HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/CS/HB 203 Growth Management
SPONSOR(S): Commerce Committee, Local, Federal & Veterans Affairs Subcommittee, McClain and others
TIED BILLS: **IDEN./SIM. BILLS:** CS/SB 410

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Local, Federal & Veterans Affairs Subcommittee	9 Y, 5 N, As CS	Rivera	Miller
2) Commerce Committee	16 Y, 6 N, As CS	Wright	Hamon
3) State Affairs Committee			

SUMMARY ANALYSIS

In order to manage growth in Florida, certain statutory procedures and requirements have been put in place for state agencies and local governments to follow and enforce.

The bill makes the following changes to growth management regulations:

- Requires a local comprehensive plan to have a property rights element which requires the local government to consider certain private property rights in its decision-making process. Local governments must adopt this element during their next plan amendment process, or by July 1, 2023.
- Provides that all municipal comprehensive plans effective after January 1, 2019, must incorporate development orders existing before the plan's effective date.
- Provides that a developer and the local government are authorized to amend or cancel a development agreement without securing the consent of other parcel owners of property, unless such amendment or cancellation directly modifies the uses or entitlements of an owner's property.
- Prohibits a municipality from annexing area within another municipality's jurisdiction without the other municipality's consent, unless an interlocal agreement to the contrary is in effect.
- Allows existing developments of regional impact agreements that are classified as essentially built out and were valid on or before April 6, 2018, to exchange land uses under certain circumstances.
- Provides that a municipality may not extend new water or sewer services into the unincorporated area of a county, without consent of the county, if the county already provides the same service, on or after July 1, 2020.
- Requires that all utility permit applications for use of the public right-of-way be processed within the timeframe that currently applies only to permit applications submitted by communications services providers.
- Requires the Department of Economic Opportunity to give preference to counties and municipalities with populations less than 200,000 when selecting applications for funding for technical assistance related to certain determinations that need to be made when developing or amending a local government's comprehensive plan.
- Allows the prevailing party in a challenge to certain local ordinances for local growth policy and land development regulation to seek attorney fees and costs.

The bill may have a minimal, negative fiscal impact on state government, and an indeterminate, negative fiscal impact on local governments.

The bill has an effective date of July 1, 2020.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Local Comprehensive Plans

Private Property Rights

The "Bert Harris Jr., Private Property Rights Protection Act" (Harris Act) entitles private property owners to relief when a specific action of a governmental entity inordinately burdens the owner's existing use, or a vested right to a specific use, of real property.[1] The Harris Act recognizes that the inordinate burden, restriction, or limitation on private property rights as applied may fall short of a taking under the State Constitution or the U.S. Constitution and establishes a separate and distinct cause of action for relief, or payment of compensation, when a new law, rule, or ordinance of the state or a political entity in the state, unfairly affects real property.[2] The Harris Act applies generally to state and local governments but not to the U.S. government, federal agencies, or state or local government entities exercising formally delegated U.S. or federal agency powers.[3]

In addition to action inordinately burdening a property right, an owner may seek relief when a state or local governmental entity imposes a condition on the proposed use of the real property that amounts to a prohibited exaction.[4] A prohibited exaction occurs when an imposed condition lacks an essential nexus to a legitimate public purpose and is not roughly proportionate to the impacts of the proposed use that the governmental entity seeks to avoid, minimize, or mitigate.[5]

The "Florida Land Use and Environmental Dispute Resolution Act" (Land Use Act) allows a landowner to request relief from a government entity's development order or enforcement action when the order or action is unreasonable or unfairly burdens the use of the owner's real property.[6] Parties in pending judicial proceedings may also use the dispute resolution process outlined in the Land Use Act if all parties agree and the court approves.[7]

State and Local Comprehensive Plans

Laws protecting private property rights are balanced against the state's need to effectively and efficiently plan, coordinate, and deliver government services amid the state's continued growth and development.[8] The State Comprehensive Plan provides long-range policy guidance for the orderly social, economic, and physical growth of the state,[9] which must be consistent with the protection of private property rights.[10] Local governments are required to adopt local comprehensive plans to manage the future growth of their communities under the Community Planning Act.[11]

Adopted in 1985, the Local Government Comprehensive Planning and Land Development Regulation Act, also known as Florida's Growth Management Act, was significantly revised in 2011, becoming the Community Planning Act.[12] The Community Planning Act governs how local governments create and adopt their local comprehensive plans. The Legislature intended for all governmental entities in the state to recognize and respect judicially acknowledged or constitutionally protected private property

[1] S. 70.001(2), F.S.
[2] S. 70.001(1), F.S.
[3] S. 70.001(3)(c), F.S.
[4] S. 70.45(2), F.S.
[5] S. 70.45(1)(c), F.S.
[6] S. 70.51(3), F.S.
[7] S. 70.51(29), F.S.
[8] *See* s. 186.002(1)(b), F.S.
[9] S. 187.101(1), F.S.
[10] S. 187.101(3), F.S. The plan's goals and policies must also be reasonably applied where they are economically and environmentally feasible and not contrary to the public interest.

[12] *See* ch. 2011-139, s. 17, L.O.F.

rights.[13] Authority under the Community Planning Act must be exercised with sensitivity for private property rights, without undue restriction, and leave property owners free from actions by others that would harm their property or constitute an inordinate burden on property rights under the Harris Act.[14]

Local Comprehensive Plan Elements

Local comprehensive plans must include principles, guidelines, standards, and strategies for the orderly and balanced future land development of the area and reflect community commitments to implement the plan.[15] Plans also are required to identify procedures for monitoring, evaluating, and appraising implementation of the plan.[16] Plans may include optional elements,[17] but must include the following nine elements:

- Capital improvements;[18]
- Future land use plan;[19]
- Intergovernmental coordination;[20]
- Conservation;[21]
- Transportation;[22]
- Sanitary sewer, solid waste, drainage, potable water, and aquifer recharge;[23]
- Recreation and open space;[24]
- Housing;[25] and
- Coastal management (for coastal local governments).[26]

Counties and municipalities may employ individual comprehensive plans or joint plans if both entities agree. Counties and municipalities may also coordinate plans in any combined manner that aligns with their common interests.[27] A county plan controls in a municipality until a municipal comprehensive plan is adopted. New municipalities must adopt a comprehensive plan within three years after the date of incorporation.[28]

Amendments to a Local Comprehensive Plan

Local governments must review and amend their comprehensive plans every seven years to reflect any changes in state requirements.[29] Within a year of any such amendments, local governments must adopt or amend local land use regulations consistent with the amended plan.[30] A local government is not required to review its comprehensive plan before its regular review period unless the law specifically requires otherwise.[31]

Generally, a local government amending its comprehensive plan must follow an expedited state review process.[32] Certain plan amendments, including amendments required to reflect a change in state requirements, must follow the state coordinated review process for the adoption of comprehensive

[13] S. 163.3161(10), F.S.
[14] S. 163.3161(10), F.S.
[15] S. 163.3177(1), F.S.
[16] S. 163.3177(1)(d), F.S.
[17] S. 163.3177(1)(a), F.S.
[18] S. 163.3177(3)(a), F.S. The capital improvements element must be reviewed by the local government on an annual basis.
[19] S. 163.3177(6)(a), F.S.
[20] S. 163.3177(6)(h), F.S.
[21] S. 163.3177(6)(d), F.S.
[22] S. 163.3177(6)(b), F.S.
[23] S. 163.3177(6)(c), F.S.
[24] S. 163.3177(6)(e), F.S.
[25] S. 163.3177(6)(f), F.S.
[26] S. 163.3177(6)(g), F.S.
[27] S. 163.3167(1), F.S.
[28] S. 163.3167(3), F.S.
[29] S. 163.3191, F.S.
[30] S. 163.3203, F.S.
[31] S. 163.3161(12), F.S.
[32] S. 163.3184(3)(a), F.S.

plans.[33] Under the state process, the state land planning agency is responsible for plan review, coordination, and preparing and transmitting comments to the local government.[34] The Department of Economic Opportunity (DEO) is designated as the state land planning agency.[35]

Under the state coordinated review process, local governments must hold a properly noticed public hearing[36] about the proposed amendment before sending it for comment from several reviewing agencies, including DEO, the Department of Environmental Protection, the appropriate regional planning council, and the Department of State.[37] Local governments or government agencies within the state filing a written request with the governing body are also entitled to copies of the amendment.[38] Comments on the amendment must be received within 30 days after DEO receives the proposed plan amendment.[39]

DEO must provide a written report within 60 days of receipt of the proposed amendment if it elects to review the amendment.[40] The report must state the agency's objections, recommendations, and comments with certain specificity, and must be based on written, not oral, comments.[41] Within 180 days of receiving the report from DEO, the local government must review the report and any written comments and hold a second properly noticed public hearing on the adoption of the amendment.[42] Adopted plan amendments must be sent to DEO and any agency or government that provided timely comments within 10 working days after the hearing.[43]

Once DEO receives the adopted amendment and determines it is complete, it has 45 days to determine if the adopted plan amendment complies with the law[44] and to issue on its website a notice of intent finding whether or not the amendment is compliant.[45] A compliance review is limited to the findings identified in DEO's original report unless the adopted amendment is substantially different from the reviewed amendment.[46] Unless the local comprehensive plan amendment is challenged, it takes effect pursuant to the notice of intent.[47] If there is a timely-filed challenge, then the plan amendment will not take effect until DEO or the Administration Commission enters a final order determining the adopted amendment is in compliance with the law.[48]

Requirements for Local Land Development Regulations and Comprehensive Plans

Section 163.3202(2), F.S., outlines the minimum provisions that counties and municipalities should include in their local government land development regulations. These provisions include:

- Regulating the subdivision of land;
- Regulating the use of land and water;
- Providing for protection of potable water wellfields;
- Regulating areas subject to seasonal and periodic flooding and provide for drainage and stormwater management;
- Ensuring the protection of environmentally sensitive lands designated in the comprehensive plan;

[33] S. 163.3184(2)(c), F.S.
[34] S. 163.3184(4)(a), F.S.
[35] S. 163.3164(44), F.S.
[36] S. 163.3184(4)(b) and (11)(b)1., F.S.
[37] S. 163.3184(4)(b) and (c), F.S.
[38] S. 163.3184(4)(b), F.S.
[39] S. 163.3184(4)(c), F.S.
[40] S. 163.3184(4)(d)1., F.S.
[41] S. 163.3184(4)(d)1., F.S. All written communication the agency received or generated regarding a proposed amendment must be identified with enough information to allow for copies of documents to be requested. S. 163.3184(4)(d)2., F.S.
[42] S. 163.3184(4)(e)1. and (11)(b)2., F.S. If the hearing is not held within 180 days of receipt of the report, the amendment is deemed withdrawn absent an agreement and notice to DEO and all affected persons that provided comments. S. 163.3184(4)(e)1., F.S.
[43] S. 163.3184(4)(e)2., F.S.
[44] S. 163.3184(4)(e)3. and 4., F.S.
[45] S. 163.3184(4)(e)4., F.S.
[46] *Id*.
[47] S. 163.3184(4)(e)5., F.S.
[48] *Id*.

- Regulating signage;
- Addressing concurrency;
- Ensuring safe and convenient onsite traffic flow; and
- Maintaining the existing density of residential properties or recreational vehicle parks.

Local comprehensive plans **adopted** after January 1, 2019, and all land development regulations adopted to implement the plan, must incorporate a development order existing before the comprehensive plan's effective date. The plan may not impair a party's ability to complete development in accordance with the development order and must vest the density[49] and intensity[50] approved by the development order without any limitations or modifications. Land development regulations must incorporate preexisting development orders.[51]

Effect of Proposed Changes

The bill requires local governments to include a property rights element in their comprehensive plans at their next proposed plan amendment or by July 1, 2023, whichever comes first. The bill provides that a local government may develop its own property rights language if such language does not conflict with the model statement of rights. The model statement of rights requires the local government to consider the following 4 elements in local decision-making:

1. Physical possession and control of the property owner's interests in the property, including easements, leases, or mineral rights;
2. Use, maintenance, development, and improvement of the property for personal use or the use of any other person, subject to state law and local ordinances;
3. Privacy and exclusion of others from the property to protect the owner's possessions and property; and
4. Disposal of the property owner's property through sale or gift.

The bill provides that all local comprehensive plans **effective** after January 1, 2019, instead of **adopted** after January 1, 2019, and all land development regulations adopted to implement the plan, must incorporate development orders existing before the plan's effective date.

Local Government Development Agreements

Background

Under the Florida Local Government Development Agreement Act,[52] local governments are authorized to enter into development agreements with developers.[53] A "development agreement" is a "contract between a local government and a property owner/developer, which provides the developer with vested rights by freezing the existing zoning regulations applicable to a property in exchange for public benefits."[54]

Any local government may, by ordinance, establish procedures and requirements, as provided in the Act, to consider and enter into a development agreement with any person having a legal or equitable interest in real property located within its jurisdiction.[55]

[49] S. 163.3164(12), F.S., defines "density" as an objective measure of the number of people or residential units allowed per unit of land, such as residents or employees per acre.
[50] S. 163.3164(22), F.S., defines "intensity" as an objective measurement of the extent to which land may be developed or used, including the consumption or use of the space above, on, or below the ground; the measurement of the use of or demand on natural resources; and the measurement of the use of or demand on facilities and services.
[51] Ss. 163.3167(3) and 163.3203, F.S.
[52] Ss. 163.3220- 163.3243, F.S.
[53] S. 163.3220(4), F.S.
[54] *Morgran Co., Inc. v. Orange County*, 818 So. 2d 640 (Fla. 5th DCA 2002); 7 Fla. Jur 2d Building, Zoning, and Land Controls § 168 (2019).
[55] S. 163.3223, F.S; 7 Fla. Jur 2d Building, Zoning, and Land Controls § 168 (2019).

A development agreement must include the following:[56]

- a legal description of the land subject to the agreement, and the names of its legal and equitable owners;
- the duration of the agreement;
- the development uses permitted on the land, including population densities, and building intensities and height;
- a description of public facilities that will service the development, including who shall provide such facilities; the date any new facilities, if needed, will be constructed; and a schedule to assure public facilities are available concurrent with the impacts of the development;
- a description of any reservation or dedication of land for public purposes;
- a description of all local development permits approved or needed to be approved for the development of the land;
- a finding that the development permitted or proposed is consistent with the local government's comprehensive plan and land development regulations;
- a description of any conditions, terms, restrictions, or other requirements determined to be necessary by the local government for the public health, safety, or welfare of its citizens; and
- a statement indicating that the failure of the agreement to address a particular permit, condition, term, or restriction shall not relieve the developer of the necessity of complying with the law governing said permitting requirements, conditions, term, or restriction.

A development agreement may also provide that the entire development or any phase thereof be commenced or completed within a specific period of time.[57] Within 14 days after a local government enters into a development agreement, the local government must record the agreement with the clerk of the circuit court in the county where the local government is located. A development agreement will not be effective until it is properly recorded in the public records of the county.[58]

The requirements and benefits contained in a development agreement are binding upon and vest or continue with any person who later obtains ownership from one of the original parties to the agreement.[59] This person is also known as a successor in interest.[60]

A development agreement may be amended or canceled by mutual consent of the parties to the agreement or by their successors in interest.[61]

Effect of Proposed Changes

The bill provides that a party or its designated successor in interest to a development agreement and the local government are authorized to amend or cancel a development agreement without securing the consent of other parcel owners of property that were originally subject to the development agreement unless the amendment, modification or termination directly modifies the allowable uses or entitlements of an owner's property.

Municipal Annexation

Background

Section 2(c), Art. VIII of the Florida Constitution provides that municipal annexation of unincorporated territory, merger of municipalities, and exercise of extra-territorial powers by municipalities must be as provided by general or special law. This provision authorizes the Legislature to annex unincorporated property into a municipality by special act. It also authorizes the Legislature to establish procedures in general law for the annexation of property.

[56] S. 163.3227(1), F.S.
[57] S. 163.3227(2), F.S; 7 Fla. Jur 2d Building, Zoning, and Land Controls § 168 (2019).
[58] S. 163.3239, F.S; 7 Fla. Jur 2d Building, Zoning, and Land Controls § 168 (2019).
[59] S. 163.3239, F.S.
[60] A successor in interest is one who follows another in ownership or control of property. A successor in interest retains the same rights as the original owner, with no change in substance. Black's Law Dictionary 1473 (8th ed. 2004).
[61] S. 163.3237, F.S.

The Legislature established local annexation procedures by general law in 1974, with the enactment of ch. 171, F.S., the "Municipal Annexation or Contraction Act."[62] This act describes the way in which property may be annexed or de-annexed by cities without legislative action. The purpose of the act is to set forth procedures for adjusting the boundaries of municipalities through annexations or contractions of corporate limits, and criteria for determining when annexations or contractions may take place so as to:

- ensure sound urban development and accommodation to growth;
- establish uniform legislative standards for the adjustment of municipal boundaries;
- ensure efficient provision of urban services to areas that become urban in character; and
- ensure areas are not annexed unless municipal services can be provided to those areas.[63]

Pursuant to s. 171.042, F.S., before local annexation procedures may begin, the governing body of the municipality must prepare a report containing plans for providing urban services to any area to be annexed. A copy of the report must be filed with the board of county commissioners where the municipality is located. This report must include appropriate maps, plans for extending municipal services, timetables, and financing methodologies. It must certify that the area proposed to be annexed is appropriate for annexation because it meets the following standards and requirements described by s. 171.043, F.S.:

- The area to be annexed must be an unincorporated area that is contiguous to the boundary of the annexing municipality.[64]
- The area to be annexed must be reasonably compact.[65]
- No part of the area to be annexed may fall within the boundary of another incorporated municipality.
- Part or all of the land to be annexed must be developed for urban purposes.[66]
- Alternatively, if the proposed area is not developed for urban purposes, it can either border at least 60 percent of a developed area, or provide a necessary bridge between two urban areas for the extension of municipal services.

The Interlocal Service Boundary Agreement Act (Interlocal Boundary Act)[67] authorizes an alternative to these statutory procedures. Intended to encourage intergovernmental coordination in planning, delivery of services, and boundary adjustments, the primary purpose of the Interlocal Boundary Act is to promote establishing boundaries that reduce the costs of local governments, prevent duplication of services, increase local government transparency and accountability, and reduce intergovernmental conflicts.[68]

An interlocal agreement may provide an annexation procedure with a flexible process for securing the consent of those within the area to be annexed, while continuing the requirement for approval of the proposed annexation by a majority of the registered voters, the land owners, or both, within the proposed annexation area. The alternate process also must provide for certain disclosures pertaining to a privately owned solid waste disposal facility included within the proposed annexation area, including whether the owner of the facility objects to the proposed annexation.[69]

---

[62] Ch. 74-190, s. 1, Laws of Fla.
[63] S. 171.021, F.S.
[64] This means that a substantial part of the boundary of the area to be annexed has a common boundary with the municipality. There are specified exceptions for cases in which an area is separated from the city's boundary by a publicly owned county park, right-of-way or body of water.
[65] S. 171.031(12), F.S., defines "compactness" as concentration of a piece of property in a single area and precludes any action which would create enclaves, pockets, or finger areas in serpentine patterns. Any annexation proceeding in any county in the state is required to be designed in such a manner as to ensure that the area will be reasonably compact.
[66] An area developed for urban purposes is defined as an area which meets any one of the following standards: (a) a total resident population equal to at least two persons per acre; (b) a total resident population equal to at least one person per acre, with at least 60 percent of subdivided lots one acre or less; or (c) at least 60 percent of the total lots used for urban purposes, with at least 60 percent of the total urban residential acreage divided into lots of five acres or less.
[67] Ch. 171, Part II, F.S. *See* s. 171.20, F.S.
[68] S. 171.201, F.S.
[69] S. 171.205, F.S.

Effect of Proposed Changes

The bill amends s. 171.042, F.S., prohibiting a municipality from annexing an area within another municipality's jurisdiction without the other municipality's consent.

The bill provides an exception to these annexation requirements when an interlocal agreement is in effect for property annexed by a municipality.

Developments of Regional Impact

Background

Developments of Regional Impact (DRIs) are defined as "any development which, because of its character, magnitude, or location, would have a substantial effect on the health, safety, or welfare of citizens of more than one county."[70]

The DRI program was initially created in 1972 as an interim program intended to be replaced by comprehensive planning and permitting programs.[71] The program provided a process to identify regional impacts stemming from large developments and appropriate provisions to mitigate impacts on state and regional resources.

In 2015,[72] the Legislature amended the laws related to DRI's to provide that new DRI-sized developments proposed after July 1, 2015, must be approved by a comprehensive plan amendment in lieu of the state review process provided for in s. 380.06, F.S. The Legislature also amended the laws related to comprehensive plans to require that plan amendments be reviewed under the state coordinated review process.[73] Additional changes were made in 2016 requiring DRI reviews to follow the state coordinated review process if the development, or an amendment to the development, required an amendment to the comprehensive plan.[74]

However, state and regional reviews of existing DRIs were eliminated in 2018.[75] The responsibility for implementation of, and amendments to, existing DRI agreements and development orders was transferred to the local governments where the developments are located.[76]

Currently, an amendment to a development order for an approved DRI may not amend to an earlier date until the local government agrees that the approved DRI will not be subject to downzoning, unit density reduction, or intensity reduction, unless:[77]

- the local government can demonstrate that substantial changes in the conditions underlying the approval of the development order have occurred,
- the development order was based on substantially inaccurate information provided by the developer, or
- the change is clearly established by local government to be essential to the public health, safety, or welfare.

Any proposed change to a previously approved DRI must be reviewed by the local government based on the standards and procedures in its adopted local comprehensive plan and adopted local land development regulations, including, but not limited to, procedures for notice to the applicant and the public regarding the issuance of development orders.[78]

[70] s. 380.06(1), F.S.
[71] The Florida Senate, Committee on Community Affairs, Interim Report 2012-114, September 2011, citing: Thomas G. Pelham, *A Historical Perspective for Evaluating Florida's Evolving Growth Management Process*, in Growth Management in Florida: Planning for Paradise, 8 (Timothy S. Chapin, Charles E. Connerly, and Harrison T. Higgins eds. 2005).
[72] Ch. 2015-30, Laws of Fla.
[73] s. 163.3184(2)(c), F.S.
[74] Ch. 2016-148, Laws of Fla.
[75] Ch. 2018-158, Laws of Fla.
[76] S. 380.06(4)(a), (7), F.S.
[77] S. 380.06(4)(a), F.S.
[78] S. 380.06(7)(a), F.S.

However, a change to a DRI that has the effect of reducing the originally approved height, density, or intensity of the development must be reviewed by the local government based on the standards in the local comprehensive plan at the time the development was originally approved. If the proposed change would have been consistent with the comprehensive plan in effect when the development was originally approved, the local government may approve the change.[79]

DRI agreements that were classified as essentially built out and valid on or before April 6, 2018, were preserved, but the provisions that allowed such agreements to be amended to exchange approved land uses was eliminated.[80]

For such agreements, a DRI is essentially built out if:[81]

- all the mitigation requirements in the development order were satisfied, all developers were in compliance with all applicable terms and conditions of the development order except the buildout date, and the amount of proposed development that remained to be built was less than 40 percent of any applicable development-of-regional-impact threshold; or
- the project was determined to be an essentially built-out development of regional impact through an agreement executed by the developer, the state land planning agency, and the local government.

Effect of Proposed Changes

The bill allows any DRI agreement previously classified as or officially determined to be essentially built out, and entered into on or before April 6, 2018, to be amended to authorize the developer to exchange approved land uses.

Such amendments may only be made subject to the developer demonstrating that the exchange will not increase impacts to public facilities.

Any such amendments must be made pursuant to the processes adopted by the local government for amending development orders.

Technical Assistance Funding

Background

Section 163.3168(3), F.S., requires the Department of Economic Opportunity (DEO), as the state land planning agency, to help communities find creative solutions to fostering vibrant, healthy communities and authorizes DEO to use various means to provide direct and indirect technical assistance within available resources. To carry out this charge, DEO's Bureau of Community Planning and Growth manages the Community Planning Technical Assistance Grant Program.

Under the program, DEO awards grant funds to counties, cities, and regional planning councils to assist local governments in developing economic development strategies, meeting the requirements of the Community Planning Act, addressing critical local planning issues, and promoting innovative planning solutions to challenges identified by local government applicants.[82] The program has funded a wide range of activities which have included, for example, the development and revision of comprehensive plan amendments, economic development strategic plans, affordable housing action plans, downtown master plans, transportation master plans, and revitalization plans.

[79] *Id*.
[80] Ch. 2018-158, Laws of Fla.
[81] S. 380.06(15)(g)3., 4., F.S. (2017).
[82] DEO, Division of Community Planning, *Technical Assistance*, *available at:* http://www.floridajobs.org/community-planning-and-development/programs/community-planning-table-of-contents/technical-assistance (last visited Feb. 8, 2020).

Beginning in fiscal year 2011-2012, the Legislature has annually appropriated state funds to DEO to implement the program. From fiscal years 2015-2016 to 2019-2020, DEO has expended almost $6 million on 174 approved grant projects.[83]

M-CORES Program

Enacted during the 2019 Regular Session,[84] the Multi-use Corridors of Regional Economic Significance (M-CORES) Program is designed to advance the construction of regional corridors that will accommodate multiple modes of transportation and multiple types of infrastructure.[85] The specific purpose of the program is to revitalize rural communities, encourage job creation in those communities, and provide regional connectivity while leveraging technology, enhancing the quality of life and public safety, and protecting the environment and natural resources.[86]

Section 338.2278(1)(a)-(k), F.S., enumerates the intended benefits which the M-CORES Program seeks to address, which include, but are not limited to:

- hurricane evacuation;
- congestion mitigation;
- trade and logistics;
- broadband, water, and sewer connectivity;
- energy distribution;
- autonomous, connected, shared, and electric vehicle technology;
- other transportation modes, such as shared-use nonmotorized trails, freight and passenger rail, and public transit;
- mobility as a service;
- availability of a trained workforce skilled in traditional and emerging technologies;
- protection or enhancement of wildlife corridors or environmentally sensitive areas;
- and protection or enhancement of primary springs protection zones and farmland preservation areas.

The following three corridors comprise the M-CORES Program:

- Southwest-Central Florida Connector (Collier County to Polk County);
- Suncoast Connector (Citrus County to Jefferson County); and
- Northern Turnpike Connector (the northern terminus of the Florida Turnpike northwest to the Suncoast Parkway).[87]

As required by law, the Florida Department of Transportation (FDOT) has assembled three task forces to study the three specific multi-use corridors.[88] The task forces will make recommendations to FDOT regarding the potential economic and environmental impacts of the corridor and other factors as specified in the M-CORES legislation. Task Forces are required to report their evaluations in a final report submitted to the Governor, the President of the Senate, and the Speaker of the House of Representatives by October 1, 2020.[89] The law requires, to the maximum extent feasible, project construction to begin no later than December 31, 2022, with projects open to traffic no later than December 31, 2030.[90]

Effect of Proposed Changes

[83] Information received from DEO staff on Jan. 23, 2020 (on file with Senate Committee on Judiciary).
[84] Ch. 2019-43, Laws of Fla.
[85] For additional detailed information about M-CORES, see the FDOT M-CORES website, https://floridamcores.com/ (last visited Jan. 28, 2020).
[86] S. 338.2278(1), F.S.
[87] S. 338.2278(2)(a)-(c), F.S.
[88] S. 338.2278(3)(c)1., F.S.
[89] S. 338.2278(3)(c)9., F.S.
[90] S. 338.2278(6), F.S.

The bill requires DEO, when selecting applications for Community Planning Technical Assistance Grants, to give preference to counties with a population of 200,000 or less, and municipalities within such counties, for assistance in:

- Determining whether an area in and around a proposed multiuse corridor interchange contains appropriate land uses and natural resource protection; and
- Developing or amending a local government's comprehensive plan to provide for the land uses, natural resource protection, and intended benefits associated with a proposed multiuse corridor interchange.

Municipal Water and Wastewater Service in Unincorporated Areas

Background

Municipalities are authorized by general law to provide water and sewer utility services.[91] With respect to public works projects, including water and sewer utility services,[92] municipalities may extend and execute their corporate powers outside of their corporate limits as "desirable or necessary for the promotion of the public health, safety and welfare."[93] A municipality may not extend or apply these corporate powers within the corporate limits of another municipality.[94] However, it may permit any other municipality and the owners of lands outside its corporate limits or within the limits of another municipality to connect with its water and sewer utility facilities and use its services upon agreed terms and conditions.[95]

Effect of Proposed Changes

The bill provides that a municipality may not extend new water or sewer service into the unincorporated area of a county, without the express consent of a majority of the county commissioners given at a duly noticed meeting of the commission, if the county already provides the same service within the county. However, the bill provides that a municipality does not need to obtain consent to continue to provide water or sewer service within an unincorporated area in which it provided service prior to July 1, 2020.

Permitting for Use of Public Rights-of-Way by Utilities

Background

Pursuant to s. 337.401, F.S., the Department of Transportation (DOT) and each local government that has jurisdiction and control of public roads or publicly owned rail corridors is authorized to prescribe and enforce reasonable rules or regulations with regard to the placement and maintenance of utility facilities across, on, or within the right-of-way (ROW) limits of any road or publicly owned rail corridors under its jurisdiction. Each of these types of entities is individually referred to as the "authority" when acting in this capacity. Each authority may authorize any person who is a resident of this state, or any corporation which is organized under the laws of this state or licensed to do business within this state, to use a public ROW for a utility[96] in accordance with the authority's rules or regulations. A utility may not be installed, located, or relocated within a public ROW unless authorized by a written permit.

[91] Pursuant to s. 180.06, F.S., a municipality may "provide water and alternative water supplies;" "provide for the collection and disposal of sewage, including wastewater reuse, and other liquid wastes;" and "construct reservoirs, sewerage systems, trunk sewers, intercepting sewers, pumping stations, wells, siphons, intakes, pipelines, distribution systems, purification works, collection systems, treatment and disposal works" to accomplish these purposes.
[92] Other public works projects authorized under s. 180.06, F.S., include alternative water supplies, maintenance of water flow and bodies of water for sanitary purposes, garbage collection and disposal, airports, hospitals, jails, golf courses, gas plants and distribution systems, and related facilities.
[93] S. 180.02(2), F.S.
[94] *Id.*
[95] S. 180.19, F.S.
[96] S. 337.401(1)(a), F.S., refers to "any electric transmission, telephone, telegraph, or other communications services lines; pole lines; poles; railways; ditches; sewers; water, heat, or gas mains; pipelines; fences; gasoline tanks and pumps; or other structures referred to in this section and in ss. 337.402, 337.403, and 337.404" as a "utility."

In 2017, the Legislature established an expedited permitting process for small wireless facilities[97] (SWF) that a wireless provider[98] seeks to place in the public ROW.[99] Under this process, a completed permit application for a SWF is deemed approved if the authority fails to approve or deny the application within 60 days of receipt. This review period may be extended by mutual agreement. If an application is denied, the applicant may cure the deficiencies and submit a revised application within 30 days after denial. The revised application is deemed approved if the authority does not approve or deny it within 30 days of receipt. If the authority provides for administrative review of its denial of an application, the authority must complete its review and issue a written decision within 45 days of a written request for review.

In 2019, the Legislature expanded the application of this expedited permitting process to include all communications facilities that a provider of communications services[100] seeks to place in the public ROW.[101] No timeframes are specified in current law for processing permit applications to use the public ROW for any other type of utility.

Effect of Proposed Changes

The bill provides that all permit applications to use the public ROW for any type of utility[102] must be processed within the expedited timeframe that currently applies only to permit applications submitted for communications facilities. Thus, the bill expands application of the expedited permitting process to include public ROW permits for, among other things, electric, natural gas, water, and sewer facilities.

Attorney Fees and Costs for Claims Related to Growth Policy Ordinances

Preemption

The Florida Constitution grants local governments broad home rule authority. Non-charter county governments may exercise those powers of self-government that are provided by general or special law.[103] Counties operating under a county charter have all powers of self-government not inconsistent with general law or special law approved by the vote of the electors.[104] Municipalities have governmental, corporate, and proprietary powers that enable them to conduct municipal government, perform municipal functions and provide services, and exercise any power for municipal purposes

[97] "Small wireless facility," s. 337.401(7)(b)10., F.S., means a wireless facility that meets the following qualifications:
- Each antenna associated with the facility is located inside an enclosure of no more than 6 cubic feet in volume or, in the case of antennas that have exposed elements, each antenna and all of its exposed elements could fit within an enclosure of no more than 6 cubic feet in volume; and
- All other wireless equipment associated with the facility is cumulatively no more than 28 cubic feet in volume. The following types of associated ancillary equipment are not included in the calculation of equipment volume: electric meters, concealment elements, telecommunications demarcation boxes, ground-based enclosures, grounding equipment, power transfer switches, cutoff switches, vertical cable runs for the connection of power and other services, and utility poles or other support structures. S. 337.401(7)(b)10., F.S.

[98] "Wireless provider" means wireless infrastructure provider or a wireless services provider. S. 337.401(7)(b)14., F.S.
[99] Ch. 2017-136, L.O.F., codified in pertinent part at s. 337.401(7)(d)7.-9., F.S.
[100] "Communications services" means "the transmission, conveyance, or routing of voice, data, audio, video, or any other information or signals, including video services, to a point, or between or among points, by or through any electronic, radio, satellite, cable, optical, microwave, or other medium or method now in existence or hereafter devised, regardless of the protocol used for such transmission or conveyance. The term includes such transmission, conveyance, or routing in which computer processing applications are used to act on the form, code, or protocol of the content for purposes of transmission, conveyance, or routing without regard to whether such service is referred to as voice-over-Internet-protocol services or is classified by the Federal Communications Commission as enhanced or value-added." The term does not include: information services; installation or maintenance of wiring or equipment on a customer's premises; the sale or rental of tangible personal property; the sale of advertising, including, but not limited to, directory advertising; bad check charges; late payment charges; billing and collection services; or Internet access service, electronic mail service, electronic bulletin board service, or similar online computer services. Ss. 337.401(5) and 202.11(1), F.S.
[101] Ch. 2019-131, L.O.F.
[102] *Supra* note 96.
[103] Art. VIII, s. 1(f), Fla. Const.
[104] Art. VIII, s. 1(g), Fla. Const.

except when expressly prohibited by law.[105] A local government enactment may be considered inconsistent with state law if:

- The State Constitution preempts a subject area;
- The Legislature preempts a subject area; or
- It conflicts with a state statute.

Florida law recognizes two types of preemption: express and implied. Express preemption requires a specific legislative statement; it cannot be implied or inferred.[106] To expressly preempt a subject area, the Legislature must use clear statutory language stating that intent.[107] Implied preemption occurs when the Legislature has demonstrated an intent to preempt an area, though not expressly. Florida courts find implied preemption when "the legislative scheme is so pervasive as to evidence an intent to preempt the particular area, and where strong public policy reasons exist for finding such an area to be preempted by the Legislature."[108]

Where state preemption applies, a local government may not exercise authority in that area.[109] Whether a local government ordinance or other measure violates preemption is ultimately decided by a court. If a local government improperly enacts an ordinance or other measure on a matter preempted to the state, a person may challenge the ordinance by filing a lawsuit. If the court rules against the government, it can declare the preempted ordinance void.[110]

Attorney Fees and Costs, Generally

In Florida, a party generally may recover attorney fees only if authorized by statute or agreement of the parties. This is known as the "American Rule."[111]

Florida law requires a party or attorney who brings an unsupported claim or defense to pay attorney fees, or sanctions, to the other party.[112] A party may move for sanctions and, under certain circumstances, a court may impose sanctions on its own. Sanctions are appropriate where a party or attorney:

- Brought a claim or defense unsupported by the material facts necessary to establish the claim or defense;
- Brought a claim or defense unsupported by the application of then-existing law to the material facts; or
- Took an action primarily for the purpose of unreasonable delay.[113]

Sanctions cannot be imposed:

- Where a party reasonably presented a claim or defense as a good faith argument for the extension, modification, or reversal of existing law;
- Against the culpable party's attorney, if the attorney acted in good faith based on his or her client's representations as to material fact; or
- Against a represented party whose attorney raised an unsupported legal claim or defense.[114]

[105] Art. VIII, s. 2(b), *See also* s. 166.021(1), F.S.
[106] *See City of Hollywood v. Mulligan*, 934 So. 2d 1238, 1243 (Fla. 2006); *Phantom of Clearwater, Inc. v. Pinellas County*, 894 So. 2d 1011, 1018 (Fla. 2d DCA 2005).
[107] *Mulligan*, 934 So. 2d at 1243.
[108] *Tallahassee Mem. Reg. Med. Ctr., Inc. v. Tallahassee Med. Ctr., Inc.*, 681 So. 2d 826, 831 (Fla. 1st DCA 1996).
[109] Judge James R. Wolf and Sarah Harley Bolinder, The Effectiveness of Home Rule: A Preemptions and Conflict Analysis, 83 Fla. B.J. 92 (June 2009).
[110] *See, e.g., Nat'l Rifle Ass'n of Am., Inc. v. City of S. Miami,* 812 So.2d 504 (Fla. 3d DCA 2002).
[111] *Dade County v. Peña*, 664 So. 2d 959, 960 (Fla. 1995); *Reiterer v. Monteil*, 98 So. 3d 586, 587 (Fla. 2d DCA 2012).
[112] S. 57.105, F.S.
[113] *Id.*
[114] S. 57.105(3), F.S.

A party may appeal a court's ruling on sanctions, and the appellate court must review the award or denial of sanctions under the abuse of discretion standard, meaning the appellate court must uphold the lower court's decision unless it was "arbitrary, fanciful, or unreasonable."[115]

Under Florida law, the prevailing party in any civil action is entitled to an award of their costs.[116] Costs that may be awarded in the judgment include those for which account is kept by the clerk of the court[117] and other specified expenses such as amounts for posting and maintaining bonds, court reporter fees, taxes on legal services, if applicable, and expert witness fees under certain conditions.[118]

Attorney Fees and Costs in Actions Related to Certain Local Government Ordinances

Section 57.112, F.S., entitles a prevailing party to attorney fees and costs in an action challenging a local government ordinance when such ordinance is found to be expressly preempted by the Florida Constitution or Florida law.

“Attorney fees and costs" include those reasonable and necessary attorney fees and costs incurred for all:

- Preparations;
- Motions;
- Hearings;
- Trials; and
- Appeals.

An award of attorney fees and costs against a local government is prohibited if the local government:

- Receives written notice that an ordinance or proposed ordinance is expressly preempted; and
- Within 30 days of receiving the notice, withdraws a proposed ordinance; or, in the case of an adopted ordinance, notices an intent to repeal the ordinance within 30 days of receiving the notice and repeals the ordinance within 30 days thereafter.

Attorney fees and costs may not be awarded for challenges to ordinances relating to:

- part II of ch. 163, F.S., for local growth policy and land development regulations;
- s. 553.73, F.S., for the Florida Building Code; or
- s. 633.202, F.S., for the Florida Fire Prevention Code.

This remedy is supplemental to other available sanctions or remedies. This attorney fees and costs provision applies only to cases commenced on or after July 1, 2019.[119]

Effect of Proposed Changes

The bill removes the prohibition on the application of s. 57.112, F.S., on actions relating to part II of ch. 163, F.S., for local growth policy and land development regulations.

The bill allows a prevailing party in an action challenging an ordinance related to local growth policy and land development regulations which is determined or found to be expressly preempted by the Florida Constitution or Florida law to collect attorney fees and costs, in accordance with the requirements set forth in s. 57.112, F.S.

The bill provides an effective date of July 1, 2020.

B. SECTION DIRECTORY:

[115] *MC Liberty Express, Inc. v. All Points Servs., Inc.*, 252 So. 3d 397 (3d DCA 2018) (quoting *Canakaris v. Canakaris*, 382 So. 2d 1197, 1203 (Fla. 1980)); *Ferere v. Shure*, 65 So. 3d 1141 (Fla. 4th DCA 2011).
[116] S. 57.041, F.S.
[117] S. 57.021, F.S.
[118] S. 57.071, F.S.
[119] 2019-151, Laws of Fla.

Section 1. Amends s. 57.112, F.S., relating to attorney fees and costs for prevailing parties in certain growth policy ordinance actions.

Section 2. Amends s. 163.3167, F.S., requiring comprehensive plans initially effective after a certain date to incorporate development orders preexisting the plan.

Section 3. Amends s. 163.3168, F.S., relating to technical assistance funding for certain small counties and municipalities.

Section 4. Amends s. 163.3177, F.S., requiring a comprehensive plan to include a private property rights element.

Section 5. Amends s. 163.3237, F.S., relating to development agreement amendments and cancelations.

Section 6. Amends s. 172.042, F.S., relating to municipal annexation procedures.

Section 7. Amends s. 180.02, F.S., relating to municipal extension of water and sewer service.

Section 8. Amends s. 337.401, F.S., relating to local processing time limits for utility permits in a right-of-way.

Section 9. Amends s. 380.06, F.S., allowing certain agreements relating to an approved development of regional impact to be amended under certain circumstances.

Section 10. Provides an effective date of July 1, 2020.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   None.

2. Expenditures:

   The bill provides that all permit applications to use the public ROW for a utility must be processed within the expedited timeframe that currently applies only to permit applications submitted for communications facilities. Permitting authorities, including DOT, may need to expend additional resources to satisfy this requirement.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None.

2. Expenditures:

   The bill may have an insignificant fiscal impact on local governments not scheduled to review their plans before 2024 due to the requirement to amend their comprehensive plans by July 1, 2023, to include a property rights element; and for counties and municipalities to amend their comprehensive plans to include development orders existing before the comprehensive plan's effective date if it does not already do so.

   The bill provides that all permit applications to use the public ROW for a utility must be processed within the expedited timeframe that currently applies only to permit applications submitted for

communications facilities. Permitting authorities, including local governments, may need to expend additional resources to satisfy this requirement.

The bill allows attorney fees and costs to be collected by a prevailing party in certain challenges to growth policy ordinances. This may cause local governments to be liable for attorney fees and costs in such cases where they are not the prevailing party.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The county/municipality mandates provision of Art. VII, s. 18 of the Florida Constitution may apply because this bill requires counties and municipalities that are not scheduled to amend their comprehensive plans before 2024 to amend their plans by July 1, 2023 to include the statement on property rights; and for counties and municipalities to amend their comprehensive plans to include development orders existing before the comprehensive plan's effective date if it does not already do so. However, an exemption may apply given that laws having an insignificant fiscal impact are exempt from the requirements of Art. VII, s. 18 of the Florida Constitution.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

The bill neither provides authority for nor requires rulemaking by executive branch agencies.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On February 13, 2020, the Commerce Committee considered a proposed committee substitute, adopted 4 amendments, and reported the bill favorably as a committee substitute.

The following provisions were added to the bill:

- All municipal comprehensive plans **effective** after January 1, 2019, must incorporate development orders existing before the plan's effective date.
- A developer and the local government are authorized to amend or cancel a development agreement without securing the consent of other parcel owners of property, unless such amendment or cancellation directly modifies the uses or entitlements of an owner's property.
- A municipality is prohibited from annexing area within another municipality's jurisdiction without the other municipality's consent, unless an interlocal agreement to the contrary is in effect.
- Existing developments of regional impact agreements that are classified as essentially built out and were valid on or before April 6, 2018, may have their land uses exchanged under certain circumstances.
- The Department of Economic Opportunity is required to give preference to counties and municipalities with populations less than 200,000 when selecting applications for funding for technical assistance

related to certain determinations that need to be made when developing or amending a local government's comprehensive plan.
- A municipality may not extend its water or sewer service into the unincorporated area of a county, without consent of the county, if the county already provides the same service within the county, on or after July 1, 2020.
- All utility permit applications for use of the public right-of-way must be processed within the timeframe that currently applies only to permit applications submitted by communications services providers.
- The prevailing party in a claim brought under part II of ch. 163, F.S., relating to local growth policy and land development regulation, may seek attorney fees and costs.

Additionally, a provision regarding the consideration of a right to quiet enjoyment related to local comprehensive plans was removed from the bill.

This analysis is drafted to the committee substitute as passed by the Commerce Committee.