

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 143 Land Development Regulations
SPONSOR(S): Barreiro
TIED BILLS: **IDEN./SIM. BILLS:** SB 162

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) <u>Local Affairs (Sub)</u>	<u>9 Y, 0 N</u>	<u>Mitchell</u>	<u>Cutchins</u>
2) <u>Local Government & Veterans' Affairs</u>	_____	_____	_____
3) <u>Judiciary</u>	_____	_____	_____
4) _____	_____	_____	_____
5) _____	_____	_____	_____

SUMMARY ANALYSIS

This bill adds a new subsection to section 163.3167, Florida Statutes, which is part of the Local Government Comprehensive Planning and Land Development Regulation Act. This new subsection relates to development orders that have been granted by a local government pursuant to its land development regulations.

Provided an approved quasi-judicial development order is not the subject of a pending appeal, this bill provides that the right to commence and complete development under the order may not be abrogated or revoked in the event that a court determines that the land development regulations, under which the development order was approved, are deficient.

The bill does not preclude or affect the timely institution of a writ of certiorari¹. It also does not affect an original proceeding filed pursuant to section 163.3215, Florida Statutes, which relates to standing to enforce local comprehensive plans through development orders.

The bill applies retroactively to any development order granted prior to the effective date of the act.

The bill does not appear to have a fiscal impact on state or local government revenues or expenditures.

¹ A writ of certiorari is issued by a court and it directs a lower court or decision-making body to deliver the record in the case for its review. See *Black's Law Dictionary* 220 (7th ed. 1999).

This document does not reflect the intent or official position of the bill sponsor or House of Representatives.

STORAGE NAME: h0143a.lgv.doc
DATE: March 3, 2004

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. DOES THE BILL:

- | | | | |
|--------------------------------------|------------------------------|-----------------------------|---|
| 1. Reduce government? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 2. Lower taxes? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 3. Expand individual freedom? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 4. Increase personal responsibility? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 5. Empower families? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |

For any principle that received a "no" above, please explain:

B. EFFECT OF PROPOSED CHANGES:

Part II of Chapter 163, Florida Statutes, contains the Local Government Comprehensive Planning and Land Development Regulation Act. Section 163.3167, Florida Statutes, sets forth the scope of this act – including setting forth the powers and responsibilities of municipalities and counties and requiring local governments to prepare and submit a comprehensive plan.

This bill adds a new subsection to section 163.3167, Florida Statutes. This new subsection relates to quasi-judicial development orders that have been granted by a local government pursuant to its land development regulations.

As provided in section 163.3164(23), Florida Statutes, land development regulations are "ordinances enacted by governing bodies for the regulation of any aspect of development and include any local government zoning, rezoning, subdivision, building construction, or sign regulations or any other regulations controlling the development of land."

A development order is defined in section 163.3164(7), Florida Statutes, as "any order granting, denying, or granting with conditions an application for a development permit." While not explicitly defined in the Florida Statutes, a "quasi-judicial development order" seems to be a development order granted by the local government as part of a quasi-judicial hearing. A quasi-judicial hearing is one in which the local government is applying a general rule of policy as is generally the case with land development regulations.²

Provided the approved quasi-judicial development order is not the subject of a pending appeal, this bill provides that the right to commence and complete development under the order may not be abrogated or revoked in the event that a court determines that the land development regulations, under which the development order was approved, are deficient.

The bill specifically does not preclude or affect the timely institution of a writ of certiorari. It also does not affect an original proceeding filed pursuant to section 163.3215, Florida Statutes, which allows an "aggrieved and adversely affected party" to challenge any decision of local government granting or denying an application for a development order "which materially alters the use or density or intensity of use on a particular piece of property, on the basis that it is not consistent with the comprehensive plan."

The bill applies retroactively to any development order granted prior to the effective date of the act.

² See *Board of County Com'rs of Brevard County v. Snyder*, 627 So.2d 469 (Fla. 1993).

Miami-Dade County v. Omnipoint Holdings Inc.

This legislation is directed at the problems created as a result of the decision in *Miami-Dade County v. Omnipoint Holdings Inc.*, 811 So. 2d 767 (Fla. 3d DCA 2002). In that decision the Third District Court of Appeal found two sections of the Miami-Dade County Code relating to zoning unconstitutional since these sections did not provide objective criteria to guide the zoning board in making a decision. As a result of this decision, Miami-Dade County "canceled most zoning hearings, saying its authority to approve new projects was in doubt."³ The decision also led to concerns as to how courts would treat projects which had approved under the invalid zoning code.

Subsequently the Florida Supreme Court reiterated the standards district courts of appeal should use for this type of "second-tier" certiorari review and held that the Third District Court of Appeal exceeded the proper scope of its review when it held the provisions of the zoning code facially unconstitutional.⁴ The Florida Supreme Court quashed, or voided, the decision of the Third District Court of Appeal and instructed it to review the case again.⁵ The Third District Court of Appeal then issued another opinion which, as directed by the Florida Supreme Court, did not address the constitutionality of the zoning code.⁶

The proponents of the bill suggest that the issues related to zoning in the Miami-Dade County Code are still unresolved and that Third District Court of Appeal may yet hold sections of it unconstitutional. They contend that this prospect has had a negative impact on land development and its associated financing in Miami-Dade County. The proponents argue that the provisions of the bill will serve to eliminate this prospect and that its provisions will only operate if there is a judicial determination that the land development regulations, or any portion thereof, are invalid because of a deficiency in the approval standards.

C. SECTION DIRECTORY:

Section 1: Amends section 163.67, Florida Statutes, adding subsection (13).

Paragraph (a) of subsection 13 provides that if a local government grants a quasi-judicial development order pursuant to its adopted land regulations, the right to commence and complete development under the order may not be abrogated or revoked by a subsequent judicial determination that the land development regulations are invalid because of a deficiency in the approval standards.

Paragraph (b) provides that the new subsection does not preclude or affect the timely institution of a common law writ of certiorari or an original proceeding pursuant to section 163.3215, Florida Statutes, which relates to standing to enforce local comprehensive plans through development orders.

Paragraph (c) makes the subsection apply retroactively to any development order granted prior to the effective date of the act.

Section 2: Provides that the bill will take effect upon becoming law.

³ Douglas Hanks III, *Suit Seeks to Restart Zoning Process*, The Miami Herald, January 22, 2003, 2003 WL 2572627; see also Douglas Hanks III, *Doubt Clouds Zoning Appeal*, The Miami Herald, June 3, 2003, 2003 WL 20218173 and 2003 WL 57347692 (describing the zoning process in Miami-Dade County as "paralyzed...as county staffers rushed to add details to the building rules").

⁴ See *Miami-Dade County v. Omnipoint Holdings, Inc.*, 863 So.2d 195 (Fla. 2003).

⁵ See *id.*

⁶ See *Miami-Dade County v. Omnipoint Holdings, Inc.*, 863 So.2d 375 (Fla. 3d DCA 2003).

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

There are no known or expected fiscal impacts on state government revenues.

2. Expenditures:

There are no known or expected fiscal impacts on state government expenditures.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

There are no known or expected fiscal impacts on local government expenditures.

2. Expenditures:

There are no known or expected fiscal impacts of local government revenues.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

There is no per se direct economic impact on the private sector, but the bill seeks to provide certainty once development orders are granted by a local government as this certainty is important for the financing of development projects.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This bill does not appear to require counties or municipalities to take action requiring the expenditure of funds, does not appear to reduce the authority that counties or municipalities have to raise revenue in the aggregate, and does not appear to reduce the percentage of state tax shared with counties or municipalities.

2. Other:

- a. This bill may have implications for the access to courts provision of the Florida Constitution.⁷
- b. There may be some due process implications related to the bill.⁸

⁷ Article I, section 21 of the Florida Constitution provides: "The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial, or delay." This bill has the potential to limit redress of injury by providing that the right to commence and complete development cannot be abrogated if there is a determination that the land development regulations which were used to grant the development order are invalid because of a deficiency in the approval standards. Also, by providing only for development orders that are "not the subject of a pending appeal," the bill may adversely impact those persons for whom the timeframe for filing an appeal has not expired since the potential remedy of abrogating the right to commence and complete development would be unavailable if there is a judicial determination that land development regulations, or any portion thereof, are invalid because of a deficiency in the approval standards.

c. The provisions of this bill may not meet the criteria for retroactive application.⁹

B. RULE-MAKING AUTHORITY:

No rule-making authority is provided by this bill.

C. DRAFTING ISSUES OR OTHER COMMENTS:

Drafting Issues

The provisions bill will only operate if there is a judicial determination that the land development regulations, or any portion thereof, are invalid because of a deficiency in the approval standards. In the event this occurs, however, there are some drafting issues raised by the bill that the sponsor may wish to address through an amendment:

- At page 1, lines 15-16, the term “quasi-judicial development order” is not defined by statute.
- At page 1, lines 17-18, when providing that "the order is not the subject of a pending appeal," requires that the appeal actually be pending and would preclude those persons for whom the time for appeal has not expired.
- At page 1, line 18, the language, “commence and complete development” may provide rights beyond those that exist by virtue of having a valid development order.
- At page 1, lines 20-21, the phrase “or any portion thereof” could be read to permit the application of this bill even if the portion declared invalid is in no way related to the provisions of the development order.
- At page 1, lines 25-26, with the specific references to Rule 9.190, Florida Rules of Appellate Procedure and section 163.3215, Florida Statutes, there is a question as to whether the bill intends to affect other remedies that may be available.
- At page 1, lines 27-29, provides broad retroactivity.

Other Comments - Doctrine of Equitable Estoppel

The doctrine of equitable estoppel precludes a local government from exercising its zoning power where a property owner (1) in good faith (2) upon some act or omission of the government (3) has made such a substantial change in position or has incurred such extensive obligations and expenses that it would be highly inequitable and unjust to destroy the right acquired.¹⁰ This doctrine could normally be raised if there was a judicial determination that the land development regulations are

⁸ Both the Fourteenth Amendment to the United States Constitution of the United States, and Article 1, section 9 of the Florida Constitution prohibit the state from depriving a person of life, liberty, or property without due process of law. As a procedural matter, a party must be provided notice and an opportunity to be heard. See *Matthews v. Eldridge*, 424 U.S. 319 (1976) and *Hadley v. Dep't of Admin.*, 411 So.2d 184 (Fla. 1982). By providing only for development orders that are “not the subject of a pending appeal,” the bill may adversely impact due process for those persons for whom the timeframe for filing an appeal has not expired since the potential remedy of abrogating the right to commence and complete development would be unavailable if there is a judicial determination that land development regulations, or any portion thereof, are invalid because of a deficiency in the approval standards. The retroactivity provision of this bill might also adversely impact due process.

⁹ In general, “a substantive statute will not operate retrospectively absent clear legislative intent to the contrary, but a procedural or remedial statute is to operate retrospectively.” See *State Farm Mut. Auto. Ins. Co. v. Laforet*, 658 So.2d 55, 61 (Fla. 1995). The Florida Supreme Court has, however, refused to apply a statute retroactively if the statute impairs vested rights, creates new obligations, or imposes new penalties.

¹⁰ See, e.g., *Hollywood Beach Hotel Co. v. City of Hollywood*, 329 So.2d 10 (Fla. 1976).

invalid because of a deficiency in the approval standards and the local government was trying to take adverse action related to a previously granted development order.

This bill, however, would make this doctrine inapplicable since the action of the local government in approving the development order under the deficient standards and the subsequent invalidation of those standards would be sufficient to preserve the development order without having good faith or having a substantial change in position or incurring extensive obligations.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES

On March 3, 2004, the Subcommittee on Local Affairs recommended the adoption of a “strike-everything” amendment to HB 143 which makes the following changes to the language of the bill:

- changes the term “quasi-judicial development order” to “development order;”
- adds a provision requiring that “the timeframe for filing an appeal has expired” for this new subsection to operate;
- changes “the right to commence and complete the development order” to provide that “the development order may not be invalidated;”
- restricts application of the new subsection to that which “is relevant to the development order” as it relates to a portion of the land development regulations being held invalid;
- clarifies that this new subsection is also not meant to affect “any other remedy at law or equity;” and
- limits the retroactivity of the bill to January 1, 2002.