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The 2007 Growth Management Legislation: Clarification and More

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After the 2005 Florida Legislature amended the state Growth Management Act, we noted the amendments are meaningful, but what they actually and ultimately mean would have to be sorted out in the coming months. We also prognosticated that several parts of the 2005 legislation would need to be clarified in a later "glitch" bill.

Both observations proved correct.

The 2007 legislation began as a relatively limited effort to clarify, refine, and in certain instances, redirect initial agency interpretation of prior legislative language, particularly regarding proportionate fair share mitigation and financial feasibility of local capital improvement plans. As this legislative engine picked up steam, it also picked up additional growth management riders and companion legislation.

Together, the growth management bill, HB 7203 (Chapter No. 2007-204), and provisions of transportation and affordable housing bills, CS/CS/HB 985 (Chapter No. 2007-196) and CS/HB 1375 (Chapter No. 2007-198), provide useful clarification and practical redirection of key Growth Management Act mitigation and capital facility/accountability policies. The 2007 revisions also establish some new opportunities to address and fund transportation and school concurrency and to purchase conservation land. Additionally, a pilot program for expedited state review of local plan amendments is created and the Legislature underscored the need for certain workforce-housing-challenged localities to plan and provide this housing product.

Local Comprehensive Plan Financial Feasibility

The 2005 amendments reinforced the requirement that capital improvement plans be financially feasible, which is to say the improvements to be provided by the plan must be identified and matched by adequate funds. But the legislation did not address the timeframe or trigger for determining financial feasibility. The 2007 revision clarifies that financial feasibility is satisfied for transportation and school concurrency if adopted levels of service are achieved and maintained by the end of the appropriate capital improvements planning period. Local government has discretion to determine this planning period, which typically is five years, but may be as long as 10 or 15 years.

The revision extends to December 1, 2008 the deadline for local governments to adopt and transmit to the state land planning agency — the Department of Community Affairs (DCA) — a financially feasible capital improvement schedule. Penalties for failure to adopt and transmit likewise are extended. Another amendment clarifies that DCA will not review upon adoption the schedule for compliance with state financial feasibility standards. However, DCA probably will assess financial feasibility when localities submit their periodic evaluation and appraisal reports.

Proportionate Fair Share Mitigation

The 2005 amendments strengthened several concurrency provisions and also provided landowners a useful tool to smooth the harder edges of this inadequately funded, adequate public facilities policy. Transportation concurrency may be satisfied if a developer pays a proportionate fair share (PFS) of money, land, or other developer-provided value to mitigate the impact caused by its new project. PFS mitigation also may be applied to satisfy school concurrency mandates.

Unfortunately, the 2005 provisions that addressed financial feasibility and PFS were not coordinated, and early agency interpretation of these provisions suggested that although PFS is paid or committed for a project, an accompanying plan amendment must be financially feasible and if not, the project could be denied.

The revision coordinates financially feasible and PFS policy and, as noted, allows localities to satisfy financial feasibility at the end of a planning period. At local government's discretion, a comprehensive plan or a plan amendment is financially feasible and will satisfy transportation concurrency if the amendment is supported by a Development of Regional Impact (DRI) development order condition or binding agreement that meets statutory PFS requirements. For non-DRI projects, financial feasibility and concurrency are satisfied if a plan amendment is supported by a binding agreement that meets statutory PFS requirements and the project is located in an area designated in a local plan for urban infill, urban redevelopment, downtown revitalization, or an urban service area. The binding agreement must be based on the maximum amount of development allowed by the plan amendment.

These clarifying amendments are positive and further the driving intent of PFS to allow localities to apply "pay and go" fair share mitigation. However, the revision significantly restricts application of PFS to non-DRI projects by limiting applicability to urban core and service areas.

The 2007 revision unwound an unfortunate and illogical initial agency interpretation that PFS not only must reflect a developer's fair share of its project's impacts, it also must address the developer's contribution to reducing or eliminating any existing local transportation backlog. The revision, supported by the present DCA administration, expressly limits PFS mitigation to a project's impacts and excludes consideration of any facility backlog.

The PFS transportation mitigation option for multi-use DRIs is broadened to include all DRIs, Florida Quality Developments, and detailed, specific area plans that implement optional sector plans. This revision also extended to all DRIs the ability to apply "pipelining" to mitigate transportation impacts on regionally significant roads. Pipelining allows PFS contributions to be channeled to pay for one or more transportation improvements as opposed to being spread incrementally among numerous improvements.

Similarly, for non-DRIs, PFS mitigation may be pipelined to mitigate impacts reasonably related to project impacts and may include multi-modal transportation improvements.

Transportation Concurrency and Mitigation

The 2007 revision authorizes local governments to establish through an inter-local agreement a transportation concurrency backlog authority (TCBAA). It is not clear whether a single locality can establish these areas, and this will require agency interpretation. TCBAAs may designate a backlog area and use tax increment financing to fund the construction and maintenance of transportation improvements to resolve backlog and deficiency issues. The governing board of the locality will comprise the authority's board and is charged to develop and implement a plan to eliminate backlogs within 10 years. The backlog plan will be reviewed by DCA for compliance with state standards. This program appears to exempt from concurrency all transportation facilities addressed by the backlog plan, although this, too, is an open question.

To encourage the private sector to fund or otherwise facilitate needed state and local transportation improvements, the transportation bill authorizes local governments to grant concurrency credits for voluntary private contributions of right-of-way and construction or expansion of a state transportation facility or segment, and for contribution of right-of-way and construction of local collector or arterial transportation improvements. Private contributions and improvements must be committed in a binding agreement among the property owner or developer, local government, and if appropriate, the Florida Department of Transportation (FDOT).

Through an existing incentive program, local governments may promote urban infill and redevelopment by designating transportation concurrency exception areas (TCEA). Development within TCEAs is exempt from meeting transportation concurrency. The 2007 revision authorized a TCEA to be designated for an urban service area that is appropriate for compact urban development, is served or planned to be served by public facilities and services, and that does not exceed the amount of land needed to accommodate the area's projected population growth for a 10-year period.

School Concurrency

The 2005 amendments added schools to the list of public services and facilities that are subject to concurrency. School concurrency is satisfied if education facilities are available or under construction within three years of certain development approval.

The revision allows a project to proceed even if there is inadequate school capacity by accelerating private construction of school facilities. Accelerated facilities must be included in years four or later of the school capital improvement schedule. If the facilities presently are not included in the capital improvement plan, they must be added in the next update plan. Additionally, the developer must commit in a binding, financially guaranteed agreement with the school district to build the improvements during the first three years of the capital improvement plan. The cost of the accelerated facility must equal or exceed the project's fair share of school mitigation. Once the facility is conveyed to the school district, the project developer must receive local impact fee credits usable within the attendance zone where the accelerated facility is constructed or in a contiguous attendance zone once the facility is conveyed to the school district.

Affordable Housing

A housing element long has been a staple of local plans but did not receive much attention. Recent amendments to the Growth Management Act and housing assistance programs raised this element's profile by emphasizing the state's interest to promote provision of affordable workforce housing.

The affordable housing bill requires local plan housing elements to include principles and standards to ensure provision of needed affordable workforce housing.

Additionally and significantly, by July 1, 2008 each county that is not designated an area of critical state concern and for which the gap between family buying power and median county home sales prices exceeds $170,000 must identify sites for adequate workforce housing. County failure to adopt this plan will result in county ineligibility to receive any state housing assistance grants until the plan is adopted.

The affordable housing bill also provides expedited local plan adoption and other process incentives for plan amendments that implement housing incentive strategies required to participate in the State Housing Initiative Partnership Program.

A transportation concurrency exemption is granted for certain affordable workforce housing units in a DRI scale project that are located in close proximity to employment centers. And exemption from DRI substantial deviation review is established for changes to DRIs that permit the sale of certain affordable housing units to persons who earn a certain percentage of the area median income.

Another new incentive authorizes counties and cities to allow deferral of ad valorem taxes and non-ad valorem assessments for owners of property who are operating, rehabilitating, or renovating affordable rental housing property.

Developments of Regional Impact

To help mitigate the recent slowdown in the statewide real estate market and in recognition of the time and resources required to process and obtain approval for a DRI, all phase, buildout, and expiration dates for DRI projects that are under "active construction" on July 1, 2007 are extended for three years, regardless of any prior extension. DCA interprets active construction to mean physical development has been authorized by local government and has occurred. The three-year extension is not a substantial deviation, is not subject to further review, and must not be considered when determining whether a subsequent extension is a substantial deviation requiring further DRI review.

Guidelines and standards for determining hotel and motel DRIs are amended so that any proposed hotel or motel development that is planned to create or accommodate 750 units in a county with a population greater than 500,000 will require DRI review.

Alternative State Review Process Pilot Program

A thorough review of the state's role in administering the Growth Management Act is overdue. Many localities have developed sophisticated, experienced planning departments and project processes in response to state mandates. Some urban areas have or will soon reach development build out. Additionally, the state has limited resources that should be focused on promoting and protecting interests and issues that are of true state significance.

The Legislature previously has recognized that state planning guidelines and standards should not be applied uniformly in all areas of the state and that urban areas merit some flexibility under the Growth Management Act.

An effort to address these concerns and practicalities is reflected in a new local plan review process that will apply as a pilot program to Pinellas and Broward counties, the cities within these counties, and the cities of Jacksonville, Miami, Tampa, and Hialeah. Cities within the pilot counties, by super majority vote, may opt out of the pilot.

The new program offers an expedited process for adopting local plan amendments with less state review. Following an initial public hearing on a plan amendment, the locality will transmit the amendment to specified state, regional, and local agencies for comments. DCA will not issue a formal objections, recommendations and comments report (ORC).

Following adoption at a second public hearing, the locality will send the amendment to DCA and agencies that previously provided comments. DCA will not issue a notice of intent on compliance with state standards (NOI).

Affected persons may challenge a plan amendment as not in compliance with state standards, similar to existing Growth Management Act process. DCA may challenge the amendment as not in compliance with state standards and may raise issues identified by the other reviewing agencies. DCA strongly is encouraged by the Legislature to focus any challenge on issues of regional or statewide importance. These issues are not defined by the legislation and DCA is prohibited from adopting rules to implement the new program.

The Office of Program Policy Analysis and Government Accountability (OPPAGA) must review the program and submit a report and recommendations to the Legislature and governor by December 1, 2008. This report will be extensive and must address, among other subjects, criteria for determining issues of regional and statewide importance for the new program and localities that

should be added or deleted from the pilot. The pilot program does not include a sunset provision, so it will not automatically terminate on a specific date.

Comment: The new program will satisfy the intent of its drafters if DCA focuses its review and comments on issues of state or regional importance. Although DCA will not issue an ORC or NOI, it will provide comments, and plan amendment applicants and localities will take these comments to heart in order to avoid a later challenge. So DCA retains significant policy leverage in this pilot. Some legislative guidance on identifying issues of state and regional importance would have enhanced this program, but shifting the burden to DCA to develop appropriate guidelines by experience with strong legislative "encouragement" to focus on state and regional issues can produce a satisfactory product. If not, the OPPAGA report may recommend definitive standards for state review of local plan amendments in the pilot localities and other urbanized areas.

DCA's effort to identify state and regional issues to be considered in the pilot program could lay a useful foundation for a thorough review of Rule 9J-5, the present state standards for local plan amendments, and possible refocus of state review on issues of significant state interest.

Development Agreements

The maximum term for a local government development agreement is extended from 10 years to 20 years. This positive action does not diminish the discretion of local governments to enter into development agreements and establish agreement terms, including duration. The extension will enable these agreements to be used to confirm a developer's long-term mitigation obligations, including proportionate fair share commitments, and to "lock in" local plan policies and regulations that will apply to a developer's project for the term of the agreement.

Conservation Land Purchases

The revision authorizes two or more counties or at least one county and one or more municipalities to execute an inter-local agreement establishing a tax increment area that will generate revenue to purchase conservation land. A water management district may join the agreement if it contributes ad valorem revenue for the purchases.

DCA must review the boundary of a tax increment area to determine if the proposed purchase will benefit property owners within the area and if it will serve a public purpose. The Florida Department of Environmental Regulation must determine whether a purchase is sufficient to provide additional recreational and ecotourism opportunities for area residents.

The tax increment will be determined annually, and revenues may be bonded.

Comment: The potential jurisdiction for **community development districts** (CDDs) and the authority of these districts to fund infrastructure was expanded by HB 1491 (Chapter No. 2007-160). CDDs now may cover more than one county, may fund roads that ultimately are conveyed to a government body and other infrastructure required by a development order or inter-local agreement, and, with local approval, may construct and maintain site improvements related to schools that will be leased, sold, or donated to the school district.

The transportation legislation establishes significant criteria and authority for FDOT to enter into **public-private-partnerships** (P3s). Additional provisions authorize expressway, bridge, transportation, and toll authorities to enter P3s.

Regional transportation planning and facilities are promoted with passage of SB 506 (Chapter No. 2007-254), which establishes the Tampa Bay Area Regional Transportation Authority. The duties and responsibilities of the South Florida Regional Transportation Authority are refined by SB 606 (Chapter No. 2007-255), and the transportation legislation clarifies the membership of the Northwest Florida Transportation Authority.

Comment: One hopes that FDOT and the regional transportation authorities will partner with DCA to help develop regional approaches to both transportation and land use that will reflect community inclusive regional visions.

The 2007 legislation took effect July 1, 2007.

About the Author

Robert M. Rhodes is of counsel to Foley & Lardner LLP, where he is a member of the Real Estate Practice and focuses on the areas of land use, environmental law, and real estate development. In the mid-1980s, he chaired the State of Florida Environmental Land Management Study Committee (ELMS), which developed much of the 1985 growth management act. He is the former executive vice president of The St. Joe Company and also served as the company's general counsel. Mr. Rhodes also chaired the 2005 Mayor's Growth Management Task Force for the City of Jacksonville.

For More Information

For more information on "The 2007 Growth Management Legislation: Clarification and More," we invite you to contact the author directly:

Robert M. Rhodes
Foley & Lardner LLP
Phone: 904.359.8765
e-Mail: rrhodes@foley.com

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