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## Growth Management: Florida's Past as Prologue for the Future

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# FLORIDA STATE UNIVERSITY LAW REVIEW



GROWTH MANAGEMENT:  
FLORIDA'S PAST AS PROLOGUE FOR THE FUTURE

*David L. Powell*

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GROWTH MANAGEMENT: FLORIDA’S PAST AS  
PROLOGUE FOR THE FUTURE

DAVID L. POWELL\*

I. INTRODUCTION..... 519  
II. THE MODERN TREND IN FLORIDA LAND USE CONTROLS..... 521  
III. FUTURE DIRECTIONS FOR FLORIDA LAND USE CONTROLS ..... 531  
    A. *Continued State Involvement with More Focus*..... 532  
    B. *More Emphasis on Outcomes*..... 533  
    C. *Stronger Linkage Between Land and School Planning*..... 534  
    D. *Promoting Compact Urban Development* ..... 535  
    E. *Greater Compliance Without More Litigation*..... 538  
    F. *Updating or Eliminating the DRI Program*..... 539  
    G. *Streamlining and De-politicizing Appeals*..... 541  
IV. CONCLUSION ..... 543

I. INTRODUCTION

Some years ago, the owner of an office park in a medium-sized Florida city engaged me to do some legal work. The assignment required me to track down the original developer who began the project in the late 1960s. With him, I reconstructed the original review process.

“It was so simple then,” the original developer explained. “I just got some land outside the city limits, went down to the County building department, showed them the plans for my first building, and pulled a building permit. Then I started construction. That was it.”

There was no land use consistency review, no zoning, no subdivision platting, no site plan review, and no state or local environmental permits. Without being subjected to any of today’s normal development review processes (which entail varying degrees of scrutiny and usually some unnecessary duplication), this developer began what is now one of his community’s largest office parks on what today we would call a “greenfield” site at the developing fringe of town.

More than any matter I have handled while practicing law in the field of land use and growth management, the above example

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This Article is based on presentations which the author made to the Growth Management Study Commission in Tallahassee on August 28, 2000, and to the annual convention of the Florida League of Cities in Fort Lauderdale on August 11, 2000. An earlier, truncated version of this Article was published in the *St. Petersburg Times*.

illustrated for me the changes that have taken place over the last thirty years during Florida's modern era of land development controls. Florida's experience in regulating land development during this era is a useful frame of reference for the current political debate in Florida and the legislature's evaluation of the recommendations by Governor Bush's Growth Management Study Commission.<sup>1</sup> So much has changed in so little time that it is easy to be overwhelmed. The raw emotions that surfaced in last year's legislative session reveal the angst of some legislators, and the fervor with which both sides eagerly drew their political weapons demonstrates the divide.<sup>2</sup>

The longer view of Florida's history suggests a process of evolution, not revolution. It bespeaks political consensus and bipartisanship, not combat. The past thirty years' achievements were attained by our ability to work together and respond in a measured way to development—by appropriately balancing the competing constituencies. That is the only way we will make lasting change again.

The purpose of this Article is to review and analyze the evolution of law and public policy regarding Florida's integrated planning and growth management system in the modern era that began in the 1970s and to suggest some appropriate reforms that would meet current needs. The Article places the beginnings of the modern policy trends in a national context and identifies some of the pertinent political and social factors within the state which contributed to these trends. Part III recapitulates the outpouring of reform legislation in 1972 which initiated the modern era and follows with a discussion on the enactment of mandatory local comprehensive planning as the lynchpin of the nascent regulatory system. It then discusses the emergence of a state and regional policy framework to provide direction for this statewide system and the adoption of other major policies, such as the temporal development controls embodied in the concurrency requirement.

Part III concludes by identifying some recurring themes in Florida policymaking on land use and growth management, and it suggests

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1. See Fla. Exec. Order No. 00-196 (July 3, 2000) (establishing the Growth Management Study Commission). This Article was written prior to completion of the commission's work and the filing of its final report. The commission made its recommendations on a 20-1 vote, but the final report faced an uncertain future in the legislature due to continuing controversies. The commission's lone environmentalist filed a minority report, which was promptly dubbed "whining" by one of the Governor's key allies on the commission. Other members of the commission said they did not understand all the recommendations, and various constituencies expressed dissatisfaction with some of the report's most attention-getting initiatives. See Julie Hauserman, *Growth Changes Prompt Debate*, ST. PETE. TIMES, Feb. 15, 2001, at 1B.

2. See, e.g., David Wasson & Joe Follick, *Session Ends on Raucous Footing*, TAMPA TRIB., May 6, 2000, LEXIS, News Library, TAMTRB File.

some approaches to further reforms that would make existing programs more effective, provide regulatory relief to local governments and the private sector, and achieve more evenhanded and professional decisionmaking at all levels of government—all in a manner consistent with the overall policy themes that have guided the evolution of these programs.

## II. THE MODERN TREND IN FLORIDA LAND USE CONTROLS

Almost since attaining statehood in 1845, Florida has had a policy on growth. The Riparian Act of 1856<sup>3</sup> granted state-owned lands to shoreline landowners who would use them to construct docks, wharves, and other waterfront projects to promote commerce on coastal and inland waters.<sup>4</sup> Later, the legislature granted state lands to railroad companies, again to promote physical growth and trade.<sup>5</sup> In 1913, the legislature established the Everglades Drainage District to create dry land for new agricultural areas in South Florida.<sup>6</sup>

While public policy of that earlier time promoted growth, it included few if any local government controls to guide and manage development.<sup>7</sup> A hodge-podge of special laws gave limited zoning authority to local governments. At one time, more than 1200 of these special acts were in existence.<sup>8</sup> Indeed, Florida was the last state to grant general zoning authority to cities. It finally did so in 1939 and then only by mistake, when lawmakers thought they were passing another special act.<sup>9</sup>

All of that began to change in the post-World War II era. Nationally, a reawakening took place during the 1940s and 1950s that was best described in a 1971 report published by the Council on Environmental Quality, *The Quiet Revolution in Land Use Control*.<sup>10</sup> This seminal work explained how states were reasserting a role in land use decisions that were once believed to be only local in nature.<sup>11</sup> Reviewing then-emerging state land use programs, the authors described an evolutionary pattern that proved prophetic for Florida:

To see regulation as the predecessor of planning is not wholly logical. But Americans have rarely looked kindly on the idea of

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3. Ch. 791, 1856 Fla. Laws 25 (repealed 1921).

4. *See id.*

5. *See, e.g.*, Act effective May 16, 1895, ch. 4468, § 6, 1895 Fla. Laws 238, 239.

6. *See* Act effective June 6, 1913, ch. 6456, § 1, 1913 Fla. Laws 129, 129.

7. *See* ERNEST R. BARTLEY, STATUS AND EFFECTIVENESS OF LAND DEVELOPMENT REGULATION IN FLORIDA TODAY 8-10 (1973).

8. *See id.* at 9.

9. *See id.* at 8.

10. FRED BOSSELMAN & DAVID CALLIES, COUNCIL ON ENVIRONMENTAL QUALITY, THE QUIET REVOLUTION IN LAND USE CONTROLS (1971).

11. *See id.* at 2-4.

planning for its own sake, and have paid attention to planning only when it immediately affects decision-making. As a political matter probably the most feasible method of moving towards a well-planned system of state land use regulation is to begin with a regulatory system that concentrates on a few goals that are generally perceived as important, and then to gradually expand the system by adding more comprehensive planning elements, as is being done in Vermont. To insist that the planning precede the regulation is probably to sacrifice feasibility on the altar of logic.<sup>12</sup>

By the 1970s, the American Law Institute (ALI) had prepared a Model Land Development Code to help state and local governments freshen their land use regulatory programs.<sup>13</sup> The ALI model code called for state involvement in local land use decisions on a limited basis, when decisions involved important state or regional interests.<sup>14</sup> President Nixon also proposed a National Land Use Policy Act to promote land planning throughout the country.<sup>15</sup> This bill passed one house of the Congress. In the words of the model code drafters, "The long period of unquestioned acceptance of the local prerogative to control land development [was] clearly over."<sup>16</sup>

In Florida, a variety of forces for reform were at work. In 1970, Reubin Askew was elected governor and brought in a change-minded administration.<sup>17</sup> The Askew administration guided Florida through a period of difficult adjustment and into the modern era of civil rights.<sup>18</sup>

These changes in the political landscape occurred at the same time that changes were taking place in the physical landscape. While South Florida was booming, a severe water shortage and problems with quality led Governor Askew to convene a conference of community leaders and other experts to consider a course of action.<sup>19</sup> Their recommendations were unorthodox, if not heretical:

There is a limit to the number of people which the South Florida basin can support and at the same time maintain a quality environment. The State and appropriate regional agencies must develop a comprehensive land and water use plan with enforcement machinery to limit population. This is especially

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12. *Id.* at 29.

13. See MODEL LAND DEV. CODE (1975).

14. See *id.* § 7-101 note at 255-56.

15. National Land Use Policy Act, S. 992, 92d Cong. (1971).

16. MODEL LAND DEV. CODE §7 commentary at 252.

17. See generally Reubin O'D. Askew & Lance DeHaven-Smith, *E Pluribus Unum in a Multi-Racial, Multi-Cultural State*, 27 FLA. ST. U. L. REV. at xiii (2000) (discussing the administration's experience during this era).

18. See *id.* at xvi-xix (describing Florida's civil rights movement).

19. See GOVERNOR'S CONF. ON WATER MGMT. IN S. FLA., A STATEMENT TO REUBIN O'D. ASKEW, GOVERNOR, STATE OF FLORIDA 1-2 (1971).

crucial in the South Florida region. The population level must be one that can be supported by the available natural resources, especially water, in order to sustain a quality environment. A State comprehensive land and water use plan would include an assessment of the quality and quantity of these resources. Moreover, it would set density controls on further development by regions and sub-regions.<sup>20</sup>

Governor Askew sent the recommendations of the conference to a special Task Force on Resource Management, which prepared four major bills for consideration by the legislature.<sup>21</sup> During the 1972 Regular Session, the legislature responded by enacting them.<sup>22</sup>

The Florida Environmental Land and Water Management Act of 1972<sup>23</sup> was based on Tentative Draft No. 3 of the ALI Model Land Development Code.<sup>24</sup> This act created a new regulatory process for “developments of regional impact” (DRIs) in those local jurisdictions with local land use controls.<sup>25</sup> It also limited local government authority by imposing stringent state oversight of development in environmentally sensitive areas like the Florida Keys when specially designated as “areas of critical state concern.”<sup>26</sup>

The Florida Water Resources Act of 1972,<sup>27</sup> among other things, created the regional water management districts,<sup>28</sup> which today regulate the consumptive use of water and perform other planning and regulatory functions related to water resources.<sup>29</sup> The Florida State Comprehensive Planning Act of 1972<sup>30</sup> required Governor

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20. *Id.* at 2-3.

21. Fla. SB 629 (1972) (The Environmental Land and Water Management Bill); Fla. HB 4060 (1972) (The Water Resources Bill); Fla. HB 3801 (1972) (The State Comprehensive Planning Bill); Fla. HB 4228 (1972) (The Land Conservation Bill).

22. *See* Florida Environmental Land and Water Management Act of 1972, ch. 72-317, 1972 Fla. Laws 1162 (codified as amended at FLA. STAT. §§ 380.012-.10 (2000)); Florida Water Resources Act of 1972, ch. 72-299, 1972 Fla. Laws 1082 (codified as amended at FLA. STAT. ch. 373 (2000)); Florida State Comprehensive Planning Act of 1972, ch. 72-295, 1972 Fla. Laws 1072 (codified as amended at FLA. STAT. §§ 186.001-.031, 186.801-.901 (2000)); Land Conservation Act of 1972, ch. 72-300, 1972 Fla. Laws 1126 (codified as amended at FLA. STAT. ch. 259 (2000)).

23. Ch. 72-317, 1972 Fla. Laws 1162 (codified as amended at FLA. STAT. §§ 380.012-.10 (2000)).

24. MODEL LAND DEV. CODE (Tentative Draft No. 3, 1971).

25. *See* ch. 72-317, § 6, 1972 Fla. Laws at 1172-76 (codified as amended at FLA. STAT. 380.06 (2000)).

26. *Id.* § 5, 1972 Fla. Laws at 1168.

27. Ch. 72-299, 1972 Fla. Laws 1082 (codified as amended at FLA. STAT. ch. 373 (2000)).

28. *See id.* § 12, 1972 Fla. Laws at 1093 (codified as amended at FLA. STAT. § 373.069 (2000)).

29. *See id.* § 2, 1972 Fla. Laws at 1083-84 (codified as amended at FLA. STAT. § 380.021 (2000)).

30. Ch. 72-295, 1972 Fla. Laws 1072 (codified as amended at FLA. STAT. §§ 186.001-.031, 186.801-.901 (2000)).

Askew to prepare a State Comprehensive Plan to articulate goals and policies to guide Florida's future growth following enactment by the legislature.<sup>31</sup>

The Land Conservation Act of 1972<sup>32</sup> authorized the Governor and Cabinet to buy environmentally endangered lands throughout the state.<sup>33</sup> Both this statute and the state's powers to regulate areas of critical state concern were made contingent upon voter approval of over \$200 million in bonds for land acquisition.<sup>34</sup> The bonds were approved in November 1972.<sup>35</sup> This legislation laid the groundwork for Florida's aggressive land acquisition programs, which today include the Conservation and Recreation Lands program,<sup>36</sup> the "Save Our Rivers" program,<sup>37</sup> and the Florida Communities Trust program.<sup>38</sup>

From the beginning of this modern era, Florida has relied on both regulatory programs and taxpayer-financed land acquisition programs as strategies to meet the challenges of rapid growth and development. Further, modern growth policy in Florida has sought to balance the competing interests of environmental protection, economic development, community well-being, and private rights. Finally, local and state governments have shared decisionmaking power over some land development issues that historically were only local in nature.

The outpouring of new policy in 1972 was a watershed. At the time, fifty percent of Florida's land area was like the original site of my client's office park: without a comprehensive plan, zoning, subdivision regulations, site plan review requirements, or environmental regulations.<sup>39</sup> Of those local governments that did

31. See *id.* § 7-8, 1972 Fla. Laws at 1075-76 (codified as amended at FLA. STAT. § 186.007-.008 (2000)).

32. Ch. 72-300, 1972 Fla. Laws 1126 (codified as amended at FLA. STAT. ch. 259 (2000)).

33. See *id.* § 1, 1972 Fla. Laws at 1128-29 (codified as amended at FLA. STAT. § 259.04(1)(d)).

34. See *id.* § 2, 1972 Fla. Laws at 1129 (authorizing \$240 million in bonds for acquisition, subject to referendum); ch. 72-317, § 13, 1972 Fla. Laws 1162, 1181 (prohibiting designation of areas of critical state concern until "a favorable vote . . . on a state bond program for the acquisition of lands").

35. See *Cross Key Waterways v. Askew*, 351 So. 2d 1062, 1067 n.10 (1977) (noting that the referendum passed 1,131,718 to 482,584) (citing Gilbert L. Finnell, Jr., *Saving Paradise: The Florida Environmental Land and Water Management Act of 1972*, 1973 URB. L. ANN. 103, 121 n.91).

36. See Act effective Oct. 1, 1979, ch. 79-255, § 8, 1979 Fla. Laws 1402, 1406-08 (codified as amended at FLA. STAT. § 259.032 (2000)).

37. See Florida Preservation 2000 Act, ch. 90-217, § 1, 1990 Fla. Laws 1608, 1609-12 (codified as amended at FLA. STAT. § 259.101 (2000)).

38. See Florida Communities Trust Act, ch. 89-175, § 28, 1989 Fla. Laws 601, 711 (codified as amended at FLA. STAT. §§ 380.501-.515 (2000)).

39. See BARTLEY, *supra* note 7, at 8-10.



have land use controls, only a few were based on a comprehensive land use plan.

The Environmental Land and Water Management Act was the centerpiece of the 1972 reforms. With follow-up work performed by the first Environmental Land Management Study Committee (ELMS I), this new law, as noted above, created the DRI program, which provides multi-disciplinary review for large-scale land developments with the potential to impact state and regional resources and facilities.<sup>40</sup> A major premise of this new program was that most land use decisions do not significantly affect state or regional interests and consequently should be formulated at the local level.<sup>41</sup> In formulating the implementing regulations for the DRI program, the guiding principle of the first ELMS was “a *balanced* view toward assuring the highest quality of human amenities and environmental protection consistent with a sound and economic pattern of well-planned development.”<sup>42</sup>

ELMS I went further, however, and recommended that all local governments be required to adopt comprehensive plans as a policy basis for local land use controls that would address all development.<sup>43</sup> Not only did this recommendation provide a basis for the DRI program to be implemented throughout the state instead of just those jurisdictions where local governments already exercised local land use controls, it also addressed the concern that while “a great number of innovative ideas in the land development regulation field” had occurred since World War II—including performance standards, conservation zoning, and unified land development codes—most local ordinances in Florida did not reflect them.<sup>44</sup>

In 1975, the legislature enacted the Local Government Comprehensive Planning Act.<sup>45</sup> This measure greatly strengthened the general law on local comprehensive planning in several ways. First, it required all local governments to adopt a comprehensive plan.<sup>46</sup> Second, it required those plans to identify future land uses throughout their respective jurisdictions and to adopt capital

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40. See ch. 72-317, § 6, 1972 Fla. Laws 1162, 1172-76, (codified as amended at FLA. STAT. § 380.06 (2000)).

41. See Thomas G. Pelham, *Regulating Developments of Regional Impact: Florida and the Model Code*, 29 U. FLA. L. REV. 789, 796 (1977).

42. ENVIRONMENTAL LAND MGMT. STUDY COMM., ENVIRONMENTAL LAND MANAGEMENT: FINAL REPORT AND RECOMMENDATIONS 5 (1973).

43. See *id.* at 5-6.

44. BARTLEY, *supra* note 7, at 10-11.

45. Ch. 75-257, 1975 Fla. Laws 794 (codified as amended at FLA. STAT. ch. 163, pt. II (2000)).

46. See *id.* § 4, 1975 Fla. Laws at 797-98 (codified as amended at FLA. STAT. § 163.3167 (2000)).

improvement programs to serve that future development.<sup>47</sup> Third, it required all local governments to implement their plans with land development regulations such as subdivision regulations and zoning.<sup>48</sup> Fourth, it required all development to be consistent with the adopted plan.<sup>49</sup> The state could review and comment on local plans, but state comments were only “advisory.”<sup>50</sup>

Aside from validating the evolutionary pattern described some years earlier in *The Quiet Revolution in Land Use Control*,<sup>51</sup> the 1975 enactment of mandatory local planning legislation in Florida created the prospect of the first-generation land use regulatory programs being seen as duplicating the broader-based, second-generation planning program. This circumstance arose because the DRI program’s reliance on “impact analysis” in a site-specific context replicated the analysis that comprehensive planning aimed to perform jurisdiction-wide. As one commentator explained:

Impact analysis is both antithetical to and redundant of comprehensive planning. In criticizing California’s system of requiring both a NEPA-like environmental impact statement and consistency with a comprehensive plan, Professor Donald Hagman has observed that under the impact analysis approach, “a project is first imagined in a particular place” without reference to a preconceived plan, “and its impacts on the surroundings is considered.” If the probable adverse externalities are deemed too great, the project is not allowed to proceed. By contrast, the comprehensive planning approach commences from the opposite pole. A comprehensive plan “is adopted first. Development is then placed in accordance with this comprehensive plan. If it does not fit the plan, it does not theoretically get built.”

. . . .

The unnecessary duplication perceived by Hagman is clearly evident in the regional impact analysis required by the Environmental Land [and Water Management] Act and the comprehensive planning process mandated by the [Local Government] Comprehensive Planning Act.

. . . .

Unless a conceptual marriage of the two processes can be arranged, the regional impact analysis of the Environmental Land [and Water Management] Act and the consistency requirement of

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47. See *id.* § 7(3), (6)(a), 1975 Fla. Laws at 802 (codified as amended at FLA. STAT. § 163.3177(3), (6)(a) (2000)).

48. See *id.* §§ 7(6), 12, 1975 Fla. Laws at 802-04, 809 (codified as amended at FLA. STAT. §§ 163.3177(6), .3194 (2000)).

49. See *id.* § 12(1), 1975 Fla. Laws at 809 (codified as amended at FLA. STAT. § 163.3194(1) (2000)).

50. See *id.* § 9, 1975 Fla. Laws at 806-07 (codified as amended at FLA. STAT. § 186.3184 (2000)).

51. BOSSELMAN & CALLIES, *supra* note 10.

the [Local Government] Comprehensive Planning Act may present a bewildering phalanx of substantive criteria for evaluating DRI [projects].<sup>52</sup>

Thus, within five years of the DRI program's enactment, commentators sympathetic to public control of land use were arguing that the program needed to be reconciled with comprehensive planning in order to avoid unnecessary duplication of the new local land use controls.

While these new programs were being implemented, Governor Askew prepared a State Comprehensive Plan. Replete with a map showing future development areas, he sent the proposed plan to the legislature in 1978.<sup>53</sup> Jealously guarding their prerogatives and mindful of the constitutional reality that no legislature can bind future legislatures, lawmakers decided to give the plan no legal effect at all.<sup>54</sup>

In 1982, Governor Graham created a second Environmental Land Management Study Committee (ELMS II) to assess the state's programs for managing growth.<sup>55</sup> A principal focus of this committee's study was to address a variety of shortcomings in the mandatory planning program.<sup>56</sup> Based on the recommendations of ELMS II, the legislature enacted the State and Regional Planning Act of 1984,<sup>57</sup> which authorized a new effort to draft a State Comprehensive Plan.<sup>58</sup> This measure also broadened the planning powers of Florida's eleven regional planning councils.<sup>59</sup>

Then in 1985, the legislature enacted a State Comprehensive Plan.<sup>60</sup> While watered down by legislators who were again protective

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52. Pelham, *supra* note 41, at 827-28 (citations omitted).

53. See FLORIDA LEGISLATURE, SUMMARY OF GENERAL LEGISLATION 270-71 (1978); see also Gov. Reubin O'D. Askew, Address Before the Joint Assembly (Apr. 4, 1978), in FLA. S. JOUR. 2-3 (Reg. Sess. 1978).

54. See Act effective July 1, 1978, ch. 78-287, 1978 Fla. Laws 814 (codified as amended at Fla. Stat. §§ 186.003, .007-.008 (2000)) (amending the Florida State Comprehensive Planning Act of 1972 in a way that, *inter alia*, prevented the plan from taking effect); see also Thomas G. Pelham et. al., *Managing Florida's Growth: Toward an Integrated State, Regional, and Local Comprehensive Planning Process*, 13 FLA. ST. U. L. REV. 515, 518 & n.8 (1985) (noting the 1978 Act provided "no new regulatory authority").

55. See Fla. Exec. Order No. 82-95 (Aug. 23, 1982).

56. See JOHN M. DEGROVE & DEBORAH A. MINESS, THE NEW FRONTIER FOR LAND POLICY: PLANNING AND GROWTH MANAGEMENT IN THE STATES 10 (1992).

57. Ch. 84-257, 1984 Fla. Laws 1166 (codified as amended at scattered sections of FLA. STAT. chs. 186, 380). See generally Robert M. Rhodes & Robert C. Apgar, *Charting Florida's Course: The State and Regional Planning Act of 1984*, 12 FLA. ST. U. L. REV. 583 (1984).

58. See ch. 84-257, sec. 4, § 23.0114(1), 1984 Fla. Laws at 1169 (codified as amended at FLA. STAT. § 186.007 (2000)).

59. See *id.* § 10, 1984 Fla. Laws at 1173 (codified as amended at FLA. STAT. § 186.502(3) (2000)).

60. See Act effective July 1, 1985, ch. 85-57, 1985 Fla. Laws 295 (codified as amended at FLA. STAT. ch. 187 (2000)).

of their lawmaking and budget-writing powers, this plan for the first time articulated a coherent set of state goals and policies regarding Florida's growth and development.<sup>61</sup> The 1985 legislature also made major changes to the Local Government Comprehensive Planning Act.<sup>62</sup> The 1985 legislation required state review and approval of enhanced local plans, based on state minimum criteria.<sup>63</sup> The DRI program was revised but not eliminated because local plans had not yet shown the ability to address the extrajurisdictional impacts of local development decisions.<sup>64</sup> The following year, the legislature went further than the ELMS II recommendations and amended the 1985 Act to mandate that development be approved only if adequate public facilities would be available to accommodate the impacts of that development—the “concurrency” requirement.<sup>65</sup>

These legislative acts put into place an integrated planning and growth management system that has frequently been described as “top-down” on account of the policy direction from state government that is implemented at the regional and local levels through a vertical consistency requirement.<sup>66</sup> This description is apt, as far as it goes. What it overlooks is that the implementation experience of local governments in particular is supposed to be accumulated and analyzed periodically at the regional and state levels, through such means as the “evaluation and appraisal report” process,<sup>67</sup> to inform and guide the evolution of state policy. This “bottom-up” dimension of Florida's planning and growth management system has never been fully realized.

In the years following 1985, more than 450 local governments adopted revised plans based on state minimum criteria, often with controversy and litigation over compliance with state requirements.<sup>68</sup> In 1991, Governor Chiles created the third Environmental Land

61. See generally Pelham et. al., *supra* note 54, at 526-34 (detailing the legislative history of the act).

62. Act effective October 1, 1985, ch. 85-55, 1985 Fla. Laws 207 (codified as amended at scattered sections of FLA. STAT. chs. 163, 380 (2000)). See generally Pelham et al., *supra* note 54, at 544-59.

63. See ch. 85-55, § 6, 1985 Fla. Laws at 215, 218-19 (codified at FLA. STAT. § 163.3177(9) (2000)).

64. See Pelham et al., *supra* note 54, at 535-36.

65. See Act effective July 1, 1986, ch. 86-191, § 7, 1986 Fla. Laws 1404, 1415-19 (codified at FLA. STAT. § 163.3177(10)(h) (2000)); see also Thomas G. Pelham, *Adequate Public Facilities Requirements: Reflections on Florida's Concurrency System for Managing Growth*, 19 FLA. ST. U. L. REV. 973, 1013-14 (1992).

66. See Ilene S. Lieberman & Harry Morrison, Jr., *Warning: Municipal Home Rule is in Danger of Being Expressly Preempted By . . .*, 18 NOVA L. REV. 1437, 1446 (1994) (noting that the state has rejected its home rule position that the state should not be interfere in matters of local concern).

67. FLA. STAT. § 163.3191 (2000).

68. ENVIRONMENTAL LAND MGMT. STUDY COMM., FINAL REPORT: BUILDING SUCCESSFUL COMMUNITIES 11 (1992).

Management Study Committee (ELMS III) to assess the 1985 legislation as implemented.<sup>69</sup> Its watchword, in the memorable expression of one member, was: "One size fits all is not true for pantyhose, and it's not true for planning."<sup>70</sup> Based on ELMS III's recommendations, the 1993 legislature allowed more flexibility in local planning to accommodate the differing needs and circumstances of various communities within a state policy framework.<sup>71</sup>

The ground rules for concurrency, originally developed through case-by-case adjudication and agency rules, were refined and ratified by the legislature.<sup>72</sup> Due to concerns about the poor level of accountability for regional planning councils, their planning and regulatory powers were sharply curtailed.<sup>73</sup> Less-publicized recommendations by ELMS III led to legislative approval of bond financing for the Preservation 2000 land-acquisition financing program<sup>74</sup> and authorization for state purchase of less-than-fee interests in lands deserving protection.<sup>75</sup> The 1993 legislation also required termination of the DRI program in most parts of Florida after implementation of improved local plan policies for addressing extrajurisdictional impacts.<sup>76</sup> This policy innovation was later repealed by the legislature due to widespread dissatisfaction with the administrative rule that would have implemented this change.<sup>77</sup>

In recent years, the legislature has refined existing policy and laid the groundwork for future innovations. In 1996, lawmakers created the Sustainable Communities Demonstration Project as an experiment in delegating far greater land use decisionmaking authority to selected local governments with a good growth management track record.<sup>78</sup> In 1998, the legislature adopted a

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69. See Fla. Exec. Order No. 91-291 (Nov. 19, 1991), amended by Fla. Exec. Order No. 92-215 (Aug. 18, 1992).

70. Gail Easley, quoted in James Lawlor, *State of the Statutes: Planning Enabling Laws*, PLANNING, Dec. 1992, at 10.

71. See Act effective July 1, 1993, ch. 93-206, § 8, 1993 Fla. Laws 1887, 1898-1901 (codified at FLA. STAT. § 163.3180 (2000)). See generally David L. Powell, *Managing Florida's Growth: The Next Generation*, 21 FLA. ST. U. L. REV. 223 (1993).

72. See ch. 93-206, § 8, 1993 Fla. Laws at 1898-1901.

73. See *id.* sec. 32, § 186.507(13)-(17), 1993 Fla. Laws at 1922-23.

74. See *id.* § 64, 1993 Fla. Laws at 1964-65 (codified at FLA. STAT. § 259.101(2)(d)-(4) (2000)).

75. See Act effective May 31, 1996, ch. 96-389, sec. 6, § 259.101(9)(a), 1996 Fla. Laws 2384, 2391-96.

76. See ch. 93-206, sec. 52, § 380.06(27), 1993 Fla. Laws at 1955-56, repealed by Act effective June 6, 1996, ch. 96-416, § 10, 1996 Fla. Laws 3186, 3195.

77. Ch. 96-416, § 10, 1996 Fla. Laws at 3195.

78. See ch. 96-416, § 15, 1996 Fla. Laws at 3205-08 (codified at FLA. STAT. § 163.3244 (2000)).

comprehensive framework for local-option school concurrency.<sup>79</sup> In 1999, the legislature addressed continuing implementation problems with transportation concurrency.<sup>80</sup>

Several themes run through Florida's modern experience of growth policy. One theme is innovation. At every juncture, leaders have built on prior decisions and either created new approaches or borrowed ideas from other states. They have opted for periodic evolutionary change. One reason for taking an incremental approach has been to enable the political system to digest these policy changes without provoking a backlash. Another reason has been to maintain enough predictability in the regulatory process so private developers and lenders will continue to make the major capital investments needed to support Florida's future growth.

Another theme of Florida's modern experience in growth policy is balance. These programs are political in nature, in the classic sense of policymakers finding ways to accommodate the interests of diverse constituencies while pursuing broadly accepted public purposes. As former University of Florida Professor Ernest R. Bartley once explained: "Planning is the determination by government of future objectives and the use of governmental authority, hopefully in cooperation with the private sector, to accomplish these objectives. Planning is policy and policy is politics—and so thankfully it shall be so long as the American constitutional system endures."<sup>81</sup>

Another theme of Florida's modern experience in growth policy is bipartisanship. At major decision points, governors and legislators have emphasized consensus-based, bipartisan policies. Democratic Governor Graham appointed Republicans Porter Goss, Wade Hopping, and Nat Reed to ELMS II.<sup>82</sup> Republican Senator Curtis Kiser was an influential member of ELMS III, created by Democratic Governor Chiles, and the principal legislative architect of the ELMS III legislation.<sup>83</sup> Republican Governor Bush appointed Agriculture Commissioner Bob Crawford and former Senator James Hargrett of Tampa, both Democrats, to the Bush commission.<sup>84</sup> This bipartisan

79. See Act effective July 1, 1998, ch. 98-176, §§ 4-9, 1998 Fla. Laws 1556, 1559-67 (amending scattered sections of FLA. STAT. chs. 163, 235 (1997)). See generally David L. Powell, *Back to Basics on School Concurrency*, 26 FLA. ST. U. L. REV. 451 (1999).

80. See Act effective July 1, 1999, ch. 99-378, § 4, 1999 Fla. Laws 3743, 3754-57 (codified at FLA STAT. § 163.3180 (2000)).

81. BARTLEY, *supra* note 7, at 6.

82. ENVIRONMENTAL LAND MGMT. STUDY COMM. II, FINAL REPORT i-ii (1982).

83. See Elizabeth Wilson, *Growth Reforms Call for More Flexibility*, ST. PETE. TIMES, Jan. 17, 1993, at 1D.

84. See Peter E. Howard, *Growth Panel Makeup Attacked*, TAMPA TRIB., July 7, 2000, at 1 (noting that some were disappointed but listing the membership of several Democrats and environmentalists).

tradition has made it easier to bridge the many gaps that divide the competing interests that play a role in shaping growth policy.

There were signs last year that this spirit of bipartisanship may be eroding. House Republican leaders made support for their favored growth management bill a “leadership vote” for rank-and-file Republican members.<sup>85</sup> House Democrats adopted a “caucus position” against that bill.<sup>86</sup> Unless it is reversed, this trend toward Washington-style party-line voting threatens to erect an additional barrier to attaining a consensus on growth policy in our state, a barrier that was all too evident last year when no legislation on growth management passed at all.

### III. FUTURE DIRECTIONS FOR FLORIDA LAND USE CONTROLS

Now the time has come again to review these programs, some dating back thirty years. In his executive order creating the Growth Management Study Commission, Governor Bush concluded that, despite all the work of the last thirty years, “we have created a more complicated, more costly process, without the expected corresponding benefits.”<sup>87</sup> To be sure, those of us whose work brings us into daily contact with Florida’s growth management programs would be the first to agree that there is much that can be improved. There are weak links in the policy chain. There are outdated components that should be overhauled or junked. There are duplicative requirements that should be streamlined and consolidated.

Still, the progress we have made in Florida over the last thirty years should not be overlooked or minimized. All local governments now have local land use controls (zoning, subdivision regulations, and the like) based on a comprehensive plan that fits within a statewide policy framework. This policy framework balances the interests of local governments, landowners, environmentalists, developers, and citizen groups. It attempts to manage growth by linking development approvals to the availability of adequate public facilities—to make sure that we do not build new buildings where there is not adequate water, sewer, drainage, solid waste, park, and

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85. See, e.g., *Stalwarts During an Ugly Session*, TAMPA TRIB., May 10, 2000, at 6 (quoting an unidentified legislator as complaining, “If you dared to say anything against them they called you a communist”).

86. See Joe Follick, *House Environmental Bills Pass but Face Uncertain Future*, TAMPA TRIB., May 2, 2000, at 6 (describing the vote on the bill—70-46—as “largely on the party lines”).

87. Fla. Exec. Order No. 2000-196 (July 3, 2000). The Governor drew this conclusion directly from his campaign position paper on growth management. However, he did not reiterate in the executive order his campaign-season judgment that “[i]t’s time to recognize that, even with the best of intentions, Florida’s growth management system has failed.” Jeb Bush, *Redeeming the Promise of Growth Management*, available at <http://www.ficus.usf.edu/orgs/1000fof/GMSC/JebTalk.htm>.

transportation infrastructure. It includes the first incentives for compact urban development and curbs against urban sprawl. So while the status quo is not a good option, neither is a return to the regulatory philosophy that existed prior to 1972. Fortunately, no one is advocating either.

It will be tempting to take out our frustrations with the current system by tossing it onto the trash heap and starting over. Some will argue for this approach. I believe the wiser course would be to build on the successes we have had and fix or replace the parts of our current system that are outdated and broken, or which merely need to be freshened. Too much time and energy have gone into creation of the current system to throw it away. Too much progress has been made toward protecting our natural resources while accommodating the homes, stores, schools, and workplaces needed for a growing population. Too many citizens and businesses have ordered their affairs and relied on decisions made under the current system, imperfect as it may be, to give in to the siren song of starting all over from scratch.

Of the many issues deserving attention, I believe these are the most important:

- Continued state involvement with more focus
- More emphasis on outcomes
- Stronger linkage between land and school planning
- Promoting compact urban development
- Greater compliance without more litigation
- Updating or eliminating the DRI program
- Streamlining and de-politicizing appeals

#### *A. Continued State Involvement with More Focus*

Since 1972, the central issue in growth policy in Florida has been where to draw the line between state and local interests. As the ALI concluded in the Model Land Development Code which was the basis for modern Florida's first-generation land use regulatory programs, state participation should "be directed toward only those decisions involving *important* state or regional interests . . . [while] retain[ing] local control over the great majority of matters which are only of local concern."<sup>88</sup>

Today, state involvement in local planning continues to be vital; important state policies must be implemented locally if they are to be effective. State involvement would be more effective if it were more focused and directed. The challenge is to agree on and articulate significant state interests in the abstract when in fact they are highly

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88. MODEL LAND DEV. CODE § 7 commentary at 253 (emphasis added).



situational. Their presence usually depends upon a site's proximity to specific natural resources or public facilities, the particulars of a project, and other similar considerations. As the Model Code drafters noted, "The problem of defining in advance those matters that will be of state or regional interest is not an easy one."<sup>89</sup>

Despite the difficulty of the task, I believe a concise list of important state interests can be prepared to guide and limit state involvement in local planning decisions. ELMS III prepared such a list, and lawmakers enacted it in 1993 as required topics for the updated regional policy plans adopted by Florida's eleven regional planning councils.<sup>90</sup> The plans were renamed "strategic" regional plans because they were intended to focus on the subjects deemed most important for physical growth and development from a regional perspective;<sup>91</sup> those topics are natural resources of regional significance, regional transportation facilities, economic development, emergency preparedness, and affordable housing.<sup>92</sup>

A similar identification of important interests to guide state review of local comprehensive plan amendments would make compliance reviews more predictable and more effective while affording local governments more autonomy to address local concerns. Such an approach would certainly require the exercise of judgment by reviewing agencies. However, it is all but impossible to conceive of a list of precisely described state interests that would adequately address all the situations in which the state might claim an interest.

### B. *More Emphasis on Outcomes*

Our state suffers from a failure to keep track of the results we are attaining from our growth management programs. What specific goals are we trying to achieve with these programs? How do we measure their effectiveness? What do those measures show? At present, it is impossible for anyone to determine with precision how well these programs are furthering their public purpose of preserving and enhancing our quality of life. That failure, in turn, undermines the accountability that all citizens have a right to expect of governmental decisionmakers.

Governor Chiles attempted to increase accountability by measuring the outcomes of various programs. His "Benchmarks"

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89. *Id.*

90. See Act effective July 1, 1993, ch. 93-206, sec. 32, § 186.507(1), 1993 Fla. Laws 1887. These topics are amplified in rules adopted by the Executive Office of the Governor. See FLA. ADMIN. CODE ANN. ch. 27E-5 (1999). Each regional planning council may address additional topics which it deems regionally significant. See FLA. STAT. § 186.507(1) (2000).

91. See generally Powell, *supra* note 71, at 262-66.

92. See FLA. STAT. § 186.507(1) (2000).

initiative established specific yardsticks for many programs, including growth management.<sup>93</sup> While Benchmarks left something to be desired, it was a step in the right direction. Unfortunately, the legislature effectively discontinued it in 1998 by refusing to fund it.<sup>94</sup> A more well-conceived effort to measure the performance of our growth management programs, similar to the performance measures that some local governments have adopted with their comprehensive plans, would be a worthy step toward promoting effectiveness and accountability in managing physical growth and development.

One starting place for more emphasis on outcomes is in state planning. Important as it was when enacted in 1985, today the State Comprehensive Plan is in need of a makeover that will provide more policy direction without infringing on the decisionmaking powers of elected officials. The 1993 requirement for preparation of a Growth Management Portion of the State Comprehensive Plan aimed to bring together land, water, and transportation policy, but it was never implemented.<sup>95</sup> A different approach to the articulation of state growth policy may be useful at this juncture, but no matter how state policy is set forth, it should be accompanied by an agreed-upon means for the periodic measurement of our progress toward those ends.

### C. *Stronger Linkage Between Land and School Planning*

In recent years, policymakers have sought to improve the coordination and planning between the local governments that regulate future development and the school districts that provide public schools. In 1995, lawmakers required local governments to identify future land use districts where schools would be a permissible use.<sup>96</sup> In 1998, the legislature took additional steps to promote closer coordination between land planning by local governments and educational facility planning by school districts.<sup>97</sup> These steps were crafted against a backdrop of forbidding practical

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93. See Act effective May 25, 1994, ch. 94-249, § 19, 1994 Fla. Laws 1848, 1864-65 (codified as amended at FLA. STAT. § 286.30 (2000)) (creating the Commission on Government Accountability to the People).

94. See *The Importance of State Benchmarks*, TAMPA TRIB., Mar. 13, 1998, at 14.

95. See Act effective July 1, 1993, ch. 93-206, sec. 24, § 186.009(2)(d), 1993 Fla. Laws 1887, 1917. Under the 1993 Act, the growth management portion must be adopted by the Legislature to have legal effect. See *id.* sec. 24, § 186.009(3)(c), 1993 Fla. Laws at 1918.

96. See Act effective June 15, 1995, ch. 95-322, § 4, 1995 Fla. Laws 2867, 2877-78 (codified at FLA. STAT. § 163.3177(6)(a) (2000)).

97. See Act effective May 22, 1998, ch. 98-176, § 9, 1998 Fla. Laws 1556, 1567 (codified at FLA. STAT. § 235.193 (2000)).

and legal barriers arising from the separate constitutional status of local governments and school districts.<sup>98</sup>

Additional steps can be taken to enhance collaborative planning by local governments and school boards. For example, state law requires each school district to submit annually a “general educational facilities report” to each local government within the district to provide information regarding each existing school and its projected physical needs.<sup>99</sup> Yet some districts do not submit these reports as required.<sup>100</sup> Until existing coordination measures are fully implemented and found wanting, it is difficult to justify more aggressive regulatory steps, particularly when classroom overcrowding is primarily a fiscal issue.<sup>101</sup>

Lawmakers should resist renewed calls for school concurrency. Two prior blue-ribbon commissions have recommended against adding educational facilities to the list of public facilities covered by Florida’s mandatory concurrency requirement.<sup>102</sup> Those commissions responded in part to local government opposition to more state-imposed mandates.<sup>103</sup> Given the separate constitutional roles of local governments and school districts, one with sole regulatory authority over the development of land, the other with sole authority to finance, construct, and operate public schools, the coordination of land development with educational facility construction—as the prior study commissions recognized—is the ultimate challenge in intergovernmental coordination. Enhanced planning coordination coupled with additional funding for school construction will do more than school concurrency to ease classroom overcrowding, without the regulatory baggage and potential for political conflict and litigation.

#### *D. Promoting Compact Urban Development*

One central purpose of Florida’s planning and growth management system is to promote compact urban development. While the pursuit of this policy has not been without controversy, it has been an accepted tenet of our state’s growth policy for more than a decade.<sup>104</sup> The initial steps in implementing this policy included the

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98. See PUBLIC SCHOOLS CONSTRUCTION STUDY COMM’N, FINAL REPORT 22 (1997) [hereinafter PUBLIC SCHOOLS CONSTRUCTION REPORT].

99. FLA. STAT. § 235.194 (2000).

100. See PUBLIC SCHOOLS CONSTRUCTION REPORT, *supra* note 98, at 10.

101. See *id.* at 16.

102. See ENVIRONMENTAL LAND MGMT. STUDY COMM., FINAL REPORT: BUILDING SUCCESSFUL COMMUNITIES 66-67 (1992); PUBLIC SCHOOLS CONSTRUCTION REPORT, *supra* note 98, at 17.

103. See Lawlor, *supra* note 70 (noting the opposition generally).

104. See GOVERNOR’S TASK FORCE ON URBAN GROWTH PATTERNS, FINAL REPORT (1989); see also Thomas G. Pelham, *Shaping Florida’s Future: Toward More Compact,*

discouragement of urban sprawl through case-by-base compliance determinations for individual comprehensive plans.<sup>105</sup> This policy was later formalized by rule adoption of state minimum criteria for determining whether a local comprehensive plan or plan amendment discouraged urban sprawl.<sup>106</sup>

In recent years, the focus has been on taking affirmative steps to encourage compact urban development. In 1993, based on the recommendations of ELMS III, the legislature enacted a number of statutory changes intended to create incentives for compact urban development. DRI thresholds for residential, hotel/motel, office, and retail projects were increased by 50% in urban central business and regional activity centers, and the thresholds for mixed-use projects in those areas were increased 100%.<sup>107</sup> To address the criticism that transportation concurrency could be counterproductive to promoting compact urban development,<sup>108</sup> the 1993 legislation authorized exception areas where transportation concurrency would not apply in urban areas meeting certain criteria,<sup>109</sup> transportation concurrency management areas utilizing area-wide level-of-service standards for developed urban areas,<sup>110</sup> redevelopment projects in existing urban service areas to generate 110% of the transportation impacts of prior development without a concurrency penalty,<sup>111</sup> and outright exemptions from transportation concurrency for certain projects typically found in urban areas.<sup>112</sup>

Based on recommendations of the Transportation and Land Use Study Committee,<sup>113</sup> the legislature in 1999 expressly authorized special transportation districts with multimodal levels of service in areas where primary emphasis was placed on individual mobility

*Efficient, and Livable Development Patterns*, 7 J. LAND USE & ENVTL. L. 321 (1992) (recounting and critiquing Florida's "anti-sprawl" policies).

105. See, e.g., *Home Builders & Contractors Ass'n v. Department of Comm'y Aff.*, 585 So. 2d 965, 966 (Fla. 1st DCA 1991) (upholding the Department of Community Affairs' nonrule policy on discouragement of urban sprawl).

106. See FLA. ADMIN. CODE ANN. r. 9J-5.006(5) (1999); see also *Florida E. Coast Indus., Inc. v. Department of Comm'y Aff.*, 677 So. 2d 357 (Fla. 1st DCA 1996) (upholding urban sprawl minimum criteria rule).

107. See Act effective July 1, 1993, ch. 93-206, sec. 52, §380.06(2)(e), 1993 Fla. Laws 1887, 1948.

108. See *id.* sec. 8, § 163.3180(5)(a), 1993 Fla. Laws at 1899 (setting forth findings of the legislature).

109. See *id.* sec. 8, § 163.3180(5)(b), 1993 Fla. Laws at 1899; see also FLA. ADMIN. CODE ANN. r. 9J-5.0055(6) (1999).

110. See *id.* sec. 8, § 163.3180(7), 1993 Fla. Laws at 1900; see also FLA. ADMIN. CODE ANN. r. 9J-5.0055(5) (1999).

111. See ch. 93-206, sec. 8, § 163.3180(8), 1993 Fla. Laws at 1900.

112. See *id.* sec. 8, § 163.3180(5)(c), 1993 Fla. Laws at 1899; see also FLA. ADMIN. CODE ANN. r. 9J-5.0055(7) (1999).

113. See TRANSPORTATION & LAND USE STUDY COMM., FINAL REPORT (1998).

rather than vehicular mobility.<sup>114</sup> Public transit facilities were exempted from transportation concurrency.<sup>115</sup> Trip-intensive mixed-use projects with specified amounts of residential development were enabled by allowing them to satisfy transportation concurrency through proportionate-share contributions for local and regionally significant transportation impacts sufficient to complete construction of one or more regionally significant transportation improvements.<sup>116</sup>

These continual changes to transportation concurrency reflect widespread misgivings about transportation concurrency among many constituencies.<sup>117</sup> Yet it is unlikely the legislature will eliminate transportation as a covered facility in Florida's mandatory adequate public facilities requirement. Accordingly, additional steps are needed to promote compact urban development and reconcile that policy with transportation concurrency and our desire for higher quality development.

A number of additional steps should be taken. The criteria for establishment of transportation concurrency exception areas should be relaxed so this planning tool can be utilized over larger urban areas.<sup>118</sup> State, regional, and local planners should identify coordinated transit corridors through our most urbanized regions, and where necessary, concurrency-free areas should be established adjacent to those corridors to facilitate intensive, transit-oriented development.<sup>119</sup> This enhancement would complement the recent liberalization of the concurrency exemption for "projects that promote public transportation."<sup>120</sup> Because large master-planned projects tend to result in higher quality development, DRI-scale office, retail, and hotel/motel projects should be given the same transportation concurrency benefit that was extended to trip-intensive mixed-use projects in 1999, especially if the DRI program continues to resemble its current form.

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114. See Act effective July 1, 1999, ch. 99-378, sec. 4, § 163.3180(15), 1999 Fla. Laws 3743, 3757.

115. See *id.* sec. 4, § 163.3180(4)(b), 1999 Fla. Laws at 3754-55.

116. See *id.* sec. 4, § 163.3180(12), 1999 Fla. Laws at 3756.

117. See generally Powell, *supra* note 71, at 301-11.

118. See FLA. ADMIN. CODE ANN. r. 9J-5.0055(6) (1999) (listing current transportation concurrency exception area requirements).

119. Local comprehensive plan transportation elements already are required to address density and intensities of use to facilitate public transportation in corridors. See FLA. STAT. § 163.3177 (2000). Regional planning councils already have authority to propose minimum densities along designated regional transportation corridors. See FLA. STAT. § 186.507(12) (2000); see also ENVIRONMENTAL LAND MGMT. STUDY COMM., *supra* note 42, at 29, 39-40, 68-69 (Recommendations 27, 47, 100).

120. FLA. STAT. § 163.3164(28) (2000); see also FLA. STAT. § 163.3180(5)(b) (2000).

*E. Greater Compliance Without More Litigation*

Ten years ago, the major controversies that arose from local land use decisions dealt with the preparation of local plans. In recent years, the major controversies have dealt with plan implementation. Environmental Protection Secretary David Struhs told Governor Bush's study commission that too many local governments approve projects that are not consistent with their adopted plans and expect state officials to stop them.<sup>121</sup>

Planning advocates are not the only ones interested in greater local government adherence to local planning decisions. Landowners and developers rely on these plans when making business decisions and ordering their affairs. And yet, faced with their own needs and fiscal pressures, local governments can take advantage of their regulatory authority to exact money and other concessions from developers without any policy basis for doing so in their adopted plans. Although this abuse rarely takes place in public, there can be no doubt that it is taking place.

The challenge is to promote greater adherence to local plans by everyone, recognizing that plans legitimately may be changed from time to time, without an increase in litigation. Litigation is expensive, time-consuming, and deleterious to continuing relationships within a community. Moreover, the courts are the worst place to formulate growth management decisions. This dilemma was one of the most vexing for Governor Bush's commission, but as a policy matter, it may be the most important.

Also needed is a level playing field for those circumstances where litigation may be required to enforce a local plan. Pursuant to section 163.3215, *Florida Statutes*, when a third-party challenger seeks judicial review of a development order on grounds that the local government action is not consistent with the adopted comprehensive plan, he or she gets the benefit of a de novo review in which a new record is established at the reviewing circuit court.<sup>122</sup> However, a developer who seeks judicial review of a local government's adverse decision on a development order on the same grounds is limited to a circuit court's certiorari review of the record compiled below.<sup>123</sup> This inequity should be remedied by the legislature. A respect for judicial resources and the primacy of local government decisionmaking on development applications suggests that judicial review of plan

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121. See Craig Pittman, *Growth Panel Departs with Few Hard Ideas*, ST. PETE. TIMES, Sept. 15, 2000, at 7B.

122. See Poulos v. Martin County, 700 So. 2d 163 (Fla. 4th DCA 1997).

123. See Parker v. Leon County, 627 So. 2d 476 (Fla. 1993).

consistency be addressed by certiorari regardless of the party initiating the review.<sup>124</sup>

#### *F. Updating or Eliminating the DRI Program*

Governor Bush charged his Growth Management Study Commission with recommending changes to the DRI program “if you can find something to replace it.”<sup>125</sup> To be sure, with local comprehensive plans now in place throughout Florida and giving local effect to state policy, the time has come to eliminate the DRI program, or at least to find a more rational fit for it in today’s regulatory framework.

In 1993, the legislature authorized termination of the DRI program in most local jurisdictions contingent upon the implementation of enhanced intergovernmental coordination measures in their local plans.<sup>126</sup> This strategy foundered on widespread concerns about the administrative rule that would have implemented this new plan-based development review process. Ultimately, the legislature backtracked and retained the DRI program.<sup>127</sup> Lawmakers should again consider whether local comprehensive plans can be revised to improve intergovernmental coordination in the identification and mitigation of extrajurisdictional impacts.<sup>128</sup> The ELMS III statutory formula for termination of the DRI program could yet prove programmatically and politically viable if it were to be implemented with a more restrained and evenhanded administrative rule.

Absent improvements to local plans that establish an adequate basis for the identification and mitigation of extrajurisdictional impacts, the legislature should at least scale back the DRI program to eliminate regulatory redundancy and to focus on a few key issues

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124. The House of Representatives considered one worthwhile approach for addressing this inequitable situation in 1999, *see* FLA. H.R. JOUR. 1273, 1287 (Reg. Sess. May 1, 2000) (amendment 1 to Fla. CS for SB 758 (2000)) (proposed amendment to FLA. STAT. § 163.3215 (2000)), however, other formulas also may be meritorious.

125. Gov. Jeb Bush, Remarks Before the Growth Management Study Commission (Aug. 28, 2000), *quoted in* Julie Hauserman, *Governor to Make Growth Woes a Top Issue*, ST. PETE. TIMES, Aug. 29, 2000, at B5.

126. *See* Act effective July 1, 1993, ch. 93-206, sec. 52, § 380.06(27), 1993 Fla. Laws 1887, 1955-56, *repealed by* Act effective June 1, 1996, ch. 96-416, sec. 10, § 380.06(27), 1996 Fla. Laws 3186, 3203.

127. *See* ch. 96-416, sec. 10, § 380.06(27), 1996 Fla. Laws at 3203.

128. The last time it conducted an internal policy review of the DRI program, the Department of Community Affairs concluded that local comprehensive plans as then constituted did not provide a basis for local permitting programs that could fully replace the DRI program because of the failure of the comprehensive plans to adequately ensure that extra-jurisdictional impacts of development are appropriately considered and mitigated. *See* DEPARTMENT OF COMM’Y AFF., DEVELOPMENT OF REGIONAL IMPACT REPORT 23 (1992). Unfortunately, that conclusion remains largely true today.

with the potential for offsite, extrajurisdictional impacts that otherwise would not be addressed. First, some issues should be eliminated from DRI review because they are more effectively addressed by other regulatory programs implemented since the DRI program began in 1972. For example, DRI projects must be reviewed for wetland impacts even though Florida has had a separate and more exacting regulatory program to protect wetlands since 1986,<sup>129</sup> and local governments have been required to adopt comprehensive plan policies to protect wetlands since 1985.<sup>130</sup> DRI projects also must be reviewed for impacts on water, sewer, drainage, and other public facilities, even though since 1985 Florida has required all local governments to implement “concurrency” to ensure adequate public facilities are available to accommodate the impacts of development on a timely basis.

Second, some land uses that currently trigger DRI review should be deleted since they can be addressed more effectively through a plan-based approach. For example, last year, the Department of Community Affairs (DCA) developed legislation for an airport master-planning process similar to the current deepwater port master-planning process which provides a DRI exemption for port development.<sup>131</sup> This proposal recognized that major airports require extensive master planning efforts under federal law. DCA also concluded last year that DRI review adds no regulatory value to other state and local regulatory programs that govern marinas, and it recommended their removal from the DRI program, or at least a liberalization of the DRI threshold for marinas.<sup>132</sup> These changes were well conceived and should be enacted by the legislature this year. Other uses which prove conducive to such an approach should likewise be relieved of DRI review.

Third, some local jurisdictions have reached such a stage of maturity in their local land development controls that the DRI program adds no appreciable regulatory value. This premise, among others, underlies the “Sustainable Communities Demonstration Project” statute.<sup>133</sup> Some large urban municipalities and counties may be particularly fitting candidates for release from mandatory

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129. See Act effective Oct. 1, 1986, ch. 86-186, 1986 Fla. Laws 1340 (codified at FLA. STAT. § 373.414 (2000)).

130. See Act effective Oct. 1, 1985, ch. 85-55, sec. 6, § 163.3177(6)(d), 1985 Fla. Laws 207, 216-17; see also FLA. ADMIN. CODE ANN. r. 9J-5.013(2)(c), (3)(a)-(b) (1999). Separately, the Federal Government requires permit approval for dredge-and-fill activities in waters of the United States. See Clean Water Act of 1972 § 404, 33 U.S.C. § 1344 (1994).

131. See FLA. H.R. JOUR. 1273, 1287 (Reg. Sess. 2000) (amendment 1 to CS for SB 758 (2000)) (proposed creation of FLA. STAT. § 163.3177(6)(k)).

132. See *id.* (proposed amendment to FLA. STAT. § 380.0651(3)(e) (2000)).

133. Act effective May 22, 1998, ch. 98-176, 1998 Fla. Laws 1556 (codified at FLA. STAT. § 163.3244 (2000)).



participation in the DRI program. One way to bring about orderly release from mandatory local participation in the DRI program would be revision of the DRI certification process enacted by the legislature in 1985, but never actually utilized by any local government because of the onerous certification criteria.<sup>134</sup>

Additionally, the legislature should consider enhancing the already available alternatives to DRI review for large-scale activities. In 1998, the legislature authorized a limited number of optional sector plans that could be adopted by local governments and, once fully implemented, would result in waiver of DRI review for any development that is consistent with the sector plan.<sup>135</sup> Under current law, sector plans are limited to areas of at least 5000 acres without special dispensation by DCA.<sup>136</sup> Further, they are encumbered by the DRI uniform review standards for identifying and mitigating impacts to natural resources and facilities.<sup>137</sup> These features of the sector planning law minimize its usefulness to the public sector and its attractiveness to the private sector. As part of any reexamination of the DRI program that does not result in its complete replacement, sector planning should be streamlined so it is not just DRI review by another name.

These reforms would result in a leaner, more expeditious, and less duplicative review process for certain large-scale projects where extrajurisdictional impacts should be identified and mitigated. They would also reduce the regulatory burdens of DRI review which discourage developers from undertaking the very large-scale projects which are most likely to be master-planned. There will, no doubt, be voices that cry out against the elimination of duplicative or outdated requirements—even those which cannot be justified in today's regulatory framework—out of the mistaken fear that the elimination of *any* requirement is tantamount to deregulation. In the current political climate, however, a more compelling concern for those in favor of public land use controls is that the “unnecessary duplication” of regulatory review will undermine political support for the modern programs that have been put in place.<sup>138</sup>

### *G. Streamlining and De-politicizing Appeals*

The legislature should revisit the role of the Governor and Cabinet in growth management. Initially, the Governor and Cabinet

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134. See FLA. STAT. § 380.065 (2000) (setting forth the procedure for obtaining certification).

135. See ch. 98-176, 1998 Fla. Laws 1556 (codified at FLA. STAT. § 163.3245 (2000)).

136. See FLA. STAT. § 163.3245(1) (2000).

137. See *id.* § 163.3245(5) (2000).

138. See text accompanying note 52.

were given a policymaking role as the Administration Commission that adopted guidelines and standards governing the DRI program<sup>139</sup> and an adjudicatory role through the Florida Land and Water Adjudicatory Commission, which decided administrative appeals in disputes involving individual project approvals.<sup>140</sup> Later, the Administration Commission was given authority to determine when local comprehensive plans and plan amendments were not in compliance with state law and therefore invalid or subject to financial sanctions against the local governments.<sup>141</sup>

Much has been written and said over the years about Florida's Cabinet system,<sup>142</sup> and there is much experience from which to conclude that the Governor and elected Cabinet have been miscast as decisionmakers in complex quasi-judicial proceedings. Growth management cases end up before the Governor and Cabinet only after an evidentiary hearing and entry of a recommended order pursuant to Florida's Administrative Procedure Act.<sup>143</sup> Such cases are supposed to be decided on the basis of the facts as established by an impartial factfinder.<sup>144</sup> Yet the forum in which these dispassionate decisions are supposed to be made is composed of statewide elected officials<sup>145</sup>—who are often exposed to a barrage of newspaper editorials and packed meeting rooms. No one should be surprised when the politicians react like politicians, as they frequently do.

There is surprising agreement on this point from constituencies with varying and often conflicting interests.<sup>146</sup> A more fitting administrative decisionmaker is needed to replace the Governor and Cabinet in passing judgment on compliance with these important state laws. Several states have alternative models, such as Oregon's

139. See Florida Environmental Land and Water Management Act of 1972, ch. 72-317, § 6, 1972 Fla. Laws 1162, 1172-76 (codified as amended at FLA. STAT. § 380.031 (2000)) (providing for adoption of guidelines and standards by the Administration Commission); see also FLA. STAT. §§ 380.0651(1)-(3), 380.0685 (2000) (defining the "Administration Commission" as the Governor and the Cabinet).

140. See ch. 72-317, § 7, 1972 Fla. Laws at 117-78 (codified at FLA. STAT. § 380.07 (2000)).

141. See Act effective Oct. 1, 1985, ch. 85-55, sec. 8, § 163.3184(4), 1985 Fla. Laws 207, 221.

142. See, e.g., William L. Boyd, IV, *The Case for an Appointed Cabinet*, FLA. B.J., Oct. 1978, at 640; Joseph W. Landers, Jr., *The Myth of the Cabinet System: The Need to Restructure Florida's Executive Branch*, 19 FLA. ST. U. L. REV. 1089 (1992); Kent J. Perez & Edwin Bayo, *Florida's Cabinet System: Y2K and Beyond*, FLA. B.J., Nov. 2000, at 68.

143. See FLA. STAT. § 163.3184 (10)(a)-(b) (2000).

144. See MODEL LAND DEV. CODE §§ 7-501, 7-502, 7-503 note at 287-90 (1975).

145. See Landers, *supra* note 142, at 109 (noting all cabinet members in Florida are elected).

146. See, e.g., Joseph W. Little, *The Need to Revise the Florida Constitutional Revision Commission*, 52 U. FLA. L. REV. 475, 493 (2000) (describing the cabinet structure as creating "attenuated political accountability between these officials and the electorate").

Land Use Board of Appeals.<sup>147</sup> Florida has administrative boards that also may be useful models.<sup>148</sup> As part of the larger Cabinet reform agenda to be implemented in the aftermath of voter approval of 1998's Revision No. 8,<sup>149</sup> the legislature should relieve the Governor and Cabinet of their quasi-judicial duties in growth management cases and confer those duties on an administrative body better able to make nonpolitical quasi-judicial decisions based on the application of Florida law to an impartially found factual record.

#### IV. CONCLUSION

There are other pressing issues that should be addressed as part of a comprehensive policy review of Florida's growth management programs. In addressing these needs, we should hope that legislators and other policymakers will build on prior successes and take some calculated risks with innovative strategies to address the shortcomings. We also should hope they will emphasize bipartisanship and balance among the interests of competing constituencies. If these polestars continue to guide the development of growth policy in Florida, then we can expect to make another step forward.

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147. See OR. REV. STAT. §§ 197.805-.860 (1999) (creating the Board).

148. See, e.g., FLA. STAT. § 447.205 (2000) (Public Employees Relations Commission).

149. See, e.g., Little, *supra* note 146.