

Critical Issues on the Agenda

**Tampa Marriott Waterside • 700 South Florida Avenue
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Tampa, FL • September 9, 2008**

8:30 AM – 9:00 AM

Registration

9:00 AM – 10:30 AM

The Development Approval Process

- Maximizing Your Chances of Development Success
- Negotiating With Local Governments
- Development Agreements as a Permitting Strategy

— Richard E. Davis, Esq.

Mediation Alternatives When Permitting Is Denied

- When to Mediate
- How to Find a Land Use Mediator
- How the Process Works in Practice
- Mediation Techniques

10:30 AM – 10:45 AM

Break

10:45 AM – 12:15 PM

Process for Obtaining Government Permits

- Applicability of Quasi-Judicial Process
- Preparing for the Quasi-Judicial Process
- Prevailing at the Quasi-Judicial Hearing
- Appealing From an Adverse Decision at the Quasi-Judicial Hearing

— Donald E. Hemke, Esq.

12:15 PM – 1:15 PM

Lunch (On Your Own)

1:15 PM – 2:15 PM

Creative Concurrency, Proportionate Fair Share and Florida Hometown Democracy

- How to Creatively Comply With Fla. Stat. §163.3180
- Transportation Concurrency Backlog Authorities (Fla. Stat. §163.3182)
- Employment Centers
- Transportation Concurrency Management Areas
- De Minimis Impacts

— Ronald L. Weaver, Esq.

School Concurrency

- Ways of Complying With School Concurrency
- School Concurrency Implementation in Hillsborough County
- Difficulty in Calculating Enrollment and Capacity
- Paying for Roads at New Schools
- Future of School Concurrency

Coping With Proportionate Fair Share

- Basics of Proportionate Fair Share Program in Florida
- Problems With Proportionate Fair Share
- New Bills That May Have Passed During 2008 Legislation Session That Amend Proportionate Fair Share Law
- Resistance to Proportionate Fair Share Throughout the State

Current State of Concurrency and Other Growth Management Topics

- Growth Management Related Bills That Passed During 2008 Legislative Session, Including Guns at Work Legislation
- Current Status of Florida Hometown Democracy
- Questions and Answers

2:15 PM – 2:30 PM

Break

2:30 PM – 4:00 PM

Regulatory Due Diligence

- What Is Due Diligence? Who Are the Regulatory Players?
- What Agencies and Governments Have Jurisdiction?
- What Permit Requirements Will Agencies Assert? What Are Permit Time Frames?
- Identifying Entitlements and Applicable Codes and Regulations
- Impact Fees
- Project Flow Chart

— Richard Diaz Jr., P.E.

4:00 PM – 4:30 PM

Questions and Answers

— Richard E. Davis, Esq., Richard Diaz Jr., P.E., Donald E. Hemke, Esq., and Ronald L. Weaver, Esq.

Registration

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Construction Insurance, Bonding and Liens – Insurance Considerations; Projects and Properties That Cannot Be Made Subject to Construction Lien; Practical Aspects of Lien Preparation; Florida Private Project Bonds; Florida Public Project Bonds.

Item: **375447** CD and Manual ___@ \$169 Manual ___@ \$79 E-Manual ___@ \$79

The Fundamentals of Construction Contracts: Understanding the Issues – Essential Construction Contract Terms; Avoiding Future Problems by Addressing Key Issues; Alternative Dispute Resolution; Contract Clauses; Surety Bonds.

Item: **372349** CD and Manual ___@ \$169 Manual ___@ \$79 E-Manual ___@ \$79

What to Do When Construction Projects Go Bad – Identifying and Measuring "Bad"; Taking Action When "Bad" Occurs; Alternative Dispute Resolution; Termination; Pursuing Sureties; Construction Liens and Lien Avoidance.

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Our Distinguished Faculty

Richard E. Davis, Esq., is in private practice representing both public and private clients. In addition, he represents the city of San Antonio as their city attorney. Mr. Davis has served as a special hearing master for land use matters in Hillsborough, Manatee, Orange and Pinellas counties. He is a member of numerous civic organizations relating to land use and often speaks at CLE seminars. Mr. Davis graduated from the University of South Florida with a B.A. degree in political science and an M.A. degree in counseling. He received his J.D. degree, cum laude, from Stetson University College of Law. He has 30 years of experience in the area of land use law and is a recognized expert in developments of regional impact. Mr. Davis is board certified by The Florida Bar in city, county and local government law. In addition, he is a Florida Supreme Court certified mediator. Over the years, both law firms and governmental agencies throughout the state of Florida have utilized his service as an expert witness in the area of land use law. Mr. Davis has served as the chairman of Tampa Downtown Partnership and the City, County and Local Government Section of the Hillsborough County Bar Association. He is listed in *Who's Who in American Law* and the *Bar Register of Preeminent Lawyers*. Mr. Davis has achieved the highest rating in the *Martindale-Hubbell Law Directory*. He is a member of the Florida Academy of Professional Mediators and the Florida Association of Municipal Attorneys. Mr. Davis has been a frequent contributing author to *The Lawyer* magazine. He is a member of the American, Florida and Hillsborough County bar associations.

Richard Diaz Jr., P.E., is president of Diaz Pearson & Associates, Inc., located in Tampa. Mr. Diaz is a registered civil engineer with more than 30 years of consulting experience in land development engineering, transportation, planning, site design, permitting and right of way. His consulting includes land surveying, land planning, water and sewer utility design, roadway improvements, storm water management and infrastructure permitting. Mr. Diaz has been actively involved as a litigation consultant and expert witness in right of way acquisition and eminent domain matters for more than 25 years. He has served governmental, private and institutional clients, with trial experience in federal, state and municipal jurisdictions. Mr. Diaz has been a seminar facilitator on a variety of topics and presents courses in real estate engineering, property descriptions, engineering plan development, "How to Effectively Use Your Engineer in Eminent Domain" and "Reading Construction Plans." He has been an IRWA instructor since 1994.

Donald E. Hemke, Esq., is a shareholder in the Tampa office of Carlton Fields. Mr. Hemke has a general commercial litigation practice. In addition, he is often involved in obtaining government permits and licenses. Mr. Hemke has served as an arbitrator for the U.S. District Court for the Middle District of Florida and for the American Arbitration Association. Recently, he successfully obtained

a multimillion-dollar jury verdict on behalf of a developer against the Town of Longboat Key, obtained a multimillion-dollar refund in a class action against the City of Punta Gorda and obtained an injunction against a state agency's disadvantaged business program. Mr. Hemke has also represented owners, suppliers, contractors and subcontractors in construction cases often involving delay, inefficiency, hindrance and differing site condition claims. He has been involved in obtaining permits from the Corps of Engineers. Mr. Hemke has extensive experience in the areas of zoning/land use/environmental, governmental and construction litigation. He has tried land use/zoning cases, including Section 1983 civil rights cases for landowners in federal court. Mr. Hemke is admitted in Florida, the U.S. District Courts for the Middle and Northern Districts of Florida, the 6th and 11th U.S. Courts of Appeals, the U.S. Claims Court and the U.S. Supreme Court. He is a member of The Florida Bar, the American Bar Association and the Hillsborough County Bar Association. Mr. Hemke has written the chapter "How Does Florida Handle Toxic Torts" for the Environmental Law Series, *Toxic Torts Practice Guide*, and chapters titled "Election of Remedies" and "Sovereign Immunity" for The Florida Bar's *Florida Civil Practice Before Trial*. He earned his B.A. degree, cum laude, from Vanderbilt University and his J.D. degree from the University of Virginia School of Law, where he was in the *Virginia Law Review*.

Ronald L. Weaver, Esq., is chairman of the Environmental and Land Use Law Department in the Tampa office of the 115 member law firm of Stearns Weaver Miller Weissler Alhadeff & Sitterson, P.A., where his practice includes land use, environmental, real estate acquisition and real estate finance. He received his law degree, with honors, from Harvard Law School. Mr. Weaver has chaired the American Bar Association Commercial Banking and Real Estate Financing Subcommittees. His committees sponsored the international Real Estate Finance symposium in London, and he chaired the Florida Chamber of Commerce Solid and Hazardous Waste Statewide Conference for 400 industry leaders. Mr. Weaver has represented the San Diego Chamber of Commerce in concurrency and growth management ordinance considerations, and successfully negotiated as lead counsel the conclusion of a water moratorium in the Las Vegas, Nevada, area. He led a national forum on impact fees for 43 area governments in Atlanta, Georgia. Mr. Weaver is past chairman of an American Bar Association Property Rights Subcommittee. In 1996, he was inducted into the Tampa Bay Real Estate Hall of Fame by NAIOP. In 2005 Mr. Weaver was selected as one of Florida's top land use attorneys according to Chambers Guide, and has presented for over a dozen seminars in 2007 on concurrency, proportionate fair share, takings law, Bert Harris Property Rights Act and Florida hometown democracy.

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Creative Concurrency Management

By Ronald L. Weaver, Esq. and Melissa Stok, Law Clerk

Background

In 1985, Florida lawmakers enacted a new system to alleviate the significant problems the State was experiencing as a result of rapid and uncontrolled growth, called concurrency. Currently, there are seven mandatory facilities, which are subject to concurrency requirements as required by Chapter 163, Part II, Florida Statutes. These mandatory facilities for which local governments are required to adopt level of service (“LOS”)¹ standards include: sanitary sewer, solid waste, drainage, potable water, parks and recreation, schools, and transportation systems, including mass transit, where applicable.² Water supply and schools are the two newest mandatory facilities—both were added in 2005, with water becoming effective in 2007 and schools in 2008. A capital improvements program (“CIP”) must be set forth in the local government’s comprehensive plan and establish both LOS standards for the facilities subject to concurrency and the means for meeting the LOS standards. Impacts of development that result in service levels below the adopted LOS will not be allowed. Counties are encouraged to adopt a community vision and urban service boundary into their comprehensive plans, exempting developers of developments of regional impacts (“DRI”) if developers enter into a binding agreement with the adjacent jurisdictions and Florida Department of Transportation to ensure transportation impacts are mitigated.

Senate Bill 360 (see § 163.3180 Fla. Stat.), passed during the 2005 legislative session, provided for a new, more stringent transportation concurrency requirement that ensures that adequate road systems will be available for the increasing traffic that is often partnered with growth. Under the bill, developers have a new option to satisfy transportation concurrency—the Proportionate Fair Share (“PFS”) program. PFS allows companies to pay their “proportionate fair share” on improvements that are needed to serve their proposed development. The fair share is based on the proportion of new capacity created by the improvements that is consumed by the new traffic generated by their development. Local governments were required to adopt Proportionate Fair Share regulations by December 1, 2006.

The definition of “financial feasibility” was amended by SB 360, requiring committed funding sources for the first three years of a five-year capital improvements program (“CIP”), and allows committed and planned funding sources for the fourth and fifth years.³ Under the current revised statute, capital improvement elements (“CIE”) must be revised by December 2008.⁴ The new concurrency legislation requires construction within three years,⁵ but local regulations can be even more onerous.

1 LOS is a basic planning concept used to reflect the degree a public facility will be needed or required per unit of growth or development in a community. Fla. Admin. Code R. 9J-5.003(65).

2 Fla. Stat. § 163.3180(1)(a).

3 Fla. Stat. § 163.3164 (32)

4 Fla. Stat. § 163.3177 (3)(b)(1). The date was postponed from December 2007 to December 2008 by HB 7203.

5 Fla. Stat. § 163.3180(2)(c).

2007 Legislation

One of the most important questions left to developers and municipalities alike after the passage of the SB 360 was, “will developments have to mitigate for their impacts, and also be required to cure existing deficiencies?” There has also been much concern over unnecessary state oversight in the comprehensive plan amendment process, as well as how to promote growth in urban redevelopment areas when there are onerous proportionate fair share requirements. In a bill recently passed by the Florida State Legislature, these questions and others were partially answered.

HB 7203/SB 800 was passed by the Florida House and Senate on May 4, 2007. There were financial feasibility, concurrency, proportionate fair share, and local planning empowerment measures included in the bill. Some of the key items include:

- Added to the definition of “*financial feasibility*,” a comprehensive plan shall be deemed financially feasible for transportation and school facilities if it can be demonstrated that the LOS standards will be achieved and maintained by the end of the planning period, even if in a particular year such improvements are not concurrent.
- Financial feasibility shall apply to the 5-year planning period, except in the case of a long-term concurrency management system, in which case financial feasibility requirements shall apply to the 10- or 15-year period.
- At the discretion of the local government, a comp plan as revised by an amendment to the future land use map, shall be deemed financially feasible and to have achieved and maintained LOS standards if the amendment to the future land use map is supported by:
 - a condition in a development order for a DRI or binding agreement that addressed PFS; or
 - a binding agreement addressing PFS and the property subject to the amendment is located within an area designated in the comp plan for urban infill, urban redevelopment, downtown revitalization, urban infill and redevelopment, or an urban service area.
- A local government may create *urban service areas*, in addition to prior allowed exception areas. The lands designated must be appropriate for compact, contiguous urban development, must not exceed the amount of land needed to accommodate the projected population growth at densities consistent with the adopted comp plan within the 10-year planning period, and must be served or planned to be served with public facilities and services as provided by the capital improvement element.
- Prior to designating concurrency exception areas, the Department of Transportation **AND** the state land planning agency shall be consulted.
- Several times throughout the bill’s text, it states, “Proportionate fair-share mitigation shall be limited to ensure that a development meeting the requirements of this section mitigates its impact on the system, but is not responsible for the cost of eliminating backlogs.” This makes it clear that the purpose of proportionate fair share is not to cure existing deficiencies.
- Funding of improvements that *significantly benefit* the impacted transportation system shall satisfy concurrency as a mitigation of the development’s impact to the overall transportation system even if there remains a failure of concurrency on other impacted facilities.

- A new section was created, § 163.3182, which allows counties and municipalities to create *transportation concurrency backlog authorities* if they have identified transportation concurrency backlogs.
 - Each of these authorities has the power to make and execute contracts, undertake and carry out transportation concurrency backlog projects, invest in property or securities, redeem bonds, borrow money, make or have made surveys and plans, and to appropriate such funds and make such expenditures as are necessary.
 - Each authority shall adopt a backlog plan as part of the local government comp plan within six months after creation of the authority. The plan shall include all transportation facilities designated as deficient, include a priority listing of the facilities, and establish a schedule for financing and constructing the backlog projects.
 - The authority shall establish a local transportation concurrency backlog trust fund. The trust fund shall be funded by the proceeds of an ad valorem tax increment collected within each backlog area to be determined annually.
 - Upon adoption of a backlog plan, the area subject to the plan shall be deemed to have achieved and maintained LOS standards, and to have met requirements for financial feasibility for transportation facilities.
- A new section is created by the bill, § 163.32465, which does the following:
 - Creates an *Alternative State Review Process Pilot Program*. Included in the program are Pinellas and Broward counties and their municipalities, plus the cities of Jacksonville, Miami, Tampa, and Hialeah.
 - The program expedites the process for getting a comp plan amendment approved. State agency comments may include technical guidance on issues of agency jurisdiction as it relates to the requirements. Comments and challenges shall identify issues of regional or statewide importance that, if not resolved, may result in an agency challenge to the amendment. The review and challenge process is expedited through the pilot program.
- All DRI phase and build-out dates for projects under construction as of July 1, 2007 are extended for three years, regardless of any prior extensions. The extension is not a substantial deviation, shall not be subject to further DRI review, and shall not be considered when determining whether any subsequent extension is a substantial deviation.

Current Concurrency Alternatives or Creative Ways to Comply

1. Object under § 163.3180(3). Under this section, local governments that are not responsible for providing, financing, operating, or regulating public facilities needed to serve development may not establish binding LOS standards on governmental entities that do bear these responsibilities.
2. Concurrency does not apply to public transit facilities. If the project can fit under the definition of a “public transit facility” given in § 163.3180(4)(b), concurrency is not a concern. However, the definition does not include commercial or residential development built in conjunction with a public transit facility.

3. Get an exception from the local government under § 163.3180(5)(b). Transportation Concurrency Exception Areas are excepted from transportation concurrency requirements, if the development is otherwise consistent with the comp plan and is a project that promotes public transportation or is located within an area designated in the comp plan for: urban infill development, urban redevelopment, downtown revitalization, urban infill and redevelopment under § 163.2517, or an urban service area.
4. Certain areas which pose only part-time demands on the transportation system can be excepted from transportation concurrency under § 163.3180(5)(c).
5. De minimis impacts are exempt from concurrency requirements under § 163.3180(6). A de minimis impact is an impact that would not affect more than 1% of the maximum volume at the adopted LOS of the affected transportation facility. If the sum of existing roadway volumes and the projected volumes would exceed 110% of the maximum volume at the adopted LOS, the impact is not de minimis. However, an impact of a single-family home on an existing lot will constitute a de minimis impact. In addition, no impact will be de minimis if it would exceed the adopted LOS standard of any affected designated hurricane evacuation routes.
6. Transportation concurrency management areas under § 163.3180(7). In order to promote infill development and redevelopment, transportation concurrency management areas may be designated in the comp plan. Area-wide LOS standards may be established for these areas.
7. Proposed urban redevelopment within an established existing urban service area under § 163.3180(8). Redevelopment requiring less than 110% of the previous existing capacity shall not be prohibited due to the reduction of transportation LOS's below the adopted standards.
8. Long-term concurrency management systems under § 163.3180(9)(a). A local government may adopt long-term concurrency management systems with up to a 10-year planning period where significant backlogs exist. The system must be designed to correct existing deficiencies and set priorities for addressing backlogged facilities.
9. Long-term schedule of capital improvements under § 163.3180(9)(b). The state land planning agency may allow a local government that has a transportation or school facility backlog to develop a plan and long-term schedule of capital improvements covering up to 15 years for good and sufficient cause.
10. Proportionate fair share payment under § 163.3180(11).
11. Multi-modal transportation districts under § 163.3180(15)(a). A local government may establish multimodal transportation districts in areas delineated on the future land use map for which the comp plan assigns primary priority to assuring a safe, comfortable, and attractive pedestrian environment, with convenient interconnection to transit. Local governments may establish multimodal LOS standards that rely primarily on non-vehicular modes of transportation within the district.
12. Improvements that significantly benefit the impacted transportation system under § 163.3180(16)(f). A developer and a local government may enter into a binding proportionate fair share agreement, and concurrency requirements are fulfilled when the funding of any improvements significantly benefit the impacted transportation system, even if there remains a failure of concurrency on other impacted facilities.
13. Establishment of employment centers under § 163.3180(17). A local government and a developer of affordable workforce housing units may identify employment centers in close proximity to the affordable workforce housing units, and if at least 50% of the units are occupied by employees of an

employment center, all of the affordable workforce housing units are exempt from transportation concurrency requirements.

14. Creation of concurrency backlog districts under § 163.3182. Counties and municipalities may create *transportation concurrency backlog authorities* if they have identified transportation concurrency backlogs. Each authority shall adopt a backlog plan as part of the local government comp plan within six months after creation of the authority. The plan shall include all transportation facilities designated as deficient, include a priority listing of the facilities, and establish a schedule for financing and constructing the backlog projects. Upon adoption of a backlog plan, the area subject to the plan shall be deemed to have achieved and maintained LOS standards, and to have met requirements for financial feasibility for transportation facilities.
15. Concurrency exception for projects that promote public transportation (Fla. Admin. Code R. 9J-5.0055(7)). Local governments may exempt projects that promote public transportation as defined in § 163.3164(28).

DCA 2008 Legislative Concurrency Agenda

The DCA has released a “discussion draft” of revisions to the concurrency statute. Some of the new ideas presented in this draft include:

- A new category of “transportation concurrency alternatives.” The list of alternatives includes all of the current methods available to developers and local governments (see Current Concurrency Alternatives), and proposes some new measures that a local government may adopt to satisfy concurrency:
 - Transportation corridors. By adopting a corridor mobility plan and supporting mobility strategies, a local government may satisfy concurrency within a transportation corridor. The plan should include high intensity development and multimodal design in an area ½ mile on either side of the corridor centerline.
 - Mobility fee based on vehicle miles traveled. If a local government establishes a mobility fee based on vehicle miles of travel anticipated to result from the proposed development in a designated concurrency alternative area, concurrency is satisfied.
 - In regards to proportionate fair share calculation, the draft proposes to allow local governments to adopt a vehicle miles traveled methodology or an alternative method, at its own discretion.

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