

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

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

SPONSOR(S): State Affairs Committee, Grant

TIED BILLS: **IDEN./SIM. BILLS:** CS/CS/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	21 Y, 0 N, As CS	Toliver	Williamson

SUMMARY ANALYSIS

The State Emergency Management Act confers upon the Governor the 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 ch. 373, F.S.; and
- Buildout dates for developments of regional impact, including any extension of a buildout date that was previously granted.

The bill 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 for the following:

- Consumptive use water permits issued by DEP or a water management district under part II of ch. 373, F.S., for land subject to a development agreement under the Florida Local Government Development Agreement Act in which the permittee and the developer are the same or a related entity; 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 an effective date of upon becoming a law.

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 for, responds to, and recovers from emergencies and disasters.² It confers upon the Governor, the Division of Emergency Management (Division), and the governing body of each county and municipality specific emergency powers in the event of an emergency and disaster. The Act ensures preparations of the state will be adequate to deal with, reduce vulnerability to, and recover from such emergencies and disasters.³

The Act vests the authority to declare a state of emergency in the Governor.⁴ 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.⁵ This authority includes issuing executive orders, proclamations, and rules that have the force and effect of law.⁶ 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.⁷ Furthermore, the Act allows the Governor to suspend the provisions of any regulatory statute prescribing the procedures for conduct of state business or the orders or rules of any state agency, if strict compliance with the provisions of any such statute, order, or rule would in any way prevent, hinder, or delay necessary action in coping with the emergency.⁸

Declaring a State of Emergency

Upon the existence of an actual or impending emergency,⁹ Florida law allows the Governor to declare a state of emergency through executive order.¹⁰ A state of emergency declaration activates state and local emergency management plans.¹¹ 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.¹² A state of emergency lasts for 60 days and may be renewed by executive order at the end of that 60-day period.¹³ A state of emergency may also be terminated by a concurrent resolution of the Florida Legislature.¹⁴

Permits

Upon the declaration of an emergency by the Governor for a natural emergency,¹⁵ the period remaining to exercise the rights under a permit or other authorization is suspended (tolled) and extended for the

¹ Part I of ch. 252, F.S.

² Ss. 252.31-252.60, F.S., are cited as the State Emergency Management Act.

³ S. 252.32, F.S.

⁴ S. 252.36(2), F.S.

⁵ S. 252.36(1)(a), F.S.

⁶ S. 252.36(1)(b), F.S.

⁷ S. 252.36(5)(b), F.S.

⁸ S. 252.36(5)(a), F.S.

⁹ The term "emergency" means any occurrence, or threat thereof, whether natural, technological, or manmade, in war or in peace, which results or may result in substantial injury or harm to the population or substantial damage to or loss of property. Section 252.34(4), F.S.

¹⁰ S. 252.36(2), F.S.

¹¹ S. 252.36(3)(a), F.S.

¹² S. 252.36(2), F.S.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ The term "natural emergency" means 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. Section 252.34(8), F.S. The Florida Supreme Court has ruled that a pandemic is a natural emergency. *Abramson v. DeSantis*, Case No.: SC20-646, 202 WL 3464376 (Fla. 2020).

duration of the emergency declaration.¹⁶ Further, the emergency declaration extends the period remaining to exercise the rights under a permit or other authorization for six months in addition to the suspended and extended period.¹⁷ 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 (DEP) or a water management district pursuant to part IV of ch. 373, F.S.
- The buildout date of a development of regional impact,¹⁸ including any extension of a buildout date that was previously granted as specified in s. 380.06(7)(c), F.S.¹⁹

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.²⁰ The notice must be in writing and identify the specific permit or other authorization qualifying for extension. It is not automatic.²¹ A permit that has been extended is governed by the laws, administrative rules, and ordinances in effect when the permit was issued.²² Notwithstanding the suspension or extension of a permit, a county or municipality may still require property be maintained and secured in a safe and sanitary condition in compliance with applicable laws, administrative rules, or ordinances.²³

The suspension or extension of a permit during a natural emergency does not apply to the following types of permits:

- A permit or other authorization for a building, improvement, or development located outside the geographic area for which the declaration of a state of emergency applies.
- A permit or other authorization under any programmatic or regional general permit issued by the Army Corps of Engineers.
- A permit or other authorization that is subject to a court order specifying an expiration date or buildout date that would be in conflict with the extensions granted in s. 252.363, F.S.
- A permit or authorization held by an individual that is determined by the authorizing agency to be in significant noncompliance with the conditions of the permit or other authorization through the issuance of a warning letter or notice of violation, the initiation of formal enforcement, or an equivalent action.²⁴

State of Emergencies for Natural Emergencies Issued Since March 2020

On March 9, 2020, Governor DeSantis issued Executive Order (EO) 20-52, which declared a state of emergency throughout the state in response to the COVID-19 pandemic.²⁵ EO 20-52 has been renewed continuously since March 2020. The most recent extension was EO 21-45 on February 26, 2021, which expires on April 26, 2021, unless renewed.²⁶

¹⁶ S. 252.363(1)(a), F.S.

¹⁷ *Id.*

¹⁸ 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.

¹⁹ S. 252.363(1)(a), F.S.

²⁰ S. 252.363(1)(b), F.S.

²¹ *Id.*; See AGO 2012-13, available at: <http://www.myfloridalegal.com/ago.nsf/Opinions/0DF58A091F0DDBEC852579EB00743D48> (last visited Mar. 30, 2021).

²² S. 252.363(2), F.S.

²³ S. 252.363(3), F.S.

²⁴ S. 252.363(1)(d), F.S.

²⁵ 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. 30, 2021).

²⁶ 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. 30, 2021).

On September 14, 2020, Governor DeSantis issued EO 20-224, which declared a state of emergency in response to Hurricane Sally.²⁷ The state of emergency applies to 14 counties.²⁸ EO 20-224 has been renewed continuously since September 2020. The most recent extension was EO 21-64 on March 10, 2021, which expires on May 9, 2021, unless renewed.²⁹

On November 7, 2020, Governor DeSantis issued EO 20-277, which declared a state of emergency in response to Tropical Storm Eta. The state of emergency applied to 22 counties. EO 20-277 was renewed on November 18, 2020, and has not been renewed since.³⁰

On July 31, 2020, Governor DeSantis issued EO 20-181, which declared a state of emergency in response to Hurricane Isaias. The state of emergency applied to 19 counties. Governor DeSantis terminated EO 20-181 on August 11, 2020.³¹

Florida Water Resources Act of 1972

Chapter 373, F.S., known as the Florida Water Resources Act (FWRA), creates a regulatory system that governs water rights, uses, planning, and quality control for the state's water resources. The FWRA provides that DEP and the five cooperating water management districts³² partner to ensure the continued water supply, water quality, flood protection and floodplain management, and the protection of natural systems.

Consumptive Water Use Permits

Part II of ch. 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 that 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.³³

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.³⁴

CUP/WUPs are granted for a period of 20 years if requested by the applicant and if there is sufficient data to provide reasonable assurance that the conditions for permit issuance will be met for the duration of the permit.

²⁷ 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. 30, 2021).

²⁸ Executive Order 20-248 (Oct. 1, 2020), https://www.flgov.com/wp-content/uploads/orders/2020/EO_20-248.pdf (last visited Mar. 30, 2021).

²⁹ 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. 30, 2021).

³⁰ 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. 30, 2021).

³¹ 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. 30, 2021);

³² 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. 30, 2021).

³³ 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. 30, 2021).

³⁴ 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. 30, 2021).

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.³⁵ 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.³⁶

DEP or a water management district may authorize a CUP/WUP for a duration of up to 50 years in the following instances:

- To 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.³⁷
- 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 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.³⁸

CUP/WUPs approved by the state on or after July 1, 2013, for the development of alternative water supplies³⁹ 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.⁴⁰

Management and Storage of Surface Waters

Part IV of ch. 373, F.S., governs construction and other projects that affect surface water resources, and 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.⁴¹ A water management district or DEP may require an environmental resource permit (ERP) and impose reasonable conditions necessary to assure the construction or alteration of any stormwater management system,⁴² dam,⁴³ impoundment,⁴⁴ reservoir,⁴⁵ appurtenant work,⁴⁶ or works⁴⁷ complies with state law and applicable rules, and will not be harmful to water resources.⁴⁸ A person proposing such construction or alteration must apply to the water management district or DEP for an ERP permit authorizing the construction or alteration.

General permits are provided for certain activities determined to have minimal adverse environmental effects to the water resources of the state when conducted in compliance with the terms and conditions

³⁵ *Id.*

³⁶ *Id.*

³⁷ S. 373.236(3), F.S.

³⁸ S. 373.236(6), F.S.

³⁹ S. 373.019(1), F.S.

⁴⁰ If, within seven 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 seven years after the permit's original expiration date. S. 373.236(5), F.S.

⁴¹ See DEP, *Division of Water Resource Management*, available at: <https://floridadep.gov/water> (last visited Mar. 31, 2021).

⁴² Section 373.403(10), F.S., defines "stormwater management system" to mean a system which is designed and constructed or implemented to control discharges which are necessitated by rainfall events, incorporating methods to collect, convey, store, absorb, inhibit, treat, use, or reuse water to prevent or reduce flooding, overdrainage, environmental degradation, and water pollution or otherwise affect the quantity and quality of discharges from the system.

⁴³ Section 373.403(1), F.S., defines "dam" to mean any artificial or natural barrier, with appurtenant works, raised to obstruct or impound, or which does obstruct or impound, any of the surface waters of the state.

⁴⁴ Section 373.403(3), F.S., defines "impoundment" to mean any lake, reservoir, pond, or other containment of surface water occupying a bed or depression in the earth's surface and having a discernible shoreline.

⁴⁵ Section 373.403(4), F.S., defines "reservoir" to mean any artificial or natural holding area which contains or will contain the water impounded by a dam.

⁴⁶ Section 373.403(2), F.S., defines "appurtenant works" to mean any artificial improvements to a dam, which might affect the safety of such dam or, when employed, might affect the holding capacity of such dam or of the reservoir or impoundment created by such dam.

⁴⁷ Section 373.403(5), F.S., defines "works" to mean all artificial structures, including, but not limited to, ditches, canals, conduits, channels, culverts, pipes, and other construction that connects to, draws water from, drains water into, or is placed in or across the waters in the state.

⁴⁸ Section 373.413(1), F.S.

of the permit.⁴⁹ Individual permits are required for activities that do not qualify for a general permit.⁵⁰ Individual permits are issued for five years, but an applicant may request a longer permit duration by providing reasonable assurance that the project cannot reasonably be expected to be completed within five years after commencement of construction, and the impacts of the activity, considering its nature, the size of the project, and any required mitigation, can be accurately assessed and offset where appropriate, and the terms of the permit can be met for the duration of the requested permit.⁵¹

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.⁵² 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.⁵³ A "development order" is issued by a local government and grants, denies, or grants with conditions an application for a development permit.⁵⁴

Local Government Development Agreements

The Florida Local Government Development Agreement Act⁵⁵ 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.⁵⁶

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.⁵⁷ 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:⁵⁸

- 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 will 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.

⁴⁹ Section 403.814(1), F.S.

⁵⁰ Rule 62-330.054(1), F.A.C.

⁵¹ Rule 62-330.320(2), F.A.C.; r. 62-330.010, F.A.C., *Environmental Resource Permit Applicant's Handbook Volume I*, 6.1.2.2 (June 1, 2018).

⁵² S. 163.3167(1), F.S.

⁵³ S. 163.3164(16), F.S.

⁵⁴ S. 163.3164(15), F.S.

⁵⁵ See ss. 163.3220-163.3243, F.S.

⁵⁶ *Morgan Co., Inc. v. Orange Cnty*, 818 So. 2d 640 (Fla. 5th DCA 2002); 7 Fla. Jur. 2d Building, Zoning, and Land Controls § 168 (2019).

⁵⁷ S. 163.3223, F.S.; 7 Fla. Jur. 2d Building, Zoning, and Land Controls § 168 (2019).

⁵⁸ S. 163.3227(1) and (2), F.S.; 7 Fla. Jur. 2d Building, Zoning, and Land Controls § 168 (2019).

- 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.
- A statement indicating that the failure of the agreement to address a particular permit, condition, term, or restriction does not relieve the developer of the necessity of complying with the law governing said permitting requirements, conditions, term, or restriction.

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.⁵⁹ A development agreement binds any person who obtains ownership of a property already subject to an agreement.⁶⁰

A development agreement may be amended or canceled by mutual consent of the local government and the developer or by their successors in interest.⁶¹ A development agreement may not last longer than 30 years, unless it is extended by mutual consent of the local government and the developer.⁶²

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.⁶³ Notice of the public meetings must be advertised seven days before each meeting in a newspaper of general circulation in the county where the government is located, and be must be mailed to the affected property owners.⁶⁴ The day, time, and place of the second meeting must be announced at the first meeting.⁶⁵

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., for land subject to a development agreement under the Florida Local Government Development Agreement Act in which the permittee and the developer are the same or a related entity; 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.

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, F.S., 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 to March 1, 2020.

Section 3: Provides an effective date of upon becoming a law.

⁵⁹ S. 163.3239, F.S.; 7 Fla. Jur. 2d Building, Zoning, and Land Controls § 168 (2019).

⁶⁰ 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.

⁶¹ S. 163.3237, F.S.

⁶² S. 163.3229, F.S.

⁶³ S. 163.3225(1), F.S.

⁶⁴ S. 163.3225(2)(a), F.S.

⁶⁵ *Id.*

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:

The bill does not create new rulemaking authority nor modify existing rulemaking authority. Section 252.35(2)(x), F.S., already provides the Division with rulemaking authority over ss. 252.31-252.90, F.S.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On April 6, 2021, the State Affairs Committee adopted an amendment and reported the bill favorably as a committee substitute. The amendment specified that the type of CUP/WUP tolled or extended under a natural emergency only includes CUPs/WUPs for land subject to a development agreement under the Florida Local Government Development Agreement Act in which the permittee and the developer are the same or a related entity.

The analysis is drafted to the committee substitute as adopted by the State Affairs Committee.