

It's Not Your Father's Growth Management Law

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On June 2, 2011, Governor Scott signed HB 7207 into law (2011-139, Laws of Florida), thereby redesignating the "Local Government Comprehensive Planning and Land Development Regulation Act" as the "Community Planning Act" (the "Act"). The Department of Community Affairs was eliminated as a state agency by a separate bill (SB 2156), and its growth management functions were transferred to the new Department of Economic Opportunity. Already a good start. What the Act does is radically reduce the State's role in growth management regulations. What it does not do, contrary to the claims of opponents, is turn the keys to the kingdom over to developers. Local government Comprehensive Plans and development regulations remain in place and in force until changed.

The Act is a wide ranging 349 pages of revisions to state law. For a detailed analysis of all of the changes it includes, go to our website (www.bsbfirm.com) and click on "News and Resources", then "Florida's New Community Planning Act". This article will focus on several elements of the Act that should be immediately relevant to most readers.

Concurrency.

The Act eliminates State mandated concurrency for transportation, parks and recreation, and schools. However, the claim that this change eliminates a developer's obligation to pay for the impacts of his project is totally false. The web of locally generated concurrency regulations that currently blankets the State remains in effect until each local government chooses to change its requirements. There are changes that the Act requires to be made, such as the way "Proportionate Share" is calculated (as discussed below), that would truly have a major, positive impact on reducing the cost of development in Florida. Nevertheless, it will likely take a major effort by the regulated community to convert the new, favorable provisions in the Act into actual relief from existing local government regulations.

Proportionate Share.

The Act requires that local governments that implement transportation concurrency must, among other things, allow a developer to satisfy transportation concurrency by paying its "proportionate share" of the cost of providing the transportation facilities necessary to serve the proposed development. However, an applicant cannot be held responsible for the additional cost of reducing or eliminating existing deficiencies. Stated otherwise, and several times in the Act, an improvement necessary to correct an existing deficiency must be paid for by the entity responsible for maintaining the road, not the developer of a new project. Further, local governments are prohibited from requiring a developer to pay costs greater than the development's proportionate share as newly defined by the Act. These provisions were adopted to address the way local governments historically have calculated a development's proportionate share obligation and required additional contributions. Developments across the

state are currently saddled with tens of millions of dollars of proportionate share obligations that would VANISH if calculated and applied in accordance with the new law.

The Act also requires the FDOT to report to the President of the Senate and the Speaker of the House by December 15, 2011 regarding alternatives to the calculation of proportionate share contributions. The stated objective of these calculations is to ensure that required contributions from developers to mitigate traffic impacts are predictable and fair.

Impact Fee Credits.

Most projects mitigate their transportation impacts by paying transportation impact fees according to the local government's impact fee schedule. Frequently, however, large projects pay to mitigate their impacts by constructing one or more road improvements or making cash or other contributions. Then, when it comes time to pay impact fees, they get a credit for a portion of what they spent or contributed. For road improvements, total costs are reduced by the portion of the increased capacity created by the improvement that is used by the project making the improvement, as well as any costs the local government determines are excessive. So if you mitigate your impacts by paying impact fees, you get dollar-for-dollar. But if you mitigate by building a road, you get less than dollar-for-dollar. Is that fair? Constitutional?

The Act addresses this violation of equal protection, though not as completely as it should have. The Act mandates that an applicant must get dollar-for-dollar credit against impact fees or similar fees, reduced by no more than 20% based on the added capacity of the improvement consumed by the project's traffic.

Permit Extensions.

In recognition of the 2011 real estate market conditions, Section 54 of the Act amends the substantial deviation section of the DRI statute (§ 380.06(19)(c)2) to extend for four (4) years all commencement, phase, buildout, and expiration dates for currently valid DRI's, regardless of any previous extension. Associated mitigation requirements are also extended for four (4) years unless the local government notifies the developer by December 1, 2011 that it has entered a contract for construction of a facility with funds required to be provided by the developer for the phase being developed.

In 2009, SB 360 provided for two year extensions of DRI buildout dates, Department of Environmental Protection (DEP) and Water Management District (WMD) permits, and local government issued development orders and building permits due to expire from September 1, 2008 through January 1, 2012. Section 73 of the Act extends any permits or authorizations extended under SB 360, as reauthorized by Section 47 of Chapter 2010-147, Laws of Florida, for an additional two years, but not more than a total of four years. Further, the commencement and completion dates for any required mitigation associated with a phased construction project are extended so the mitigation takes place in the same timeframe relative to the phase as originally permitted.

In further recognition of 2011 real estate market conditions, Section 79 of the Act provides a two-year extension of the expiration date of any building permit, DEP permit or WMD permit, local government issued development order and certificate of levels of service (concurrency compliance), that expires from January 1, 2012 through January 1, 2014. Again, this two-year extension is in addition to any existing permit extensions, provided that it is subject

to a maximum four-year extension, and it cannot be used to extend DRI deadlines extended pursuant to § 380.06(19)(c). Commencement and completion dates for mitigation related to a phased construction project are also extended by this section.

To implement the extensions authorized by the above sections of the Act, the permit holder must send a written notice to the authorizing agency by December 31, 2011, specifying the permit and the new expiration date.

It is important to note that local governments have not interpreted prior statutory extensions uniformly and have established varying policies and procedures regarding what permits qualify and how. The complicated structure of the extension provisions in this Act will undoubtedly add to the confusion and diversity of application among local governments. Nevertheless, these provisions may give dormant projects an opportunity for extended life support.

Conclusion.

As noted, the above discussion barely scratches the surface of the myriad of changes to the State's growth management laws included in the Act. As the economy continues to recover and the regulated community gets back to business, the potential benefits of these changes will be realized as local governments implement them – or not.