

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: PCB RCC 11-09 Ratification of rules pertaining to Land Planning Regulations For The Florida Keys Area Of Critical State Concern

SPONSOR(S): Rules & Calendar Committee

TIED BILLS: **IDEN./SIM. BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
Orig. Comm.: Rules & Calendar Committee		Miller	Birtman

SUMMARY ANALYSIS

The Administration Commission adopted rules affecting the comprehensive plans for three communities in the Florida Keys Area of Critical State Concern: the City of Marathon, the Village of Islamorada, and Monroe County. The statements of estimated regulatory costs showed each of the following rules would have a specific, adverse economic effect, or would increase regulatory costs, exceeding \$1 million over the first 5 years the rule was in effect:

- Rule 28-18.100, Florida Administrative Code (FAC)
- Rule 28-18.400, FAC
- Rule 28-19.310, FAC
- Rule 28-20.400, FAC

Accordingly, these rules must be ratified by the Legislature before they may go into effect.

On February 4, 2011, the Legislature was notified these rules would be submitted for ratification if the rulemaking process was completed before the end of the regular session. Each rule was adopted on April 11, 2011, and submitted for ratification on April 12, 2011.

The proposed bill authorizes the referenced rules to go into effect. The scope of the bill is limited to this rulemaking condition and does not adopt the substance of any rule into the statutes.

The bill is effective upon becoming law.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

PRESENT SITUATION

Comprehensive Plans

In response to continued rapid growth and the challenges of the state and local governments to adequately address development impacts, the Legislature adopted Florida's Growth Management Act in 1985, known officially as "The Local Government Comprehensive Planning and Land Development Regulation Act" (the Act).¹ The Act was designed to remedy deficiencies in earlier law by giving more state oversight and control of the planning process to the Department of Community Affairs (DCA), the state's land planning agency. As directed by law, DCA adopted minimum standards for all local plans.² The 1985 Act created the current intergovernmental system of planning. Every county and municipality is required to adopt a local government comprehensive plan in order to guide future growth and development, and the Act authorizes DCA to review comprehensive plans and plan amendments for compliance with the Act. Other state and regional entities also review local government plans and amendments and provide comments to DCA. With state, regional, and local government oversight, Florida has one of the most comprehensive, regulatory, growth management systems in the country.

The Act requires all local governments to adopt comprehensive land use plans and implement those plans through land development regulations and development orders. Each local government comprehensive plan must include at least two planning periods, one covering at least the first 5-year period occurring after the plan's adoption and one covering at least a 10-year period.

Each comprehensive plan contains chapters or "elements" that address future land use (including a future land use map), housing, transportation, infrastructure, coastal management, conservation, recreation and open space, intergovernmental coordination, capital improvements (and a 5-year capital improvement schedule) and public school facilities. Section 163.3177, F.S., and Chapter 9J-5, Florida Administrative Code (FAC), provide the requirements for elements of local comprehensive plans. The statute also provides for scheduled updates to various elements and imposes penalties for failure to adopt or update elements.

Florida Keys Area of Critical State Concern

Areas of critical state concern are designated pursuant to s. 380.05 F.S., which directs the state land planning agency to recommend to the Administration Commission specific areas of critical state concern. In its recommendation, the agency makes recommendations with respect to the purchase of lands situated within the boundaries of the proposed area as environmentally endangered lands and outdoor recreation lands under the Land Conservation Act of 1972. The Florida Keys Area of Critical State Concern is authorized by s. 380.0552, F.S. The designation may be removed upon fulfilling the Work Program Tasks set out in rules of the Administrative Commission.³

The state land planning agency is charged with reviewing all land development regulations for compliance with the adopted principles for guiding development. The state land planning agency can then, after consulting with the appropriate local government, recommend to the Administration Commission the enactment, amendment, or rescission of a land development regulation or element of a local comprehensive plan.

¹ See ch. 163, pt. II, F.S.

² Rule 9J-5, F.A.C. (Minimum Criteria for Review of Local Government Comprehensive Plans and Determination of Compliance).

³ s. 380.0552(4)(a), F.S.

Rulemaking Authority

A rule is an agency statement of general applicability which interprets, implements, or prescribes law or policy, including the procedure and practice requirements of an agency as well as certain types of forms.⁴ Rulemaking authority is delegated by the Legislature⁵ through statute and authorizes an agency to “adopt, develop, establish, or otherwise create”⁶ a rule. Agencies do not have discretion whether to engage in rulemaking.⁷ To adopt a rule an agency must have a general grant of authority to implement a specific law by rulemaking.⁸ The grant of rulemaking authority itself need not be detailed.⁹ The specific statute being interpreted or implemented through rulemaking must provide specific standards and guidelines to preclude the administrative agency from exercising unbridled discretion in creating policy or applying the law.¹⁰

Under current law, an agency begins the formal rulemaking process by filing a notice of the proposed rule.¹¹ The notice is published by the Department of State in the Florida Administrative Weekly¹² and must provide certain information, including the text of the proposed rule, a summary of the agency’s statement of estimated regulatory costs (SERC) if one is prepared, and how a party may request a public hearing on the proposed rule. In 2010 the Legislature created s. 120.541(2)(a), F.S., expanding the scope of a SERC to include an economic analysis projecting a proposed rule’s adverse effect on specified aspects of the state’s economy or increase in regulatory costs.

Legislative Ratification

HB 1565 was passed during the 2010 regular session but was vetoed by Governor Crist. On November 16, 2010, the Legislature in special session voted to override that veto and the bill became law as Chapter 2010-279. The law expanded the requirement for agencies to prepare a formal SERC,¹³ broadened the mandatory scope of each SERC to include an economic analysis of a rule’s potential fiscal impacts over 5 years,¹⁴ and created new s. 120.541(3), requiring rules with certain economic impacts must be submitted for ratification by the Legislature before they may go into effect.

The economic analysis now mandated for each SERC by s. 120.541(2)(a), F.S., must address a rule’s potential impact over the 5 years from when the rule goes into effect. First is the rule’s likely adverse impact on economic growth, private-sector job creation or employment, or private-sector investment.¹⁵ Next is the likely adverse impact on business competitiveness,¹⁶ productivity, or innovation.¹⁷ Finally, whether the rule is likely to increase regulatory costs, including any transactional costs.¹⁸ If the analysis shows the projected impact of the proposed rule in any one of these areas will exceed \$1 million in the aggregate for the 5 year period, the rule cannot go into effect until ratified by the Legislature pursuant to s. 120.541(3), F.S.

⁴ s. 120.52(16); *Florida Department of Financial Services v. Capital Collateral Regional Counsel-Middle Region*, 969 So. 2d 527, 530 (Fla. 1st DCA 2007).

⁵ *Southwest Florida Water Management District v. Save the Manatee Club, Inc.*, 773 So. 2d 594 (Fla. 1st DCA 2000).

⁶ s. 120.52(17).

⁷ s. 120.54(1)(a), F.S.

⁸ s. 120.52(8) & s. 120.536(1), F.S.

⁹ *Save the Manatee Club, Inc.*, supra at 599.

¹⁰ *Sloban v. Florida Board of Pharmacy*, 982 So. 2d 26, 29-30 (Fla. 1st DCA 2008); *Board of Trustees of the Internal Improvement Trust Fund v. Day Cruise Association, Inc.*, 794 So. 2d 696, 704 (Fla. 1st DCA 2001).

¹¹ s. 120.54(3)(a)1, F.S.

¹² s. 120.55(1)(b)2, F.S.

¹³ Agencies now must prepare a SERC if the proposed rule will adversely affect small businesses or will directly or indirectly increase regulatory costs in excess of \$200,000 in the aggregate within the 1 year of the rule going into effect. s. 120.54(3)(b)1.b., 120.541(1)(b), F.S.

¹⁴ s. 120.541(2)(a), F.S.

¹⁵ s. 120.541(2)(a)1., F.S.

¹⁶ Including the ability of those doing business in Florida to compete with those doing business in other states or domestic markets.

¹⁷ s. 120.541(2)(a) 2., F.S.

¹⁸ s. 120.541(2)(a) 3., F.S.

Present law distinguishes between a rule being “adopted” and becoming enforceable or “effective.”¹⁹ A rule must be filed for adoption before it may go into effect²⁰ and cannot be filed for adoption until completion of the rulemaking process.²¹ A rule projected to have a specific economic impact exceeding \$1 million in the aggregate over 5 years²² must be ratified by the Legislature before going into effect.²³ As a rule submitted under s. 120.541(3), F.S., becomes effective if ratified by the Legislature, a rule must be filed for adoption before being submitted for legislative ratification.

Proposed Rules

Comprehensive land management plans for the Florida Keys Area of Critical State Concern may be amended by the local government first adopting the plan and then submitting the amendments for approval by DCA.²⁴ Changes are authorized only once annually and are adopted by the Administration Commission²⁵ through rulemaking after DCA approves the changes by local government.²⁶

On April 11, 2011, the Administration Commission filed several rules for adoption, including the 4 rules referenced above in the initial summary. Statements of estimated regulatory costs submitted with these rules showed each as increasing regulatory costs in excess of \$ 1 million over the next 5 years.

Rules 28-18.100 and 28-18.400, F.A.C., Affecting the City of Marathon

Rule 28-18.100, FAC, notes the comprehensive plan is superseded by the amendments to Rule 28-18.400, the actual comprehensive plan. The proposed changes primarily address continuations and updates to the wastewater treatment and stormwater management components of the plan. These changes bear directly on the availability of permits for construction in Marathon. According to the SERC provided, the estimated assessments and permit fees to move 10,087 private entities, including small businesses, from current on-site treatment plants to a central treatment system, would exceed a total of \$57,798,510. For some 3,855 owners of onsite sewage treatment and disposal facilities, there would be an additional total cost of \$11,565,000 for connecting a residential unit to a central collection line. No lower cost regulatory alternative was received by the agency.

Rule 28-19.310, F.A.C., Affecting Islamorada, Village of Islands

Rule 28-19.310, FAC, is the comprehensive plan for Islamorada, Village of Islands. The proposed changes primarily address continuations and updates to the wastewater treatment and stormwater management components of the plan. These changes bear directly on the availability of permits for construction in Islamorada. According to the SERC provided, the estimated assessments and permit fees to move 3,100 private entities, including small businesses, from current on-site treatment plants to a central treatment system, would exceed a total of \$17,670,000. For these owners of onsite sewage treatment and disposal facilities, there would be an additional total cost of \$9,300,000 for connecting a residential unit to a central collection line. No lower cost regulatory alternative was received by the agency.

Rule 28-20.140, F.A.C., Affecting Monroe County

Rule 28-20.140, FAC, is the comprehensive plan for Monroe County. The proposed changes primarily address continuations and updates to the wastewater treatment and stormwater management components of the plan. These changes bear directly on the availability of permits for construction in Monroe County. According to the SERC provided, the estimated assessments and permit fees to move

¹⁹ s. 120.54(3)(e)6. Before a rule becomes enforceable, thus “effective,” the agency first must complete the rulemaking process and file the rule for adoption with the Department of State.

²⁰ s. 120.54(3)(e)6, F.S.

²¹ s. 120.54(3)(e), F.S.

²² s. 120.541(2)(a), F.S.

²³ s. 120.541(3), F.S.

²⁴ s. 380.0552(9)(a), F.S.

²⁵ Comprised of the Governor and Cabinet. s. 380.031(1), F.S.

²⁶ s. 380.0552(9)(b), F.S.

19,145 private entities, including small businesses, from current on-site treatment plants to a central treatment system, would exceed a total of \$109,126,500. Additionally, 3,855 property owners are subject to a Lower Keys Assessment which would total \$96,375,000. 15,438 owners of onsite sewage treatment and disposal facilities would face an additional total cost of \$46,314,000 for connecting a residential unit to a central collection line. No lower cost regulatory alternative was received by the agency.

EFFECT OF PROPOSED CHANGES

The bill removes the condition for the cited rules to become effective created in s. 120.541(3), F.S. The purpose of the bill is limited to authorizing the rules to go into effect and does not adopt, amend, or approve the substance of any rule. The bill expressly denies that it is intended to cure any procedural defect that may exist in the rule. Thus, the bill leaves the rule in the same condition it would be had it been filed for adoption and no ratification condition hindered its execution.

B. SECTION DIRECTORY:

Section 1: Identifies each submitted rule and provides for the rules to go into effect pursuant to s. 120.541(3), F.S. Expressly limits ratification to the effectiveness of the rules. Directs the act shall not be codified in the Florida Statutes but only noted in the historical comments to each rule by the Department of State.

Section 2: Provides the act goes into effect upon becoming law.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

The bill creates no additional source of state revenues.

2. Expenditures:

The bill requires no state expenditures.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

The bill itself has no impact on local government revenues.

2. Expenditures:

The bill does not impose additional expenditures on local governments.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill does not have an economic impact on the private sector.

D. FISCAL COMMENTS:

The economic impacts projected in the statements of estimated regulatory costs would result from the operation of the new rules. Some of these economic impacts, including assessments on private individuals or businesses, would appear to result in increased revenues for local governments.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The following information was provided by the Department of Community Affairs in its Statement of Estimated Regulatory Cost analyzing each rule referenced in the bill:

(c) A good faith estimate of the cost to the agency, and to any other state and local government entities, of implementing and enforcing the proposed rule, and any anticipated effect on state or local revenues.

This is an ongoing program with existing staff involved in the growth management implementation at the local and state level, no new costs are anticipated.

Based upon this analysis, the legislation does not appear to require counties or municipalities to take any action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

No other constitutional issues are presented by the bill.

B. RULE-MAKING AUTHORITY:

The bill meets the final statutory requirement for the Administration Commission to exercise its rulemaking authority concerning these 3 comprehensive plans. No additional rulemaking authority is required.

C. DRAFTING ISSUES OR OTHER COMMENTS:

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES