The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Community Affairs Committee

BILL:	CS/SB 2452
INTRODUCER:	Community Affairs Committee and Senator Bennett
SUBJECT:	Growth Management
DATE:	March 17, 2010 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Wolfgang	Yeatman	CA	**Fav/CS**
2.			JU	
3.				
4.				
5.				
6.				

Please see Section VIII. for Additional Information:

A. COMMITTEE SUBSTITUTE.....	X	Statement of Substantial Changes
B. AMENDMENTS.....		Technical amendments were recommended
		Amendments were recommended
		Significant amendments were recommended

I. Summary:

In order to provide some degree of certainty in light of the law suit challenging the constitutionality of Senate Bill 360, Chapter 2009-96, Laws of Florida, this committee substitute (CS) provides protection for exemptions related to developments of regional impact, permit extensions, and comprehensive plan amendments implementing transportation concurrency exception areas.

This CS creates an undesignated section of law.

II. Present Situation:

In 2009, the Legislature passed and the Governor signed into law Senate Bill 360, Chapter 2009-96, Laws of Florida. This bill made a wide array of changes to Florida's growth management laws. The law is now being challenged in the courts on constitutional grounds.[1] Local governments, developers, and other private interests are facing uncertainty as a result of this

[1] For a summary and court documents, *see* The City of Weston, SB 360 Constitutional Challenge Website, *available at* http://www.westonfl.org/SB_360_Intro.aspx.

lawsuit. This discussion explains just some of the provisions of the bill that these local governments and private entities have begun to rely on since SB 360 became law in July of 2009.

Definitions
Senate Bill 360 created two key definitions. These definitions are "dense urban land area" and "urban service area." A "dense urban land area" is:

- a municipality that has an average population of at least 1,000 people per square mile and at least 5,000 people total;
- a county, including the municipalities located therein, which has an average population of at least 1,000 people per square mile; and
- a county, including the municipalities located therein, which has a population of at least 1 million.

Senate Bill 360 amended s. 163.3164, F.S., to change "existing urban service area" to "urban service area" and to redefine the term to include built-up areas where public facilities and services, including central water and sewer and roads are already in place or are committed within the next three years. The definition also grandfathers-in existing urban service areas or their functional equivalent within counties that qualify as dense urban land areas. This definition is important because for counties that are dense urban land areas, the area within the urban service area is automatically exempt from transportation concurrency and development-of-regional-impact review.

Development of Regional Impact Exemptions
Section 380.06, F.S., provides state and regional review of local land use decisions regarding large developments that, because of their character, magnitude, or location, would have a substantial effect on the health, safety, or welfare of the citizens of more than one county.[2] Regional planning councils assist the developer by coordinating multi-agency DRI review. The council's job is to assess the DRI project, incorporate input from various agencies, gather additional information and make recommendations on how the project should proceed. The DCA reviews developments of regional impact for compliance with state law and to identify the regional and state impacts of large-scale developments. The DCA makes recommendations to local governments for approving, suggesting mitigation conditions, or not approving proposed developments.

Senate Bill 360 created s. 380.06(29), F.S., to exempt developments from the development-of-regional-impact process in the following areas:

- municipalities that qualify as dense urban land areas;
- any urban service area that has been adopted into the local comprehensive plan and is located within a county that qualifies as a dense urban land area; and
- any county, such as Pinellas and Broward, that has a population of at least 900,000 and qualifies as a dense urban land area, but does not have an urban service area designated in its comprehensive plan.

Developments that meet the DRI thresholds and are located partially within a jurisdiction that is not exempt still require DRI review. DRIs that had been approved or that have an application for

[2] Section 380.06(1), F.S.

development approval pending when the exemption takes effect may continue the DRI process or rescind the DRI development order. Developments that chose to rescind are exempt from the twice a year limitation on plan amendments for the year following the exemption. In exempt jurisdictions, the local government would still need to submit the development order to the state land planning agency for any project that would be larger than 120 percent of any applicable DRI threshold and would require DRI review but for the exemption. The state land planning agency still has the right to challenge such development orders for consistency with the comprehensive plan.

If a local government that qualifies as a dense urban land area for DRI exemption purposes 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. The section does not limit or modify the rights of any person to complete any development that has been authorized as a DRI. An exemption from the DRI process does not apply within the boundary of any area of critical state concern, within the boundary of the Wekiva Study Area, or within 2 miles of the boundary of the Everglades Protection Area.

Extension of Permits

Senate Bill 360 provided a retroactive 2-year extension and renewal from the date of expiration for:

- any permit issued by the Department of Environmental Permitting or a Water Management District under part IV of ch. 373, F.S.,
- any development order issued by the DCA pursuant to s. 380.06, F.S., and
- any development order, building permit, or other land use approval issued by a local government which expired or will expire on or after September 1, 2008, to January 1, 2012. For development orders and land use approvals, including but not limited to certificates of concurrency and development agreement, the extension applies to phase, commencement, and buildout dates, including a buildout date extension previously granted under s. 380.016(19)(c), F.S.

The conversion of a permit from the construction phase to the operation phase for combined construction and operation permits is specifically provided for. The completion date for any mitigation associated with a phased construction project is extended and renewed so the mitigation takes place in the appropriate phase as originally permitted. Entities requesting an extension and renewal must have notified the authorizing agency in writing by December 31, 2009, and must have identified the specific authorization for which the extension will be used.

Exceptions to the extension were provided for certain federal permits, and owners and operators who are determined to be in significant noncompliance with the conditions of a permit eligible for an extension. Permits and other authorizations which are extended and renewed shall be governed by the rules in place at the time the initial permit or authorization was issued. Modifications to such permits and authorizations are also governed by rules in place at the time the permit or authorization was issued, but may not add time to the extension and renewal.

Transportation Concurrency Exception Areas

The Growth Management Act of 1985 required local governments to use a systematic process to ensure new development does not occur unless adequate transportation infrastructure is in place to support the growth. Transportation concurrency is a growth management strategy aimed at ensuring transportation facilities and services are available "concurrent" with the impacts of development. To carry out concurrency, local governments must define what constitutes an adequate level of service (LOS) for the transportation system and measure whether the service needs of a new development exceed existing capacity and scheduled improvements for that period. The Florida Department of Transportation (FDOT) is responsible for establishing level-of-service standards on the highway component of the strategic intermodal system (SIS) and for developing guidelines to be used by local governments on other roads. The SIS consists of statewide and interregionally significant transportation facilities and services and plays a critical role in moving people and goods to and from other states and nations, as well as between major economic regions in Florida.

Senate Bill 360 made certain local governments automatic transportation concurrency exception areas (TCEAs).[3] The Department of Community Affairs interpreted the change as removing state-mandated transportation concurrency within the specified jurisdictions while preserving transportation concurrency ordinances and the transportation concurrency provisions the local governments had already adopted into their comprehensive plans. Therefore, some local governments have begun to amend their comprehensive plans and/or land use regulations to implement transportation concurrency exception areas.

III. Effect of Proposed Changes:

Section 1 of the CS creates an undesignated section of law designed to protect parties that have relied on Senate Bill 360, notwithstanding any final declaration by a court of this state. The CS protects:

- the exemption of any development of regional impact in an area designated as exempt under Senate Bill 360 if:
  - a development application has been approved or filed or
  - a complete application or rescission request is continuing in good faith;
- any 2-year extension granted pursuant to Senate Bill 360; and
- any amendment to a local comprehensive plan designed to implement a transportation concurrency exception area.

Section 2 provides that the CS becomes effective upon becoming law.

[3] These areas are municipalities that are designated as dense urban land areas and the urban service area of counties designated as dense urban land areas. Section 163.3164, F.S., defines "dense urban land area" as (1) "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;" (2) "A county, including the municipalities located therein, which has an average of at least 1,000 people per square mile of land area; or" (3) "A county, including the municipalities located therein, which has a population of at least 1 million."

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

Creating a law to mitigate the possible effects of a court ruling that has not yet occurred raises a potential separation of powers issue. The Florida Constitution provides for strict separation of powers;[4] the question here will be whether the Legislature is impinging on the powers of the judiciary to decide the case. The language that raises this issue most distinctly is, "Notwithstanding any final declaration by a court of this state that chapter 2009-96, Laws of Florida, or any portion of such law is invalid. . ."

Legislation that interferes with the exercise of judicial authority is unconstitutional.[5] It is the purview of the courts to interpret the constitution. This CS does not direct the courts how to interpret the constitution, but rather attempts to preserve the rights of parties who have relied on chapter 2009-96, Laws of Florida.

Bush v. Schiavo held that the Legislature cannot pass a statute to overturn a final judgment of the court as to a particular party.[6] This case is distinguishable from the *Schiavo* case. It is clear that if provisions of a law were unconstitutionally enacted, the Legislature can reenact those provisions using proper constitutional methods so long as the substance of the law is constitutional.[7] Additionally, the Legislature has the discretion to make laws granting benefits retroactive.[8] The courts also have the authority to apply a finding of unconstitutionality prospectively.[9] Courts have held that "if a power is not

[4] Art II, § 3, Fla. Const.
[5] *Simmons v. State*, 36 So.2d 207 (Fla. 1948).
[6] 885 So.2d 321 (Fla. 2004).
[7] *See, e.g.*, *Martinez v. Scanlan*, 582 So. 2d 1167 (Fla. 1991); *see also State v. Johnson*, 616 So. 2d 1 (Fla. 1993).
[8] *Old Port Cove Holdings, Inc. v. Old Port Cove Condominium Ass'n One, Inc*., 986 So.2d 1279 (Fla. 2008); *Promontory Enterprises, Inc. v. Southern Engineering & Contracting, Inc*., 864 So.2d 479 (5th DCA 2004) ("It is firmly established that a statute may be retroactively applied if: 1) there is clear evidence that the Legislature intended to apply the statute retroactively; and 2) retroactive application is constitutionally permissible.") (citing *Campus Communications, Inc. v. Earnhardt*, 821 So.2d 388, 395 (Fla. 5th DCA 2002); *Metropolitan Dade County v. Chase Fed. Hous. Corp.*, 737 So.2d 494 (Fla.1999)), *Romine v. Florida Birth Related Neurological Injury Comp. Ass'n*, 842 So.2d 148 (Fla. 5th DCA 2003)).
[9] *Interlachen Lakes Estates, Inc. v. Snyder*, 304 So.2d 433 (Fla. 1973).

exclusive to one branch, the exercise of that non-exclusive power is not unconstitutional."[10]

At least one Florida Supreme Court case suggests that the Legislature cannot ratify or confirm invalid statute by a reference to the statute confirming and validating acts previously done under the statute.[11] However, a more recent Florida Supreme Court case striking down an impact fee held that "the courts should show great deference to the legislative prerogative. If there is any reasonable way that prerogative may be honored without substantial injustice to the taxpayers of this state, then a court reviewing a tax case of this type should give the Legislature the opportunity to fashion a retroactive remedy within a reasonable period of time."[12] Although this is not a tax case, an argument can be made that the same principle would apply here such that the courts and the Legislature are afforded broad leeway to provide a retroactive remedy that protects the interests of individuals and of the state as a whole in the event that 2009-96, Laws of Florida, is declared unconstitutional.[13] Nevertheless, this CS is likely subject to challenge on constitutional grounds.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The CS helps provide the private sector with certainty that they can rely on the law as it has been amended for DRIs, permit extensions, and TCEAs. This should promote economic development by protecting the reliance interest.

C. Government Sector Impact:

Just as for the private sector, local governments may rely on the provisions set out in Senate Bill 360 for DRIs, permit extensions, and TCEAs.

VI. Technical Deficiencies:

None.

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[10] *Simms v. State, Dept. of Health & Rehabilitative Services*, 641 So.2d 957 (3d DCA 1994) (citing *Department of Health & Rehabilitative Servs. v. Hollis*, 439 So.2d 947, 948 (Fla. 1st DCA 1983)); *see also Florida House of Representatives v. Crist*, 990 So. 2d 1035 (Fla. 2008) (finding that a branch of government has the inherent right to accomplish all objects naturally within its orbit, not expressly limited by the fact of the existence of a similar power elsewhere or the express limitations in the constitution).

[11] *Hillsborough County v. Temple Terrace Assets Co*., 149 So. 473 (1933).

[12] *Department of Revenue v. Kuhnlein*, 646 So. 2d 717 (Fla. 1994).

[13] *Id. See also Interlachen Lakes Estates, Inc. v. Snyder*, 304 So.2d 433 (Fla. 1973). ("This decision operates prospectively from the date the opinion becomes final because persons relying on the state statute did so assuming it to be valid. . .").

VII. Related Issues:

None.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Community Affairs on March 17, 2010:

- Protects developments of regional impacts that have been approved or filed.
- Deletes the provision that declares that any judgment shall be prospective only.

B. Amendments:

None.