South
Florida
Regional
Planning
Council

MEMORANDUM

AGENDA ITEM #8c)1)i

DATE: OCTOBER 5, 2009

TO: COUNCIL MEMBERS

FROM: STAFF

SUBJECT: A RESOLUTION BY THE SOUTH FLORIDA REGIONAL PLANNING COUNCIL OPPOSING ADDITIONAL WEAKENING OF FLORIDA'S GROWTH MANAGEMENT LAWS; PROVIDING AN EFFECTIVE DATE

As requested by the Council at the September 14, 2009 Board Meeting, Resolution #09-04 addresses language opposing additional weakening of Florida's Growth Management Laws and considering the detrimental consequences of future legislation that would:

- Pre-empt or limit local government's home rule power or ability to adopt ordinances or impose fees;
- Exacerbate suburban sprawl;
- Add to vehicle miles traveled and accelerate the adverse impacts of climate change;
- Add to Cities' and Counties' backlog of infrastructure needs;
- Eliminate impact fees that pay for real impacts to communities;
- Adversely affect our natural resources;
- Eliminate or alter school concurrency; or
- Create unfunded mandates.

Attached are letters from Senator Michael Bennett and Representation Dave Murzin to Secretary Pelham as well as a response regarding the Department of Community Affairs' interpretation of Senate Bill (SB) 360. A highlighted listing of Secretary Pelham notes follows:

- SB 360 removes state-mandated concurrency requirements in targeted areas designated as transportation concurrency exception areas (TCEAs);
- Local governments may continue to apply their existing, previously state-mandated transportation concurrency requirements in TCEAs;
- SB 360 does not contain language preempting the area of transportation concurrency;
- SB 360 does not prohibit local governments from adopting regulations that are stricter than state requirements; and
- Existing Comprehensive Plans were adopted by local ordinance and are within the statutory powers of local governments to adopt pursuant to Chapters 125, 163, and 166, Florida Statutes. SB 360 does not prohibit a local government from continuing to apply, as local law, the transportation concurrency provisions of its existing local Comprehensive Plan and land development regulations in TCEAs if it desires to do so.

Recommendation

Support the Resolution

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South
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RESOLUTION #09-04

A RESOLUTION BY THE SOUTH FLORIDA REGIONAL PLANNING COUNCIL OPPOSING ADDITIONAL WEAKENING OF FLORIDA'S GROWTH MANAGEMENT LAWS; PROVIDING AN EFFECTIVE DATE.

WHEREAS, the membership of the South Florida Regional Planning Council consists of elected officials from Broward, Miami-Dade, and Monroe Counties and South Florida's municipalities, and private sector representatives appointed by Governor Crist; and

WHEREAS, in March 2009, the South Florida Regional Planning Council expressed its concern and opposition to the proposed weakening of Florida's growth management laws in the form of Resolution 09-01 which addressed CS/SB 360 and other legislative proposals related to growth management; and

WHEREAS, on May 1, 2009, CS/CS/SB 360 was passed by the Florida Legislature and subsequently signed into law by Governor Crist on June 4, 2009 (Chapter 2009-96); and

WHEREAS, Chapter 2009-96 made significant changes to Florida's growth management laws including, but not limited to, the Development of Regional Impact process in urban areas such as South Florida, transportation concurrency exemption areas, and the establishment of new planning requirements; and

WHEREAS, the South Florida Regional Planning Council is concerned that additional weakening of Florida's growth management laws during the 2010 Legislative Session will significantly and adversely impact economic development and the quality of life in South Florida and our State.

NOW THEREFORE, BE IT RESOLVED BY THE BOARD OF THE SOUTH FLORIDA REGIONAL PLANNING COUNCIL THAT:

Section 1. The South Florida Regional Planning Council requests that the Florida Legislature oppose any additional weakening of Florida's growth management laws and future legislation that would:

- Pre-empt or limit local government's home rule power or ability to adopt ordinances or impose fees;
- Exacerbate suburban sprawl;
- Add to vehicle miles traveled and accelerate the adverse impacts of climate change;
- Add to Cities' and Counties' backlog of infrastructure needs;
- Eliminate impact fees that pay for real impacts to communities;
- Adversely affect our natural resources;
- Eliminate or alter school concurrency; or
- Create unfunded mandates

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Section 2. This Resolution shall take effect immediately upon adoption hereof.

APPROVED unanimously by the South Florida Regional Planning Council, this the 5th day of October, 2009.

October 5, 2009

Sandra Walters, Chair — Date
South Florida Regional Planning Council

STATE OF FLORIDA

DEPARTMENT OF COMMUNITY AFFAIRS

"Dedicated to making Florida a better place to call home"

CHARLIE CRIST
Governor

THOMAS G. PELHAM
Secretary

July 23, 2009

The Honorable Michael Bennett
Senator, District 21
3653 Cortez Road West, Suite 90
Bradenton, Florida 34210

The Honorable Dave Murzin
Representative, District 2
11 East Olive Road, Suite 1
Pensacola, Florida 32514

Dear Senator Bennett and Representative Murzin:

Thank you for your letter of June 24, 2009, regarding CS/CS/SB 360 ("SB 360") and your views regarding its interpretation. The Department appreciates your interest in the implementation of this important legislation.

As the agency charged with the implementation of SB 360, the Department has the primary responsibility to interpret this legislation. The Department takes its responsibility very seriously, and has carefully considered the language of Chapter 163, Part II, Florida Statutes, as amended by SB 360, as well as various suggested interpretations offered by other individuals and entities.

Under Florida law, the Department's interpretation of SB 360 must be based on its language. Further, the interpretation of SB 360 is governed by the court-established rules of statutory construction which require that SB 360 be construed in *para materia* with the other provisions of Chapter 163, Part II. The Department has applied these rules in formulating its interpretation which is set forth and explained in the enclosed "Notice to Local Governments of Transportation Planning Options Under SB 360 for Transportation Concurrency Exception Areas in Dense Urban Land Areas."

As you both know, the transportation concurrency exception area provisions of SB 360 were developed in the Senate. I personally attended many Senate legislative staff meetings in which the development of this legislation was discussed, and I was present at Senate committee meetings at which SB 360 was considered. At no time did I ever hear any discussion that this

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legislation was intended to preempt the area of transportation concurrency, that it would restrict the power of local governments to address transportation issues as a matter of local law, or that this legislation would effectively amend, supersede, or repeal the transportation concurrency provisions in existing local comprehensive plans. I note that when the Legislature intended in SB 360 to amend some state and local permits by extending their expiration dates, the Legislature expressly said so. Clearly, SB 360 does not contain any such language regarding local comprehensive plans nor does it contain language preempting the subject of transportation concurrency or prohibiting local governments from adopting standards stricter than state requirements.

On the contrary, SB 360 contains the following key provision:

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

Significantly, every existing local comprehensive plan was adopted by **local ordinance** pursuant to statutory authority granted by Chapters 125, 163, or 166, Florida Statutes, and is a validly enacted local law. Chapter 163, Part II, is a minimum criteria statute which allows local governments to adopt stricter local growth management standards than state-mandated requirements established in Chapter 163.

Senator Bennett, in his June 11, 2009, guest column in the *Sarasota Herald Tribune*, expressed the following view regarding SB 360:

> "The bill removes state-mandated concurrency requirements in a number of jurisdictions. However, it also specifies that 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 [home rule] provision was created to preserve a local government's right to implement and fund transportation strategies using any of the tools that it would have under its home rule powers. The bill is designed to give local governments even broader discretion on how to manage transportation issues within their jurisdictions, because it

> does not require them to fall in line with the state transportation concurrency requirements.
>
> * * *
>
> Any suggestions in the media that the bill takes away options from a local government's 'tool box' are likely an indication that the writer is not familiar with the provisions in the bill designed to facilitate local control of transportation planning."

The Department's interpretation is entirely consistent with this view of SB 360.

The Department's interpretation also avoids the problems that arise if SB 360 is interpreted as abolishing transportation concurrency as a matter of local law without the amendment of existing local comprehensive plans. Under this scenario, local development orders would be subject to legal challenge for inconsistency with the adopted local plan and there would be confusion and uncertainty among the public as to the status of local plans, particularly as to which plan provisions relating to transportation remain in effect.

Given the complexity of SB 360, it is inevitable that there will be differing interpretations of the legislation. However, I believe that the Department's interpretation is a reasonable, permissible, and workable construction of the language of Chapter 163, Part II, Florida Statutes, as amended by SB 360. The agency's interpretation recognizes that the Act removes state-mandated concurrency requirements, that local governments retain their powers to address transportation issues, including transportation concurrency, as a matter of local law, that local governments may adopt stricter standards than state-mandated requirements, and that existing local comprehensive plans are valid local laws that remain in effect until they are amended in accordance with the provisions of Chapter 163, Part II, Florida Statutes.

The Department is working with local governments to implement this important legislation in an orderly and responsible manner. For those local governments that wish to amend their comprehensive plans to abolish transportation concurrency as a local law requirement, the Department will do everything it can to assist them in achieving this objective as expeditiously as possible. In fact, the Department has received and is expediting review of Orange County comprehensive plan amendments that will designate the County's entire urban service area as a transportation concurrency exception area.

Again, thank you for your interest in the implementation of SB 360, and please do not hesitate to call if you have any questions about the agency's implementation activities.

Sincerely,

Tom Pelham

Thomas G. Pelham
Secretary

TGP/rd

Enclosure

Division of Community Planning

2009 Growth Management Legislation

Notice to Local Governments of Transportation Planning Options Under Senate Bill 360 For Transportation Concurrency Exception Areas in Dense Urban Land Areas

The Department is providing this Notice to local governments in which transportation concurrency exception areas (TCEAs) designated pursuant to Senate Bill 360 are located. This Notice advises these local governments of the planning options and requirements applicable to TCEAs under Senate Bill 360.

Dense Urban Land Areas and TCEAs

Senate Bill 360 designates TCEAs in local governments qualifying as Dense Urban Land Areas. The list of local governments qualifying as Dense Urban Land Areas is posted on the Department's website. The list contains both cities and counties. Each of the cities on the list is a TCEA pursuant to Senate Bill 360. In each of the eight counties on the list, the non-rural area of a county which has adopted into the county charter a rural area designation or areas identified in the comprehensive plan as urban service areas or urban growth boundaries on or before July 1, 2009, are TCEAs under Senate Bill 360, with two exceptions. The two exceptions are Miami-Dade County in its entirety and designated transportation concurrency districts in Broward County. (See Senate Bill 360, Section 4, Sections.163.3180(5)(b)5. and 6.).

Effective Date of TCEA Provisions of Senate Bill 360

The effective date is July 8, 2009, the day on which the Department posted on its website the list of cities and counties which qualify as Dense Urban Land Areas under Senate Bill 360.

Pursuant to Senate Bill 360, the Legislature's Office of Economic and Demographic Research determined which local governments meet the total population and density criteria necessary for designation as Dense Urban Land Areas and submitted the list to the Department on July 1, 2009.

Interpretation of the State's Growth Management Legislation

The Department of Community Affairs is the state agency responsible for the administration of the state's Growth Management Act, Chapter 163, Part II, Florida Statutes, as amended by Senate Bill 360. Therefore, under Florida law, the Department has the authority and primary responsibility to interpret these growth management statutes. Also, under Florida law, the Department's interpretation of Chapter 163, Part II, Florida Statutes, as amended by Senate Bill 360, will be given great weight by the courts and will not be overturned unless the interpretation is clearly erroneous.

The Department's interpretation must give effect to legislative intent as reflected in the **language** of Chapter 163, Part II, as a whole. It is not permissible to interpret one provision in Senate Bill 360 in isolation from the other provisions of the bill or to interpret Senate Bill 360 in isolation from the other provisions of Chapter 163, Part II. The interpretation of Senate Bill 360 must take into consideration all of the provisions of Chapter 163, Part II, as amended.

The Department's Interpretation of the TCEA-Related Provisions of Senate Bill 360

Senate Bill 360 removes state-mandated transportation concurrency requirements in targeted areas designated as TCEAs. Local governments are no longer required to comply with state-mandated transportation

requirements in TCEAs, but state-mandated transportation concurrency requirements still apply in other areas.

Local governments may continue to apply their existing, previously state-mandated transportation concurrency requirements in TCEAs, if they chose to do so. Senate Bill 360 contains no language preempting the area of transportation concurrency or prohibiting local governments from adopting regulations that are stricter than state requirements. On the contrary, Senate Bill 360 expressly provides:

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

Existing local comprehensive plans were adopted by local ordinance and are within the statutory powers of local governments to adopt pursuant to Chapters 125, 163, and 166, Florida Statutes. Thus, by virtue of the above-quoted home rule provision, Senate Bill 360 does not prohibit a local government from continuing to apply, as local law, the transportation concurrency provisions of its existing local comprehensive plan and land development regulations in TCEAs if it desires to do so.

Some have suggested that a local government must readopt its existing transportation concurrency provisions in TCEAs if it wishes to retain them. It makes no sense to require local governments to readopt existing valid local laws, and Senate Bill 360 contains no such requirement. Moreover, prohibiting local governments from applying validly adopted local ordinances would be a limitation on their home rule power, contrary to the express language of Senate Bill 360.

If a local government wishes to eliminate state-mandated transportation concurrency requirements in TCEAs, the local government must amend its existing local comprehensive plan and land development regulations to delete such requirements or to adopt alternative requirements. Until the local government amends its comprehensive plan, existing transportation concurrency requirements continue to apply in TCEAs.

This interpretation is supported by the fact that Senate Bill 360 does not alter the legal status of local comprehensive plans under Chapter 163, Part II, Florida Statutes. Chapter 163 requires local governments to adopt a local plan, requires that local land development regulations and development orders be consistent with the adopted local plan, and provides the exclusive method of amending adopted local plans. Senate Bill 360 does not change any of these requirements and does not state that the bill is intended to amend, override, repeal, or supersede in any way existing local comprehensive plans.

Potential Problems Arising From Failure to Amend Local Plans

A local government that decides not to apply its existing transportation concurrency requirements without amending the local plan to delete those requirements is likely to encounter the following problems:

1. Local development orders will be subject to challenge for inconsistency with the transportation concurrency requirements in the local plan.
2. Future local comprehensive plan amendments may be found not in compliance because of internal inconsistency with the transportation concurrency provisions in the local plan.
3. There is likely to be confusion and controversy among the general public and affected landowners and developers as to which local plan provisions relating to transportation, if any, are still being enforced by the local government.

New State-Mandated Mobility Planning Requirements for TCEAs

Senate Bill 360 imposes new local planning requirements for TCEAs designated pursuant to the bill. Within two years after a TCEA becomes effective, the local government must amend its local comprehensive plan to include "land use and transportation strategies to support and fund mobility within the exception area, including alternative modes of transportation."

Failure to comply with this mandate may result in the imposition of sanctions against the defaulting local government. Senate Bill 360 directs the Department to report a defaulting local government to the

Administration Commission (Governor and Cabinet) if the Department finds "insufficient cause" for the failure to timely adopt the new mobility strategies. The Administration Commission may impose sanctions.

Local Transportation Planning Options In TCEAs

Under Senate Bill 360, local governments in Dense Urban Land Areas have the following options regarding transportation concurrency in TCEAs:

1. Retain and continue to apply the transportation concurrency provisions in existing local comprehensive plans and land development regulations.
2. Amend the existing local comprehensive plan and local land development regulations to delete or modify transportation concurrency requirements for a TCEA or adopt alternatives to transportation concurrency.

In addition, of course, these local governments MUST amend their local comprehensive plans to include new mobility planning requirements for the TCEA within two years.

Department of Community Affairs Review Of Plan Amendments In TCEAs

After a TCEA becomes effective, the Department no longer has the authority to review plan amendments in the TCEA for compliance with state-mandated transportation concurrency requirements, including the achieve and maintain standard.

The Department will continue to review plan amendments in TCEAs for compliance with all other state-mandated planning requirements in Chapter 163, Part II, Florida Statutes, and Chapter 9J-5, Florida Administrative Code, including other transportation planning requirements and internal consistency.

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THE FLORIDA LEGISLATURE

Committee on Community Affairs

Senator Michael S. "Mike" Bennett
Chair

Economic Development & Community Affairs Policy Council

Representative Dave Murzin
Chair

June 24, 2009

Mr. Thomas Pelham, Secretary
Department of Community Affairs
2555 Shumard Oak Boulevard
Tallahassee, Florida 32399

Dear Secretary Pelham:

Governor Crist's letter of June 1, 2009, transmitting CS/CS/SB 360 with his signature to the Secretary of State correctly captured the purpose behind the Legislature's enactment of that bill: "The Community Renewal Act – was taken up as a means to stimulate Florida's economy and create jobs for our people." The Act was carefully crafted to allow for immediate economic activity in Florida's most urban areas. Unfortunately, your interpretation of certain key provisions of the Community Renewal Act provided on June 12, 2009, would thwart any immediate ease of regulatory burdens relating to transportation concurrency, thereby delaying and possibly even preventing the ability for this legislation to stimulate Florida's economy and create jobs.

As the sponsors of this legislation, this letter is provided in an effort to improve understanding of this law as it was enacted by the Florida Legislature, focusing at this time on two areas in particular: the effect of the legislatively designated transportation concurrency exception areas and the 2-year permit extension. Additionally, we encourage an ongoing, open dialog with the Department of Community Affairs (DCA), other state agencies, local governments and stakeholders as we move forward to implement the provisions of this new law.

Transportation Concurrency Exception Areas

Under the provisions of the Act, certain areas of the state are designated by state law as transportation concurrency exception areas (TCEAs). These TCEAs are identified in subparagraph 163.3180(5)(b)1, F.S. It is the expectation of the Legislature that these

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designations occur no later than July 8, 2009, and every year thereafter consistent with the list provided by the Legislative Office of Economic and Demographic Research to DCA for publication on DCA's website.

As accurately reflected in your own agency's staff analysis of the enrolled version of CS/CS/SB 360 dated May 20, 2009, this designation is automatic and does not require a comprehensive plan amendment or any other specific local action to be in effect and commence implementation. Subparagraphs 163.3180(5)(b)5 and 6, F.S., provide only two exceptions to these automatically designated TCEAs. First, TCEAs are not created for designated transportation concurrency districts within a county, such as Broward County, that has a population of at least 1.5 million, that uses its transportation concurrency system to support alternative modes of transportation and that does not levy transportation impact fees. Second, TCEAs are not created for a county, such as Miami-Dade, that has exempted more than forty percent of its urban service area from transportation concurrency for purposes of urban infill. In all other areas identified in subparagraph 163.3180(5)(b)1, F.S., transportation concurrency is no longer applicable.

Permit Extensions

The bill creates a 2-year extension for certain permits. Your June 16, 2009, statement accurately states that, except for DRI extensions pursuant to s. 380.06(19)(c), F.S., DCA does not have jurisdiction over the permits in this section. However, with respect to your previous statement of June 12 regarding other permits, the Senate's Summary of Legislation Passed provides clarity. The Act provides extension and renewal from the date of expiration for the following authorizations which expired or will expire on or after September 1, 2008 to January 1, 2012:

- Any permit issued by the Department of Environmental Protection or a water management district under ch. 373, part IV, F.S.,
- Any development order issued by the Department of Community Affairs pursuant to s. 380.06, F.S., and
- Any development order, building permit, or other land use approval issued by a local government. For development orders and land use approvals, including but not limited to certificates of concurrency and development agreements, the extension applies to phase, commencement, and buildout dates, including a buildout date extension previously granted under s. 380.016(19)(c), F.S.

Specific provisions have been made for the conversion of a permit from the construction phase to the operation phase for combined construction and operation permits. 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 notify the authorizing agency in writing by December 31, 2009, and must identify the specific authorization for which the extension will be used.

Exceptions to the extension are 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.

Again, we look forward to continuing an ongoing, open dialog with DCA, other state agencies, local governments and stakeholders as we move forward to implement the provisions of this new law.

Sincerely,

Senator Michael S. "Mike" Bennett
Chair, Senate Community Affairs

Representative Dave Murzin
Chair, House Economic Development &
Community Affairs Policy Council