

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 859 Expiration of Permits and Agreements During Natural Emergencies

SPONSOR(S): Grant

TIED BILLS: **IDEN./SIM. BILLS:** SB 912

| REFERENCE | ACTION | ANALYST | STAFF DIRECTOR or BUDGET/POLICY CHIEF |
|---|-----------|----------|--|
| 1) Pandemics & Public Emergencies Committee | 16 Y, 0 N | Nations | Dearden |
| 2) Commerce Committee | 22 Y, 0 N | Brackett | Hamon |
| 3) State Affairs Committee | | | |

SUMMARY ANALYSIS

The State Emergency Management Act endows the Governor with authority to declare a state of emergency. It also provides that once the Governor issues a state of emergency for a natural emergency the time-periods for a party to exercise rights under certain permits and other authorized agreements are suspended and extended (tolled) for the duration of the state of emergency, plus an additional six months. These provisions currently apply to:

- Development orders issued by local governments;
- Building permits;
- Permits relating to projects affecting surface water resources that are issued by the Department of Environmental Protection (DEP) or a water management district pursuant to part IV of chapter 373, F.S.; and
- Buildout dates for developments of regional impact, including any extension of a buildout date that was previously granted.

HB 859 provides that the time-periods for certain additional permits and authorizations may also be suspended and extended during a state of emergency for a natural emergency, including:

- Consumptive use water permits issued by DEP or a water management district under Part II of ch. 373, F.S.; and
- Development agreements and development permits entered into or issued by a local government or other governmental entity.
 - These include development agreements and development permits issued or entered into pursuant to the Florida Local Government Development Agreement Act.

The bill applies retroactively to emergency declarations issued by the Governor for natural emergencies on or after March 1, 2020.

The bill does not appear to have a fiscal impact on state or local governments.

The bill provides that it is effective upon becoming a law and applies retroactively.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

State Emergency Management Act

The State Emergency Management Act (Act)¹ establishes the framework for how Florida prepares, responds, and recovers from emergencies and disasters. It confers upon the Governor, the Division of Emergency Management (Division), and the governing body of each county and municipality certain emergency powers in the event of emergencies and disasters resulting from natural, technological, or manmade causes to ensure preparations of the state will be adequate to deal with, reduce vulnerability to, and recover from such emergencies and disasters; to provide for the common defense and to protect the public peace, health, and safety; and to preserve the lives and property of the people of the state.²

The Governor, the Division, and counties and municipalities have specific emergency powers and authority granted to them in the event of an emergency. The individual powers are broad, but also include specific parameters in which they may be executed.

The Act vests the authority to declare a state of emergency in the Governor.³ The Act authorizes the Governor to assume or delegate direct operational control over all or any part of emergency management functions in the event of an emergency. This authority includes issuing executive orders, proclamations, and rules that have the force and effect of law. The Act specifically authorizes the Governor to use all resources of state government and counties and municipalities of the state as reasonably necessary to cope with the emergency.⁴

Declaring a State of Emergency

Upon the existence of an actual or impending “emergency”, Florida law allows the Governor to declare a state of emergency through executive order. A state of emergency declaration activates state and local emergency management plans. The Division coordinates with local governments to provide assistance in the distribution of necessary supplies, equipment, and other resources to effectively respond to the emergency. The state of emergency continues until the Governor finds that the threat or danger no longer exists. A state of emergency lasts for 60 days and may be renewed by executive order at the end of that 60-day period. A state of emergency may also be terminated by a concurrent resolution of the Florida Legislature.⁵

Permits

Upon the declaration of an emergency by the Governor for a natural emergency, the period remaining to exercise the rights under a permit or other authorization is suspended and extended for the duration of the emergency declaration. Further, the emergency declaration extends the period remaining to exercise the rights under a permit or other authorization for 6 months in addition to the suspended and extended period. This applies to the following:

- The expiration of a development order issued by a local government;
- The expiration of a building permit;
- The expiration of a permit relating to projects affecting surface water resources that are issued by the Department of Environmental Protection or a water management district pursuant to part IV of chapter 373 of F.S.; and

¹ Part I of ch. 252, F.S.

² S. 252.32, F.S.

³ S. 252.36(2), F.S.

⁴ S. 252.36(5)(b), F.S.

⁵ S. 252.36(2), F.S.

- The buildout date of a development of regional impact,⁶ including any extension of a buildout date that was previously granted as specified in s. 380.06(7)(c).⁷

A “natural emergency” is an emergency caused by a natural event, including, but not limited to, a hurricane, a storm, a flood, severe wave action, a drought, or an earthquake. The Florida Supreme Court has ruled that a pandemic is a “natural emergency.”⁸

The holder of a permit or other authorization must notify the issuing authority of the intent to exercise the suspension and extension provisions within 90 days after the termination of the emergency declaration. The notice must be in writing and identify the specific permit or other authorization qualifying for extension. It is not automatic.⁹

State of Emergencies for Natural Emergencies Issued Since March 2020

On March 9, 2020, Governor DeSantis issued Executive Order 20-52, which declared a state of emergency in all of Florida in response to the COVID-19 pandemic and its impacts on the state of Florida.¹⁰ Executive Order 20-52 has been renewed continuously since March of 2020. The most recent extension was EO 21-45 on February 26, 2021, and expires on April 26, 2021, unless renewed.¹¹

On September 14, 2020, Governor DeSantis issued Executive Order 20-224, which declared a state of emergency in response to Hurricane Sally.¹² The state of emergency applies to 14 counties.¹³ Executive Order 20-224 has been renewed continuously since September of 2020. The most recent extension was EO 21-64 on March 10, 2021, and expires on May 9, 2021, unless renewed.¹⁴

On November 7, 2020, Governor DeSantis issued Executive Order 20-277, which declared a state of emergency in response to Tropical Storm Eta. The state of emergency applied to 22 counties. Executive Order 20-277 was renewed on November 18, 2020, and has not been renewed since.¹⁵

On July 31, 2020, Governor DeSantis issued Executive Order 20-181, which declared a state of emergency in response to Hurricane Isaias. The state of emergency applied to 19 counties. Governor DeSantis terminated Executive Order 20-181 on August 11, 2020.¹⁶

Florida Water Resources Act of 1972

Chapter 373 of F.S., known as the Florida Water Resources Act (FWRA), creates a framework for a regulatory system that governs water rights, uses, planning, and quality control for the state’s water resources. The FWRA provides that the Florida Department of Environmental Protection (DEP) and the 5 cooperating water

⁶ A development of regional impact is any development that, because of its character, magnitude, or location, would have a substantial effect upon the health, safety, or welfare of citizens of more than one county. S. 380.06(1), F.S.

⁷ S. 252.363(1)(a), F.S.

⁸ S. 252.34(8), F.S.; See *Abramson v. DeSantis*, Case No.: SC20-646, 202 WL 3464376 (Fla. June 25, 2020).

⁹ See AGO 2012-13, available at: <http://www.myfloridalegal.com/ago.nsf/Opinions/ODF58A091F0DDBEC852579EB00743D48> (last visited Mar. 4, 2021).

¹⁰ Executive Order 20-52 (Mar. 9, 2020), available at: https://www.flgov.com/wp-content/uploads/orders/2020/EO_20-52.pdf (last visited Mar. 4, 2021).

¹¹ The state of emergency declared in Executive Order 20-52, as extended by Executive Orders 20-114, 20-166, 20-192, 20-213, 20-276, and 20-316 will be extended for 60 days following the issuance of this order for the entire State of Florida. See Executive Order 21-45 (Feb. 26, 2021), available at: https://www.flgov.com/wp-content/uploads/orders/2021/EO_21-45.pdf (last visited Mar. 1, 2021).

¹² Executive Orders 20-224 (Sep. 14, 2020) and 20-225 (Sep. 15, 2021), available at: https://www.flgov.com/wp-content/uploads/orders/2020/EO_20-225.pdf (last visited Mar. 24, 2021).

¹³ Executive Order 20-248 (Oct. 1, 2020), https://www.flgov.com/wp-content/uploads/orders/2020/EO_20-248.pdf (last visited Mar. 24, 2021).

¹⁴ Executive Order 21-64 (Mar. 10, 2021), available at https://www.flgov.com/wp-content/uploads/orders/2021/EO_21-64.pdf (last visited Mar. 24, 2021).

¹⁵ Executive Orders 20-277 (Nov. 7, 2020), 20-278 (Nov. 11, 2020), and 20-295 (Nov. 18, 2020) available at: <https://www.flgov.com/2020-executive-orders/> (last visited Mar. 25, 2021).

¹⁶ Executive Orders 20-181 (Jul. 31, 2020) and 20-195 (Aug. 11, 2021) available at: <https://www.flgov.com/2020-executive-orders/> (last visited Mar. 24, 2021);

management districts¹⁷ partner to ensure the continued water supply, water quality, flood protection and floodplain management, and protecting natural systems.

Consumptive Water Use Permits

Part II of Chapter 373, F.S. creates a framework for permitting consumptive use of water projects. Consumptive water uses are regulated by DEP as well as the water management district with proper jurisdiction.

A consumptive use permit (CUP), also known as a water use permit (WUP), allows the holder to withdraw a specified amount of water from the ground, canals, lakes, or rivers, for reasonable-beneficial uses that will not interfere with any presently existing legal use of water, and is consistent with the public interest. The water removed may be used for numerous purposes including but not limited to, drinking water, agriculture, and golf course irrigation. Water used for domestic purposes, home irrigation, and firefighting are not included under a CUP/WUP. CUP/WUPs require water conservation to prevent wasteful uses, require reclaimed water instead of higher-quality groundwater where appropriate, and set limits on the amount of water that can be withdrawn.¹⁸

There are projects that require a CUP/WUP that cannot be issued until a permit has been issued under Part IV of ch. 373, F.S. and a recommendation of approval by staff of the issuing agency has been received.¹⁹

CUP/WUPs are granted for a period of 20 years if:²⁰

- requested by the applicant; and
- there is sufficient data to provide reasonable assurance that the conditions for permit issuance will be met for the duration of the permit.

If either of these requirements are not met, a CUP/WUP with a shorter duration may be issued to reflect the period for which reasonable assurances can be provided. The DEP and water management districts may determine the duration of permits based upon a reasonable system of classification according to the water source, type of use, or both.²¹

DEP or a water management district may authorize a CUP/WUP for a duration of up to 50 years in the case of a municipality, other governmental body, public works, or public service corporation where such a period is required to provide for the retirement of bonds for the construction of waterworks and waste disposal facilities.²²

CUP/WUPs approved by the state after July 1, 2013, for the development of alternative water supplies²³ must have a term of at least 30 years if there is sufficient data to provide reasonable assurance that the conditions for permit issuance will be met for the duration of the permit.²⁴

DEP or a water management district may also authorize a CUP/WUP for a duration of up to 50 years to municipalities, counties, special districts, regional water supply authorities, multijurisdictional water supply entities, and publicly or privately owned utilities when a landowner has made extraordinary land contributions

¹⁷ Florida's five districts are the Northwest Florida Water Management District, the Suwannee River Water Management District, the St. Johns River Water Management District, the Southwest Florida Water Management District, and the South Florida Water Management District. See Florida Department of Environmental Protection, *Water Management Districts*, available at: <https://floridadep.gov/water-policy/water-policy/content/water-management-districts> (last visited Mar. 4, 2021).

¹⁸ See South Florida Water Management District, *Consumptive Water Use Permits*, <https://www.sfwmd.gov/doing-business-with-us/permits/water-use-permits> (last visited Mar. 4, 2021).

¹⁹ Florida Department of Environmental Protection, *2021 Florida Water Plan*, available at: <https://fdp.maps.arcgis.com/apps/Cascade/index.html?appid=473b768b4af049bf91b2879b83ea961c>. (last visited Mar. 4, 2021).

²⁰ S. 373.236(1), F.S.

²¹ *Id.*

²² S. 373.236(3), F.S.

²³ S. 373.019(1), F.S.

²⁴ If, within 7 years after the CUP/WUP is granted, the permittee issues bonds to finance the project, completes construction of the project, and requests an extension of the permit duration, the permit must be extended to expire upon the retirement of such bonds or 30 years after the date construction of the project is complete, whichever occurs later. However, a permit's duration may not be extended more than 7 years after the permit's original expiration date. S. 373.236(5), F.S.

or funding for an alternative water supply development project, as long as there is sufficient data to provide reasonable assurance that the conditions for permit issuance will be met for the duration of the permit.²⁵

Management and Storage of Surface Waters

Part IV of Ch. 373, F.S. governs construction and other projects that affect surface water resources. Part IV authorizes DEP and the water management district with proper jurisdiction to regulate these projects to further the state's interest in protecting and maintaining its surface water resources.²⁶

The projects regulated by Part IV of Ch. 373, F.S. are any construction, alteration, operation, maintenance, abandonment, and removal of any water management system. Water management systems are dams, impoundments, reservoirs, etc.²⁷ Regulated projects also include any projects that have direct or indirect effects on surface water resources, such as dredging, filling, canal construction, ditch construction, impoundments, fill roads, etc. All of these projects are governed by Part IV of Ch. 373, F.S. and fall within the jurisdiction of DEP and the water management district with proper jurisdiction.

Growth Policy and Land Development Regulation

The Community Planning Act established under Part II of Ch. 163, F.S. governs growth policy and development in Florida. The Community Planning Act establishes a framework for how local governments plan for future developments and adopt and amend comprehensive plans for future growth.²⁸ One of the responsibilities of a local government's planning procedures is the review and approval of rights related to the development of real property.

Under the Community Planning Act, a "development permit" is any official action of a local government that has the effect of permitting the development of land including, but not limited to, building permits, zoning permits, subdivision approval, rezoning, certifications, special exceptions, and variances.²⁹

A "development order" is issued by a local government and grants, denies, or grants with conditions an application for a development permit.³⁰

Section 252.363, F.S. provides that upon the declaration of an emergency by the Governor for a natural emergency, the period remaining to exercise the rights under a development order is suspended and extended for the duration of the emergency declaration, and extend for an additional 6 months after the Governor ends the state of emergency.

However, section 252.363, F.S., does not provide that a development permit is suspended and extended when there is an emergency declaration for a natural emergency. As a result, it is unclear if a development permit is suspended and extended when there is an emergency declaration for a natural emergency.

Local Government Development Agreements

The Florida Local Government Development Agreement Act³¹ establishes the framework for development agreements between local governments and developers. 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.³²

²⁵ S. 373.236(6), F.S.

²⁶ See Florida Department of Environmental Protection, *Division of Water Resource Management*, available at: <https://floridadep.gov/water> (last visited Mar. 4, 2021).

²⁷ See Environmental Resource Permit Applicant's Handbook, available at: https://www.flrules.org/gateway/readRefFile.asp?filename=010_4a--AHI_thruAppendix_D_ADA_3-5-14.doc&refId=3174 (last visited Mar. 4, 2021).

²⁸ S. 163.3167(1), F.S.

²⁹ S. 163.3164(16), F.S.

³⁰ 163.3164(15), F.S.

³¹ See S. 163.3220-163.3243, F.S.

³² *Morgan Co., Inc. v. Orange County*, 818 So. 2d 640 (Fla. 5th DCA 2002); 7 Fla. Jur 2d Building, Zoning, and Land Controls § 168 (2019).

A local government may establish, by ordinance, procedures and requirements for considering and entering into a development agreement with any person having a legal or equitable interest in real property located within its jurisdiction.³³ A development agreement may provide that the entire agreement, or any phase thereof, must be commenced or completed within a specific time and must include:³⁴

- 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.³⁵

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, and such an agreement is not effective until it is properly recorded.³⁶ A development agreement binds any person who obtains ownership of a property already subject to an agreement.³⁷

A development agreement may be amended or canceled by mutual consent of the local government and the developer or by their successors in interest. A development agreement may not last longer than 30 years, unless it is extended by mutual consent of the local government and the developer.³⁸

Prior to amending, canceling, or extending a development agreement, the local government must hold at least two public hearings, one of which may be held by a local planning agency. Notice of the public meetings must be advertised 7 days before each meeting in a newspaper in circulation in the county where the government is located, and be must be mailed to the affected property owners. The day, time, and place of the second meeting must be announced at the first meeting.³⁹

Effect of Proposed Changes

The bill amends s. 252.363, F.S. to provide that the time-periods for the following additional permits and authorizations are subject to suspension and extension during a declared state of emergency for a natural emergency:

- CUP/WUPs issued by DEP or a water management district with proper jurisdiction under Part II of ch. 373, F.S.; and
- Development agreements and development permits entered into or issued by a local government or other governmental entity, including development agreements and development permits issued or entered into pursuant to the Florida Local Government Development Agreement Act.

³³ S. 163.3223, F.S.; 7 Fla. Jur 2d Building, Zoning, and Land Controls § 168 (2019).

³⁴ S. 163.3227(1) and (2), F.S.; 7 Fla. Jur 2d Building, Zoning, and Land Controls § 168 (2019).

³⁵ 7 Fla. Jur. 2d Building, Zoning, and Land Controls s. 168 (2020) (from s. 163.3223, F.S.)

³⁶ S. 163.3239, F.S.; 7 Fla. Jur 2d Building, Zoning, and Land Controls § 168 (2019).

³⁷ Commonly referred to as a successor in interest: one who follows another in ownership or control of property and retains the same rights as the original owner. Black's Law Dictionary 1473 (8th ed. 2004); s. 163.3239, F.S.

³⁸ Ss. 163.3225, 163.3237, and 163.3229, F.S.

³⁹ *Id.*

The bill is effective upon becoming a law, and applies retroactively to any declaration of a state of emergency issued by the Governor for a natural emergency on or after March 1, 2020. The time-periods for such permits and agreements may be suspended and extended for any state of emergency declared for a natural emergency on or after March 1, 2020, including the state of emergency Governor DeSantis declared on March 9, 2020, in response to the COVID-19 pandemic.

B. SECTION DIRECTORY:

Section 1: Amends s. 252.363 to provide for additional permits to be eligible under the suspension and extension provisions during a declared state of emergency.

Section 2: Provides that the bill applies retroactively.

Section 3: Provides that the bill is effective upon becoming a law.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The holders of permits and agreements added to the emergency suspension and extension statute may see a benefit from having more flexibility to exercise the rights under such permits and agreements.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. The bill does not appear to require counties or municipalities to spend funds or take action requiring the expenditures of funds; reduce the authority that counties or municipalities have to raise revenues in the aggregate; or reduce the percentage of state tax shared with counties or municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

Not applicable.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES