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MEMORANDUM

DATE: July 31, 2019

TO: Fred Goodrich, Division Manager/County Zoning Official,
Building and Development Services Department

THROUGH: Mitchell O. Palmer, County Attorney MOP 8-5-19

FROM: Sarah A. Schenk, Assistant County Attorney 7.31.19
William E. Clague, Chief Assistant County Attorney 07/31/19

RE: Chapter 2019-165, Laws of Florida (a/k/a HB 7103), Development Orders and Permits; CAO Matter No. 2019-0361

Background

Pursuant to the above Request for Legal Services ("RLS"), you have asked for the advice of this Office regarding Chapter 2019-165, Laws of Florida (a/k/a HB 7103), which amends Section 125.022, Florida Statutes (as amended, the "Act"). The Act establishes specific time frames for the processing of development permits and development orders. The Act applies to development orders and permits processed administratively, as well as to those requiring quasi-judicial public hearings. A response to this Request for Legal Services was requested by July 31, 2019.

This RLS raises a number of specific questions. The CAO response will address each question in the order presented in the RLS. Additionally, this memorandum provides recommendations for the implementation of the Act, to achieve legally defensible land use decisions.

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Issues Presented

A. Time Frames: Whether the various time frames specified in Section 125.022, F.S., are calculated as calendar days or working days.

B. Modifications: Whether a new 30-day time frame allows for multiple completeness reviews, each of which takes 30 days, in the event an applicant modifies a pending application for a development permit or order after the first completeness review is performed.

C. Extensions: What is the definition of "a reasonable request for an extension of time" as used in Section 125.022(1) of the Act?

D. Deadlines: What are the consequences if the County cannot act upon the pending application for a development permit or order within the required time frame? Is the application automatically approved?

E. Mass Grading/Infrastructure: Whether plans for mass grading or infrastructure construction plans are included in the definition of development permit or order under Section 125.022(4) of the Act.

F. Requests for Information: Whether the applicant should be given a fixed period of time to respond to a request from staff for additional information concerning the pending application for a development order or permit. (Rephrased for clarity)

Brief Answer

A. Time Frames: The various time frames specified in Section 125.022(1) of the Act are calculated as calendar days.

B. Modifications: Though the Act is silent on the matter, it can be construed to permit the County to require an application to undergo a new completeness review if the applicant makes a substantial modification. The County should define a substantial modification in an amendment to the Land Development Code (LDC) or in implementing administrative procedures.

C. Extensions: The Act does not define a "reasonable request for an extension of time". Whether such a request is reasonable would depend upon the facts and circumstances of the particular case.

D. Deadlines: The Act does not provide any consequences when a time deadline is exceeded by the County, such that an application will not be deemed approved as a result.

E. Mass Grading/Infrastructure: Assuming for purposes of this memorandum that mass grading and infrastructure construction plans do not require a development permit or order, then the definitions of Section 163.3164, F.S., control. Staff should review the list of activities that constitute "development" in Section 380.04, F.S., copy attached. See Discussion section below for further details.

F. Requests for Information: The County should amend either the LDC or the implementing administrative procedures to provide for a specified time frame within which the applicant is required to respond to a request for additional information concerning a pending development permit or order.

Discussion

A. Time Frames: Section 125.022 (1) of the Act provides for a 30-day time frame for completeness review of an application for a development permit or development order, which begins to run from the date of submittal. Section 125.022(1) also provides a 30-day window for the applicant to address any deficiencies identified in the completeness review by submitting additional information.

Section 125.022(1) specifies that the final action on an application for a development permit or development order that is subject to *administrative* approval must occur within 120 days after the application is deemed complete. This deadline applies to administratively approved development permits or orders, such as most final site plans and construction plans.

Section 125.022(1) provides for a 180-day window for the County to take final action on a pending development permit or development order requiring a *quasi-judicial* public hearing. This deadline applies to public hearing items such as special permits, re-zonings, general development plans, preliminary site plans, and DRI development orders.

All of the above described time frames — 30 days, 120 days and 180 days — are calculated utilizing calendar days. See Rule 2.514, Computing and Extending Time, Fla. R. Jud. Admin. However, if the last day for the period is

a Saturday, Sunday or legal holiday, the period continues to run until the end of the next calendar day that is not a Saturday, Sunday or legal holiday.

B. Modifications: The Act is silent as to what should happen in the event an applicant makes a substantial modification to an application after receiving a completeness determination. The Act can be construed to allow the County to send a substantially modified application back to the beginning of the process for a new completeness review. The threshold for changes that would constitute substantial modifications that trigger a subsequent completeness review should be reduced to writing in the LDC or in implementing administrative procedures.

C. Extensions: The Act allows both parties to "agree to a reasonable request for an extension of time" but provides no guidance as to what is "reasonable". The common usage of the term "reasonable" in statutory provisions requires consideration of the specific facts and circumstances surrounding the request. The Act lists as examples the occurrence of a force majeure, a set of circumstances beyond the control of the parties. Another example of an extraordinary circumstance would be a state of emergency declared by the Governor or by the County Commission, during which the conduct of business would be suspended. As expressly stated in Section 125.022(1) of the Act, the mutual agreement of the County and the applicant is required as to the duration of the time extension. Thus, it is important to document the factual basis for the extension *in writing*, and to document the applicant's agreement or lack thereof *in writing*. The *applicant's authorized agent* should be the point person to act on behalf of the applicant on this issue.

D. Deadlines: The Act does not specify any consequences when a time deadline is exceeded, such that an application will not be deemed approved as a result. Repeated delays may affect the strength of the County's legal position in a wide range of land use disputes, including both litigation and administrative proceedings.

E. Mass Grading/Infrastructure: Section 125.022(4) of the Act relies upon the definition of "development permit" and "development order" in Section 163.3164, F.S. In turn, the definitions in Section 163.3164 (15) and (16), F.S., rely upon the definition of "development" in Section 380.04, F.S. There is a list of activities that constitute "development" and a list of activities that do not constitute "development" in Section 380.04, F.S., and the list is extensive. A copy of Section 380.04, F.S., is attached to this memorandum for staff to review. If and only if any of the approvals required for "mass grading" or

"infrastructure construction plans" fall within one of these definitions, then the time frames set forth in the Act will apply. Otherwise, they will not.

F. Requests for Information: In the scenario described in the RLS, the Act does place the burden on the applicant to request that the application move forward notwithstanding a request from the County for more information. The County should amend either the Land Development Code or the implementing administrative procedures to provide a deadline by which the applicant must respond to a request for additional information. This amendment should also address the requirement that the applicant state in writing the intent to invoke the right to move forward pursuant to the Act. In the event the applicant provides the above written statement, then the County should proceed to process the application, unless the applicant makes a written request for a time extension to resolve the issue.

Recommendations

We provide the following recommendations for the implementation of the Act to provide for legally defensible land use decisions:

1. Completeness/Particularity: The importance of a *detailed* completeness review of newly submitted applications for a development order or permit cannot be overemphasized in light of the deadlines in the Act. Deadlines will begin to run with the issuance by the County of a letter stating either the application is complete or specifying with *particularity* any areas that are deficient.

   The use of the terms "with particularity" in Section 125.022(1) requires that the staff response stating any deficiency must also include a *specific citation* to the provisions of the LDC or other County standard for which staff is requesting further information. Completeness determinations, or requests for additional information, must be documented carefully to meet this requirement.

2. Completeness/Substantive Review: We understand that your Department handles most completeness decisions as "front desk" decisions that rely on checklists. Because a completeness determination now carries significantly more import for the County, a more substantive review of submittals will probably be necessary. Applicable County departments should review each application and provide comments as to whether it is complete.

   For example, if a traffic impact study is submitted, a staff person with substantive knowledge of traffic impact study requirements should check it for

completeness, making sure that it includes the basic information required pursuant to the County's standards. Similarly, if a wetland impact analysis is required, then the staff person with expertise in that subject area should review the analysis for completeness.

If a specific approval is requested for a Planned Development, then any required study or analysis (for example, a parking study to justify reduced parking requirements) should be included in the application and reviewed for completeness by a qualified staff person. If additional building height is requested, then the required analysis and building elevations should be part of the application package, and similarly reviewed.

This will likely require a realignment of staff resources to handle completeness decisions, and a more complicated set of checklists and protocols for completeness review.

3. LDC Amendments: Section 312.4, LDC describes the County's completeness review process. Section 312.5, LDC describes the County's sufficiency review process. Completeness review and sufficiency review are distinct levels of review. After an application is determined to be complete, the Director forwards the application to the Development Review Committee ("DRC") for sufficiency review, unless DRC review is not required by the LDC, then the Director performs the sufficiency review.

   The LDC describes the sufficiency review as: an analysis of whether a proposed application: (a) meets the stated objective requirements of the Comprehensive Plan, the LDC and the County's rules and regulations; and (b) includes the necessary analysis and information to enable the approving authority to make the necessary determinations under the Comprehensive Plan and the LDC.

   An application may be deemed complete, but nevertheless be determined to be insufficient and recommended for denial. The written determinations of completeness and sufficiency need to reflect the clear distinction between these two levels of review – which should take place separately and sequentially – in order to provide a defensible legal basis for the County's land use decisions. Both of these LDC sections, and related definitions, will need to be examined for possible amendments for clarity and consistency with the Act. Other LDC amendments will likely be necessary to spell out the procedural changes the County will need to make to implement the Act.

The process imposed by the Act also forces a more careful consideration of the maintenance of the LDC and Comprehensive Plan. Staff will have to rely upon it in writing more often in order to establish why an application has moved forward with or without a positive recommendation. This Office, and the County's LDC consultant, have expressed concerns about certain provisions of the LDC and Comprehensive Plan that should be updated for clarification, particularly as to matters of procedure. We are in the process of summarizing these longstanding issues.

4. Timelines/Communications: The 180-day time frame for applications requiring quasi-judicial public hearings requires that *both* the Planning Commission and the Board public hearings must be held *within* the 180-day window. Many applications must also undergo review by the DRC. Some must be reviewed by other agencies (for example, fire districts). We strongly recommend that you establish target time frames for the steps in the process for the common applications that your Department handles, and include communication points at which applicants are put on notice as to whether they are likely to proceed forward within the deadlines in the Act while still receiving favorable recommendations for approval.

5. Staff Analysis: There has been speculation in the land use bar that rigid enforcement of the deadlines in the Act will result in more staff recommendations for denial. The deadlines imposed by the Act may force the County to move applications forward for decision notwithstanding that staff has questions or concerns. Oftentimes staff resolves its concerns by engaging in dialogue with an applicant. But if an applicant insists on moving forward within the prescribed deadlines, staff may be forced to move an application forward with a recommendation for denial.

   As we have advised many times, decisions to approve or deny land use applications (either administratively or in quasi-judicial public hearings) must be supported by the record, and must be in writing citing specific sections of the applicable code. In the case of a denial, notice of the denial must be provided to the applicant. See Sections 125.022(1) and (3), F.S. Many times, this Office has advised of the importance of (a) identifying in writing any potential deficiencies in applications as early as possible in the process, and (b) including in staff reports a meaningful analysis of positive and negative aspects of applications. The deadlines in the Act, and potential for disputes between staff and applicants, will increase the need to follow this advice. Failure to do so will likely place the Board in a very difficult legal position if an

applicant insists on moving forward notwithstanding unresolved concerns of staff.

6. Use of DRC: We have also advised many times that the County does not use the DRC process with the same level of finality as many other local governments. While staff does routinely provide substantive comments during DRC review, many issues are raised later in the process, and applications continue forward through the process regardless of whether the DRC has approved them. (It is not clear, in fact, whether applications receive "approval" by DRC.) Under the deadlines imposed by the Act, this practice may also put staff (and ultimately the Board) in a difficult position if an applicant insists on moving forward notwithstanding unresolved concerns of staff. We advise that you should consider whether DRC should function as a "gatekeeping" process, in which an applicant is advised in writing of all identified staff concerns, and given the option (a) to move forward under the proscribed deadlines without a staff recommendation of approval, or (b) agree to extend the time frame to move forward, in order to resolve staff concerns and receive a positive staff recommendation.

7. Legal Review: In light of the volume of land use applications currently received by the County, and the high potential for litigation that may result from decisions (either to approve or deny) on such applications pursuant to the Act, we have decided to adjust the required review time for Requests for Legal Services from two weeks to 30 calendar days. This applies to all RLSs relating to development permits or orders subject to the Act, regardless of whether they are subject to administrative or quasi-judicial approval. We advise that you should incorporate sufficient time for such review into the timelines described in paragraph 4, above.

Conclusion

The advice provided in this memorandum is intended to assure legal defensibility and certainty in the County's land development process. It does, in some respects, impose greater discipline with respect to the review and approval of applications. It should not, however, be misinterpreted as advice to impose more stringent restrictions on development. Of the last six lawsuits filed against the County regarding land development decisions, five challenged *approvals* of development applications. Maintaining a process that is consistent with the Act and other Florida Statutes, and one that also provides clarity as to the standards and practices of the County, is as important for defending development approvals as it is for defending denials.

Please remain cognizant of the effective date of the Act (July 1, 2019). Applications for development orders or permits pending as of this date are subject to the processing time frames in the Act.

This memorandum concludes the CAO's response to this RLS. This memorandum has been prepared without the benefit of any judicial decisions interpreting the Act, due to the effective date (July 1, 2019) of this legislation. This memorandum will be revised accordingly to address any subsequent judicial decisions construing this new legislation.

Copies to:
Board of County Commissioners
Cheri Coryea, County Administrator
John Osborne, Deputy County Administrator
Karen Stewart, Acting Deputy County Administrator
John Barnott, Director, Building and Development Services Department
Anne M. Morris, Assistant County Attorney
Clarke Davis, Transportation Planning Manager, Public Works Department
Robert Brown, Environmental Protection Division Manager,
Parks and Natural Resources Department
Tom Gerstenberger, Stormwater Engineering Division Manager,
Public Works Department

Enclosure:
Section 380.04, F.S.

Select Year: 2018 ▼ Go

The 2018 Florida Statutes

Title XXVIII
NATURAL RESOURCES; CONSERVATION, RECLAMATION, AND USE

Chapter 380
LAND AND WATER MANAGEMENT

View Entire Chapter

380.04 Definition of development.—

(1) The term "development" means the carrying out of any building activity or mining operation, the making of any material change in the use or appearance of any structure or land, or the dividing of land into three or more parcels.

(2) The following activities or uses shall be taken for the purposes of this chapter to involve "development," as defined in this section:

(a) A reconstruction, alteration of the size, or material change in the external appearance of a structure on land.

(b) A change in the intensity of use of land, such as an increase in the number of dwelling units in a structure or on land or a material increase in the number of businesses, manufacturing establishments, offices, or dwelling units in a structure or on land.

(c) Alteration of a shore or bank of a seacoast, river, stream, lake, pond, or canal, including any "coastal construction" as defined in s. 161.021.

(d) Commencement of drilling, except to obtain soil samples, mining, or excavation on a parcel of land.

(e) Demolition of a structure.

(f) Clearing of land as an adjunct of construction.

(g) Deposit of refuse, solid or liquid waste, or fill on a parcel of land.

(3) The following operations or uses shall not be taken for the purpose of this chapter to involve "development" as defined in this section:

(a) Work by a highway or road agency or railroad company for the maintenance or improvement of a road or railroad track, if the work is carried out on land within the boundaries of the right-of-way.

(b) Work by any utility and other persons engaged in the distribution or transmission of gas, electricity, or water, for the purpose of inspecting, repairing, or renewing on established rights-of-way or corridors, or constructing on established or to-be-established rights-of-way or corridors, any sewers, mains, pipes, cables, utility tunnels, power lines, towers, poles, tracks, or the like. This provision conveys no property interest and does not eliminate any applicable notice requirements to affected land owners.

(c) Work for the maintenance, renewal, improvement, or alteration of any structure, if the work affects only the interior or the color of the structure or the decoration of the exterior of the structure.

(d) The use of any structure or land devoted to dwelling uses for any purpose customarily incidental to enjoyment of the dwelling.

(e) The use of any land for the purpose of growing plants, crops, trees, and other agricultural or forestry products; raising livestock; or for other agricultural purposes.

(f) A change in use of land or structure from a use within a class specified in an ordinance or rule to another use in the same class.

(g) A change in the ownership or form of ownership of any parcel or structure.

(h) The creation or termination of rights of access, riparian rights, easements, distribution and transmission corridors, covenants concerning development of land, or other rights in land.

(4) "Development," as designated in an ordinance, rule, or development permit includes all other development customarily associated with it unless otherwise specified. When appropriate to the context, "development" refers to the act of developing or to the result of development. Reference to any specific operation is not intended to mean that the operation or activity, when part of other operations or activities, is not development. Reference to particular operations is not intended to limit the generality of subsection (1).

History.—s. 4, ch. 72-317; s. 2, ch. 83-308; s. 94, ch. 2002-20; s. 29, ch. 2002-296; s. 2, ch. 2018-34.