HOME RULE IMPLICATIONS OF THE COMMUNITY PLANNING ACT

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by

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This paper is intended to highlight areas of direct or indirect preemption in Chapter 2011-139, Laws of Florida (the "Community Planning Act") and to summarize the judicial standards of review anticipated to be applied in reviewing the validity of growth management initiatives and land use regulations by Florida counties and municipalities as a consequence of its enactment. Included is a discussion of the additional limitations on transportation concurrency and alternative transportation funding systems contained in Chapter 2013-78, Laws of Florida (CS/CS/CS for HB 319).

All references to the Community Planning Act, unless otherwise noted, are to the 2012 codification.

The advocates of the Community Planning Act argue that its purpose was to adopt minimum state growth management requirements in reliance on county and municipal home rule authority to guide and manage the bulk of future development through locally initiated growth management and local land use regulations. Such advocacy and the ensuing statements of legislative purpose in the Community Planning Act should be viewed with skepticism and caution by local governments in the current political climate fueled by escalating general law preemption of home rule powers.

Statement of Florida Home Rule Principles

To place the home rule power of counties and municipalities to plan for managed growth and regulate development and land use in perspective, it is helpful to first summarize their existing Florida constitutional and statutory powers of local self-government.

Under Article VIII, section 1(g), Florida Constitution, upon approval of its charter by the electors, the home rule powers of a charter county are a direct constitutional grant. Under such direct grant, a county operating under a county charter has all powers of local self-government not inconsistent with general law or special law approved by a vote of the electors. See Art. VIII, § 1(f), Fla. Const.

The home rule power of counties not operating under a charter and municipalities contemplated in Article VIII, section 1(f), Florida Constitution, as to non-charter counties, and Article VIII, section 2, Florida Constitution, as to municipalities, has been broadly implemented by general law. Section 125.01 is an expansive grant of home rule authority to all counties and section 166.021 is an equally expansive grant of home rule authority to all municipalities.

As a consequence, the quantum of home rule power possessed by a charter and non-charter county is essentially the same. In fact, a charter limitation not inconsistent with general law or special act approved by a vote of the electors can limit the home rule power of a charter county. See State v. Sarasota County, 549 So. 2d 659 (Fla. 1989). The other distinction is that the home rule power of both a non-charter county

and a municipality can be limited or diminished by a special act not subject to elector approval.

A unique power of a charter county is that, in the absence of express preemption by the legislature, a charter county is automatically vested with the taxing power of a municipality in the unincorporated areas. See McLeod v. Orange County, 645 So. 2d 411 (Fla. 1994).

In a non-charter county, a county ordinance in conflict with a municipal ordinance is not effective to the extent of the conflict. A county charter shall provide which shall prevail in the event of a conflict between an ordinance adopted by a charter county and municipal ordinances. For a municipal ordinance to trump in a conflict with a countywide initiative approved by county ordinance adopted by either a charter or non-charter county, the municipal ordinance must serve a municipal purpose. See City of Ormond Beach v. County of Volusia, 535 So. 2d 302 (Fla. 5th DCA 1988); and Seminole County v. City of Casselberry, 541 So. 2d 666 (Fla. 5th DCA 1989).

summary of county and municipal home rule powers

The following is a summary of the constitutional and statutory home rule power of counties and municipalities, the power of the Legislature to restrict or diminish such home rule power and the expanded home rule power possessed by charter counties.

- The constitutional home rule powers of counties and municipalities cannot be inconsistent with general law.
- Upon elector approval of its charter, the power of local self-government of charter counties is derived directly from the Florida Constitution and can be limited or diminished by special act only if the special act is approved by a vote of the electors.
- The power of local self-government provided by general law for municipalities and non-charter counties can be preempted by special act with no requirement of elector approval.
- A county charter can contain limitations on county home rule power not inconsistent with general law that apply only to that charter county.

- The ordinance of a non-charter county that is in conflict with a municipal ordinance shall not be effective within the municipality to the extent of such conflict.
- A county charter can provide which shall prevail in the event of a conflict between a county and a municipal ordinance. A county charter provision providing for countywide regulatory authority that preempts inconsistent municipal action requires elector approval only in a single countywide vote. Under judicial construction of the transfer of power provisions of Article VIII, section 4, Florida Constitution, a county charter that attempts to transfer municipal services to a county requires dual approval by electors countywide and within each municipality.
- A charter county is vested with the authority to levy any tax within its jurisdiction that the Legislature authorizes for a municipality unless a contrary legislative intent is provided in the general law tax authorization.
- For a municipal ordinance to be in conflict with a countywide initiative imposed by county ordinance, the municipal ordinance is required to serve a municipal purpose that is advanced in its legislative determination to opt out of the countywide initiative.

General Statements of Legislative Preemption

The home rule powers of counties and municipalities can be preempted or limited by both a general law or special act. As discussed previously, the power of local self-government of a charter county is constitutionally derived by the elector approval of its charter and can be diminished only by general law or special act likewise approved by the electors.

Judicial analysis frequently divides legislative preemption in two types – express and implied. Legislative preemption can also occur when a conflict between a local government ordinance and state law exists. See, e.g., Santa Rosa County v. Gulf Power Company, 635 So. 2d 96, 101 (Fla. 1st DCA 1994) (the court recognized that "[i]mplied preemption occurs if a legislative scheme is so pervasive that it occupies the entire field, creating a danger of conflict between local and state laws"); see also

Tribune Company v. Cannella, 458 So. 2d 1075 (Fla. 1984) (holding that the area of public records has been the subject of comprehensive regulation by the State preempting local government regulation); and Florida Power Corp. v. Seminole County, 579 So. 2d 105 (Fla. 1991), (the Court recognized legislative preemption of local government regulation relating to the location of power lines underground as a consequence of the expansive jurisdiction granted to the Florida Public Service Commission to regulate rates and services of electric utilities).

The doctrine that local government action is preempted if it is in conflict with state law and is clearly stated in Rinzler v. Carson, 262 So. 2d 661 (Fla. 1972). See also Phantom of Brevard, Inc. v. Brevard County, 3 So. 3d 309 (Fla. 2008).

The final area of local government preemption exists when a proposed governmental action is contrary to or in conflict with an assignment of governmental responsibility by the legislature. See Department of Transportation v. Lopez-Torres, 526 So. 2d 674 (Fla. 1988).

As discussed subsequently in this paper, notwithstanding its recognition of home rule powers, the Community Planning Act sometimes enacts an express preemption and often creates an implied preemption or raises a potential conflict.

Recognition of Home Rule Power in the Community Planning Act

The stated thrust of the Community Planning Act is a shift of the role of the State to protection of important state resources and facilities.

While the term "important state resources and facilities" is not defined, section 163.3161(3) provides

> It is the intent of this act to focus the state role in managing growth under this act to protecting the functions of important state resources and facilities.

Additionally, the Community Planning Act contains numerous statements recognizing the home rule power of counties and municipalities. The following legislative statements in the Act acknowledge the home rule power of counties and municipalities and provide a statement of legislative intent to provide minimum requirements and standards:

- Section 163.3161(8) declares that the provisions of the Community Planning Act are declared to be minimum requirements as follows:

> The provisions of this act in their interpretation and application are declared to be the minimum requirements necessary to accomplish the stated intent, purposes, and objectives of this act; to protect human, environmental, social, and economic resources; and to maintain, through orderly growth and development, the character and stability of present and future land use and development in this state.

- Section 163.3161(9) further provides that it is the intent of the legislature that the amendments to Chapter 163 by the Community Planning Act are "not [to] be interpreted to limit or restrict the powers of municipal or county officials, but be interpreted as a recognition of their broad statutory and constitutional powers to plan for and regulate the use of land."
- Another statement supporting home rule growth management initiatives is section 163.3161(2) which provides:

> It is the purpose of this act to utilize and strengthen the existing role, processes, and powers of local governments in the establishment and implementation of comprehensive planning programs to guide and manage future development consistent with the proper role of local government.

Inconsistent with the recognition of home rule principles is the statement in section 163.3161(9) that it is the intent of the legislature that the indicated sections of the Community Planning Act provide necessary statutory direction and bases for municipal and county power for county officials to carry out their comprehensive plan and land development regulation duties. The home rule response is that counties and municipalities had such regulatory powers without the enactment of the Community Planning Act.

Additionally, the following statement of intent in section 163.3161(4) is gratuitous and not necessary since Florida counties and municipalities would have the constitutional and statutory authority to take such actions absent legislative preemption.

> (4) It is the intent of this act that local governments have the ability to preserve and enhance present advantages; encourage the most appropriate use of land, water, and resources, consistent with the public interest; overcome present handicaps; and deal effectively with future problems that may result from the use and development of land within their jurisdictions. Through the process of comprehensive planning, it is intended that units of local government can preserve, promote, protect, and improve the public health, safety, comfort, good order, appearance, convenience, law enforcement and fire prevention, and general welfare; facilitate the adequate and efficient provision of transportation, water, sewerage, schools, parks, recreational facilities, housing, and other requirements and services; and conserve, develop, utilize, and protect natural resources within their jurisdictions.

In summary, these statements of legislative intent and direction in the Community Planning Act can be capsulized as follows:

- The state role in growth management is to protect the function of important state resources and facilities.
- The Community Planning Act provides minimum requirements to accomplish its stated intent.
- The Community Planning Act is not to be interpreted to limit or restrict the home rule power of counties and municipalities.
- The Community Planning Act is to be interpreted to recognize the broad statutory and constitutional power of counties and municipalities to regulate the use of land.

The issue to be resolved is the scope of comprehensive planning and land use regulation within the remaining home rule power of counties and municipalities under the regulatory scheme of the Community Planning Act. These remaining areas of local government prerogative will become defined as local regulatory initiatives and exactions are tested in future litigation.

The next area of analysis is the judicial standard to be applied in testing any home rule initiatives within the framework of the Community Planning Act.

Judicial Standard of Review For Validity of Ordinance In Face of Minimum Standard Statutes

The general rule is that an ordinance is unconstitutional and conflicts with a law if the ordinance and the legislative provisions cannot coexist. See Board of County Commissioners of Dade County v. Wilson, 386 So. 2d 556 (Fla. 1980); and State ex rel. Dade County v. Brautigam, 224 So. 2d 688 (Fla. 1969). Or, stated another way, legislative provisions are inconsistent if, in order to comply with one provision, a violation of the other is required. See Jordan Chapel Freewill Baptist Church v. Dade County, 334 So. 2d 661 (Fla. 3d DCA 1976).

This general rule however, is softened by the principle that an ordinance is not in conflict if it is more stringent than a statute or regulatory scheme that by its language does not preempt local action or implement a pervasive legislative scheme of regulation that the legislature intended to be uniform. The Community Planning Act not only does not preempt local government action but expressly contemplates active local government participation in planning and land use regulation. The future debate will be the boundaries of preemption of local government ordinances more stringent than the minimum standards of the Community Planning Act.

Past Florida case law prescribes guidance on the boundaries of more stringent local government regulation.

For example, in Kissimmee v. Florida Retail Federation, 915 So. 2d 205 (Fla. 5th DCA 2005), a City ordinance creating a "shopping cart retention system" was not declared unconstitutional because of conflict with a statutory provision that provided that, notwithstanding any law or local ordinance, no fine could be assessed against the owner of a parking cart found on public property without state agency approval. The ordinance required local businesses of a certain size to install a retention system to manage the transportation of the shopping carts offsite. Recognizing the principle that a local ordinance cannot conflict with a state statute, the Court held that conflict does not exist simply because the ordinance is more stringent than the state law or regulates an area not covered by the state law. The Court held as follows:

> Where there is no direct conflict between the two, appellate courts should indulge every reasonable presumption in favor of an ordinance's constitutionality.

Id. at 209.

The Court upheld the constitutionality of the ordinance under the reasoning that: the state statute only regulates shopping carts found on public property; the ordinance did not impose a fee or fine against the owner of a shopping cart placed on public property; and the ordinance was directed at methods to keep the shopping carts on the shopping cart owner's property not the regulation of the abandonment of shopping carts on public property.

Likewise, in F.Y.I Adventures v. City of Ocala, 698 So. 2d 583 (Fla. 5th DCA 1997), the Court upheld an ordinance providing additional regulations on the conduct of bingo games on rental property. The Court held that under its review of the statute, it perceived no intent by the Legislature to preempt the field of bingo regulation or that the Legislature intended that bingo regulations be uniform across the State. As a consequence, the F.Y.I. Adventures Court held in citing Board of County Commissioners of Dade County v. Wilson as follows:

> If there is no issue of preemption, then the question is whether an ordinance passed by a municipality or county with Home Rule powers, "conflicts" with the state statute. Art. VII § 11(5), Fla. Const. "Conflict" for this purpose is given a very strict and limited meaning. . . . they must contradict each other in the sense that both legislative provisions (the ordinance and the statute) cannot co-exist. They are in "conflict" if, in order to comply with one, a violation of the other is required. The question is, does compliance with the ordinance violate the state law, or make compliance with state law impossible? It is not a conflict if the ordinance is more stringent than the statute.

698 So. 2d at 584.

In Phantom of Clearwater v. Pinellas County, 894 So. 2d 1011 (Fla. 2nd DCA 2005), the Court faced the question of whether an ordinance that regulates businesses that sell fireworks was unconstitutional because of express or implied preemption by or because of conflict with Chapter 791.

The Court analyzed the area of express and implied preemption and conflict in detail and acknowledged that the state law had a section that stated: "This chapter shall be applied uniformly throughout the state."

First, the Court characterized express preemption as legislative acts that essentially take a topic or field in which a local government might otherwise establish appropriate local laws and reserves that topic for regulation exclusively by the Legislature. The Court concluded that express preemption usually contains language creating express preemption:

> We conclude that section 791.001 does not contain language creating an express preemption. This statute does not contain language similar to the phrase, "It is the legislative intent to give exclusive jurisdiction in all matters set forth in this chapter"-language that has been held to establish a level of preemption in the field of telecommunication companies.

894 So. 2d at 1018.

Second, the Court reasoned that implied preemption is actually a decision by the courts to create preemption in the absence of an explicit legislative directive and that such judicial decisions are made reluctantly since they preclude an elected local governing body from exercising its local powers. The Court concluded as follows:

> [I]f the legislature can easily create express preemption by including clear language in a statute, there is little justification for the courts to insert such words into a statute. In the absence of express preemption, normally a determination based upon any direct conflict between the statute and a local law, . . . is adequate to solve a power struggle between existing statutes and newly created ordinances.

894 So. 2d at 1019. Therefore, the courts imply preemption only when the legislative scheme is so pervasive that it evidences an intent to preempt the particular area under a uniform legislative scheme.

Third, the Court recognized the general rule that an ordinance conflicts with a state statute when the two cannot coexist or:

> Stated otherwise, legislative provisions are inconsistent if, in order to comply with one provision, a violation of the other is required.

894 So. 2d 1020.

The Court held that, under this definition of conflict, the fact that an ordinance imposed additional requirements on a person or business is not evidence of a conflict. The Court further found no pervasive scheme or regulation and no strong public policy that would prevent a local government from enacting ordinances in an area as long as they did not conflict with the statutory provisions.

The Court upheld the constitutionality of the ordinance with the exception of the provision that appeared to impose a penalty in excess of that provided in the statute which the Court held was an impermissive conflict. However, since the ordinance had a severability clause, the Court held that it was not required to declare the whole ordinance unconstitutional because of the conflict in penalty since the ordinance was otherwise valid.

In Thomas v. State, 614 So. 2d 468 (Fla. 1993), the Court likewise held a penalty in a municipal ordinance invalid since it exceeded the penalty imposed by the State. However, the Court recognized the concurrent regulatory jurisdiction of both the municipality and the state as follows:

> Although municipalities and the state may legislate concurrently in areas that are not expressly preempted by the state, a municipality's concurrent legislation must not conflict with state law.

614 So. 2d at 470.

In Jordan Chapel Freewill Baptist Church v. Dade County, 334 So. 2d 661 (Fla. 1976), the Court was again determining whether an ordinance providing additional regulations of bingo was in conflict with the State statute. The Court stated the general rule that legislative provisions are inconsistent if, to comply with one provision, a violation of the other is required. The Court further held as follows:

> Courts are therefore concerned with whether compliance with a County ordinance requires a violation of a state statute or renders compliance with a state statute impossible.

334 So. 2d at 664.

In upholding the constitutionality of the ordinance, the Court recognized that the State bingo regulations were minimum regulations as follows:

> The regulations provided by the state constitute minimum regulations. This Court has not found, and the plaintiff has not cited any language in the statute which can be deemed a prohibition on additional stricter regulations by local government agencies, such as are contained in the Dade County ordinance.

334 So. 2d at 664.

This distinction between express and implied preemption was analyzed in detail in Tallahassee Memorial Regional Medical Center v. Tallahassee Medical Center, 681 So. 2d 826, 831 (Fla. 5th DCA 1996), as follows:

> In cases where the Legislature expressly or specifically preempts an area, there is no problem with ascertaining what the Legislature intended. Implied preemption, however, is a more difficult concept. The courts should be careful in imputing an intent on behalf of the Legislature to preclude a local elected governing body from exercising its home rule powers. [cits. omitted] Implied preemption should be found to exist only in cases where 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. [cits. omitted] The scope of the preemption should also be limited to the specific area where the Legislature has expressed their will to be the sole regulator.

Standard of Review in Comprehensive Plan Challenge

The standard of review adopted in a challenge to a comprehensive amendment in section 163.3184(5)(c)1. is that in challenges filed by an affected person the comprehensive plan or plat amendment shall be determined to be in compliance if the

local government's determination of compliance is fairly debatable. As to challenges by the state land planning agency, a local government's determination that the comprehensive plan is in compliance is presumed to be correct and the local government's determination shall be sustained unless it is shown by a predominance of the evidence that the comprehensive plan is not in compliance. See § 163.3184(5)(c)2.a., Fla. Stat.

As discussed previously, a challenge by the state land planning agency is limited to a determination that an important state resource or facility will be adversely affected by the adopted plan amendment. See § 163.3184(5)(b)1., Fla. Stat.

General Discussion of Concurrency Preemption Under the Community Planning Act

general

The only public facilities and services subject to statewide concurrency are sanitary sewer, solid waste and potable water.

Any local government may extend concurrency to public facilities within its jurisdiction if: (1) the local government comprehensive plan provides the principles, guidelines, standards and strategies to guide the application of concurrency, including adopted levels-of-service; and (2) the local government comprehensive plan demonstrates that the levels-of-service can be reasonably met.

The preemption for transportation concurrency appears to be more extreme than those applied to school concurrency and transportation mobility funding systems as a consequence of the application of transportation concurrency limitations in section 163.3180(5)(h)3. to "a development-of-regional-impact development order, a rezoning, or other land use development permit." In contrast, the concurrency limitation for school facilities and mobility funding systems only apply to site plans, final subdivision approvals or their functional equivalent. See the following provisions in Chapter 2013-78, Laws of Florida: § 163.3180(6)(h)2., Fla. Stat. (2013) (as to school facilities); and § 163.3180(5)(i), Fla. Stat. (2013) (as to mobility funding systems). This differing treatment for transportation concurrency was increased in Chapter 2013-78 which

added "development agreements" to the type of local government actions which transportation concurrency limitations apply.

Additionally, infrastructure required to ensure that adopted level of service standards are achieved and maintained for the five-year period of a capital improvement schedule must be identified.

It should be noted that the requirements of the capital improvement element of the local comprehensive plan has been substantially weakened. Under the Community Planning Act, the capital improvement element can include either funded projects or unfunded projects and such projects are required to be given a level of priority to ensure that the adopted level-of-services are achieved and maintained under the five-year period. There is no longer any financial feasibility mandate. In contrast, the previous definition of financial feasibility in section 163.3164(32) (2010) which was repealed in the Community Planning Act defined "financial feasibility" as follows:

> that sufficient revenues are currently available or will be available from committed funding sources for the first 3 years, or will be available from committed or planned funding sources for years 4 and 5, of a 5-year capital improvement schedule. . . .

A matter of express preemption is referendum approval of comprehensive plan amendments. Unless included in a local government charter provision in effect on June 1, 2011, any initiative or referendum process regarding any comprehensive plan amendment or plat amendment is prohibited. See § 163.3167(8), Fla. Stat.

The bulk of the preemption in the Community Planning Act relates to the optional application by local governments of concurrency to transportation and public education facilities. Section 163.3180(5)(a) controls if concurrency is applied to transportation facilities. Section 163.3180(6)(a) controls if concurrency is applied to public education facilities.

The interpretation of these statutory provisions is hindered by vagueness resulting from the repeal of key definitions in the Community Planning Act. The lack of statutory definitions and the repeal of Rule 9-J5 of the Florida Administrative Code combines to raise questions concerning the validity of prior interpretations and

assumptions concerning key growth management words and phrases. For example, a definition does not appear in the Community Planning Act of "concurrency"; "transportation concurrency"; "school concurrency"; "concurrency management system" or "alternative mobility funding system."

Specific Preemption in an Application of Concurrency To Transportation Facilities

general

The first sentence in section 163.3180(5)(d) relating to the application of concurrency to transportation facilities provides:

> The premise of concurrency is that the public facilities will be provided in order to achieve and maintain the adopted level of service standard.

A comprehensive plan imposing optional transportation concurrency is required to contain appropriate amendments to the capital improvement element consistent with the requirements in the amended section 163.3177(3)(a). As discussed previously, while the capital improvement element is required to identify the facilities necessary to meet adopted level-of-services during the five-year period, the financial feasibility definition requirements as contained in prior law has been repealed.

Local governments that implement transportation concurrency are required to exempt public transit facilities from concurrency requirements. See § 163.3180(h)(2), Fla. Stat.

proportionate share rights

The greatest and most extensive preemption is the proportionate share contribution rights given to an applicant for development approval in section 163.3180(5)(h)3.a.-c.

Specially, such statutory provisions allow an applicant for: (a) a development-of-regional-impact development order; (b) a rezoning; or (c) other land use development permit to satisfy the transportation concurrency requirements of (1) the local

comprehensive plan and (2) the local government's concurrency management system; or (3) if applicable, section 380.06, if

- The applicant enters into a binding agreement to pay for or construct its proportionate share of required improvements.
- The proportionate-share contribution or construction is sufficient to accomplish one or more mobility improvements that will benefit a regionally significant transportation facility.
- The local government has provided a **MEANS** by which the landowner will be assessed a proportionate share of the cost of providing the transportation facilities necessary to serve the proposed development.

The **MEANS** provided by the local government to assess a proportionate share contribution under the Community Planning Act is subject to the following statutory requirements and mandates:

- The applicant shall not be held responsible for the additional cost of reducing or eliminating deficiencies. (§ 163.3180(5)(h)3.c.(I), Fla. Stat.)
- A local government may not require payment for construction of transportation facilities whose costs would be greater than a development's proportionate share of the improvements necessary to mitigate the development's impact. (§ 163.3180(5)(h)3.c.II., Fla. Stat.)
- The proportionate share construction shall be calculated based on the following formula. (§163.3180(5)(h)3.c.(II)(A), Fla. Stat.)

$$\frac{\text{No. of New Trips at Peak Hour}^{1}}{\text{Anticipated Change in Peak Hour Maximum Service Volume}^{2}} \times \text{Construction Cost at Time of Development Payment}^{3}$$

[1]Number of trips from proposed development expected to reach roadways during peak hours from phase being approved.
[2]Resulting from construction of an improvement necessary to maintain or achieve adopted LOS.
[3]Of the improvement necessary to maintain or achieve the adopted LOS on the impacted roads.

In applying the proportionate share formula, section 163.3180(5)(h)3.c.(II)(B) provides:

- The applicant, in its traffic analysis should identify roads or facilities that have a transportation deficiency as defined in section 163.3180(5)(h)3.e.

- Section 163.3180(5)(h)3.e. defines "transportation deficiency" as a facility which exceeds the adopted LOS by a combination of the following trip determinations:

(existing, committed, and vested trips, exceeding adopted LOS standards)
+
(additional projected background trips from any source other than the development project under review)
+
(trips that are forecast by established traffic standards)

- The proportionate share formula shall be applied only to those facilities determined to be significantly impacted by the projected traffic under review.
- For any road determined to be transportation deficient without the project traffic under review: (a) the cost of deficiency correction shall be removed from the calculation; and (b) the necessary transportation improvement required to correct the deficiency shall be considered in place for the proportionate share calculation.
- The improvement to correct the transportation deficiency is the responsibility of the entity with maintenance responsibility.
- The proportionate share shall be calculated only for the needed transportation improvements that are greater than the identified deficiency.

Additional preemptions in the proportionate share calculation provisions include:

- If the provisions of section 163.3180(5)(h)3.c.(II). has been satisfied for a particular phase, all transportation impact fees from the phase shall be deemed fully mitigated in any transportation analysis from a subject phase. See 163.3180(5)(h)3.c.(II)(E), Fla. Stat.
- If trips from a previous phase did not generate a volume of trips that required a mitigation, such trips may be cumulatively analyzed from a subsequent phase to determine mitigation.
- Any trips assumed from a toll-financed facility shall be eliminated from the formula.

credit requirements

The applicant shall receive a credit on a dollar-for-dollar basis for impact fees, mobility fees, and other transportation concurrency mitigation requirements paid or payable in the future for the project. The credit shall be reduced up to 20 percent by the percentage share that the project's traffic represents of the added capacity of the improvement, or to the amount specified in the county ordinance -- whatever yields the greatest credit.

impact of proportionate share requirements on development approval

Section 163.3180(5)(h)3.d. (2013), provides that these proportionate share requirements of that subsection do not require development approval of an otherwise unqualified project:

> This subsection does not require a local government to approve a development that is not otherwise qualified for approval pursuant to the applicable local comprehensive plan and land development regulations.

Caveat: See the amendments to this subsection in HB 319 adopted by the 2013 Legislature and discussed in the subsequent sections of this paper.

Transportation Preemption in Chapter 2013-78, Laws of Florida
(CS/CS/CS/HB 319)

Chapter 2013-78, Laws of Florida ("HB 319") is an amendment to the Community Planning Act advanced by the development community and adopted during the 2013 Legislative Session. The language of HB 319 is intended to continue to discourage local governments from implementing or continuing the now optional implementation of transportation concurrency systems. For example, section 163.3180(5)(h) clarifies that the limitations on optional transportation concurrency in the Community Planning Act apply to local governments that continue to implement transportation concurrency systems whether in the form adopted into their comprehensive plan before the effective date of the Community Planning Act or as subsequently modified. Thus, the preemption

in the Community Planning Act applies to both old and new plans that apply concurrency to transportation facilities.

The provisions in section 163.3180(h) that allows an applicant to pay the proportionate share of required improvements are amended as follows:

- Clarification is made that the an applicant for a development agreement can also rely on the proportionate share provisions.
- The proportionate share provision is triggered if an applicant "in good faith offers" to enter into a binding agreement rather than the prior language which required the execution into of a binding agreement.
- Most significantly, the provision of section 163.3180(5)(h)3.d. was amended to include the phrase "for reasons other than transportation impacts." Such section now reads as follows:

> This subsection does not require a local government to approve a development that, <u>for reasons other than transportation impacts</u>, is not ~~otherwise~~ qualified for approval pursuant to the applicable local comprehensive plan and land development regulations.

(HB 319, lines 132-136).

Although such language is awkward, it appears to be intended to eliminate transportation impacts as a factor for consideration in approval of a development as long as a good faith effort is made to enter into the proportionate share contribution sanctioned by the Community Planning Act.

A new section 163.3180(5)(i) was added to provide additional limitations on local government comprehensive planning and land use regulatory authority in the event it elects to repeal transportation concurrency.

First, local governments are encouraged to adopt an alternative mobility system that uses one or more of the tools and techniques identified in section 163.3180(5)(f) which include:

- Adoption of long-term strategies to facilitate development patterns that support multimodal solutions, including urban design, and appropriate land use mixes, including intensity and density.

- Adoption of an areawide level of service not dependent on any single road segment function.
- Exempting or discounting impacts of locally desired development, such as development in urban areas, redevelopment, job creation, and mixed use on the transportation system.
- Assigning secondary priority to vehicle mobility and primary priority to ensuring a safe, comfortable, and attractive pedestrian environment, with convenient interconnection to transit.
- Establishing multimodal level of service standards that rely primarily on non-vehicular modes of transportation where existing or planned community design will provide adequate level of mobility.
- Reducing impact fees or local access fees to promote development within urban areas, multimodal transportation districts, and a balance of mixed-use development in certain areas or districts, or for affordable or workforce housing.

(HB 319, lines 148-151).

Second, the following prohibition in new section 163.3180(5)(i) is placed upon the adoption of any alternative mobility funding system:

> Any alternative mobility funding system adopted may not be used to deny, time, or phase an application for site plan approval, plat approval, final subdivision approval, building permits, or the functional equivalent of such approvals provided that the developer agrees to pay for the development's identified transportation impacts via the funding mechanism implemented by the local government.

(HB 319, lines 151-157).

It does not appear that the term "funding mechanism" referenced in the above quote is the strict proportionate share calculation formula discussed previously applicable to a concurrency management system. Additionally, it is unclear whether the preemption in section 163.3180(5)(i) relating to denying timing or phasing of local use applications apply to home rule land development regulations that do not constitute transportation concurrency or an undefined alternative mobility funding system.

Third, any mobility-fee funding system must also comply with the following:

- The revenue received under the "alternative system" must be used to implement the needs of the local government's plan which serves as the basis for the fee imposed.

- The mobility fee funding system must comply with the dual rationale nexus test applicable to impact fees.

(HB 319, lines 151-162).

Finally, any alternative system that is not mobility fee based shall not be applied in a manner that imposes upon new development any responsibility for funding an existing transportation deficiency. (HB 319, lines 162-166). This seems to indicate that mobility fees could be used to fund transportation deficiencies as defined in the Community Planning Act.

Preemptions on the Adoption of Impact Fees

Section 163.31801, the "Florida Impact Fee Act" places certain preemption and restrictions on the adoption of impact fees by local governments.

Section 163.31801(3) requires that an impact fee ordinance meet the following minimum requirements: (a) the fee calculation must be based on the most recent and localized data, provide an accounting and report of impact fee collections and expenditures that an impact fee imposed for infrastructure needs to be maintained in a separate accounting fund, and limit the administrative charges for the collection to the impact fee's actual cost; and (b) 90-day notice be provided prior to the effective date of an ordinance proposing a new or increased impact fee.

Any audits or financial statements performed by a CPA must include an affidavit filed by the chief financial officer stating that the local government has complied with the Florida Impact Fee Act.

Section 163.31801(5) changes the burden of proof in a judicial challenge to an impact fee by providing that the government has the burden of proving by a predominance of the evidence that the impact fee meets the requirements of state precedent and that the Court may not use a different standard.

Specific Preemption in Application of Concurrency to Public Education Facilities

general

The first sentence in section 163.3180(6)(g) is identical in the first sentence in section 163.3180(5)(d) relating to transportation concurrency:

> The premise of concurrency is that the public facilities will be provided in order to achieve and maintain the adopted level of service standard.

Like transportation, if local governments apply concurrency to public education facilities, the interlocal agreements "shall include principles, guidelines, standards, and strategies, including adopted levels of service, in their comprehensive plans and interlocal agreements." § 163.3180(6)(a), Fla. Stat. Additionally, the following specific statutory directives are limitations on the application of concurrency to public education facilities:

- Even if all municipalities do not agree, the county and one or more municipalities representing 80% of the total countywide population can adopt school concurrency in their comprehensive plan and interlocal agreement. Id.
- The adequate LOS standards, based on data and analysis, shall be adopted jointly by the local governments and the school board. § 163.3180(6)(b), Fla. Stat.
- School LOS standards included and adopted in the capital improvement element of the local comprehensive plan shall apply districtwide to all schools of the same type. § 163.3180(6)(c), Fla. Stat.
- Local governments and school boards may utilize "tiered level-of-service standards to allow time to achieve an adequate and desirable level of service as circumstances warrant." § 163.3180(6)(d), Fla. Stat.
- If a school district includes relocatable facilities in their inventory of student stations they are required to include capacity of such relocatable facilities if they meet certain standards and were purchased after 1998. § 163.3180(6)(e), Fla. Stat.

- The capital improvement element is required to have amendments consistent with section 163.3177(3) and identify the facilities necessary to meet adopted level of services during a five-year period. The impact of this requirement has been eliminated by the change in definition of "financial feasibility" in the Community Planning Act.
- Local governments may not deny an application for a site plan, final subdivision approval or the functional equivalent for a development or phase for failure to achieve and maintain the LOS standard where adequate school facilities will be in place or under adequate construction within three years after issuance of final subdivision or site plan approval or the functional equivalent.

limitations on LOS standards

In addition to the requirement that public school LOS shall be applied districtwide under section 163.3180(6)(c) the Community Planning Act lessened the concurrency impact of LOS standards and concurrency service areas in several ways.

First, section 163.3180(6)(f)1. provides as follows:

> In order to balance competing interests, preserve the constitutional concept of uniformity, and avoid disruption of existing educational and growth management processes, local governments are encouraged, if they elect to adopt school concurrency, to apply school concurrency to development on a districtwide basis so that a concurrency determination for a specific development will be based upon the availability of school capacity districtwide.

(Such lessening of concurrency standards is wrapped in the constitutional concept of uniformity for purely political reasons.)

Second, section 136.3180(6)(f)2.b. provides as follows:

> Where school capacity is available on a districtwide basis but school concurrency is applied on a less than districtwide basis in the form of concurrency service areas, if the adopted level-of-service standard cannot be met in a particular service area as applied to an application for a development permit and if the needed capacity for the particular service area is available in one or more contiguous

> service areas, as adopted by the local government, then the local government may not deny an application for site plan or final subdivision approval or the functional equivalent for a development or phase of a development on the basis of school concurrency, and if issued, development impacts shall be subtracted from the contiguous service area's capacity totals. Students from the development may not be required to go to the adjacent service area unless the school board rezones the area in which the development occurs.

Third, section 163.3180(6)(f)2.a. provided that if a local government elects to apply school concurrency on a less than districtwide basis by the utilization of school attendance for concurrency service areas the local government and the school board has the burden to demonstrate that the utilization of school capacity is maximized to the greatest extent possible, taking into account specifically transportation costs in court approved desegregation plans. Additionally, the standards for establishing such boundary shall be identified and included as supporting data analysis in the local comprehensive plan.

proportionate share requirements

Section 163.3180(6)(h) provides as its rationale "to limit the liability of local governments" and provides that the local government may allow a landowner to proceed with the development of a specific parcel of land notwithstanding failure of the development to satisfy school concurrency if all of the following factors are found to exist:

- the proposed development is consistent with a future land use designation for the specific property and with pertinent portions of the adopted local plan;
- the capital improvement element and the education facility plan provides for school facilities adequate to serve the development but the local government school board has not implemented that element;
- the project includes a plan that demonstrates that the capital facilities needed as a result of the project can be reasonably provided; or

- the local government school board has provided a **MEANS** by which the landowner will be assessed a proportionate share of the cost to provide the school facilities necessary to serve the proposed development.

Section 163.3180(6)(h)2. provides that school concurrency is satisfied if the developer executes a legally binding commitment to provide mitigation proportionate to the demand for public school facilities to be created by actual development of the property including, but not limited to, the mitigation options enumerated in section 163.3180(6)(h)2.a. which provides:

> Appropriate mitigation options include the contribution of land; the construction, expansion, or payment for land acquisition or construction of a public school facility; the construction of a charter school that complies with the requirements of s. 1002.33(18); or the creation of mitigation banking based on the construction of a public school facility in exchange for the right to sell capacity credits.

In determining the amount of proportionate share mitigation, section 163.3180(6)(h)2.a. provides that the developer has to pay the proportionate share mitigation for additional residential units approved by the local government and "actually developed on the property, taking into account residential density allowed on the property prior to the plan amendment that increased the overall residential density."

Section 163.3180(6)(h)2.c. provides as follows:

> Any proportionate-share mitigation must be directed by the school board toward a school capacity improvement identified in the 5-year school board educational facilities plan that satisfies the demands created by the development in accordance with a binding developer's agreement.

Section 163.3180(6)(h)3. recognizes home rule power in the application of local government of proportionate share contributions within the limitations provided, as follows:

> This paragraph does not limit the authority of a local government to deny a development permit or its functional equivalent pursuant to its home rule regulatory powers, except as provided in this part.

credit requirements

The local government is required to credit any proportionate share contribution, construction, expansion or payment towards any other impact fee or exaction imposed by a local ordinance from the same need on a dollar-for-dollar basis at fair market value. § 163.3180(6)(h)2.b., Fla. Stat.

miscellaneous limitations

- The need for a local government, municipalities and the public school entering into an interlocal agreement in section 163.31777 is preserved. See § 163.3180(6)(j), Fla. Stat.
- Section 163.3180(6)(i) reaffirms the requirement that school concurrency be applied on a less than districtwide basis. The second sentence in section 163.3180(6)(i)3. requires the interlocal to:

> Define the geographic application of school concurrency. If school concurrency is to be applied on a less than districtwide basis in the form of concurrency service areas, the agreement shall establish criteria and standards for the establishment and modification of school concurrency service areas. The agreement shall ensure maximum utilization of school capacity, taking into account transportation costs and court-approved desegregation plans, as well as other factors.

Conclusion

The Community Planning Act and its new proportionate share provisions and additional implementation limitations severely undermines the option to apply concurrency to transportation facilities and encourages the establishment of a mobility fee system. The structure and application of such mobility fee system remains to a large extent within the home rule power of counties and municipalities. As to educational facilities, the push to district-wide LOS is strengthened in the Community Planning Act yet the joint interlocal agreement remains an effective growth management tool to ensure the availability of adequate educational facilities.