



STATE OF FLORIDA

# DEPARTMENT OF COMMUNITY AFFAIRS

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RICK SCOTT  
Governor

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Secretary

## MEMORANDUM

TO: All Interested Parties

FROM: Mike McDaniel

DATE: July 22, 2011

SUBJECT: Transportation Questions Related to Chapter 2011-139,  
Laws of Florida (HB7207)

The State Land Planning Agency has coordinated with the Department of Transportation to answer some of the many questions we have received regarding how the changes to the transportation provisions in Chapter 163, particular proportionate share, should be interpreted. Listed below are answers to some of those questions. Please direct additional questions to Jeannette Hallock-Solomon at [Jeannette.Hallock-Solomon@dca.state.fl.us](mailto:Jeannette.Hallock-Solomon@dca.state.fl.us), or by phone at 850-922-1809.

1. **Question:** Deficient Roadways: How will deficient roadways, for purposes of exemption from development impacts, be managed? Will there be some standard means of determining, projecting, and tracking which roads will be deficient in a given jurisdiction such that they will be applied uniformly for each development application? Who will make those determinations?

**Response:** *The determination of deficient roadways is made by the local government. A "transportation deficiency," as defined in Section 163.3180(5)(h)3.e., F.S., means a facility or facilities on which the adopted level of service standard is exceeded by 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.*

*It is the responsibility of the local government to establish a standard means of determining, projecting, and monitoring transportation deficient facilities. The system should be uniform throughout the jurisdiction, and pursuant to 163.3180(5)(g), F.S., the methodologies used for measuring impacts should be coordinated with adjacent local governments.*

2. **Question:** If a local government chooses to eliminate concurrency, what would provide the basis for a deficient roadway?

**Response:** *The definition of a transportation deficiency is not relevant for the area within which transportation concurrency is eliminated. However, the concept would continue to be applicable to DRIs and the basis for determining a deficiency would be the level of service standards adopted in the comprehensive plan. All local governments must maintain a transportation element in the comprehensive plan, even if they elect to eliminate transportation concurrency, and the element must establish level of service standards for the jurisdiction's major thoroughfares and transportation routes and identify capital improvements (funded and unfunded) that are needed.*

3. **Question:** SIS Level of Service Standard – Paragraph 163.3180(5)(h)1 states that local governments must consult with FDOT regarding impacts on the SIS. Does this mean that while local governments must consult with FDOT, it is not mandatory they adopt the standards established by FDOT?

**Response:** *While local governments must consult with FDOT regarding impacts to the SIS, local governments are not required to adopt the LOS standard adopted by FDOT for SIS facilities.*

4. **Question:** Binding Agreement – Paragraph 163.3180(5)(h)3.a states that the applicant must enter into a binding agreement to pay for or construct its proportionate share of required improvements, but it doesn't say with whom. Which entity must the agreement be with?

**Response:** *The binding agreement should at a minimum include the developer and the local government. Where the roadway improvement lies within the jurisdiction of another entity, the agency with jurisdiction must agree to the improvement and be a party to the binding agreement.*

5. **Question:** Sufficiency of Proportionate Share – Paragraph 163.3180(5)(h)3.b states that the proportionate share contribution or construction must be sufficient to accomplish one or more mobility improvements that will benefit a regionally significant transportation facility. Suppose the proportionate share amount is not sufficient to complete the entire improvement at the time the developer pays, but that the local government's and/or FDOT's strategy is to pool the

proportionate share amounts collected over time until sufficient funding exists, can the developer pay his share and proceed with the development?

**Response:** *Yes, the developer may pay his proportionate share and proceed with the development under the following conditions:*

- 1) *The developer enters into a binding agreement to pay for or construct its proportionate share of the required improvements; and*
- 2) *The proportionate share contribution or construction is sufficient to accomplish one or more mobility improvements that will benefit a regionally significant transportation facility.*

*The parties will need to agree that the mobility improvement benefits a regionally significant facility and that the funding is sufficient to accomplish the mobility improvement. Nothing in the statute specifies the timing for when the mobility improvement must be accomplished. Additionally, should the contribution not be sufficient to accomplish the improvement, the local government may need to provide other options for funding the mobility improvement (for example, by supplementing the proportionate share amount with its own funds or funds from other sources). The schedule of capital improvements should be amended to include any publically funded projects and may include privately funded projects for which the local government has no fiscal responsibility. (s. 163.3177(3)a.4.)*

*Given the treatment of deficient roadways in the revised formula of proportionate share, it appears that the pooling of proportionate share contributions may not be permissible under the statutory framework. Once the facility becomes deficient, the improvement to correct the deficiency is assumed to be in place and only that amount greater than the assumed improvement needed to correct the deficiency can be collected through additional proportionate share payments.*

6. **Question:** Significance Test – Paragraph 163.3180(5)(h)3.c.(II)(B) says that 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. Significant impacts are not defined in the Chapter 163, but are defined in 9J-2 as being at least 5% of the service volume of the roadway at the adopted level of service standard. Does the same definition of significance apply here, or must local government define it in their comp plan?

**Response:** *Chapter 163, F.S., does not define significant impact. For review of Development of Regional Impact projects, the Rule 9J-2, F.A.C., 5% significance test should be used. However, for non-DRI project reviews, the local government has discretion over the percentage of significance, or the definition of what constitutes a significant impact, which should be adopted into the comprehensive plan or land development regulations. In cases where the local government has not yet defined a significant impact, one approach would be for the local government to consider a significant impact to be any impact which results in the adopted level of service standard being exceeded.*

7. **Question:** Paragraph 163.3180(5)(h)3.c.(II)(B) also states that “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.” Does this passage mean that any improvements needed to achieve the level of service standard must be assumed to be in place, and that the test of significance is measured against the additional capacity those assumed improvements would provide?

**Response:** *For the purpose of calculating the proportionate share amount, improvements needed to achieve the level of service standard should be assumed to be in place before project traffic is added, whether they are funded or not. However, for the purpose of determining whether a project has a significant impact, only existing and funded improvements should be considered to be in place.*

8. **Question:** If the project traffic has a significant impact, would the developer be responsible only for any improvements needed beyond the assumed additional capacity?

**Response:** *Yes, if the project traffic has a significant impact, the developer will be responsible only for those improvements needed beyond the assumed additional capacity.*

9. **Question:** Cumulative analysis – How does paragraph 163.3180(5)(h)3.c.(II)(C), F.S. affect cumulative analysis of project trips? For purposes of calculating the mitigation amount, are trips from an earlier phase excluded from project traffic (i.e., excluded from the numerator) if they have already been mitigated, but for purposes of determining significance (i.e., whether the trips constitute 5% of service volume) should all trips be included from earlier phases whether mitigated or not?

**Response:** *Yes, for purposes of calculating the mitigation amount, the mitigated trips from an earlier phase are excluded. However, for purposes of determining significance, all trips are counted in the analysis whether mitigated or not.*

10. **Question:** What does the phrase “required and provided” in paragraph 163.3180(5)(h)3.c.(II)(C), F.S., mean? Does ‘provided’ mean the mitigation must actually be accomplished, or is it sufficient that it will be provided in accordance with a schedule or terms included in the DO?

**Response:** *A binding agreement or DO condition requiring the improvement to be provided in accordance with a schedule or defined condition is considered to constitute “required and provided.”*

11. **Question:** Credits -- Paragraph 163.3180(5)(h)3.c.(II)(E), F.S., says that the proportionate share 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. How should this be interpreted?

**Response:** *Once the proportionate share calculation has been performed and the contribution amount determined, the applicant shall receive credit for any transportation impact fees, mobility fees, and other transportation concurrency mitigation requirements paid or payable in the future. However, that credit shall be reduced by up to 20 percent, or by the amount specified in local ordinance, whichever yields the greater credit, by the percentage share that the project’s trips consume of the selected improvement. For example, if a project’s trips represent 5% of the added capacity of the improvement, the amount of the credit is reduced by 5%.*

12. **Question:** What do you believe is the effective date of the new traffic concurrency provision? We are discussing whether we would have to amend our Comp Plan and our Land Development Regulations prior to it becoming effective vs. the opinion that the law is in effect now and we must allow a developer that is starting now through our processes to use the proportionate share to meet traffic concurrency as put forth in the law.

**Response:** *The new law went into effect on June 2, 2011, and local governments must begin implementing it now. However, they are not required to amend the comprehensive plan to reflect the new provisions until the evaluation and appraisal process in accordance with the schedule published on the Department’s web site, unless the law specifies otherwise. In the interim, a local government that continues to implement optional transportation concurrency must apply the provisions of the new law, whether the plan and land development regulations are updated or not. There are three specific requirements that local governments that implement transportation concurrency must apply. They are:*

- 1 - Consult with FDOT on impacts to the SIS;*
- 2- Exempt public transit facilities from transportation concurrency; and*
- 3- Allow an applicant for a DRI, rezoning, or other land use development permit to satisfy transportation concurrency and s. 380.06, when applicable, through proportionate share mitigation consistent with the provisions of Section 163.3180(5)(h)3, F.S.*

*A local government choosing not to implement transportation concurrency in all or a portion of its jurisdiction must rescind the application of concurrency by means of a plan amendment, which is not subject to state review.*

*A number of local governments have adopted alternative mobility approaches to concurrency in their comprehensive plans that are in compliance with state law. These alternative approaches replace traditional transportation concurrency and therefore proportionate share mitigation is not required under such programs. For example, in 8 of Broward County's 10 concurrency districts, transit oriented fees are required in lieu of traditional transportation concurrency; Alachua County provides for a payment of multimodal transportation fees in lieu of traditional transportation concurrency; and Jacksonville Duval County has adopted a mobility fee approach to replace traditional transportation concurrency. If traditional transportation concurrency is retained in a portion of a local government's jurisdiction, the local government must allow developers the option to satisfy concurrency through proportionate share mitigation in that portion.*

13. **Question:** Referencing 163.3180 (5)(h)(3)(c)(II)(B) – How do we interpret when Proportionate Share is to be applied to a given roadway? First example: We understand that we have to require/allow the first developer that will take a “sufficient” road to a “deficient” road to use prop share. Question: Once the first developer receives approval and makes his payment, the next developer impacting that road will be impacting a “deficient” road (since we have to include the first developer’s traffic). Under one reading of the language, the second developer cannot be made to contribute a prop share – since “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.” Second example: The two lane road is 5% over capacity when a developer submits his study. Question: Can he ignore the road for purposes of calculating proportionate share, since government would have to build two lanes (can’t build 5% of a lane) as the “necessary transportation improvements....”?

**Response:** *First example: To the extent that the assumed improvements to correct the deficiency created by the first developer would accommodate the second developer’s impacts, then the second developer would not be responsible for making a proportionate share contribution for that facility. Second example: Even if the road is only 5% deficient, the necessary improvements to correct the deficiency must be assumed to be in place, even if those improvements add more capacity than is actually needed to accommodate the development’s impacts. And again, to the extent that the additional capacity will accommodate the development’s traffic, then proportionate share would not be required.*

14. **Question:** There is specific language in section 163.3180 (5)(h)(3)(b) that states “The proportionate-share contribution or construction is sufficient to accomplish one or more mobility improvements that will benefit a regionally significant transportation facility.” What is the intent of this provision? Example: Current two-lane road is right at capacity (even calculating “background). If there is a 2% impact (we will assume that 2% is significant) on future needed capacity – and in this example let’s say it is a one-mile stretch of two lane road that is projected to cost \$3m to provide an additional two lanes – the prop share is  $\$3m \times .02 = \$60,000$ . Do I read the legislation to read that it is our (government’s) choice on how to spend the money, and on what? And/or does the developer have to also agree since we have to enter into a “binding agreement” as per the language in the immediately preceding section of the law? Given the language it looks like I could take the money and extend a turn lane on a road 10 miles away, or I could maybe run an extra bus during the day until the money runs out on a road 15 miles away – or any other of an almost limitless things that “will benefit a regionally significant transportation facility.” The developer is only responsible for giving me a check. So even though \$60,000 when applied to the original two-lane road would probably not be sufficient to provide a “benefit”, the developer could not be expected to contribute more since the law limits his prop share contribution and he would argue that those dollars spent elsewhere would “benefit” some facility.

**Response:** *A local government does not have open-ended discretion to use the proportionate share contribution anywhere. Settled case law requires that there be a connection between where the money is generated and the impacts from the development. Furthermore, the developer must be a part of the process of determining on what and where the money will be spent, since an agreement between him, the local government, and FDOT (for facilities within their jurisdiction) is required. However, the proportionate share contribution must be sufficient to accomplish one or more capital improvements that will benefit a regionally significant facility.*

15. **Question:** Since the law, 163.3180 (5)(h)(3)(c)(II)(E), says that prop share payment is creditable against impact fees, does that limit the use of prop share to those uses that can be paid for by road impact fees (typically capital improvements, and definitely not operation or maintenance of mass transit in our county)?

**Response:** *The statute does not limit the use of the proportionate share contribution to only those improvements that are eligible for funding through impact fees. It requires only that the proportionate share contribution be sufficient to accomplish one or more mobility improvements that will benefit a regionally significant transportation facility. It does not require that the improvement be directly to a regional facility, only that it benefit a regionally significant facility (for example, a parallel reliever, or a transit-oriented improvement). However, the improvement must be a capital improvement, and operational and maintenance improvements are not eligible proportionate share expenditures.*

