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March 7, 2012

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RE: **Response to Pasco County Questions relating to Transportation Concurrency**

Dear David:

Enclosed is the Florida Association of County Attorneys Growth Management Committee's final response to the transportation concurrency questions posed by Pasco County.

I want to give special thanks to Amy Petrick and David Goldstein for their efforts as well as to Gail Ricks and Ginger Delegal for their assistance in scheduling and coordinating the Committee's responses.

Sincerely,

Daniel S. McIntyre
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DSM/caf
Enclosure
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FINAL VERSION – March 2, 2012

FACA Growth Management Committee's Response to Pasco County's Questions Relating to the Transportation Concurrency Provisions of HB 7207 (the Community Planning Act) —Section 163.3180(5)(h)3., Florida Statutes

Based on interactions with the development community and other interested parties, Pasco County posed several questions to the FACA Growth Management Committee relating to the Transportation Concurrency Provisions of HB 7207, which amended Section 163.3180(5)(h)3., Florida Statutes. The Growth Management Committee conducted research and discussion and has drafted the following answers to Pasco County's questions.

All of Pasco County's questions relate to Section 163.3180(5)(h)3, Florida Statutes, which reads as follows (emphasis has been added to illustrate the terms that are most relevant to the questions):

> (h) Local governments that implement **transportation concurrency must**:
>
> 3. **Allow** an **applicant** for a **development-of-regional-impact development order**, **a rezoning**, or **other land use development permit** to satisfy **the transportation concurrency requirements of the local comprehensive plan**, the local government's concurrency management system, and s. 380.06, when applicable, **if**:
>
> a. The applicant enters into a binding **agreement** to pay for or construct its proportionate share of required improvements.
>
> b. The proportionate-share contribution or construction is **sufficient to accomplish one or more mobility improvements that will benefit a regionally significant transportation facility**.
>
> c. (I) 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. An applicant shall not be held responsible for the additional cost of reducing or eliminating deficiencies.
>
> (II) **When an applicant contributes or constructs its proportionate share pursuant to this subparagraph, a local government may not require payment or construction of transportation facilities whose costs would be greater than a development's proportionate share of the improvements necessary to mitigate the development's impacts.**

(A)The proportionate-share contribution shall be calculated based upon the number of trips from the proposed development expected to reach roadways during the peak hour from the stage or phase being approved, divided by the change in the peak hour maximum service volume of roadways resulting from construction of an improvement necessary to maintain or achieve the adopted level of service, multiplied by the construction cost, at the time of development payment, of the improvement necessary to maintain or achieve the adopted level of service.

(B)In using the proportionate-share formula provided in this subparagraph, the applicant, in its traffic analysis, shall identify those roads or facilities that have a transportation deficiency in accordance with the transportation deficiency as defined in sub-subparagraph e. The proportionate-share formula provided in this subparagraph shall be applied only to those facilities that are determined to be significantly impacted by the project traffic under review. If any road is determined to be transportation deficient without the project traffic under review, the costs of correcting that deficiency shall be removed from the project's proportionate-share calculation and the necessary transportation improvements to correct that deficiency shall be considered to be in place for purposes of the proportionate-share calculation. The improvement necessary to correct the transportation deficiency is the funding responsibility of the entity that has maintenance responsibility for the facility. The development's proportionate share shall be calculated only for the needed transportation improvements that are greater than the identified deficiency.

(C) When the provisions of this subparagraph have been satisfied for a particular stage or phase of development, all transportation impacts from that stage or phase for which mitigation was required and provided shall be deemed fully mitigated in any transportation analysis for a subsequent stage or phase of development. Trips from a previous stage or phase that did not result in impacts for which mitigation was required or provided may be cumulatively analyzed with trips from a subsequent stage or phase to determine whether an impact requires mitigation for the subsequent stage or phase.

(D)In projecting the number of trips to be generated by the development under review, any trips assigned to a toll-financed facility shall be eliminated from the analysis.

(E)**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 selected improvement, or by the amount specified by local ordinance, whichever yields the greater credit.

d. **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.**

e. As used in this subsection, the term "transportation deficiency" means a facility or facilities on which the adopted level-of-service standard is exceeded by the existing, committed, and vested trips, plus additional projected background trips from any source other than the development project under review, and trips that are forecast by established traffic standards, including traffic modeling, consistent with the University of Florida's Bureau of Economic and Business Research medium population projections. Additional projected background trips are to be coincident with the particular stage or phase of development under review.

Pasco County's questions about this new statutory section are as follows:

1. If a local government eliminates the transportation concurrency requirements in its Comprehensive Plan, and its transportation concurrency management system (including proportionate share mitigation), but retains transportation level of service standards and general timing or adequate public facility requirements in its Comprehensive Plan and land development regulations, is an applicant entitled to utilize this statutory section to satisfy the transportation level of service standards and general timing/adequate public facility requirements of the Comprehensive Plan and land development regulations?

Committee's Answer: No

Analysis: Section 163.3180(5), Florida Statutes, begins by stating, "**if** concurrency is applied to transportation facilities," indicating that local governments are not obligated to apply concurrency to transportation facilities. Further, Section 163.3180(1), explains that "[s]anitary sewer, solid waste, drainage, and potable water are the only public facilities and services subject to the concurrency requirement on a statewide basis;" therefore, there are no statewide transportation concurrency requirements. Thus, the Community Planning Act contemplates that there can be Comprehensive plans that do not contain concurrency programs for transportation facilities.

Comprehensive Plans that are adopted without a transportation concurrency plan will necessarily include transportation levels of service. Section 163.3177(6)(b), Florida Statutes, which governs required elements of a Comprehensive Plan, provides that each Comprehensive Plan's transportation element "reflect the data, analysis, and associated principles and strategies relating to . . . . . [t]he projected transportation system **levels of service and system needs based upon the future land use map** and the projected integrated transportation system." (emphasis added). Furthermore, the capital improvement element of the Comprehensive Plan is required to include "[s]tandards to ensure the availability of public facilities and the adequacy of those facilities **to meet established acceptable levels of service.**" F.S. §163.3177(3)(a)(3)(2011)(emphasis added). Accordingly, both the establishment of levels of service and the identification of their relationship to "system needs based upon the future land use map" are required elements of a Comprehensive Plan, whether or not the transportation concurrency option is utilized by the local government.

Section 163.3180(5), provides that the requirements regarding an applicants right to use proportionate share agreements, etc., apply to "[l]ocal governments that implement transportation concurrency." When a statute specifies the application of certain provisions to a particular category of actors, rules of legislative interpretation lead to the implication that those actors not identified are intended to be excluded from application of those same provisions under the doctrine of *expressio unius est exclusio alterius. Moonlit Waters Apartments Inc., v. Cauley,* 666 So.2d 898, 900 (Fla. 1996) (holding that references to land leases in one statute, but not in another, implied intentional exclusion of land leases in the latter statute on the part of the Legislature). Therefore, it is only where a transportation concurrency system is being implemented by the local government that the corresponding proportionate share provisions can be invoked; the identification of levels of service is required for a Comprehensive Plan and, therefore, cannot be the sole basis for concluding that a transportation concurrency program is in place, because it would render the optional nature of transportation concurrency a nullity.

Another element of the Community Planning Act that supports enforcement of levels-of-service without triggering the concurrency rights set forth in Section 163.3180(5), is the consistency requirement. Section 163.3215, requires that all development orders be consistent with the Comprehensive Plan. If a local jurisdiction's Comprehensive Plan sets forth a specific level of service and/or a capacity-specific adequate public facility, any development order approved that would cause the level of service to be violated or the public facility to be rendered inadequate, would cause an inconsistency that is prohibited by the Community Planning Act. The consistency requirement exists separate and apart from the optional concurrency program set forth in Section 163.3180, and, thus, can be a separate justification for development limitations at the zoning level, even for local governments that have not chosen to implement transportation concurrency. *See Mann v. Board of County Commissioners of Orange County*, 830 So.2d 144, 147 (Fla. 5th DCA 2002), *review denied*, 844 So. 2d 646 (Fla. 2003) (affirming that a "county is empowered by statute to disapprove an

application for site approval if it finds that a proposed development is inconsistent with any of the objectives in the comprehensive plan.") This conclusion is supported by the language in Section 163.3180(5)(h)(3)(d) that, "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." *See* Analysis in Question 2 below.

Although the Legislature redefined the "premise" or "basis" of transportation concurrency to be the provision of public facilities to achieve and maintain the adopted transportation level of service standards, *see* Section 163.3180(5)(d), Florida Statutes, a Comprehensive Plan that imposes transportation concurrency is required to have other "principles, guidelines, standards, and strategies" that extend from this "premise." *See* F.S. §§ 163.3180(1)(a) and 163.3180(5)(a)(2011).[1] Therefore, a system that only contains part of the premise—transportation level of service standards—is not a transportation concurrency system.

Even if the retention of transportation level of service standards were construed to be the equivalent of retaining "transportation concurrency," this does not mean that every system that emanates from transportation level of service standards is required to comply with Section 163.3180(5)(h). This is best evidenced by Section 163.3180(5)(f), Florida Statutes, which specifically encourages local governments to develop other "tools and techniques" to complement the application of transportation concurrency. Many of the "tools and techniques" listed in Section 163.3180(5)(f) are not compatible with the proportionate share calculation in Section 163.3180(5)(h);[2] therefore, the Section 163.3180(5)(f) "tools and techniques" were clearly intended by the Legislature to be a different system or systems that emanate from the adopted level of service standards in the Comprehensive Plan, and such "tools and techniques" are not required to comply with Section 163.3180(5)(h). This means that a local government can adopt a timing or adequate public facility system that utilizes one or more of the tools and techniques in Section 163.3180(5)(f), and that system would not be subject to the transportation concurrency requirements of Section 163.3180(5)(h).

The ability of a local government to deny development requests based on general timing or adequate public facility requirements in the Comprehensive Plan in lieu of statutorily required concurrency requirements was previously addressed in *Mann v. Board of County Commissioners*, 830 So. 2d 144 (Fla. 5th DCA 2002), *review denied*,

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[1] Although it was repealed by HB 7207, Rule 9J-5.0055, Florida Administrative Code, previously contained the minimum required Comprehensive Plan standards for a concurrency management system. These minimum standards included Comprehensive Plan requirements that are not addressed by the stated "premise" of concurrency in HB 7207, such as: (a) a monitoring system, (b) guidelines for interpreting and applying level of service standards to applications for development orders and development permits and determining when the test for concurrency must be met, (c) requirements for implementing land development regulations, and (d) vesting provisions.

[2] For example, Section 163.3180(5)(f) discusses "establishing multimodal level of service standards that rely primarily on nonvehicular modes of transportation..." However, the proportionate share calculation in Section 163.3180(5)(h) is based solely on peak hour roadway impacts.

844 So. 2d 646 (Fla. 2003). In *Mann*, the Petitioner argued that the "legislature's enactment of a statutory school concurrency implementation process preempts any other power the Board possesses to deny a request based on school overcrowding." *Mann*, 830 So. 2d at 147. The Fifth District Court of Appeal rejected this argument, and found that Orange County had the statutory authority to deny development requests based on the timing/adequate public facility requirements of its Comprehensive Plan. *Id.* at 147-148. While *Mann* was a school capacity case, the principle is the same in the transportation capacity context.

While the Petitioner in *Mann* did not attack the propriety of the timing/adequate public facility requirements of the Orange County Comprehensive Plan by arguing that these requirements were preempted, such an attack would likely fail for the following reasons:

1. There is nothing in HB 7207, or in the Final Bill Analysis for HB 7207, indicating any legislative intent to overrule *Mann* or to otherwise preempt general timing or adequate public facility requirements in a Comprehensive Plan. To the contrary, the first page of the Final Bill Analysis for HB 7207 states: "This bill is not intended to reduce the home rule authority of any local government."

2. If the legislature had been concerned about local governments replacing transportation concurrency with timing or adequate public facility requirements, or had otherwise intended to preempt the field, the legislature would not have made the recission of transportation concurrency exempt from state review. *See* F.S. §163.3180(1)(a)(2011).

3. A local government ordinance is not in conflict with state law if it can coexist with the state law. *See, e.g., Phantom of Clearwater, Inc. v. Pinellas County*, 894 So. 2d 1011, 1020 (Fla. 2d DCA 2005). In this case, if a local government chooses to use a timing or adequate public facility system in lieu of a transportation concurrency system, the local system can clearly coexist with state law, because state law makes transportation concurrency optional, and state law does not contain any minimum requirements for those local governments that choose to rescind transportation concurrency.

4. The Final Bill Analysis for HB 7207 states that the bill "removes state required transportation and school concurrency, allowing local governments the flexibility to employ less costly methods of managing transportation and school impacts." Final Bill Analysis for HB 7207, p. 26 (emphasis added). Therefore, the Legislature clearly contemplated that local governments would continue to manage transportation impacts through other means, and the Legislature is presumed to be aware that the method described in *Mann* could be one of those "less costly methods." *See Florida Dept. of Environmental Protection v. Contractpoint Florida Parks, LLC*, 986 So. 2d 1260, 1269 (Fla. 2008) ("the legislature is presumed to have adopted prior judicial constructions of a law

unless a contrary intention *is expressed* in the new version.") (emphasis in original) (citations and internal quotations omitted).

2. Assuming the answer to question #1 is "yes," can the local government still deny the applicant's DRI, rezoning, or other land use development permit request pursuant to Section 163.3180(5)(h)3.d., Florida Statutes, and the general timing/adequate public facility requirements of the Comprehensive Plan or land development regulations?

Committee's Answer: Yes

Analysis: The term "otherwise" in Section 163.3180(5)(h)3.d. refers to any provision in the Comprehensive Plan or land development regulations that is not a transportation concurrency requirement, and level of service, timing and adequate public facility requirements are not always transportation concurrency requirements. *See* Analysis in Question 1 above. Therefore, even if a local government retains transportation concurrency (or is deemed to have retained transportation concurrency), and even if an applicant is willing to satisfy the requirements of Section 163.3180(5)(h)3., the local government can still deny a DRI, rezoning, or other land use development permit request pursuant to Section 163.3180(5)(h)3.d. based on general level of service, timing and/or adequate public facility requirements. *See Mann v. Board of County Commissioners*, 830 So. 2d 144 (Fla. 5th DCA 2002), *review denied*, 844 So. 2d 646 (Fla. 2003) and the Analysis in Question 1 above relating to *Mann*. Not only can the local government do so, the local government **must** do so if the proposed application would be inconsistent with the required level of service or adequate public facility standards set forth in the Comprehensive Plan's transportation policies. *See* Analysis in Question 1 above regarding consistency challenges.

3. Assuming the answer to question #1 is yes, and assuming the answer to question #2 is no, can the local government still deny the applicant's discretionary land use requests (e.g. rezonings) under the *Snyder* standard of review, if it is able to meet its burden of showing that maintaining the status quo serves a legitimate public purpose (such as maintaining adequate public facilities)?

Committee's Answer: Yes

Analysis: The provisions of Section 163.3180(5) provide that an applicant must be allowed "to satisfy the transportation concurrency requirements of the local comprehensive plan" by making the binding commitment; it does not say that the applicant must be **approved** if he/she enters into the binding agreement, and the statute is silent on the applicability of the binding agreement to other planning or zoning requirements that may exist. Because the satisfaction is limited to the

concurrency requirement, the local government is free to enforce other policies and standards that exist in the Comprehensive Plan and corresponding land development regulations relative to traffic.

As stated in *Board of County Commissioners of Brevard County v. Snyder*, 627 So. 2d 469, 476 (Fla. 1993), and its progeny,

> [W]hen it is the zoning classification that is challenged, the comprehensive plan is relevant only when the suggested use is inconsistent with that plan. Where any of several zoning classifications is consistent with the plan, the applicant seeking a change from one to the other is not entitled to judicial relief absent proof the status quo is no longer reasonable.

Town of Manalapan v. Gyongyosi, 828 So.2d 1029, 1031-32 (Fla. 4th DCA 2002) (citations omitted).[3]

Even if Section 163.3180(5)(h)3. were construed to allow an applicant to use the proportionate share process to satisfy any Comprehensive Plan provision relating directly or indirectly to transportation capacity, timing, or adequate public facilities, then at best it allows the applicant to satisfy its initial burden under *Snyder*, 627 So. 2d at 476, of showing that the development proposal is consistent with the Comprehensive Plan. Section 163.3180(5)(h)3. is silent on what happens after that initial burden has been met. Therefore, under *Snyder*, the local government could still deny a rezoning request if it is able to carry its burden of demonstrating that maintaining the status quo (the existing zoning) accomplishes a legitimate public purpose. *Snyder*, 627 So. 2d at 476. Maintaining adequate transportation capacity for economic development, tourism, public safety, and hurricane evacuation is unquestionably a legitimate public purpose. Furthermore, if the adopted transportation level of service standards in the Comprehensive Plan and/or adopted timing/adequate public facility criteria are utilized to measure whether adequate transportation capacity has been maintained, it will help the local government demonstrate that the refusal to rezone the property was not "arbitrary, discriminatory, or unreasonable." *Id.*

There is nothing in HB 7207 or the Final Bill Analysis for HB 7207 indicating any legislative intent to overrule the holding in *Snyder*, and therefore the legislature is presumed to have incorporated this prior common law authority. *See Florida Dept. of Environmental Protection v. Contractpoint Florida Parks, LLC*, 986 So. 2d 1260, 1269 (Fla. 2008) ("the legislature is presumed to have adopted prior judicial constructions of a law unless a contrary intention *is expressed* in the new version.")

[3] However, a general citation to increase in traffic will not be sufficient justification for denying a re-zoning request that is otherwise compliant with the Comprehensive Plan. *See Debes v. Key West*, 690 So.2d 700 (Fla. 3d DCA 1997)(" Because it is virtually self-evident that, by its very nature, all commercial uses create "more traffic" than non-commercial ones, it is equally obvious that local government cannot justify a denial of a particular commercial use on this ground.")

(emphasis in original) (citations and internal quotations omitted). Furthermore, had the Legislature intended for Section 163.3180(5)(h)3. to be a complete preemption of denials based on transportation capacity, it would have used different language, and it certainly knew how to use such language. *See, e.g.,* Section 163.3180(6)(h)2., Fla. Stat. ("If a local government applies school concurrency, **it may not deny** an application for site plan, final subdivision approval, or the functional equivalent for a development or phase of a development authorizing residential development for failure to achieve and maintain the level-of-service standard for public school capacity in a local school concurrency management system...") (emphasis added).[4]

4. This statutory section refers to a binding proportionate share "agreement." If a local government applies transportation concurrency, can a local government refuse to enter into such an agreement if it does not want to accept proportionate share to mitigate the transportation impacts of the project?

Committee's Answer: No

Analysis: When the word "must" is used in a statute, it is generally considered to be a mandatory term. *See, e.g., American Boxing & Athletic Ass'n, Inc. v. Young*, 911 So. 2d 862, 865 (Fla. 2nd DCA 2005); *State v. Meyers*, 708 So. 2d 661, 663 (Fla. 3rd DCA 1998). Therefore, assuming the other criteria in Section 163.3180(5)(h)3. are satisfied, and the applicant is willing to enter into the proportionate share agreement, the local government "must" enter into the proportionate share agreement. The only purpose of the "agreement" requirement is to ensure that the applicant is legally bound to follow the terms of the agreement, which is why Section 163.3180(5)(h)3.a. only refers to the "applicant" deciding to enter into the agreement, and not the local government.

While there may be some ambiguity as to whether a local government can choose not to adopt a proportionate share program, *see* Analysis and Contrary Analysis in Question 6, it is clear that if the local government has such a program and the applicant's proposed agreement meets the requirements of both the statute and local program, refusal to enter into a proportionate share agreement would be considered arbitrary and capricious. As noted above, the statute provides "local governments . . . **must** . . . [a]llow an applicant. . . to satisfy requirements **if** . . . [t]he applicant enters into a binding agreement. . . [and t]he proportionate-share contribution or construction is sufficient to accomplish one or more mobility improvements that will benefit a regionally significant transportation facility. . . and [t]he 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."

[4] It is noteworthy that rezonings are not included in this denial prohibition for school concurrency, which implies that the legal theories in *Mann* and *Snyder* are still available to deny rezonings based on school overcrowding.

Therefore, once the local government decides to retain transportation concurrency, the local government has little choice if the agreement satisfies these requirements.[5]

5. Who determines whether the proportionate share contribution is "sufficient to accomplish one or more mobility improvements that will *benefit* a *regionally significant* transportation facility"? The local government? The applicant? FDOT? The applicable Regional Planning Council?

Committee's Answer: The local government

Analysis: The local government decides whether to even have a transportation concurrency system. The local government controls the Comprehensive Plan (including the level of service standards) and land development regulations that implement that system. The local government also controls the transportation impact fee or mobility fee system and capital improvement element that will have to bear the financial burden of any credits awarded for the chosen mobility improvement(s) pursuant to Section 163.3180(5)(h)3.c.(II)(E), Florida Statutes. The local government also controls the use of land around the chosen mobility improvement(s). In sum, the local government has the most at stake in this decision, so it is only logical entity that can make this determination. Furthermore, if the Legislature had intended that some other entity make this determination, or be consulted in the determination, it would have specifically mentioned that entity in Section 163.3180(5)(h)3.b. *See, e.g.,* F.S. §163.3180(5)(h)1. (2011)(specifically requiring consultation with FDOT); F.S. §163.3180(5)(h)3.a. (2011)(specifically requiring the applicant to enter into the proportionate share agreement); and F.S. §163.3180(6)(h)2.a. (specifically requiring the district school board to be a party to the school proportionate share agreement).

FDOT has also taken the position that the local government should make this determination. *See FDOT's Memorandum and Guidance on Proportionate Share Agreements After HB 7207*, a copy of which is attached hereto (hereinafter the "FDOT Guidance Memo") ("At the outset, it is important to bear in mind that the decision-maker on these issues is the local government with jurisdiction over the development. FDOT will likely be interested, but FDOT cannot grant or deny proportionate share modifications.")

While the Committee and FDOT both believe that this determination must be made by the local government, the Committee also believes that local government consultation with FDOT and/or the applicable Regional Planning Council prior to making this determination is appropriate when reasonable under the circumstances.

[5] Although the agreement is a mandatory requirement for local governments that retain transportation concurrency, this does not mean that local governments that retain transportation concurrency are required to approve the project under review. *See* Analysis in Answer to Question 2 and 3.

6. If a local government applies transportation concurrency, can a local government refuse to provide "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"?

Committee's Answer: No, but the statute is ambiguous on this issue.

Analysis: The Final Bill Analysis for House Bill 7207 provides "[f]or local governments that choose to apply transportation concurrency, this bill [HB 7207] provides the **minimum requirements and guidelines** for doing so." (emphasis added). Construing the proportionate share process as optional would be contrary to the Legislature's intent that the provisions of Section 163.3180(5)(h)3. be considered **minimum requirements**. When the word "must" is used in a statute, it is generally considered to be a mandatory term. *See, e.g., American Boxing & Athletic Ass'n, Inc. v. Young*, 911 So. 2d 862, 865 (Fla. 2nd DCA 2005); *State v. Meyers*, 708 So. 2d 661, 663 (Fla. 3rd DCA 1998). If the word "if" were interpreted to make the proportionate share process optional, it would render the word "must" meaningless or superfluous. It would also potentially allow a local government to use its concurrency system to make applicants pay for the additional cost of reducing or eliminating existing deficiencies/backlog, which would make such payments inconsistent with the second sentence of Section 163.3180(5)(h)3.c.(I) and Section 163.3180(5)(h)3.c.(II), and possibly an unconstitutional tax. To avoid these results, the word "if" should be interpreted to only apply to subsections 163.3180(5)(h)3.a. and 163.3180(5)(h)3.b., and Section 163.3180(5)(h)3.c. should be construed as mandatory. FDOT appears to concur with this position. *See* FDOT Guidance Memo ("If a local government opts to retain transportation concurrency, there **must** be a prop share "pay and go" option for development...") (emphasis added). Therefore, if a local government wants to avoid the proportionate share process, its only choice is to eliminate transportation concurrency.[6]

Although a majority of the Committee supports the answer and analysis set forth above, a majority of the Committee also found that the Legislature's use of the word "if" renders the statute ambiguous for purposes of this question. Therefore, the Committee has included the contrary analysis set forth below to illustrate this ambiguity. This appears to be an issue that requires additional legislative clarification.

Contrary Analysis: The requirements of Section 163.3180(5)(h)3. are only mandatory "if" 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. When the word "if" is used in a statute, it implies a condition, and generally means "in the event that," "so long

[6] Although the proportionate share process is a mandatory requirement for local governments that retain transportation concurrency, this does not mean that local governments that retain transportation concurrency are required to **approve** the project under review. *See* Analysis in Answer to Question 2 and 3.

as," or "when." *See, e.g., Blacknall v. Board of Parole and Post-Prison Supervision*, 229 P. 3d 595, 600 (Ore. 2010); *Knowles v. Beverly Enterprises-Florida, Inc.*, 898 So. 2d 1, 12 (Fla. 2005) (Cantero, J. concurring) ("The words "if" and "when," when used to introduce a condition, are commonly understood to mean "if and only if" or "when and only when.") By using the word "if," the Legislature clearly contemplated that this condition—the local government providing a proportionate share process—may not occur. Therefore, it is optional for the local government, and the local government can refuse to provide a proportionate share process. If the Legislature had intended for the transportation proportionate share process to be mandatory, it certainly knew how to draft more mandatory proportionate share language. *See* F.S. §163.3180(6)(h)2. ("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…")(emphasis added).

Furthermore, making the proportionate share process conditional or optional for the local government does not render the term "must" meaningless or superfluous, because even if the local government chooses not to provide a proportionate share process, it still "must" comply with Section 163.3180(5)(h)1. (consultation with FDOT on plan amendments) and Section 163.3180(5)(h)2. (exemption for public transit facilities) if the local government implements transportation concurrency. Making the proportionate share process optional also does not raise any unconstitutional tax concerns, as long as the local government does not **actually** assess applicants for the cost of fixing existing deficiencies/backlog. For example, the local government could choose not to have a proportionate share process, and instead time or phase entitlements to match available transportation capacity. A timing or phasing system does not assess the applicant for the additional cost of reducing or eliminating existing deficiencies/backlog, so it cannot possibly be considered an unconstitutional tax.

7. Does this statutory section prohibit a local government from charging an applicant a transportation impact fee or mobility fee in lieu of the proportionate share amount calculated pursuant to the statute, if that fee is higher than the statutorily calculated proportionate share amount? [Assume for purposes of answering this question that the transportation impact fee or mobility fee does not assess for backlog or the additional cost of reducing or eliminating deficiencies]

Committee's Answer: No

Analysis: The statute states, "[w]hen an applicant contributes or constructs its proportionate share pursuant to this subparagraph, a local government may not require payment or construction of transportation facilities whose costs would be greater than a development's proportionate share of the improvements necessary to mitigate the development's impacts." F.S. §163.3180(5)(h)3.c.(II)(2011). The statute goes on to specify,

> [t]he 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 selected improvement, or by the amount specified by local ordinance, whichever yields the greater credit.

F.S. §163.3180(5)(h)3.c.(II)(E)(2011).

When read *in pari materia*, these two provisions provide the interplay between impact/mobility fee programs and proportionate share programs. The fact that the Legislature specified how the two types of programs interrelate indicates the continuing vitality of impact/mobility fee programs, the new transportation concurrency language notwithstanding. The statute is very specific about dollar-for-dollar credits and percentage reduction credits for transportation concurrency payments under a proportionate share arrangement; the statute does not say that the transportation concurrency payments supersede other impact/mobility fee payment requirements.

It is clear that the limitation in Section 163.3180(5)(h)3.c.(II), only applies to the statutory proportionate share process, and not home rule or common law revenue sources such as transportation impact fees or mobility fees. The following additional arguments support this conclusion:

1. The Final Bill Analysis for HB 7207 contains the following statement: "This bill does not restrict the ability of local governments to raise revenues through their home rule powers." Final Bill Analysis for HB 7207, p. 26. If Section 163.3180(5)(h)3.c.(II), were construed as a limitation on transportation impact fees or mobility fees, it would restrict the ability of local governments to raise revenues through their home rule powers.

2. Impact fees are based on common law authority, and statutes should not be interpreted to displace the common law further than is clearly necessary and intended. *See, e.g., Essex Ins. Co. v. Zota*, 985 So. 2d 1036, 1048 (Fla. 2008). There is nothing in HB 7207 or the Final Bill Analysis for HB 7207 indicating any clear legislative intent to overrule the common law relating to impact fees.

3. Construing Section 163.3180(5)(h)3.c.(II), to limit transportation impact fees or mobility fees would be pointless, because a local government could easily avoid this limitation by simply eliminating transportation concurrency. *See* Analysis in Question 1 above.

4. Section 163.3180(5)(h)3.c.(II)(E), Florida Statutes, allows the applicant to receive a "credit" for impact fees "paid or payable in the future for the project."

This section does not require a "refund" of impact fees or mobility fees previously paid, and the impact fees or mobility fees previously paid could have exceeded the proportionate share amount calculated pursuant to Section 163.3180(5)(h)3.c.(II); therefore, the Legislature clearly contemplated that the impact fees or mobility fees might exceed the proportionate share amount.

5. In adopting the Community Planning Act, the Legislature did not rescind or substantially amend the Florida Impact Fee Act in Section 163.31801, Florida Statutes, which sets forth the methodology for developing proper impact fee programs; if the intent was to replace impact fees with transportation proportionate share programs, then the Legislature surely could have done so by amending the Florida Impact Fee Act.

8. Does this statutory section apply to Comprehensive Plan future land use map amendments?

Committee's Answer: No

Analysis: A Comprehensive Plan future land use map amendment is clearly not a DRI development order or rezoning. It is also not a "land use development permit." All of the "development permits" listed in Section 163.3164(16), Florida Statutes, are zoning actions, or other quasi-judicial actions that occur pursuant to the criteria in the local government's land development regulations. These actions are all required to be consistent with the Comprehensive Plan. *See Snyder*, 627 So. 2d at 472 (citations omitted). Comprehensive Plans, and amendments to the Comprehensive Plan, are legislative planning and policy actions that are not dependent on zoning or land development regulations. *See Machado v. Musgrove*, 519 So. 2d 629, 631-32 (Fla. 3d DCA 1987); *Martin County v. Yusem*, 690 So. 2d 1288, 1293-94 (Fla. 1997). Therefore, it is inconsistent with the established case law governing Comprehensive Plan amendments to group these actions with the other listed development permits in Section 163.3164(16), Florida Statutes.

Although the definition of "development" in Section 380.04, Florida Statutes, includes "a change in the intensity of use of land," see Section 380.04(2)(b), a Comprehensive Plan amendment does not result in such a change. *See Snyder*, 627 So. 2d at 475-76 ("[A] comprehensive plan **only establishes** a **long-range** maximum limit on the **possible** intensity of land use; a plan **does not** simultaneously **establish** an **immediate** limit on the possible intensity of land use. The present use of land may, by zoning ordinance, continue to be more limited than the future use contemplated by the comprehensive plan.") (emphasis added) (citations and internal quotations omitted).

In order for a Comprehensive Plan map amendment to be made, while maintaining internal consistency within the Comprehensive Plan itself, the applicant would be required to demonstrate adequate public facilities over the planning horizon for the proposed use/intensity. Concurrency relates to the timing of development relative to

the construction of planned infrastructure; it does not supplant the adequate public facilities analysis at the planning stage. Thus, concurrency programs are available once the land use change authorized by the Comprehensive Plan comes in for development, but do not impact the initial land use change itself.

Furthermore, had the Legislature intended to apply Section 163.3180(5)(h)3. to Comprehensive Plan amendments, it would have used the phrase "plan amendments," as it did in Section 163.3180(5)(h)1., Florida Statutes (requiring consultation with FDOT on proposed "plan amendments" that affect facilities on the strategic intermodal system).

9. Assuming the answer to question #6 is no, does this statutory section apply to a Comprehensive Plan future land use map amendment that is accompanied by a rezoning or DRI request?

Committee's Answer: No

Under the Community Planning Act, the local government is required to consider an application for zoning changes that would be required to properly enact any proposed Comprehensive Plan amendment, if the applicant makes such a request. *See* F.S. §163.3184(12)(2011). However, this does not mean that zoning review standards or analysis applies to the Comprehensive Plan amendment, or that the local government is required to approve the rezoning and Comprehensive Plan amendment at the same public hearing. The mere approval of a Comprehensive Plan amendment on the same date as a rezoning (or DRI approval) does not transform the Comprehensive Plan amendment into one of the approvals subject to Section 163.3180(5)(h)3. *See* Analysis in Question 8 above and Judge Wells' dissent in *Payne v. City of Miami*, 52 So. 3d 707, 741-743 and 752-754 (Fla. 3d DCA 2010).

Section 163.3180(5)(h)3. applies to the timing considerations raised by the DRI or rezoning request, but does not supplant the initial adequate public facility analysis inherent in Comprehensive Plan amendment review; the statute governing DRI applications is specific to that point. *See* F.S. §380.06(6)(b)(2011)(associated Comprehensive Plan amendments do not require favorable consideration just because they accompany a DRI request) and F.S. §380.06(6)(b)(2)(2011)(Comprehensive Plan amendment requests that accompany a DRI application still require appropriate data and analysis from which a local government can determine whether to transmit the Comprehensive Plan amendment).

10. Is this statutory section retroactive to projects that obtained transportation concurrency approval prior to the enactment of HB 7207 (based on proportionate share mitigation), and that are now seeking to have their proportionate share amount and/or construction obligations reduced under the new HB 7207 language?

Committee's Answer: No

Analysis: Applying the first prong of the two-prong test in *Florida Ins. Guar. Ass'n, Inc. v. Devon Neighborhood Ass'n, Inc.*, 67 So. 3d 187 (Fla. 2011), there is no clear evidence of legislative intent to apply Section 163.3180(5)(h)3., Florida Statutes retroactively. *Devon*, 67 So. 3d at 196. The text of Section 163.3180(5)(h)3. is silent as to its forward or backward reach. *Id.* In addition, the legislature also provided that HB 7207 would take effect upon becoming law, and it became law when it was approved by the Governor and filed in the office of the Secretary of State on June 2, 2011. *See* Ch. 2011-139, § 81, at 190, Laws of Florida. The inclusion of an effective date is considered to be evidence rebutting intent for retroactive application of the law. *Devon*, 67 So. 3d at 196 (citation omitted). *Compare* Ch. 2011-139, § 79 (5), at 190, Laws of Florida, which specifically explains that permits extended under the bill "shall continue to be governed by the rules in effect at the time the permit was issued, except if it is demonstrated that the rules in effect at the time the permit was issued would create an immediate threat to public safety or health."

Furthermore, Section 163.3180(5)(h)3. specifically refers to "an applicant for a development-of-regional-impact development order, a rezoning, or other land use development permit." It **does not** refer to an applicant for **an amendment** of such approvals, a reference which the Legislature would have certainly included had they intended Section 163.3180(5)(h)3. to be retroactive.

The only indication that the Legislature had any intent to make Section 163.3180(5)(h)3. retroactive was the addition of Section 380.06(19)(e)6., Florida Statutes, which allows DRI approval holders to propose a change in the DRI's transportation proportionate share calculation and mitigation plan in an adopted development order as a result of recalculation of the proportionate share contribution pursuant to Section 163.3180(5)(h), and the proposed change is presumed not to create a substantial deviation or an additional regional impact. However, this section only applies "if a local government agrees to [the] proposed change"; therefore the provision is really not retroactive unless the local government agrees to make it retroactive.

Even if Section 163.3180(5)(h)3. were deemed to be retroactive under prong one of the two-prong test, retroactive application would also not satisfy prong two of the two-prong test in *Devon*. Proportionate share mitigation under the pre-HB 7207 version of the proportionate share calculation generally resulted in some type of agreement or contract between the concurrency applicant and the local government. If concurrency applicants were allowed to retroactively and unilaterally use Section 163.3180(5)(h)3. to reduce their obligations under such agreements, it would result in an unconstitutional impairment of the agreement or contract with the local government. *See Pomponio v. Claridge of Pompano Condo., Inc.*, 378 So. 2d 774, 780 (Fla. 1979). This is likely the primary reason that the Legislature required the

local government to agree to any retroactive application of Section 163.3180(5)(h)3. for DRIs.

FDOT has also concluded that this provision is not retroactive. *See* FDOT Guidance Memo ("The Act does not expressly provide that the new requirements for proportionate share apply to existing development. That is, the Act is not retroactive. ...[I]t does not appear to have been the intent [of the Act] to undermine previous development decisions, and so the Act should apply prospectively, i.e., to new development, unless the local government agrees to the recalculation.")

11. Assuming the answer to question #10 is yes, can the local government deny the request to reduce the proportionate share amount and/or construction obligations pursuant to the statutory authority referenced in question #2 (or pursuant to Section 380.06(19)(e)6., (f)5. or (f)6., Florida Statutes for DRIs), or pursuant to the common law authority referenced in question #3?

Committee's Answer: Yes

Analysis: *See* Analysis in Questions 2 and 3. Although the statutory and common law authority referenced in these questions would generally apply to the denial of proposed modifications to permitted uses or density/intensity, the legal principles should apply equally to a proposed transportation mitigation reduction that will cause the proposed development to be inconsistent with the level of service, timing or adequate public facility requirements of the Comprehensive Plan, or if denial of the reduction would otherwise accomplish a legitimate public purpose.

The DRI statute is instructive on this issue as well. *See* F.S. §380.06(19)(e)6.(2011)("**If** a local government agrees to a proposed change..."); F.S. §380.06(19)(f)5.(2011)("The local government may also deny the proposed change **based on matters relating to local issues**..."); *Bay Point Club, Inc. v. Bay County*, 890 So. 2d 256, 259 (Fla. 1st DCA 2004) ("Proposed changes that are not required to undergo a new DRI permitting process, must be "**otherwise approved**" and may be subject to "**conditions of approval**.") (*citing* F.S. §380.06(19)(f)6.)(emphasis added). If Section 380.06(19)(e)6., Florida Statutes, is used as the basis for making Section 163.3180(5)(h)3. retroactive for non-DRI projects, then the local government denial and condition authority in Section 380.06(19)(e) and (f) should apply to non-DRI projects as well.

FDOT has reached a similar conclusion. *See* FDOT Guidance Memo ("[I]f a proportionate share agreement for a DRI required $10 million-worth of improvements, but a recalculated proportionate share amount under the Act would be only $1 million, the local government does not have to accept this change. Even if the recalculation is consistent with the new proportionate share calculation requirements after HB 7207, the local government does not have to accept the change

if the development would then be inconsistent with the local comprehensive plan and/or land development regulations.").

12. Assuming the answer to question #10 is yes, and assuming the answer to question #11 is no, can the local government time or deny the originally requested entitlements pursuant to the statutory authority referenced in question #2 (or pursuant to Section 380.06(19)(e)6., (f)5. or (f)6., Florida Statutes for DRIs), or pursuant to the common law authority referenced in question #3?

Committee's Answer: Yes

Analysis: *See* Analysis in Questions 2, 3 and 11. If a retroactive reduction of proportionate share mitigation is allowed, the local government must also be allowed to reexamine the entitlements that were originally granted to avoid an unconstitutional impairment of contract. *See Pomponio*, 378 So. 2d at 780. Any vested right to such entitlements is lost by virtue of the proposed change in the transportation mitigation, and the local government can condition the proposed proportionate share reduction on a reduction or timing of entitlements. *See Bay Point Club*, 890 So. 2d at 258-59.

FDOT has reached a similar conclusion. *See* FDOT Guidance Memo ("For example, if the local land development regulations would not authorize the development rights authorized by the DRI, the local government may choose to deny or postpone approval of development rights with the reduction in proportionate share contribution. There is no "right" for a development to get the reduction in proportionate share mitigation yet maintain development entitlements.") (citation omitted).