local government to enact zoning changes with any plan amendments. The zoning changes would become effective upon the comprehensive plan amendment becoming effective.

- Maintains the Pilot Program currently allowed for approval of comprehensive plan amendments, and allows any local government to use the program in order to designate an area as an urban service area.
- Requires the Department of Transportation and the Department of Community Affairs to undertake studies on the use of a mobility fee instead of transportation concurrency. A final joint report on the mobility fee methodology study, complete with recommended legislation and a plan to implement the mobility fee as a replacement for the existing local government transportation concurrency system is due to the President of the Senate and the Speaker of the House no later than December 1, 2009.
- States that the designation of a transportation concurrency exception area (apparently any type) does not limit a local government's home rule power to adopt ordinances or impose fees and that the subsection on transportation concurrency exception areas does not affect any contract or agreement entered into or development order rendered before the creation of the transportation concurrency exception area, except as provided in Fla. Stat. §380.06(29)(e), dealing with previously approved DRIs which are now located with areas exempt from the DRI process.

IV. Conclusion

The Act is far reaching in its effects on growth management; however, it offers little guidance with respect to how local governments shall regulate development within areas no longer subject to the transportation concurrency process or the DRI process. The act will allow local governments the opportunity to craft their own transportation exaction process under home rule powers.

While dense urban areas will have more freedom to allow development without transportation concurrency limitations, more rural areas may opt for these optional TCEA provisions but will be required to implement urban service designations by comprehensive plan amendment to do so. It can be expected that the Department of Community Affairs will vigorously defend their interpretation of urban sprawl and "needs" constraints under Chapter 163 in compliance findings related to such amendments.

The Act is vague in regards to the parameters of mobility planning within NEW TCEAs and what costs will be assigned to developers to fund the infrastructure necessary to ensure mobility within NEW TCEAs, such as public transportation.

The Department of Community Affairs and the Department of Transportation study proposed legislation for implementation of a mobility fee to replace transportation concurrency by December, 2009 should be closely monitored.