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# Monetary and Regulatory Hobbling: The Acquisition of Real Property by Public Institutions of Higher Education in Florida

Carol L. Zeiner

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# MONETARY AND REGULATORY HOBBLING: THE ACQUISITION OF REAL PROPERTY BY PUBLIC INSTITUTIONS OF HIGHER EDUCATION IN FLORIDA

CAROL L. ZEINER\*

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Assistant Professor, St. Thomas University School of Law; B.S., Florida State University; J.D., University of Miami School of Law; former College Attorney for Miami-Dade Community College (now Miami-Dade College). The author thanks St. Thomas University School of Law for a research grant to write this Article. The author also gratefully acknowledges Elizabeth Pendo, Fleta Stamen, and Anthony R. Parrish, Jr. for comments on previous drafts, as well as Marbet Mier and Sandra Seder for their excellent research assistance. Mr. Ron Fahs, Director of Facilities Planning and Budgeting for the Florida Division of Community Colleges, in the area of capital outlay projects for public community colleges, possesses a wealth of knowledge and experience that he readily shared with the author. The author also thanks Dr. Catherine Morris, Director, Institutional Research, Miami-Dade Community College (now Miami-Dade College) for her contributions. It should be noted that by providing factual information, explanations, or other input, the various persons thanked or cited by the author do not necessarily endorse or concur with the positions taken by the author in this article.

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## I. INTRODUCTION

“If you build it, he will come.”<sup>1</sup>

Protagonist Ray Kinsella, portrayed by Kevin Costner in the modern classic film *Field of Dreams*, heard an omnipotent voice make this statement. The voice compelled Kinsella to construct a baseball diamond in the middle of an Iowa cornfield. *Field of Dreams* recreated a nostalgic time when America’s favorite pastime involved the love of the game and sportsmanship, rather than egos and endorsement dollars. A determined man funded and built a baseball diamond, completing the project in a relatively short period of time. Although Kinsella did not know specifically who was to come, he remained committed to the project and believed in its purpose. When he completed the baseball diamond, something amazing happened. “He,” Kinsella’s father, did come, along with some of the greatest players to ever play the sport. Kinsella demonstrated what may happen when a person adheres to his dream without hesitation.

If the scene's geography were changed from a farm in Iowa to a public university or community college in Florida, and the protagonist changed from Kinsella to the president of one of those institutions, then the protagonist's response might be something quite different. Rather than building a large-scale project with funding and construction completed in a short period of time, the president's response may sound something like, "He can't come, because we can't build it any time soon." The president's response would reflect the frustration and difficulties encountered by those who seek to acquire land and build new facilities, both in a timely manner and at a competitive price, for Florida's community colleges and state universities. "He" refers to a real person in our community, who would benefit greatly from a community college or university's new facilities. This person may be a student seeking a high-quality, reasonably priced undergraduate or graduate level education; a student with career ambitions requiring a two-year, career-specific Associate in Science degree or technical certificate; a worker requiring job retraining to upgrade his or her skills or prepare for a new career; or, a prospective employee needing entry-level technical job skills. Post-secondary education plays an important role in helping many *real-life* people attain their *real-life* dreams.<sup>2</sup>

The objective of this article is to begin the search for ways to enable Florida's public institutions of higher education to acquire real property at prices that make the most cost-effective use of public funds, and to complete acquisitions in a timely manner so that the institutions can meet their needs to serve students. It is my contention that two elements impede this objective. First, funding for land acquisition and educational facility construction is insufficient to meet the reasonable needs of Florida's public universities and community colleges for land and buildings. Second, the current process of identifying the need for real property and obtaining the authorization and funding for acquisitions is too slow and cumbersome. This element generally places institutions in a disadvantageous bargaining position and also prevents them from moving quickly when a good purchasing opportunity arises.

Funding is the more critical of the two problems. Even if the inherently problematic process was addressed, state funding for the capital outlay projects of public higher education is so scarce that the institutions would be unable to meet students' needs. The problematic process exacerbates the

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<sup>2</sup> In an interview with Dr. Willis Holcombe, retiring President of Broward Community College, he noted that although community colleges are "open access" institutions to which all qualified persons are admitted, an admitted person may not be able to take classes because of shortages in facilities and personnel. See Antonio Fins, *Willis Holcombe BCC President Talks About College Life in Tough Budget Times*, SUN-SENTINEL, July 6, 2003, at 5F.

financial situation by raising the cost of projects. Moreover, the delays caused by insufficient funding also tend to increase the cost of projects because the price of land and construction tend to increase over time. These problems existed before the economic slump of the early 2000's. Florida's current economic plight compounds an already extant situation. Students need post-secondary education now. They should not have to wait for a better economy. Moreover, an educated populace and a well-trained workforce are key to the economic growth of an area. We must provide educational facilities and the land on which to build those facilities in a timely, cost-effective manner. We cannot simply wait until the economy changes and the Legislature appropriates adequate funds.

This article provides insight into the nature of the problems, and then suggests some solutions. Some of these suggestions are interim measures until the Florida Legislature provides adequate funding. Others could assist in achieving a long-term solution. The article also suggests a number of solutions to the overly cumbersome process. These recommendations will prove beneficial even after, or if, the adequacy of funding is addressed.

This article examines and critiques the land acquisition process from the perspective of the public institutions of higher education in order to identify the issues that interfere with the institutions' ability to achieve efficient, cost-effective results in real estate acquisitions. The article begins by examining the problems in the process. First, for purposes of comparison, this article describes a "typical"<sup>3</sup> real estate acquisition by a commercial business enterprise. Second, it describes the public higher education transaction, including the statutory and regulatory processes that govern decision-making, obtaining authority and funding for the acquisition, as well as the limited financing options. Third, the article pinpoints problematic issues in transactions of the public institutions of higher education. Finally, the article identifies possible solutions for both the process and funding issues. It also analyzes the legal and policy ramifications to identify and recommend those solutions most worthy of further study.

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<sup>3</sup> Although it is debatable whether any transaction is ever "typical," this section of the article describes key factors commonly found in commercial real estate acquisitions.

## II. BACKGROUND

### A. *The Typical Real Estate Acquisition by a Commercial Business Enterprise*

The executive management of a commercial enterprise typically determines whether to acquire real property<sup>4</sup> with input from other relevant senior management, such as the chief operating officer, the chief financial officer, and the general counsel. Virtually all decisions can be made within the company and can be accomplished swiftly, confidentially, and with a great deal of flexibility so that the transaction can be timed and structured to meet the company's needs. The time and attention devoted to the transaction by company executives and other operations employees are mandated by the decisions they deem necessary, rather than by externally imposed regulations. Thus, the distractions from the company's normal business and the disruption of operations, although important and sometimes of significant duration, can be limited to only those that are absolutely necessary.

The decision to acquire real property is based on need, the company's mission, the particular transaction's objectives, and financial considerations. Essentially, the company's leadership determines whether an acquisition of real property would enhance the company's profitability. Appropriate financial and operations personnel make a careful cost/benefit analysis. If the analysis indicates that an acquisition of real property is appropriate, then the company's financial sector considers the availability of funds and financing options. The latter can take place simultaneously with a search for potential sites. The search for potential sites can occur with absolute confidentiality to prevent the possibility of real estate speculation, which could drive up the cost of the acquisition.<sup>5</sup> Only those individuals directly involved in effectuating the transaction typically share information; part of their job is to protect the information's confidentiality.

The business' leadership must decide whether the company should expand at its existing location or relocate to a new, larger site. It must consider: the size of the additional parcel needed; whether the real property

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<sup>4</sup> An entity may use the purchase of a fee simple, lease, ground lease, lease-purchase, or an option to purchase followed by purchase to obtain use of real property. This article focuses on the purchase of land. However, because the statutes governing the purchase of real property by institutions of higher education in Florida also pertain to the use of options and lease-purchase agreements to acquire title, those specific means of acquiring title can be considered in much of the discussion in this article.

<sup>5</sup> See ERICA L. ENGLISH & MICHAEL D. KATZ, *Shopping Centers, Office Buildings, Showrooms and Industrial Properties*, in FLORIDA REAL PROPERTY COMPLEX TRANSACTIONS 2.3 (3rd ed. 2000).

expansion can be accomplished with one acquisition or whether an assemblage<sup>6</sup> of several parcels under separate ownership is required; the availability of potential sites for acquisition in the existing facility's vicinity; and, the possible price of that real property compared with the total expense of acquiring land in a new location, constructing a new facility, and moving part or all of the company's operations. It must also consider the availability of alternative sites in the existing facility's vicinity and their relative suitability so that the company can turn to alternatives, if, during the course of negotiations, it appears that acquisition of the preferred site will be too costly. The buyer must also consider: the ownership of various sites and the potential ease or difficulty in successfully concluding a transaction with the owner(s) of the various sites; the restrictions contained in the applicable governmental comprehensive master plan, zoning, and building codes; whether the contemplated use of the site will require significant governmental approvals, such as zoning changes, and the likelihood of obtaining such governmental approvals; and, the comparative costs and benefits of splitting the company's operations and conducting business from two separate locations. Management would also consider the impact of a change in location on profits, the ease of operating the company from a new location, the availability of a well-trained workforce, the impact of a move on the proximity to relevant markets, transportation issues, and the like. Public relations may also be considered, especially where the acquisition may have a perceived or real negative impact on the surrounding community.

Most of this preliminary information can be obtained by the company itself with the assistance of a very limited number of consultants, such as a capable commercial real estate broker and counsel specializing in zoning and land use matters. Most importantly, the information can be gathered promptly, often within a few days, and with a high degree of confidentiality.

A well-managed company can keep confidential its contemplated course of action, the order of preference among alternative sites, its acquisition and negotiating strategies, the maximum price it is willing to pay, and the business terms that will be acceptable. If the real estate acquisition will entail an assemblage of various parcels with different owners to obtain a site of sufficient size, the company may have available to it the use of one or

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<sup>6</sup> The author asserts that an assemblage is inherently more complex than the purchase of a single parcel because the assemblage transaction consists of multiple purchases, each the subject a separate negotiation with separate transaction costs. If one or two sellers "hold-out" for an exorbitant price, their actions can thwart the success of the assemblage as a whole. Thus, the buyer must choose between abandoning the assemblage transaction entirely or paying the hold-out more than his or her property may be worth as a single, separate parcel. If the buyer has already closed and taken title to other parcels within the assemblage, the situation becomes exacerbated leaving the buyer with few alternatives.

more strawmen.<sup>7</sup> During the course of negotiations for the purchase of real property, the company maintains complete flexibility, subject only to general legal requirements such as good faith and a limited number of laws, the terms of the company's existing contractual obligations,<sup>8</sup> market conditions, and the business realities of the particular transaction. The company can simultaneously explore acquisition of alternative sites. It can abandon negotiations with one seller if success seems unlikely, and focus its efforts on an alternative site. The amounts of appraisals, initial offers, counter-offers, as well as the amounts and terms of final offers and various business considerations can be determined out of the public eye.<sup>9</sup> Similarly, the company's acquisition strategy can be kept confidential. During negotiations, the company need not discuss the transaction publicly. If it chooses to issue news releases or to otherwise publicly discuss the transaction, then it need not reveal any information that it desires to keep confidential.

Once the company has contracted to purchase the real property, it can perform such due diligence as it determines is prudent. Due diligence generally involves a feasibility study, a site investigation to ascertain visible conditions requiring further inquiry, a title search, a survey, a phase I and possibly a phase II environmental review, a review of applicable governmental requirements, construction-related investigations such as soil borings, and other inspections appropriate to the contemplated construction. Some purchasers may also perform an archeological inspection.<sup>10</sup> The extent of the due diligence, the analysis of the results, and the determination of the levels of risk with which the company is comfortable, are all within the discretion of the company. Governmental regulations do not specify the inspections or the tolerable levels of risk. In general, the results of a closely held company's due diligence are not open to public second-guessing.

Within the confines of market conditions and the requirements of existing contractual obligations, the company makes all decisions as to the source of funds for the real estate acquisition. Financing options consist of

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<sup>7</sup> A strawman is a third party who contracts to buy the desired property under a fully and freely assignable contract and then assigns the contract to the ultimate buyer. In the alternative, the strawman may close, take title, and then convey the property to the ultimate buyer. Before using a strawman, however, a buyer should review the laws and rules of the jurisdiction, particularly those applicable to brokers and agents.

<sup>8</sup> The financing arrangements of a company, for example, those commonly used to acquire the company in a leveraged buy-out, may contain restrictions on additional indebtedness or require the master lender's approval of additional indebtedness.

<sup>9</sup> Such confidentiality, of course, is subject to obligations to shareholders, lenders, etc.

<sup>10</sup> See generally, Patty Gerstenblith, *Protection of Cultural Heritage Found on Private Land: The Paradigm of the Miami Circle and Regulatory Takings Doctrine After Lucas*, 13 ST. THOMAS L. REV. 65 (2000) (showing that archeological factors occasionally interfere with a developer's plans).



whatever types of financing and terms are acceptable to the company<sup>11</sup> and its potential lender(s). The terms are not specified by governmental regulations. The company can seek additional capital, borrow against its operations or other assets, or borrow and secure the loan with a mortgage on the real property to be acquired or a mortgage encumbering other real property. It can arrange financing with the seller. Additionally, it can structure the transaction as a lease-purchase or issue debt instruments as permitted by laws of the jurisdiction and its particular business structure.<sup>12</sup>

In summary, almost all of the decision-making in a real estate acquisition transaction by a commercial business enterprise is within the discretion of the company itself. Aside from zoning and building codes, and general land use restrictions, few government regulations pertain to the purchase of real property by a commercial business enterprise.

### *B. The Public Higher Education Transaction*

#### **1. IN GENERAL; THE SURVEY PROCESS**

The purchase of real property by a public institution of higher education in Florida is significantly different from the private commercial transaction described above. Every aspect of the acquisition of real property by Florida public institutions of higher education is highly regulated. The review and approval of various layers of state government are needed at almost every juncture, and ultimately, the process is subject to political forces, including those related to funding by the Legislature. The process is time-consuming, both in terms of labor-intensity and overall time-span, which is measured by months and years, from the beginning to the end of any particular project. This section of the article describes the process of acquiring property and identifies problems inherent in this process;<sup>13</sup> however, the concomitant problem of inadequate funding must also be kept in mind.

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<sup>11</sup> Provided these types of financing options comply with the existing contractual obligations of the company, such as master financing agreements.

<sup>12</sup> The company ultimately decides whether to seek government assisted financing. For example, Urban Development Action Grant (UDAG) financing may be available in severely distressed cities and urban counties. See Housing and Community Development Act, 42 U.S.C. § 5318 (2000). Such financing is beyond the scope of this article which seeks only to compare the typical private commercial acquisition of land with the typical public higher education transaction.

<sup>13</sup> This article does not purport to be an exhaustive compendium; such an effort would require a book, rather than a law review article. The purpose of this article is to provide a relatively concise statement of the process in order to facilitate the reader's analysis of the issues that are presented in later portions of this article.

The first step in a commercial business transaction involving the acquisition of real property is to determine need.<sup>14</sup> In the transactions of public higher education, however, there are a number of regulatory steps mandated as preliminary to the determination of need. Unlike a private business enterprise that determines *need* based on measures and information in its own discretion, *need* for the acquisition of real property<sup>15</sup> by public institutions of higher education in Florida is determined, when public funds are involved, through a complex, state-mandated process culminating in the Educational Plant Survey.<sup>16</sup>

The process begins with the calculation of enrollment. Rather than using a headcount of individual students, the formula-driven calculation of Full Time Equivalent (FTE) enrollment is utilized. This calculation must be completed before undertaking an Educational Plant Survey. FTE enrollment is derived by combining credit hours of study taken by part-time and full-time students, as well as contact hours for non-credit students, and dividing the result by certain factors.<sup>17</sup> Variations of the FTE calculation are used for various purposes in higher education in Florida,<sup>18</sup> such as determining the need for education facilities.<sup>19</sup> Thus, the initial phase of the *need* analysis is made on the basis of FTE,<sup>20</sup> rather than the actual and projected headcount of individuals to be served.<sup>21</sup> Using the community college

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<sup>14</sup> For a discussion of commercial business transaction and the determination of need, see *supra* Part II.A.

<sup>15</sup> Real property acquired for educational purposes is statutorily referred to as a "site." A site is defined as "a space of ground occupied or to be occupied by an educational facility or program." FLA. STAT. § 1013.01(20) (2003).

<sup>16</sup> See FLA. STAT. §§ 1013.01(8), 1013.31 (2003). (The "Educational Plant Survey" may sometimes be referred to as the Survey.)

<sup>17</sup> For example, a community college FTE is calculated as the college credits for which students register divided by forty, plus the hours of instruction for which students register in other instruction divided by nine hundred. See FLA. ADMIN. CODE r. 6A-14.076 (2002).

<sup>18</sup> The FTE calculations for both state universities and community colleges are modified according to their intended use.

<sup>19</sup> "Educational facilities" are defined as "the buildings and equipment, structures, and special educational use areas that are built, installed, or established to serve primarily the educational purposes and secondarily the social and recreational purposes of the community and which may lawfully be used as authorized by the Florida Statutes and approved by boards." FLA. STAT. § 1013.01(6) (2003). The variation of FTE used for the determination of need for educational facilities is sometimes referred to as capital outlay FTE. See FLA. STAT. § 1013(8) (2003). The reader will note that the statutes and rules focus on the need for educational facilities. The need for sites (i.e., land) follows therefrom. "Site" is defined by FLA. STAT. § 1013.01(20) (2003).

<sup>20</sup> See FLA. STAT. § 1013.01(8) (2003).

<sup>21</sup> FTE and actual, unduplicated headcount can be vastly different. Each individual comprising the actual unduplicated headcount requires parking, library resources, academic advisement, student records, financial records, and possibly a determination of eligibility for financial aid and financial aid

system as an example, the governing statutes provide that the Department of Education will estimate the annual enrollment of each community college for the current fiscal year and the six subsequent fiscal years by December 15 of each year. In actuality, the estimate is not a one-step process; it involves a series of steps that concludes with providing FTE information to the education estimating conference.<sup>22</sup>

The education estimating conference reviews the submitted information, including the institution's justification for all recommended changes.<sup>23</sup> It then determines and approves the official estimate of FTE enrollment for each community college and state university for the current academic year.<sup>24</sup> Both houses of the Florida Legislature use this figure in the upcoming

processing, as well as other individual services. Of course, more than one of the individuals making up a particular FTE can decide to take courses, request services or attend activities at the same time. Ron Fahs, Director of Facilities Planning and Budgeting for the Division of Community Colleges explained, that the formulas for Survey-recommended unmet need take into account, and make some adjustments for, the fact that more than one individual included in an FTE may be in attendance at the same time by providing for some duplication of services such as the size of advisement areas, additional parking, etc. See Telephone Interview with Ron Fahs, Director of Facilities Planning and Budgeting for the Division of Community Colleges, Florida Department of Education (Aug. 27, 2003).

The author believes, based on empirical observations during her employment within the Florida community college system, that although Survey-recommended unmet need makes allowances for some overlap among individuals, the formulas do not sufficiently take into account the need for parking, academic advisement, classroom space and other services resulting from more than one individual taking classes or attending activities at the same time, especially in the peak early morning and early evening hours at community colleges.

<sup>22</sup> See FLA. STAT. § 1011.84 (2003). It should be noted that state university funding does not operate in the same manner. See FLA. STAT. § 1011.90. Dr. Catherine Morris explained that in practice the community college institutions do not initiate the process themselves. With respect to community colleges, the Division of Community Colleges annually prepares figures for each institution in the community college system. The figures prepared by the Division are sent to the institution to which the figures apply.

The institutions, generally working through their respective Institutional Research Departments, have an opportunity to review the figures and to recommend changes based on more precise information that may be available on the local level. Any changes to the figures must be justified to the satisfaction of the applicable Division, the Department of Education, and, ultimately, the education estimating conference. See Telephone Interview with Dr. Catherine Morris, Director, Institutional Research, Miami-Dade College (Oct. 17, 2003). See also FLA. STAT. § 1013.31 (2003). The estimates and justification for all changes are returned to the Division from which they originated. The Division reviews the figures for reasonableness and forwards the information for each institution in its constituent group to the education estimating conference. See FLA. STAT. § 235.193 (2002) (current version at FLA. STAT. §§ 216.136, 1013.33 (2003)).

<sup>23</sup> A similar result is obtained for universities through a separate process.

<sup>24</sup> Although the FTE projections provided by the Department of Education cover the current year and the six succeeding years, the education estimating conference determines and approves a figure for community colleges for the then current academic year *only*. A similar system is followed for the state universities. See FLA. STAT. § 216.136 (2003).

session for all budget and other enrollment driven figures.<sup>25</sup> Among the items that are enrollment driven is each institution's Educational Plant Survey. The Survey substantiates the need for additional educational facilities,<sup>26</sup> including the sites<sup>27</sup> for those facilities.

The Educational Plant Survey is the key element in the statutory determination of need for additional education sites and facilities.<sup>28</sup> Florida Statutes section 1013.40(1)<sup>29</sup> specifically states, "[t]he need for community college facilities shall be established by a [S]urvey conducted pursuant to this chapter. The facilities recommended by such [S]urvey must be approved by the State Board of Education."<sup>30</sup> With the exception of capital projects funded from non-state sources, such as private or federal grants,<sup>31</sup> the constraints governing public universities are similar.<sup>32</sup> Each public institution of higher education in Florida is to perform and prepare a complete Survey every five years,<sup>33</sup> utilizing the appropriate year's figures from the FTE projections described above. Expressed simply, there is one set of rules for community colleges and another for universities that establish square footage figures for educational uses. For community colleges, the FTE figure is applied to the square footage for each of ten categories of specific uses to calculate the number of square feet allocable to the institution for that FTE.<sup>34</sup> Next, the institution must verify the use of each

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<sup>25</sup> General revenue appropriations to universities are enrollment driven. See FLA. STAT. § 1011.90 (2003). Although general revenue appropriations to community colleges were once enrollment driven, they are now awarded using a base figure plus an amount determined by performance-based formulas. See FLA. STAT. § 1011.84 (2003).

<sup>26</sup> See FLA. STAT. § 1013.01(6) (2003) (defining "educational facilities").

<sup>27</sup> See FLA. STAT. § 1013.01(20) (2003) (defining "site").

<sup>28</sup> "Educational Plant Survey" (Survey) is defined as "a systematic study of present educational and ancillary plants and the determination of future needs to provide an appropriate educational program and services for each student." FLA. STAT. § 1013.01(8) (2003).

<sup>29</sup> Real property acquired for educational purposes is statutorily referred to as a "site." A site is defined as "a space of ground occupied or to be occupied by an educational facility or program." FLA. STAT. § 1013.01(20) (2003).

<sup>30</sup> FLA. STAT. §§ 1013.31, 1013.40, 1013.74 (2003). The Survey conducted pursuant to section 1013 constitutes the Educational Plant Survey.

<sup>31</sup> See FLA. STAT. § 1013.74 (2003) (providing for certain other exceptions as well, most notably those funded through state revenue bonds under FLA. CONST. art. VII, § 11(f), which requires the prior approval of the project by the Legislature).

<sup>32</sup> See FLA. STAT. § 1013.31 (2003).

<sup>33</sup> See *id.*

<sup>34</sup> The state-mandated rules governing the Survey are very specific. Those governing community colleges set forth formulas for square footage per student station in ten assigned categories to be used in conjunction with the FTE figures. The assigned categories for community colleges are: classrooms, non-vocational labs, vocational labs, libraries, physical education, audio visual, auditorium/exhibition space, student services, offices and support services. The rules provide minimum

and every space in the existing physical plant of the institution, categorize each use, and re-measure where necessary.<sup>35</sup> The figures for the existing educational facilities are subtracted from the totals calculated based on the FTE projections. The difference represents the unmet need of the institution as determined by the Educational Plant Survey. Provision is made by statute for some deviation; however, the Survey may deviate from approved standards for determining space needs only if the institution justifies the deviation and the State approves it as being necessary for the delivery of an approved educational program.<sup>36</sup> The Survey is to include recommendations for existing educational facilities and recommendations for new educational or ancillary plants. With respect to the latter, the Survey is to include the general location of the new educational or ancillary plants, and with respect to community colleges the Survey is to update the campus' master plan.<sup>37</sup>

Once completed, the Survey is presented to the institution's board of trustees for consideration and approval at a properly noticed public meeting.<sup>38</sup> Upon approval by the board, the Surveys of community colleges

and maximum square feet per student station allowances for each category. See FLA. STAT. § 1013.03 (2003). Universities have a somewhat analogous, but not identical, formula.

<sup>35</sup> The Survey calculations must reflect the capacity of existing facilities as specified in the inventory of space for that institution maintained and validated by the State. See FLA. STAT. § 1013.31(1)(b)(3) (2003)(governing community colleges); FLA. STAT. § 1013.31(1)(b)(4) (2003)(governing state universities).

<sup>36</sup> See FLA. STAT. § 1013.31(1)(b)(5) (2003). Section 1013.32 allows an exception to the recommendations in the Educational Plant Survey if the institution's board of trustees deems "that it will be advantageous to the welfare of the educational system or that it will make possible a substantial savings of funds." FLA. STAT. § 1013.32 (2003). The board of trustees must present a full statement supporting its decision to the Commissioner of Education.

<sup>37</sup> See FLA. STAT. § 1013.31(1)(a) (2003). State universities are also required to have master plans. FLA. STAT. § 1013.30 (2003).

<sup>38</sup> Under Florida's Government in the Sunshine Law, all action of the boards of trustees of community colleges and the boards of trustees of state universities must take place in a public meeting. See FLA. STAT. § 286.011 (2003). The law has been applied to any gathering of two or more members of the same board to discuss some matter, which will foreseeably come before that board for action. There are three basic requirements of this statute:

- (1) meetings of public boards or commissions must be open to the public;
- (2) reasonable notice of the meetings must be given; and
- (3) minutes of the meetings must be taken.

OFF. OF THE ATT'Y GEN., FLORIDA'S GOVERNMENT-IN-THE-SUNSHINE MANUAL AND PUBLIC RECORDS LAW MANUAL (First Amend. Found. 2003), at 1. For an excellent article on Florida's Sunshine Law and Public Records Law, see Patricia A. Gleason & Joslyn Wilson, *The Florida Constitution's Open Government Amendments: Article I, Section 24 and Article III, Section 4(E) -- Let the Sunshine In!*, 18 NOVA L. REV. 973 (1994). See generally Barry Richard & Richard Grosso, *A Return to Sunshine: Florida Sunsets Open Government Exemptions*, 13 FLA. ST. U. L. REV. 705 (1985). In November 2002, Florida's voters approved a constitutional amendment to the Sunshine Law. See FLA. CONST. art. I, § 24 (amended 2002).

and state universities are forwarded to the Department of Education for review and validation.<sup>39</sup> The Survey is thoroughly reviewed at the state level. If it complies with all applicable requirements, it is validated by the Department of Education. A copy is then sent to the Commissioner of Education.<sup>40</sup>

Due to changing requirements of the community or other circumstances,<sup>41</sup> an institution's needs can change prior to the date of the next statutorily required Survey. In such circumstances, the Survey can be amended. The amendment must be approved by the institution's board of trustees at a public meeting and is then subject to the same review and validation process described above.<sup>42</sup> Upon completion of the survey process and the validation process, the institution has met the requirement that the "need" for facilities "be established by a survey conducted pursuant to this chapter."<sup>43</sup>

At this point in the process, however, the institution is still not authorized to buy land. A Florida public institution of higher education cannot expend public funds for the acquisition of additional real property without the specific approval of the Legislature.<sup>44</sup> For example, section 1013.40(2) of the Florida Statutes expressly provides that "[n]o community college may expend public funds for the acquisition of additional property without the specific approval of the Legislature." Subsection (3) goes on to state, "[n]o facility may be acquired or constructed by a community college or its direct-support organization if such facility requires general revenue funds for operation or maintenance upon project completion or in

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<sup>39</sup> See FLA. STAT. §§ 1013.31(1)(c), 1013.03 (2003). Earlier versions of these statutes did not apply to validation of state university Surveys. See FLA. STAT. §§ 235.15(1)(c), 235.014(10)(a)(2) (2002).

<sup>40</sup> FLA. STAT. § 235.01(1)(a) (2002) (repealed 2003); see also FLA. STAT. § 1013.31(1)(a) (2002) (section effective Jan. 7, 2002). The position Commissioner of Education has traditionally been an elected position, however, the position became an appointed position in 2003 pursuant to the Education Governance Reorganization Implementation Act of 2001. See FLA. STAT. §§ 229.001, 229.002, 229.003 (2002) (repealed 2003). Under the Act, the Florida Board of Education merged into the State Board of Education (SBE) to create a new SBE headed by the Commissioner of Education.

<sup>41</sup> For example, there may be an increase in enrollment in a community college that is significantly higher than projected at the time that the last Survey was completed due to economic changes in the community.

<sup>42</sup> See FLA. STAT. §§ 1013.31(1)(c), 1013.03 (2003). Earlier versions of these statutes did not apply to validation of state university Surveys. See FLA. STAT. §§ 235.15(1)(c), 235.014(10)(a)(2) (2002).

<sup>43</sup> FLA. STAT. § 1013.40 (2003) (applicable to community colleges). A similar statute pertains to universities. See FLA. STAT. § 1013.74 (2003).

<sup>44</sup> See FLA. STAT. § 1013.78(1) (2003) ("No university or university-direct support organization shall construct, accept, or purchase facilities for which the state will be asked for operating funds unless there has been prior approval for construction or acquisition granted by the Legislature."). This provision is subject to exceptions in FLA. STAT. §§ 1013.40, 1013.64 (2003).

subsequent years of operation, unless prior approval is received from the Legislature."<sup>45</sup> The university statute is similar but allows limited exceptions under section 1013.65.<sup>46</sup> The impact of these statutory provisions is that a public university or community college cannot expend state funds to purchase improved or unimproved real property without the approval of the Legislature. In the event that an institution obtains non-state funding, such as contributions raised by the institution's foundation<sup>47</sup> or grants, the institution still cannot acquire the property without approval of the Legislature if state funds are required for future maintenance or operation of the facility.

To obtain the requisite approval of the Legislature, the needs identified in the validated Survey must be described in terms of projects. For example, a community college can determine that it will meet a portion of its Survey-identified need by constructing a new building containing a specific number of square feet of classrooms, non-vocational labs, offices and student services spaces. As the institution plans how to meet its needs with particular structures, the institution consults its master plan to determine where to locate the structure and whether additional land is necessary.<sup>48</sup> The project is typically put on the list commonly referred to as the institution's PECO List because Public Education Capital Outlay (PECO) funds<sup>49</sup> are the primary source of state funds for land acquisition and construction of educational facilities. Annually, each community college and state university is to adopt a capital outlay budget<sup>50</sup> and develop a three-year priority list for PECO projects.<sup>51</sup> These items, including requests for authorization of both PECO and non-PECO projects, are submitted to the State.

Yet another state-mandated process must be completed in connection with the acquisition of land and the related construction of educational facilities before they can be funded. Projects for new construction and the acquisition of land, including site development<sup>52</sup> are added to the institu

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<sup>45</sup> FLA. STAT. §§ 1013.40(2), 1013.40(3) (2003).

<sup>46</sup> See FLA. STAT. § 1013.78 (2003).

<sup>47</sup> State universities and community colleges are authorized by statute to create direct-support organizations, generally referred to as foundations. These foundations are organized as Florida not-for-profit corporations. See FLA. STAT. §§ 1004.28, 1004.70 (2003).

<sup>48</sup> See also FLA. STAT. §§ 1013.30, 1013.36(1) (2003) (addressing state universities and community colleges, respectively).

<sup>49</sup> See FLA. CONST. art. XII § 9(a)(2); FLA. STAT. §§ 1013.01(4)-(16), 1013.31, 1.011.011, 1.013.60, 1013.65, 1013.66, 1013.64 (2003).

<sup>50</sup> See FLA. STAT. § 1013.61 (2003).

<sup>51</sup> See FLA. STAT. §§ 1013.60, 1013.64(4)(a) (2003).

<sup>52</sup> "Site development" means work that must be performed on an unimproved site in order to make it usable for the desired purpose or work incidental to new construction or to make an addition

tion's Capital Improvement Plan (CIP).<sup>53</sup> The CIP is based upon the Survey and lists each capital project of the institution, regardless of the source of funds and whether it contemplates remodeling<sup>54</sup> of an existing educational facility,<sup>55</sup> renovation<sup>56</sup> of such a facility, new construction<sup>57</sup> of an educational facility, the acquisition of land to expand an existing site,<sup>58</sup> or the establishment of a new site at a location that is geographically separate from the location of the existing operations of the institution.<sup>59</sup> In addition to describing each proposed project, the proposed source of funds for each project must be shown on the CIP.<sup>60</sup> The completed CIP is submitted to the board of trustees of the institution for its review, discussion, and approval at a public meeting.<sup>61</sup> The approved CIP of each community college and university is then submitted to the appropriate state authority. At the conclusion of this lengthy process, the Department of Education, the

usable." FLA. STAT. § 1013.01(21) (2003).

<sup>53</sup> For community colleges, the contents of the CIP are set forth in Division of Community College Guidelines; for universities, the requirements for a CIP are statutory. See FLA. STAT. §§216.011-216.351 (2003).

<sup>54</sup> "Remodeling' means the changing of existing facilities by rearrangement of spaces and their use and includes, but is not limited to, the conversion of two classrooms to a science laboratory or the conversion of a closed plan arrangement to an open plan configuration." FLA. STAT. § 1013.01(17) (2003).

<sup>55</sup> "Educational facilities' means the buildings and equipment, structures, and special educational use areas that are built, installed or established to serve primarily the educational purposes and secondarily the social and recreational purposes of the community and which may lawfully be used as authorized by the Florida Statutes and approved by boards." FLA. STAT. § 1013.01(6) (2003).

<sup>56</sup> "Renovation' means the rejuvenating or upgrading of existing facilities by installation or replacement of materials and equipment and includes, but is not limited to, interior or exterior reconditioning of facilities and spaces; air conditioning, heating or ventilating equipment; fire alarm systems; emergency lighting; electrical systems; and complete roofing or roof replacement, including replacement of membrane or structure. As used in this subsection, the term "materials" does not include instructional materials." FLA. STAT. § 1013.01(18) (2003).

<sup>57</sup> "New construction' means any construction of a building or unit of a building in which the entire work is new or an entirely new addition connected to an existing building or which adds additional square footage to the space inventory." FLA. STAT. § 1013.01(14) (2003).

<sup>58</sup> "Site' means a space of ground occupied or to be occupied by an educational facility or program." FLA. STAT. § 1013.01(20) (2003).

<sup>59</sup> See FLA. STAT. §§1001.74(27), 1013.36 (2003) (discussing new campuses and centers for state universities and community colleges, respectively); FLA. ADMIN. CODE ANN. r. 6H-1.040 (2003) (discussing new campuses and centers for community colleges). For a discussion of the selection of sites for new community college campuses and centers, see discussion *infra* Part II.B.2-3. If PECO funds are to be used such projects would also appear on the institution's PECO list.

<sup>60</sup> For a discussion of funding sources, see discussion *infra* Part.II B.4.

<sup>61</sup> See discussion of Florida's Sunshine Law *supra* note 38; *infra* notes 152-63; see also OFF. OF THE ATT'Y GEN., FLORIDA'S GOVERNMENT-IN-THE-SUNSHINE MANUAL AND PUBLIC RECORDS LAW MANUAL (First Amend. Found. 2003).



Commissioner of Education, and the State Board of Education, through their various divisions, will have the FTE projections, the Survey, and the CIP of each community college and state university, as well as each institution's three-year priority list<sup>62</sup> and requests for authorization for non-PECO projects.<sup>63</sup> With this information available, the Commissioner of Education prepares and submits to the Governor and to the Legislature an integrated, comprehensive budget request for educational facilities construction and fixed capital outlay needs for the entire K-20 system of public education.<sup>64</sup> A variety of considerations, including political considerations, can enter into the preparation of the funding requests submitted to the Legislature, as well as in the funding process of the Legislature itself.<sup>65</sup>

The legislative process ultimately results in legislative action that provides funding for public education for the ensuing fiscal year. Authorization for non-PECO projects is provided separately from authorization for PECO projects. PECO projects are individually selected for funding. The Legislature can also ignore the PECO requests and choose to fund projects that do not appear in any CIP but have found legislative favor. On occasions when the Legislature exercises this prerogative, the usefulness of the painstaking, time-consuming FTE, Survey, and CIP processes is diluted. The Legislature also chooses the amount of funding for the current year. Only the current year's funding is assured because one Legislature cannot bind a subsequent Legislature.<sup>66</sup> The process begins again each year with the order, timing, and amounts of funding for any project, as well as the

<sup>62</sup> See FLA. STAT. §§ 1013.60, 1013.64 (2003).

<sup>63</sup> For example, non-PECO projects might include projects to be constructed with funds raised by the institution, or with respect to community colleges, projects to be funded with CO & DS funds discussed. See *infra* notes 133-37.

<sup>64</sup> The reason for the K-20 budget request is as follows. In 1998, the voters of Florida adopted Article IX, Section 1 to the Florida Constitution. Subsequent thereto, the Legislature undertook a comprehensive reorganization of education for the State of Florida and in 2002 enacted the "Florida K-20 Education Code." FLA. STAT. § 1000-1013 (2003). The policy and underlying purpose of Florida's educational reorganization is to, *inter alia*, establish a seamless academic educational system consisting of an integrated continuum of kindergarten through graduate school education for Florida's students. That system is referred to as the "Florida K-20 education system." FLA. STAT. §§ 1000.01(3), 1000.02(1)(a) (2003).

For a discussion of the capital outlay budget request and the distribution of PECO funds, see FLA. STAT. §§ 1013.60, 1013.64(2003). For additional explanation of budget request information including operating budgets, see FLA. STAT. § 1011.01 (2003).

<sup>65</sup> Obviously, the process can be highly politicized because multiple causes, both inside and outside education, are all vying for funds. Within the PECO funding process for the capital outlay expenditures for education, the process can be competitive, particularly in recent years, because the available PECO funding falls far short of needs.

<sup>66</sup> See *Neu v. Miami Herald Publ'g Co.*, 462 So.2d 821, 824 (Fla. 1985) (citations omitted).

specific selection of projects for funding, even if then underway with prior year's funding, being subject to change by the next Legislature.

## 2. RULES FOR SELECTION AND APPROVAL OF SITES

If the Survey process described above<sup>67</sup> leads to the determination that additional real property is necessary to fulfill the educational facilities needs of the public institution of higher education, then another set of statutes and regulations govern the acquisition of the property. The statutes and regulations pertaining to community colleges are used for illustrative purposes.

Site planning and selection by community colleges is governed by both statute and rule. The requirements are more extensive for the establishment of a new site, than for the expansion of an existing site.<sup>68</sup> The starting point with respect to the expansion of an existing site, as well as for the selection of new sites, is section 1013.36 and section 1.4 of the State Requirements for Educational Facilities (SREF).<sup>69</sup> These sections legislate the use of numerous standards, most of which are common sense.<sup>70</sup> In addition to typical requirements, section 1013.36(3)<sup>71</sup> states that the proposed site must not be located within the path of flight of any airport.<sup>72</sup> Specifically, this subsection incorporates the requirements of section 333.03,<sup>73</sup> which provides detailed and extensive measurements for the proximity to runways and provides exceptions for the expansion of existing sites. Prior to the acquisition of real property, the board of trustees of a community college must obtain at least one appraisal by a properly qualified appraiser if the

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<sup>67</sup> For a discussion of the Survey process, see *supra* notes 16-42.

<sup>68</sup> See FLA. STAT. § 1013.36 (2003). For the definition of the term site, see *supra* note 15.

<sup>69</sup> See FLA. STAT. § 1013.36 (2003); see also *State Requirements for Educational Facilities*, 2000 FLA. DEP'T. EDUC. § 1.4 (2000) [hereinafter *SREF*].

<sup>70</sup> For example, according to the standards set by either FLA. STAT. § 1013.36 (2003) or *SREF* § 1.4 (2000), or both, before acquiring a site the board of trustees must consider: the most economical and practical locations for current and anticipated needs; the present and projected uses of property adjacent to the site; that the proposed site not be adjacent to a railroad right-of-way or be adjacent to a factory or other property from which noise, odors or other disturbances or conditions would be likely to interfere with the learning environment; that the road capacity will be adequate; that there is adequate drainage; that soil borings indicate that the proposed site is suitable for construction; and, that the board can acquire clear title. Section 1013.36 also incorporates all other standards required by law and allows the State Board of Education to impose such additional requirements as it believes will promote the educational interests of students.

<sup>71</sup> See FLA. STAT. § 1013.36(3) (2003).

<sup>72</sup> Although this requirement was present before September 11, 2001, it would appear to take on a greater significance after that date.

<sup>73</sup> FLA. STAT. § 333.03 (2003).

purchase price is more than \$100,000, but not more than \$500,000. Two such appraisals are required if the purchase price is in excess of \$500,000.<sup>74</sup> If the agreed purchase price for the property exceeds the average appraised value, the board is required to approve the purchase by an extraordinary vote.<sup>75</sup> Every appraisal, offer and counteroffer, must be in writing. Approval of a contract to purchase real property must take place at a public meeting after at least 30 days' public notice of the proposed acquisition.<sup>76</sup> By virtue of Florida's Sunshine Law, any action by boards of trustees, including the identification and discussion of potential sites, future expansion, and development plans, must take place in the sunshine at a properly noticed public meeting. This includes all planning sessions and board discussions of specific acquisition or negotiation strategies, as well as formal approval of any particular contract.<sup>77</sup> Similarly, all documents and other records of the board, including those pertaining to future expansion and development plans, specific acquisition strategies and the like, are public records that are made available to the public upon request.<sup>78</sup> Florida's public records and sunshine laws, being among the broadest in the country, provide very few exceptions;<sup>79</sup> these exceptions are to be narrowly construed.<sup>80</sup>

### 3. ADDITIONAL REQUIREMENTS FOR APPROVAL OF NEW COMMUNITY COLLEGE CAMPUSES OR CENTERS

The rules for acquisitions of new sites also apply to the establishment of new campuses and centers.<sup>81</sup> Again, the community college system is used for illustrative purposes. The Florida Statutes and administrative rules provide further requirements for a new community college campus or center<sup>82</sup> that is geographically separate from an existing site.

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<sup>74</sup> See FLA. STAT. § 1013.14(1)(b) (2003).

<sup>75</sup> See *id.*

<sup>76</sup> See FLA. STAT. § 1013.14(1)(a) (2003).

<sup>77</sup> See FLA. CONST. art. I, § 24(b); see also FLA. STAT. § 286.011 (2003).

<sup>78</sup> See FLA. STAT. § 119.07 (2003) (requiring records in any form, for example electronic records, to be made available; it does not obligate a board to create records for the purpose of responding to an information request).

<sup>79</sup> See, e.g. FLA. STAT. § 1013.14 (2003) (exempting appraisals obtained by the board of trustees for a limited period of time).

<sup>80</sup> See *Bruckner v. City of Dania Beach*, 823 So.2d 167, 170 (Fla. 4th DCA 2002).

<sup>81</sup> For a discussion of the acquisition of new sites, see *supra* Part II.B.2.

<sup>82</sup> These requirements are defined in the State Board of Education rules. FLA. ADMIN. CODE r. 6H-1.040 (2003), in pertinent part, specifies:

(1) A campus is an instructional and administrative unit of a community college, consisting of college owned facilities and staffed primarily by full-time personnel. It houses a full range of instructional services and of institutional, instructional, and student support services.

Under the State's existing regulatory scheme, establishment of a new campus or center must be proposed by the community college's board of trustees to the appropriate state authorities and is subject to their approval.<sup>83</sup> State Board of Education rule 6H-1.040 states a number of requirements that must be fulfilled by the requesting institution as a condition of obtaining such State approval. Among these requirements is the requirement that existing campuses already have a specified minimum number of FTE students, and that the institution's master plan projects a minimum FTE student enrollment for the proposed campus or center. Exceptions to these standards are authorized only when justified in the judgment of the state authorities.

Obviously, if the board of trustees of an institution desires to recommend the addition of a new center or campus to meet the needs of students and the community, rather than the continued expansion of existing locations, then it is necessary for the institution to first amend its Survey and its master plan, as well as its CIP.<sup>84</sup> Some of these steps require action by state authorities in addition to the administration and board of trustees of the particular community college. All steps require time and possible delay. As previously stated, all discussions must take place in the sunshine,<sup>85</sup> and virtually all documents are open to the public for inspection and copying.<sup>86</sup>

#### 4. FUNDING AND FINANCING

An institution cannot acquire land or construct educational facilities without funds. This section of the article identifies the major sources of funds for the capital outlay projects of public higher education in Florida and describes the limited means of financing that are available for those projects.

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Facilities and other resources are sufficient to accommodate at least one thousand (1,000) full-time equivalent students and is compliance with the certain criteria established in Rule 6A-2.039(1)(a)5., FAC.

(2) A center is an instructional and administrative unit with limited support services. It consists of college owned or unowned facilities and is staffed primarily by full-time personnel. It does not necessarily offer a full range of instructional programs or courses and is in compliance with the criteria established in Rule 6A-2.039(1)(a)6., FAC.

<sup>83</sup> See FLA. ADMIN. CODE r. 6H-1.040 (2003).

<sup>84</sup> For a discussion of the Survey and CIP, see *supra* Part II.B.1.

<sup>85</sup> See FLA. STAT. § 286.011 (2003). For a discussion of Florida's Sunshine Law, see *supra* note 38; *infra* notes 152-164.

<sup>86</sup> See FLA. STAT. § 119.07 et seq. (2003) (known as the Florida Public Records Law). For a discussion of Florida's Public Records Law, see *infra* notes 152-164.

The funding and financing methods for the acquisition of real property<sup>87</sup> in public higher education are complicated and highly regulated. To a great extent, financing options are also limited by constitutional<sup>88</sup> and statutory proscriptions. Before proceeding with a discussion of the financial aspects of acquisition of real property in public higher education, a basic description of public higher education funding may be in order.

Funding traditionally comes from three sources: the State, payments by students, and grants.<sup>89</sup> Grant funds may be derived from public or private entities. The institution writes a grant proposal in response to an invitation for proposals issued by a granting entity. If the institution receives the award of a grant, the awarded funds are placed in the restricted accounts of the institution. Use of the funds is limited to the purposes contained in the governing grant documents and regulations.

The amount that a Florida institution of public higher education can charge its students for matriculation fees,<sup>90</sup> out-of-state tuition,<sup>91</sup> and the specific types and amounts of other fees, is limited.<sup>92</sup> Matriculation and tuition fees from students are ordinarily unrestricted as to their use and are placed in the operating account of the institution. Certain other student fees, such as community college capital improvement fees,<sup>93</sup> are restricted as to their use and are placed in restricted accounts of the institution.

Funds received from the State come by way of appropriations from the Legislature and consist of general revenues and restricted funds.<sup>94</sup> General revenues can be used for any legally permissible purpose, and are usually referred to and accounted for in the institution's financial system as operating funds. Restricted funds, as their name implies, may be used only for certain specific purposes. These funds are placed in appropriately restricted accounts of the institution. Among such funds are Public Education Capital Outlay (PECO) funds, which are the primary state funds available to public higher education for the acquisition of sites, new

<sup>87</sup> Real property is referred to as "sites" in the statutes and rules. See FLA. STAT. § 1013.01(20) (2003).

<sup>88</sup> The author is specifically referring to constitutional provisions contained in the Constitution of the State of Florida.

<sup>89</sup> Gifts and revenue from entrepreneurial activity are additional sources of funds.

<sup>90</sup> Matriculation fees refer to in-state tuition. See FLA. ADMIN. CODE r. 6-A-14.05 (2003).

<sup>91</sup> See FLA. ADMIN. CODE r. 6-A-14.05 (2003).

<sup>92</sup> See FLA. STAT. §§ 1009.23, 1009.24 (2003) (for community colleges and for state universities, respectively).

<sup>93</sup> See FLA. STAT. §§ 1009.23(11), 1001.64(38) (2003).

<sup>94</sup> FLA. STAT. § 1011.01 (2003) provides information with respect to the operating budget generally, while FLA. STAT. § 1013.03 (11) (2003) and FLA. STAT. § 1013.60 (2003) provide information with respect to the capital outlay budget.

construction, remodeling, renovation, and furniture and equipment in connection with such projects.<sup>95</sup> The amount of general revenues allocated to the state university system or the community college system as a whole,<sup>96</sup> and for special appropriations to an institution for particular purposes, are the result of the interplay of various state and national economic factors as well as political influences at work in the session(s) of the Legislature for that fiscal year.<sup>97</sup>

Article XII, section 9(a)(2) of the Florida Constitution establishes the Public Education Capital Outlay and Debt Service Fund for funds derived from a gross receipts tax. PECO Funds are the funds generated by this source.<sup>98</sup> These funds can and have been bonded by the State to increase the amount of funds available for PECO projects. Thus, PECO funds generated in subsequent years are utilized for debt service on the previously issued and outstanding bonds, with any additional funds generated being available for direct expenditure on PECO projects, or for additional bonding capacity. The sources of the gross receipts tax that generate the Capital Outlay and Debt Service Funds are limited.<sup>99</sup> The amount generated in any particular year depends in great part on the State's economy that year. Growth of the fund is necessary in order to make funds available for expenditures on new projects, rather than merely servicing issued and outstanding bonds. Growth of the fund requires consistent economic growth in the State, especially new development.

As described in Part II.B.1., the Governor submits recommendations for PECO projects to the Legislature each year. Once submitted, political processes and partisan support in the Legislature determine which projects on the PECO list will be funded in the coming fiscal year,<sup>100</sup> as well as the amount of funding to be provided. The process is primarily driven by the availability of funds and the political processes.<sup>101</sup> Thus, the funds and timing of funds for a particular project may or may not meet the cash flow needs of the institution's specific land acquisition project and the related construction.

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<sup>95</sup> See FLA. STAT. §§ 1013.64, 1013.66 (2003).

<sup>96</sup> For example, funds allocated to the community college program fund.

<sup>97</sup> See *infra* Part II.B.4 (regarding PECO).

<sup>98</sup> See FLA. CONST. art. XII, § 9(a). For a description of PECO projects, see FLA. STAT. § 1013.01(16) (2003).

<sup>99</sup> The gross receipts tax is levied upon certain utilities including telephone, electric and gas service. FLA. CONST. art. XII, § 9; FLA. STAT. §§ 202.012, 215.61 (2003).

<sup>100</sup> Florida's fiscal year begins on July 1 and ends on June 30 of the next calendar year.

<sup>101</sup> The Legislature need not follow the PECO list and can choose to fund projects not on the list. See *supra* Part II.B.1.

In such instances, an institution is faced with the decision of waiting until the funds are appropriated and received from the State of Florida, or finding an interim source of financing from among very limited alternatives. The risks of utilizing interim financing are compounded by the fact that one Legislature cannot bind the next Legislature.<sup>102</sup> Although the completion of funding for a particular project may be scheduled for years two and three on the PECO list, the next Legislature is technically free to change, not only the timing of the cash flow, but also the ultimate amount of funding for the project and even the selection of projects designated for funding. In addition, PECO funds generated by the gross receipts tax can be less than previously projected for the year. This requires the Legislature to make changes despite what it may otherwise wish to do.<sup>103</sup> The Florida Constitution requires that the State's budget be balanced each year; no deficit spending is allowed.<sup>104</sup> With these risks in mind, the institution must decide whether to seek interim funding to allow a project to proceed, and if so, to determine the method of interim financing.

Both state universities and community colleges are authorized to acquire real property through lease-purchase arrangements.<sup>105</sup> Like most of the other options described below, this technique involves risk because PECO funds to make lease-purchase payments in future years are not assured.

Public higher education in the State of Florida, unlike K-12 school districts, has no taxing authority; therefore, direct tax revenues are not available as they would be for the K-12 system. Among the uses of tax revenue available to the K-12 system is the use of such revenues as a dedicated fund source for repayment of bonds. Until recently, a community college had no allowable source of funds that could constitute a dedicated source of funds for the repayment of bonds. Although community colleges are now allowed to bond capital improvement fees<sup>106</sup> and parking fees<sup>107</sup> paid by students, the amount of bond proceeds that could be based on these types of fund sources is small.<sup>108</sup>

<sup>102</sup> See *Neu v. Miami Herald Pub. Co.*, 462 So.2d 821, 824 (Fla. 1985) (citations omitted).

<sup>103</sup> See FLA. STAT. § 1013.60 (2003).

<sup>104</sup> See FLA. CONST. art. VII, § 1(d).

<sup>105</sup> See FLA. STAT. §§ 1001.64(36), 1001.74(5) (2003) (for community colleges and state universities, respectively).

<sup>106</sup> See FLA. STAT. § 1001.64(38) (2003).

<sup>107</sup> See *id.*

<sup>108</sup> Maggie Aleman Manrara, Sr. Legislative Analyst, Miami-Dade College, explains this point by way of an example. Suppose, a very large community college, the size of Miami-Dade College (by far the largest community college in Florida and believed to be the largest campus-based institution in the U.S.) were to charge fees at their current levels (\$1 per credit in-state; \$2.44 per credit out-of-state). This would generate approximately \$1.6 million in fees annually. If the institution were to save all of

As state agencies, public universities in Florida have access to bonds issued under Article VII, section 11 of the Florida Constitution.<sup>109</sup> Although projects built with such bond proceeds need not be Survey-recommended,<sup>110</sup> they must have the prior approval of the Legislature.<sup>111</sup> The bonds issued pursuant to Article VII, section 11(f) must be supported by the building fee, the capital improvement fee, or other revenue approved by the Legislature for facilities construction.<sup>112</sup>

By statute, community colleges and universities in the State of Florida are permitted to have direct support organizations.<sup>113</sup> These not-for-profit corporations, generally known as a *foundation* of the institution to which it relates,<sup>114</sup> are “[o]rganized and operated exclusively to receive, hold, invest and administer property and to make expenditures to, or for the benefit of,”<sup>115</sup> the applicable community college or university. Foundations of public institutions of higher education have been used to issue bonds.<sup>116</sup> Bonds issued by a community college foundation have been issued by the foundation as a small issuer.<sup>117</sup> As previously stated, while the foundations of state universities can issue revenue bonds, community colleges have no dedicated source of funds that can be pledged by the institution for the repayment of the bonds, except for the relatively small amount of capital

those funds, spending none, until it had amassed \$7 million (this would take over 4 years), then bonded the entire amount at currently prevailing rates, the transaction would generate only approximately \$15 million in bond proceeds. Future capital improvement fees would not be available for additional expenditures for a number of years because they would be pledged to service the debt. See Interview with Maggie Aleman Manrara, Sr. Legislative Analyst, Miami-Dade College, in Miami, Fl. (Oct. 17, 2003).

<sup>109</sup> See FLA. CONST. art. VII, § 11.

<sup>110</sup> See FLA. STAT. § 1013.74 (2003).

<sup>111</sup> See FLA. CONST. art. VII, § 11(f).

<sup>112</sup> See FLA. STAT. § 1010.60 (2003).

<sup>113</sup> See FLA. STAT. §§ 1004.28, 1004.70 (2003).

<sup>114</sup> See *supra* Part II.B.1.

<sup>115</sup> See FLA. STAT. § 1004.70 (2003) (relating to community colleges). In addition to the language quoted in the above text, university foundations have as an additional allowable purpose “or for the benefit of research and development park or research and development authority affiliated with a state university . . . .” FLA. STAT. § 1004.28 (2003).

<sup>116</sup> See, e.g., Miami-Dade Community College Foundation, Inc. Lease Revenue Bond, \$9,500,000 (Hialeah Center Project), Series 1992. (Binder on file, Legal Department Library, Miami-Dade College.) The bonds issued by a state university foundation must be approved by the State Board of Education. See FLA. STAT. § 1010.60 (2003).

<sup>117</sup> The total amount of bonds that can be issued in a private placement by a small issuer in any one year, however, is limited to \$10 million. Generally this amount has been sufficient for small community college projects. See, e.g., Miami-Dade Community College Foundation, Inc. Lease Revenue Bond, \$9,500,000 (Hialeah Center Project), Series 1992. (Binder on file, Legal Department Library, Miami-Dade College.)



improvement and parking fees which are bondable by the community college itself. Accordingly, with that exception,<sup>118</sup> funds for each successive year's repayment of bonds issued by a community college foundation must be subject to appropriations for that year. In essence, such bonds are *de-facto* unsecured.<sup>119</sup> Nevertheless, these bonds are attractive to a number of banks that are familiar with them. Furthermore, the purchasing bank may be able to derive tax-exempt income and credit under the Community Reinvestment Act,<sup>120</sup> sometimes referred to as CRA, for their participation.

The availability of unsecured loans directly from banks to public institutions of higher education for their purchases of land is also very limited. Section 1011.31 of the Florida Statutes permits borrowing by a community college only with the specific approval of the Commissioner of Education.<sup>121</sup> To obtain such approval, the request for permission to borrow must be made by the community college's board of trustees to the Commissioner and the Department of Education, who must decide that "the proposal is reasonable and just, that the expenditure necessary, and that revenues sufficient to meet the requirements of the loan can reasonably be anticipated."<sup>122</sup> The loan must be repaid in the fiscal year in which it is made.<sup>123</sup> The author has located no companion statute for state universities.

Another process, referred to as the "joint-use facilit[y] [process],"<sup>124</sup> is available when two, or more, public institutions desire to develop a common educational facility to accommodate students of both institutions. The process governing joint use facilities requires that the boards of trustees jointly request a formal assessment of the need, both for the academic program and the facility.<sup>125</sup> Justification for the construction of a new facility must be demonstrated through actual, current FTE in leased or borrowed

<sup>118</sup> A community college is free to pledge capital improvement fees or parking fees.

<sup>119</sup> Small issuer privately placed bonds have been secured by a lease-purchase agreement between the community college and its foundation with the lease cancelable by the community college in any fiscal year. The lease-purchase agreement is assigned by the foundation to the purchaser of the bond as security. In essence, however, the bonds are *de-facto* unsecured. See, e.g., Miami-Dade Community College Foundation, Inc. Lease Revenue Bond, \$9,500,000 (Hialeah Center Project), Series 1992. (Binder on file, Legal Department Library, Miami-Dade College.)

<sup>120</sup> 12 U.S.C. §§ 2901, 2908 (1999).

<sup>121</sup> Previously, community colleges were required to obtain the Governor's permission to borrow funds. See FLA. STAT. § 287.064, amended by 2003 Fla. Sess. Law Serv. 261 (West); 2003 Fla. Sess. Law Serv. 399 (West).

<sup>122</sup> FLA. STAT. § 1011.31(2) (2003).

<sup>123</sup> See FLA. STAT. § 1011.31(1) (2003).

<sup>124</sup> See FLA. STAT. § 1013.52 (2003).

<sup>125</sup> Such assessment and approval should be completed prior to conducting the Survey. See FLA. STAT. § 1011.52(1)(a) (2003).

facilities.<sup>126</sup> Requests for funding joint use projects are to be submitted to the Commissioner of Education, who decides the funding priority of these projects in relation to the priority of all other capital outlay projects under consideration.<sup>127</sup> For these projects to be eligible<sup>128</sup> for PECO funding, the project must be on the three-year capital outlay priority list of each of the prospectively participating institutions.<sup>129</sup>

Matching challenge grant programs for the construction of high-priority facilities have been established for both community colleges<sup>130</sup> and state universities<sup>131</sup> that allow the state to match private funds raised by the institutions.<sup>132</sup>

The final category of funding to be described in this section is Capital Outlay and Debt Service (CO & DS) bond funds.<sup>133</sup> This source of funding, established under Article XII, Section 9(d), of the Florida Constitution, is available to K-12 school districts and community colleges, but not to state universities.<sup>134</sup> It is one of one of the most restrictive sources of fixed capital outlay funds available for educational projects.<sup>135</sup> The funds generated are the basis for bonds issued by the State. Funds are allocated to participating community colleges based on a calculation of "instructional units"<sup>136</sup> using a formula somewhat similar to FTE. These funds may be used for "acquiring, building, constructing altering, remodeling, improving,

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<sup>126</sup> Rather than the enrollment projected if the joint use facility were approved, completed and placed in service. See FLA. STAT. § 1011.52(1)(b) (2003).

<sup>127</sup> See FLA. STAT. § 1011.52(1)(d) (2003).

<sup>128</sup> The author is using the word *eligible* to mean eligible to compete for funding.

<sup>129</sup> See FLA. STAT. § 1011.52(1)(d) (2003).

<sup>130</sup> See FLA. STAT. § 1011.32 (2003).

<sup>131</sup> See FLA. STAT. § 1013.79 (2003).

<sup>132</sup> The community college matching grant program also includes matching for local government funds. Compare FLA. STAT. § 1011.32 (2003), with FLA. STAT. § 1013.79(2) (2003). See also *infra* Part III.C.1.(c).

<sup>133</sup> See FLA. CONST. art. XII, § 9(d). The source of CO & DS bond funds is motor vehicle license revenue.

<sup>134</sup> Likely, the reason for this situation is that Florida's community colleges were formerly operated by the K-12 school boards of the State. In July 1968, governance of Florida's community colleges (then referred to as junior colleges) was withdrawn from the K-12 school boards. See Broward Community College, *College Background*, available at <http://www.broward.edu/view/college.jsp> (last visited May 11, 2004).

<sup>135</sup> To participate in such funds, a community college is to annually (for each year it chooses to participate) comply with another state-mandated process based on the most current Survey to designate those projects for which the institution desires to seek CO & DS bond funds. All such projects must be Survey-recommended.

<sup>136</sup> See FLA. CONST. art. XII, § 9(d)(1) (specifying that the funding formula is based on instructional units); FLA. STAT. § 1010.58 (2003) (detailing the procedure for calculating the instructional units).

enlarging, furnishing, equipping, maintaining, renovating, or repairing of capital outlay projects."<sup>137</sup>

Any discussion of funds and financing for land acquisition and construction projects of Florida's state universities and community colleges would not be complete without discussion of the woeful inadequacy of funding. The staggering extent of the shortfall in funding can be made clear by one example: the unmet Survey-recommended need of community colleges alone. This is need established through the painstaking Survey process. Obviously, unmet Survey-recommended need is need for funds that have not been appropriated. The Division of Community Colleges is in receipt of requests for \$2,379,399,285 in unmet Survey-recommended need for the next five fiscal years.<sup>138</sup> The amount of PECO funds, the primary source of funds for land acquisition and construction projects, estimated to be available for these projects during the next five years is estimated at approximately \$554 million.<sup>139</sup> This amounts to a shortfall in funding of over \$1.8 billion in the community college system alone.

In summary, PECO funds, the primary source of funds for land acquisition and construction projects of Florida institutions of public higher education, are not available until the conclusion of a highly regulated, time-consuming process. Moreover, interim financing bears risks because receipt of PECO funds cannot be assured. Universities can utilize revenue bonds for revenue-producing projects. For community colleges, bonding is not available except with respect to capital improvement fees and parking fees. The foundations of both universities and community colleges can issue bonds under varying state requirements. The bonds of community college foundations, however, are mostly unsecured. Joint use facilities and matching challenge grant programs are available for both community colleges and universities. Community colleges have access to CO & DS bond funds based on instructional units.

Despite the number of programs described above, the most noteworthy point is that funding is completely insufficient. The unmet need of higher education for PECO funds is staggering. Likewise, CO & DS funds are insufficient. Although matching grant programs for higher education are included in the Florida Statutes, state funds to match the privately generated funds are not necessarily available for appropriation under these programs.<sup>140</sup>

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<sup>137</sup> FLA. CONST. art. XII, § 9(d)(5).

<sup>138</sup> See Telephone Interview with Ron Fahs, Director of Facilities Planning and Budgeting for the Division of Community Colleges, Florida Department of Education (Aug. 27, 2003).

<sup>139</sup> See *id.*

<sup>140</sup> Mr. Fahs also indicated that \$8 million in matching fund requests by community colleges were being carried over from fiscal year 2003-2004 to the next fiscal year. See *id.*

## 5. DECISION-MAKING IN HIGHER EDUCATION VERSUS PRIVATE BUSINESS

To fully understand the procedural problems inherent in the land acquisition process of public higher education, it is necessary to consider the differences between the decision-making and governance structures of public higher education and those of private business enterprise.

The governance and decision-making processes of public institutions of higher education differ significantly from those of commercial business enterprises. Likewise, practices and attitudes toward the sharing and discussion of institutional strategic business information differ significantly between the two models. These differences can be reflected in the land acquisition transactions of the two types of entities.

Profitability, market share, being the first to market with a new product, beating the competition, and protecting the company's business information, products, and intellectual assets are hallmarks of private commercial business enterprise. Regardless of whether the product of the particular business is goods or services, the goal of profit requires that the company focus on efficiency, timing, and cost effectiveness.<sup>141</sup>

In contrast, providing educational services and the furtherance and exploration of knowledge, learning, and scholarship are the purposes and hallmarks of higher education. The products of higher education are well-educated students<sup>142</sup> and the advancement of learning. Academic freedom<sup>143</sup> and the pursuit of intellectual inquiry, together with intellectual analysis and criticism, are highly valued in higher education. Among upper division and graduate school faculty in particular, having the time and freedom to pursue, analyze, criticize, and discard ideas, and to have the opportunity to begin the process anew with revised or new theories, is especially valued. In the scholarly tradition, the pursuit, analysis, and discussion of ideas can be more prized than reaching a final outcome in the business sense of the term. This is because in higher education, unlike most commercial businesses, the

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<sup>141</sup> As used here, cost-effectiveness means not only controlling expenses and maximizing revenue, but maximizing the benefits derived from the efficient use of employee time and labor.

<sup>142</sup> What defines a well-educated student is the subject of debate among educators, scholars, politicians, employers and the general public. While this definition is a partial summary of the author's view, the author asserts that a well-educated student is one who is academically and technically prepared for the future goals for which he or she enrolled in the institution, capable of critical thinking and of engaging in the life-long learning process, and who has been given an opportunity to be exposed to and participate in the scholarly discourse of higher education in his or her field of study.

<sup>143</sup> See American Association of University Professors, *1940 Statement of Academic Freedom and Tenure*, available at <http://www.aaup.org/statements/Redbook/1940stat.htm> (last visited May 11, 2004).

pursuit, analysis, discussion, and criticism of ideas and academic criticism of traditional ways of doing things can be, in fact, a desired final outcome of the scholarly function of the institution. An atmosphere in which faculty can contemplate, innovate, experiment, test, criticize, and discard ideas is of great importance to an academically vigorous faculty. Of course, it is also an academically vigorous faculty that creates an academically vigorous institution. In such an environment, open discussion of ideas, including the future growth of the institution, is commonplace and considered both normal and appropriate.

Broad-based participation can play a role in the non-academic decision-making of public institutions of higher education, although the degree of such activity can vary substantially among institutions. Committees for the formulation of recommendations, and for decision-making, in various non-academic areas of the institution can be, and are, used in institutions of higher education. Sometimes the result is inspiration, synergy, and innovation; sometimes it is discord, frustration, and delay. However, the sharing of information and participatory recommendations or decision-making are characteristics of higher education. As a result, the needs and future growth of the institution can become topics of open discussion. In some institutions, this can extend to the need for additional land and possible acquisitions. Even when this is not the case, the habit of sharing information can sometimes lead to divulging information that would be kept confidential in a private business enterprise.<sup>144</sup>

Thus, while the governance of a business enterprise is through senior management effectuating the desires of the board,<sup>145</sup> the governance model for higher education is shared governance in which faculty has a role, depending on the subject matter, either in a participatory decision-making role or in a recommending capacity. In addition, student body representatives and support staff councils, with varying areas and levels of recommending or decision-making authority, exist in many institutions of higher education.

### III. POSSIBLE SOLUTIONS

#### A. Introduction

The synopses set forth above highlight a number of significant differences between the land acquisitions of public institutions of higher

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<sup>144</sup> See discussion *supra* Part II.A.

<sup>145</sup> For a corporation this also includes the desires of the corporation's shareholders.

education and those of private business enterprises. In contrast to the transactions of private enterprises, the public institutions' transactions lack flexibility and are highly regulated. The public institutions' transactions tend to take a longer period of time from the moment that need is anticipated until the time that the need is fulfilled, and the public transactions tend to be more time consuming for the public employees because of the number of steps involved. There are more participants and decision-makers in the process of determining need, the granting of authority, and the funding of the public transactions. These participants include senior management; sometimes faculty, staff, student, and administrative committees; the board of trustees; the appropriate division of the Department of Education; the Commissioner; the State Board of Education; and the Legislature. There is virtually no confidentiality for the decision-making and formulation of acquisition strategies of public institutions.

Public funding for the capital outlay projects of Florida institutions of public higher education is vastly short of identified needs. The acquisitions of public institutions can be long overdue before they can be fulfilled because need tends to be exacerbated over time. All of these factors can adversely impact the bargaining position of the public institutions of higher education in their efforts to acquire land.

The objective of this article is to begin the search to find ways to enable Florida's public institutions of higher education to acquire real property at prices that make the most cost-effective use of public funds, and to complete the acquisition in a timely manner so that the institutions can better meet their needs to serve students. Obviously, once the land is acquired, a related objective, which is beyond the scope of this article, is to facilitate the completion of educational facilities on those sites so that these facilities can be placed in service as quickly as possible in order to meet the educational needs of current and future students and taxpayers.<sup>146</sup>

After distilling the issues down to their most essential components, the problems can be described as follows. First, the present process of identifying need for real property and for obtaining the necessary authorization and funding for acquisitions is too slow and cumbersome to enable public institutions of higher education to move quickly when a good purchasing opportunity arises. Next, the process is so slow and so public that the public institution is frequently unable to attain a good bargaining position. This interferes with the institution's ability to achieve a deal that makes the most financially advantageous use of public funds. Finally, and

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<sup>146</sup> Although technically beyond the scope of this article, timely cost-effective construction of educational facilities is so closely related to the subject of timely cost-effective acquisition of land that some of the possible solutions address both objectives.

perhaps most significantly, the amount of funding available is insufficient to meet the reasonable needs of the institutions for land and facilities. Thus, solutions to two problems must be found: the problem of the process, and the problem of funding.

### B. *Brainstorming: Beginning the Search for Possibilities*

The author's preferred problem solving technique for problems such as those that are the subject of this article is the process of identifying, without judgment or evaluation, as many possibilities as can be generated. The process consists of the spontaneous production of ideas without screening for feasibility, legal or other impediments to implementation, practicality, conformity with policy objectives, over-broadness, or any other objection. It is a process by which lots of ideas are placed *on the table* so that they can then be analyzed with appropriate thoroughness. This particular problem solving technique can be performed by one person, or through brainstorming, which is "the group problem-solving technique that involves the spontaneous contribution of ideas from all members of the group."<sup>147</sup> For this article, the author engaged in an individual process that drew upon the author's own ideas and those generated by others during conversations spanning over a decade.<sup>148</sup> The process generated a number of possible solutions to the present problems, unscreened and unanalyzed, for future examination. The list of unscreened, unanalyzed possibilities includes: exceptions to the public records and sunshine laws for the purchase of real property by public institutions of higher education; increased and more effective use of eminent domain proceedings; permitting institutions to borrow funds on an unsecured basis for a period longer than the current fiscal year while awaiting PECO funds; distributing lump sums similar to block grants to institutions and allowing the institutions to determine their needs and how to best meet those needs; allowing institutions to implement a construction fee or increase the amount of the present capital improve-

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<sup>147</sup> MERRIAM WEBSTER'S COLLEGIATE DICTIONARY 138 (10th ed. 1993).

<sup>148</sup> Although the list that follows was generated during a one-person problem-solving exercise, it reflects discussions ranging from casual lunchtime conversations, to outbursts of frustration, to serious problem-solving discussions between the author and over forty individuals, either singly or in groups, over more than a decade. Many of those people may have brought forth ideas based on their conversations with others over the years. The author will endeavor to attribute ideas, wherever possible, to the individuals who brought the idea to the author's attention and thus into the author's current problem-solving exercise. Some of the particular formulations of ideas that are presented in this article as recommendations for possible adoption or for further study are the author's variation on an idea that may have been initially generated by another. The author will endeavor to differentiate for the reader.

ment fee;<sup>149</sup> expanding the possible sources of dedicated funds in order to service bonds; expanding the PECO base to generate more PECO funds; encouraging the broader identification of real property in legislative authorizations for acquisitions; enhancing the matching grant programs; authorizing and encouraging the use of interim funding mechanisms for later PECO reimbursement; establishing direct taxing authority for universities and community colleges; and increasing the state sales tax, with the increase directed to the needs of higher education without using the funds to substitute for general revenue funds presently directed toward public higher education. It is noted that these are not the only ideas that could be generated in the search for solutions. More brainstorming with participation by all interested constituencies is encouraged.

### C. *Examining the Possibilities in Search of Fair, Workable Solutions*

The following sections of this article begin the process of analyzing the various ideas listed above, eliminating some and identifying others for further future analysis. It should be noted at the outset that a number of the possibilities are not mutually exclusive, but could be implemented together, each providing varying degrees of relief to the problems identified. Some of the possibilities could be implemented immediately under the current system.

While analyzing various possibilities for solving the dilemmas faced by public institutions of higher education in their efforts to acquire land, good sense and a healthy respect for the intellect and hard work of others in the course of their efforts accomplished in the past would suggest that one look at the reasons originally and currently supporting the existing processes. If those reasons are still valid, the search for solutions should take into consideration those reasons for the existing system, as well as the previous hard work and intellectual effort of others.

It is also important to specify what constitutes a *good* solution. As indicated by the title of this section, it is my view that in order to be *good* a solution must be fair and workable. For purposes of this article, *good* solutions are those that contribute to achieving the identified objective<sup>150</sup> and comply with the policies underlying good stewardship of public funds. First and foremost, a *good* solution must enable institutions to make purchases at

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<sup>149</sup> This particular term names a specific community colleges' fee; a similar concept exists within state university terminology.

<sup>150</sup> The objective is enabling public institutions of higher education to acquire real property at prices making the most cost-effective use of public funds and to complete the acquisition within a time span that enables the institutions to meet their needs to serve students in reasonably timely fashion.



competitive prices comparable to those achievable in a well-managed private transaction using one's own money. This necessitates a number of things, most notably that the institution be able to act swiftly to get properties under contract. Thus, the institution must be empowered to make decisions and to make those decisions promptly. The institution must also have funds or financing available in order to act on decisions to capitalize on advantageous market opportunities. For purposes of this article, a *good* solution ought to be narrowly tailored to meet the problems to be addressed. Although a broad, far-reaching suggestion, such as restructuring the entire system by which education is funded in the State of Florida, could also resolve the issues presented in this article, such solutions have implications well beyond the scope of this article that would require extensive analysis. For this reason alone, the discussion of some of the more broad, far-reaching suggestions will be limited. Narrowly tailored solutions are emphasized in this article as being more feasible because they have a greater likelihood of obtaining support and governmental approval.

The various ideas generated in Part III.C. fall into two categories corresponding to the two types of extant problems to be resolved; namely, problems with the process and problems with funding. The first category of ideas is aimed at increasing flexibility in order to address the overly cumbersome nature of the current process. The second category of ideas is aimed at increasing the total amount of funding that is currently available. The analysis below utilizes these two groupings.

## **1. REVISING THE PROCESS: ANALYZING POSSIBILITIES FOR INCREASING FLEXIBILITY**

### *a. Creating an Exemption to the Public Records and Sunshine Laws*

Although the author would not ordinarily present the analysis of an idea that is immediately eliminated from further consideration on the basis of that analysis, the author has chosen to make an exception for the idea of creating an exemption to the Public Records and Sunshine Laws. The analysis is presented because of the frequency with which this suggestion is made and the importance of the legal and public policy ramifications that are involved. At first blush, creation of an appropriately narrow exemption to the Public Records and Sunshine laws for the land acquisition activities of public institutions of higher education might seem to present a relatively simple way to equalize the bargaining position of public entities with that of

private sellers.<sup>151</sup> Nevertheless, the author of this article cannot and does not recommend such a solution. First, although the lack of confidentiality is one of the more striking ways in which the land acquisition efforts of public institutions of higher education differs from those of private business enterprises, it does not necessarily follow that enabling public institutions of higher education to formulate their expansion plans and acquisition strategies out of the view of the public would solve the problems. Two obstacles prevent such a result: the glacial rate at which the process proceeds and the culture of institutions of openly discussing everything. The present process moves so slowly, and funding is so scarce, that the needs of institutions become critical long before those needs are addressed. As a result, any relatively alert landowner in the vicinity can detect that the institution may have an acute need to acquire his or her property. Also, the slower that any business strategy proceeds, the more likely that the news will leak out, before the strategy is fully implemented. This situation is common in the academic setting where open discussion is more the norm than protecting the confidentiality of business decisions. Thus, it is unlikely that an exemption from the Sunshine and Public Records law would provide an effective solution under present circumstances.

Furthermore, and of overriding importance, I cannot and do not recommend an exemption because Florida's Open Government Laws, the Public Records Law in Florida Statutes section 119.07 (2003), and the Sunshine Law in Florida Statutes section 286.011 (2003),<sup>152</sup> play a vital role in the democratic process of government in the State of Florida. Florida has a long tradition of open government; the first Public Records law was enacted in 1909, followed in 1967 with the adoption of the Sunshine Law.<sup>153</sup> The significance placed on these laws by the citizens of Florida has grown, not diminished. At first, the protective provisions were statutory, and as pointed out by various authors,<sup>154</sup> were subject to the discretion of the Legislature, which could freely enact exemptions. The clear trend, particularly in recent years, has been to strengthen and extend these laws, including enactment of constitutional safeguards in 1990 and 1992.

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<sup>151</sup> The first reaction of persons previously unfamiliar with the open government rules applicable to the acquisition of land by Florida public higher education institutions is typically one of great surprise. Frequently made comments include: "How can you develop an expansion plan or successful acquisition strategy without confidentiality?," "This isn't the way the real estate business works," and, "This is nuts."

<sup>152</sup> See FLA. STAT. §§ 119.07, 286.011 (2003), respectively.

<sup>153</sup> See Patricia A. Gleason & Joslyn Wilson, *The Florida Constitution's Open Government Amendments: Article I, Section 24 and Article III, Section 4(E)—Let the Sunshine In!*, 18 NOVA L. REV. 973 (1994).

<sup>154</sup> See *id.* at 974. See generally Barry Richard & Richard Grosso, *A Return to Sunshine: Florida Sunsets Open Government Exemptions*, 13 FLA. ST. U. L. REV. 705 (1985).

The 1992 constitutional amendment was passed overwhelmingly by Florida's voters after the Attorney General for the State of Florida, Bob Butterworth, proposed that an "Open Government Constitutional Amendment to be added to the Declaration of Rights"<sup>155</sup> of the Florida Constitution. Interestingly, the constitutional amendment actually followed and reaffirmed the law codified by the statute and elevated the protections to constitutional proportions.<sup>156</sup> The current status of the law is that all branches of state government and all local governments are constitutionally subject to open meetings and public records requirements.<sup>157</sup>

Under the Florida Constitution,

[e]very person has the right to inspect or copy any public record made or received in connection with the official business of any public body, officer, or employee of the state, or persons acting on their behalf, except with respect to records exempted pursuant to this section or specifically made confidential by this Constitution.<sup>158</sup>

This constitutional provision is expressly applicable to all three branches of the government and every agency or department created under them, including "counties, municipalities, and districts; and each constitutional officer, board, and commission, or entity created pursuant to law or this Constitution."<sup>159</sup> Article I, section 24(b) requires all meetings of public bodies where public business is to be conducted, or official acts taken, to be noticed and open to the public.<sup>160</sup>

By judicial decisions interpreting the statutory provisions, the Public Records Law extends to all records and the Sunshine Law applies to all meetings of public boards, even planning sessions. Together, they provide access to the records and proceedings of government. The purpose behind the Sunshine Law is to "prevent at non-public meetings the crystallization of secret decisions to a point just short of ceremonial acceptance."<sup>161</sup>

Subsequent to the Constitutional amendments, the Legislature may still create exemptions to the Public Records and Sunshine laws by general law.

<sup>155</sup> See Gleason, *supra* note 153, at 978 (citations omitted).

<sup>156</sup> See *Monroe County v. Pidgeon Key Historical Park, Inc.*, 647 So. 2d 857 (Fla. 3d DCA 1994); Gleason, *supra* note 153, at 980.

<sup>157</sup> See FLA. CONST. art. I, § 24(a). Legislative meetings are governed by FLA. CONST. art. III, § 4(c).

<sup>158</sup> FLA. CONST. art. I, § 24(a).

<sup>159</sup> *Id.*

<sup>160</sup> See FLA. CONST. art. I, § 24(b).

<sup>161</sup> *Monroe County v. Pidgeon Key Historical Park, Inc.*, 647 So.2d 857, 860 (Fla. 3d Dist. Ct. App. 1994) (quoting *Town of Palm Beach v. Gradison*, 296 So.2d 473, 477 (Fla. 1974)).

However, the enactment of exemptions must be by two-thirds vote, the general law creating such exemptions must “state with specificity the public necessity justifying the exemption,”<sup>162</sup> and, the exemption “shall be no broader than necessary to accomplish the stated purpose of the law.”<sup>163</sup> Any law creating an exemption or governing enforcement must relate only to one subject.<sup>164</sup>

Private businesses, unlike public institutions of higher education, operate based on a profit motive for which management is accountable to the owners of the business. Florida’s Open Government Laws are the means by which the conduct of public business can be held accountable. Ultimately, it must be recognized that public institutions of higher education are, in fact, public entities using public funds, which are fundamentally different from the assets of private business enterprises. Moreover, the land acquisitions of public institutions of higher education are not so different from the land acquisitions of other governmental bodies as to merit a special exemption. Citizens of Florida established the Public Records and Sunshine laws to safeguard the public trust, to enable public scrutiny, and to provide for accountability. After examining the purposes of the Public Records Law and the Sunshine Law, the historical background, and the voters’ clear expression of the importance of these protections, the author has concluded that it is not appropriate to recommend a special exemption from either the Public Records Law or the Sunshine Law for any additional aspects of the land acquisition transactions of public higher education in Florida; therefore, this possibility is eliminated.

#### b. *Broader Identification of Land in Legislative Authorizations for Acquisitions*

This suggestion is the simplest of the recommendations discussed in this article and is already being used by a number of institutions.<sup>165</sup> The author

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<sup>162</sup> FLA. CONST. art. I, § 24(c).

<sup>163</sup> *Id.*; see also *Bruckner v. City of Dania Beach*, 823 So. 2d 167 (Fla. 2002) (holding that while courts must liberally construe the Sunshine Law to give effect to its public purpose, its exemptions must be narrowly construed) (citing *Zorc v. City of Vero Beach*, 722 So.2d 891, 897 (Fla. 4th DCA 1998)).

<sup>164</sup> See FLA. CONST. art. I, § 24(c).

<sup>165</sup> This technique, conceived by the author in late 1991 or early 1992, was developed in collaboration with Anthony R. Parrish, Jr. real estate consultant for Miami-Dade Community College (now Miami-Dade College), with the approval and support of Lester Brookner, then Vice President for Business Affairs, M. Duane Hansen, then Senior Vice President for Administration and Robert McCabe, then College President of Miami-Dade Community College (now Miami-Dade College). The author is without knowledge whether others independently developed the same idea. Ron Fahs confirmed that when drafting requests to be sent to the Legislature, he currently uses this technique whenever possible. See Telephone Interview with Ron Fahs, Director of Facilities Planning and Budgeting for the Division

recommends its immediate adoption and use by others. This suggestion will continue to be beneficial even if other problems in the process are resolved. It will also continue to be beneficial when and if the funding problem is resolved.<sup>166</sup>

The specific wording of a legislative authorization for acquiring land typically mirrors the wording of the request made by the institution. If a request for authorization identifies a specific parcel,<sup>167</sup> then the legislative authorization, if granted, will most likely mirror the request by authorizing the institution to purchase only that particular parcel and no other. The seller has little incentive to be reasonable in the asking price because the buyer cannot look elsewhere to satisfy its needs. In order to purchase alternate sites, the institution must seek an amendment to its legislative authorization. The amendment, however, cannot be implemented until the next legislative session and the subsequent date<sup>168</sup> on which the amended authorization takes effect.

The institution has much greater flexibility if it seeks and receives authorization to acquire, for example, "up to X acres in the vicinity of the Y campus."<sup>169</sup> If the owner of a particular parcel insists on a price in excess of what is reasonable, the more broadly worded legislative authorization gives the institution the flexibility to negotiate with the owners of alternate sites, without the expense, risk, or delay of requesting amended legislative authority.

The best course of action in the opinion of the author is for the institution to identify all possible alternative sites at the outset and to negotiate simultaneously with all owners. During negotiations, the institution's representatives can clearly communicate that the institution will contract with the owner that agrees to the best price and terms. The institution may be able to gain bargaining power that can work to the institution's and the taxpayers' advantage if potential sellers realize that the institution is not locked into purchasing the seller's particular property, and that competition exists for the sale.

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of Community Colleges, Department of Education, State of Florida (Oct. 16, 2003).

<sup>166</sup> Although this solution works, standing alone, it is not sufficient to resolve all the problems with respect to the process. This solution helps to provide a measure of flexibility for the institution and eliminates additional delay. It does not, however, fully address the complexity or cumbersome nature of the process.

<sup>167</sup> For example: Lot 4, Block 1, Plat Book 106, Page 63, Miami-Dade County, Florida.

<sup>168</sup> The legislation usually becomes effective on July 1 following the close of the session.

<sup>169</sup> Possible language for legislative authorization.

c. *More Auspicious Use of Eminent Domain Proceedings*<sup>170</sup>

Florida's community colleges and state universities are able to acquire land through eminent domain proceedings.<sup>171</sup> These proceedings are available

[w]henver it becomes necessary for the welfare and convenience of any of its institutions or divisions to acquire private property for the use of such institutions, and this cannot be acquired by agreement satisfactory to a university or community college board of trustees and the parties interested in, or the owners of, the private property[.]<sup>172</sup>

Before a board of trustees is authorized to exercise the power of eminent domain it must obtain the approval of the State Board of Education.<sup>173</sup>

<sup>170</sup> Eminent domain proceedings are the means by which the requirements of the Takings Clause of the Fifth Amendment to the United States Constitution are met ("[N]or shall private property be taken for public use without just compensation." U.S. CONST. amend. V). It has long been established that the protections of the Takings Clause of the Fifth Amendment are applicable to the individual States through the Due Process Clause of the Fourteenth Amendment. See *Chicago, Burlington & Quincy R.R. Co. v. City of Chicago*, 166 U.S. 226, 238-39 (1897). The Constitution of the State of Florida also contains a Takings Clause. See FLA. CONST. art. X, § 6.

<sup>171</sup> See FLA. STAT. §§ 1001.64(35), 1001.74(30) (2003) (relating to community colleges and state universities, respectively); FLA. STAT. § 1013.25 (2003) (relating to both community colleges and state universities). The earlier version of the governing statute had required the approval of the State Board of Education, before a community college, acting through its board of trustees could institute eminent domain proceedings. See FLA. STAT. § 240.319(4)(d) (2001). Under the prior statutory requirements applicable to state universities, the Board of Regents was the entity authorized to institute eminent domain proceedings to benefit a state university. See FLA. STAT. § 240.217 (2001). As with the section applicable to community colleges, the approval of the State Board of Education, was a prerequisite to the filing of eminent domain proceedings to benefit a state university. Under the former statutes, community colleges were authorized to proceed under either chapter 73 or chapter 74 of the Florida Statutes, while the Board of Regents was authorized to proceed only under chapter 73 for universities. See FLA. STAT. ch. 73-74 (2001).

<sup>172</sup> FLA. STAT. § 1013.25 (2003).

<sup>173</sup> See FLA. STAT. § 1013.25 (2003). Prior to the passage of the Florida Education Reorganization Act, the members of the Cabinet were also the members of the State Board of Education. Thus, the reference in FLA. STAT. §§ 240.319(4)(d), 240.217 (2001) to the State Board of Education was to the Cabinet sitting as the State Board of Education. Under the new reorganized education system, the State Board of Education is a citizen board of seven members, all residents of Florida, appointed by the Governor to staggered four-year terms and subject to confirmation by the Senate. See FLA. STAT. § 1001.01 (2003). Therefore, although the term used is identical in the prior and current statutes, it refers to a different group of officials. At the time the Florida Statutes were being re-written to reflect

Upon approval, the board of trustees may proceed to condemn the property pursuant to either chapter 73 or chapter 74<sup>174</sup> of the Florida Statutes, whichever is determined by the board to be more appropriate to the particular situation.

Under both chapter 73 and 74,<sup>175</sup> “the condemning authority must attempt to negotiate in good faith with the fee owner of the parcel to be acquired.”<sup>176</sup> This requirement<sup>177</sup> appears to be analogous to that provision already binding upon state universities and community colleges set forth in section 1013.25.<sup>178</sup> The petition of the condemning authority must set forth “the use for which the property is to be acquired, and that the property is necessary for that use.”<sup>179</sup>

The Supreme Court has held that the taking must be for public use or rationally related to a conceivable public purpose.<sup>180</sup> The requirement of necessity for a public purpose has been met in a variety of circumstances. Of particular importance, the acquisition of land for public universities and

the Florida Education Reorganization Act, the author served on an ad hoc committee composed of counsels and governmental affairs representatives of a number of state universities and community colleges. The purpose of the committee was to propose statutory language and, where possible, agree on language that promoted consistency between universities and community colleges. The author recommended, and the committee proposed, statutory language eliminating the need for State approval and thus allowing the local boards of trustees of universities and community colleges to make the decision as to whether or not eminent domain proceedings were necessary and appropriate. The rationale for this recommendation was that one of the underlying principles for the reorganization of the educational system was to devolve decision-making authority to the local level. Under the proposed language even though the local boards would have the authority to make the decision to initiate eminent domain proceedings, their actions and the proceedings themselves would continue to be limited by the statutory requirements and the judicial case law precedents governing and limiting the exercise of the power of eminent domain. However, the language adopted by the Legislature continued to require the approval of the State Board of Education.

<sup>174</sup> Compare FLA. STAT. ch. 73 (2003) (setting forth the regular, or slow-take process of eminent domain as possession must wait 20 days post judgment), with FLA. STAT. ch. 74 (2003) (setting forth the quick-take process where possession may be taken prior to judgment).

<sup>175</sup> FLA. STAT. ch. 73-74 (2003).

<sup>176</sup> FLA. STAT. § 73.015(1) (2003).

<sup>177</sup> See *id.* This statute was part of the substantial amendments to the law of eminent domain, which passed in 1999 and became effective on July 1, 2000. It obligated all condemning authorities to engage in pre-suit negotiations. See FLA. STAT. §§ 240.319(4)(d), 240.217 (2001). Prior versions had already imposed that obligation on community colleges and state universities.

<sup>178</sup> FLA. STAT. § 1013.25 (2003).

<sup>179</sup> FLA. STAT. § 73.021(1) (2003). The same requirement applies under the quick take process of chapter 74. See FLA. STAT. § 74.031 (2003).

<sup>180</sup> “[W]here the exercise of the eminent domain power is rationally related to a conceivable public purpose, the Court has never held a compensated taking to be proscribed by the Public Use Clause.” *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 241 (1984). For a discussion of the public use clause, see generally DAVID A. DANA & THOMAS W. MERRILL, PROPERTY TAKINGS 191 (2002).

colleges, provided those institutions are open to all residents of the state, has been held to constitute necessity to support eminent domain proceedings.<sup>181</sup>

The objective of using eminent domain proceedings, like all other means of acquiring sites for educational facilities, is to accomplish a timely acquisition at a price that makes the most cost-effective use of the taxpayers' money under the existing circumstances. Thus, the difference between slow-take and quick-take proceedings becomes important. If the institution proceeds under the slow-take process,<sup>182</sup> the institution as the condemning authority need not consummate the taking if it decides that the compensation determined by the jury is too high. This option is not available in quick-take proceedings.<sup>183</sup> More specifically, the compensation is based on the time that the taking occurs. This time is different under the two processes. Under the slow-take process, the jury determines the compensation to be paid<sup>184</sup> and the interest in the property does not vest in the condemning authority until the amount of the judgment is deposited with the court.<sup>185</sup> Therefore, if the amount of compensation to be paid as determined by the jury is in excess of what the board of trustees of a community college or state university considers appropriate, the board of trustees, as the condemning authority, need not consummate the taking. If, however, because of delays in the prior parts of the land acquisition process,<sup>186</sup> or as a result of other circumstances, a board of trustees finds itself in a position that it absolutely must obtain title to the particular parcel immediately, regardless of the cost,<sup>187</sup> the board of trustees has no alternative but to proceed under the quick-take procedures of chapter 74. Under this process, because the condemning authority takes possession and title in advance of the entry of final judgment,<sup>188</sup> it is obligated<sup>189</sup> to pay the amount of compensation determined by the jury even if the amount so determined is in excess of what the board of trustees would otherwise be willing to pay.

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<sup>181</sup> See generally ROHAN & RESKIN, NICHOLS ON EMINENT DOMAIN § 7.06(33)(C) (3d ed. 2003).

<sup>182</sup> See FLA. STAT. ch. 73 (2003).

<sup>183</sup> See FLA. STAT. ch. 74 (2003).

<sup>184</sup> See FLA. STAT. § 73.101 (2003).

<sup>185</sup> See FLA. STAT. § 73.111 (2003). If the amount of the judgment is not deposited into the registry of the court within twenty days after rendition of the judgment, the proceeding is null and void. This section also states that the twenty 20 day period can be extended for a period not to exceed sixty (60) days upon a showing of good cause.

<sup>186</sup> Such delays might result because of the PECO process or obtaining Legislative approval.

<sup>187</sup> For example, if construction is about to begin and the parcel to be acquired lies within the footprint of the building, the board of trustees has little choice.

<sup>188</sup> See FLA. STAT. § 74.011 (2003).

<sup>189</sup> Appeal is allowed, in which event the appellate standards of review would govern. See FLA. STAT. § 74.091 (2003) (describing timely appeal).



Obviously, unwelcome eminent domain proceedings<sup>190</sup> are likely to produce bad feelings toward the institution by the particular property owner, and possibly adverse publicity and political reaction as well. Thus, it is a process that a board of trustees should undertake only after careful consideration.

The author recommends that boards of trustees steer clear of quick-take eminent domain proceedings whenever possible, because such proceedings have the potential for adverse financial consequences that would be unavoidable at that point in time.<sup>191</sup> It is the author's recommendation that eminent domain proceedings be initiated at the time real property is needed to provide sites for prudent future expansion. This, however, should occur before a land crisis develops that could force the board of trustees into situation where price is irrelevant and the board is compelled to buy at any price because of impending construction or some similar crisis. Under the slow-take method of eminent domain, the board of trustees has greater flexibility and it can be more protective of the taxpayers' money because the board is not proceeding under duress.

Instances may exist in which an institution has a critical need for land or facilities that is not a long-term need for the foreseeable future, but is rather a need that will end at a point in time that is determinable in advance. Under such circumstances, the author suggests that the boards of trustees seek advice as to whether the taking of a term of years<sup>192</sup> rather than a taking of the fee simple interest in the property, might be an appropriate course of action.<sup>193</sup> The taking of a lesser interest in a properly structured taking might be more cost-conscious.

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<sup>190</sup> Friendly eminent domain proceedings are also a possibility; such proceedings would not generate the adverse consequences described in this paragraph.

<sup>191</sup> Obviously, there may be other strategic reasons for choosing the quick-take process such as dramatically rising prices in the vicinity. Under such circumstances, the quick-take process might be preferable because the value to be determined by the jury is the value as of the date of taking. In a real estate market in which prices are rapidly spiraling upward, the moment of taking occurs earlier in time in a quick-take proceeding and therefore might theoretically result in a lower monetary judgment.

<sup>192</sup> A leasehold interest.

<sup>193</sup> This approach conceived by the author in approximately 1998 or 1999 was discussed in collaboration with Fleta A. Stamen, Assistant College Counsel for Miami-Dade Community College (now Miami-Dade College), and Anthony R. Parrish, Jr., real estate consultant for Miami-Dade Community College (now Miami-Dade College). It was referred to Gary Brooks, Esq. of Miami, Florida, for further analysis and implementation. Miami-Dade Community College (now Miami-Dade College) resolved the matter without a taking in that instance. Before proceeding with this course of action, the author cautions that the approach and its legal ramifications may require further study. For a discussion of temporary takings, see DAVID A. DANA & THOMAS W. MERRILL, *PROPERTY TAKINGS* (2002).

The State Board of Education is a high-level policy maker and the chief implementing and coordinating body of public education in Florida.<sup>194</sup> There are a number of ways in which the State Board of Education may advance the interests of public education and safeguard the States' resources as it fulfills its discretionary duties for initiating eminent domain proceedings under section 1013.25.<sup>195</sup> Specifically, these suggestions ensure that local boards of trustees will have the time and flexibility needed to proceed with eminent domain proceedings that have the desired level of fiscal caution. First, in considering whether the requesting community college or state university has demonstrated necessity for a public purpose, the author recommends that the State Board of Education utilize standards similar to those used by the courts. In particular, it is urged that the State Board of Education recognize the need to prudently provide for future growth as constituting appropriate necessity for public purpose. It is also recommended that the State Board of Education give considerable deference to the local board of trustees' decision that a satisfactory agreement cannot be reached through further negotiations. In so doing, the State Board of Education should also be guided by the precedents that will govern the court's determination that the condemning authority has negotiated in good faith with the property owner.<sup>196</sup> Of course, the institution's board of trustees has the concomitant obligation and responsibility to negotiate vigorously, and in good faith, and with repeated efforts appropriate to the circumstances, before seeking the State Board of Education's approval of eminent domain proceedings.<sup>197</sup> If the board of trustees makes strong, concerted effort to reach a satisfactory agreement for sale before requesting authority to proceed in eminent domain, and if the State Board of Education gives deference to the board of trustees' determination that further efforts to reach an agreement will be fruitless,<sup>198</sup> then the ultimate objective of timely acquisitions at an appropriate price can be achieved.

While fulfilling their respective obligations, both the local and state officials must recognize the potential for politicization, delay, and drastic shifts in bargaining power that can occur in the process of requesting State Board of Education approval under section 1013.25.<sup>199</sup> If approval is not

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<sup>194</sup> See FLA. STAT. § 1001.02(1) (2003).

<sup>195</sup> See FLA. STAT. § 1013.25 (2003).

<sup>196</sup> See FLA. STAT. § 73.015(1) (2003).

<sup>197</sup> See *District Board of Trustees of Daytona Beach Community College v. Allen*, 428 So.2d 704 (Fla. 5th DCA 1983) (holding that a board of trustees, in not attempting to negotiate or enter in into an agreement with the owners of a parcel of land, failed to comply with a statutory condition precedent necessary to acquire the property under the right of eminent domain).

<sup>198</sup> The court will also consider the standards of good faith.

<sup>199</sup> See FLA. STAT. § 1013.25 (2003).

obtained, then the institution may not be able to proceed with the necessary expansion of its campus, despite the existence of necessity for public purpose that would meet the judicial standards applicable to other governmental entities. Or, in the alternative, the institution will be forced to pay an outrageous price for the parcel that will unnecessarily deplete public funds available for education and concurrently drive up the market value of land in proximity to the campus and affect all future attempted acquisitions by inflating the appraised values of properties in the vicinity.<sup>200</sup>

Local boards of trustees and the State Board of Education should also recognize that a finding that the board of trustees needs to negotiate further with the property owner can drastically impact the negotiating positions of the prospective buyer and seller. An instruction to return to the negotiating table can potentially raise the specter for both buyer and seller that the State Board of Education may refuse to approve of the eminent domain proceedings. A belief that eminent domain proceedings will not be approved may encourage the seller to demand an excessive price and lead the institutional buyer to believe that it must accede to the seller's unreasonable demands in order to meet its expansion needs. Of course, such a sale also has the effect of raising market values in the vicinity of the campus, and thus increasing the prices that the institution will have to pay for subsequent acquisitions.<sup>201</sup>

In summary, the author recommends that local boards of trustees make strong, concerted good faith efforts to reach a mutually satisfactory agreement for sale before requesting authority to proceed in eminent domain. The local boards of trustees should take into account the costs of eminent domain proceedings that it will have to bear and, where appropriate, make appropriately timed and conditioned attempts to reach a negotiated settlement in lieu of condemnation.<sup>202</sup> The author also recommends that further study be undertaken as to the ramifications and advisability of taking a leasehold interest rather than a fee simple interest in land. It is recommended that the State Board of Education give considerable deference to the board of trustee's determination that a satisfactory agreement cannot be obtained, and that the State Board of Education, in determining whether to grant approval, utilize standards no more onerous than those that would be applied by the court.

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<sup>200</sup> See FLA. STAT. § 1013.14 (2003).

<sup>201</sup> *Id.*

<sup>202</sup> Under the 1999 amendments to Florida's eminent domain statutes, public bodies with the power of eminent domain must engage in pre-suit negotiation. This practice encourages pre-suit settlement as well as decreases litigation costs. See FLA. STAT. ch. 73 (2003); Paul D. Bain, 1999 *Amendments to Florida's Eminent Domain Statutes*, 73 FLA. B.J. 68 (1999).

d. *Interim Financing Mechanisms While Awaiting PECO Reimbursement*

Permitting institutions to borrow funds on an unsecured basis for a period longer than the current fiscal year while awaiting PECO reimbursement, and encouraging the use of interim funding mechanisms for later PECO reimbursement, are two recommendations that should be examined together. These two concepts are jointly examined because the first idea of unsecured loans with a term beyond the current fiscal year, is simply one specific expression of the latter idea, which is a more general idea of encouraging the use of interim funding mechanisms pending later PECO reimbursement. The potential problems inherent in both ideas are similar and both ideas require a great deal of further evaluation by all interested parties before the author could consider recommending them for widespread adoption. Nevertheless, the author believes both possibilities merit further study.

As previously mentioned in Part II.B.4, section 1011.31<sup>203</sup> permits a community college to borrow on an unsecured basis, but only under very limited circumstances.<sup>204</sup> The section allows a community college to borrow only if the board of trustees first obtains the approval of the Commissioner of Education<sup>205</sup> and the loan is repaid within the current fiscal year. The Commissioner of Education is to approve the request when the expenditures, for which the loan is requested, are within the community college's approved budget, and when, in the Commissioner's opinion, the board of trustee's proposal "is reasonable and just, the expenditure is necessary, and revenues sufficient to meet the requirements of the loan can reasonably be anticipated."<sup>206</sup>

While such a loan might be especially helpful under very narrow circumstances, the statute does not lend itself to providing benefits beyond the very short term. For example, the loan might be extremely helpful if PECO funds for the current year have been appropriated for a particular project, but have not been received at the time required to meet the actual cash flow needs of the project. If the full amount of the funds needed for the

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<sup>203</sup> FLA. STAT. § 1011.31 (2003).

<sup>204</sup> No corresponding authority for borrowing has been located for state universities.

<sup>205</sup> Miami-Dade College, under the leadership of President Eduardo Padron was the first, or among the first, of Florida's community colleges to utilize this mechanism. Early versions of the statute required the approval of the Governor. See FLA. STAT. § 287.064, *amended by* 2003 Fla. Sess. Law Serv. 261 (West); 2003 Fla Sess Law Serv. 399 (West). In the opinion of the author, the current version, which requires approval by the Commissioner of Education, places the approval at a more appropriate level.

<sup>206</sup> FLA. STAT. ANN. § 1011.31(2)(2003).

project have not been appropriated during the current fiscal year and, in fact, have not yet been appropriated, then the problem becomes more complicated and risky.<sup>207</sup> At present, neither community colleges nor universities have authority to borrow by means of unsecured loans for a period longer than the current fiscal year. This approach is used in private real estate transactions and might seem to be an equally useful means to assist Florida's community colleges and universities with acquisitions of land. However, because of the possibility that funds may not be appropriated in subsequent years, the issues are the same as those with respect to current-year short-term loans when PECO funds for repayment have not been appropriated.<sup>208</sup>

Lease-purchase arrangements can be categorized as interim financing mechanisms. While state universities and community colleges can each acquire real property by lease-purchase,<sup>209</sup> the provisions of section 1001.64(36)<sup>210</sup> that govern community colleges are somewhat more limited and are emphasized here. Lease-purchase agreements for the acquisition of real property by community colleges exclude dormitories by statute.<sup>211</sup> Subsection 1001.64(36)<sup>212</sup> specifies that lease-purchase arrangements with private parties shall be paid from capital outlay and debt service funds pursuant to section 1011.84(2).<sup>213</sup> Although the statutorily required use of capital outlay and debt service funds provides a reasonably anticipated source of funds for lease-purchase payments, it also presents a limitation. It would be appropriate to consider expanding the possible sources of dedicated funds in order to service bonds.

Real property also has been acquired by a community college from its direct support organization,<sup>214</sup> through use of a lease-purchase agreement while the institution awaits future PECO funds. The lease for this particular agreement must be subject to annual appropriations and thus must be cancelable by the institution on an annual basis. These arrangements can be used in situations in which the institution is quite comfortable that PECO funds will be appropriated in future years.<sup>215</sup>

<sup>207</sup> Funds might not be appropriated for the following fiscal year. See *supra* notes 102-04 and accompanying text.

<sup>208</sup> See *id.*

<sup>209</sup> See FLA. STAT. §§ 1001.64(36), 1001(37), 1001.74(5), 1001.74(32) (2003) (for community colleges and state universities respectively).

<sup>210</sup> FLA. STAT. § 1001.64(36)(2003).

<sup>211</sup> See FLA. STAT. §§ 1001.64(36), 1001.64(37)(2003).

<sup>212</sup> FLA. STAT. § 1001.64(36) (2003).

<sup>213</sup> See FLA. STAT. § 1011.84(2) (2003). For a discussion of capital outlay and debt service funds, see *supra* notes 133-137 and accompanying text.

<sup>214</sup> For a description of direct support organizations, see *supra* note 113.

<sup>215</sup> These arrangements were developed by Lester Brookner, former Vice President for Business

Among the benefits of using loans or other interim methods of financing while awaiting PECO funds is that boards of trustees can acquire real property when financially advantageous acquisitions can be accomplished and use the loans, lease-purchase arrangement, or other interim financing to meet the cash flow needs of the project while PECO funds are awaited.

The fundamental problem with the expanded use of unsecured loans and other interim financing mechanisms, such as lease-purchase agreements with the institution's foundation, is that approval of PECO funding in subsequent years, even for projects that are underway with current year's PECO funding, is not assured.<sup>216</sup> Thus, the institution that incurs debt in anticipation of future PECO funding can find itself with a debt, but no PECO funds with which to repay that debt. In such event an institution could use its other reserve funds; however, such an occurrence could place an institution in financial jeopardy. With respect to a lease-purchase with a foundation, the institution could cancel. There are obvious adverse financial repercussions to this course of action.

If institutions were allowed to borrow on an unsecured basis or use other interim financing techniques for a period beyond the current year, some additional issues quite similar to the previously described PECO issue arise. First, if such a statutory provision were proposed or enacted, would the statute violate the constitutional requirement that the state have a balanced budget at the end of each fiscal year?<sup>217</sup> Or, would the unpaid debt at the end of the fiscal year merely be treated as other costs, such as salaries for pay periods that extend beyond the close of the fiscal year, or liability for vacation leave accrued but unused by employees at the end of the fiscal year? Finally, loans and other financing techniques are essentially means of spending money that one does not yet have. Just as consumers can become overburdened with too much debt, couldn't the same thing happen to a community college or university because of excessive borrowing? This is especially true in difficult economic times when state funds are scarce but more members of the public decide to pursue an education rather than seek employment. On the other hand, boards of trustees are comprised of highly responsible individuals. Boards of trustees are charged with the statutory obligation to properly govern the institution.<sup>218</sup> Are not boards of trustees

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Affairs, Miami-Dade Community College (now Miami-Dade College) together with Robert Gang, Greenburg Traurig et al., Miami, Florida, and are sometimes referred to as "Brookner Bonds."

<sup>216</sup> See *supra* Part II.B.

<sup>217</sup> See FLA. CONST. art. VII, § 1(d).

<sup>218</sup> With respect to community colleges: "boards of trustees shall be responsible for cost-effective policy decisions appropriate to the community college's mission." FLA. STAT. § 1001.64(1) (2003); "[c]ach board of trustees is vested with responsibility to govern its respective community college and

the appropriate body to make these critical fiscal decisions as to debt? Certainly, the constitutional prohibition on mortgaging and requiring a balanced budget suggest a strong public policy against excess public indebtedness. What happens if an institution bankrupts itself? Is the control of indebtedness better left with the State and the Legislature by statutes that greatly restrict borrowing? These are issues that require further study and involve fundamental policy decisions at the state level.

e. *Utilizing and Enhancing the Matching Grant Program*

Florida Statutes section 240.383, first enacted in 1997,<sup>219</sup> now appearing as section 1011.32,<sup>220</sup> was a laudable measure by the Florida Legislature to respond to the problem that “community colleges do not have sufficient physical facilities to meet the current demands of their instructional and community programs.”<sup>221</sup> This measure was patterned after the similar program for state universities, which was first adopted in 1988.<sup>222</sup> Both programs combine encouragement of, and reward to, institutions for their fundraising efforts by establishing a matching program that provides state funds to match private donations. The challenge grant programs do not directly address the problem of acquiring land in advance of immediate need to provide prudently for long-term future expansion. They do, however, provide an additional means of addressing immediate problems.<sup>223</sup> Thus, they also indirectly assist with long-range land issues.

Under this program, the direct-support organization of the community college,<sup>224</sup> or the foundation of the university,<sup>225</sup> is to undertake efforts to

with such necessary authority as is needed for the proper operation and improvement thereof.” FLA. STAT. § 1001.64(2) (2003). A similar statute exists for Boards of Trustees for Florida’s public universities. See FLA. STAT. § 1001.74 (2003).

<sup>219</sup> Laws 1997, c 97-210 § 1, more recently codified as FLA. STAT. § 240.383 (2001) (repealed Jan. 7, 2003 when the Florida K-20 Education Code became effective).

<sup>220</sup> FLA. STAT. § 1011.32 (2003).

<sup>221</sup> FLA. STAT. § 1011.32(1) (2003).

<sup>222</sup> See Laws 1988, c. 88-241, § 2, more recently codified as FLA. STAT. § 240.2601 (2001) (repealed Jan. 7, 2003). The statute is presently codified as FLA. STAT. § 1013.79 (2003).

<sup>223</sup> The community college program is aimed at “assisting the community colleges in building high priority instructional and community-related capital facilities.” FLA. STAT. § 1011.32(2) (2002). The university program is directed toward “assisting universities build high priority instructional and research-related capital facilities.” FLA. STAT. § 1013.79(2) (2002). The Legislature approaches the problem by “establish[ing] a program” for community colleges (FLA. STAT. § 1011.32(1)(2003)), while “establish[ing] a trust fund” for universities (FLA. STAT. § 1013.79(1) (2003)).

<sup>224</sup> See FLA. STAT. § 1004.70 (2003).

<sup>225</sup> See FLA. STAT. § 1004.28 (2003).

raise private contributions<sup>226</sup> for the development of high priority capital facilities,<sup>227</sup> by providing funds equal to one-half of the total cost of the project.<sup>228</sup> Once such funds are raised and received,<sup>229</sup> the institution is eligible to receive state appropriations equal to the amount of private funds raised for the project,<sup>230</sup> subject to the General Appropriations Act,<sup>231</sup> and the further requirements of section 1011.32<sup>232</sup> or section 1013.79,<sup>233</sup> respectively. In addition to the raising, receipt, and certification of the funds for the project, in order to be eligible for the community college program the project must also be recommended by the Survey,<sup>234</sup> included in the institution's CIP,<sup>235</sup> and approved by the State Board of Education.<sup>236</sup> A state

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<sup>226</sup> With respect to community colleges, "private sources of funds . . . [exclude] any federal or state government funds that a community college may receive." FLA. STAT. § 1011.32(2) (2002). For universities "private sources of funds shall not include any federal, state or local government funds that a university may receive." FLA. STAT. § 1013.79(2) (2002) (emphasis added).

<sup>227</sup> For community colleges, such facilities must be "high priority instructional and community-related capital facilities, including common areas connecting such facilities." FLA. STAT. § 1011.32(4) (2003). For universities, such facilities must be "high priority instructional and research-related capital facilities, including common areas connecting such facilities." FLA. STAT. § 1013.79(2) (2003). The author believes that the different wording relates to the differing missions and responsibilities of universities versus community colleges. Universities focus on baccalaureate and graduate-level instruction, and to varying degrees, research. The community college mission and responsibilities focus on, *inter alia*, post-secondary academic education, technical degree education for vocations requiring less than a baccalaureate degree such as associate in science degrees or certificates, retraining to supplement skills and knowledge, responding to employers' needs in new areas of technology, community enhancement including cultural activities, and economic development within the region with emphasis on workforce development. See FLA. STAT. § 1004.65 (2002).

<sup>228</sup> See FLA. STAT. §§ 1011.32(6), 1013.79(5) (2003) (for community colleges and state universities, respectively).

<sup>229</sup> For community colleges the funds must be received and deposited in a separate capital facilities matching account with the community college's direct-support organization and certified by the direct-support organization and the community college. This certification process, referred to in Section 1011.32(4), involves a certification by the community college president that the funds have been received and are on deposit with the community college's direct-support organization. See Florida Community College System Memorandum 03-04 from J. David Armstrong, Jr. to Community College Presidents (Jan. 6, 2003) (available from the Division of Community Colleges). For state universities the funds must be received and deposited in the state's trust fund. See FLA. STAT. § 1013.79(4) (2002).

<sup>230</sup> A community college can also apply to the project and include in its certification unrestricted funds received by and on deposit with the direct-support organization. See FLA. STAT. § 1011.32(4) (2003).

<sup>231</sup> FLA. STAT. §§ 1011.32(6), 1013.79 (2003) (for community colleges and state universities, respectively).

<sup>232</sup> FLA. STAT. § 1011.32 (2003) (for community colleges).

<sup>233</sup> FLA. STAT. § 1013.79 (2003) (for state universities).

<sup>234</sup> See *supra* Part II.B.1.

<sup>235</sup> See *id.*

<sup>236</sup> See FLA. STAT. § 1011.32(9) (2003).



university's project must be included in the university's CIP and must receive the prior approval of the State Board of Education and the Legislature.<sup>237</sup> If a project, which becomes eligible for either the community college or university facility enhancement challenge grant program is also included on the institution's three-year PECO priority list,<sup>238</sup> matching grant eligibility does not serve to remove the project from the institution's PECO list.<sup>239</sup>

The availability of state matching funds is not automatic upon a community college's or a university's success in its fundraising efforts. This is because one Legislature cannot bind another,<sup>240</sup> and accordingly, the statutory language provides that matching funds under the program are subject to the General Appropriations Act.<sup>241</sup> A more accurate characterization of the program is that upon raising and receiving one-half of the total cost of a high priority facility from private sources and meeting the other statutory requirements of the program, a community college or university becomes eligible to receive money that is subsequently appropriated by the Legislature under the matching grant program. The institution may receive state funds up to the amount of private money that was raised and received, or placed in the state's trust account,<sup>242</sup> by the institution.

A number of community colleges and state universities have taken advantage of the programs, and a number of projects have received matching appropriations over the years.<sup>243</sup> Although the statutory language is directed toward building or purchasing capital facilities, rather than acquiring land, the phrase of "including common areas connecting such facilities"<sup>244</sup> appears in the statutory language, and the program has been used to acquire sites<sup>245</sup> for such facilities when necessary.

Both the Community College Facility Enhancement Challenge Grant Program and the University Facility Enhancement Challenge Grant

<sup>237</sup> See FLA. STAT. § 1013.79 (8) (2003).

<sup>238</sup> See FLA. STAT. § 1013.64(4)(a) (2003).

<sup>239</sup> See FLA. STAT. §§ 1011.32(10), 1013.79(9) (2003) (for community colleges and state universities, respectively).

<sup>240</sup> See *Neu v. Miami Herald Publ'g Co.*, 462 So.2d 821, 824 (Fla. 1985).

<sup>241</sup> FLA. STAT. § 1011.32(6) (2003).

<sup>242</sup> "Received by" a community college. Funds for a state university are to be received and placed in the state trust fund account. See *supra* note 229.

<sup>243</sup> For example, approximately \$48 million in dollar for dollar matching funds has been provided by the State of Florida for community college matching grants since fiscal year 1997-98. See Telephone Interview with Ron Fahs, Director of Facilities Planning and Budgeting for the Division of Community Colleges, Department of Education, State of Florida (Aug. 27, 2003).

<sup>244</sup> FLA. STAT. § 1011.32(2) (2003).

<sup>245</sup> See FLA. STAT. § 1013.01(20) (2003) (defining "site").

Program<sup>246</sup> are excellent programs to augment, but should not replace, the traditional means by which community colleges and state universities obtain facilities.<sup>247</sup> The matching grant programs can and should be used in their present statutory forms to provide for needed community college and university facilities. The author is particularly enthusiastic about the potential of the community college matching grant program to create a culture of philanthropy toward community colleges. Expanded publicity about the program, together with the use and full funding of projects under the program could benefit community colleges and the state of Florida in three ways. First, community colleges could acquire and put into service facilities that are badly needed in order to fulfill the community college's mission to its present and future students. Second, the State would realize the benefit of acquiring needed facilities for the community college system at half<sup>248</sup> the cost as would be otherwise incurred for such facilities. Third, the program encourages fundraising efforts by, and philanthropy toward, community colleges.<sup>249</sup>

The author believes<sup>250</sup> that individuals tend to make contributions to the institutions from which they received their baccalaureate or graduate degrees more readily than the institution from which they received an associate's degree. In the author's opinion this situation needs to be rectified. The genuine availability of matching funds from the State can give community colleges an incentive for fundraising activities. The publicity associated with such a fundraising drive might serve two objectives. First, it may enhance the image of the community college within the community by raising awareness of the important role played by the institution in the life of the community. Second, it may raise the overall awareness of citizens that community colleges are worthy recipients of their charitable contributions. This, in turn, will help to create a culture of philanthropy toward the local community college that could energize further fundraising efforts. Moreover, the presence of one or more facilities on campus recognized as being built with private donations can act as an ever-present catalyst for further philanthropy.

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<sup>246</sup> FLA. STAT. §§ 1011.32, 1013.79 (2003) (addressing community colleges and universities, respectively).

<sup>247</sup> For community colleges, the traditional means is that the State provides 100 percent of the cost of the site and facility. Although the state is obligated to provide necessary facilities, the state universities sometimes receive private funds for the construction, maintenance, and operation of educational facilities.

<sup>248</sup> This assumes full dollar for dollar matching funding by the State.

<sup>249</sup> State universities would derive the same three benefits.

<sup>250</sup> This is based only upon empirical observation and without knowledge of any supporting studies.

It is also the author's opinion that the more that the Legislature provides appropriations to support these excellent matching grant programs it created, the more likely it will be that the programs can fully realize their potential. Although the statutes provide a mechanism for returning donors' contributions if a project does not receive sufficient state funds,<sup>251</sup> such an outcome would greatly hamper an institution's future fundraising efforts and destroy the momentum generated by the present fundraising drive.<sup>252</sup>

Obviously, reduced state revenues during difficult economic times can make it difficult for the Legislature to locate and acquire funds for necessary appropriations. The author, nevertheless, would encourage the Legislature to give as much priority as possible to these programs. In particular, the Legislature should use the program to encourage community colleges to use it as a catalyst for the institution's fundraising activities and for public relations efforts in the community.

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<sup>251</sup> FLA. STAT. § 1011.32(7) (2003) states, "If the state's share of the required match is insufficient to meet the requirements of subsection (6) [the subsection that states that the contributions raised by the direct-support organization will be matched by a state appropriation equal to the amount raised - subject to the General Appropriations Act], the community college shall renegotiate the terms of the contribution with the donors. If the project is terminated, each private donation, plus accrued interest, reverts to the direct-support organization for remittance to the donor." The state university provision is almost identical. See FLA. STAT. § 1013.79(6) (2003).

<sup>252</sup> Obviously, a community college or state university could, and perhaps should, prior to accepting the contributions, negotiate terms so that the contributions could be retained by the community college's direct-support organization (or the state trust fund with respect to universities) until the project, or one similar to it, is approved and provided with sufficient matching funds by the State (or until sufficient private funds are raised via additional private contributions that would allow completion of the project). This would create greater flexibility, and could avert what otherwise might result in considerable adverse publicity. However, it would not eliminate the damage to the momentum of the current fund-raising effort, or the potential damage to future efforts.

The author believes that the damage and loss of momentum would be more severe for community colleges than for state universities because community colleges have less of a history of philanthropic support; donors might conclude that their efforts to support the community college are to little avail. Moreover, although the text focused on generating a culture of philanthropy among alumni of the community colleges, contributions from businesses and civic groups may be even more important to the institution than individual contributions; business or civic organization contributions might be larger than the contributions of individuals. It is the author's opinion that when a civic group or a business enterprise, makes a contribution, it wants to see prompt results that will reflect benefit to the donor. While the anticipated benefit (for example, goodwill in the community, better facilities for the training of prospective employees, enlarging the size of the well-trained workforce, enhancement of educational opportunities or the general economy in the community) might vary between specific civic or business donors, it is the author's opinion that all want prompt, visible results. A stalled initiative due to the unavailability of State appropriations, could hamper the outcome.

f. *Distributing Lump Sum Block Grants to Institutions*

The idea of making lump sum distributions of PECO or other state funds to institutions for their use at the institution's discretion for capital facilities projects, including the purchase of land, is an idea that merits further study.<sup>253</sup> Although vastly different from the current process, the use of lump sum distributions has the possibility of increasing institutional flexibility, eliminating unnecessary delay, reducing bureaucracy, and furthering the purposes of the new K-20 reorganization of education in Florida.

First, the idea of increasing local boards of trustees' discretion and decision-making authority comports with at least one of the Legislature's policies underlying the new Florida K-20 Education Code,<sup>254</sup> which is "[t]o provide for the decentralization of authority to the . . . community colleges [and] universities . . . that deliver educational services to the public."<sup>255</sup> Moreover, one of "[t]he guiding principles for Florida's K-20 education system[,] "<sup>256</sup> is to create "[a] system that provides for local operational flexibility while promoting accountability for student achievement and improvement."<sup>257</sup> This purpose is also reflected in the statute, which states that the function, mission, and goals of the Florida K-20 system "shall be a decentralized system without excess layers of bureaucracy."<sup>258</sup>

The idea of making lump sum distributions to be utilized for capital projects at the discretion of the local boards of trustees increases an institution's flexibility to re-arrange priorities, meet changing needs, and take advantage of opportunities. With funds on hand, interim financing mechanisms become unnecessary. The institution's board of trustees would have the decision-making authority and the ability to utilize capital outlay funds in a timely manner best suited to the institution. For example, the board of trustees could authorize the construction of a particular building that is of the highest priority under existing economic and educational circumstances, or take advantage of an excellent opportunity to acquire land at the time it becomes available at an advantageous price in order to provide for cost-effective future expansion. Accordingly, lump sum distributions

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<sup>253</sup> As of the time of writing this article, Summer 2003, the author is not aware of anyone else ever proposing block grants for this purpose.

<sup>254</sup> See FLA. STAT. ch. 1000-1013 (2003).

<sup>255</sup> FLA. STAT. § 1000.02(1)(e) (2003).

<sup>256</sup> FLA. STAT. § 1000.02(2) (2003).

<sup>257</sup> FLA. STAT. § 1000.02(2)(e) (2003).

<sup>258</sup> FLA. STAT. § 1000.03(1) (2003).

similar to block grants could eliminate much of the delay inherent in the present system.

Block grants can make it possible to reduce both bureaucracy and the number of preliminary steps that must be completed by an institution before it can buy land or construct an educational facility.<sup>259</sup> One way to envision the lump sum distribution process is that every few years, on a rotating cycle, an institution would receive a lump sum of capital outlay funds that could be utilized to meet the needs of the institution as determined by the board of trustees. This approach could result in very timely, well-prioritized, and cost-effective efforts. If, on the other hand, an institution chose to spend its lump sum unwisely, it would not get more funds until funds again became available to that institution under the funding cycle. The repercussions of the poor decision-making would lie with the entity that made the poor decision.<sup>260</sup> Thus, both the benefits and the burdens of decision-making, as well as accountability, would rest squarely on the shoulders of the local officials. To better assure the likelihood of good decision-making, the author recommends that each institution establish a Land and Facilities Planning Committee with considerable authority to assure continuity in an institution's planning initiative.

As with many innovative ideas, the devil is in the details. As soon as one begins to conceptualize how the block grant idea would work in actual application, one quickly realizes that there are many policy issues and specific practical questions that must be addressed before a system of lump sum distributions could be implemented. Several of these considerations are highlighted below.

First, there is a strong likelihood that such a system will fail if the total state funding available for the capital outlay needs of community colleges and state universities is vastly insufficient.<sup>261</sup> If funds were distributed in block grant lump sums, but few, if any, of the lump sums were sufficient to complete projects, a situation worse than the present situation could arise. Every institution would receive a small amount every few years, but few institutions would ever have enough money to accomplish anything. Therefore, at least minimally adequate funding must exist for the idea to succeed.<sup>262</sup>

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<sup>259</sup> See FLA. STAT. § 1013.01(6) (2003) (defining "educational facilities").

<sup>260</sup> Obviously, its students and the larger community would also suffer the consequences; however, this would comport with the notions of decentralization of authority and accountability for student achievement and improvement. See *supra* notes 254, 256 and accompanying text.

<sup>261</sup> See *supra* note 138.

<sup>262</sup> A less dramatic version of the idea of block grants suggested by the author for further study is the idea of instituting block grants simply for the acquisition of land, rather than for both the

Second, state revenues can vary from year to year. If lump sums are distributed in cyclical fashion with each institution receiving a lump sum once every several years, how is parity to be maintained? If an institution is scheduled to receive its lump sum in a low revenue year, how will this fact impact the institution's distribution as compared to the distribution of an institution that receives its distribution in a year of strong state revenues? The problem is compounded by the fact that one Legislature cannot bind another;<sup>263</sup> therefore, it is more difficult to make adjustments between years.<sup>264</sup>

Third, if one is to streamline the process to eliminate delay and unnecessary steps in the approval process, the issue becomes how much state control is really needed? This is a policy question of considerable magnitude and numerous implications. One must ask if Legislative approval of specific projects is necessary, or whether the Legislature could achieve effective fiscal oversight by simply approving the amount of money rather than projects.<sup>265</sup> If the Survey process was eliminated and the concept of Survey-recommended unmet need was discarded, how would the money be distributed in a fair and equitable manner? What method would be fair to both large and small institutions, and to institutions with growing enrollment, as well as to those institutions with steady or declining enrollment?<sup>266</sup>

Based on the foregoing analysis, it is essential to the success of the block grant distribution idea that there be at least minimal adequate funding available and that lump sum distributions be accomplished in a fair and equitable manner. One must determine, however, what is fair and equitable and whether it should be accomplished administratively through the Department of Education, politically through the taxpayer's elected representatives, or through a mathematical formula to be adopted as a statute. If the process were, in fact, streamlined to eliminate many of the

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acquisition of land and the construction of facilities. This idea has merit because the sums needed are smaller. Moreover, this more limited solution would still allow institutions the flexibility needed to take advantage of land acquisition opportunities before land speculation becomes such a costly problem.

<sup>263</sup> See *Neu v. Miami Herald Publ'g Co.*, 462 So.2d 821, 824 (Fla. 1985) (citations omitted).

<sup>264</sup> But for the problem that one legislature cannot bind another, perhaps, this problem could be resolved by an additional distribution in the first succeeding fiscal year in which additional revenues were generated.

<sup>265</sup> Perhaps other ways could be developed to ascertain, quantify and verify need that are less time- and labor-intensive. The author notes that, with respect to state universities, current law requires the time-consuming Survey, CIP and Legislative process only when state funds are involved. As boards of trustees of state universities develop a track record for prudent, cost-effective transactions involving funds that are not subject to the full state process, perhaps this history can suggest ways to streamline the current regulatory process governing state funds.

<sup>266</sup> One suggestion is to use a formula similar to instructional units used for CO & DS bond funds. See FLA. STAT. § 1010.58 (2003).

present steps, what about the employees who presently perform those steps? It is not the author's suggestion that these employees be laid-off. Rather, empirical evidence would indicate that many of these employees presently have more duties and a greater workload than they can handle. If the process were simplified, these employees would be better able to devote their working hours to other matters of more direct impact, thus resulting in greater overall efficiency.

In conclusion, the idea of lump sum distributions has some strong possibilities in its favor, but it also presents complicated policy and implementation issues. The author believes, however, that neither unanswered policy-level questions nor unanswered issues concerning implementation ought to deter further analysis. The idea merits further examination by all interested constituencies.

## 2. ANALYZING POSSIBILITIES FOR INCREASING FUNDS

### a. *Background; Legislative Plans*

The problems under the current system for land acquisition and capital construction needs of public higher education in Florida cannot be adequately resolved under either the present system or any of the ideas set forth in Part III.C.1., unless the total amount of funds for such purposes is significantly increased. As previously stated, the Survey-recommended unmet need of public institutions of higher education in Florida is staggering.<sup>267</sup> Despite the vigorous efforts and promises of the state government to increase funding for education, the land acquisition and capital outlay project category is one area in which the need continues to vastly exceed the present amount of available state resources. Thus, to address the problem, it is necessary to consider various ideas for both temporary and long-term measures in order to increase revenues. Ultimately, the State of Florida must provide additional funds for the land acquisition and capital needs of public higher education. Four ideas of interim or longer term measures are presented here for further analysis: 1) allowing institutions to implement a construction fee or to increase the amount of the present capital improvement fee;<sup>268</sup> 2) expanding the PECO base to generate more PECO funds;<sup>269</sup> 3) granting direct taxing authority to community colleges and state universities, or increasing the state sales tax to

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<sup>267</sup> See *supra* note 138.

<sup>268</sup> The capital improvement fee is a specific type of fee imposed by community colleges; universities have a corresponding term.

<sup>269</sup> See *supra* notes 95-105 and accompanying text.

provide increased funding; and, 4) use of local referendum tax initiatives. Some, if not all, of these ideas have been discussed, attempted, or utilized in some form or another by public institutions of higher education in Florida, or discussed in the Legislature.

By way of background, there are only eight sources of additional revenue for public higher education in Florida: (1) increasing the total amount of funds in the state budget that is devoted to higher education; (2) increasing the percentage of the cost borne directly by the student; (3) increasing the tax burden on all taxpayers of and visitors to the state; (4) amending or imposing excise taxes and user fees; (5) gifts; (6) state and federal grants; (7) entrepreneurial activity by or on behalf of the institution; and, (8) local taxes. Of course, each of these sources of additional revenue and the ideas that flow from them presents its own set of issues and problems. Institutional entrepreneurial activity, seeking state and federal grants and the generation of additional gifts to educational institutions are all outside the scope of this article and will not be discussed further because this article focuses on the state's means of generating funds. Obviously, however, each of these avenues<sup>270</sup> is a way of deriving additional funds for public higher education, including funds for land and buildings, and each is presently the subject of considerable effort by institutions.

It is necessary to consider the institutions' efforts to obtain the needed appropriations because the State of Florida bears the primary responsibility to provide the public funds required by public higher education, including the funding of higher education capital outlay needs. The effort to increase, as well as to preserve and protect the amount of the state's general revenues and budget that are devoted to public higher education, is a challenge that is faced annually<sup>271</sup> in the planning and political efforts that take place not only during the Legislative Session(s), but also prior to each session.

Each division of the Department of Education<sup>272</sup> develops a legislative plan for its respective constituency.<sup>273</sup> Institutional interests and efforts play a role in shaping the divisions' respective legislative plans.<sup>274</sup> In addition, each institution should, and most do, formulate an extensive legislative plan.

<sup>270</sup> Grants, gifts, and entrepreneurial activity.

<sup>271</sup> See *supra* notes 64-66 and accompanying text.

<sup>272</sup> The Division of Community Colleges with respect to community colleges and the Division of Colleges and Universities with respect to state universities.

<sup>273</sup> By way of its legislative budget request, consisting of an operating budget request and a capital outlay budget request.

<sup>274</sup> The Council of the Presidents of Florida's Community Colleges prepares an annual Legislative Plan to coordinate the efforts of the various community colleges. That Legislative Plan is then shared with the Division of Community Colleges.



It is important that the legislative plan of an institution be pro-active as well as reactive. Letter-writing campaigns when appropriations are in danger of being cut are important safeguards; however, the legislative plan of an institution should not begin or end there.<sup>275</sup> Institutions ought to continuously seek to inform legislators, the committees of both Houses of the Legislature, the general public, and the business community of the means by which the institution presently enhances, and could with the necessary appropriations further enhance, the education, employment, and economic vitality of its service areas.<sup>276</sup> The more that an institution can leverage its legislative plan, the more it can multiply the impact of its legislative efforts. For instance, by making industry aware of the benefits available to it through the educational institution, and by providing the specifics of the educational institution's legislative plan that could be advanced by industry's efforts, then the more likely it will be that industry's own legislative efforts will include advancement of portions of the educational institution's legislative plan.<sup>277</sup>

b. *Expanding the PECO Base to Generate More PECO Funds*

PECO funds were described in some detail in earlier portions of this article.<sup>278</sup> These funds are the primary source of funds for the acquisition of land and the construction and equipping of educational facilities in Florida. In recent years, new PECO funds have been in short supply.<sup>279</sup> Accordingly, it is very important to note that the phrase *while awaiting PECO funds* as used in a variety of places in this article, and particularly when used in the context of interim financing mechanisms,<sup>280</sup> can describe a *very long* wait. Thus, unless more PECO funds can be generated, or unless alternate sources of

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<sup>275</sup> See FLA. STAT. § 11.061 (2003) (addressing state, state university, and community college employee lobbyists; regulation; recording attendance; penalty; and exemptions).

<sup>276</sup> A community college primarily benefits the community college district which it serves; universities have more of a state-wide mission, but with greater impact on the geographic region in which a state university is located. Moreover, community colleges have a greater role in the workforce development and immediate economic growth of an area.

<sup>277</sup> Mason Jackson, recommends this course of action. See Interview with Mason Jackson, Executive Director of Workforce One of the Broward Workforce Development Board, in Ft. Lauderdale, FL (June 19, 2003).

<sup>278</sup> See *supra* Part II.B.1; Part II.B.4; notes 49-66, 95-102.

<sup>279</sup> There are a number of possible reasons for the reduction in new PECO funds: slower economic growth in the State in the sector of new development; lower yields on State investments; and, the criteria for the allocation of PECO funds among the three systems of public education, K-12, community colleges and state universities, because of the demand of the K-12 system. See Interview with Victoria Hernandez, Director of Governmental Affairs for Miami-Dade College in Miami, FL (June 19, 2003).

<sup>280</sup> See *supra* notes 138-39.

funds for land and capital construction projects can be generated, interim financing mechanisms for such initiatives can be fiscally dangerous. Nevertheless, there have been efforts to increase PECO funds by making more utility-type services subject to the excise tax that generates PECO funds. For example, there were efforts to subject cable television services to the tax. Unfortunately, these efforts were not successful.<sup>281</sup> Better education and adequate educational facilities could enhance the State's ability to draw business to Florida. However, increasing taxes can have the opposite effect, and accordingly, the imposition of user fees or excise taxes that place the tax burden only on certain business sectors should be carefully analyzed for their overall economic impact on the State of Florida. Nevertheless, the author highly recommends that the issue be revisited to examine the impact and feasibility of broadening the PECO base. Increasing the amount of PECO funds available for the capital outlay needs of public higher education, or providing other additional state revenues, is critical to the viability of the present system of meeting higher education's needs for land and facilities. It is also critical to the success of many of the suggestions for improving or replacing the present system discussed in this article.<sup>282</sup>

c. *Direct Taxing Authority; Increasing the State Sales Tax*

Both the grant of direct taxing authority to universities and community colleges<sup>283</sup> and the increase of state sales tax, specifically to support higher education, are two possibilities that could increase the funds available for the acquisition of real property by public institutions of higher education. Both solutions, particularly direct taxing authority, would constitute fundamental changes that would have a far-reaching impact beyond the situation being addressed. Aside from possibly requiring amendment to the Florida Constitution,<sup>284</sup> the granting of direct taxing power to community colleges and universities raises a number of questions that require exhaustive analysis; therefore, as stated in the introduction to Part III, this article's discussion of them is limited.

Specific mention of only a few of the questions involved is illustrative of the magnitude of the issues. If community colleges and universities were to have direct taxing powers, should their boards of trustees continue to be

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<sup>281</sup> During his years as Chairman of the Board of Miami-Dade Community College (now Miami-Dade College), Martin Fine was a major proponent of increasing the PECO base. The ideas expressed here were derived from his comments.

<sup>282</sup> For example, block grants.

<sup>283</sup> Florida's K-12 system has direct taxing authority pursuant to FLA. CONST. art. VII, § 9.

<sup>284</sup> Depending on the type of direct taxing authority sought.

appointed or should they be elected as are district school boards? How would they be elected—statewide or locally? While boards locally elected within the geographic confines of each community college district might be viable for community colleges, it would not make sense for state universities. Would publicly elected boards of trustees result in higher quality post-secondary, graduate and post-graduate education and enhance academic freedom? Would it produce better, more skilled trustees? Better institutions? How well has it worked in the K-12 system? Would trustees be paid and, if so, how much? Is it possible that if they were elected the focus of trustees might shift from enhancement of the higher education experience and the advancement of knowledge to re-election? How would that impact academic freedom and the exploration and expression of unpopular ideas by faculty and students? How would it impact the research being performed by research universities?

If the sales tax were increased specifically to support higher education, the question then becomes whether the sales tax funds would supplant the appropriation of general revenues? If so, the supposed solution could be self-defeating. If not, one must then ask how would it be ensured that general revenue funds would continue to be appropriated at the same levels as would occur without the sales tax. Moreover, how would the sales tax funds be allocated among institutions? What kind of precedent would be set by a special purpose statewide sales tax? How many special sales taxes could the economy support?

Obviously, both the granting of direct taxing authority to universities and community colleges, and increasing the state sales tax to support higher education involve fundamental policy changes. The granting of direct taxing authority could involve total restructuring of the financing of higher education in Florida. Although both are broad, rather than narrowly tailored solutions, the author believes that both merit further study.

d. *Implementation of a Land and Construction Fee or Increasing the Present Capital Improvement Fee*<sup>285</sup>

A straightforward idea for increasing funds available for the acquisition of land and for capital projects of state universities and community colleges is to impose an additional fee for such purpose, either by increasing an existing fee or establishing a new fee.

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<sup>285</sup>

Refers to present community college fee terminology.

A community college may not charge any fee except as specifically authorized by law or by the rules of the State Board of Education.<sup>286</sup> By enumerating the special fees that are authorized,<sup>287</sup> the provisions governing state universities have a similar effect. Moreover, community colleges also find themselves limited by the extent to which they can increase tuition and fees.<sup>288</sup> Thus, enabling legislation is needed before this idea could be implemented.

In considering the idea of imposing such fees, one must consider its economic impact on students.<sup>289</sup> Increasing the financial burden on students to the extent that state-supported higher education, career training, or re-training becomes unaffordable would be counter-productive. The total amount of such fees, both as a specific fee, and with respect to the total cost of one's education or training, must be modest in amount. A new fee or an increase in an existing fee of \$3 per semester credit for a sixty-credit Associate's degree would amount to a cumulative increase of \$180 (\$90 per year), for a full-time student taking fifteen credits per major term. A fee increase of \$5 per semester credit would increase the cost to a student of a sixty-credit Associate's degree by a total of \$300 (\$150 per year). For a four-year course of study at a state university leading to a 120-credit Baccalaureate degree, the additional cost to the student would be \$360 (\$90 per year) at the \$3 per semester credit level, and \$600 (\$150 per year) at the \$5 per credit level. For parity, a comparable increase would be imposed on non-credit courses. The author would not recommend rates higher than \$5 per semester credit due to the adverse impact on the cost of education to be borne by the student. In fact, before enabling legislation is adopted, the author would suggest that the Legislature utilize its mechanisms for performing studies to examine the financial impact of such fees. For an

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<sup>286</sup> See FLA. STAT. § 1009.23(12) (2003).

<sup>287</sup> See FLA. STAT. §§ 1009.24 (6)-(12) (2003) (authorizing collection of tuition and out-of-state fee for financial aid purposes, Capital Improvement Trust Fund fee of \$2.44 per credit hour per semester, building fee of \$2.32 per credit hour per semester, student health fee, athletic fee, and specified additional fees). Furthermore, an institution's board of trustees sets tuition and fees within proviso in the General Appropriations Act and law; although a state university may assess and increase *optional* fees, payment of such fees cannot be required as part of registration for courses. See FLA. STAT. § 1009.24(3) (2003) (emphasis added). Prior to the re-organization in Florida, fees for state universities were set by the Board of Regents. See FLA. STAT. § 240.209 (2001).

<sup>288</sup> See FLA. STAT. § 1009.23 (2003).

<sup>289</sup> For the twelve months ending March 2003, inflation was running at a low 3 percent; however, tuition costs rose 7.3 percent for the same period. See Michael Arnone, *Students Face Another Year of Big Tuition Increases in Many States*, CHRON. HIGHER EDUC., Aug. 15, 2003, at A24; Kathleen Madigan, *It Sure Doesn't Feel Like Low Inflation*, BUS. WK., May 19, 2003, at 39 ("Double-digit percentage increases in tuition for the second straight year, by the largest margins ever at some institutions, were common across the country.")

institution with 20,000 FTE, these fees could generate \$2.7 or \$4.5 million per year, at the \$3 and \$5 per semester credit rates, respectively. Such a sum could provide either a recurring annual source of funds for land and capital outlay purposes, or an additional dedicated source of funds to support bonding capacity as an interim financing mechanism while PECO funds are awaited. As previously stated in this article,<sup>290</sup> it is absolutely critical that this additional fee not be allowed to replace appropriation of general revenues by the Legislature to public institutions of higher education in Florida.<sup>291</sup>

Community colleges presently assess a capital improvement fee that can be bonded.<sup>292</sup> Various university fees can be bonded as well. With the appropriate Legislative language, the new or increased fees, as well as those applicable to non-credit courses, could establish a source of additional funds that could be bonded or directly spent to acquire, construct, equip, maintain, improve, or enhance educational facilities. Reformers must seek proper legislative language to alleviate the unfortunate possibility of the use of such fees to supplant general appropriations state revenue. Additionally, a means must be found to ensure that the state funding of community colleges and state universities would not be less than what would have been provided absent these fees.

The idea of modestly increasing an existing fee or imposing a nominal fee to provide an additional source of funds for the land acquisition and capital project needs of community colleges and state universities is a narrowly tailored approach that would provide immediately needed relief under the present state financial structure. Thus, with the express provisos that the new fees not be so large as to make higher education unaffordable, nor supplant appropriations of general revenues, the author recommends that this idea be given serious consideration for prompt implementation.

#### e. *Local Tax Initiatives*

The author highly recommends the prudent use of local tax initiatives by referendum to augment<sup>293</sup> the state funds currently available for public higher education during the current difficult economic times.<sup>294</sup> The local

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<sup>290</sup> See *supra* Part III.C.2.c

<sup>291</sup> If the additional fee replaces the appropriation of general revenue to the institutions, the result would be especially adverse. In such an event, student fees would, in effect, support other areas of the State budget, which is a totally unacceptable use of students' money.

<sup>292</sup> See FLA. STAT. § 1001.64(38) (2002).

<sup>293</sup> The use of local tax referenda is self-defeating if local funds supplant state revenues. See *supra* Part III.C.2.d.

<sup>294</sup> While funding for land and capital outlay needs is covered by this article, the general funding

tax referendum is particularly well suited to community colleges where the community college district encompasses one county.<sup>295</sup> Nonetheless, local tax initiatives have been attempted at both community colleges and state universities in Florida,<sup>296</sup> even though community colleges and state universities in Florida do not have direct taxing authority to levy sales tax, ad valorem taxes, or other types of taxes.<sup>297</sup>

Community colleges may access ad valorem tax funds by two means and state universities by one method.<sup>298</sup> Article VII, section 9 of the Florida Constitution states in pertinent part:

(a) Counties, school districts, and municipalities shall, and special districts may, be authorized by law to levy ad valorem taxes and may be authorized by general law to levy other taxes for their respective purposes, except ad valorem taxes on intangible personal property and taxes prohibited by this constitution.

(b) Ad valorem taxes exclusive of taxes levied from the payment of bonds and taxes levied for periods not longer than two years when authorized by vote of the electors who are the owners of freeholds therein not wholly exempt from taxation, shall not be levied in excess of the following millages upon the assessed value of real estate and tangible personal property: for all county purposes, ten mills; . . . and for all other special districts a millage authorized by law approved by vote of the electors who are owners of freeholds therein not wholly exempt from taxation.<sup>299</sup>

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situation of education in Florida, as well as elsewhere in the country, is currently problematic. See Carolyn Polinsky, *DC Bureau: Voters Choose Higher Education Measures*, U-WIRE, Nov. 11, 2002, available at 2002 WL 103621516. The prudent use of local tax initiatives could be used as in interim solution to address the broader problem, as well as the land and facilities issue covered by this article.

<sup>295</sup> The majority of community colleges are limited to one county, but some community college districts such as Okaloosa-Walton Community College, Lake-Sumter Community College and Pasco-Hernando Community College serve the populations of more than one county. The service areas of state universities are statewide; however, each university has heightened impact on the geographic region in which it is located.

<sup>296</sup> The following institutions are among those that have attempted specific referenda: Palm Beach Junior College, Miami-Dade Community College (now Miami-Dade College), and Florida International University.

<sup>297</sup> See FLA. CONST. art. VII, § 9(a) (stating that the K-12 system of schools has direct ad valorem taxing authority).

<sup>298</sup> See 90 Op. Fla. Att'y Gen. 78 (1990) (providing a particularly good, concise summary of the process as it relates to community colleges).

<sup>299</sup> FLA. CONST. art. VII, § 9.

Community colleges are separate, legal entities that are political subdivisions of the state.<sup>300</sup> Accordingly, the Legislature can authorize a community college to levy ad valorem taxes by special act.<sup>301</sup> This method has been employed on several occasions.<sup>302</sup> State universities, on the other hand, are bodies corporate with various legal powers, such as the power to contract, to sue, and to be sued. For some purposes, a university is a state agency. Universities, however, are not established as political subdivisions of the State.<sup>303</sup>

The second means available to community colleges to gain access to ad valorem tax funds is also available to state universities. Counties are empowered by the Florida Constitution to levy ad valorem taxes of up to ten mills for county purposes.<sup>304</sup> No referendum is required<sup>305</sup> for the levy and collection of ad valorem taxes within the ten mill limit. A county may levy ad valorem taxes in excess of the ten mill maximum for county purposes<sup>306</sup> for a period not to exceed two years, "provided such levy has been approved by majority vote of the qualified electors in the county . . . voting in an election called for such purpose."<sup>307</sup>

Section 200.091 states that the governing body of the county may place the question on the ballot upon its own motion. In the alternative, the governing body of the county is obligated to place the question on the ballot upon receipt of a petition, signed within sixty days of the date that such petition is filed with the county, by at least ten percent of the persons qualified to vote in such an election.<sup>308</sup>

<sup>300</sup> See FLA. STAT. §§ 1001.63, 1004.67 (2003).

<sup>301</sup> See 90 Op. Fla. Att'y Gen. 78 (1990) (citing *State ex rel. Arthur Kudner Inc. v. Lee*, 7 So.2d 110 (Fla. 1942) (stating that the power of taxation is an attribute of a sovereign power of the state and can be exercised only pursuant to a valid statute)).

<sup>302</sup> See 90 Op. Fla. Att'y Gen. 78 (1990) (citing Fla. Laws ch. 469 (authorizing the Board of Trustees of the St. Petersburg Junior College to levy a special ad valorem tax; 1979 Fla. Laws ch. 538 (authorizing the Board of Trustees of the Palm Beach Junior College to levy a special ad valorem tax); and 1987 Fla. Laws 419 (authorizing the Board of Trustees of the Palm Beach Junior College to levy a special ad valorem tax)). All three public laws were conditioned on voter approval.

<sup>303</sup> See FLA. STAT. §§ 1001.72(1)-(3) (2003).

<sup>304</sup> See FLA. CONST. art. VII, § 9(b).

<sup>305</sup> See FLA. CONST. art. VII, § 9.; FLA. STAT. § 125.01(1)(r) (2003).

<sup>306</sup> See FLA. CONST. art. VIII § 9; FLA. STAT. § 200.071(2) (2003).

<sup>307</sup> FLA. STAT. § 200.091 (2003).

<sup>308</sup> See FLA. STAT. § 200.091 (2003). Local referendum tax initiatives are particularly well suited to community colleges where the community college district is co-extensive with a particular county because it is then simple to identify the boundaries of the taxing district. If a community college district includes two counties, it would be necessary for two county commissions to put the issue on the ballot and for the tax measure to prevail in two elections. Interesting issues could arise if the tax measure was approved in only one of the two counties. Likewise, it is more difficult to identify the area that ought

It is essential to the validity of the tax that it is used for "county purposes."<sup>309</sup> In addition, the taxes of one unit of government, such as the county,<sup>310</sup> cannot be expended for purposes of another unit of government, such as the community college. Thus, in the exercise of its legislative discretion, the governing board of the county must make legislative findings of fact as to the purpose(s) of such expenditures, the benefit(s) to be derived therefrom, and a finding that such purposes are county purposes to benefit the county.<sup>311</sup> The Attorney General of Florida has pointed out that "county purposes"<sup>312</sup> is not defined in the Florida Constitution or statutes, but that there have been some judicial determinations on particular sets of facts.<sup>313</sup>

The wording of the legislative findings of "county purpose"<sup>314</sup> can be quite important. The author suggests that the findings of "county purpose"<sup>315</sup> be both specific enough so as to provide future guidance as to what is included and what "county purpose"<sup>316</sup> is being served, and broad enough so as to not unnecessarily exclude valid purposes and expenditures.

Similarly, the specific ballot language must be drafted with the greatest of care, insight, and foresight. Once again, the concern is that the language has sufficient specificity so that the voters are well aware of that on which they are voting. Yet, the language ought to be sufficiently broad and flexible so that all the legitimate needs of the institution that are intended to be within the gamut of allowable expenditures will be included.

The case law and Florida Attorney General's Opinions on the subject of interpretation of referendum ballot language, and the permissible and impermissible uses of referendum funds, state that expenditures of referendum money are limited to those purposes expressly enumerated in the act of which the voters were expressly aware at the time of their vote.<sup>317</sup> The Attorney General's Opinions cite earlier Attorney General's Opinions

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to be subject to the tax where the institution is a state university. State universities have much more of a statewide role compared with community colleges. However, most state universities have a large impact on the quality of life, the workforce and the economy of the region in which they are located. A local referendum tax initiative has been attempted for a state university, Florida International University, but the referendum failed.

<sup>309</sup> FLA. STAT. § 200.091 (2001).

<sup>310</sup> See 90 Op. Fla. Att'y Gen. 78 (1990) (citing *Prescott v. Board of Public Instruction*, 32 So. 2d 731, 733 (Fla. 1947); 75 Op. Fla. Att'y Gen. 32 (1975)).

<sup>311</sup> See 90 Op. Fla. Att'y Gen. 78 (1990).

<sup>312</sup> *Id.*

<sup>313</sup> See *supra* note 310.

<sup>314</sup> See *supra* note 311.

<sup>315</sup> *Id.*

<sup>316</sup> *Id.*

<sup>317</sup> See 86 Op. Fla. Att'y Gen. 39 (1986) (citing 68 Op. Fla. Att'y Gen. 76 (1968)); 82 Op. Fla. Att'y Gen. 54 (1982) (citing 68 Op. Fla. Att'y Gen. 76 (1968)).



and a continuous line of case law going back a century for the proposition that tax funds raised for a particular purpose cannot be used for some other purpose without legislative authority, and that such funds comprise a trust fund in the lands of the legal custodians. Judicial decisions from other jurisdictions state that another referendum is required when there is a material change in the use of funds so as to constitute a policy change that is not within the evident intent of the voters. Thus, the overall governing rule is that referendum funds can only be used for "county purposes,"<sup>318</sup> and the uses of such funds are limited to the purposes expressly enumerated in the referendum.

The informational groundwork that is laid in preparation for a referendum, and the timing of the election, are equally as important as the drafting of the actual ballot language and the legislative findings of county purposes.<sup>319</sup> In order for a referendum to be successful, the institution's importance must be widely known and valued by the electorate. This must include knowledge and understanding of the institution's good reputation, the means by which the institution has served the needs of the voting district in the past, the needs for funding that may at some time become the subject of a referendum, and the reasons why such funding is especially needed at the time of the referendum.

The importance of the timing of the vote is self-evident. Is the electorate sufficiently informed? What is the status of the economy in the voting district? What is the mood of the voters? What is the expected voter turnout?

It could take years to disseminate information and convince the voters of the status of the institution and the need for the initiative. In connection with any referendum campaign, one must note that limitations exist on the activities of public entities and their employees with respect to specific ballot questions, versus providing information about the status of an educational institution. Although outside the immediate scope of this article, institutions interested in obtaining the benefits of a local tax initiative must become well informed about the governing laws, which include election laws that might pertain to a referendum.

Finally, any one institution should not turn too frequently to local referendum tax initiatives to address its funding problems, and use of such

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<sup>318</sup> See *supra* note 311. Funds cannot be used for the purposes of another governmental unit.

<sup>319</sup> Conclusion derived from statements of Martin Fine, Chairman of the Board of Trustees of Miami-Dade Community College (now Miami-Dade College) and statements of Robert M. McCabe, then President of Miami-Dade Community College prior to the highly successful referendum for the benefit of Miami-Dade Community College in September 1992. The organization, Friends of Miami-Dade Community College, was instrumental in the campaign.

initiatives should not become too widespread among public institutions of higher education in Florida. As repeatedly stressed throughout the part of this article dealing with means of increasing the total amount of available funding, it is critical that such mechanisms are used to *augment* state revenues, and *not replace* state revenues. Under Florida's system of public higher education, the State is responsible for funding.<sup>320</sup> The State must not become complacent about or avoid that responsibility by attempting to shift the burden, even in part, to local governments. If local referendum tax initiatives were to become commonplace, then the danger of that shift occurring heightens. Thus, institutions ought to coordinate with one another in the timing of local referenda. A similar shifting of the economic burden might result if any one institution were to resort too frequently to local referendum tax initiatives. Moreover, taxpayers could grow weary of repeated calls for their special assistance. Therefore, institutions ought to plan their referenda and use the proceeds and earnings therefrom with great care. With the cautions set forth above, however, the prudent use of the local referendum tax initiative can be a very useful means of addressing the funding dilemmas of public higher education in Florida, and it is a means that can be instituted under the present funding process that exists in the State. The author recommends such efforts.

#### IV. CONCLUSION

The objective of this article is to begin the search for ways to enable public institutions of higher education in Florida to acquire real property at prices that make the most cost-effective use of public funds and to complete timely the acquisitions so that institutions can meet their needs to serve students. This article has identified a number of problems in the current state process that interfere with meeting the objective. In addition, this article has pointed out the dramatic insufficiency of current state funding, particularly PECO funds, available to meet the capital outlay needs of public higher education.

This article examined in preliminary fashion a number of ideas to address these problems. The proposals fall into two categories: possibilities for increasing flexibility and possibilities for increasing funds. The author contends that without increasing funds, the problems in meeting the land acquisition and capital construction needs of public higher education in Florida cannot be adequately resolved under either the present system or any of the ideas for increasing flexibility.

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Aside from student fees and items such as grants, gifts, and entrepreneurial activity.

The author eliminated one possibility from further consideration; namely, exempting additional aspects of the land acquisition process of public higher education from the Sunshine Law and Public Records Law. Additional exemptions of the land acquisition process of public higher education from the Sunshine Law and Public Records Law would be contrary to the principles of good government and contrary to the principle of public accountability. The author finds the Sunshine and Public Records laws to be essential to responsible government and fiscal accountability.

This article has identified that a number of the suggested ideas merit continued or expanded use,<sup>321</sup> including the continuing efforts on the State and institutional levels to increase funding; broader identification of land in legislative authorizations for acquisitions; the funding and use of the matching grant programs for community colleges and universities; more auspicious use of eminent domain proceedings; careful use of short-term loans and other interim financing methods such as lease-purchase transactions and bonds; and, the use of local referendum tax initiatives. Although bonds, lease-purchases and short-term unsecured borrowing<sup>322</sup> are available, the author advised caution due to the current insufficiency of funds, otherwise institutions will find themselves financially overextended.

Based on analysis, a number of the suggested ideas were identified for further study. These ideas include: refinement of the use of eminent domain proceedings, including temporary takings of a leasehold interest; a modest increase in the present capital improvement fee<sup>323</sup> or imposition of a modest land and construction fee; expansion of the PECO base to generate more PECO funds; the use of block grants from the State to institutions for their land and construction needs; an increase in the State sales tax or a grant of direct taxing authority to institutions of public higher education; and, authorization for unsecured borrowing for a period beyond the current fiscal year. The latter idea was accompanied by a strong caveat warning that there is a risk of institutions becoming fiscally overextended. All of the ideas were accompanied with the recommendation of further study; some ideas also require fundamental policy determinations.

The ideas suggested in this article are neither all-inclusive nor exhaustive. Further brainstorming and analysis by all interested constituencies is required in order to resolve issues in the acquisition of real property by public institutions of higher education in Florida.

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<sup>321</sup> With respect to a number of the items in this list, the article recommends refinements to the present system.

<sup>322</sup> Unsecured borrowing is presently available for community colleges.

<sup>323</sup> Or the university terminology equivalent thereof.