



COVID-19: LAND USE APPLICATIONS, STAFF ACCESS AND PUBLIC HEARINGS

MARCH 27, 2020

Many of you may have questions regarding how state and local government agencies are handling land use and permitting applications during this unprecedented public health emergency and what this means for your clients. As you know, the government's response to the Covid-19 crisis is unfolding on a day-to-day, if not hour-by-hour, basis. Thus, the best we or anyone else can do at this time is to answer frequently asked questions as accurately as possible with the information available as of the date of this memo. We hope you find the below information helpful. If you have any questions, whether general in nature or specific to a client's situation, please reach out to Juli James, Scott Glass, James Johnston or Steve Zucker.

FREQUENTLY ASKED QUESTIONS:

Q. Aren't local governments required by state law to process my application within a specified period of time?

A. Ordinarily, yes, but not necessarily during a declared state of emergency.

Sections 125.022(1) and 166.033(1), Florida Statutes, respectively, require counties and municipalities to make a final decision on an application for approval of a development permit or development order within 120 days after the jurisdiction has deemed the application complete, or 180 days for applications that require final action through a quasi-judicial hearing or public hearing. Moreover, the respective statutes each provide that the applicant and the local jurisdiction, "may agree to a reasonable request for an extension of time, particularly in the event of a force majeure or other extraordinary circumstance." The use of the permissive, "may," rather than the compulsory, "must," or the directive, "shall," implies that the only way to extend the prescribed time period is by mutual consent. However, pursuant to Art. IV, §(1)(a) of the Florida Constitution and Ch. 252 Florida Statutes (the "State Emergency Management Act"), Governor DeSantis issued Executive Order Number 20-51 on March 1st, declaring a public health emergency ("E.O. 20-51"), and Executive Order Number 20-52 on March 9th, declaring a general state of emergency in the State of Florida ("E.O. 20-52").



Pursuant to Section 252.36(b), Florida Statutes, executive orders, proclamations, and rules issued by the Governor during a state of emergency have the force and effect of law and may supersede existing statutes for the duration of the emergency. The current state of emergency will expire on May 8, 2020 unless extended by Governor DeSantis. To date, none of the executive orders issued by the Governor purport to specifically supersede the time limits set forth in Sections 125.022(1) and 166.033(1), Florida Statutes. Even if the Governor were intent on enforcing these time frames, when the legislature added them last year as part of H.B. 7103 it failed to provide any penalty or other enforcement mechanism. Simply put, even absent the existing state of emergency, an applicant would have to bring an action in circuit court to compel the governing jurisdiction to comply with the statutory directive and such action could only be brought when it was clear that the deadline would not otherwise be met. Please note that, in light of the current state of emergency, most courts have placed substantial restrictions on the processing of most cases at this time.

Q. Will local governments continue to process pending applications during the state of emergency?

A. It will be up to each local government to decide how it handles pending applications, but many jurisdictions are encouraging, and some are directing, their employees to stay home and work remotely. To the extent a jurisdiction, for example, Orlando, has directed its employees to stay home it can be expected that the processing of applications will be considerably slowed, at least through the end of March when the "15 Days to Slow the Spread" guidance issued by the Centers for Disease Control is scheduled to expire. Of course, depending on reported cases in Florida and nationwide, work-from-home policies and guidance may be extended so there is no way to accurately predict the new "normal" processing time during the Covid-19 crisis. We anticipate that many jurisdictions will do their best to accept new applications electronically and process them to the degree possible short of conducting required public hearings. The best anyone can do at this time is to check local government websites for information or reach out to the applicable local government, preferably via telephone, email or other electronic method, to find out what, if any procedures are being used to deal with pending and new land use applications.

Q. Will scheduled public hearings still be held during the state of emergency?

A. Neither the Governor nor the federal government have issued any prohibition against local governments from proceeding with public hearings, so it will be up to each individual jurisdiction to decide whether to hold or postpone required public hearings. Many jurisdictions are actively working on devising procedures which would allow their governing bodies to meet via Skype® or other communications meeting technology ("CMT"). In fact, at the urging of the Florida League of Cities and a multitude of local governments, Governor DeSantis issued Executive Order Number 20-69 ("E.O. 20-69") on March 20th, suspending the requirement that a quorum be physically present at a specified location in order for a local government body to take official action. E.O. 20-69 does not, however, waive any other requirement of Section 286.011, Florida Statutes, a/k/a the "Government in the Sunshine Law."



This has engendered considerable debate among local government attorneys as to how public hearings can be held electronically and still ensure the right of interested parties to participate. There is also considerable debate underway as to whether E.O. 20-69 only applies to governing bodies or also applies to advisory bodies such as planning and zoning commissions. It is also unclear from the E.O.'s language whether it applies only to local governments or also applies to special districts, such as hospital districts and community development districts. No clear written direction has been provided on either of these points by the Governor's Office or the Florida Attorney General at the time this memo was prepared. Therefore, we expect each local government and each special district will likely follow the advice of its own legal counsel until further guidance is issued out of Tallahassee.

Q. Can I force the local government to hold the required hearing on my pending application?

A. No. The only way to force a local government to hold a public hearing would be to petition the circuit court for an extraordinary writ directing the local government to hold such hearing. Even absent a global pandemic, however, courts are loathe to inject themselves into the decisions of local government absent a compelling reason to do so, e.g., to defend an applicant against arbitrary and capricious, politically-based decisions. In light of the Center for Disease Control's guidelines regarding the Covid-19 virus and the Governor's prior actions limiting assemblies of more than 10 people, it is, we believe, extremely unlikely that a circuit court would compel a local government to hold any type of public hearing, at least until procedures are put into place to ensure it can be held without threatening the public health and welfare.

Q. If the local government elects to proceed with my public hearing via some form of CMT, how will that work?

A. Local governments are working on the answer to this question, but to the best of our knowledge no local government has promulgated specific procedures as of the date of this memo. As noted above, E.O. 20-69 authorizes local government bodies to meet electronically, without the need to have a quorum physically present. Specifically, Section 2 of E.O. 69 states that, "local government bodies may utilize communications media technology, such as telephonic and video conferencing, as provided in Section 120.54(5)(b)2., Florida Statutes." Section 120.54(5)(b)2., in turn, provides for the adoption of a uniform rule for use by state agencies when conducting such proceedings. However, this uniform rule, which is set forth in Ch. 28-109, Florida Administrative Code, specifically states that, "[n]othing in this chapter shall be construed to permit the agency to conduct any proceeding otherwise subject to the provisions of Section 286.011, F.S., exclusively by means of CMT without making provision for the attendance of any member of the public who desires to attend." Rule 28-109.004(1), F.A.C.



Allowing citizens who may be infected with the Coronavirus to attend in person would, of course, defeat the purpose of E.O. 20-69 which is to help stem the spread of the virus. Thus, local government law attorneys are currently trying to determine if the language of E.O. 20-69 can be interpreted to prevent the physical attendance of everyone at such a meeting. They are also trying to determine how documentary evidence could be offered into the record at such a “virtual” meeting. The existing uniform rule fails to provide any guidance, merely stating at Rule 28-109.003, F.A.C., that the entity holding the proceeding “may provide CMT access to a proceeding for purposes of taking evidence, testimony, or argument.” Even then, Rule 28-109.006, F.A.C., states that, to the extent that sworn testimony is required in such proceeding, those “persons offering such testimony shall be responsible for making appropriate arrangements for offering sworn testimony.”

As a result of the shortcomings of the existing uniform rules, it appears that a number of jurisdictions plan to promulgate their own rules utilizing emergency powers conferred upon them directly by Section 252.46, Florida Statutes. Section 252.46(1), Florida Statutes, provides that, so long as they comply with certain prescribed rulemaking procedures, “the political subdivisions of the state ... are authorized and empowered to make, amend, and rescind such orders and rules as are necessary for emergency management purposes ... which are not inconsistent with any orders or rules adopted by the (State of Florida Emergency Management Division) or by any state agency exercising a power delegated to it by the Governor or the division.” Section 252.46(2), Florida Statutes, goes on to provide that, “[a]ll orders and rules adopted by the division or any political subdivision ... have full force and effect of law ... when filed in the office of the clerk or recorder of the political subdivision ... promulgating the same.” It goes on to specifically provide that, “[a]ll existing laws, ordinances, and rules inconsistent with (the State Emergency Management Act), or any order or rule issued under the authority of (the State Emergency Management Act), shall be suspended during the period of time and to the extent that such conflict exists.”

Thus, at the time of this memo there appear to be as many possible procedures for conducting quasi-judicial land use hearings as there are local jurisdictions. Furthermore, it is probably a safe bet that not all of these procedures will ultimately satisfy constitutionally protected due process rights, whether such rights are those of the applicant or those of affected persons. For example, we are aware of at least one jurisdiction that intends to have its staff physically present in council chambers, have its elected officials attend via telephone or Skype, and intends to provide a viewing area for the public in the city hall parking garage. In order to facilitate public participation, a telephone will be provided for public use in the parking garage. No information was provided as to how applicants will be allowed to participate in their own quasi-judicial hearings. Perhaps they are expected to use the phone in the garage. In any event, one can only hope such jurisdiction will provide a suitable number of disinfectant wipes for the one phone being provided for multiple members of the public. Accordingly, moving forward with a quasi-judicial hearing before appropriate processes can be vetted and put in place will subject a number of decisions to subsequent legal challenges. Therefore, it is probably prudent that a number of jurisdictions have elected to postpone controversial land use hearings until either the crisis passes or suitable procedures can be put in place, whichever occurs first.



Q. Can I recover or at least mitigate any financial damages caused by the delay imposed on my project by the local government?

A. As of the date of this memo, we are unaware of any relief program which would cover costs realized by developers or land owners as a result of delay to the normal land use review and approval process due to the Covid-19 state of emergency. Some clients have asked us about the possibility of bringing a "temporary taking" claim against the government for what they perceive to be an overreaction to a virus which, to date, does not have a high mortality rate. As attorneys, we have advised that prevailing on a temporary taking claim is extremely difficult, expensive and time-consuming. As counselors, we have advised these clients to consider the optics of bringing such claim in light of the economic impact of the Covid-19 pandemic on so many workers and small businesses in Florida. We have also pointed out what such a suit could do to any future dealings the client may have with the jurisdiction in question. While we would be happy to discuss the specifics of any case with you, in most instances a suit seeking damages for a temporary taking is likely to do more harm than good.

Q. Does the Governor's declaration in E.O. 20-52 of a general public health state of emergency in the State of Florida based on the Covid-19 crisis amount to a "natural emergency" that tolls the period of time remaining to exercise the rights under a permit or other authorization for the duration of the emergency declaration as provided for in Section 252.363, Florida Statutes?

Section 252.363, Florida Statutes stipulates that the declaration of a state of emergency issued by the Governor for a natural emergency tolls the period of time remaining to exercise the rights under a permit or other authorization for the duration of the emergency declaration. In accordance with Section 253.363(1), the declaration of a state of emergency extends the period remaining to exercise the rights under a permit or other authorization for six (6) months in addition to the tolled period. Therefore, a new executive order permit extension is typically for a period of eight months beyond the current expiration date (60 days plus 6 months), however the length of time available under each state of emergency can vary depending on whether E.O. 20-52 is the executive order is extended by Governor DeSantis.

The tolling and extension of permit expirations applies to development orders issued by local governments, building permits, various permits issued by the Department of Environmental Protection or water management districts, and development of regional impact buildout dates. The terms "development order" and "development permit" are defined in section 163.3164, Florida Statutes, as follows:

(15) "Development order" means any order granting, denying, or granting with conditions an application for a development permit.

(16) "Development permit" 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.



Section 252.363, Florida Statutes, was amended in 2019 to limit the applicability of the tolling and extension of permits and other authorizations to declarations of "natural emergencies" as opposed to all declarations of emergency. The amended section 252.363(a)(1), Florida Statutes reads in pertinent part:

"The declaration of a state of emergency issued by the Governor for a natural emergency tolls the period remaining to exercise the rights under a permit..."

Further, Section 252.34, Florida Statutes, defines "natural emergency" as "an emergency caused by a natural event, including, but not limited to, a hurricane, a storm, a flood, severe wave action, a drought, or an earthquake."

Although Section 252.363, Florida Statutes, and the definition of "natural emergency" in Section 252.34, Florida Statutes, do not specifically list outbreaks of infectious diseases, epidemics or pandemics as natural emergencies, we believe, based on the rules of statutory interpretation and common sense, that the Covid-19 pandemic should be considered an emergency caused by a natural event. As such, E.O. 20-52 should be deemed a state of emergency for a "natural emergency" that would act to toll and extend the expiration dates of, among other things, development orders issued by local governments. Please note that as of the time of this memo, we are not aware of any local jurisdiction that has made an official determination that E.O. 20-52 is a declaration for a "natural emergency" that tolls or extends development orders issued by that local jurisdiction; however, on March 20, 2020, the Florida Department of Business and Professional Regulation ("DBPR") issued a memo of Frequently Asked Questions related to building permits which states that it is its interpretation that E.O. 20-52 qualifies as a "natural emergency". We anticipate, absent definitive clarification from the state, each local jurisdiction will have to make its own determination regarding whether E.O. 20-52 qualifies for the tolling and extensions provided for in Section 252.363, Florida Statutes, and will likely refer to the DBPR interpretation in its determination. We will update this response if and when there is any clarification from the state and as we become aware of individual determinations made by local jurisdictions.