Emergency, tolling of development order

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Subject:
Emergency, tolling of development order

Mr. Samuel S. Goren
Mr. Jacob G. Horowitz
Goren, Cherof, Doody & Ezrol, P.A.
3099 East Commercial Boulevard
Suite 200
Fort Lauderdale, Florida 33308

RE: PERMITS--STATE OF EMERGENCY--GOVERNOR--MUNICIPALITIES--DEVELOPMENT--whether municipality's site plan approval constitutes development order for purposes of tolling and extension. s. 252.363, Fla. Stat.

Dear Messrs. Goren and Horowitz:

As attorneys for the City of Tamarac, you have asked for my opinion on substantially the following questions:

1. Does a site plan approval by the City of Tamarac constitute a development order for purposes of section 252.363(1)(a)1., Florida Statutes?

2. If the answer to Question One is in the affirmative, does the City of Tamarac have an affirmative obligation to take action extending the site plan approval pursuant to section 252.363(1)(a), Florida Statutes, or does the extension occur as a matter of law without any municipal action or confirmation?

In sum:

1. Section 252.363, Florida Statutes, contains no definition of the term "development order" and no statutory definition of the term "development order" includes a "site plan approval." In determining what may constitute a development order, Florida courts have looked to local codes. However, the City of Tamarac Code contains provisions which appear to be contradictory and this office cannot interpret local codes or resolve inconsistencies in local legislative language.

2. Section 252.363, Florida Statutes, contains no direction or authority to a municipality to take affirmative action to extend a permit or other authorization. Rather, the burden of seeking an extension falls to the holder of the permit who must provide written notification to the issuing authority of his or her intention to exercise the tolling and extension of a qualifying permit granted under the statute.

Question One

Section 252.363, Florida Statutes, was created in section 494, Chapter 2011-142, Laws of Florida, and tolls and extends the expiration of development permits during and following a state of emergency declared by the Governor. The act became effective July 1, 2011,[1] and provides, in part:

"(1)(a) The declaration of a state of emergency by the Governor tolls the period remaining to exercise the rights under a permit or other authorization for the duration of the emergency declaration. Further, the emergency declaration extends the period remaining to exercise the rights under a permit or other authorization for 6 months in addition to the tolled period. This paragraph applies to the following:
1. *The expiration of a development order issued by a local government.*
2. The expiration of a building permit.
3. The expiration of a permit issued by the Department of Environmental Protection or a water management district pursuant to part IV of chapter 373.
4. The buildout date of a development of regional impact, including any extension of a buildout date that was previously granted pursuant to s. 380.06(19)(c).
(b) Within 90 days after the termination of the emergency declaration, the holder of the permit or other authorization shall notify the issuing authority of the intent to exercise the tolling and extension granted under paragraph (a). The notice must be in writing and identify the specific permit or other authorization qualifying for extension.
(c) If the permit or other authorization for a phased construction project is extended, the commencement and completion dates for any required mitigation are extended such that the mitigation activities occur in the same timeframe relative to the phase as originally permitted.
(d) This subsection does not apply to:
1. A permit or other authorization for a building, improvement, or development located outside the geographic area for which the declaration of a state of emergency applies.
2. A permit or other authorization under any programmatic or regional general permit issued by the Army Corps of Engineers.
3. The holder of a permit or other authorization who is determined by the authorizing agency to be in significant noncompliance with the conditions of the permit or other authorization through the issuance of a warning letter or notice of violation, the initiation of formal enforcement, or an equivalent action.
4. A permit or other authorization that is subject to a court order specifying an expiration date or buildout date that would be in conflict with the extensions granted in this section." (e.s.)

Section 252.363, Florida Statutes, requires the tolling and extension of development orders following the declaration of a state of emergency by the Governor.

While the term "development order" is not defined for purposes of section 252.363, Florida Statutes, that phrase is defined elsewhere in the statutes for land development and building construction purposes. In the absence of specific direction by the Legislature, a definition of the phrase "development order" contained in other land development statutes may be helpful in delineating what may be considered a development order within the scope of section 252.363(1)(a)1., Florida Statutes.[2]

Part II, Chapter 163, Florida Statutes, is the "Community Planning Act," the purpose of which is to

"utilize and strengthen the existing role, processes, and powers of local governments in the establishment and implementation of comprehensive planning programs to guide and manage future development consistent with the proper role of local government."[3]

In this context, the act defines a "development order" as "any order granting, denying, or granting with conditions an application for a development permit."[4] A "[d]evelopment permit," for purposes of the "Community Planning Act"[5] "includes any building permit, zoning permit, subdivision approval, rezoning, certification, special exception, variance, or any other official action of local government having the effect of permitting the development of land."[6] Similarly, a "development order" is defined in "The Florida Environmental Land and Water Management Act of 1972,"[7] as "any order granting, denying, or granting with conditions an application for a development permit."[8] Section 380.031(4), Florida Statutes, defines a "[d]evelopment permit" as any building permit, zoning permit, plat approval, or rezoning, certification, variance, or other action having the effect of permitting development as defined in this chapter." None of these definitions specifically contains "site plan approval" within its terms.

In a recent case, the Fourth District Court of Appeal looked to local code definitions to determine whether a city's actions in approving a revised plat constituted a development order subject to challenge pursuant to the statute governing standing to enforce local comprehensive plans. In *Graves v. City of Pompano Beach*,[9] a group of citizens brought a declaratory judgment action seeking a declaration that the city's revised plat approval was inconsistent with the city's comprehensive plan. The City of Pompano Beach land development code adopted the statutory definition for "development order," but also extended the definition of a "development permit" to include plat approval. The court relied on a review and consideration of the development rights consequent to a plat approval under the city's land development code, to find that the plat approval by the City of Pompano Beach was a "development order."[10]

The City of Tamarac code defines a "site plan" as a technical submission presented "prior to filing for any development permit[.]"[11] However, the code also includes, within this same section, a definition of the term "development permit" which specifically includes a "site plan approval."[12] Thus, the City of Tamarac code contains inconsistent provisions regarding whether a site plan approval may constitute a development order under the provisions of the code. This office has no authority to interpret local codes and cannot advise you which of these definitions would control a determination of whether a site plan approval under the City of Tamarac code would be a "development order"[13] as that term is used in section 252.363(1)(a)1., Florida Statutes. Nor can this office resolve mixed questions of law and fact and determine whether a "site plan approval" under the City of Tamarac code would, in effect, be an "official action . . . having the effect of permitting the development of land"[14] for purposes of the code.[15]

Question Two

You have also asked whether the city has an affirmative obligation to take action extending development orders pursuant to section 252.363(1)(a), or whether the tolling and extension

described in the statute operate as a matter of law.

Section 252.363(1), Florida Statutes, provides that

"(b) Within 90 days after the termination of the emergency declaration, the holder of the permit or other authorization shall notify the issuing authority of the intent to exercise the tolling and extension granted under paragraph (a). The notice must be in writing and identify the specific permit or other authorization qualifying for extension.
(c) If the permit or other authorization for a phased construction project is extended, the commencement and completion dates for any required mitigation are extended such that the mitigation activities occur in the same timeframe relative to the phase as originally permitted."

Nothing in the statute imposes an obligation on the municipality to take any action extending development orders, rather, it appears that the Legislature intended to place that burden on the holder of the permit who must provide written notification to the issuing authority of his or her intent to exercise the tolling and extension of the statute. As specifically provided in section 252.363(2), Florida Statutes, any permit or other authorization that is the subject of an extension is governed by the laws, administrative rules, and ordinances which were in effect when the permit was issued.

Thus, it is my opinion that the City of Tamarac has no affirmative obligation to take action extending the site plan approval pursuant to section 252.363(1)(a), Florida Statutes, rather, the extension occurs as a matter of law in response to a written notification of intent to exercise the tolling and extension granted by the statute.

Sincerely,

Pam Bondi
Attorney General

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[1] *See* s. 528, Ch. 2011-142, Laws of Fla.

[2] *See Krause v. Reno*, 366 So. 2d 1244 (Fla. 3d DCA 1979) (lack of definition for "agency" in Sunshine Law, s. 286.011, Fla. Stat., allows court to look to similar or analogous statutory provisions which give effect to the same public policy underlying the Sunshine Law.); Ops. Att'y Gen. Fla. 09-38 (2009) and 95-14 (1995) (definitions of terms in related statutes may be reviewed to determine meaning).

[3] Section 163.3161(2), Fla. Stat.

[4] Section 163.3164(15), Fla. Stat.

[5] *See* s. 163.3161, Fla. Stat., for the short title.

[6] Section 163.3164(16), Fla. Stat.

[7] Section 380.012, Fla. Stat., for the short title of the act.

[8] Section 380.031(3), Fla. Stat.

[9] *Graves v. City of Pompano Beach*, 74 So. 3d 595 (Fla. 4th DCA 2011).

[10] *And see* Judge Gerber's dissent in *Graves v. City of Pompano Beach*, 74 So. 3d at 599, in which he argues that the statutory definition of "development permit" in s. 163.3164, Fla. Stat., which does not contain a plat approval within its scope, would not permit the development of land and would, thus, not constitute a "development order" within the scope of the statute. Judge Gerber's dissent argues that the statutory definition controls over the city's provision and that, by adding the city's definition of "development permit" to s. 163.3164's definition, the court has broadened the cause of action beyond that which the Legislature intended.

[11] *See* s. 10-1, Art. I, Part I, Code of Ordinances, City of Tamarac.

[12] *Id.*

[13] *See* s. 16.01(3), Fla. Stat., prescribing the authority of the Attorney General to issue opinions on questions of state law.

[14] *See* the definition of "development permit" for purposes of Part II, Art., I, s. 10-1, Code of Ordinances, City of Tamarac. *And see Graves v. City of Pompano Beach*, 74 So. 3d 595 (Fla. 4th DCA 2011).

[15] *Cf. Graves v. City of Pompano Beach*, 74 So. 3d 595 (Fla. 4th DCA 2011) (in which the court, on rehearing, reviewed and considered the development rights consequent to a plat approval under the city land development code and found that the plant approval in that case did constitute a development order under provisions of s. 163.3215(3), Fla. Stat.).