



BOARD OF COUNTY COMMISSIONERS

Planning & Development Department

2725 Judge Fran Jamieson Way
Building A, Room 114
Viera, Florida 32940

TO: Brevard County Board of County Commissioners

THRU: Jim Liesenfelt, County Manager
Tad Calkins, Assistant County Manager – Development & Environmental Services Group

FROM: Billy Prasad, Director – Planning and Development

DATE: September 29, 2025

SUBJECT: Declaration of EAR-Based and Brevard Barrier Island Element Amendments to the Comprehensive Plan as Null and Void

BACKGROUND

Both the Evaluation and Appraisal-Based (EAR-Based) Amendments and the Brevard Barrier Island Element Amendment to the Brevard County Comprehensive Plan have been declared null and void *ab initio* by Florida Commerce. Florida Commerce has taken this action due to their enforcement of Chapter 2025-190, Laws of Florida, which is commonly known by its originating bill number, SB 180. Section 28 of SB 180 prohibits the proposal or adoption of comprehensive plan amendments that are more restrictive or burdensome. Although SB 180 had not even been introduced at the time the County transmitted the Amendments, because of its retroactive application, the transmittal is subject to this prohibition and the entire process has been deemed void *ab initio* (“from the beginning”). Legally, it is as if the County never transmitted the Amendments in the first instance.

This renders Brevard County out of compliance with statutory requirements regarding comprehensive plans. Preliminary analysis indicates that the applicable consequence for this would be that no County-initiated Comprehensive Plan amendments would be permitted other than those necessary to come into compliance. The County may continue to process privately-initiated Comprehensive Plan amendments.

As a result of the null and void determination, the proposed Comprehensive Plan Amendments, as approved by the Board on July 17, 2025 will not take effect. All pre-existing policies will remain in full force and continue to be implemented. For example, Policy 7.1 of the Coastal Management Element, prohibiting residential density increases in the South Beaches area, remains in effect and will continue to be enforced by Brevard County staff.

Florida Commerce has indicated they are reviewing the situation and will provide guidance on the best path forward regarding the implementation of an Area of Critical State Concern while Section 28 of 180 remains in effect. Based on guidance provided by Florida Commerce, Brevard County staff will restart the process of developing new EAR-based Amendments.

DECLARATION OF THE BREVARD BARRIER ISLAND AREA ELEMENT AMENDMENT AS NULL AND VOID

The Brevard Barrier Island Protection Act was unanimously approved by both chambers of the Florida Legislature in 2023 (as CS/CS/HB 1489) and subsequently signed by the Governor. Enacted as Chapter No. 2023-272, Laws of Florida, it took effect on July 1, 2023. This Act designates the South Beaches area of unincorporated Brevard County (that area south of the City of Melbourne Beach to the Sebastian Inlet) as an “Area of Critical State Concern.” These unique designations are implemented in places where “an area containing, or having a significant impact upon, environmental or natural resources of regional or statewide importance . . . the uncontrolled private or public development of which would cause substantial deterioration of such resources.”¹ The Brevard Barrier Island Protection Act sets out “guiding principles for development” for which the County is required to “coordinate their plans and conduct their programs and regulatory activities to be consistent with.” These ten guiding principles include such directives as “prohibiting new shoreline hardening structures” and “reducing nutrient contribution . . . into the Indian River Lagoon.”

In order to come into compliance with this Act, and after significant local community efforts through which hundreds of local residents participated, Brevard County, in consultation with Florida Commerce, transmitted its package regarding the Brevard Barrier Island Area Element (BBIA Element) both as a separate Comprehensive Plan Amendment, and as part of the cumulative package of amendments done as part of its Evaluation and Appraisal Report-based Comprehensive Plan Amendments (discussed further below). The Board of County Commissioners voted to transmit both items, under the “State Coordinated Review Process” mandated by State Statute, on November 7, 2024.

As part of the typical review process of such Amendments, Florida Commerce issued its Objections, Recommendations, and Comments report concerning the BBIA Element on January 21, 2025. An example of a comment included in this report is for the County to change policies for the “clarification of terminology and strengthening of regulatory language.” This is consistent with the general direction the County received from Commerce throughout the project.

During the 2025 legislative session, SB 180 was under consideration, and on or around May 1, 2025, a floor Amendment was made to SB 180. This amendment, though Section 28 of

¹ Section 380.05, Florida Statutes

the Bill, included retroactive changes to Florida law that provides any county that was within the Federal Disaster Declaration for either Hurricanes Debby, Helene, or Milton “may not propose or adopt more restrictive or burdensome amendments to its comprehensive plan or land development regulations.” After being signed by the Governor on June 26, 2025, this law took effect on July 1, 2025,² with retroactive effect to any regulation adopted August 1, 2024, or later. The law does not define “more restrictive” or “burdensome” in this context.

While this law was under consideration and before it was approved, Brevard County reached out to officials with Florida Commerce seeking guidance. County staff was told Florida Commerce was not in a position to discuss the bill prior to its passage. After the passage of the bill, staff again reached out to Florida Commerce to get a better understanding of how the agency would interpret the provisions contained in SB 180, but was told Florida Commerce would not be able to assist in the interpretation of the provisions at that time. Staff had worked on this package to respond to those issues identified in the ORC report, including many hours meeting with State agencies and local advocacy groups, as specifically requested by Florida Commerce. Given the uncertainty at the time, and under a belief that the Brevard Barrier Island Protection Act could be interpreted in good faith as superseding Section 28 of SB 180 due to its specific mandates, staff recommended the Board continue with the process to adopt the package; the Board did so on July 17, 2025.

Normally, at this stage, Florida Commerce would only review ORC-related issues, and the final review would result in formal findings that the County either is “in compliance,” or “not in compliance” with the controlling law, Florida Statute 163.3184, Florida Statutes. Unfortunately, for reasons that are still unclear, Florida Commerce has instead taken the position that it is their duty to interpret and enforce these provisions of SB 180 as part of their process, and to declare any proposed or adopted amendments it considers in breach of these provisions null and void. Florida Commerce did just that, in regard to the BBIA Element specifically, in addition to the EAR-based Amendment package. In contrast with the letter declaring the EAR-Based Amendments null and void, Florida Commerce did not identify specific policies in the BBIA Element that are in conflict with SB 180; it would appear the Florida Commerce has determined that the BBIA Element as a whole is in conflict with SB 180.

In a recent meeting between Brevard County staff and Florida Commerce representatives, it was made clear that the project to implement the Area of Critical State Concern in our Comprehensive Plan was doomed the moment SB 180 was enacted into law. There was no way for the County to even attempt to comply with SB 180 at the time the BBIA Element was transmitted because SB 180 had not been introduced yet. Nonetheless, due to SB 180’s retroactive application, Florida Commerce deemed the County’s November 7, 2024 transmittal null and void *ab initio* because it “propose[d] ... more restrictive or burdensome

² Enacted as Chapter 2025-190, Laws of Florida

amendments” in violation of SB 180. Thus, everything flowing from that effort is treated as if it did not happen.

To be blunt, Brevard County has been placed in an impossible position. On the one hand, the law requires that the County implement the Brevard Barrier Island Protection Act in the County’s Comprehensive Plan and land development regulations. On the other hand, the Brevard Barrier Island Protection Act, at least as it has generally been understood until now, cannot be faithfully implemented in a manner consistent with SB 180. County staff posed this quandary to Florida Commerce during the meeting, and the response received was they will consider the issue and inform the County of a potential path forward at a later date.

With that said, it should be made clear that existing policies are already in place which institute an unusually high level of protection in the South Beaches Area. For Example, Policy 7.1 of the Coastal Management Element of the Comprehensive Plan prohibits residential density increases within the area. This provision remains in effect, as it long predates August 1, 2024, and staff’s implementation of it has not changed.

DECLARATION OF THE EVALUATION AND APPRAISAL REPORT-BASED AMENDMENTS AS NULL AND VOID

Evaluation and Appraisal Report-Based Amendments (EAR-based Amendments) are required by the County under State law to be done, at a minimum, every seven years. The primary purpose of this is to ensure that our Comprehensive Plan is “in compliance;” that is, in alignment with State requirements. Most required changes are necessary due to changes in State law. Due to the breadth of the work done as part of this process, however, it is often seen as a good opportunity to make other textual changes to the Comprehensive Plan in order to meet County priorities, and based on experience. These Amendments followed the same State Coordinated Review process that was noted above in the section explaining the Brevard Barrier Island Protection Act, with some additional steps at the beginning of the process. The first step is the County evaluating which parts of the Comprehensive Plan need to be amended to come into Compliance, and to notify the State if any amendments are found to be necessary. This notification happened on November 28, 2023. The next step is for the County to develop a package to meet these requirements, and to include any other changes it may want considered, for the “transmittal” phase. We were required to transmit no later than December 6, 2024. During the phase, staff reaches out to Florida Commerce for technical assistance, and also coordinates with interested parties and seeks recommendations from advisory boards, as applicable. The culmination of this phase is “transmittal.” This gives the Board an opportunity to make any changes it deems fit, and ultimately vote on whether to transmit the package to the State for the next phase of review. This is critical, because once this stage is complete, the freedom to amend the package diminishes. Any substantial changes after transmittal that are not contained in the Objections, Recommendation, and Comments Report (discussed further below) are not given any deference during further reviews and risk a finding of non-compliance. During a

Public Hearing, the Board voted to transmit this package on November 7, 2024. As it turns out, this hearing became significant in hindsight. At the time, we had no way of knowing—since SB 180 had not yet been proposed—that, once adopted, this transmittal would later be viewed as a “proposal” of more restrictive or burdensome regulations. Given Florida Commerce’s implementation of SB 180, they are bound to declare anything flowing from this point to be null and void.

In any case, after the Board chose to transmit the amendment package, Florida Commerce reviewed it and on January 21, 2025 they met their obligations to send an Objections, Recommendations, and Comments letter. Not surprisingly, this letter included language seeking policy changes that could be interpreted as more restrictive or burdensome³; again, there was no way to know at the time that a retroactive law would be enacted about 6 months later.

County staff, together with its consultant, Bonnie C. Landry & Associates, devoted many additional hours to revising the package and made all necessary changes. However, as with the BBIA Element, just weeks before the scheduled adoption hearing on July 17, 2025, SB 180 took effect, with Section 28 applying retroactively to August 1, 2024. On September 12, 2025, the County received a letter declaring the package “null and void ab initio.” In the letter, Florida Commerce specifically identifies 43 policies as more restrictive or burdensome in violation of SB 180 (they did not include the Brevard Barrier Island Element in this analysis).

After conversations with Florida Commerce, it has become clear that everything from transmittal onward is considered null and void (because the transmittal included more restrictive and burdensome amendments). Brevard County is not alone in receiving such null and void letters. It appears other jurisdictions, including Orange County, City of Cocoa, and the City of Ocoee, have also been placed in a similar predicament.

In Florida Commerce’s view, this has triggered a provision of section 163.3191, Florida Statutes, which states that if a County fails to timely transmit its required amendments, it cannot adopt publicly-initiated comprehensive plan amendments.⁴ It can, however, continue processing privately-initiated amendments.

³ For example, one of the included objections related to changes in State law imposing stricter requirements on septic tanks. Given the State’s position on the BBIA Element, it is unclear what the proper path towards meeting both mandates might be at this time.

⁴ Florida Statute Section 163.3191(4) states “If a local government fails to submit the letter and affidavit prescribed by subsection (1) or to transmit the update to its plan pursuant to subsection (3) within 1 year after the date the letter was transmitted to the state land planning agency, it may not initiate or adopt any publicly initiated plan amendments to its comprehensive plan until such time as it complies with this section, unless otherwise required by general law. This prohibition on plan amendments does not apply to privately initiated plan amendments. The failure of the local government to timely update its plan may not be the basis for the denial of privately initiated comprehensive plan amendments.”

As a result of this, our Comprehensive Plan is unchanged by the EAR-based amendments but otherwise remains in effect. Brevard County staff will now restart the process of creating a new EAR-based Amendment package to transmit to Florida Commerce. Staff will seek technical assistance from Florida Commerce regarding policies that could be construed as more restrictive or burdensome before bringing a proposal before the Board.