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 Judiciary Committee

BILL:	CS/CS/SB 2452
INTRODUCER:	Judiciary Committee, Community Affairs Committee, and Senator Bennett
SUBJECT:	Growth Management
DATE:	April 8, 2010 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Wolfgang	Yeatman	CA	**Fav/CS**
2.	Daniell	Maclure	JU	**Fav/CS**
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 a lawsuit challenging the constitutionality of Senate Bill 360, titled "An Act Relating to Growth Management," which the Legislature passed during the 2009 Regular Session, this bill provides protection for exemptions related to developments of regional impact, permit extensions, and comprehensive plan amendments implementing transportation concurrency exception areas.

This bill creates an undesignated section of law.

II. Present Situation:[1]

In 2009, the Legislature passed, and the Governor signed into law, Senate Bill 360, titled "An Act Relating to Growth Management" (SB 360).[2] This bill made a wide array of changes to Florida's growth management laws. The law is now being challenged by various local

[1] A majority of the information contained in the Present Situation of this bill analysis is replicated from the professional staff analysis for CS/SB 2452 by the Senate Committee on Community Affairs (Mar. 17, 2010), *available at* http://www.flsenate.gov/data/session/2010/Senate/bills/analysis/pdf/2010s2452.ca.pdf (last visited Mar. 30, 2010).

[2] Chapter 2009-96, Laws of Fla.

governments on constitutional grounds. Specifically, the complaint raises two counts: first, that SB 360 violates the single subject provision of the Florida Constitution and, second, that the bill is an unfunded mandate on local government.[3] Local governments, developers, and other private interests are facing uncertainty as a result of this lawsuit. This discussion explains 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." Under the bill, 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.[4]

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 mean built-up areas where public facilities and services, including central water and sewer capacity and roads, are already in place or are committed in the first three years of the capital improvement schedule. 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[5]

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.[6] Regional planning councils assist the developer by coordinating multi-agency development of regional impact (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 Department of Community Affairs (DCA or department) 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.

[3] *City of Weston v. Crist*, Case No. 09-CA-2639 (Fla. 2d Jud. Cir. 2009). For a summary of the lawsuit and copies of court documents, see the City of Weston, *SB 360 Introduction* (Aug. 5, 2009), http://www.westonfl.org/SB_360_Intro.aspx (last visited Mar. 30, 2010).
[4] Chapter 2009-96, s. 2, Laws of Fla.
[5] See ch. 2009-96, s. 12, Laws of Fla.
[6] Section 380.06(1), F.S.

Senate Bill 360 created s. 380.06(29), F.S., to exempt developments from the DRI process in the following areas:

- Municipalities that qualify as dense urban land areas;
- Any proposed development located within a dense urban land area and that is within an urban service area, which has been adopted into the local comprehensive plan; and
- Any proposed development within a county 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. Developments of regional impact that were approved or have an application for 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 two miles of the boundary of the Everglades Protection Area.

Extension of Permits[7]

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

- Any permit issued by the Department of Environmental Protection or a water management district under part IV of ch. 373, F.S., which has an expiration date of September 1, 2008, through January 1, 2012;
- Any local government-issued development order or building permit; and
- Any development order previously issued by DCA.

The extension applies to phase, commencement, and build-out dates, including a build-out date extension previously granted under s. 380.06(19)(c), F.S. The conversion of a permit from the

[7] See ch. 2009-96, s. 14, Laws of Fla.

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 that 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 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 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.[8]

Senate Bill 360 made certain local governments automatic transportation concurrency exception areas.[9] The department 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 or land use regulations to implement transportation concurrency exception areas.

[8] *See* Professional staff analysis, Committee on Ways and Means, *CS/CS/SB 360* (Mar. 19, 2009), *available at* http://www.flsenate.gov/data/session/2009/Senate/bills/analysis/pdf/2009s0360.wpsc.pdf (last visited Mar. 30, 2010).
[9] 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. See ch. 2009-96, s. 4, Laws of Fla.

III. Effect of Proposed Changes:

This bill creates an undesignated section of law designed to protect parties that have relied on Senate Bill 360 (SB 360),[10] which was enacted during the 2009 Regular Session and is currently the subject of a lawsuit. The bill reauthorizes the following:

- The exemption of any development of regional impact in an area designated as exempt under SB 360 if:
  - A development application has been approved or filed, or
  - A complete development application or rescission request has been approved or is pending

  and the application or rescission process is continuing in good faith;
- Any two-year extension authorized and timely applied for pursuant to SB 360; and
- Any amendment to a local comprehensive plan adopted pursuant to SB 360 and in effect pursuant to s. 163.3189, F.S., designed to implement a transportation concurrency exception area.

The bill provides that it is remedial in nature and its purpose is to reenact provisions of existing law. The bill applies retroactively to all actions addressed in this bill, as well as any actions pending as of the effective date of the act.

The bill provides that it becomes effective upon becoming a law.

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:

This bill reauthorizes certain provisions of law that, among other provisions in ch. 2009-96, Laws of Florida, are currently the subject of a lawsuit. 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. Specifically, article II, section 3 of the Florida Constitution provides:

[10] Chapter 2009-96, Laws of Fla.

> The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein.

However, courts have held that "if a power is not exclusive to one branch, the exercise of that non-exclusive power is not unconstitutional."[11] At issue in this bill is whether the Legislature is impinging on the powers of the judiciary to decide a case by essentially passing a statute that may conflict with a court's holding.

The Florida Supreme Court has previously held that "'any legislation that hampers judicial action or interferes with the discharge of judicial functions is unconstitutional.'"[12] The role of the judiciary is to decide cases, subject to review only by superior courts, and a judicial decision becomes the last word with regard to a particular case or controversy.[13] In *Bush v. Schiavo*, 885 So. 2d 321 (Fla. 2004), the Florida Supreme Court held that the Legislature cannot pass a statute to overturn a final judgment of the court as to a particular party. Specifically, the court held:

> When the prescribed procedures are followed according to our rules of court and the governing statutes, a final judgment is issued, and all post-judgment procedures are followed, it is without question an invasion of the authority of the judicial branch for the Legislature to pass a law that allows the executive branch to interfere with the final judicial determination in a case.[14]

However, 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.[15] Additionally, the Legislature has the discretion to enact laws retroactively.[16] The argument has been raised 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 . . . case . . . should give the Legislature the opportunity to fashion a retroactive remedy within a reasonable period of time."[17] Moreover, both the United States Supreme Court and the Florida Supreme Court have held that courts have the authority to apply a finding of unconstitutionality prospectively so as to not affect the

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[11] *Simms v. Dep't of Health & Rehabilitative Servs.*, 641 So. 2d 957 (3d DCA 1994) (citing *Dep't of Health & Rehabilitative Servs. v. Hollis*, 439 So. 2d 947, 948 (Fla. 1st DCA 1983)); *see also Florida House of Representatives v. Crist*, 999 So. 2d 601, 611 (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).

[12] *Simmons v. State*, 36 So.2d 207, 628 (Fla. 1948) (internal citation omitted); 16A Am. Jur. 2d *Constitutional Law* s. 300.

[13] *Bush v. Schiavo*, 885 So. 2d 321, 330 (Fla. 2004) (citing *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218-19 (1995)).

[14] *Bush*, 885 So. 2d at 332.

[15] *See, e.g., Martinez v. Scanlan*, 582 So. 2d 1167 (Fla. 1991); *see also State v. Johnson*, 616 So. 2d 1 (Fla. 1993); *but see Hillsborough County v. Temple Terrace Assets Co.*, 149 So. 473 (1933) (suggesting that the Legislature cannot ratify or confirm an invalid statute by referencing the statute and confirming and validating acts previously done under the statute).

[16] *Promontory Enterprises, Inc. v. Southern Engineering & Contracting, Inc*., 864 So. 2d 479, 483 (5th DCA 2004).

[17] *Dep't of Revenue v. Kuhnlein*, 646 So. 2d 717, 727 (Fla. 1994) (Grimes, C.J., dissenting).

rights and obligations of persons who relied on the statute, assuming it was valid.[18] Therefore, it appears, at least in some instances, even if part of a statute is declared unconstitutional, the court will apply its decision prospectively and allow the Legislature to cure the defect if significant hardships would be imposed on parties who relied on the statute in good faith.

It could be argued that the Legislature should be 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 ch. 2009-96, Laws of Florida, is declared unconstitutional. However, it is unclear how a court would rule on this issue.

Additionally, this bill provides that it is the Legislature's intent to reenact provisions of existing law and that the bill shall apply retroactively to all actions addressed in the bill, as well as to any actions pending as of the effective date of the bill. Retroactive operation is disfavored by courts and generally "statutes are prospective, and will not be construed to have retroactive operation unless the language employed in the enactment is so clear it will admit of no other construction."[19] The Florida Supreme Court has articulated four issues to consider when determining whether a statute may be retroactively applied:

- Is the statute procedural or substantive?
- Was there an unambiguous legislative intent for retroactive application?
- Was [a person's] right vested or inchoate?
- Is the application of [the statute] to these facts unconstitutionally retroactive?[20]

The general rule of statutory construction is that a procedural or remedial statute may operate retroactively, but that a substantive statute may not operate retroactively without clear legislative intent. Substantive laws either create or impose a new obligation or duty, or impair or destroy existing rights, and procedural laws enforce those rights or obligations.[21] It appears that the bill is reenacting existing law, rather than creating new statutory rights, duties, or obligations.

Additionally, the bill makes it clear that it is the Legislature's intent to apply the law retroactively. "Where a statute expresses clear legislative intent for retroactive application, courts will apply the provision retroactively."[22] A court will not follow this rationale, however, if applying a statute retroactively will impair vested rights, create new obligations, or impose new penalties.[23] This bill does not appear to do any of these things.

Accordingly, the retroactive nature of the bill may survive a constitutional challenge.

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[18] *Cipriano v. City of Houma*, 395 U.S. 701 (1969); *Martinez*, 582 So. 2d 1175; *Interlachen Lakes Estates, Inc. v. Snyder*, 304 So. 2d 433 (Fla. 1973).
[19] Norman J. Singer and J.D. Shambie Singer, *Prospective or retroactive interpretation*, 2 SUTHERLAND STATUTORY CONSTR. s. 41:4 (6th ed. 2009).
[20] *Weingrad v. Miles*, 2010 WL 711801, *2 (Fla. 3d DCA 2010) (internal citations omitted).
[21] *See Alamo Rent-A-Car, Inc. v. Mancusi*, 632 So. 2d 1352, 1358 (Fla. 1994); *In re Rules of Criminal Procedure*, 272 So. 2d 65, 65 (Fla. 1972).
[22] *Weingrad*, 2010 WL 711801 at *3.
[23] *Id*. at *4.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The bill helps provide the private sector with certainty that they can rely on the law as it has been amended for developments of regional impact (DRI), permit extensions, and transportation concurrency exception areas (TCEA). Having more certainty on the legality of Senate Bill 360 may help promote economic development.

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, which may promote economic development.

VI. Technical Deficiencies:

None.

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/CS by Judiciary on April 7, 2010:
The committee substitute expressly provides for retroactivity and that its purpose is to reenact provisions of existing law and to be remedial in nature. The committee substitute removes the language from the bill that, notwithstanding a final court decision, certain actions shall remain valid and continue to be in effect. It also reauthorizes any two-year extension authorized *and timely applied for* pursuant to ch. 2009-96, Laws of Florida.

CS by Community Affairs on March 17, 2010:
The committee substitute:

- 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.