

## **Senate Bill 360 Issue Paper**

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### **PREFACE**

On June 2, 2009, Governor Charlie Crist signed into law CS/CS/SB 360, passed by the 2009 Florida Legislature and styled as the “Community Renewal Act.” This legislation has become increasingly controversial since its passage and enactment, leading to varying interpretations of critical components of the law. Most recently, the Florida Department of Community Affairs on June 12, 2009, conducted an on-line “webinar” in which Secretary Pelham offered the Department’s interpretation on a number of key provisions in the legislation.

The authors of this document, both of whom spent considerable effort with all interested stakeholders during the 2009 Legislative Session, understood many of the Department’s statements to be contrary to the intent of CS/CS/SB 360. Accordingly, this document is generated in an effort to recite the Department’s interpretation and, in turn, offer an explanation more consistent with the clear language of the enactment. As with any law, the opinion of the Department or these authors is merely that; ultimately, the Florida courts and a subsequent Legislature may be forced to resolve the discussed topics.

### **ISSUE ANALYSIS**

ISSUE 1. Does the automatic creation of TCEAs merely remove “State mandated” concurrency requirements or do these exemptions also extend to existing local government concurrency ordinances?

#### **DCA Position**

- SB 360 only removes “State mandated” concurrency requirements in the designated TCEAs. See pages 27-29 of DCA SB 360 PowerPoint, attached as Attachment “A.”
- SB 360 expressly preserves local government’s home rule powers to impose transportation concurrency at the local level or to impose transportation related impact fees.
- DCA suggests that any existing locally adopted transportation concurrency ordinances remain in effect until such time as local governments amend their ordinances to remove such requirements.
- DCA indicates that for purposes of “State mandated” concurrency obligations in Chapter 163, Fla. Stat., it will not review plan amendments within the TCEAs for compliance with transportation concurrency requirements. However, local governments will be obligated within 2 years to adopt into its comprehensive plan a mechanism for managing mobility demands within these areas.

### **Intent of Creating Statutory TCEAs**

- SB 360 added the following language to Section 163.3180(5):

*The designation of a transportation concurrency exception area does not limit a local government's home rule power to adopt ordinances or impose fees....*

This language is DCA's apparent source to conclude concurrency requirements remain in place. However, nothing within the language suggests that previously adopted ordinances concerning concurrency remain effective. To the contrary, the language suggests the ability to prospectively enact ordinances to impose fees pertaining to transportation impacts. Certainly, even in the absence of this language, local governments retain their home rule powers and with that the inherent ability to impose fees on development via lawfully adopted ordinances. Regardless of the title attached to such a fee, to the extent a local government imposes a locally adopted fee on development to compensate for impacts of the development, that fee must comply with well settled federal and state law concerning impact fees. Specifically, the fee must satisfy the dual rational nexus test with the local government demonstrating (1) "a reasonable connection, or rational nexus, between the need for additional capital facilities and the growth in population generated by the subdivision;" and (2) "a reasonable connection, or rational nexus, between the expenditures of the funds collected and the benefits accruing to the subdivision." *Hollywood, Inc. v. Broward Co.*, 431 So.2d 606, 611-612 (Fla. 4<sup>th</sup> DCA 1983); *Volusia Co. v. Aberdeen at Ormond Beach*, 760 So.2d 126 (Fla. 2000). To the extent the existing local concurrency laws which DCA suggests remain effective fail to meet this standard, they may be illegal.

- SB 360, at lines 496-497, states: "The following **are** transportation concurrency exception areas...." Emphasis added. It then proceeds to define those areas within Cities and Counties which qualify. Nothing in this language suggests a limitation to "State mandated" concurrency. In fact, had that been the intent of the Legislature, the necessity to exclude Broward and Dade Counties (lines 542-555) from the statutorily created exemption appears superfluous as the "local" concurrency systems for those counties would have remained in effect. State law requires local comprehensive plans to comply with certain provisions of Chapter 163 Part II, among other requirements. Specifically, Section 163.3184(1)(a), Fla. Stat., defines "in compliance" to require consistency with Section 163.3180, Fla. Stat. The TCEA areas created by SB 360 are within Section 163.3180(5); therefore, it appears local requirements cannot be contrary to these statutory exclusions from concurrency.
- For local governments not within a statutorily created TCEA, SB 360 provides the ability to amend the "urban service area" within the local comprehensive plan as a mechanism for creating a TCEA within that jurisdiction. This process is simplified by SB 360 in the form of exclusion from the twice per year limitation

on comprehensive plan amendments and is eligible for expedited processing under the “alternative state review” provisions. If local concurrency requirements in local comprehensive plans remain in effect after passage of SB 360, then the exclusive mechanism for removal of that obligation is amendment of the local comprehensive plan—this amendment would count toward the twice per year limitation of Section 163.3187 and would not be eligible for the alternative state review process. Such a result is an illogical contradiction of the ability to more easily create the TCEAs.

- Lines 645-656 of SB 360 obligate OPPAGA to report on “*the methods that local governments have used to implement and fund transportation strategies to achieve the purposes of designated [TCEAs], and the effects of the strategies on mobility, congestion, urban design, the density and intensity of land use mixes, and network connectivity plans used to promote urban infill, redevelopment, or downtown revitalization.*” If the Legislature intended the preservation of local concurrency requirements after passage of SB 360, then the obligation of OPPAGA to report on the impact of alleviating transportation concurrency entirely within TCEAs would be unnecessary.

ISSUE 2. Whether a municipality within a county which meets the definition of “dense urban land area” must independently qualify for the TCEA and DRI exemptions of SB 360?

#### **DCA Position**

- SB 360 defines “dense urban land area” to include

*(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.*

- DCA indicates that a county may include the municipalities for purposes of these density or population calculations; however, the municipalities themselves do not qualify for the benefits unless independently meeting the requirements of the dense urban land area definition.
- Interestingly, the effect of this strict interpretation is to suggest that the municipalities within Dade County would not be subject to the Dade County exclusion for statutorily created TCEAs (lines 551-555).

#### **Intent of DULA Definition**

- The “dense urban land area” definition in SB 360 speaks clearly and is intended to include any municipality within the qualifying counties.

ISSUE 3. In order to qualify for the 2 year permit extension, must the subject project hold a Chapter 373, Part IV (Environmental Resource) permit?

#### **DCA Position**

- Initially, DCA verbally articulated an interpretation which suggested local development permits only qualified for the 2 year extension IF the project utilizing the extension possessed an environmental resource permit (“ERP”) issued by FDEP or a water management district pursuant to Chapter 373, Part IV. Subsequently, DCA issued a policy statement (Attachment B) clarifying its interpretation that at least as to approvals under DCA oversight (primarily DRI orders), DCA was not requiring an ERP permit to qualify for the extension.

#### **Intended Scope of 2 Year Permit Extension**

- DCA’s policy statement is an accurate application of the statutory language in that the extension was not limited only to projects holding an ERP permit.
- The extension is intended to apply to any “local government-issued development order or building permit” so long as the permit expiration falls between September 1, 2008-January 1, 2012, AND notice of exercise of the extension is provided to the authorizing government by December 31, 2009.
- SB 360 does not authorize permitting authorities to impose a fee for utilization of this extension.

ISSUE 4. Does the amendment to Section 163.3202, Fla. Stat., require county governments via land development regulations to impose a density cap on certain residential or recreational vehicle zoning categories? That language provides:

*(i.) 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.*

#### **DCA Position**

- Yes, this new requirement serves as both a ceiling and floor on rezonings in unincorporated areas outside of coastal high hazard areas.

#### **Intent of “Minimum Criteria” Language**

- This language specifically pertains SOLELY to locations where “sufficient infrastructure” is in place and which ARE NOT located in a coastal high hazard area. DCA’s interpretation, in the alternative, suggests that the

Legislature intended to allow density increases in areas lacking sufficient infrastructure or areas located within coastal high hazard zones.

- A more reasonable alternative read in context with the plain language of the entire section of law at issue is that this language was intended to set “minimum criteria” (see 163.3202(2)), and not a ceiling in any respect.



# IMPLEMENTING SB 360



Secretary Tom Pelham

June 11, 2009

## **XVI. (continued)**

- F. Local Governments must amend their Comprehensive Plans in order to abolish or revise existing Transportation Concurrency provisions as a matter of local law or to adopt other approaches
  
- G. Until a Local Government effectively amends its Comprehensive Plan, existing Transportation Concurrency provisions continue to apply in TCEA's as a matter of local law

## **XVI. (continued)**

- H. DCA will no longer review Plan Amendments in TCEA's for compliance with State-mandated Transportation Concurrency requirements, including the Achieve and Maintain Standard
- I. DCA will review Plan Amendments in TCEA's for compliance with all Non-Transportation Concurrency planning requirements

## **XVI. (continued)**

- J. Local Governments also have the Home Rule Power to adopt other requirements or approaches such as Impact or Mobility Fees and adequate Public Facilities requirements
- K. However, Local Governments must comply with new mobility planning requirements for a TCEA within two years
- L. Compliance with new mobility planning requirements may require revision of locally retained Transportation Concurrency requirements

**DCA'S STATEMENT REGARDING  
PERMIT EXTENSIONS UNDER SENATE BILL 360**

Section 14(1) of SB 360 provides in part as follows:

Except as provided in subsection (4), and in recognition of 2009 real estate market conditions, any permit issued by the Department of Environmental Protection or a water management district pursuant to Part IV of Chapter 373, Florida Statutes, that has an expiration date of September 1, 2008, through January 1, 2012, is extended and renewed for a period of two years following its date of expiration. This extension includes any local government-issued development order or building permit. The two-year extension also applies to build-out dates including any build-out date extension previously granted under s. 380.06(19)(c), Florida Statutes.

The Department has received numerous inquiries about the agency's interpretation of the above-quoted provisions. The extension of permits issued by the Department of Environmental Protection, water management districts, and local governments for non-DRI related development orders and building permits are not within the jurisdiction of the Department of Community Affairs. Accordingly, the Department has no authority to issue binding interpretations of the statutory language pertaining to permits issued by those agencies. Local governments will have to determine the scope of the statutory extension for local government-issued development orders or building permits except for those that pertain to developments of regional impact.

The Department of Community Affairs does have jurisdiction over local development orders that pertain to DRIs, including local actions which approve extension of build-out dates pursuant to s. 380.06(19)(c), Florida Statutes. The Department interprets the above-quoted statutory provisions as granting a two-year extension of the expiration date and build-out date for any local government-issued DRI development order and related building permits which have an expiration date of September 1, 2008, through January 1, 2012.

Secretary Tom Pelham  
June 16, 2009