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## Managing Florida's Growth: The Next Generation

David L. Powell

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MANAGING FLORIDA'S GROWTH:  
THE NEXT GENERATION

DAVID L. POWELL

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## MANAGING FLORIDA'S GROWTH: THE NEXT GENERATION

DAVID L. POWELL\*

### I. INTRODUCTION

FOR more than twenty years, Florida has tried to address the forces of growth and change in its natural and built environments. During this period, state leaders have erected a complex system of programs "to balance the need to provide for the large number of people coming to the state with the equally legitimate demand for the protection of the state's natural systems: land, air and water."<sup>1</sup> This legal system, while not without flaws, is one of the nation's most comprehensive frameworks for dealing with physical growth and development.<sup>2</sup>

This system was the subject of major reform legislation enacted by the Florida Legislature during its 1993 Regular Session.<sup>3</sup> The Growth Management Act of 1993 (1993 Act), enacted after an intensive year-long policy review by the third Environmental Land Management Study (ELMS) Committee, attempts to address some of the shortcomings of Florida's planning and growth management system, and to promote the system's improved functioning and future stability. This legislation touches on programs at every level of government in Florida.

#### A. *The Integrated Planning and Growth Management System*

Since 1971, a succession of Florida's leaders has directed public attention to both the promises and problems brought about by Florida's

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\* Partner, Hopping Boyd Green & Sams, Tallahassee, Florida; B.J., 1974, University of Texas at Austin; M.S., 1975, Columbia University; J.D., 1986, Florida State University. Mr. Powell served as Executive Director of the third Environmental Land Management Study Committee and participated in drafting the legislation to enact its recommendations into law.

The author wishes to thank Mary Kay Falconer, Casey J. Gluckman, Robert M. Jones, James F. Murley, Thomas G. Pelham, Robert M. Rhodes, and Linda Loomis Shelley for reviewing and offering comments on a draft of this article. All conclusions, and any errors or omissions, are the responsibility of the author.

1. JOHN M. DEGROVE & DEBORAH A. MINESS, LINCOLN INSTITUTE OF LAND POLICY, *THE NEW FRONTIER FOR LAND POLICY: PLANNING & GROWTH MANAGEMENT IN THE STATES* 9 (1992).

2. *Id.* at 7. See also Sarah H. Sigel, *Statewide Growth Management Planning*, LAND DEV., Fall 1992, at 14.

3. Ch. 93-206, 1993 Fla. Laws 1887. For purposes of this Article, the act will be referred to as the Growth Management Act of 1993 (1993 Act).

tremendous population growth.<sup>4</sup> Four governors—Reubin Askew,<sup>5</sup> Bob Graham,<sup>6</sup> Bob Martinez,<sup>7</sup> and Lawton Chiles<sup>8</sup>—have made growth policy a priority issue for their administrations. Each has shunned the extremes of growth at any price or halting growth altogether, and instead has charted a moderate course committed to management of the state's growth.

Properly defined and understood, growth management, far from being a code word for no-growth or slow-growth efforts, has as central to its meaning a commitment to plan carefully for the growth that comes to an area so as to achieve a responsible balance between the protection of natural systems—land, air, and water—and the development required to support growth in the residential, commercial, and retail areas. Growth management is not pro-growth, nor is it anti-growth. It is deeply committed to a responsible "fit" between development and the infrastructure needed to support the impacts of development, including such things as roads, schools, water, sewer, drainage, solid waste, and parks and recreation.<sup>9</sup>

Florida's integrated planning and growth management system includes plans and activities at three governmental tiers. At the state level, the State Comprehensive Plan provides policy direction for all levels of government. It is the cornerstone of the system. State agencies must adopt agency plans to implement pertinent portions of the State Comprehensive Plan. At the regional level, each regional planning council must adopt a regional plan that is consistent with the State Comprehensive Plan, but is shaped by, and reflects, the circumstances and conditions of its region. At the local level, each county and municipality must adopt a local comprehensive plan that is consistent with the state and regional plans. Statutory consistency requirements bind the system together. The consistency requirements linking state, regional, and local plans, however, are generally stronger and

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4. The development of Florida's integrated planning and growth management system is usually traced to the Governor's Conference on Water Management in South Florida, convened in August 1971 by Governor Reubin Askew. The conference included "a keynote address by the governor in which a statewide elected official for the first time in the history of the state challenged the necessary goodness of growth" and concluded with a call for new public policies to manage Florida's future development. DEGROVE & MINESS, *supra* note 1, at 9.

5. Dem., 1971-79.

6. Dem., 1979-87.

7. Repub., 1987-91.

8. Dem., 1991-.

9. DEGROVE & MINESS, *supra* note 1, at 1. See also H. Glen Boggs & Robert C. Appgar, *Concurrence and Growth Management: A Lawyer's Primer*, 7 J. LAND USE & ENVTL. L. 1, 26 (1991).

more effective than the consistency requirement "between and among cities and counties at the local level and the consistency requirement for state agency plans and programs."<sup>10</sup>

State, regional, and local agencies administer a variety of permitting and regulatory programs within the framework of these plans. These programs include local land planning; local growth management systems that assure adequate public facilities are available concurrent with the impacts of a development; coordinated, multi-disciplinary review of developments of regional impact (DRIs); and intensive state oversight of specially designated areas of critical state concern.

This system is the net result of incremental changes made over the last two decades. The first generation of growth management programs was established by the Legislature starting in 1972; its twin pillars were the Florida Environmental Land and Water Management Act of 1972<sup>11</sup> and the Local Government Comprehensive Planning Act of 1975.<sup>12</sup> These acts created trailblazing programs that reasserted a state role in land development regulation and laid the foundation for a statewide approach to growth management.

The second generation of growth management programs was largely an overhaul of the first generation programs, with some important additions. This second generation included the Florida State and Regional Planning Act of 1984<sup>13</sup> and the Growth Management Act of 1985 (1985 Act).<sup>14</sup> In 1985, the Legislature also enacted the State Comprehensive Plan. Since then, public officials at all levels have focused their efforts in the field of growth management on implementation of these statutes. They have refrained from making major changes to the planning and growth management system until the revision of local comprehensive plans was completed and a coordinated statewide pol-

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10. DEGROVE & MINES, *supra* note 1, at 162.

11. Ch. 72-317, 1972 Fla. Laws 1162.

12. Ch. 75-257, 1975 Fla. Laws 794.

13. Ch. 84-257, 1984 Fla. Laws 1166.

14. Ch. 85-55, 1985 Fla. Laws 207 [hereinafter 1985 Act]. For a review of this landmark legislation, see Thomas G. Pelham, William L. Hyde & Robert P. Banks, *Managing Florida's Growth: Toward an Integrated State, Regional, and Local Comprehensive Planning Process*, 13 FLA. ST. U. L. REV. 515 (1985).

The name "Growth Management Act of 1985" is sometimes used to refer to the Local Government Comprehensive Planning and Land Development Regulation Act, chapter 163, part II, *Florida Statutes*, which establishes requirements for local planning programs. In fact, the 1985 Act was a single act of the Legislature which included major revisions to, among others, statutes addressing local, regional and state planning, developments of regional impact (DRIs), and coastal zone protection. Ch. 85-55, 1985 Fla. Laws 207.

For an overview of the policy debate leading to enactment of the 1985 Act, see *Conference Remarks from "Managing Megagrowth—Florida's New Mandate,"* 1 J. LAND USE & ENVTL. LAW 151 (1985).

icy review was conducted.<sup>15</sup> The policy review was intended to provide the basis for the next generation of growth management in Florida.

### *B. The Third Environmental Land Management Study Committee*

In November 1991, Governor Chiles initiated the policy review by entering an executive order creating the ELMS Committee.<sup>16</sup> The Governor directed the Committee to "review the operation and implementation of Florida's growth management statutes . . . and . . . make recommendations for improvements in the State's system for managing growth."<sup>17</sup> The Governor identified eighteen topics for possible consideration by the ELMS Committee, but gave the Committee broad discretion to establish priorities among those topics. This multitude of issues reflected the Chiles Administration's intent that the Committee serve as the principal vehicle for development of growth management policy.<sup>18</sup>

The Governor appointed forty-five individuals to serve on the Committee, including legislators, local government officials, planners, developers, homebuilders, environmentalists, farmers, and civic leaders. The Governor also appointed the chief administrators of six state agencies to serve as *ex officio*, nonvoting members.<sup>19</sup> James Harold

15. *E.g.*, Letter from Lawton Chiles, Gov., Fla., to Gwen Margolis, Pres., Fla. S. (Feb. 17, 1992) (on file with the *Florida State University Law Review*).

16. Fla. Exec. Order No. 91-291 (Nov. 19, 1991).

The executive order creating the third Environmental Land Management Study Committee (ELMS III or Committee) was published as an appendix to the Committee's report. ENVIRONMENTAL LAND MANAGEMENT STUDY COMM., FINAL REPORT: BUILDING SUCCESSFUL COMMUNITIES 125-27 (Dec. 1992) [hereinafter ELMS III REPORT].

The first Environmental Land Management Study Committee (ELMS I) was established by the Legislature to assist in implementation of the Florida Environmental Land and Water Management Act of 1972, Chapter 72-317, § 9, 1972 Florida Laws 1162, 1178. Its work led to passage of the Local Government Comprehensive Planning Act of 1975, Chapter 75-257, 1975 Florida Laws 794 (current version at FLA. STAT. §§ 163.3161-.3243 (1991 & Supp. 1992)).

The second Environmental Land Management Study Committee (ELMS II) was created by executive order of Governor Bob Graham in 1982 and was directed to review the state's system for managing growth. Fla. Exec. Order No. 82-95 (Aug. 23, 1982). Its work led to passage of the Florida State and Regional Planning Act of 1984, Chapter 84-257, 1984 Florida Laws 1166 (current version at FLA. STAT. ch. 186 (1991 & Supp. 1992), and the 1985 Act.

17. Fla. Exec. Order No. 91-291, § 2 (Nov. 19, 1991).

18. See THE GOVERNOR'S ANNUAL REPORT 19-22 (Dec. 1992); THE GOVERNOR'S ANNUAL REPORT 28 (Apr. 1992); BUILDING COMMUNITY PARTNERSHIPS: 1992-97 DEPARTMENT OF COMMUNITY AFFAIRS' AGENCY STRATEGIC PLAN 1-14 (n.d.); FROM CROWDS TO COMMUNITIES: 1991-96 DEPARTMENT OF COMMUNITY AFFAIRS' AGENCY FUNCTIONAL PLAN 9-14 (n.d.).

19. These administrators were the Secretaries of the Departments of Commerce, Environmental Regulation, Health and Rehabilitative Services, Labor and Employment Security, and Transportation, and the Executive Director of the Department of Natural Resources. The Secretary of the Department of Community Affairs served as a voting member of the Committee.

During its 1993 Regular Session, the Legislature enacted legislation to merge the Departments



Thompson,<sup>20</sup> of Gretna, was appointed as Chairman, and Linda Loomis Shelley,<sup>21</sup> of Tallahassee, was appointed as Vice-Chair. The Committee was directed to present a report and recommendations to be considered by the Legislature during its 1993 Regular Session.<sup>22</sup>

The ELMS Committee began work amid continuing controversy regarding implementation of the 1985 Act, especially the revisions to the Local Government Comprehensive Planning and Land Development Regulation Act.<sup>23</sup> Following a year of study and debate, the ELMS Committee unanimously adopted its recommendations for changes to almost every component of the integrated planning and growth management system, from minor adjustments to changes as dramatic as program termination.<sup>24</sup> The Committee's recommendations formed the nucleus of the growth management legislation enacted by the Legislature during the 1993 Regular Session, and are an important aid to interpreting the intent of the 1993 Act.

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of Environmental Regulation and Natural Resources into a new Department of Environmental Protection. Florida Environmental Reorganization Act of 1993, ch. 93-213, §§ 3-12, 1993 Fla. Laws 2129, 2133-37.

20. Mr. Thompson, an attorney in private practice in Tallahassee, served for 12 years in the Florida House of Representatives, culminating in a term as Speaker in 1985-86.

21. Ms. Shelley served as General Counsel of the Department of Community Affairs (DCA) as well as to Governor Graham when the last major growth management measures were enacted by the Legislature. On May 1, 1992, she was appointed by Governor Chiles to serve as Secretary of DCA to fill the vacancy created by the death of Secretary William E. Sadowski. Although she continued to serve as Vice-Chair of the ELMS Committee, she ceased participation in its day-to-day management.

22. Governor Chiles initially directed the Committee to submit its report and recommendations no later than September 30, 1992. Fla. Exec. Order No. 91-291, § 4 (Nov. 19, 1991). Subsequently, he extended the submittal date to December 15, 1992. Fla. Exec. Order No. 92-215, § 1 (Aug. 18, 1992). The text of the order extending the Committee's deadline was published as an appendix to the Committee's report. ELMS III REPORT, *supra* note 16, at 128.

23. DEGROVE & MINESS, *supra* note 1, at 28. See also Letter from Lawton Chiles, Gov., Fla., to Gwen Margolis, Pres., Fla. S. *supra* note 15.

24. ELMS III REPORT, *supra* note 16. See Porter & Watson, *Rethinking Florida's Growth Management System*, URB. LAND, Feb. 1993, at 21.

The Committee's report contains a description of the Committee's decision-making process, including all briefings, working groups, and hearings as well as a selected bibliography of materials considered during its study. ELMS III REPORT, *supra* note 16, at 129-31. For a review of the consensus-building techniques utilized by the Committee, see *The Third Environmental Land Management Study Committee: The Process Behind the Product*, SOLUTIONS IN THE PROCESS, Apr. 1993, at 4 (Florida Growth Management Conflict Resolution Consortium, Tallahassee, Fla.).

The ELMS Committee did not evaluate whether the integrated planning and growth management system is leading toward a better quality of life in Florida. Unfortunately, there has been no objective, empirical evaluation of growth management programs in Florida or elsewhere. Douglas R. Porter, *Do State Growth Management Acts Make a Difference? Local Growth Management Measures Under Different State Growth Policies*, 24 LOY. L.A. L. REV. 1015, 1017-18 (1991). This task, while daunting, should be undertaken.

### C. *Legislative Action on the ELMS Committee Report*

After the Committee submitted its recommendations to Governor Chiles on December 15, 1992, the ELMS Committee's staff, with direction from its membership, prepared draft legislation for those recommendations that required legislative action. The proposed legislation was presented to the House Committee on Community Affairs by Representative Ron Saunders,<sup>25</sup> as Proposed Committee Bill CA 93-01. The proposed legislation was filed in the Senate as Senate Bill 1166, sponsored by Senator S. Curtis Kiser.<sup>26</sup>

Representative Saunders referred the proposed committee bill to the Subcommittee on Growth Management.<sup>27</sup> The Chairman of the Subcommittee, Representative Harry C. Goode, Jr.,<sup>28</sup> conducted a series of hearings and workshops on the bill. In an attempt to resolve outstanding policy questions, Representative Goode also asked Secretary Shelley to convene a series of informal meetings to allow selected interest groups to suggest refinements to the draft bill. These meetings, held throughout the 1993 Regular Session, resulted in a series of amendments that represented a consensus of many of the constituencies interested in the legislation,<sup>29</sup> and were added to the bill with a minimum of controversy.<sup>30</sup>

The Senate considered Committee Substitute for Committee Substitute for Senate Bill 1166 on March 29, 1993.<sup>31</sup> The bill passed as amended by a vote of 36-to-3.<sup>32</sup> On April 1, 1993, the House considered Committee Substitute for Committee Substitute for House Bill 2315.<sup>33</sup> The bill passed by a vote of 116-to-1.<sup>34</sup> On April 2, 1993, the

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25. Dem., Key West, Chairman of the Committee.

26. Repub., Dunedin.

Senator Kiser served as a member of the ELMS Committee and was an influential voice. He also played a central role in developing the successful legislative strategy for the Committee's proposals.

Senate Bill 1166 was introduced on February 5, 1993. FLA. S. JOUR. 116 (Reg. Sess. 1993).

27. The Committee conducted public hearings on the ELMS Committee's report in Orlando and Fort Lauderdale during January, 1993. Staff of Fla. H.R. Comm. on Comm'y Aff., CS for HB 2315 (1993) Staff Analysis 53 (final July 9, 1993) (on file with Committee) [hereinafter House Staff Analysis].

28. Dem., Melbourne.

29. Supporters of the ELMS legislation included 1000 Friends of Florida, the Florida Home Builders Association, the Florida Audubon Society, the Florida Association of Realtors, the Florida League of Cities, and the Florida Association of Counties.

30. The House Committee on Community Affairs voted on March 4, 1993, to introduce the proposed bill as revised. The ELMS legislation was introduced as House Bill 2315 on March 16, 1993. FLA. H.R. JOUR. 460 (Reg. Sess. 1993).

31. FLA. S. JOUR. 488 (Reg. Sess. 1993).

32. *Id.* at 493.

33. FLA. H.R. JOUR. 1302 (Reg. Sess. 1993).

34. *Id.* at 1312.

Senate took up Committee Substitute for Committee Substitute for House Bill 2315 and passed the legislation by a vote of 35-to-2.<sup>35</sup> It was enrolled and signed into law by Governor Chiles on May 11, 1993.

"In every major bill there is a critical issue, a question or subject which attracts controversy and gives the legislation its session image. The resolution or nonresolution of this issue invariably dictates the bill's fate, particularly in short legislative sessions."<sup>36</sup> In the case of the 1993 Act, that issue was the ELMS Committee's proposal for a statewide motor fuel tax increase of ten cents per gallon to finance the transportation improvements necessary to implement local comprehensive plans.<sup>37</sup> News coverage regarding the legislation primarily focused on this issue.

The initial versions of the legislation incorporated the ELMS Committee's gas tax proposal.<sup>38</sup> In light of sentiments in the Legislature against a general tax increase—especially on the part of the Republican-led Senate—the prospects for enactment of the gas tax were never considered favorable.<sup>39</sup> However, local governments, in particular, were adamant that additional financing for transportation be included in any growth management legislation in 1993.<sup>40</sup> Therefore, resolution of the transportation financing issue was critical to maintain a broad coalition of support for the measure.

Led by Senator Kiser, the Senate developed a compromise that avoided a statewide gas tax increase by granting additional authority for local transportation revenues.<sup>41</sup> The Senate compromise created a transportation concurrency tax on motor fuel of from one to five cents per gallon in addition to other existing revenue sources. This

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35. FLA. S. JOUR. 1440 (Reg. Sess. 1993).

36. 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, 586 (1984).

37. ELMS III REPORT, *supra* note 16, at 64-65 (Recommendation 91).

38. *E.g.*, Fla. CS for CS for SB 1166, § 44 (1993) (proposed amendment to FLA. STAT. § 206.87 (Supp. 1992)).

39. Bill Adair, *Transportation Planners Back Gas Tax*, ST. PETERSBURG TIMES, Mar. 6, 1993, at 3B.

40. Letter from Havert L. Fenn, Pres., Fla. Ass'n of Counties, to Lawton Chiles, Gov., Fla. (Jan. 12, 1993) (on file with the *Florida State University Law Review*); Letter from Raymond C. Sittig, Exec. Dir., Fla. League of Cities, to Lawton Chiles, Gov., Fla. (Jan. 6, 1993) (on file with the *Florida State University Law Review*).

41. Fla. CS for CS for SB 1166, § 40 (1993) (proposed amendment to FLA. STAT. § 336.025(1) (Supp. 1992)).

The Senate rejected a proposal to delete the local option transportation concurrency tax on motor fuel. FLA. S. JOUR. 489 (Reg. Sess. 1993) (Amendment 15). It also rejected a proposal to replace the new local option tax with a statewide increase of 10 cents a gallon in the motor fuel tax. *Id.* (Amendment 16).

new tax could be levied by a vote of a majority-plus-one of the county governing body, or by approval in a referendum. Proceeds were restricted to "transportation expenditures needed to meet capital elements of an adopted comprehensive plan."<sup>42</sup> The House adopted a similar provision<sup>43</sup> and it is included in the 1993 Act.<sup>44</sup>

The 1993 Act reflects 130 of the 174 recommendations of the ELMS Committee, or approximately seventy-five percent. Additional ELMS recommendations may be implemented by administrative agencies under pre-existing authority. In many respects, the ELMS project—the blue-ribbon study committee and the legislative effort to enact its recommendations into law—may be seen as a successful approach to creating and passing major growth management legislation at the state level.<sup>45</sup>

Each provision of the 1993 Act is intended to play a role in the management of Florida's growth, especially concerning air, land, and water resources, and public facilities. However, because of space constraints not every provision can be addressed in this Article. Instead, the Article will address statutory changes to Florida's principal planning and growth management programs. It will include a general description of the policy issue, reference to the recommendations of the ELMS Committee, and discussion of pertinent provisions of the 1993 Act.

## II. STATE COMPREHENSIVE PLAN

The threshold issue considered by the ELMS Committee was the desired role of state government in growth management. Some commentators have argued that Florida's integrated system was "designed largely as a top-down and bureaucratically controlled approach"<sup>46</sup> be-

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42. Fla. CS for CS SB 1166, § 40 (1993) (1st Engrossed).

In conjunction with this new authority, the gas tax compromise also included relaxation of the pre-existing referendum requirement on imposition of the local option Ninth Cent Gas Tax.

43. Fla. CS for CS for HB 2315, § 40 (1993).

The House rejected a proposal to require that the new local option transportation concurrency tax be levied only with approval of the voters in a referendum. FLA. H.R. JOUR. 1302 (Reg. Sess. 1993) (Amendment 2).

44. Ch. 93-206, § 40, 1993 Fla. Laws 1887, 1930 (amending FLA. STAT. § 336.025(1) (Supp. 1992)). See Mary Kay Falconer et al., *Local Government Revenues Post 1993 Legislative Session: A Combination of New and Improved*, 21 FLA. ST. U. L. REV. 585, 596-98 (1993).

45. See Patricia E. Salkin, *Political Strategies for Modernizing State Land-Use Statutes*, LAND USE LAW, Aug. 1992, at 3. For an analysis arguing that ELMS III illustrated the 10 steps to success identified by Professor Salkin, see James F. Murley, *My Life on ELMS III*, FORESIGHT, Winter 1993, at 2 (1000 Friends of Florida).

46. JUDITH INNES, UNIVERSITY OF CALIFORNIA AT BERKELEY, IMPLEMENTING STATE GROWTH MANAGEMENT IN THE U.S.: STRATEGIES FOR COORDINATION 7 (Institute for Urban and Regional

cause policy direction comes primarily from the State Comprehensive Plan, as interpreted and applied by the Department of Community Affairs (DCA) in its review of local comprehensive plans. This structure has added friction to the relationship between state and local governments, contributing to the political conflict revolving around the state's growth management programs.

The ELMS Committee concluded that state government should continue to perform a leadership role, but important changes were needed at the state level.<sup>47</sup> Some of these changes focused on the principal vehicle for the exercise of state leadership, the State Comprehensive Plan.<sup>48</sup> Although the Legislature departed from the ELMS Committee's recommendations in some significant ways, the 1993 Act is consistent with the Committee's intent.

#### A. *Revision of the Plan*

When the current state planning requirements were put into place by the Legislature in the Florida State and Regional Planning Act of 1984,<sup>49</sup> it was expected that the State Comprehensive Plan would be the subject of a systematic annual review by the Executive Office of the Governor, with any recommended changes to be considered by the Administration Commission and then to be acted on by the Legislature.<sup>50</sup> This annual review has not occurred. Since it was enacted in 1985, the State Comprehensive Plan has never received a comprehensive review and revision by the Executive Office of the Governor or by

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Development Working Paper No. 542, July, 1991). See also GOVERNOR'S OFFICE OF PLANNING AND RESEARCH & GOVERNOR'S INTERAGENCY COUNCIL ON GROWTH MANAGEMENT, OTHER STATES' GROWTH MANAGEMENT EXPERIENCES 22 (Oct. 1991) (Sacramento, Calif.).

During the ELMS Committee's deliberations, the characterization of Florida's integrated system as "top-down" proved controversial. However, the Committee's discussions illuminated a significant shortcoming: the inadequate means for utilizing local and regional planning programs to inform the judgment of state policymakers. ELMS III REPORT, *supra* note 16, at 19 (Recommendation 12). This "bottom-up" dimension of the system had been intended all along but had never been realized.

The Committee's discussions proved fruitful. The Legislature required additional efforts to utilize local plans as a basis for periodic revision of the State Comprehensive Plan. Ch. 93-206, § 22, 1993 Fla. Laws 1887, 1916 (to be codified at FLA. STAT. § 186.007(8)).

47. ELMS III REPORT, *supra* note 16, at 13 (Recommendation 1).

48. FLA. STAT. ch. 187 (Supp. 1992).

49. Ch. 84-257, 1984 Fla. Laws 1166. For an explanation and discussion on the 1984 state planning legislation and the deliberations of ELMS II which led to its enactment, see Rhodes & Apgar, *supra* note 36. For additional background and commentary, see Richard G. RuBino, *Can the Legacy of a Lack of Follow-Through in Florida State Planning Be Changed?*, 2 J. LAND USE & ENVTL. L. 27 (1986).

50. FLA. STAT. § 186.007(8) (1991).

the Legislature, although it has been the subject of piecemeal amendments.<sup>51</sup>

The ELMS Committee concluded that the State Comprehensive Plan should be subject to systematic review and revision at regular intervals. The Committee determined such a review was needed to assess the state's performance in meeting its goals as well as to address changing conditions and emerging trends.<sup>52</sup> The Committee initially considered a four-year review and revision cycle with recommendations submitted for legislative consideration during the second year of each gubernatorial term. However, the Committee ultimately recommended a biennial review and revision cycle,<sup>53</sup> which was carried forward into legislation.

Under the 1993 Act, the Governor retains the central role in preparing revisions to the State Comprehensive Plan.<sup>54</sup> On or before October 1 of every odd-numbered year, beginning in 1995, the Governor must submit a written report to the Administration Commission recommending any necessary revisions in the State Comprehensive Plan and explaining the need for them, or explaining why no change is needed.<sup>55</sup> Any proposed changes must be submitted to the Administration Commission by that date.

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51. House Staff Analysis, *supra* note 27, at 5.

52. *Id.*

53. ELMS III REPORT, *supra* note 16, at 18-19 (Recommendation 11).

54. The 1993 Act requires "sufficient opportunities for meaningful public participation" in the planning and growth management process. Ch. 93-206, § 19, 1993 Fla. Laws 1887, 1914 (to be codified at FLA. STAT. § 186.002(2)(e)).

There are a variety of means to promote public participation. The ELMS Committee recommended that the Governor consider the appointment of a State Planning Board to assist in preparing revisions of the State Comprehensive Plan. ELMS III REPORT, *supra* note 16, at 19 (Recommendation 11). The ELMS legislation initially contained language making the creation and appointment of such a board permissive. Fla. SB 1166, § 18 (1993); Fla. HB 2315, § 21 (1993) (proposed amendment to FLA. STAT. § 186.004 (1991)). The absence of that language from the 1993 Act does not diminish the authority of the Governor, by executive order, to create an advisory committee to assist in his planning duties.

Another means of public participation is special conferences. Florida has a history of such conferences, and they have played an important role in the evolution of growth policy. See, e.g., SUMMARY REPORT OF THE ENVIRONMENTAL LAND MANAGEMENT STUDY COMMITTEE'S CONFERENCE ON LAND USE (June 11-12, 1973). For a report on such a conference in another state, see NEW JERSEY FUTURE, THE STATE PLAN: REALIZING THE VISION (1990 State Planning Conference Report).

55. Ch. 93-206, § 22, 1993 Fla. Laws 1887, 1916 (to be codified at FLA. STAT. § 186.007(8)).

The Governor's responsibility for fulfillment of this task was underscored by an amendment to the statute designating her the state's "chief planning officer." *Id.* § 21, 1993 Fla. Laws 1887, 1914 (to be codified at FLA. STAT. § 186.004). The report may be included in the annual growth management report which the Governor is required to prepare pursuant to section 186.031. *Id.* § 22, 1993 Fla. Laws 1887, 1916 (to be codified at FLA. STAT. § 186.007(8)).

The Administration Commission consists of the Governor and the six statewide elected officials who comprise the Cabinet. FLA. STAT. § 14.202 (1991). See FLA. CONST. art. IV, § 4(a).

The Administration Commission is required to review the proposed changes by no later than December 15 of each odd-numbered year and provide an opportunity for public comment. The proposed changes are then to be transmitted to the Legislature along with any proposed amendments to the proposed changes or dissenting reports from members of the Commission.<sup>56</sup> These documents must be transmitted to the Legislature no later than thirty days prior to the beginning of the regular legislative session in each even-numbered year.<sup>57</sup>

The two-year review and revision cycle was recommended by the ELMS Committee following adoption of a constitutional amendment to article III of the Florida Constitution. The amendment was prepared and placed on the November 1992 ballot by the Taxation and Budget Reform Commission.<sup>58</sup> The amendment provides in part:

The governor shall recommend to the legislature biennially any revisions to the state planning document, as defined by law. General law shall require a biennial review and revision of the state planning document, shall require the governor to report to the legislature on the progress in achieving the state planning document's goals, and shall require all departments and agencies of state government to develop planning documents consistent with the state planning document. The state planning document and department and agency planning documents shall remain subject to review and revision by the legislature.<sup>59</sup>

This amendment gave constitutional status to current law on several matters, and required implementing legislation. Although the Taxation and Budget Reform Commission focused on the fiscal dimension of the state planning process, its recommendations were parallel to those of the ELMS Committee on a number of key issues. For that reason, the ELMS Committee's recommendations were intended to implement some, though not all, features of this amendment. For example, the biennial review and revision process recommended by the ELMS Committee and established by the 1993 Act was intended to

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56. Ch. 93-206, § 23, 1993 Fla. Laws 1887, 1916 (to be codified at FLA. STAT. § 186.008(2)).

The Administration Commission is required to act by resolution. *Id.* The purpose of this requirement is to preclude a formal administrative proceeding on the Commission's decision.

57. *Id.* § 22, 1993 Fla. Laws at 1916 (to be codified at FLA. STAT. § 186.007(8)).

58. See FLA. CONST. art. XI, § 6. The Taxation and Budget Reform Commission (TBRC) published a report containing findings and recommendations regarding the state planning process. TAXATION AND BUDGET REFORM COMM'N, A PROGRAM FOR REFORM OF FLORIDA GOVERNMENT 43-50 (Feb. 1991). See also TAXATION AND BUDGET REFORM COMM'N, FLORIDA'S FISCAL FUTURE: BALANCING NEEDS & TAXES 5-7 (n.d.)(summary regarding state planning).

59. FLA. CONST. art. III, § 19(h).

implement the provisions of the constitutional amendment requiring the Governor to "recommend to the legislature biennially any revisions to the state planning document, as defined by law."<sup>60</sup>

The 1993 Act does not designate the State Comprehensive Plan as the "state planning document."<sup>61</sup> This fact should have no legal significance. In the narrative to its proposed constitutional amendments, the Taxation and Budget Reform Commission expressed a clear intention that the pre-existing State Comprehensive Plan serve as the "state planning document" until the Legislature chose another document or documents to serve the same purpose.<sup>62</sup>

### B. Contents of the Plan

Although the focus of the ELMS Committee's deliberations was on physical growth and development, the 1993 Act reaffirms the need for the State Comprehensive Plan to address the full range of public policy issues relating to the future of the state. It includes a specific legislative finding with regard to the importance of "public safety, education, health care, community and economic development and redevelopment, protection and conservation of natural and historic resources, transportation, and public facilities."<sup>63</sup> In addition, the Legislature intended the State Comprehensive Plan to "provide basic policy direction to all levels of government regarding the orderly social, economic, and physical growth of the state."<sup>64</sup> Thus, notwithstanding the emphasis on physical growth and development in the

60. *Id.*

61. The version that passed the Senate did. *See* Fla. CS for SB 1166, § 23 (1993) (1st Engrossed) (proposed amendment to FLA. STAT. § 186.008(1) (1991)). However, the language creating an express statutory designation was deleted from the House version of the legislation by the House Committee on Governmental Operations, *see* Fla. H.R. Comm. on Govtl. Ops., Amendment 1a to Fla. HB 2315 (1993) (amending proposed amendment to FLA. STAT. § 186.008(1) (1991)), and it is that version of the measure which became law.

62.

It is the Commission's intent that the term "state planning document" be read to mean the State Comprehensive Plan or any subsequent planning documents adopted by the Legislature. It is not the Commission's intent to constitutionalize a particular planning document, but to require some type of state-wide planning document to provide priorities and guidance for funding the growth of the State.

Resolution of the Taxation and Budget Reform Commission, "Budgeting, Planning and Appropriations Revisions," at 10 (May 7, 1992).

The Legislature passed legislation to designate a variety of documents, including annual appropriations bills, as the "state planning document." Fla. CS for SB 1692 (1993) (Enrolled). The bill was vetoed by Governor Chiles. Letter from Lawton Chiles, Gov., Fla., to Jim Smith, Secretary of State, Fla. (May 12, 1992) (veto message) (on file with the *Florida State University Law Review*).

63. Ch. 93-206, § 19, 1993 Fla. Laws 1887, 1913 (to be codified at FLA. STAT. § 186.002(1)(a)).

64. *Id.* (to be codified at FLA. STAT. § 186.002(2)(b)).



1993 Act—especially the revised mandate to prepare a “growth management portion” of the State Comprehensive Plan—the Legislature has not retreated from its long-standing conception of the state plan as an all-encompassing document.<sup>65</sup>

The 1993 Act does mandate a significant change in the State Comprehensive Plan that should be reflected in all subsequent amendments and revisions. The ELMS Committee recommended that the plan should include “measurable objectives that the State intends to achieve by a date certain and to which all levels of government should be held accountable to the extent practicable.”<sup>66</sup> Based on a similar conclusion by the Taxation and Budget Reform Commission, article III, section 19 of the Florida Constitution requires the utilization of measurable objectives in the “state planning document.”<sup>67</sup> In part for this reason, the 1993 Act specifies the setting of formal objectives for implementation of the goals expressed in the State Comprehensive Plan.<sup>68</sup>

### C. *The Growth Management Portion of the Plan*

The most significant change to the state planning system is the mandate for preparation of a growth management portion of the State Comprehensive Plan.<sup>69</sup> This provision is an outgrowth of the ELMS

65. In 1984, Governor Graham proposed a State Comprehensive Plan with 29 quantifiable goals with specific timeframes for action. The Legislature significantly revised the plan to include 26 goals and 294 policies. It does not contain timeframes or other measurable objectives. House Staff Analysis, *supra* note 27, at 5.

For a broad conception of the state planning process in the context of budgeting and growth management policy, see B. Jack Osterholt, *Florida's State Planning Process: A Critical Review and Assessment* (n.d.) (unpublished report to ELMS Committee State Plan Work Group) (on file with the *Florida State University Law Review*).

66. ELMS III REPORT, *supra* note 16, at 18 (Recommendation 10).

67. FLA. CONST. art. III, § 19(h).

The requirement for the Governor to “report to the legislature on the progress in achieving the state planning document’s goals” implies that the planning document include some means for measuring such progress. *Id.*

This interpretation is supported by the TBRC’s narrative on the provision. The TBRC intended for the Legislature to be guided by the local comprehensive planning program—which requires measurable objectives—in revising the State Comprehensive Plan. It also explained that the Legislature should seek “to maintain its currency in terms of measurable goals and specific timeframes.” Resolution of the Taxation and Budget Reform Commission, *supra* note 62, at 10. Thus, article III, section 19(h) requires utilization of objectives or some form of benchmark to measure the state’s progress toward meeting its planning goals.

For a discussion regarding accountability measures in state planning, see A STRATEGIC PLAN FOR FLORIDA: 1992-1996 UPDATE 48-49 (Dec. 1992) (Executive Office of the Governor).

68. Ch. 93-206, § 22, 1993 Fla. Laws 1887, 1914-16 (to be codified at FLA. STAT. § 186.007(1)-(5)). An “objective” was defined by pre-existing law as “a specific, measurable, intermediate end that is achievable and marks progress toward a goal.” FLA. STAT. § 186.003(3) (1991).

69. Ch. 93-206, § 24, 1993 Fla. Laws at 1917-18 (to be codified at FLA. STAT. § 186.009).

Committee's recommendation for a new state-level planning instrument to address physical growth and development, but it has its origins in prior law.<sup>70</sup>

### 1. *The Proposal for a Strategic Growth and Development Plan*

The ELMS Committee concluded that the State Comprehensive Plan had several deficiencies.<sup>71</sup> Among them were a degree of generality and vagueness that made it susceptible to varying interpretations, a failure to resolve conflicts between planning goals, and a failure to coordinate and integrate policies in areas related to physical growth and development.<sup>72</sup> These shortcomings were especially significant because of the plan's role as one standard against which local and regional plans are judged. In addition, the Committee concluded that the so-called "translational plans"—the State Land Development Plan, the State Water Use Plan, and the Florida Transportation Plan—had proved to be ineffective components of the state planning system.<sup>73</sup>

To address these concerns, the ELMS Committee recommended a Strategic Growth and Development Plan that would be subordinate to, but derived from and consistent with, the State Comprehensive Plan.<sup>74</sup> The purpose of this new plan would be to integrate state planning goals related to physical growth and development, including land, air, water, and transportation. Because it was to be subordinate to the State Comprehensive Plan, this new plan was to be more detailed and specific, and would provide clear and unequivocal policy guidance to state, regional, and local agencies in preparing their own growth management plans. To address a perceived concern about the proliferation of planning documents, it would replace the translational plans addressing land development, water resources, and transportation programs. In addition, it was thought that the preparation and enactment of a Strategic Growth and Development Plan would bring about a major debate on growth policy at the highest levels of state government.

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70. See FLA. STAT. § 186.007(4) (1991).

71. ELMS III REPORT, *supra* note 16, at 18-22.

72. "Because the goal and policy statements in the SCP are ambiguous, they are difficult to use and evaluate." TAXATION AND BUDGET REFORM COMM'N, A PROGRAM FOR REFORM OF FLORIDA GOVERNMENT 44 (Feb. 1991) (Finding No. 3).

73. ELMS III REPORT, *supra* note 16, at 20 (Recommendation 13). In the context of growth management, the translational plans include the State Land Development Plan, FLA. STAT. § 380.031(17) (1991), the State Water Use Plan, FLA. STAT. § 373.036 (1991), and the Florida Transportation Plan, FLA. STAT. § 339.155 (Supp. 1992).

74. ELMS III REPORT, *supra* note 16, at 21-22 (Recommendations 14-17).

The initial versions of the ELMS legislation would have effectuated the recommendation for a Strategic Growth and Development Plan.<sup>75</sup> However, the proposal became one of the most controversial aspects of the legislation. For example, local governments and regulated interests expressed concern with a proposed requirement that local comprehensive plans be consistent with the adopted Strategic Growth and Development Plan when no one could know the substantive effect of a plan that had not yet been prepared.

These concerns and others were resolved by a compromise. Florida law already provided for a "growth management portion" of the State Comprehensive Plan to focus on land, water, and transportation issues.<sup>76</sup> While those topics were addressed in the State Comprehensive Plan enacted in 1985, that plan did not segregate those topics into a specific part identified as the "growth management portion" of the plan.<sup>77</sup> The existing statutory requirement for a growth management portion of the State Comprehensive Plan was dusted off and chosen as the vehicle to address the problems identified by the ELMS Committee. This approach addressed most of the deficiencies the proposal for a Strategic Growth and Development Plan had been calculated to address.

## 2. *Requirements for the Growth Management Portion*

Under the 1993 Act, the process for preparing the growth management portion of the State Comprehensive Plan is based on the process for preparation and revision of the plan as a whole.<sup>78</sup> The Executive Office of the Governor is directed to prepare the proposed growth management portion of the State Comprehensive Plan, in partnership with the Legislature, government agencies at the state, regional, and local levels, and the full range of constituency groups.<sup>79</sup> The Governor is directed to submit the proposed growth management portion to the Administration Commission no later than October 15, 1993.<sup>80</sup> The Commission is required to review the proposal and transmit it to the Legislature by no later than December 1, 1993, along with any amend-

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75. *E.g.*, Fla. SB 1166, § 22 (1993) (proposed FLA. STAT. § 186.009).

76. FLA. STAT. § 186.007(4) (1991). This provision can be traced to the Florida State and Regional Planning Act of 1984.

77. FLA. STAT. ch. 186 (1991).

78. *Compare* ch. 93-206, § 24, 1993 Fla. Laws 1887, 1918 (to be codified at FLA. STAT. § 186.009(3)) with FLA. STAT. § 186.008(1)-(2) (1991).

79. Ch. 93-206, § 24, 1993 Fla. Laws 1887, 1917 (to be codified at FLA. STAT. § 186.009(1)).

80. *Id.* (to be codified at FLA. STAT. § 186.009(3)).

ments to the proposal or dissenting reports.<sup>81</sup> The Commission also is required to provide an opportunity for public comment.<sup>82</sup>

The growth management portion is to have legal effect only upon enactment by the Legislature as general law.<sup>83</sup> After enactment, the growth management portion shall be reviewed and revised in conjunction with the general process for review and revision of the State Comprehensive Plan.<sup>84</sup>

The 1993 Act does not resolve several issues regarding the legal effect of the growth management portion of the State Comprehensive Plan. The Legislature is directed to specify, when enacting the growth management portion, "which plans, activities, and permits must be consistent with the growth management portion of the state comprehensive plan."<sup>85</sup> This provision poses two major issues: 1) the consistency of other "plans" with the growth management portion, and 2) the consistency of "activities . . . and permits" with the growth management portion.

If the Legislature adopted a growth management portion of the State Comprehensive Plan as an amendment to chapter 187, *Florida Statutes*, but did not address the consistency issue in that enactment, the vertical consistency requirements in existing law probably would apply. In that event, all strategic regional policy plans and local comprehensive plans would have to be consistent with the new growth management portion.<sup>86</sup> As discussed below,<sup>87</sup> pertinent portions of those plans would have to be revised during the periodic evaluation and appraisal process to reflect any policy changes in the growth management portion. The existing horizontal consistency requirements for state agency strategic plans also probably would apply.<sup>88</sup>

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81. *Id.* at 1918 (to be codified at FLA. STAT. § 186.009(3)(b)).

82. *Id.*

83. *Id.*

84. *Id.* (to be codified at FLA. STAT. § 186.009(3)(d)).

85. *Id.* (to be codified at FLA. STAT. § 186.009(3)(c)). This provision was buttressed by provisions requiring that the growth management portion "set forth recommendations" on the extent of consistency to be required between strategic regional policy plans and local comprehensive plans, on the one hand, and the growth management portion of the State Comprehensive Plan, on the other. *Id.* (to be codified at FLA. STAT. § 186.009(2)(m),(o)). These provisions should be read as requiring the Governor to include such recommendations when he submits the proposed growth management portion.

86. FLA. STAT. § 186.508(1) (1991) (amended by ch. 93-206, § 34, 1993 Fla. Laws 1887, 1925-26); FLA. STAT. § 163.3184(1)(b) (1991) (amended by ch. 93-206, § 10, 1993 Fla. Laws 1887, 1902).

87. See *infra* text accompanying notes 248-54 (strategic regional policy plans) and 368-954 (local comprehensive plans).

88. *E.g.*, FLA. STAT. § 186.022(3) (Supp. 1992) (agency strategic plans).

The consistency of activities and permits is another matter entirely, and may prove to be controversial. Although there are exceptions,<sup>89</sup> current law generally does not require activities and permitting decisions of state and regional regulatory agencies to be consistent with the State Comprehensive Plan. Arguably, this lack of a consistency requirement can lead to agency decisions that are at variance with state planning goals. To address this issue, the ELMS Committee recommended that all state agency activities affecting physical growth and development, including permitting decisions, be consistent with the adopted Strategic Growth and Development Plan.<sup>90</sup> This recommendation was intended in part to address the weakness of the existing horizontal consistency requirements and to assure that when implementing various regulatory programs, state agencies were bound by state growth policy in much the same manner as local governments.

The 1993 Act in effect defers consideration of expanding the horizontal consistency requirement to include state agency activities and permitting until the proposed growth management portion is acted upon by the Legislature. In the absence of new legislation on this issue, the current horizontal consistency requirements would apply with respect to agency activities and permitting.<sup>91</sup> The reach of the adopted growth management portion of the State Comprehensive Plan into state and regional agency program implementation would remain weak at best.

Unlike the current State Comprehensive Plan, the new growth management portion is intended to be "strategic in nature,"<sup>92</sup> that is, to coordinate policies on related topics and, where feasible, make choices between competing goals. At a minimum, it should give state, regional, and local decisionmakers guidance on the legislatively favored resolution for some specific conflicts. For example, the 1993 Act expressly requires the growth management portion to "integrate" policies relating to land development, air quality, transportation, and water resources.<sup>93</sup> In integrating such policies, the Governor and Leg-

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89. *E.g.*, FLA. STAT. § 380.06(14)(d) (Supp. 1992). Although this provision is not a rigid consistency requirement, it has provided a basis for appeal of a DRI development order in the past. A counterpart provision was added to DCA's expanded authority to appeal local development orders in conjunction with termination of the DRI program. Ch. 93-206, § 56, 1993 Fla. Laws 1887, 1960 (to be codified at FLA. STAT. § 380.07(3)). See *infra* text accompanying notes 586-89.

90. ELMS III REPORT, *supra* note 16, at 22 (Recommendation 17).

91. Ch. 93-206, § 24, 1993 Fla. Laws 1887, 1918 (to be codified at FLA. STAT. § 186.009(3)(c)).

92. *Id.* at 1917 (to be codified at FLA. STAT. § 186.009(2)(a)).

93. *Id.* (to be codified at FLA. STAT. § 186.009(2)(d)).

islature would be expected to reconcile conflicts. Another provision expressly requires establishment of "priorities" among certain planning goals.<sup>94</sup>

The 1993 Act identifies six areas of substantive growth management policy for inclusion in the document, and thus for closer coordination than provided by the State Comprehensive Plan. It also expressly prohibits the growth management portion from including a land use map, whether for current or future uses.<sup>95</sup>

First, the 1993 Act calls for the identification of "metropolitan and urban growth centers"<sup>96</sup> and guidelines for determining where future urban growth should be encouraged.<sup>97</sup> In light of the prohibition against a land use map, these provisions should be interpreted to authorize establishment of written descriptive criteria that may be used to distinguish metropolitan and urban growth centers, where future growth is desired, from other developed areas where growth may not be encouraged. These policies no doubt will implicate state guidelines developed by DCA in recent years.<sup>98</sup>

94. *Id.* (to be codified at FLA. STAT. § 186.009(2)(j)). This provision reflects the recurring criticism of the State Comprehensive Plan for its failure to make policy choices between competing state planning goals in the field of coastal management.

95. *Id.* (to be codified at FLA. STAT. § 186.009(2)). This prohibition mirrors, and is redundant of, another statutory prohibition. FLA. STAT. § 186.007(1) (1991). Based on earlier state planning efforts, ELMS II recommended "that the state plan not include a land-use map, to avoid any implication that the plan would be a precursor to statewide zoning." Rhodes & Apgar, *supra* note 36, at 586. This recommendation resulted in the current prohibition in chapter 186.

Other states have included mapping in their growth management programs. New Jersey began its program with mapping by the State Planning Commission but soon shifted the mapping task to local governments. NEW JERSEY FUTURE, SHAPING THE FUTURE: A GUIDE TO MAPPING THE STATE PLAN 5 (1990 State Planning Conference Report).

96. Ch. 93-206, § 24, 1993 Fla. Laws 1887, 1917 (to be codified at FLA. STAT. § 186.009(2)(b)).

97. *Id.* (to be codified at FLA. STAT. § 186.009(2)(e)).

98. These guidelines are commonly described as the policy on "urban sprawl," which they are intended to define and discourage. See, e.g., Home Builders and Contractors Ass'n of Brevard, Inc. v. Dep't of Comm'y Aff., 585 So. 2d 965 (Fla. 1st DCA 1991). A positive description would focus on what this policy is intended to bring about, namely, compact urban development.

The compact urban development policy is a counterweight to the concurrency requirement, which directs development to areas with excess infrastructure capacity, primarily for roads. These areas often are fringe areas. DEGROVE & MINNESS, *supra* note 1, at 17-21. For an account of the evolution of this policy and a concise argument for its legal basis, see Thomas G. Pelham, *Shaping Florida's Future: Toward More Compact, Efficient, and Livable Development Patterns*, 7 J. LAND USE & ENVTL. L. 321 (1992). For an alternative view of this policy, see Ivonne Audirac, Anne H. Shermeyen & Marc T. Smith, *Ideal Urban Form and Visions of the Good Life: Florida's Growth Management Dilemma*, JOURNAL OF THE AMERICAN PLANNING ASSOCIATION, Autumn 1990, at 470.

The compact urban development policy was endorsed by study committees appointed by both Governor Martinez, GOVERNOR'S TASK FORCE ON URBAN GROWTH PATTERNS, FINAL REPORT

Second, the growth management portion must identify "areas of state and regional environmental significance" and set forth strategies for their protection.<sup>99</sup> As with the identification of metropolitan and urban growth centers, this provision must be read in conjunction with the prohibition against a state land use map. Therefore, it should be interpreted to require descriptive goals, objectives, and policies that will sufficiently identify these environmentally significant areas in order to provide guidance to various state, regional, and local planning programs.<sup>100</sup>

Third, the 1993 Act mandates planning policies for the state's future transportation infrastructure.<sup>101</sup> It also requires statewide policy guidance to promote development of Florida's existing deepwater ports, with priority for water-dependent land uses in waterfront areas.<sup>102</sup> And it expressly calls for the growth management portion to address the transportation needs of the agricultural industry, both for shipping supplies to farming areas and for moving commodities to market.<sup>103</sup> These provisions take the broadest possible view of transportation infrastructure, identifying highways and roads, public transportation systems, railroads, airports, and deepwater ports.

Fourth, policies that affirmatively promote land acquisition programs also must be included in the growth management portion.<sup>104</sup> These policies are to take a much broader view of land acquisition than the historic focus on natural resource protection. Reflecting the growing awareness of Florida's land acquisition programs as key instruments of growth management, the 1993 Act directs that these poli-

(June 1989), and Governor Chiles, GOVERNOR'S COMM'N FOR GOV'T BY THE PEOPLE, FINAL REPORT 20-22 (1991). Although this policy was not expressly addressed by the ELMS Committee, it was reflected in a number of the Committee's recommendations.

Despite this policy, like other developers, the State has proven unable to resist the allure of cheap land. The State is developing a major satellite office complex on Tallahassee's urban fringe, contributing to the very kind of sprawl which it has opposed when undertaken by private developers. Gary Fineout, *State Complex Takes the Lead in South-Side Development*, TALLAHASSEE DEMOCRAT, July 8, 1993, at 1C.

99. Ch. 93-206, § 24, 1993 Fla. Laws 1887, 1917 (to be codified at FLA. STAT. § 186.009(2)(c)).

100. In contrast, the 1993 Act expressly requires regional planning councils to identify "natural resources of regional significance" by their "specific geographic location and not solely by generic type." *Id.* § 32, 1993 Fla. Laws at 1922 (to be codified at FLA. STAT. § 186.507(11)).

In light of the absence of a prohibition against strategic regional policy plans including a land use map, these provisions would appear to require each regional planning council to apply descriptive criteria on areas of "regional environmental significance" to its jurisdiction and expressly identify, by words or cartography, those areas meeting the criteria.

101. *Id.* § 24, 1993 Fla. Laws at 1917 (to be codified at FLA. STAT. § 186.009(2)(f)).

102. *Id.* (to be codified at FLA. STAT. § 186.009(2)(k)).

103. *Id.* (to be codified at FLA. STAT. § 186.009(2)(i)).

104. *Id.* (to be codified at FLA. STAT. § 186.009(2)(g)).

cies address "natural resource protection, open space needs, urban recreational opportunities, and water access."<sup>105</sup> The legislation does not require these policies to address only publicly-financed land acquisition programs.

Fifth, the growth management portion must "establish priorities regarding coastal planning and resource management."<sup>106</sup> This area of policy should include a wide range of concerns, including protection of environmentally significant areas, land acquisition for purposes of beachfront access and recreation, and waterfront development of existing deepwater ports.<sup>107</sup>

Sixth, the 1993 Act requires the growth management portion to address Florida's need for affordable housing.<sup>108</sup> The inclusion of this provision reflects the increasing awareness of the need for suitable and affordable housing in Florida.

The 1993 Act does not limit the growth management portion to these six topics; rather the topics are considered the framework to which other policy areas may be added. The Governor and Legislature are authorized to address other policy areas "related to the state's natural and built environment."<sup>109</sup> By implication, these should include goals, objectives, and policies setting forth a strategy for the future economic development of the state. Already, the 1993 Act requires this new document to "enhance the multiuse waterfront development of existing deepwater ports," thereby establishing one prong of an economic development strategy.<sup>110</sup> It would be difficult to prepare a coherent growth management plan addressing land development, air quality, transportation, and water resources without addressing the types of economic development that are most consistent with the chosen state policies on these matters. Including an economic development component in the growth management portion of the State Comprehensive Plan would follow the lead of other states that have recently established growth management programs.<sup>111</sup>

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105. *Id.*

106. *Id.* (to be codified at FLA. STAT. § 186.009(2)(j)).

107. *Id.* (to be codified at FLA. STAT. § 186.009(2)(c),(g), (k)).

108. *Id.* (to be codified at FLA. STAT. § 186.009(2)(h)).

109. *Id.* (to be codified at FLA. STAT. § 186.009(2)(l)). This provision contains a reference to the State Comprehensive Plan which results in circular logic. It should be interpreted as authorizing the Executive Office of the Governor and Legislature to include in the growth management portion additional subjects related to physical growth and development.

110. *Id.* (to be codified at Fla. Stat. § 186.009(2)(k)).

111. *See, e.g.,* DEGROVE & MINESS, *supra* note 1, at 166. The ELMS Committee's interest in promoting economic development as an integral part of the growth management equation is reflected in its recommendations for incentives to promote inclusion of optional economic elements in local comprehensive plans. ELMS III REPORT, *supra* note 16, at 37-38 (Recommendations 42-43).



Although the Legislature may elect to eliminate or supersede these plans when it considers the proposed growth management portion of the State Comprehensive Plan, one shortcoming of the 1993 Act is that it leaves intact the existing requirements for the State Land Development Plan, the Florida Transportation Plan, and the State Water Use Plan. These translational plans add little to the overall state planning program, as the ELMS Committee concluded when it recommended replacing the plans with a Strategic Growth and Development Plan.<sup>112</sup>

The 1993 Act includes three provisions intended to lead to the elimination of the translational plans. First, it directs the Governor and Legislature, where possible, to draw upon those plans in compiling the new growth management portion of the State Comprehensive Plan.<sup>113</sup> Second, the 1993 Act asks for recommendations on integrating those three plans into the State Comprehensive Plan.<sup>114</sup> Third, it directs that a task force on land and water planning be appointed by the Governor to, among other things, "consider the future role and scope, if any, of the State Water Use Plan following legislative adoption of the growth management portion of the State Comprehensive Plan."<sup>115</sup> These provisions establish a clear legislative intent for state policymakers and planners to reduce the number of state-level planning documents by eliminating the translational plans.<sup>116</sup>

Ultimately, the successful development of the growth management portion of the State Comprehensive Plan will require the maintenance of a delicate balance among all affected constituencies. State planners must reach out to all parties, especially those who are skeptical of state planning, with the intention of building a broad consensus. "Regulatory policies must be matched with practical encouragement for economic growth, incentives for particularly desirable types of growth, and strong direction to streamline regulatory approval processes."<sup>117</sup> A growth management portion developed in this way will have the best prospect for adoption and successful implementation.

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112. ELMS III REPORT, *supra* note 16, at 36 (Recommendations 38-39).

113. Ch. 93-206, § 22, 1993 Fla. Laws 1887, 1915 (to be codified at FLA. STAT. § 186.007(4)(b)).

114. *Id.* § 24, 1993 Fla. Laws at 1918 (to be codified at FLA. STAT. § 186.009(2)(m)). This language should be read as a directive for the Executive Office of the Governor to include such a recommendation in the submittal containing the proposed growth management portion.

115. *Id.*, § 77, 1993 Fla. Laws 1887, 1974.

116. Nevertheless, the 1993 Act authorizes the Department of Transportation (DOT) to prepare a separate state long-range transportation plan if required to do so by federal law. *Id.* § 25, 1993 Fla. Laws at 1919 (to be codified at FLA. STAT. § 186.021(4)). The purpose of this provision was to assure that DOT was not prohibited from preparing any plans which were a condition for obtaining federal transportation funds.

117. Rhodes & Apgar, *supra* note 36, at 604.

### III. REGIONAL PLANNING COUNCILS

The regional level is a critical part of Florida's integrated planning and growth management framework. A regional agency can act as a bridge between state and local governments as well as between neighboring local governments and other regional agencies. At present, the focal point for these efforts lies with the multi-county regional planning councils, although water management districts and metropolitan planning organizations also play important roles in the growth management system.<sup>118</sup>

During the 1992 Regular Session, the Legislature provided for the automatic repeal, or "sunset," of the Florida Regional Planning Council Act.<sup>119</sup> If the Legislature did not re-enact the Florida Regional Planning Council Act by September 1, 1993, the eleven regional planning councils would have lost a major share of their planning and operating authority.<sup>120</sup> This enactment reflected the continuing frustration of many with the performance of the regional planning councils because of overreaching and poor accountability.<sup>121</sup> More significantly, there were then, and still are, divergent conceptions of the role they should play. In the 1992 legislation, the Legislature directed the Advisory Council on Intergovernmental Relations (ACIR) to conduct a review and assessment of the regional planning councils prior to November 1, 1992, in conjunction with the policy review then being undertaken by the ELMS Committee.<sup>122</sup> The ACIR's recommendations on regional planning councils were remarkably consistent with those of the ELMS Committee, although the ACIR also addressed regional agencies and issues that the ELMS Committee did not con-

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118. For a comprehensive treatment of Florida's regional agencies and background on regional agencies in other states, see FLORIDA ADVISORY COUNCIL ON INTERGOVERNMENTAL RELATIONS, *SUBSTATE REGIONAL GOVERNANCE: EVOLUTION AND MANIFESTATIONS THROUGHOUT THE UNITED STATES AND FLORIDA* (Nov. 1991) (Report No. 91-4). This document was one of the principal research reports utilized by the ELMS Committee.

119. Ch. 92-182, § 1, 1992 Fla. Laws 1798, *repealed by* ch. 93-206, § 38, 1993 Fla. Laws 1887, 1927.

120. This regional planning council sunset legislation was commonly described as abolishing all regional planning councils. In fact, it only repealed some of the statutes which provided the legal basis for the councils' activities. Ironically, the sunset legislation did not repeal the authority of regional planning councils to appeal DRI development orders to the Florida Land and Water Adjudicatory Commission. This long-standing authority was eliminated by the 1993 Act. *See infra* text accompanying notes 203-210.

121. *See* DEGROVE & MINESS, *supra* note 1, at 13-14. The role of regional planning councils has been "a major unresolved issue" in the growth management system at least since 1984. Rhodes & Apgar, *supra* note 36, at 596.

122. Ch. 92-182, § 1, 1992 Fla. Laws 1798.

sider.<sup>123</sup> Both the ELMS Committee and the ACIR recommended retention of regional planning councils, but with significant changes in their statutory authority to focus on planning and coordination and to eliminate regulatory authority.<sup>124</sup>

The 1993 Act includes the changes recommended by the ELMS Committee, as well as several additional provisions added during the legislative process. The regional planning council was expressly recognized by the Legislature as Florida's "only multipurpose regional entity that is in a position to plan for and coordinate intergovernmental solutions to growth-related problems on greater-than-local issues, provide technical assistance to local governments, and meet other needs of the communities in each region."<sup>125</sup> In addition, the Legislature expressed its intent that regional planning councils not serve in a regulatory capacity.<sup>126</sup> Consistent with this conception of the councils, the 1993 Act enhances their coordination and mediation roles, eliminates their regulatory powers, and makes dramatic changes in the nature of the regional policy plans.

#### A. Structure and Statutory Authority

The 1993 Act contains several changes that alter the structure and statutory authority of the regional planning councils. These changes were intended to place additional emphasis on the councils' planning duties and to address concerns regarding their accountability.

##### 1. Structure of Regional Planning Councils

The ELMS Committee heard testimony that revealed varying levels of local government participation in the eleven existing regional planning councils. In addition, the system is plagued by continuing controversies over the geographic configuration of the councils.<sup>127</sup> The

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123. Compare ELMS III REPORT, *supra* note 16, at 23-33 (Recommendations 18-35) with FLORIDA ADVISORY COUNCIL ON INTERGOVERNMENTAL RELATIONS, REGIONAL GOVERNANCE IN FLORIDA: RECOMMENDATIONS AND SELECT REPORTS APPROVED BY THE FLORIDA ADVISORY COUNCIL ON INTERGOVERNMENTAL RELATIONS ON OCTOBER 19, 1992, IN TAMPA 4-30 (NOV. 1, 1992) [hereinafter ACIR REPORT].

The ACIR recommendations were separately introduced during the 1993 Regular Session of the Legislature. See Fla. SB 404 (1993).

124. ELMS III REPORT, *supra* note 16, at 23-24 (Recommendation 18).

125. Ch. 93-206, § 27, 1993 Fla. Laws 1887, 1919 (to be codified at FLA. STAT. § 186.502(4)).

126. *Id.*

127. The ELMS legislation almost became a vehicle for addressing one of these controversies. Legislators from St. Lucie, Martin, and Indian River counties added to the House bill an amendment that would have removed Palm Beach County from the Treasure Coast Regional

ELMS Committee recommended a review and assessment of the boundaries of the eleven pre-existing comprehensive planning districts.<sup>128</sup>

*a. Boundary Review*

The 1993 Act requires the Executive Office of the Governor to conduct and complete a boundary review and assessment by January 1, 1994.<sup>129</sup> The expectation was that any necessary rulemaking would be completed by that date so that the regional planning councils could then begin some of the new tasks required by the 1993 Act. By implication, the study should address the number of regional planning councils serving the state. The 1993 Act does not alter pre-existing language that provides that the Executive Office of the Governor shall analyze the boundaries and "may make such changes in the district boundaries as are found to be feasible and desirable."<sup>130</sup> It adds new language that authorizes the Executive Office of the Governor to "re-visit and update the boundaries from time to time thereafter."<sup>131</sup> These grants of power implicitly include the authority to increase or reduce the number of planning districts; nowhere do the statutes require eleven comprehensive planning districts. The Executive Office of the Governor may conclude that a different number of councils is required, and may implement this executive decision on boundaries without further legislative action.

Pre-existing law provided that "[t]he existing regional planning council in each of the several comprehensive planning districts" shall be designated to serve that district.<sup>132</sup> The term "existing regional planning councils" is defined to mean "a regional planning council created by local general-purpose governments prior to October 1, 1980, pursuant to chapters 160 and 163."<sup>133</sup> This language was en-

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Planning Council. Fla. H.R. Comm. on Comm'y Aff. Subcomm. on Growth Management., Amendment 001 to PCB CA 93-01 (1993) (proposed amendment to FLA. STAT. § 186.506(4) (1991)) (Feb. 23, 1993 meeting) (on file with the *Florida State University Law Review*). This provision was later deleted. Fla. H.R. Comm. on Comm'y Aff., Amendment 048 to PCB CA 93-01 (1993) (Feb. 26, 1993 meeting) (on file with the *Florida State University Law Review*).

128. ELMS III REPORT, *supra* note 16, at 24 (Recommendation 20).

129. Ch. 93-206, § 31, 1993 Fla. Laws 1887, 1921 (amending FLA. STAT. § 186.506(4) (1991)).

The Executive Office of the Governor, by virtue of a memorandum of agreement between itself and DCA, may delegate some duties related to the study to DCA. Memorandum of Agreement, at 6 (n.d.) (on file with the *Florida State University Law Review*). Any change to the comprehensive planning district boundaries would have to be made by rule promulgated by the Executive Office of the Governor. FLA. STAT. § 186.503(1) (1991).

130. Ch. 93-206, § 31, 1993 Fla. Laws 1887, 1921 (amending FLA. STAT. § 186.506(4) (1991)).

131. *Id.*

132. FLA. STAT. § 186.504(5) (1991).

133. *Id.* § 186.503(4).

acted in 1980 as part of the Florida Regional Planning Council Act<sup>134</sup> and should be interpreted to mean that each "existing regional planning council" was to be incorporated into the system established at that time.

The ELMS Committee recommended that "any necessary adjustments" in the boundaries be made by the Executive Office of the Governor without the need for legislative action.<sup>135</sup> This action implicitly could include a change in the number of comprehensive planning districts. Moreover, the 1993 Act contains new language that expressly authorizes the Executive Office of the Governor to revise the boundaries in the future as needed.<sup>136</sup> Based on this history and the wording of the 1993 Act, the best interpretation of these statutes is that section 186.504(4) authorizes the Executive Office of the Governor by rule to revise the comprehensive planning district boundaries, increasing or reducing their number if necessary, and to designate the appropriate regional planning council to serve each district. Section 186.504(5) is best read as only a transitional provision intended to assist in creation of the regional planning system in 1980.

The purpose of the boundary review is to ensure that the regional planning councils form an effective system, and that each council can adequately perform the tasks assigned to it by law;<sup>137</sup> these are the two principal goals which the Executive Office of the Governor should attempt to meet when assessing the number of regional planning councils and their boundaries. Pre-existing law included six factors to be considered when evaluating the boundaries.<sup>138</sup> These factors are retained by the 1993 Act. The Legislature also created five additional factors.

The first new factor requires the Executive Office of the Governor to consider "natural resource systems."<sup>139</sup> This factor was designed to focus attention on "areas of state and regional environmental significance." It also was intended to require an assessment of the compre-

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134. Ch. 80-315, § 3, 1980 Fla. Laws 1370, 1372. "Florida currently has 11 regional planning councils that are the same, with some minor boundary changes, as those established by initiative of local governments between 1962 and 1977." House Staff Analysis, *supra* note 27, at 7.

135. ELMS III REPORT, *supra* note 16, at 25 (Recommendation 20) (emphasis added).

136. Ch. 93-206, § 31, 1993 Fla. Laws 1887, 1921 (amending FLA. STAT. § 186.506(4) (1991)).

137. *Id.*

138. These factors are "the preferences of local general-purpose governments; the effect of population migration, transportation networks, population increases and decreases, economic development centers and trade areas; and other data, projections, or studies which it determines to be of significance in establishing district boundaries." FLA. STAT. § 186.506(4) (1991).

139. Ch. 93-206, § 31, 1993 Fla. Laws 1887, 1921 (amending FLA. STAT. § 186.506(4) (1991)).

hensive planning district boundaries in light of any designated areas of critical state concern that extend to more than one county.<sup>140</sup>

Second, the Executive Office of the Governor must consider "federal program requirements" when evaluating the boundaries.<sup>141</sup> This factor is intended primarily to recognize the implications of the Intermodal Surface Transportation Efficiency Act of 1991 on regional transportation planning. Other federal laws also may be pertinent.

Third, the Governor must consider the boundaries of "designated air quality nonattainment areas."<sup>142</sup> This factor was intended to focus attention on the implications of certain enforcement provisions of the Clean Air Act Amendments of 1990.

Fourth, the 1993 Act requires consideration of the "economic relationships among cities and counties."<sup>143</sup> This factor should be interpreted more broadly than the existing factor directed to "economic development centers and trade areas."<sup>144</sup> It is intended to help establish the basis for strategic regional planning that will foster economic growth.

Fifth, the 1993 Act requires the Executive Office of the Governor to consider "media markets."<sup>145</sup> This factor is intended to focus attention on emergency preparedness planning, especially hurricane evacuation.<sup>146</sup> The impetus for its inclusion was the experience of state emergency managers during Hurricane Andrew in August 1992, when major population centers of Southeast Florida had to be evacuated. In addition, this factor should direct attention to broader social and cultural considerations in defining comprehensive planning districts. Although the 1993 Act does not define the term "media market," it should be interpreted to include the area covered by the television and radio stations that broadcast emergency evacuation orders.

### *b. Governing Boards*

Following the recommendations of the ELMS Committee and the ACIR, the 1993 Act retains the current statutory requirements for the composition of the voting membership of the governing boards of the

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140. For example, the Green Swamp Area of Critical State Concern is contained within two comprehensive planning districts, the East Central Florida and Central Florida regions. This division has complicated efforts at coordinated action to preserve the natural resources of the Green Swamp.

141. Ch. 93-206, § 31, 1993 Fla. Laws 1887, 1921 (amending FLA. STAT. § 186.506(4) (1991)).

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

regional planning councils.<sup>147</sup> The formula of two-thirds local elected officials and one-third gubernatorial appointees was retained in part because of the crucial financial support provided to the councils by local governments and the uncertain prospects for increased state funding in the future.<sup>148</sup> In addition, notwithstanding some dissatisfaction with the existing regional planning councils, local government representatives refused to relinquish the numerical control which cities and counties have over the councils.

However, the ELMS Committee recommended several changes that were intended to increase the councils' efficiency and accountability. The Committee recommended a cap on the number of voting members on each governing board.<sup>149</sup> The Committee also recommended that nonvoting ex officio members be placed on each governing board to increase the opportunities for coordination among state and regional agencies.<sup>150</sup> Only the ex officio membership provision is included in the 1993 Act.

The ELMS Committee recommended that each governing board be limited to thirty-one voting members.<sup>151</sup> Only three of the pre-existing regional planning councils would have exceeded this cap. The intent was to limit the maximum size of the governing boards to provide for effective action and accountability. The cap also would have limited the opportunity for small municipalities in a given area to dominate a regional planning council through sheer numbers. The proposed cap was included in the early versions of the ELMS legislation;<sup>152</sup> however, it eventually was dropped after persistent questioning of its efficacy.<sup>153</sup>

The 1993 Act includes a provision adding ex officio nonvoting members appointed by the Governor to each regional planning council.<sup>154</sup> They are representatives of: the Department of Transportation, the Department of Environmental Protection, the Department of Commerce, and the appropriate water management district or districts. In addition, the Governor is given the discretion to appoint representatives from appropriate metropolitan planning organizations

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147. See FLA. STAT. § 186.504(3) (1991). See also ELMS III REPORT, *supra* note 16, at 28-29 (Recommendation 26).

148. ELMS III REPORT, *supra* note 16, at 28 (Recommendation 26).

149. *Id.*

150. *Id.*

151. *Id.* at 28-29.

152. See, e.g., Fla. SB 1166, § 29 (1993) (proposed amendment to FLA. STAT. § 186.504(4)(1991)).

153. See, e.g., Fla. Sen. Comm. on Comm'y Aff., Amendment 46 to Proposed CS for Fla. SB 1166 (1993) (Mar. 1, 1993 meeting) (on file with the *Florida State University Law Review*).

154. Ch. 93-206, § 29, 1993 Fla. Laws 1887, 1920 (to be codified at FLA. STAT. § 186.504(4)).

and regional water supply authorities.<sup>155</sup> The purpose of the ex officio memberships is to help build the councils as regional forums, and promote coordination among certain growth management agencies. The nonvoting ex officio members should serve at the pleasure of the Governor, as most will represent agencies under his direct or indirect control.

## 2. *Statutory Authority of Regional Planning Councils*

The 1993 Act adjusts, in six major ways, the statutory authority of regional planning councils in the realm of planning and growth management. These features are the principal means by which the Legislature tried to steer the councils away from regulatory activities and toward a more positive and collaborative role in the system.

### a. *Dispute Resolution*

First, each regional planning council is directed to establish a dispute resolution process.<sup>156</sup> The process is to be created by each council by rule in order to "reconcile differences on planning and growth management issues between local governments, regional agencies, and private interests."<sup>157</sup> This requirement is a major feature of the 1993 Act; it involves not only mandating the creation of the new processes, but also creating a demand for them through changes to the local comprehensive planning program.<sup>158</sup>

This provision is a significant change from the pre-existing statute, which required each regional planning council to establish "an informal mediation process to resolve conflicts between local governments relating to comprehensive plans."<sup>159</sup> Because the new regionally based dispute resolution process must address "planning and growth management issues," it will cover a broader range of controversies than before.<sup>160</sup> Moreover, this new process will be available to a wider

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155. *Id.*

156. *Id.* § 35, 1993 Fla. Laws at 1926 (amending FLA. STAT. § 186.509 (1991)).

157. *Id.*

158. See *infra* text accompanying notes 286-303.

For background on the significance which the ELMS Committee attached to dispute resolution, see ELMS III REPORT, *supra* note 16, at 15-16 (Recommendations 4, 6), 27 (Recommendation 24) & 38 (Recommendation 44).

159. FLA. STAT. § 186.509 (1991).

160. The 1993 Act expressly requires these regional processes to be utilized in the intergovernmental coordination elements of local plans to resolve disputes regarding "development proposals." Ch. 93-206, § 6, 1993 Fla. Laws 1887, 1895 (to be codified at FLA. STAT. § 163.3177(6)(h)1.c.). It also requires their use to resolve inconsistencies between port master plans and local comprehensive plans. *Id.* § 7, 1993 Fla. Laws at 1897 (to be codified at FLA. STAT. § 163.3178(5)).



range of parties, including "local governments, regional agencies and private interests."<sup>161</sup> Finally, it will include a full array of dispute resolution techniques, not just "informal mediation."<sup>162</sup>

The new regional dispute resolution process must include three steps within "a reasonable set of timeframes."<sup>163</sup> The first step is to be "voluntary meetings among the disputing parties."<sup>164</sup> These informal meetings, under the auspices of the council or another third party, would be for discussion purposes to identify and resolve outstanding issues.<sup>165</sup> Because the disputes that arise in growth management typically involve parties who have had extensive discussions with one another, in many cases this step may be waived by the parties.

If the voluntary meetings fail to resolve the dispute, the second step is to be "voluntary mediation or a similar process."<sup>166</sup> Mediation could be formal, that is, with the mediator controlling the agenda and all contacts between the parties, or informal, with the mediator serving only as a facilitator in formal meetings between the parties. The councils may not require mediation. The ELMS Committee recommended against mandatory mediation in the belief that parties who are required to mediate will not be fully committed to its success, and it most likely would be fruitless.<sup>167</sup>

If voluntary mediation fails, the third step is either arbitration or such administrative or judicial remedies as allowed by law.<sup>168</sup> This step could include the traditional methods for resolving disputes in the area of growth management. Significantly, the legislation requires that the new dispute resolution process must not alter the right to a judicial determination of the dispute.<sup>169</sup>

161. *Id.* § 35, 1993 Fla. Laws at 1926 (amending FLA. STAT. § 186.509 (1991)).

"Private interests" should be construed to include citizen groups because they represent themselves rather than a body politic. This provision is not applicable to cases in which the state is a party, such as compliance proceedings regarding local comprehensive plan amendments, because the provision expressly provides that the new dispute resolution process is to be utilized only by "local governments, regional agencies, and private interests." *Id.*

162. For a review of mediation and collaborative planning techniques in the context of local growth management, see Madigan et al., *NEW APPROACHES TO RESOLVING LOCAL PUBLIC DISPUTES* (National Institute for Dispute Resolution) (1990).

163. Ch. 93-206, § 35, 1993 Fla. Laws 1887, 1926 (amending FLA. STAT. § 186.509 (1991)).

164. *Id.*

165. The meetings could be similar to the settlement meetings conducted by the Florida Land and Water Adjudicatory Commission in DRI appeals, as set forth in chapter 42-2 of the *Florida Administrative Code*, although the DRI appeal meetings do not have a reputation as being generally useful. For a case study of the DRI settlement meeting process, see Stiffler & Montalvo, *Florida's 20-Day Meeting: Resolution of the Appeal of the Development Order for the Tampa Bay Park of Commerce*, 9 ENVIRON. IMPACT ASSESS. REV. 367 (1989).

166. Ch. 93-206, § 35, 1993 Fla. Laws 1887, 1926 (amending FLA. STAT. § 186.509 (1991)).

167. ELMS III REPORT, *supra* note 16, at 15 (Recommendation 4).

168. Ch. 93-206, § 35, 1993 Fla. Laws 1887, 1926 (amending FLA. STAT. § 186.509 (1991)).

169. See FLA. CONST. art I, § 21 (access to courts).

Although the regional planning councils are given considerable latitude in setting up the dispute resolution processes, as a practical matter their decisions will be shaped by other forces set in motion by the 1993 Act. Among these is the requirement that local government comprehensive plans rely on these regionally based processes for the resolution of certain issues addressed in their intergovernmental coordination elements.<sup>170</sup> This feature of the 1993 Act was intended, in part, to create a demand for these new dispute resolution processes, including mediation. Because DCA is required to establish minimum criteria for all local comprehensive plan elements,<sup>171</sup> the amendments to chapter 9J-5, *Florida Administrative Code*, establishing the minimum criteria for the intergovernmental coordination elements may exert a major influence on the design of the regional planning councils' dispute resolution processes.

Among the issues that must be addressed in implementing this provision is the degree of compulsion that may be allowed. The 1993 Act provides that the meetings and any mediation must be "voluntary."<sup>172</sup> Therefore, a regional planning council may not require a settlement meeting or mediation in any particular case. The 1993 Act also requires that the intergovernmental coordination element use the regionally-based process to bring to a close certain growth management disputes,<sup>173</sup> but the statute does not make clear whether a local government may compel disputing parties to take specific steps by incorporating the process into its local plan.

Two general questions arise about the authority of local governments in using the regional dispute resolution process. First, may the local government compel the disputing parties to use the regionally-based process to resolve a dispute? Second, may the local government require the utilization of any specific step in that process, such as settlement meetings or mediation?

Although the Legislature did not intend for local governments to be able to require the state to use the regional dispute resolution process, local governments may require its utilization by other disputing parties.<sup>174</sup> So long as a party is not required to participate in any particular step, then requiring use of the process would force the parties to

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This provision of the 1993 Act addresses only procedural matters and does not create any new causes of action.

170. Ch. 93-206, § 6, 1993 Fla. Laws 1887, 1895 (to be codified at FLA. STAT. § 163.3177(6)(h)1.c.).

171. FLA. STAT. § 163.3177 (Supp. 1992).

172. Ch. 93-206, § 35, 1993 Fla. Laws 1887, 1926 (amending FLA. STAT. § 186.509 (1991)).

173. *Id.* § 6, 1993 Fla. Laws at 1895 (to be codified at FLA. STAT. § 163.3177(6)(h)1.c.).

174. *Id.* § 35, 1993 Fla. Laws at 1926 (amending FLA. STAT. § 186.509 (1991)).

consider each specific step as a potential avenue for resolution. This approach would foster alternatives short of litigation, a positive result endorsed by the ELMS Committee.<sup>175</sup> The 1993 Act does not authorize a local government to require disputing parties to engage in a particular step, such as a settlement meeting or mediation. To interpret the statute in that way would undercut the legislative intent that such meetings and mediation be "voluntary."

Perhaps the most useful feature that a regional planning council could build into its dispute resolution process would be an assessment of each controversy to determine whether it can be resolved through mediation.<sup>176</sup> In light of the emphasis on alternatives to litigation, a mandatory mediation assessment should be permissible, even though mediation itself may not be required. A local government could require a mediation assessment as a prelude to the use of the regional dispute resolution process on the ground that the disputing parties could make more informed judgments about whether they should voluntarily engage in mediation.

The ELMS Committee also recommended that the Legislature and state agencies develop incentives to encourage parties with growth management disputes to engage in mediation and other alternatives to litigation.<sup>177</sup>

### *b. Cross-Acceptance*

Each regional planning council is directed to establish a "cross-acceptance" program to increase the coordination of regional and local plans.<sup>178</sup> This feature of the 1993 Act is an attempt to use another alternative to litigation to resolve planning disputes between regional planning councils and local governments. It also is an experiment to determine if this innovative method for achieving plan consistency can be used more widely in Florida's integrated planning system.

"Cross-acceptance" is defined as "a process by which a regional planning council compares plans to identify inconsistencies," with

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175. ELMS III REPORT, *supra* note 16, at 15-16 (Recommendations 4, 6).

176. For the ELMS Committee's endorsement of mediation assessments by regional planning councils, see *id.* at 27 (Recommendation 24).

177. *Id.* at 15 (Recommendation 4). One of the most significant shortcomings of the 1993 Act is its failure to include such incentives. The eventual success of the new regional dispute resolution processes will depend in part upon the creation of such incentives to encourage the early, nonlitigious resolution of growth management disputes.

178. Ch. 93-206, § 30, 1993 Fla. Laws 1887, 1920 (to be codified at FLA. STAT. § 186.505(22)).

consistency to be achieved through negotiation.<sup>179</sup> It is based upon New Jersey's cross-acceptance program used to develop that state's growth management plan.<sup>180</sup> The innovative New Jersey process has been the subject of considerable professional interest, and is viewed by some commentators as a constructive way to resolve inconsistencies between plans without litigation.<sup>181</sup>

The 1993 Act requires each regional planning council "to conduct" the cross-acceptance process. This mandate obligates the council to identify any inconsistencies between its strategic regional policy plan and the local government's comprehensive plan.<sup>182</sup> It also should be read as requiring the council to seek resolution of any inconsistencies through negotiation.<sup>183</sup> A local government's participation in the cross-acceptance process, and negotiation to resolve the inconsistency, is voluntary.<sup>184</sup>

The definition of cross-acceptance is broad enough to include an enlargement of the program beyond its current parameters. Under an

179. *Id.* § 28, 1993 Fla. Laws at 1920 (to be codified at FLA. STAT. § 186.503(2)). Significantly, this provision defines cross-acceptance without reference to the specific plans to be compared. In other words, it does not by definition limit the new cross-acceptance process to comparisons between local plans and the applicable strategic regional policy plan.

180. ELMS III REPORT, *supra* note 16, at 25 (Recommendation 22).

181. DEGROVE & MINESS, *supra* note 1, at 46-48.

This approach to vertical consistency is fundamentally different from the Florida system, which relies on financial and other sanctions for recalcitrant local governments.

There is no immediate "hammer" to compel a county or a municipality to bring its plan into compliance with the state plan. Compatibility depends on the ability of the key actors to resolve most differences through the process of cross-acceptance, leaving only a handful of unresolved issues at the end.

*Id.*

DeGrove and Miness report that the initial phases of the cross-acceptance process in New Jersey, while time-consuming, went better than expected. *Id.* For an approving assessment of this "experiment in a new style of collaborative planning and social learning," see JUDITH INNES, UNIVERSITY OF CALIFORNIA AT BERKELEY, GROUP PROCESSES AND THE SOCIAL CONSTRUCTION OF GROWTH MANAGEMENT: THE CASES OF FLORIDA, VERMONT, AND NEW JERSEY (Institute for Urban and Regional Development Working Paper No. 544, Sept. 1991).

182. The ELMS Committee recommended that the regional report on inconsistencies between the regional plan and a local plan be presented to the pertinent local government prior to adoption of the local government's evaluation and appraisal report. ELMS III REPORT, *supra* note 16, at 25 (Recommendation 22).

183. The 1993 Act prohibits a local plan amendment from being found not in compliance solely on the basis of an inconsistency between the local plan and the regional plan. Ch. 93-206, § 10, 1993 Fla. Laws 1887, 1903 (amending FLA. STAT. § 163.3184(5) (Supp. 1992)). Therefore, the cross-acceptance process should become the principal means by which the regional planning council seeks to achieve consistency between its plan and the local plans.

184. This provision is consistent with the ELMS Committee's recommendation against mandatory mediation. ELMS III REPORT, *supra* note 16, at 15 (Recommendation 4).

New Jersey succeeded in obtaining the participation of local governments through the utilization of incentives and rewards for those local governments which chose to participate in cross-acceptance. INNES, *supra* note 181, at 9-10. The 1993 Act provides no such incentives.

expanded program, the council could identify inconsistencies between the plans of adjacent local governments with those inconsistencies resolved through negotiation. Such a cross-acceptance process for local plans could be set up by a regional planning council. Again, participation by local governments would be voluntary.

*c. Review of Local Plan Amendments*

Under the 1993 Act, the councils are given a broader role in the review of local comprehensive plan amendments. The councils are one of a select class that may require DCA to review a proposed amendment to a local comprehensive plan and to prepare a report of objections, recommendations, and comments that the local government must consider prior to adoption of the amendment.<sup>185</sup> This provision, recommended by the ELMS Committee,<sup>186</sup> gives regional planning councils the responsibility to screen local plan amendments and alert DCA to those amendments that present issues of state or regional importance. The provision does not represent the type of delegation of plan review authority to regional planning councils that was recommended by the ACIR.<sup>187</sup>

The 1993 Act restricts the scope of review of local plan amendments by regional planning councils under section 163.3184(5). It provides that review by a council "shall be limited to effects on regional resources or facilities identified in the strategic regional policy plan and extrajurisdictional impacts which would be inconsistent with the comprehensive plan of the affected local government."<sup>188</sup> By contrast, pre-existing law instructed the councils to review local plan amendments "primarily in the context of the relationship and effect of the locally submitted plan or plan amendments on any regional policy plan."<sup>189</sup> The 1993 Act was intended to restrict the councils to addressing only those "resources or facilities" that were expressly identified in the strategic regional policy plan as being of regional concern, or cross-

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185. Ch. 93-206, § 10, 1993 Fla. Laws 1887, 1904 (amending FLA. STAT. § 163.3184(6) (Supp. 1992)).

186. ELMS III REPORT, *supra* note 16, at 40-42 (Recommendations 49-51).

187. ACIR REPORT, *supra* note 123, at 14. While delegation of the plan amendment review function to the councils may seem desirable, there are unresolved concerns. Among the issues that would have to be resolved would be the most efficient manner to determine which plan amendments should be reviewed by the councils and which by DCA, and the best way to assure consistent interpretation of the State Comprehensive Plan and other pertinent legal authorities by multiple agencies.

188. Ch. 93-206, § 10, 1993 Fla. Laws 1887, 1903 (amending FLA. STAT. § 163.3184(5) (1991)).

189. FLA. STAT. § 163.3184(5) (1991).

jurisdictional impacts that would not further the goals, objectives, and policies of the affected local jurisdiction.<sup>190</sup>

#### d. Coordination

Each regional planning council is directed to provide coordination for certain planning activities. This duty arises from three provisions of the 1993 Act. First, it directs each council:

[t]o perform a coordinating function among other regional entities relating to preparation and assurance of regular review of the strategic regional policy plan, with the entities to be coordinated determined by the topics addressed in the strategic regional policy plan.<sup>191</sup>

This provision is a general direction to each council to coordinate policy planning between itself and other regional entities, such as water management districts, on matters addressed in its regional plan. It confers no new authority on the councils vis-a-vis other regional agencies.<sup>192</sup>

Second, the statute directs each council to help coordinate land development and transportation policies that promote regionwide transportation systems.<sup>193</sup> The 1993 Act also provides several specific ways a council may fulfill this obligation when preparing its strategic regional policy plan.<sup>194</sup>

Third, the councils are directed to "review plans of independent transportation authorities and metropolitan planning organizations to identify inconsistencies between those agencies' plans and applicable local government plans."<sup>195</sup> The 1993 Act contemplates that a council will bring those issues to the attention of the appropriate agencies, but

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190. Ch. 93-206, § 10, 1993 Fla. Laws 1887, 1903 (amending FLA. STAT. § 163.3184(5) (1991)).

191. *Id.* § 30, 1993 Fla. Laws at 1920 (to be codified at FLA. STAT. § 186.505(21)).

192. The 1993 Act separately seeks to promote coordination through mandating the appointment of ex officio nonvoting members from other agencies. See *supra* text accompanying note 154.

Regional planning councils could perform this coordination role by holding joint meetings with other regional agencies, holding public hearings, and scheduling workshops for the sharing of information and expertise. ACIR REPORT, *supra* note 123, at 7. In addition, the councils could appoint technical advisory committees to bring together experts from various agencies. ELMS III REPORT, *supra* note 16, at 24 (Recommendation 19).

193. Ch. 93-206, § 30, 1993 Fla. Laws 1887, 1920 (to be codified at FLA. STAT. § 186.505(23)).

194. See *infra* text accompanying notes 236-39.

195. Ch. 93-206, § 30, 1993 Fla. Laws 1887, 1920 (to be codified at FLA. STAT. § 186.505(24)).

it does not empower the council to resolve an inconsistency.<sup>196</sup> This category of inconsistency is not embraced by the definition of cross-acceptance; it expressly includes only inconsistencies between plans prepared by regional planning councils and/or local governments.<sup>197</sup> However, a cross-acceptance process of negotiated consistency between various transportation plans and local government plans is not prohibited.

*e. Level of Service Standards*

Regional planning councils are expressly prohibited from establishing level of service (LOS) standards that would be binding on local governments or other providers of public facilities.<sup>198</sup> This provision is based on a recommendation of the ELMS Committee<sup>199</sup> and supplements a provision relating to implementation of the concurrency requirement.<sup>200</sup>

This provision is intended to prohibit a regional planning council from establishing in its regional plan, or by any other means, an LOS standard for any type of public facility that some or all local governments in the comprehensive planning district would be required to implement and enforce.<sup>201</sup> It does not affect the authority of the councils

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196. The councils' ability to resolve policy conflicts among various agencies is limited by the statutory requirement that the strategic regional policy plan is "advisory only" as to transportation issues. Ch. 93-164, § 3, 1993 Fla. Laws 954, 963 (amending FLA. STAT. § 339.155(4)(b) (Supp. 1992)).

197. See *supra* note 179 and accompanying text.

198. Ch. 93-206, § 32, 1993 Fla. Laws 1887, 1923 (to be codified at FLA. STAT. § 186.507(14)).

199. ELMS III REPORT, *supra* note 16, at 30 (Recommendation 30).

200. Ch. 93-206, § 8, 1993 Fla. Laws 1887, 1899 (to be codified at FLA. STAT. § 163.3180(3)); see also ELMS III REPORT, *supra* note 16, at 70 (Recommendation 104).

201. In a decision before the 1993 Act was signed into law, a hearing officer of the Division of Administrative Hearings considered this provision as evidence in a rule challenge to a regional planning council's rule establishing roadway LOS standards for purposes of evaluating proposed DRIs. The hearing officer correctly held that the provision was not evidence of legislative intent regarding the pre-existing law on the authority of regional planning councils. However, he went on to opine that "[i]t is not even clear from the language of section 32 what the Legislative intent as of July 1, 1993 is, assuming section 32 becomes law, concerning the authority of regional planning councils to adopt levels of service." *Pasco County, Florida v. Tampa Bay Regional Planning Council*, 93 Env'tl. & L.U. Admin. L. Rep. 55 (DOAH Case No. 92-7423RX) (Final Order entered Apr. 19, 1993) (paragraph 146).

Any doubt concerning the intention behind this unambiguous provision may be resolved by reference to the companion provision and to the report and recommendations of the ELMS Committee. The intent is unmistakable: "[g]overnmental agencies which are not responsible for providing public facilities should not have the ability to impose their preferred level of service standards on governmental agencies which do provide such facilities." ELMS III REPORT, *supra* note 16, at 70 (Recommendation 104). Because regional planning councils are not responsible for providing roads or sewers or any other kind of infrastructure, they may not impose LOS stan-

to submit comments or recommendations concerning levels of service when reviewing local plan amendments during the compliance review process.<sup>202</sup>

*f. Appeal Authority for DRI Development Orders*

Regional planning councils may no longer appeal a DRI development order to the Florida Land and Water Adjudicatory Commission.<sup>203</sup> This change deleted authority that originated in Florida's first foray into the growth management field, the Florida Environmental Land and Water Management Act of 1972.<sup>204</sup>

The exercise of the councils' appeal authority in the DRI program was considered by the ELMS Committee and the ACIR.<sup>205</sup> Although there were discrepancies between the records of the councils and DCA, an analysis showed that DCA initiated more DRI appeals than the councils during the five-year period reviewed.<sup>206</sup> Moreover, only a few councils accounted for most of the appeals; indeed, by one count, the Tampa Bay Regional Planning Council accounted for almost half the DRI appeals initiated by the eleven regional planning councils from 1987 to 1992.<sup>207</sup> However, the threat of an appeal may have provided leverage for the councils' staffs during DRI project reviews, and no doubt created some friction.

There were two reasons for the repeal of this authority. One was to eliminate a source of friction between state, regional, and local agencies, as well as between regional planning councils and developers and landowners.<sup>208</sup> Another reason was to diminish the regulatory role of

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dards on local governments which do bear that responsibility.

Even if this provision is not interpreted to prohibit adoption by the councils of LOS standards for purposes of DRI reviews, another provision of the 1993 Act accomplishes the same result. It requires DCA to establish uniform statewide standards for DRI reviews. Ch. 93-206, § 52, 1993 Fla. Laws 1887, 1953-54 (amending FLA. STAT. § 380.06(23) (Supp. 1992)). See *infra* text accompanying notes 669-72.

202. Ch. 93-206, § 32, 1993 Fla. Laws 1887, 1923 (to be codified at FLA. STAT. § 186.507(14)).

203. *Id.* § 56, 1993 Fla. Laws at 1959-60 (amending FLA. STAT. § 380.07(2) (1991)).

This provision includes a savings clause to preserve any DRI appeal initiated by a regional planning council on or before March 1, 1993, but allows an appeal initiated after March 1, 1993, but before July 1, 1993, to continue only if an appeal also was initiated by DCA. *Id.*

204. Ch. 72-317, § 7, 1972 Fla. Laws 1162, 1177-78.

Although the initial review is by administrative appeal, exhaustion of that remedy allows a regional planning council to seek judicial review of the development order at one of Florida's district courts of appeal. See FLA. STAT. § 120.68 (1991).

205. ELMS III REPORT, *supra* note 16, at 26 (Recommendation 23).

206. *Id.*

207. *Id.*

208. *Id.*



the councils and emphasize the councils' planning, coordination, and technical assistance roles.<sup>209</sup> Although they retain a voice in the decision to appeal a DRI development order,<sup>210</sup> the councils' work in the DRI program henceforth should focus on advising local governments and developers on project impacts and mitigation strategies. Their principal tools must now be the quality of their analysis and the art of persuasion.

### B. Strategic Regional Policy Plans

Under pre-existing law, the principal planning instrument of each council was the "comprehensive regional policy plan."<sup>211</sup> The description of this plan as "comprehensive" was accurate because it addressed all the goals of the State Comprehensive Plan.<sup>212</sup> The ELMS Committee and ACIR, although their approaches varied to a minor degree,<sup>213</sup> recommended a more tightly focused regional plan. The 1993 Act included the ELMS Committee's recommendations.<sup>214</sup> These changes should result in significant reconfiguration of most regional plans and the elimination of the regulatory dimension.<sup>215</sup> However, as before, the regional plan must be consistent with the State Comprehensive Plan.<sup>216</sup>

#### 1. Contents of the Regional Plan

One criticism of some regional planning councils is that they have intruded into issues that are local in nature.<sup>217</sup> The 1993 Act seeks to steer the councils away from such activity by specifying that the stra-

209. *Id.*

210. A council may recommend that DCA initiate an appeal, so long as the council acts at a regularly scheduled public meeting. Ch. 93-206, § 56, 1993 Fla. Laws 1887, 1959-60 (amending FLA. STAT. § 380.07(2) (1991)).

211. FLA. STAT. § 186.507(1) (1991).

212. FLA. ADMIN. CODE r. 27E-4.004(3) (1991).

213. Compare ELMS III REPORT, *supra* note 16, at 29-31 (Recommendations 28-32) with ACIR REPORT, *supra* note 123, at 11.

214. Although the strategic regional policy plan is intended to be more focused than its comprehensive predecessor, the legislation did not revise the definition of the plan as addressing "physical, economic and social development of the comprehensive planning district." Ch. 93-206, § 28, 1993 Fla. Laws 1887, 1920 (amending FLA. STAT. § 186.503(10) (1991)). This definition is consistent with the five required subjects and does not require a council to go beyond them when preparing its plan.

215. For example, the regional plan is no longer to establish the standards to be utilized in the regional review of DRIs. Ch. 93-206, § 32, 1993 Fla. Laws 1887, 1921 (amending FLA. STAT. § 186.507(1) (1991)). Rather, DRI reviews are to be guided by uniform standards promulgated by DCA. *Id.* § 52, 1993 Fla. Laws at 1953 (amending FLA. STAT. § 380.06(23) (1991)).

216. *Id.* § 32, 1993 Fla. Laws at 1921 (amending FLA. STAT. § 186.507(1) (1991)).

217. ELMS III REPORT, *supra* note 16, at 31 (Recommendation 31).

tegic regional policy plans must identify "key regional resources and facilities."<sup>218</sup> In addition, the legislation directs that the regional plans focus on "regional rather than local resources and facilities."<sup>219</sup>

The strategic regional policy plan need not include objectives. Previously, the state planning statutes<sup>220</sup> and the Florida Regional Planning Council Act<sup>221</sup> required state and regional plans to contain goals and policies, but not objectives. The 1993 Act amended chapter 186 expressly to require inclusion of objectives in the State Comprehensive Plan and its new growth management portion.<sup>222</sup> However, the Florida Regional Planning Council Act was not changed by the 1993 legislation to require objectives in regional plans. The different treatment reflects the use of objectives for accountability. State government has many regulatory programs through which it can act to achieve its planning goals and, in the implementation of its plans, should be held to a different degree of accountability than regional planning councils, which do not have such programs.

The strategic regional policy plan is required to address only five subjects—affordable housing, economic development, emergency preparedness, natural resources of regional significance, and regional transportation.<sup>223</sup> In addition, each council has the discretion to "address any other subject which relates to the particular needs and circumstances of the comprehensive planning district."<sup>224</sup> Thus, the regional planning councils have wide latitude in the subjects they choose to address.<sup>225</sup>

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218. Ch. 93-206, § 32, 1993 Fla. Laws 1887, 1921-22 (amending FLA. STAT. § 186.507(3) (1991)) (emphasis added).

219. *Id.* (amending FLA. STAT. § 186.507(2) (1991)). In addition, section 186.507(2) will now characterize this directive as a "requirement" rather than a mere "need." *Id.*

220. FLA. STAT. § 186.007 (1991).

221. *Id.* § 186.507.

222. Ch. 93-206, § 22, 1993 Fla. Laws 1887, 1914-16 (amending FLA. STAT. § 186.007 (1991)).

223. *Id.* § 32, 1993 Fla. Laws at 1921 (amending FLA. STAT. § 186.507(1) (1991)). For a comparison of the required subjects under pre-existing law and the 1993 Act, see ELMS III REPORT, *supra* note 16, at 5 (Fig. 3).

Although many of the 26 goal areas of the State Comprehensive Plan fall within the new subjects, the intent is for regional plans to focus on only a few issues that are critical to the region's growth and development. *Id.* at 29-30 (Recommendation 28).

The ACIR recommended that strategic regional policy plans only be required to address affordable housing, health, natural resources, and transportation. ACIR REPORT, *supra* note 123, at 11.

224. Ch. 93-206, § 32, 1993 Fla. Laws 1887, 1921 (amending FLA. STAT. § 186.507(1) (1991)).

If a council adopts a health element, it is required to enter into a memorandum of agreement with the local health councils within its planning district. *Id.* (amending FLA. STAT. § 186.507(10) (1991)).

225. However, an inconsistency between the regional plan and a local government comprehensive plan may not be "the sole basis" for determining that the local plan is not in compliance

First, the regional policy plan must address the affordable housing needs of the region.<sup>226</sup> This provision underscores the Legislature's commitment to meet the state's housing needs as Florida grows and develops. Further, it illustrates the legislative concept of growth management as focusing on physical growth and development, but reaching more than just natural resource and public facility issues. The 1993 Act does not address the relationship that should exist between state housing plans and the affordable housing provisions of the strategic regional policy plan.<sup>227</sup> Ideally, regional plans should be consistent with the state's affordable housing policies and serve as incubators for new housing strategies from which local governments may choose the means to attain their affordable housing goals.

Second, the regional plan must address economic development within the region.<sup>228</sup> This provision is one of several in the 1993 Act that reflects the growing awareness of economic development as part of an overall growth management program. This portion of the regional plan should present an assessment of the region's human and natural resources, identify preferred forms of economic growth that are compatible with those resources, and propose strategies that local governments—alone or collectively—can implement to foster preferred economic activities. It could form the basis for technical assistance in community development and is consistent with the economic development activities of several councils.<sup>229</sup>

Third, the plan must address emergency preparedness.<sup>230</sup> This provision was recommended by the ELMS Committee based in part on the

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with state law. Ch. 93-206, § 10, 1993 Fla. Laws 1887, 1903 (amending FLA. STAT. § 163.3184(5) (1991)).

The ELMS Committee considered this provision, but did not recommend it. The better interpretation of it is that a provision of a local plan or plan amendment may not be a basis for a noncompliance determination for that plan or amendment on grounds that the provision is inconsistent with the strategic regional policy plan unless the provision also is inconsistent with the State Comprehensive Plan or chapter 9J-5, *Florida Administrative Code*. See *id.* (amending FLA. STAT. § 163.3184(1)(b) (1991)).

226. *Id.* § 32, 1993 Fla. Laws at 1921 (amending FLA. STAT. § 186.507(1) (1991)).

227. It does not address the relationship between the affordable housing component of the regional plan and the affordable housing needs assessment to be conducted by DCA and local governments using a uniform statewide methodology. See *id.* § 6, 1993 Fla. Laws at 1895 (to be codified at FLA. STAT. § 163.3177(6)(f)2.).

228. *Id.* § 32, 1993 Fla. Laws at 1921 (amending FLA. STAT. § 186.507(1) (1991)).

229. Four regional planning councils have been designated and funded as Economic Development Districts by the U.S. Department of Commerce, Economic Development Administration, for multi-county economic development planning. Memorandum from Chuck Hungerford, Legis. Analyst, ACIR, to Mario Taylor, Staff Dir., House Comm. on Comm'y Aff. (Jan. 21, 1993) (on file with the *Florida State University Law Review*).

230. Ch. 93-206, § 32, 1993 Fla. Laws 1887, 1921 (amending FLA. STAT. § 186.507(1) (1991)).

experience of Hurricane Andrew. It reflects a renewed appreciation of the importance of pre-disaster planning in hurricane-prone Florida, and a conception of the regional plan as an instrument for coordinating local emergency preparedness efforts. This topic could include a wide range of concerns, such as transportation systems and land development decisions as they might affect evacuation.

Another required subject for the regional plan is "natural resources of regional significance."<sup>231</sup> "Natural resources" is not defined by the statute, but it may be given a liberal construction so as to reach land, air, and water resources of all types. In appropriate locales, it may be construed to include coastal and marine resources.

A major focus of the ELMS Committee was the manner in which the regional planning councils address natural resource issues. The 1993 Act requires each council to identify regionally significant natural resources,<sup>232</sup> and to do so "by a specific geographic location and not solely by generic type."<sup>233</sup> This language is an attempt to force councils to determine the specific resources—rivers, lakes, uplands, beaches and seashores, and so forth—that represent environmental values significant to the region as a whole. It provides that each council will identify specific regionally significant resources and facilities;<sup>234</sup> it bars a council from summarily identifying "all wetlands." In identifying these specific resources, each council should be guided by the new growth management portion of the State Comprehensive Plan in its identification of "areas of state *and regional* environmental significance."<sup>235</sup> The use of a map is not prohibited.

Finally, the plan must address regional transportation,<sup>236</sup> and the 1993 Act provides specific tools for doing so. Each council is required to identify regionally significant transportation facilities.<sup>237</sup> It may recommend minimum residential densities and building intensities for development along designated public transportation corridors;<sup>238</sup> a local government could choose to incorporate those densities and intensities into its local comprehensive plan. Further, the council may identify "investment strategies" for providing transportation infra-

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231. *Id.*

232. *Id.* (amending FLA. STAT. § 186.507(3) (1991)).

233. *Id.* (to be codified at FLA. STAT. § 186.507(1)).

234. *Id.* (amending FLA. STAT. § 186.507(1) (1991)).

235. *Id.* § 24, 1993 Fla. Laws at 1917 (to be codified at FLA. STAT. § 186.009(2)(c)) (emphasis added).

236. *Id.* § 32, 1993 Fla. Laws at 1921 (amending FLA. STAT. § 186.507(1) (1991)).

237. *Id.* (amending FLA. STAT. § 186.507(3) (1991)).

238. *Id.* (to be codified at FLA. STAT. § 186.507(12)). For a discussion regarding provisions relating to public transportation corridors, see *infra* text accompanying notes 325-28, 494-98.

structure where growth is desired in the region, rather than focusing new facilities on the task of relieving congestion in areas where growth is discouraged.<sup>239</sup>

The regional transportation component of the strategic regional policy plan must be consistent, to the maximum extent feasible, with the Florida Transportation Plan and other transportation plans. Prior to adoption, it must be reviewed by various transportation officials and, after adoption, will be advisory only as to regional transportation policy.<sup>240</sup>

## 2. *Vote for Adoption*

One concern that arose during the ELMS Committee's deliberations was the prospect of a regional planning council adopting its regional plan without broad-based support from local governments, notwithstanding the numerical domination of the council by local elected officials. To address this concern, the Committee considered a number of procedural devices to increase the local government "buy-in" to the regional plan.<sup>241</sup> It recommended adoption of the regional plan by a two-thirds vote of the council's governing board.<sup>242</sup>

The 1993 Act includes this requirement. Any subsequent amendments or revisions must also be adopted by a similar vote.<sup>243</sup> There is no requirement that the two-thirds majority be composed of any particular proportion of local elected officials or gubernatorial appointees. Because of the due process protections afforded by the Administrative Procedure Act,<sup>244</sup> the strategic regional policy plan must be adopted by rule.

## 3. *Planning Standards*

The 1993 Act requires that any standards included in the strategic regional policy plan be for "planning purposes only and not for permitting or regulatory purposes."<sup>245</sup> In addition, it prohibits a regional planning council from adopting a planning standard that "differs materially from a planning standard adopted by rule by a state or re-

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239. Ch. 93-206, § 32, 1993 Fla. Laws 1887, 1921 (to be codified at FLA. STAT. § 186.507(12)).

240. Ch. 93-164, § 3, 1993 Fla. Laws 954, 963 (amending FLA. STAT. § 339.155(4) (Supp. 1992)).

241. ELMS III REPORT, *supra* note 16, at 31 (Recommendation 31).

242. *Id.*

243. Ch. 93-206, § 32, 1993 Fla. Laws 1887, 1923 (to be codified at FLA. STAT. § 186.507(15)).

244. FLA. STAT. § 120.54 (Supp. 1992).

245. Ch. 93-206, § 32, 1993 Fla. Laws 1887, 1922 (to be codified at FLA. STAT. § 186.507(13)).

gional agency, when such rule expressly states the planning standard is intended to preempt action by the regional planning council."<sup>246</sup> This provision does not explain the distinction between a "planning" standard and a "regulatory" standard. The statute contains no definitions to help draw this line. The Executive Office of the Governor should use its rulemaking authority to define these terms by rule to give guidance to the councils and other agencies.

The purpose of this provision is to ensure that regional planning councils engage only in planning, rather than regulatory activities. Another purpose is to address duplicative standards that can unnecessarily complicate the planning and development process,<sup>247</sup> when a regional planning council and an agency with special expertise, such as a water management district, each wish to establish a planning standard on a given subject. The Legislature indicated in this provision that it prefers for such standards to be set by an agency with special expertise.

#### 4. *Revision and Consistency Determination*

The 1993 Act contemplates that all current comprehensive regional policy plans will be rewritten to reflect the new regimen for regional plans. This process is to be conducted on a schedule adopted by the Executive Office of the Governor.<sup>248</sup> The schedule must facilitate coordination between adoption of the regional plan and the schedule for submittal of evaluation and appraisal reports on local comprehensive plans by the cities and counties within that planning region.<sup>249</sup> To that end, the frequency of a complete review and, if necessary, revision of the regional plans has been changed from every three to every five years.<sup>250</sup> This provision does not affect the ability of a regional planning council to amend its plan on other occasions.

As a part of the revision process, each regional planning council is required to prepare an evaluation and appraisal report of all needed

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246. *Id.* The absence of a planning standard adopted by another agency "shall not be deemed to create a material difference from a planning standard adopted by the regional planning council." *Id.*

247. This concern is reflected in a companion provision which requires councils, when preparing their regional plans, to consider "existing requirements in other planning and regulatory programs" so as not to duplicate or conflict with those agency actions. *Id.* at 1923 (to be codified at FLA. STAT. § 186.507(16)).

248. *Id.* § 34, 1993 Fla. Laws at 1925 (amending FLA. STAT. § 186.508(1) (1991)).

249. *Id.* § 37 1993 Fla. Laws at 1927 (amending FLA. STAT. § 186.511 (1191)).

250. *Id.* Because the last revision of the plans was completed in 1990, the next one should be completed in 1995, which would coincide with the beginning of the evaluation and appraisal report (EAR) process in the local planning program.

plan changes.<sup>251</sup> The issues to be addressed are set forth in the statute.<sup>252</sup> The legislation provides that the report and the proposed wording for the revised plan must be submitted to the Executive Office of the Governor for a consistency review.<sup>253</sup> Within ninety days after receipt of the response from the Executive Office of the Governor, the council must adopt the plan by rule.<sup>254</sup>

#### IV. LOCAL COMPREHENSIVE PLANNING

The 1993 Act contains the first major revisions to the Local Government Comprehensive Planning and Land Development Regulation Act since 1985. It is largely by design that Florida's local planning laws were not changed during that interval; both the Martinez and Chiles administrations concluded that all 458 counties and municipalities should adopt local comprehensive plans in accordance with the regimen established under the 1985 Act before the program was significantly changed. The formation of the ELMS Committee by Governor Chiles was timed to coincide with the conclusion of the plan adoption process, and 1993 was targeted as a year for legislative review of Florida's growth management laws.<sup>255</sup>

Although the ELMS Committee concluded that the local planning program is the "crown jewel" of the integrated planning system, it acknowledged deficiencies in the program and proposed improvements.<sup>256</sup> For example, the Committee concluded the program was not sufficiently flexible to accommodate the divergent needs and circumstances of Florida's 458 local jurisdictions; it gave this issue the label "one size doesn't fit all" and made the issue a major theme of its recommendations.<sup>257</sup> It sought to address this concern and other criticisms of the local planning program by recommending more flexibility

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251. *Id.*

252. *Id.* The 1993 Act adds a requirement that each council "address changes to the state comprehensive plan" to ensure that new goals, objectives, and policies are reflected in the revised regional plans. *Id.*

253. *Id.* at 1926 (amending FLA. STAT. § 186.511 (1991)).

254. *Id.* (amending FLA. STAT. § 186.508(1) (1991)).

255. For an assessment of the local planning program when the ELMS Committee was created, see Patricia S. McKay, *Fall of 1991: Where Are We? A Status Report on Growth Management Plans in Florida*, ENVTL. & URB. ISSUES, Fall 1991, at 1. At that time, 58% of the local plans were in compliance. *Id.* at 3. When the ELMS Committee submitted its report in December 1992, 76% were in compliance. ELMS III REPORT, *supra* note 16, at 12 (Fig. 8).

256. ELMS III REPORT, *supra* note 16, at 35.

257. *Id.* at 3. Other commentators have leveled similar criticism at Florida's local planning program. INNES, *supra* note 46, at 9. Striking an appropriate balance between the need to accommodate local diversity and the administrative requirements of an integrated planning system in a large state is a continuing challenge.

in local planning, a streamlined plan amendment process, and enhanced requirements for intergovernmental coordination. For the most part, the 1993 Act adopts these recommendations.

### A. Property Rights

The implementation of the local planning program, particularly with the strong state role exercised by DCA, has heightened concerns among landowners and developers about a diminishment in their ability to use private property. The 1993 Act addresses that concern, without creating new rights, by adopting intent language for the Local Government Comprehensive Planning and Land Development Regulation Act, as recommended by the ELMS Committee.<sup>258</sup>

The Legislature first declares that all governmental entities should "recognize and respect judicially acknowledged or constitutionally protected private property rights."<sup>259</sup> This statement encompasses not only the constitutional guarantee of due process and the protection against the taking of property without just compensation, but also such common law rights as those embodied in the nuisance, vested rights, and equitable estoppel doctrines.

The Legislature then seeks to strike a balance between the right of a landowner who wishes to enjoy the beneficial use of her property and the countervailing right of other landowners to be free from noxious uses of that property. It focuses on the rights of a landowner to use her property and acknowledges that "[f]ull and just compensation or other appropriate relief must be provided" for a regulatory taking through a judicial proceeding.<sup>260</sup> The intent language also directs state, regional, and local agencies to implement the local planning program with "sensitivity for private property rights."<sup>261</sup> This language is a direction to all governmental agencies that implement the local planning program to consider the effects of each potential policy or requirement on private property prior to adoption and implementation. Finally, the intent language directs state, regional, and local governments to "not be unduly restrictive" in implementing the local planning program.<sup>262</sup>

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258. ELMS III REPORT, *supra* note 16, at 14 (Recommendation 3).

259. Ch. 93-206, § 1, 1993 Fla. Laws 1887, 1892 (to be codified at FLA. STAT. § 163.3161(9)).

260. *Id.* The operative language is drawn from the State Comprehensive Plan. FLA. STAT. § 187.201(15) (Supp. 1992).

261. Ch. 93-206, § 1, 1993 Fla. Laws 1887, 1892 (to be codified at FLA. STAT. § 163.3161(9)).

262. *Id.* The term "unduly restrictive" was drawn from a provision enacted by the Legislature as part of the Florida Environmental Land and Water Management Act of 1972. Ch. 72-317, § 8, 1972 Fla. Laws 1162, 1178 (current version at FLA. STAT. § 380.08(1) (1991)). As used in the 1993 Act, it was not intended to create a new statutory standard for reviewing the actions of governmental agencies.



As a counterpoint to the right to use one's property, the Legislature acknowledges that a property owner should be free from noxious uses of others' property when those uses would harm his property.<sup>263</sup> This common law principle is a limitation on the property rights of others and one rationale for the local planning program.

### B. Vision

A recurring criticism of the local planning program is that the state role, with minimum criteria for local plans adopted by DCA in chapter 9J-5, *Florida Administrative Code*, has resulted in a "cookbook" approach to local planning.<sup>264</sup> Many local plans have been criticized for being written to satisfy the DCA "checklist" and not to take the community to a specific future condition—a "destination"—that represents the shared values of the community. This criticism prompted the ELMS Committee to recommend that each local government engage in the process of developing a long-term "vision" of its community to guide future planning.<sup>265</sup>

The 1993 Act encourages, but does not require, local governments to "articulate a vision of the future physical appearance and qualities of its community as a component of its local comprehensive plan."<sup>266</sup> The vision should be expressed in both pictures and words and be developed through a collaborative planning process, such as a charrette.<sup>267</sup> It must be adopted as a component of the local plan.<sup>268</sup>

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263. Ch. 93-206, § 1, 1993 Fla. Laws 1887, 1891-92 (to be codified at FLA. STAT. § 163.3161(9)). See also *Orlando Sports Stadium v. State ex rel. Powell*, 262 So. 2d 881 (Fla. 1972) (public nuisance); *Beckman v. Marshall*, 85 So. 2d 552 (Fla. 1956) (private nuisance).

264. See, e.g., Charles L. Siemon & Michelle J. Zimet, *Public Places as "Infrastructure,"* ENVTL. & URB. ISSUES, Winter 1991, at 1, 2. This criticism was voiced often during the deliberations of the ELMS Committee and was reflected in the Committee's report and recommendations. ELMS III REPORT, *supra* note 16, at 35.

265. *Id.* at 35-36 (Recommendations 36-39).

266. Ch. 93-206, § 5, 1993 Fla. Laws 1887, 1893 (to be codified at FLA. STAT. § 163.3167(11)).

267. *Id.* A charrette is an "intensive public-participation design session over the course of several days" and is seen as a method to assist local governments in articulating a vision as part of a comprehensive plan. ELMS III REPORT, *supra* note 16, at 35-36 (Recommendation 36). For a concise discussion on visioning and urban design, see Scott Burton, Tim Law & Martin A. Schneider, *Inventing Florida's Urban Future: Community Design in the 1990s*, ENVTL. & URB. ISSUES, Spring 1991, at 12. See also WASHINGTON DEP'T OF COMM'Y DEV., *TOWARDS MANAGING GROWTH IN WASHINGTON: A GUIDE TO COMMUNITY VISIONING* (Oct. 1991).

One model for the type of collaborative planning process envisioned by the ELMS Committee is the South Walton project in the Florida Panhandle. See FLORIDA GROWTH MANAGEMENT CONFLICT RESOLUTION CONSORTIUM, *FORUM ON CONSERVATION AND DEVELOPMENT IN SOUTH WALTON COUNTY* (Mar. 12, 1993); FLORIDA GROWTH MANAGEMENT CONFLICT RESOLUTION CONSORTIUM, *SECOND FORUM ON CONSERVATION AND DEVELOPMENT IN SOUTH WALTON COUNTY* (Apr. 30, 1993).

268. Ch. 93-206, § 5, 1993 Fla. Laws 1887, 1893 (to be codified at FLA. STAT. § 163.3167(11)).

Following adoption of a vision, a local government is directed to review its local plan, land development regulations, and capital improvements program to ensure they are consistent with the vision.<sup>269</sup>

One of the most difficult aspects of the visioning issue is the relationship to be established between a vision and the other components of the integrated planning system. On balance, this new, optional feature should be incorporated into the planning program without altering the role already performed by the state in providing policy direction for local plans.

The state's role is circumscribed with respect to visioning. The DCA may not adopt minimum criteria for evaluating or judging a vision.<sup>270</sup> It is directed to serve as a "clearinghouse" for developing a vision to provide technical assistance to local governments.<sup>271</sup>

The 1993 Act requires that a local vision be consistent with the state vision, if one is adopted.<sup>272</sup> Further, it requires that a local vision be implemented in a manner consistent with the 1993 Act and with the State Comprehensive Plan.<sup>273</sup> Finally, a local vision must be internally consistent with the local plan of which it is a part; the existing requirement for local plans to be consistent with the State Comprehensive Plan is not altered.<sup>274</sup>

### C. Required Plan Elements

At the request of local governments, the 1993 Act does not include any of the proposals offered in recent years for additional required elements of local comprehensive plans.<sup>275</sup> Instead, the legislation fol-

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269. *Id.* The 1993 Act recommends, but does not require, that the visioning process be conducted in conjunction with the EAR process. *Id.* § 13, 1993 Fla. Laws at 1908 (amending FLA. STAT. § 163.3191(3) (Supp. 1992)). For a review of the new legislation on the EAR process, see *infra* text accompanying notes 368-404.

The 1993 Act also authorizes "collective visions" for neighboring local jurisdictions, "especially those sharing natural resources or physical or economic infrastructure." *Id.* § 5, 1993 Fla. Laws at 1893 (to be codified at FLA. STAT. § 163.3167(11)). A collective vision would apply in each local jurisdiction only to the extent that the local governing body chose for it to apply. All requirements and limitations on a local vision would apply to a collective vision as adopted by an individual local government.

For a concise report on a regional visioning program, see *The Bluegrass Revisited: Regional Strategic Planning for a Vision of the Future*, LANDLINES, July 1993, at 3.

270. Ch. 93-206, § 5, 1993 Fla. Laws 1887, 1893 (to be codified at FLA. STAT. § 163.3167(11)).

271. *Id.*

272. *Id.*

273. *Id.*

274. *Id.*

275. See, e.g., Fla. HB 83 (1992) (required educational facilities and public safety elements). See also Fla. Exec. Order No. 91-291, § 3(4) (Nov. 19, 1991) (identifying potential required elements for education, public safety, health care, air quality, corrections, economic development, and energy conservation).

lows the recommendations of the ELMS Committee by providing for improvements to three existing required elements, those relating to housing, intergovernmental coordination, and transportation.

### 1. *Housing Element*

The housing element is revised in four ways to address Florida's need for affordable housing. First, it clarifies that each local government's housing element must address the needs of "all current and anticipated future residents" of the jurisdiction.<sup>276</sup> This all-inclusive provision may be interpreted to require planning for "special needs" populations, such as the homeless.<sup>277</sup> Another provision clarifies that the housing needs of "very-low-income" families must be addressed.<sup>278</sup>

Second, the 1993 Act provides that affordable housing plans adopted by local government should seek to "avoid the concentration of affordable housing units only in specific areas of the jurisdiction."<sup>279</sup> This provision does not require the scattering of affordable housing throughout a jurisdiction; it requires only that in planning for affordable housing, the local government not favor the creation of low-income housing ghettos.

Third, the 1993 Act requires DCA to conduct an affordable housing needs assessment for each local jurisdiction.<sup>280</sup> The assessment is to be conducted according to a uniform methodology to assure creation of a reliable, statewide housing needs database to assist in the development of future housing policy.<sup>281</sup> The methodology for such an assessment is to be established by DCA by rule, and any local government may conduct the assessment so long as it utilizes DCA methodology.<sup>282</sup> If DCA conducts the assessment, it must provide the findings

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276. Ch. 93-206, § 6, 1993 Fla. Laws 1887, 1893 (amending FLA. STAT. § 163.3177(6)(f) (Supp. 1992)). Local governments need not plan for employees who reside elsewhere.

277. The legislation originally provided that the housing element address "all current and anticipated future residents of the jurisdiction, *including those with special needs and very low-income persons.*" Fla. H.R. Comm. on Comm'y Aff., PCB CA 93-01, § 6 (1993) (proposed amendment to FLA. STAT. § 163.3177(6) (1991)) (draft of Mar. 24, 1993 version) (emphasis added). The express reference to special needs populations was subsequently deleted. Fla. H.R. Comm. on Comm'y Aff., Amendment 1 to PCB CA 93-01 (1993) (Mar. 26, 1993 meeting) (on file with the *Florida State University Law Review*). The deleted phrase was illustrative only and did not grant authority not already granted by the phrase "*all current and anticipated future residents.*" *Id.* (emphasis added).

278. Ch. 93-206, § 6, 1993 Fla. Laws 1887, 1894 (amending FLA. STAT. § 163.3177(6)(f) (Supp. 1992)).

279. *Id.*

280. *Id.*

281. *Id.*

282. *Id.*

in time for the local government to address housing needs in its evaluation and appraisal report (EAR).<sup>283</sup> By implication, a local government that conducts the assessment itself also must do so in time for the EAR process.

Finally, the 1993 Act requires the goals, objectives, and policies of the housing element to be based on the affordable housing needs assessment, as well as any additional data and analysis.<sup>284</sup> This element will take on additional importance in local housing policy because “[s]tate and federal housing plans prepared on behalf of the local government must be consistent with the goals, objectives, and policies of the housing element.”<sup>285</sup>

These provisions reflect an awareness of the need for affordable housing in Florida, and the conclusion that no local community can address these needs in isolation from other local governments or from the state. The uniform needs assessment is intended to provide a sound database upon which each local government may base its decisions, but the local planning program otherwise retains flexibility for each local government in policy setting and program implementation.

## 2. *Intergovernmental Coordination Element*

The heart of the local planning program reforms is the focus on improving the intergovernmental coordination element (ICE). This element has been widely regarded as the weakest link in the local planning program. Yet this element is critical to improved governmental efficiency and coordination. The changes to it required by the Legislature assume additional importance because their implementation is a predicate for termination of the DRI program in each local jurisdiction.<sup>286</sup>

### a. *Impacts of Proposed Development*

The 1993 Act includes additional requirements that are intended to create local plan-based processes to address certain impacts of proposed development and to take the place of the DRI program for DRI-scale projects. Each local government's policies must address four basic issues.

First, the ICE development review process established in each local jurisdiction must determine if a proposed development, whether or

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283. *Id.*

284. *Id.*

285. *Id.*

286. For a discussion of the provisions intended to result in termination of the DRI program, see *infra* text accompanying notes 560-85.

not it would be a DRI-scale project, would have significant impacts in other local jurisdictions, or on certain state or regional resources or facilities.<sup>287</sup> This process will require coordination with other local governments, as well as a variety of state and regional agencies. The state or regional resources or facilities to be addressed would have to be identified in the State Comprehensive Plan or the appropriate strategic regional policy plan. The local government with jurisdiction over the project would determine whether the impacts would be significant.

Second, the ICE development review process must provide a method for mitigating significant extrajurisdictional impacts in the jurisdiction in which they occur, and in accord with the local plan of that jurisdiction.<sup>288</sup> Regional mitigation is permissible.<sup>289</sup> Again, the local government with jurisdiction over the project would determine the appropriateness of the mitigation, although it must be guided by the local plan of the impacted jurisdiction. Although the 1993 Act does not expressly so provide, the local government with jurisdiction over the project also must provide for appropriate mitigation of any significant impacts to identified state or regional resources or facilities.<sup>290</sup>

Third, the ICE development review process must utilize the regional planning council's dispute resolution process for disputes over a proposed development that has significant impacts on another jurisdic-

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287. Ch. 93-206, § 6, 1993 Fla. Laws 1887, 1894 (amending FLA. STAT. § 163.3177(6)(h) (Supp. 1992)).

The term "development proposals" should be read as meaning an application for local authorization to develop land, resulting in issuance of a development order setting densities or intensities of use. See FLA. STAT. § 163.3164(6) (1991) (definition of "development order"). See also FLA. ADMIN. CODE ANN r. 9J-5.055(2)(a) (1992).

288. Ch. 93-206, § 6, 1993 Fla. Laws 1887, 1895 (amending FLA. STAT. § 163.3177(6)(h) (Supp. 1992)).

289. For purposes of certain wetlands and surface water management permitting, the Legislature in 1993 authorized regional mitigation banking. Ch. 93-213, § 29, 1993 Fla. Laws 2129, 2143-44 (creating FLA. STAT. § 373.4135). Mitigation measures in state permits for wetlands and surface water management, including regional mitigation, may preempt local regulatory decisions on these issues. *Id.* § 30, 1993 Fla. Laws at 2145 (to be codified at FLA. STAT. § 373.414(1)(b)-(c)).

290. In the provision requiring mitigation, the legislation refers only to "mitigating *extrajurisdictional* impacts identified pursuant to sub-subparagraph a." Ch. 93-206, § 6, 1993 Fla. Laws 1887, 1895 (amending FLA. STAT. § 163.3177(6)(h) (Supp. 1992) (emphasis added). Sub-subparagraph a., in fact, establishes two categories of impacts: extrajurisdictional impacts and impacts to identified state or regional resources or facilities.

To serve the purposes of the DRI program, which these plan provisions are intended to do, the new local policies must provide for mitigation of significant impacts to state or regional resources or facilities in addition to mitigation of extrajurisdictional impacts.

tion, or on identified state or regional resources or facilities.<sup>291</sup> It is this provision that will give DCA considerable influence over the shape of the regional dispute resolution processes through the agency's authority to establish minimum criteria for local comprehensive plans in chapter 9J-5, *Florida Administrative Code*.<sup>292</sup>

Finally, the ICE development review process must include a method to allow modification of development orders for approved DRIs, consistent with the new plan policies on mitigation of significant impacts to other jurisdictions or identified state or regional resources or facilities.<sup>293</sup> This feature will enable approved DRIs in the jurisdiction to be amended under the new plan-based process without the need to go through the substantial deviation process of section 380.06(19), *Florida Statutes*. The new process will allow project modifications "without a loss of recognized development rights."<sup>294</sup> This provision should be broadly interpreted to provide certainty for developers of DRI-scale projects, so their creditworthiness is not questioned when a local jurisdiction implements the new review process, and the DRI program is terminated.

These four new plan provisions are to be adopted and implemented by land development regulations (LDRs) no later than December 31, 1997.<sup>295</sup> The LDRs need not be adopted by the local government at the same time as the plan amendments; the LDRs need only be legally effective by the deadline. In order to prevent any expansion of DCA's pre-existing review authority over adopted LDRs, the LDRs to implement these new plan policies may not be submitted to the agency for review with the plan amendments; they will be subject to state review only as provided by pre-existing law.<sup>296</sup>

Because these provisions are tied to phased termination of the DRI program in the most populous areas of the state, the 1993 Act contains several transition provisions regarding implementation of these

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291. *Id.*

292. *See supra* text accompanying notes 156-77.

293. Ch. 93-206, § 6, 1993 Fla. Laws 1887, 1895 (amending FLA. STAT. § 163.3177(6)(h) (Supp. 1992)).

294. *Id.*

295. *Id.* § 14, 1993 Fla. Laws at 1910 (to be codified at FLA. STAT. § 163.3202(6)). A city or county which may opt in to the DRI program may be excused from this deadline under certain circumstances. *See infra* text accompanying notes 594-99.

296. The 1993 Act provides that LDRs are not subject to state review "except as provided by s. 163.3213." Ch. 93-206, § 14, 1993 Fla. Laws 1887, 1910 (to be codified at FLA. STAT. § 163.3202(6)). This provision addresses the issue of state review for the purpose of determining whether an adopted LDR is consistent with the local plan or its compliance with section 163.3202(1)-(3), *Florida Statutes*. It does not affect DCA's separate authority to address a local government's "total failure to adopt" a required LDR. In that circumstance, DCA may investigate and, if necessary, initiate a judicial proceeding. FLA. STAT. § 163.3202(4) (1991).

new planning requirements. The legislation directs DCA to adopt amendments to chapter 9J-5, *Florida Administrative Code*, establishing minimum criteria for these provisions by January 1, 1994.<sup>297</sup> The minimum criteria must accommodate "the differing needs and circumstances of smaller and rural jurisdictions"—that is, they must provide different requirements for jurisdictions in which the DRI programs will be terminated and those "smaller and rural jurisdictions" in which the programs will continue.<sup>298</sup>

The 1993 Act also directs DCA to prepare model plan elements for local governments to use in implementing the new requirements.<sup>299</sup> These elements should be influential; many local governments may choose to adopt them with minimal changes. There is no deadline for their completion, but DCA must prepare them "promptly."

Finally, DCA is directed "to establish by rule a schedule for phased completion and transmittal of plan amendments to implement" these new intergovernmental coordination requirements.<sup>300</sup> Full implementation must be completed by December 31, 1997, assuming all local jurisdictions prepare and adopt plan amendments that pass the compliance review.<sup>301</sup> If the local government is one that may choose to retain the DRI program and it wishes to do so, it must notify DCA of that decision by the date established in the adopted schedule.<sup>302</sup> In that event, the local government must implement these required improvements to the intergovernmental coordination element in conjunction with the EAR process.<sup>303</sup>

#### *b. Other Coordination Requirements*

The 1993 Act contains three other provisions for improved intergovernmental coordination. These features address coordination needs with state, regional, and local entities.

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297. Ch. 93-206, § 6, 1993 Fla. Laws 1887, 1895 (amending FLA. STAT. § 163.3177(6)(h) (Supp. 1992)).

298. *Id.*

299. *Id.*

300. *Id.*

301. To facilitate scheduling, the Legislature has exempted these required amendments to the intergovernmental coordination elements from the general requirement in section 163.3187(1) that local plans be amended only twice a year. *Id.*

302. *Id.*

303. *Id.* Because a municipality of fewer than 2,500 residents is not required to prepare and submit its first EAR until 12 years following plan adoption, see ch. 93-206, § 13, 1993 Fla. Laws 1887, 1908 (to be codified at FLA. STAT. § 163.3191(7)), such a jurisdiction could defer updating its local plan to include these provisions until 12 years after adoption of its plan pursuant to the 1985 Act. See *infra* note 381.

The intergovernmental coordination element must provide for the "recognition" of master plans for campuses of the State University System, prepared as part of the new campus master planning law contained in the 1993 Act.<sup>304</sup> These provisions also should address the establishment of development agreements to implement campus master plans and provide the means for on-going coordination between campus and local government decisionmakers about campus development.

In addition, the intergovernmental coordination element must contain new provisions for improved coordination on choosing sites for schools and other land use issues. The 1993 Act provides:

each county, all the municipalities within that county, the district school board, and service providers in that county shall establish by interlocal or other formal agreement executed by all affected entities, and include in their respective plans, joint processes for collaborative planning and decisionmaking on population projections and public school siting, the location and extension of public facilities subject to concurrency, and siting facilities with countywide significance, including locally unwanted land uses whose nature and identity are established in the agreement.<sup>305</sup>

This provision may be satisfied by one or more agreements among the named entities because the statute says an agreement need only be executed by the affected entities.<sup>306</sup> Therefore, the local governments and school board could enter into one agreement about population projections and siting issues. The local governments and any other appropriate agencies could enter into another agreement regarding the extension of public facilities. The local general-purpose governments could enter into yet another agreement regarding locally unwanted land uses (LULUs).<sup>307</sup> The essential requirement is that all the specific entities in the county have coordination agreements that are consistent as to each subject.

This provision provides that the agreements be either interlocal agreements or some other formal agreement.<sup>308</sup> They must establish a means for joint action on the identified issues and must bind the par-

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304. Ch. 93-206, § 6, 1993 Fla. Laws 1887, 1895 (amending FLA. STAT. § 163.3177(6)(h) (Supp. 1992)). The campus master planning statute was approved by the Legislature as part of the 1993 Act. *See id.* § 43, 1993 Fla. Laws at 1935 (to be codified at FLA. STAT. § 240.155).

305. *Id.* § 6, 1993 Fla. Laws at 1895 (amending FLA. STAT. § 163.3177(6)(h) (Supp. 1992)).

306. *Id.*

307. The legislation specifies that the parties to the agreement will decide which LULUs are to be addressed by it. *Id.* DCA may suggest, but not require, which specific types of facilities should be subject to such an agreement.

308. *Id.*



ties.<sup>309</sup> A dispute regarding the creation or implementation of such an agreement could be resolved through the regional planning council's dispute resolution process.

The 1993 Act does not establish either an incentive or disincentive for compliance with this planning requirement by anyone other than the local governments that are subject to the Local Government Comprehensive Planning and Land Development Regulation Act. However, the local government with regulatory authority over a school project could deny the necessary permits on grounds of an inconsistency with its local comprehensive plan.<sup>310</sup> Further, a district school board or other agency that refused to carry out its statutory duty to negotiate an agreement under this provision could be subject to injunctive relief.

Finally, the 1993 Act requires the intergovernmental coordination element to contain "[p]rocedures to identify and implement joint planning areas, especially for the purpose of annexation, and joint infrastructure service areas."<sup>311</sup> This provision directs each county and its municipalities to coordinate decisions on some of the key needs for developing areas.<sup>312</sup> It could result in criteria describing when and how infrastructure should be extended into developing areas and when urbanizing areas should be considered candidates for annexation. If properly implemented, this provision should lead to the orderly development of new areas with their annexation by municipalities when they attain an urban character.

### 3. *Transportation Element*

The third required element affected by the 1993 Act is the traffic circulation element and, in certain jurisdictions, other transportation-related elements. These elements must be combined into one coordinated transportation planning element in certain urban jurisdictions.

Pre-existing law provides that all local jurisdictions must adopt a traffic circulation element that addresses "types, locations, and extent of existing and proposed major thoroughfares and transportation routes, including bicycle and pedestrian ways."<sup>313</sup> Perhaps reflecting

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309. *Id.*

310. The ELMS Committee recommended creation of a special dispute resolution process for schools. ELMS III REPORT, *supra* note 16, at 48 (Recommendation 64). At the behest of the school boards, the House deleted a provision which would have established such a process. FLA. H.R. JOUR. 1309 (Reg. Sess. 1993) (Amendment 18).

311. Ch. 93-206, § 6, 1993 Fla. Laws 1887, 1895 (to be codified at FLA. STAT. § 163.3177(6)(h)).

312. *Id.*

313. FLA. STAT. § 163.3177(6)(b) (Supp. 1992).

the nature of Florida's communities, it typically focuses on automobile transportation. In jurisdictions of more than 50,000 population, the plan must include a mass transit element "showing proposed methods for the moving of people, rights-of-way, terminals, related facilities, and fiscal considerations" for public transportation systems.<sup>314</sup> It also must include "plans for port, aviation, and related facilities."<sup>315</sup> Other transportation planning issues, such as recreation-related transportation<sup>316</sup> and offstreet parking,<sup>317</sup> are discretionary for all local jurisdictions.

One concern expressed by local government representatives from metropolitan areas serving on the ELMS Committee was that public transportation planning in such areas is more difficult to coordinate when jurisdictions under the 50,000-population threshold do not address public transportation. This concern is most prevalent in each formally designated "urbanized area" served by a metropolitan planning organization.<sup>318</sup>

The 1993 Act requires that each local government within an "urbanized area" designated pursuant to section 339.175, *Florida Statutes*, must prepare and adopt a transportation element, whether or not that local jurisdiction has more than 50,000 population.<sup>319</sup> This element would be in lieu of the required traffic circulation element and, for those jurisdictions of more than 50,000, the required mass transit and port or aviation elements. This new requirement is intended to foster "better coordination of transportation and land planning issues" in metropolitan areas, with one result being planning that does not unduly emphasize the automobile.<sup>320</sup>

The transportation element must address all basic infrastructure needs for the transportation system, and it should give consideration to metropolitan issues. It must address motor vehicle transportation as well as the needs for "[a]ll alternative modes of travel." It also must address parking, aviation, rail, port facilities, access to those facilities, and any necessary transfer terminals.<sup>321</sup>

In addition, the transportation element must address certain land use issues closely related to transportation planning.<sup>322</sup> It must address

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314. *Id.* § 163.3177(6)(i), (7)(a).

315. *Id.* § 163.3177(6)(i), (7)(b).

316. *Id.* § 163.3177(7)(c).

317. *Id.* § 163.3177(7)(d).

318. *See id.* § 339.175.

319. Ch. 93-206, § 6, 1993 Fla. Laws 1887, 1896 (to be codified at FLA. STAT. § 163.3177(6)(j)).

320. ELMS III REPORT, *supra* note 16, at 39 (Recommendation 46).

321. Ch. 93-206, § 6, 1993 Fla. Laws 1887, 1896 (to be codified at FLA. STAT. § 163.3177(6)(j)).

322. *Id.* The relationship between transportation and land use is a subject of great ferment.

“[t]he availability of facilities and services to serve existing land uses” and thus more closely coordinate future transportation system development with future land uses.<sup>323</sup> It must consider the ability of the transportation system to facilitate coastal evacuations during a hurricane or other emergency. It also must address the compatibility of land uses near commercial and general aviation airports.<sup>324</sup>

Finally, the 1993 Act provides that the transportation element must include “[a]n identification of land use densities, building intensities, and transportation management programs to promote public transportation systems in designated public transportation corridors so as to encourage population densities sufficient to support such systems.”<sup>325</sup> This provision embodies the intent of the 1993 Act to foster public transportation systems in Florida’s metropolitan areas as an alternative to the automobile.<sup>326</sup> It requires coordination of the future land use and capital improvement elements with the transportation element.<sup>327</sup> It is a directive to local governments to encourage higher densities and intensities of use in areas that are along, or convenient to, public transportation corridors, as designated by the Department of Transportation.<sup>328</sup>

#### D. Plan Amendments

A recurring complaint about the local planning program was the length of time necessary to amend a plan and receive a compliance determination. The 1993 Act addresses this concern by allowing the elimination of a mandatory procedural step for certain amendments. Further, it alters pre-existing law about the date of legal effect of a local plan amendment in order to prevent development orders from being issued pursuant to plan provisions that are not in compliance with state law and allow elimination of the sanctions policy.

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In many locales, planners are seeking to promote more efficient transportation systems by addressing land use decisions. See *A New Generation of Land Use Controls*, LANDLINES, May 1993, at 3.

323. Ch. 93-206, § 6, 1993 Fla. Laws 1887, 1896 (to be codified at FLA. STAT. § 163.3177(6)(j)).

324. *Id.*

In addition, DCA is required to “consider land use compatibility issues in the vicinity of all airports in coordination with” DOT. *Id.* (to be codified at FLA. STAT. § 163.3177(10)(h)).

325. *Id.* (to be codified at FLA. STAT. § 163.3177(6)(j)).

326. *Id.*

327. ELMS III REPORT, *supra* note 16, at 39 (Recommendation 46).

328. FLA. STAT. § 163.3184(3) (Supp. 1992). For a discussion regarding public transportation corridors, see *infra* text accompanying notes 494-98.

### 1. Review of Plan Amendments

Under pre-existing law, each plan amendment must be reviewed twice by DCA. First, it must be reviewed as a transmitted draft, prior to adoption by the local government. After agreeing on a form for the proposed amendment, the local government transmits it to DCA, which forwards copies to a variety of state, regional, and local agencies.<sup>329</sup> These agencies then conduct the intergovernmental review and have forty-five days to submit their written comments to DCA.<sup>330</sup> DCA then has forty-five days to review these agency comments and prepare a report of its objections, recommendations, and comments (commonly known as an ORC report), which it provides to the local government.<sup>331</sup> The local government then has sixty days to adopt the amendment in final form and submit it to DCA.<sup>332</sup> The amendment is then reviewed a second time. After the local government adopts the amendment in final form, DCA has forty-five days to review it and enter a notice of intent to find it either in compliance or not.<sup>333</sup> This procedure must be followed for each plan amendment from all 458 local jurisdictions.

The 1993 Act revises the review process so amendments are in effect screened to determine whether they warrant the intergovernmental review that results in an ORC report. The purposes of this change are to speed up the review process while still adhering to state planning policies, and to focus limited state resources on review of the most important or controversial local plan amendments. In addition, this revision helps focus regional planning councils on their planning responsibilities.

Under the new procedure, a local government must send a copy of the transmittal draft of its proposed plan amendment to DCA, the appropriate regional planning council and water management district, the Department of Environmental Protection, and the Department of Transportation.<sup>334</sup> These agencies are to consider whether the amend-

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329. *Id.* § 163.3184(3)(4).

330. *Id.* § 163.3184(4).

331. *Id.* § 163.3184(6).

332. *Id.* § 163.3184(7).

333. *Id.* § 163.3184(8).

334. Ch. 93-206, § 10, 1993 Fla. Laws 1887, 1902 (amending FLA. STAT. § 163.3184(3)(a) (Supp. 1992)). The local government also must send to those agencies the "materials" specified by DCA and, if the amendment is intended to implement an evaluation and appraisal report, a copy of the report. *Id.* (amending FLA. STAT. § 163.3184(3)(b) (Supp. 1992)).

Because each local government in general has only two opportunities each year to amend its plan, in practice each local government will transmit a batch of proposed plan amendments to each of the specified agencies. FLA. STAT. § 163.3187(1) (Supp. 1992). The amendments in each batch constitute those proposed for that amendment cycle. The different review procedures to which these proposed amendments may be subjected pursuant to the 1993 Act do not alter this pre-existing feature of the local planning program.

ment raises any planning issues of state or regional concern, such as those which implicate the State Comprehensive Plan or the strategic regional policy plan. They are not to assess any local issues implicated by the amendment, or any issues outside the scope of their own statutory authority. The 1993 Act does not require these bodies to take a position for or against further review of each proposed amendment, or to send DCA a report on each proposed amendment; it merely directs them to screen each proposed amendment for issues within its expertise and alert the DCA only in appropriate cases.

DCA is required to initiate a full-fledged intergovernmental review and prepare an ORC report on the proposed amendment only if such a review is requested in writing by the regional planning council, an affected person,<sup>335</sup> or the local government that is proposing the amendment.<sup>336</sup> Such a request must be received by DCA within forty-five days from transmittal of the proposed amendment.<sup>337</sup> In addition, DCA may choose to initiate review and prepare an ORC report, but it must give notice to the local government which is proposing the amendment, and to any other person who requested notice.<sup>338</sup> The notice must be made within thirty days from transmittal.<sup>339</sup>

If DCA has not served notice within thirty days from transmittal that it intends to initiate an intergovernmental review, and if an intergovernmental review is not requested in writing by a regional planning council or affected person within forty-five days from transmittal, the local government may proceed with adoption of the proposed amendment.<sup>340</sup> Although the legislation does not expressly prohibit the local government from altering the proposed amendment at the adoption stage when there has not been an intergovernmental review, no mate-

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335. An "affected person" is defined by statute. FLA. STAT. § 163.3184(1)(a) (Supp. 1992).

336. Ch. 93-206, § 10, 1993 Fla. Laws 1887, 1904 (amending FLA. STAT. § 163.3184(6)(a) (Supp. 1992)). The Departments of Environmental Protection and Transportation are expected to call state natural resource or transportation issues to the attention of DCA; however, these agencies cannot compel DCA to initiate an intergovernmental review unless they establish status as an affected person. They also may seek to persuade the regional planning council or an affected person to trigger an intergovernmental review.

337. *Id.* The regional planning council or an affected person must send notice of their request to the transmitting local government and to any person who has asked those agencies to provide notice of a request. *Id.*

338. *Id.* (amending FLA. STAT. § 163.3184(6)(b) (Supp. 1992)).

339. *Id.*

340. *Id.* (to be codified at FLA. STAT. § 163.3184(3)(c)). In the case of a proposed plan amendment necessary for a proposed DRI or a change to an approved DRI, the 1993 Act establishes a coordinated procedure which would require the local government to wait 30 days before adoption of the amendment after a determination that DCA would not prepare an ORC Report. *Id.* § 52, 1993 Fla. Laws at 1950 (to be codified at FLA. STAT. § 380.06(6)(b)5.).

rial changes should be made.<sup>341</sup> The normal plan adoption and compliance review procedures apply.<sup>342</sup>

Within five days of determining that the intergovernmental review will be conducted, DCA must transmit copies of the proposed amendment to the appropriate governmental agencies.<sup>343</sup> Those agencies then have thirty days to submit their comments to DCA.<sup>344</sup> DCA has thirty days from receipt of those comments to compile its ORC report and send it to the local government.<sup>345</sup>

If an intergovernmental review was conducted of the proposed amendment, then the compliance determination must be based solely upon an issue raised by DCA in its ORC report or any changes made by the local government to the amendment upon adoption.<sup>346</sup> This provision is pre-existing law. If an intergovernmental review was not conducted, then the compliance determination must be based upon the amendment as adopted.<sup>347</sup>

This new process is intended to apply only to amendments to adopted plans which have been determined to be in compliance, and is intended to be the only process by which they may be amended.<sup>348</sup> The pre-existing process, with a required intergovernmental review and issuance of an ORC report prior to adoption, should still apply to any new plans or to amendments to local plans which have not been found in compliance.<sup>349</sup>

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341. *Id.* § 10, 1993 Fla. Laws at 1903 (to be codified at FLA. STAT. § 163.3184(3)(c)).

342. FLA. STAT. § 163.3184(7),(15) (Supp. 1992). Obviously, the local government will have no ORC report to review prior to adoption. The other requirements, such as notice, will apply.

343. Ch. 93-206, § 10, 1993 Fla. Laws 1887, 1903 (amending FLA. STAT. § 163.3184(4) (Supp. 1992)). As a practical matter, DCA should not be required to send a copy of the proposed amendment to the agencies which already have received it, namely, DEP, DOT, the water management district, and the regional planning council. A notice of the need for such an agency's comments, and a deadline for receipt of them, should suffice.

344. *Id.* This timeframe was reduced from 45 days under pre-existing law in an attempt to prevent the revised plan amendment review process from taking significantly longer than the pre-existing process. The scope of review by the regional planning council has been modified by the 1993 Act to narrow the focus of the council's review and comments. *See supra* text accompanying notes 188-90.

345. Ch. 93-206, § 10, 1993 Fla. Laws 1887, 1904 (amending FLA. STAT. § 163.3184(6)(c) (Supp. 1992)). This timeframe was reduced from 45 days under the pre-existing law in an attempt to prevent the revised plan amendment review process from taking significantly longer than the pre-existing process.

346. *Id.* (amending FLA. STAT. § 163.3184(8)(a) (Supp. 1992)).

347. *Id.* Because it is not expected to prepare ORC reports on most amendments, and to promote a more efficient use of the agency's resources, DCA will no longer be required to send a representative to participate in the local government's adoption hearing. By its practice, DCA had rendered this requirement meaningless.

348. *Id.* § 12, 1993 Fla. Laws at 1906 (amending FLA. STAT. § 163.3189(2) (Supp. 1992)).

349. *Id.* DCA could ensure full-fledged review by rule. In addition, DCA should specify categories of amendments for which it will initiate an intergovernmental review and issuance of

## 2. Legal Effect of Plan Amendments

The 1993 Act also changes the date on which a local plan amendment becomes legally effective.<sup>350</sup> It does so to prevent an amendment from becoming the basis for local development orders prior to a compliance determination and allow elimination of the sanctions policy.

Pre-existing law provides that, upon adoption by ordinance, a plan amendment may become the basis for a local development order while undergoing a compliance review or, if the subject of a notice of intent to find the amendment not in compliance, while its status is contested in a formal compliance proceeding.<sup>351</sup> This circumstance can lead to valid development orders being issued pursuant to plan amendments that were subsequently found not in compliance.

To address this concern, the ELMS Committee recommended that a local plan amendment become legally effective only upon entry of a final order determining the amendment to be in compliance.<sup>352</sup> If no such order were ever entered by DCA or the Administration Commission, the amendment would never become effective, or the basis for a local development order. In connection with this change, the ELMS Committee recommended the elimination of the compliance sanctions set forth in section 163.3184(11), *Florida Statutes*.<sup>353</sup>

The Legislature, in essence, included these recommendations in the 1993 Act. However, it concluded that a local government should have the opportunity to put a plan amendment into effect notwithstanding a final order by the Administration Commission determining the amendment to be not in compliance.<sup>354</sup> Therefore, the 1993 Act provides that the Commission may specify in its order the sanctions to which the local government would be subject if the amendment were to become effective.<sup>355</sup> After entry of the final order, the local government could by resolution declare the amendment legally effective and

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an ORC report. This step would put local governments and other interested parties on notice as to the procedural treatment they should anticipate.

350. *Id.*

351. FLA. STAT. § 163.3189(2) (Supp. 1992).

352. ELMS III REPORT, *supra* note 16, at 43 (Recommendation 55).

353. *Id.* Only two local governments have had funds withheld as a result of action by the Administration Commission on account of plans not being in compliance. House Staff Analysis, *supra* note 27, at 3. See also *Florida League of Cities, Inc. v. Administration Comm'n*, 586 So. 2d 397 (Fla. 1st DCA 1991). Nevertheless, the sanctions policy was a major irritant in the relationship between state and local governments, and for that reason the ELMS Committee sought to find a way to limit or eliminate the use of sanctions.

354. Ch. 93-206, § 12, 1993 Fla. Laws 1887, 1906 (amending FLA. STAT. § 163.3189(2)(b) (Supp. 1992)).

355. *Id.*

automatically be subject to sanctions.<sup>356</sup> If the local government at any time enacts the remedial measures specified by the Administration Commission in the final order, the local government would no longer be subject to sanctions.<sup>357</sup>

### 3. *Expeditious Resolution of Compliance Proceedings*

In response to concerns regarding suspension of the legal effect of a plan amendment until a final compliance determination has been made, the 1993 Act contains features intended to speed up compliance proceedings which are in administrative litigation.<sup>358</sup> It also seeks to promote mediation of such disputes.<sup>359</sup>

Once a matter has been forwarded to the Division of Administrative Hearings (DOAH) for a formal evidentiary hearing on the adopted amendment, the local government proposing the amendment may demand "formal mediation" of the dispute.<sup>360</sup> The local government or an affected person who is a party may demand "informal mediation."<sup>361</sup> DCA and the other parties are not required to engage in formal or informal mediation, however, the DOAH hearing officer should consider granting an appropriate continuance for the purpose of attempting a mediated resolution of the dispute.<sup>362</sup>

In addition, after a matter has been forwarded to DOAH the local government proposing the amendment or an affected person who is a party may demand "expeditious resolution" of the proceeding.<sup>363</sup> In either circumstance, the demand must be in the form of written notice served on DCA, all other parties, and the hearing officer.<sup>364</sup> If the hearing officer receives a written notice demanding expeditious resolution, she must set the matter for final hearing no more than thirty days from receipt of the notice.<sup>365</sup> No further continuance and no

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356. *Id.* The legislation does not require the Administration Commission to specify any sanctions in its final order. If it does not do so and the local government chooses to make the amendment effective notwithstanding the determination of noncompliance, the Administration Commission should then promptly enter an order on sanctions if sanctions are to be imposed.

An efficient use of public and private resources would seem to require the hearing officer in the original compliance proceeding to receive evidence regarding sanctions so as to create a record on that issue for the Administration Commission and thus to avoid the need for a second hearing on sanctions at a later date.

357. *Id.*

358. *Id.*

359. *Id.* § 12, 1993 Fla. Laws at 1906 (amending FLA. STAT. § 163.3189(2)(b) (Supp. 1992)).

360. *Id.* (to be codified at FLA. STAT. § 163.3189(3)(a)).

361. *Id.*

362. *Id.*

363. *Id.*

364. *Id.*

365. *Id.* (to be codified at FLA. STAT. § 163.3189(3)(b)).



additional time for post-hearing submittals may be granted without either a written agreement of the parties or a finding by the hearing officer of "extraordinary circumstances."<sup>366</sup> Within forty-five days of issuance of the recommended order, unless the parties agree otherwise in writing, the Administration Commission must issue a final order in the proceeding.<sup>367</sup>

### *E. Evaluation and Appraisal Reports*

The next major milestone in the local comprehensive planning program will be the preparation by each local jurisdiction of an evaluation and appraisal report (EAR) on its local plan, and the revision of that plan to reflect changes in growth policy and local conditions. The 1985 Act provided that the local planning program would be ongoing; it mandated that each local government prepare an EAR to update its plan every five years,<sup>368</sup> however, it did not include significant details about how this phase of the local planning program should be conducted. One of the principal charges to the ELMS Committee was to address the implementation of the EAR process. The 1993 Act includes all of the Committee's major recommendations on this subject.

#### *1. Contents of the Reports*

Pre-existing law required each EAR to include an assessment of major land use issues in the local jurisdiction, the "condition" of each plan element, the jurisdiction's progress toward attaining the objectives identified in its plan at adoption, and "unanticipated and unforeseen problems and opportunities" in the period between plan adoption and the EAR assessment.<sup>369</sup>

The 1993 Act clarifies that, in addition to responding to these factual issues, the EAR process also is intended to be "the principal process for updating local comprehensive plans to reflect changes in

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366. Extraordinary circumstances expressly do not include "matters relating to workload or need for additional time for preparation or negotiation." *Id.* These limitations apply equally to all parties to the proceeding.

367. *Id.* (to be codified at FLA. STAT. § 163.3189(3)(c)).

368. Ch. 85-55, § 10, 1985 Fla. Laws 207, 227-28 (current version at FLA. STAT. § 163.3191(5) (Supp. 1992)). The Legislature in 1992 moved back the due date for the first report until six years after transmittal, or starting in 1994. Ch. 92-129, § 10, 1992 Fla. Laws 1030, 1044-45 (codified at FLA. STAT. § 163.3191(5) (Supp. 1992)). The 1993 Act moves this date back to seven years, or starting in 1995, to facilitate revisions to the growth management portion of the State Comprehensive Plan and strategic regional policy plans. Ch. 93-206, § 13, 1993 Fla. Laws 1887, 1908 (amending FLA. STAT. § 163.3191(5) (Supp. 1992)).

369. FLA. STAT. § 163.3191(2) (Supp. 1992).

state policy on planning and growth management."<sup>370</sup> It requires that the EAR assess the effect of changes to the State Comprehensive Plan; the Local Government Comprehensive Planning and Land Development Regulation Act; the minimum criteria in chapter 9J-5, *Florida Administrative Code*; and the strategic regional policy plan.<sup>371</sup> The EAR must set forth the "actions" or "plan amendments" which are necessary to respond to the reported changes in growth policy or local circumstances.<sup>372</sup> It also must describe the public participation process utilized in preparation of the report.<sup>373</sup> These issues must be the subject of specific findings and recommendations in the report.<sup>374</sup>

The local plan amendments to address the report's recommendations may be adopted and submitted simultaneously with the report.<sup>375</sup> Alternatively, those amendments must be adopted no later than one year following adoption of the report, although a six-month extension may be granted by DCA.<sup>376</sup> If the plan amendments are adopted and submitted subsequent to the report, they must be consistent with the report's findings and recommendations.<sup>377</sup> If the local government

370. Ch. 93-206, § 13, 1993 Fla. Laws 1887, 1907 (amending FLA. STAT. § 163.3191(1) (Supp. 1992)).

A policy change or addition to the State Comprehensive Plan; the Local Government Comprehensive Planning and Land Development Regulation Act; chapter 9J-5, *Florida Administrative Code*, or the strategic regional policy plan need not be incorporated into a local comprehensive plan until the EAR. *Id.*

There are two exceptions to this general requirement. First, a local plan amendment which includes a specific policy on which state or regional policy has changed since local plan adoption must be revised to include the new policy when that local plan policy is otherwise the subject of an amendment. FLA. STAT. § 163.3184(1)(b) (Supp. 1992).

Second, the Legislature may specify in an enactment that a new policy be incorporated into local plans prior to the EAR process. An example of such an exception is the requirement in the 1993 Act for the intergovernmental coordination elements of local plans to be revised to facilitate termination of the DRI program by December 31, 1997, in advance of the normal EAR schedule. Ch. 93-206, § 6, 1993 Fla. Laws 1887, 1895 (amending FLA. STAT. § 163.3177(6)(h) (Supp. 1992)).

371. *Id.* § 13, 1993 Fla. Laws 1887, 1907 (to be codified at FLA. STAT. § 163.3191(2)(e)).

372. *Id.* (to be codified at FLA. STAT. § 163.3191(2)(f), (g)).

373. *Id.* (to be codified at FLA. STAT. § 163.3191(2)(h)).

374. *Id.* (to be codified at FLA. STAT. § 163.3191(6)(a)). The legislation originally provided that the report "shall contain data and analysis which would support all plan amendments included in or recommended by the report." Fla. SB 1166, § 12 (1993) (proposed FLA. STAT. § 163.3191(6)(a)). The term "data and analysis" was changed to "findings and recommendations" to ensure that the reports were not required to include supporting information of the same degree of comprehensiveness or detail as required by DCA for support of a local plan amendment. See FLA. ADMIN. CODE ANN. r. 9J-5.005(2) (1992).

375. FLA. STAT. § 163.3191(4) (Supp. 1992).

376. Ch. 93-206, § 13, 1993 Fla. Laws 1887, 1908 (amending FLA. STAT. § 163.3191(4) (Supp. 1992)). If the amendments are to be adopted after adoption of the report, the report must contain a schedule for their transmittal and adoption. *Id.*

377. *Id.* (to be codified at FLA. STAT. § 163.3191(6)(b)).

fails to adopt "timely and sufficient amendments to its local plan"<sup>378</sup> to implement the recommendations of the report, DCA may initiate an enforcement proceeding against the local government before the Administration Commission.<sup>379</sup>

## 2. Review of the Reports

To facilitate the implementation of other features of the 1993 Act, the legislation defers submittal of the first EARs until 1995. It specifies that in general the first reports are due seven years following plan adoption pursuant to chapter 9J-5, *Florida Administrative Code*.<sup>380</sup> Subsequent reports are due at five-year intervals.<sup>381</sup> However, the legislation also authorizes DCA to adopt by rule a schedule for the phased submittal of reports, and some minor deviations from the five-year deadline may be necessary in order to facilitate an orderly flow of reports to DCA.<sup>382</sup>

An important challenge to the ELMS Committee was to assure local government adherence to the EAR requirements and schedule without establishing a cumbersome and politically charged oversight process similar to compliance reviews for local plan amendments, and without reliance on financial sanctions. The ELMS Committee recommended two key provisions to address these concerns. Both were included in the 1993 Act.

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378. The requirement for a "sufficient" amendment should be satisfied by an amendment which is in compliance as defined in section 163.3184(1)(b), *Florida Statutes*.

379. Ch. 93-206, § 13, 1993 Fla. Laws 1887, 1909 (to be codified at FLA. STAT. § 163.3191(11)). The only affirmative defense established by the statute is "excusable delay," which it does not define. Although the 1993 Act provides a skeletal procedure for the conduct of such a proceeding, the Administration Commission is authorized to adopt rules to implement it. *Id.* Accordingly, it should do so.

Any sanctions adopted by the Administration Commission must be prospective with a "reasonable" grace period after entry of the final order to permit the local government to take remedial steps without penalty. *Id.*

380. *Id.* (amending FLA. STAT. § 163.3191(5) (Supp. 1992)).

381. FLA. STAT. § 163.3191(1) (Supp. 1992). The sole exception to this requirement is provided for a municipality of fewer than 2,500 population on the date its EAR is due. Such a municipality may submit an EAR within 12 years after adoption of its plan pursuant to chapter 9J-5, *Florida Administrative Code*, and once every 10 years thereafter. Ch. 93-206, § 13, 1993 Fla. Laws 1887, 1908 (to be codified at FLA. STAT. § 163.3191(7)).

382. Ch. 93-206, § 13, 1993 Fla. Laws 1887, 1908 (to be codified at FLA. STAT. § 163.3191(8)). A local government may submit its report in advance of its established submittal date if it gives DCA adequate notice as prescribed by rule. *Id.* Even if it does so, the local government must submit an "addendum" on its submittal date addressing the prescribed issues for the period between submittal of the EAR and the submittal date. The purpose of this provision is to ensure that local governments which file reports early do not escape new planning requirements or delay them until the next round of EARs.

First, the 1993 Act attempts to ensure timely submittal of an EAR by each local government by statutorily halting the plan amendment process for each jurisdiction until DCA has determined that the local government has submitted an EAR which satisfies the pertinent provisions of section 163.3191, *Florida Statutes*.<sup>383</sup> No local government may amend its comprehensive plan after the EAR submittal date established by DCA by rule until the local government has submitted its report or addendum and DCA has formally determined that the report or addendum satisfies the statutory requirements.<sup>384</sup> The sole exception to this provision is for plan amendments which expressly implement the recommendations of the local government's EAR; such amendments may be adopted by the local government.<sup>385</sup> The expectation behind this provision is that the ongoing need of many constituents for a local plan to be changed will create an incentive for the local government to prepare and submit its EAR.<sup>386</sup>

Second, the 1993 Act imposes sharp limits on the nature of the inquiry which DCA must perform to determine whether the local government has satisfied the statutory requirements. It directs DCA to conduct "a sufficiency review of each report to determine whether it has been submitted in a timely fashion and contains the prescribed components."<sup>387</sup> DCA is expressly prohibited from conducting a "compliance review" like the review which it performs on local plan amendments.<sup>388</sup>

The 1993 Act gives little guidance as to the nature of the review to be conducted by DCA.<sup>389</sup> The report of the ELMS Committee's EAR Work Group suggests that the pertinent inquiry should be: Is there evidence in the report that the local government conducted an analysis on each issue required by law to be addressed during the EAR process?<sup>390</sup> If the contents of the report demonstrate that all required anal-

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383. *Id.* § 11, 1993 Fla. Laws at 1905 (to be codified at FLA. STAT. § 163.3187(5)).

384. *Id.*

385. *Id.*

386. ELMS III REPORT, *supra* note 16, at 55 (Recommendation 78).

387. Ch. 93-206, § 13, 1993 Fla. Laws 1887, 1909 (to be codified at FLA. STAT. § 163.3191(9)).

388. *Id.*

389. The staff analysis describing the legislation says the 1993 Act "[r]estricts EAR review by the state land planning agency to timeliness and component requirements . . ." House Staff Analysis, *supra* note 27, at 38.

390. The work group formulated the recommendations ultimately adopted by the ELMS Committee and set forth in the legislation. The group concluded that the DCA review should be limited:

The EAR is not an end product, but only a means to achieving a better end product, It is the plan amendment(s) which actually incorporate recommended changes into [the] local comprehensive plan and these amendments will be reviewed by DCA for consis-

yses were performed, the report should be found sufficient. DCA may address the substance of the local government's analysis and decisions during a compliance review of the amendments which implement the report's findings and recommendations.

The 1993 Act allows DCA to authorize individual regional planning councils to conduct the sufficiency review of EARs for local governments within their comprehensive planning districts.<sup>391</sup> DCA must prescribe standards to assure "uniform and adequate" review of reports, and it must oversee a council's exercise of delegated authority.<sup>392</sup> When a council has been authorized to review EARs, a local government's report may be reviewed by either DCA or the council, at the local government's election.<sup>393</sup> In all cases, local plan amendments must be reviewed by DCA pursuant to section 163.3184, *Florida Statutes*.<sup>394</sup>

### 3. *Limited Plan Updates in Certain Jurisdictions*

The 1993 Act contains another provision which is intended to provide additional flexibility to local planning programs. A municipality of fewer than 5,000 residents or a county with fewer than 50,000 residents may request in its EAR, and DCA may grant, authorization to revise and update only certain portions of its local comprehensive plan.<sup>395</sup> The purpose of this provision is to allow local governments with limited planning resources to target those resources on their most important growth issues.

The legislation establishes seven criteria which DCA must consider in addressing such a request.<sup>396</sup> An affected person may petition for a formal administrative hearing with respect to DCA's decision to grant, modify, or terminate a written agreement authorizing a limited plan update.<sup>397</sup> Approval of a request by DCA does not authorize the local government to negate any portion of its local plan.<sup>398</sup>

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gency and compliance. *The role of DCA in reviewing the EARs is to insure that the content requirements specified in Section 163.3191, [Florida Statutes], have been properly addressed.*

Memorandum from Diane Salz to EAR Work Group Members, at 3 (Oct. 16, 1992) (on file with the *Florida State University Law Review*) (emphasis added).

391. Ch. 93-206, § 13, 1993 Fla. Laws 1887, 1909 (to be codified at FLA. STAT. § 163.3191(10)).

392. *Id.*

393. *Id.*

394. *Id.*

395. *Id.* (to be codified at FLA. STAT. § 163.3191(12)(a)).

396. *Id.* (to be codified at FLA. STAT. § 163.3191(12)(b)).

397. *Id.* (to be codified at FLA. STAT. § 163.3191(12)(f)).

398. *Id.* (to be codified at FLA. STAT. § 163.3191(12)(a)).

All local governments must update four required elements—future land use, intergovernmental coordination, conservation, and capital improvements.<sup>399</sup> A local government in the coastal area must update its coastal management element unless “its coastal lands are publicly owned or managed, there is no public access to coastal lands, and there is no existing or planned development in coastal lands.”<sup>400</sup> Therefore, the required elements which may be subject to such an agreement are recreation and open space; transportation; housing; or sanitary sewer, solid waste, drainage, potable water, and natural groundwater recharge.<sup>401</sup>

An agreement authorizing a limited plan update must set forth the basis for the decision and specify the elements or portions to be updated and those not to be updated.<sup>402</sup> Within eighteen months of termination, the local government must update all portions or elements for which revision was not required pursuant to the agreement.<sup>403</sup> The agreement must automatically terminate when the local government’s annual population estimate exceeds the statutory thresholds.<sup>404</sup>

## V. CONCURRENCY

The “teeth” of Florida’s growth management system is the statutory requirement that adequate public facilities be available on a timely basis to accommodate the impacts of development—the “concurrency” requirement.<sup>405</sup> As described in one treatment on the topic:

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399. *Id.* (to be codified at FLA. STAT. § 163.3191(12)(e)).

400. *Id.*

401. Compare FLA. STAT. § 163.3177(3)(b) (Supp. 1992) with ch. 93-206, § 13, 1993 Fla. Laws 1887, 1910 (to be codified at FLA. STAT. 163.3191(12)(e)).

402. Ch. 93-206, § 13, 1993 Fla. Laws 1887, 1909 (to be codified at FLA. STAT. § 163.3191(12)(c)).

403. *Id.*

404. *Id.* (to be codified at FLA. STAT. § 163.3191(12)(d)).

405. Letter from Thomas G. Pelham, Sec., Fla. Dep’t of Comm’y Aff., to Sen. Gwen Margolis, Dem., N. Miami Beach 1 (Mar. 7, 1988), quoted in Department of Comm’y Aff., *The Evolution and Requirements of the CMS Rule*, 3 TECHNICAL MEMO, Aug. 1991, at 4.

For a thorough appraisal of adequate public facilities requirements in general and Florida’s concurrency requirement in particular, see Thomas G. Pelham, *Adequate Public Facilities Requirements: Reflections on Florida’s Concurrency System for Managing Growth*, 19 FLA. ST. U. L. REV. 973 (1992). This is perhaps the leading scholarly treatment of concurrency, written by the architect of Florida’s concurrency system. For other important insights into concurrency, see Robert M. Rhodes, *Concurrency: Problems, Practicalities, and Prospects*, 6 J. LAND USE & ENVTL. L. 241 (1991). These articles framed the concurrency issues studied by the ELMS Committee and suggested most of the policy solutions which the Committee recommended and the Legislature included in the 1993 Act.

Another resource in considering concurrency is DCA’s leading technical publication on the matter, *The Evolution and Requirements of the CMS Rule*, *supra*.

“Concurrency is land use regulation which controls the timing of property development and population growth. Its purpose is to ensure that certain types of public facilities and services needed to serve new residents are constructed and made available contemporaneously with the impact of new development.”<sup>406</sup> Although adequate public facilities ordinances have been adopted in many localities around the nation,<sup>407</sup> Florida’s concurrency requirement has been aptly described as “our nation’s most ambitious experiment in growth management.”<sup>408</sup>

The origins of the concurrency requirement are in two landmark growth management measures enacted by the Legislature in 1985. The State Comprehensive Plan and the 1985 Act each contain important threads of the legal fabric of concurrency. The State Comprehensive Plan provides that “development shall be directed to those areas which have in place, or have agreements to provide, the land and water resources, fiscal abilities, and service capacity to accommodate growth in an environmentally acceptable manner.”<sup>409</sup> It also provides that existing public facility investments should be protected and new facilities should be planned for and financed “to serve residents in a timely, orderly, and efficient manner.”<sup>410</sup> In the 1985 Act, the Legislature sought to further those goals through certain provisions incorporated into the Local Government Comprehensive Planning and Land Development Regulation Act. It required that each local plan contain a capital improvements element, including level of service standards, regarding certain public facilities and services.<sup>411</sup> And it provided that

406. Boggs & Apgar, *supra* note 9, at 1.

407. Douglas R. Porter, *The APF Epidemic*, URB. LAND, Nov. 1990, at 36. These regulatory regimes have spread rapidly in recent years but their antecedents are several decades old. The seminal decision upholding adequate public facility requirements is *Golden v. Planning Board of the Town of Ramapo*, 285 N.E.2d 291 (N.Y.), *appeal dismissed*, 409 U.S. 1003 (1972).

408. Pelham, *supra* note 405, at 974. One reason for this description is the statewide reach of the mandate. This has prompted considerable national interest. Another reason for this description—and one of the reasons for the difficulty in implementing concurrency—is that the doctrine is such a sharp break with prior policy and practice.

Florida’s application of the requirement statewide in 1985 represents a dramatic change in the way planners must operate and in the impacts of the plans and implementing regulations that they produce. The assumption that facilities needed to accommodate the impacts of development would automatically occur coincident with or shortly after that development seems, in the early 1990s, naive in the extreme. But that is exactly the assumption that governed the growth process until very recently. The concurrency requirement . . . represents . . . nothing less than a revolution in what is required of planners and the planning process.

DEGROVE & MINNEN, *supra* note 1, at 163. It can have equally profound effects on landowners and those engaged in development activities.

409. FLA. STAT. § 187.201(16)(a) (1991).

410. *Id.* § 187.201(18)(a).

411. *Id.* § 163.3177(3).

a local government could not issue a development order “which results in a reduction in the level of services for the affected public facilities below the level of services provided in the comprehensive plan.”<sup>412</sup>

These threads were pulled together by the Legislature in 1986, when it adopted intent language which gave this new doctrine a name:

It is the intent of the Legislature that public facilities and services needed to support development shall be available *concurrent* with the impacts of such development. In meeting this intent, public facility and service availability shall be deemed sufficient if the public facilities and services for a development are phased, or the development is phased, so that the public facilities and those related services which are deemed necessary by the local government to operate the facilities necessitated by that development are available *concurrent* with the impacts of the development.<sup>413</sup>

While these and additional statutory provisions gave shape to the fabric, they did not give it detail or texture. Indeed, the Legislature’s pronouncements on the topic raised more questions than they answered. “[T]he practical implications of this seemingly simple and politically seductive policy were not fully understood when it was enacted in 1985.”<sup>414</sup> It was left to DCA, under the leadership of Secretary Thomas G. Pelham, to complete the weaving begun by the Legislature, utilizing both case-by-case adjudications and agency rulemaking.

In light of this history, the concurrency rules adopted by DCA have been subject to uncertainty, even on some basic tenets. For that reason, one of the principal achievements of the 1993 Act is that it eliminates any uncertainty regarding the legal basis for the pre-existing concurrency system by providing *de facto* legislative ratification for almost all features of the pertinent DCA rules; it also includes innovations which are intended to make concurrency more flexible and workable. With one exception—the authorization for formal exceptions from transportation concurrency<sup>415</sup>—all these provisions of the 1993 Act were drawn directly from the recommendations of the ELMS Committee.<sup>416</sup>

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412. *Id.* § 163.3202(2)(g).

413. *Id.* § 163.3177(10)(h) (emphasis added).

414. Rhodes, *supra* note 405, at 243.

415. See *infra* text accompanying notes 484-516.

416. ELMS III REPORT, *supra* note 16, at 66-75 (Recommendations 94-116).



### A. Public Facilities and Services

The initial question in implementation of concurrency is to which public facilities it applies. Prior to the 1993 Act, the Legislature had never addressed this question directly. When it succinctly articulated the concurrency requirement in 1986, the Legislature mandated that “*public facilities and services* needed to support development shall be available concurrent with the impacts of such development,”<sup>417</sup> but it did not expressly identify the specific public facilities and services encompassed by the doctrine.

The term “public facilities” was defined by statute to mean: “major capital improvements, including, but not limited to, transportation, sanitary sewer, solid waste, drainage, potable water, educational, parks and recreational, and health systems and facilities.”<sup>418</sup> Thus, it is possible to argue that the concurrency requirement extends to all “major capital improvements” in a community. However, in Florida, “concurrency cannot be effectively implemented without LOS standards for measuring the adequacy of the facilities and services.”<sup>419</sup> Because local governments were required by the Local Government Comprehensive Planning and Land Development Regulation Act to establish LOS standards only for those items of infrastructure addressed by required local plan elements—potable water, sanitary sewer, solid waste, drainage, parks and recreation facilities, roads, and in certain jurisdictions, mass transit—DCA concluded that those facilities were the only ones to which the concurrency requirement extended statewide as a matter of state law.<sup>420</sup>

The 1993 Act ratifies this decision. It expressly provides that only these seven types of public facilities are subject to the concurrency requirement statewide as a matter of state law.<sup>421</sup> Additional public facilities may not be made subject to concurrency as a matter of state law without “appropriate study and approval by the Legislature.”<sup>422</sup> Thus, although each local government is free to extend the concurrency requirement within its jurisdiction as it wishes, DCA may not extend the concurrency requirement to additional public facilities without legislative action.

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417. FLA. STAT. § 163.3177(10)(h) (Supp. 1992) (emphasis added).

418. FLA. STAT. § 163.3164(23) (1991). This definition was amended in 1992 to add “spoil disposal sites for maintenance dredging located in the intracoastal waterways, except for spoil disposal sites owned or used by ports listed in [section] 403.021(9)(b).” Ch. 92-129, § 3, 1992 Fla. Laws 1030, 1032 (codified at FLA. STAT. § 163.3164(23) (Supp. 1992)).

419. Pelham, *supra* note 405, at 1015.

420. FLA. ADMIN. CODE ANN. r. 9J-5.0055(1)(a) (1992).

421. Ch. 93-206, § 8, 1993 Fla. Laws 1887, 1898 (to be codified at FLA. STAT. § 163.3180(1)).

422. *Id.*

The ELMS Committee recommended against extending the concurrency requirement to other public facilities on a statewide basis at this time, but it did recommend that the Legislature begin the process of extending concurrency to social infrastructure by identifying public schools as the next type of facility to be brought into the concurrency system as a matter of state law.<sup>423</sup> The Committee reasoned that "limiting concurrency to basic physical infrastructure for the long term could skew State and local fiscal priorities."<sup>424</sup> To facilitate this step, the Legislature was urged to direct that state assistance be provided to local governments which are addressing the complex issues involved in extending concurrency to include public schools.<sup>425</sup>

The 1993 Act does not specify any type of public facility to be brought under concurrency next on a statewide basis. It only includes directory language that a local government which chooses to extend the concurrency requirement to public schools should conduct a study to "determine how the requirement would be met and shared by all affected parties."<sup>426</sup>

### B. *Minimum Standards for Achieving Concurrency*

In addition to the issue of which public facilities are subject to the mandate, the other principal issues of the concurrency requirement are determining the "adequacy" of the facility and establishing when the facility must be "available" in order to be concurrent with the impacts of development.<sup>427</sup> These requirements are set forth in the Local Government Comprehensive Planning and Land Development Regulation Act through the requirement for the capital improvements element to set forth "standards to ensure the availability of public facilities and the adequacy of those facilities including acceptable levels of service."<sup>428</sup> However, the Legislature has provided very little statutory guidance on adequacy and availability. The 1993 Act expressly ratifies most features of the DCA rules on these issues and requires changes in only a few instances.

#### 1. *Adequacy*

The issue of adequacy focuses on the specific level of service standard for a particular public facility. The statute requires this standard

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423. ELMS III REPORT, *supra* note 16, at 67 (Recommendation 96).

424. *Id.* at 66 (Recommendation 95).

425. For an assessment of the implications of concurrency for public education, see JOINT CENTER FOR ENVIRONMENTAL AND URBAN PROBLEMS, EDUCATIONAL FACILITY SITING AND GROWTH MANAGEMENT (Oct. 30, 1992 abridged version).

426. Ch. 93-206, § 8, 1993 Fla. Laws 1887, 1898 (to be codified at FLA. STAT. § 163.3180(1)).

427. *Id.* § 8, 1993 Fla. Laws at 1898-1901 (to be codified at FLA. STAT. § 163.3180).

428. FLA. STAT. § 163.3177(3)(a)3. (Supp. 1992).

to be "acceptable," but it does not provide guidance for determining when an LOS standard is acceptable.<sup>429</sup> DCA requires such standards to be adequate, realistic, and financially feasible.<sup>430</sup> The ELMS Committee did not address this issue in general and, except for roadway levels of service,<sup>431</sup> the 1993 Act contains no express provisions on the adequacy or acceptability of the LOS standards adopted by a local government. The general intent to confirm the key provisions of DCA's concurrency rule, other than those requirements clearly changed, however, suggests that the agency should adhere to its pre-existing policy and practice regarding the review of LOS standards.

The 1993 Act does address some issues involved in setting LOS standards. In response to concerns that other governmental entities, such as regional planning councils, might seek to require local governments to adopt a specific LOS standard which the local government then would be obligated to enforce through development permitting or paying for improvements, the ELMS Committee recommended that the Legislature provide an additional safeguard for the authority of local government to set LOS standards.<sup>432</sup>

The 1993 Act provides that "governmental entities that are not responsible for providing, financing, operating, or regulating public facilities needed to serve development may not establish binding level-of-service standards on governmental entities that do bear those responsibilities."<sup>433</sup> Therefore, in general a LOS standard may not be deemed unacceptable because it differs from the LOS standard for that facility adopted by another public agency.<sup>434</sup> While this provision was intended as a protection for local governments, it protects other public agencies from having to meet locally adopted LOS standards on the infrastructure that they have a duty to provide. The most obvi-

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429. *Id.*

430. Department of Comm'y Aff., *supra* note 405, at 5. *See also* Pelham, *supra* note 405, at 1016-18.

431. The 1993 Act requires that, with respect to certain specified roads, the levels of service adopted by the local government must be deemed "adequate" by DCA in order to satisfy the requirements of law. Ch. 93-206, § 8, 1993 Fla. Laws 1887, 1899 (to be codified at FLA. STAT. § 163.3180(10)).

432. ELMS III REPORT, *supra* note 16, at 70 (Recommendation 104).

433. Ch. 93-206, § 8, 1993 Fla. Laws 1887, 1899 (to be codified at FLA. STAT. § 163.3180(3)). This general limitation does not alter the authority of the Administration Commission to enter a final order finding a plan not in compliance on grounds of an unacceptable LOS standard, of DCA to enter a notice of intent to find a plan not in compliance on such grounds, or of any agency to comment on locally adopted LOS standards during the review of plans or plan amendments. *Id.*

434. The 1993 Act creates an exception to this general rule in the case of roads on the Florida Intrastate Highway System. *Id.* (to be codified at FLA. STAT. § 163.3180(10)). *See infra* text accompanying notes 468-76.

ous example: The Department of Transportation cannot be required to improve state roads to comply with locally adopted LOS standards.<sup>435</sup>

## 2. Availability

The issue of availability focuses on one word—"concurrent." The Legislature provided some statutory guidance on this issue through the intent language adopted in 1986,<sup>436</sup> but its precise meaning and application in specific circumstances have been fraught with uncertainty and controversy. DCA has sought to utilize availability standards with some measure of flexibility without stripping all meaning from the concurrency requirement: "What is required is that public facilities be available sufficiently close to the time when impacts of the development occur to ensure that levels of service for the facilities do not drop below standards that have been set by the local government for an inordinate period."<sup>437</sup> This common-sense approach to availability found great favor with the ELMS Committee and is reflected in the 1993 Act.<sup>438</sup>

### a. Sanitary Sewer, Solid Waste, Drainage, and Potable Water

Under the DCA rule, sanitary sewer, solid waste, drainage, and potable water facilities are held to the most stringent standard for availa-

435. This provision is significant in light of the new authority which the 1993 Act grants to local governments to establish LOS standards on certain portions of the State Highway System. See *infra* text accompanying notes 474-76.

436. FLA. STAT. § 163.3177(10)(h) (Supp. 1992).

437. ELMS III REPORT, *supra* note 16, at 71 (Recommendation 107). In *Citizen's Political Committee, Inc. v. Collier County*, 92 Env'tl. & L.U. Admin. L. Rep. 162 (DOAH Case No. 90-4545GM) (Final Order entered Aug. 20, 1992) (on file with Clerk, Div. of Admin. Hearings), the hearing officer entered a recommended order which addressed the availability standards for certain public facilities and services governed by the Collier County Growth Management Plan. The hearing officer recommended a conclusion of law which embodied a rigid interpretation of the concurrency requirement contrary to DCA's long-established interpretation.

[T]he concurrency requirement demands that capital improvements for transportation, sanitary sewer, solid waste, drainage, potable water, and parks and recreation necessitated, based on locally adopted level of service standards, by material changes in the use of land be at hand and usable at the same time as the effect is experienced from such land use changes.

*Id.* (Recommended Order entered Apr. 13, 1992) (recommended conclusion of law 40). Secretary Shelley's final order disapproved this interpretation and substituted the more flexible interpretation historically followed by DCA. The final order was appealed. *Citizen's Political Comm. v. Collier County*, Case No. 92-3191 (Fla. 1st DCA appeal filed Sept. 15, 1992).

The recommended order in this administrative proceeding, entered during the deliberations of the ELMS Committee, created additional impetus for statutory confirmation of most of the policy decisions embodied in rule 9J-5.0055, *Florida Administrative Code*.

438. Legislative staff also interpreted the pre-existing statute as requiring that "the necessary public facilities are available with, or within a reasonable time of, the actual permitting or occupation of the new development." House Staff Analysis, *supra* note 27, at 4.

bility. These facilities will be deemed available for purposes of concurrency if:

1. The necessary facilities and services are in place at the time a development permit is issued; or
2. A development permit is issued subject to the condition that the necessary facilities and services will be in place when the impacts of the development occur; or
3. The necessary facilities are under construction at the time a permit is issued; or
4. The necessary facilities and services are guaranteed in an enforceable development agreement that includes the provisions of Rules 9J-5.0055(2)(a)1.—3. of this Chapter. . . .<sup>439</sup>

As an initial matter, the ELMS Committee addressed the guidelines to be utilized in establishing the minimum standards for availability. Because the concurrency requirement is grounded on the police power, the touchstone for the ELMS Committee's analysis was the public health, safety, and welfare. It recommended that the most stringent standard—protection of the public health and safety—be applied in setting availability for sanitary sewers, potable water, solid waste, and drainage because “[t]hese facilities and services are the most fundamental for human habitation.”<sup>440</sup> The ELMS Committee concluded that the requirements of Rule 9J-5.0055(2)(a) were consistent with the public health and safety.

The 1993 Act expressly adopts the public health and safety standard for determining availability of sanitary sewers, solid waste, potable water, and drainage.<sup>441</sup> It then confirms the standards in Rule 9J-5.0055(2)(a) by requiring that these facilities “shall be in place and available to serve new development no later than the issuance by the local government of a certificate of occupancy or its functional equivalent.”<sup>442</sup>

#### *b. Parks and Recreation Facilities*

Under the DCA rule, parks and recreation facilities will be deemed available for purposes of satisfying the concurrency requirement if

439. FLA. ADMIN. CODE ANN. r. 9J-5.0055(2)(a) (1992). “Concurrency must be determined before approval of an application for a development order or permit that contains a specific plan for development, including densities and intensities.” Department of Comm’y Aff., *supra* note 405, at 5. See FLA. ADMIN. CODE ANN. r. 9J-5.0055(2)(a) (1992).

440. ELMS III REPORT, *supra* note 16, at 67 (Recommendation 97).

441. Ch. 93-206, § 8, 1993 Fla. Laws 1887, 1898 (to be codified at FLA. STAT. § 163.3180(2)(a)).

442. *Id.*

they meet any of the specific standards set forth for sanitary sewer, drainage, solid waste, and potable water,<sup>443</sup> or if:

1. At the time the development permit is issued, the necessary facilities and services are the subject of a binding executed contract which provides for the commencement of the actual construction of the required facilities or the provision of services within one year of the issuance of the development permit; or
2. The necessary facilities and services are guaranteed in an enforceable development agreement which requires the commencement of the actual construction of the facilities or the provision of services within one year of the issuance of the applicable development permit . . . .<sup>444</sup>

The ELMS Committee recommended that a standard less stringent than the public health and safety was most appropriate for determining availability for parks and recreation facilities because they are not essential for human habitation of new development. While they undoubtedly contribute to quality of life, "[i]t is not necessary for park and recreation facilities to be at hand and usable at the same point in time as development impacts."<sup>445</sup> The Committee thus recommended the public welfare as the appropriate standard for determining availability.<sup>446</sup> It also concluded that slightly more flexibility should be allowed for achievement of availability than permitted by the rule.<sup>447</sup>

The 1993 Act incorporates the ELMS Committee's recommendations by adopting the less stringent public welfare standard for determining the availability of parks and recreation facilities.<sup>448</sup> Further, it adopts the ELMS Committee's recommendation that, with the exception of the "pay-and-go" option discussed below,<sup>449</sup> parks and recreation facilities "shall be in place or under actual construction no later than 1 year after issuance by the local government of a certificate of occupancy or its functional equivalent."<sup>450</sup> This one-year-after-occu-

443. See *supra* text accompanying note 439.

444. FLA. ADMIN. CODE ANN. r. 9J-5.0055(2)(b) (1992).

445. ELMS III REPORT, *supra* note 16, at 68 (Recommendation 98). The reference to park and recreation facilities being "at hand and usable" represented the Committee's disagreement with the hearing officer's recommended order in *Citizen's Political Committee, Inc. v. Collier County*, 92 Env'tl. & L.U. Admin. L. Rep. 162 (DOAH Case No. 90-4545GM) (Final Order entered Aug. 20, 1992).

446. ELMS III REPORT, *supra* note 16, at 68 (Recommendation 98).

447. *Id.*

448. Ch. 93-206, § 8, 1993 Fla. Laws 1887, 1898 (to be codified at FLA. STAT. § 163.3180(2)(b)).

449. See *infra* text accompanying notes 529-33.

450. Ch. 93-206, § 8, 1993 Fla. Laws 1887, 1898 (to be codified at FLA. STAT. § 163.3180(2)(b)).

pancy standard is intended to provide slightly more time to achieve availability than the current one-year-after-permitting standard. Therefore, the 1993 Act requires revision of Rule 9J-5.0055(2)(b).

*c. Transportation Facilities*

Under the DCA rule, transportation facilities will be deemed available for purposes of satisfying the concurrency requirement if they meet any of the specific standards adopted for sanitary sewer, drainage, potable water, solid waste, or parks and recreation facilities.<sup>451</sup> In addition, the DCA rule establishes that the concurrency requirement may be satisfied for transportation facilities if the local plan contains a capital improvements element that meets certain criteria, including "[a] 5-year schedule of capital improvements which must demonstrate that the actual construction of the road or mass transit facilities and the provision of services are scheduled to commence in or before the third year of the 5-year schedule of improvements."<sup>452</sup> Therefore, roads and mass transit facilities must be under construction no later than the end of the third year after permit approval.<sup>453</sup>

The ELMS Committee received extensive testimony on the need for more flexibility with respect to implementation of transportation concurrency. One issue was whether a longer period should be allowed before transportation facilities were required to be in place and usable. Washington State, for example, allows six years before such facilities must be in place.<sup>454</sup>

The Committee concluded that the less stringent public welfare standard should be utilized to determine when roads and mass transit should be available because they are not necessary for human habitation and "[t]he principal result when transportation facilities are not available on a timely basis is a period of congestion."<sup>455</sup> It recommended that, in general, roads and mass transit facilities be in place or under actual construction no later than three years following issuance of a certificate of occupancy or its functional equivalent, a standard more lenient than allowed pursuant to Rule 9J-5.0055(2)(c).<sup>456</sup>

The 1993 Act adopts the public welfare standard with respect to determining availability of roads and mass transit.<sup>457</sup> It also adopts,

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451. See *supra* text accompanying notes 439 & 444.

452. FLA. ADMIN. CODE ANN. r. 9J-5.0055(2)(c)5. (1992).

453. The language of the rule is confusing, however, DCA has set forth its interpretation of this provision in authoritative fashion. Department of Comm'y Aff., *supra* note 405, at 6. See also Pelham, *supra* note 405, at 1019-20.

454. ELMS III REPORT, *supra* note 16, at 71 (Recommendation 107).

455. *Id.*

456. *Id.*

457. Ch. 93-206, § 8, 1993 Fla. Laws 1887, 1899 (to be codified at FLA. STAT. § 163.3180(2)(c)).

with some exceptions discussed below,<sup>458</sup> the specific availability standard for roads and mass transit recommended by the ELMS Committee. Therefore, the 1993 Act requires revision of Rule 9J-5.0055(2)(c).

### C. Transportation Concurrency

More than any other aspect of concurrency, the application of this doctrine to transportation facilities, primarily roads, has been especially troublesome.<sup>459</sup> Each constituency with a stake in the growth management system had a major concern with transportation concurrency, as it had been implemented prior to the ELMS Committee's policy review. The complicating factors which make transportation concurrency a "special case" are many.<sup>460</sup>

Not the least of these complications is the sheer magnitude of the state's urban transportation needs. After underfunding its transportation system for decades, Florida's biggest infrastructure deficiencies are its roads. A survey of local governments conducted for the Florida League of Cities found that seventy-five percent of the respondents identified state roads as the category of public facilities subject to concurrency for which the local government was experiencing a facility deficit at that time or anticipated one in the future.<sup>461</sup> Nothing else was close. Fifty-three percent reported a current deficit on state roads in their jurisdictions or expected such a deficit within one year.<sup>462</sup>

Against the backdrop of this staggering need, the ELMS Committee and individual legislators devoted considerable energy during 1992 to studying potential refinements of transportation concurrency and additional sources of funding to provide needed facilities. Representative Steven Geller<sup>463</sup> and Senator Howard Forman<sup>464</sup> developed legislation intended to provide more flexibility in transportation concurrency, especially for the purpose of easing development in older, urbanized areas of the state.<sup>465</sup>

The Committee's recommendations were included in the original ELMS legislation<sup>466</sup> and most of the recommendations relating to

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458. See *infra* text accompanying notes 484-528 & 535-42.

459. Boggs & Apgar, *supra* note 9, at 25.

460. Pelham, *supra* note 405, at 1020.

461. BUREAU OF ECONOMIC & BUSINESS RESEARCH, UNIVERSITY OF FLORIDA, *Classification and Legal Analysis of Local Government Concurrency Management Systems*, at 14 (Sept. 1991) (STAR Project No. 90-062).

462. *Id.*

463. Dem., Hallandale.

464. Dem., Ft. Lauderdale.

465. Fla. HB 503 (1993).

466. Fla. SB 1166, § 8 (1993); Fla. H.R. Comm. on Comm'y Aff., PCBCA 93-01, § 8 (draft of Feb. 17, 1993).



transportation concurrency were enacted by the Legislature.<sup>467</sup> However, the legislation was amended to include compromise provisions based on several proposals developed by Representative Geller and Senator Forman. These compromise provisions reflect the general tenor of the ELMS Committee's thinking even though they differ significantly in detail.

### 1. *Level of Service Standards*

The setting of LOS standards for roads on the State Highway System has been one of many difficulties in implementing transportation concurrency. Under pre-existing law, local governments were charged with establishing the appropriate level of service for all public facilities and services, subject to DCA review.<sup>468</sup> However, the Department of Transportation was responsible for maintaining state roads and setting operational standards for them.<sup>469</sup> DCA attempted to resolve this conflict by requiring local governments, "to the maximum extent feasible as determined by the local government," to adopt LOS standards for state roads that were compatible with the adopted DOT standards.<sup>470</sup> Where the local government adopted a standard that was incompatible with the DOT standard, the burden was on the local government to justify the departure. Notwithstanding this compromise, compatibility between state and local goals for levels of service on the State Highway System was a continuing source of friction.<sup>471</sup>

The ELMS Committee recommended a different division of authority for setting LOS standards on state roads,<sup>472</sup> a compromise which is included in the 1993 Act.<sup>473</sup> For all roads on the Florida Intrastate Highway System,<sup>474</sup> which is the portion of the overall State Highway System devoted to the regional and statewide movement of people and goods, the local government is required to adopt and enforce the DOT-established LOS standard through its concurrency management

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467. Compare ELMS III REPORT, *supra* note 16, at 71-75 (Recommendations 106-16) with ch. 93-206, § 8, 1993 Fla. Laws 1887, 1898-1901 (to be codified at FLA. STAT. § 163.3180).

468. FLA. STAT. § 163.3177(3)(a)3. (Supp. 1992).

469. FLA. STAT. §§ 334.044(1), (10), .045(1) (1991). These standards are adopted by rule. FLA. ADMIN. CODE ANN. r. 14-94.003 (1992).

470. FLA. ADMIN. CODE ANN. r. 9J-5.0055(1)(d) (1992).

471. Boggs & Apgar, *supra* note 9, at 8-9. "The DOT wishes to maintain high levels of service that promote efficient travel between Florida's cities. Local governments, on the other hand, feel that it is unrealistic to require them to maintain high levels of service on roads that pass through heavily developed metropolitan areas." *Id.* at 9. This conflict is exacerbated by the Legislature's unwillingness to properly finance state transportation programs.

472. ELMS III REPORT, *supra* note 16, at 74-75 (Recommendations 114-15).

473. Ch. 93-206, § 8, 1993 Fla. Laws 1887, 1901 (to be codified at FLA. STAT. § 163.3180(10)).

474. See FLA. STAT. § 338.001 (1991).

system.<sup>475</sup> For all other roads on the State Highway System, the local government may set the level of service standard without reference to the DOT standard so long as it is "adequate."<sup>476</sup> Thus, local governments achieved greater flexibility over standard-setting for most state roads within their jurisdictions in exchange for giving up their circumscribed authority to set LOS standards on the thoroughfares in the Florida Intrastate Highway System.

## 2. *Transportation Concurrency Management Areas*

The initial reform intended to provide more flexibility to transportation concurrency was the authorization for local governments to designate Transportation Concurrency Management Areas (TCMAs) which would utilize areawide LOS averaging.<sup>477</sup> The TCMA rule adopted by DCA in 1991, however, has been criticized for its complexity, expense, and "onerous planning requirements."<sup>478</sup> "The problem with the current TCMA regulations is that they are limited to the largest urban areas, and ignore the smaller cities."<sup>479</sup>

The ELMS Committee recommended specific legislative authorization for TCMAs, and a thorough revision of the pre-existing rule "to encourage its utilization in a greater variety of locales and at less expense to local governments."<sup>480</sup> The 1993 Act gives effect to those recommendations. It expressly authorizes the establishment of a TCMA, utilizing areawide level-of-service averaging, in "a compact geographic area with an existing network of roads where multiple, viable alternative travel paths or modes are available for common trips."<sup>481</sup> A local government must justify the level of service chosen, show how urban infill development or redevelopment would be promoted by the TCMA, and demonstrate how mobility will be accomplished.<sup>482</sup> DCA is required to revise Rule 9J-5.0057 to reflect the statutory mandate and make the rule more accessible to and less burdensome on local governments.<sup>483</sup>

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475. Ch. 93-206, § 8, 1993 Fla. Laws 1887, 1901 (to be codified at FLA. STAT. § 163.3180(10)).

476. *Id.*

477. FLA. ADMIN. CODE ANN. r. 9J-5.0057 (1992). *See, e.g.,* Rhodes, *supra* note 405, at 253.

478. Pelham, *supra* note 405, at 1021 (commentary on the TCMA rule in draft form). *See* FLA. ADMIN. CODE ANN. r. 9J-5.0057 (1992).

479. Redesigning the Transportation Concurrency Standard in Florida to Promote Urban Infill, at 2 (Nov. 25, 1992) (attachment to Memorandum from Rep. Steven Geller to Interested Parties (Nov. 25, 1992)) (on file with the *Florida State University Law Review*).

480. ELMS III REPORT, *supra* note 16, at 72 (Recommendation 110).

481. Ch. 93-206, § 8, 1993 Fla. Laws 1887, 1900 (to be codified at FLA. STAT. § 163.3180(7)).

482. *Id.*

483. *Id.*

### 3. *Exceptions from Transportation Concurrency*

Perhaps the most significant departure from the existing concurrency regimen pursuant to the 1993 Act is the creation of formal exceptions from the concurrency requirement for transportation facilities. This new planning tool was initially developed and recommended by the ELMS Committee "in order formally to make trade-offs between concurrency and other planning goals."<sup>484</sup> One essential feature of the ELMS recommendation for a concurrency exception process was that an exception from concurrency for transportation and parks and recreation facilities could be granted only for a specific geographic area; it would not be project-specific. "Within expressly excepted areas, *all* land uses . . . would be exempt from the concurrency requirement."<sup>485</sup>

The legislation introduced by Representative Geller and Senator Forman took a different approach. It proposed several categories of exemptions from transportation concurrency for certain kinds of development. For example, it authorized blanket exemptions for courthouses, hospitals, racetracks, and other specific types of facilities, to be implemented at local option.<sup>486</sup> In discussions led by Representative Geller and Secretary Shelley, compromise proposals on exceptions from transportation concurrency were agreed to, drawing on ideas from both bills. The compromise proposals, discussed below, were included in the 1993 Act.

The public policy rationale for formal exceptions from transportation concurrency is that "countervailing planning and public policy goals may come into conflict with the requirement that adequate public facilities and services be available concurrent with the impacts of such development."<sup>487</sup> One unintended result of the conflict is that transportation concurrency can discourage the very kind of urban development which DCA has favored through its compact urban development policy.<sup>488</sup> The purpose of the exceptions from transportation

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484. ELMS III REPORT, *supra* note 16, at 68 (Recommendation 99). Although significantly different in many respects, the exceptions under Oregon law for land use classifications in that state's growth management program were the inspiration for the exceptions proposal developed by the ELMS Committee.

485. *Id.* at 69 (Recommendation 100) (emphasis added). The Committee recommended that no exceptions be allowed from the concurrency requirement regarding solid waste, potable water, drainage, and sanitary sewer facilities. *Id.* (Recommendation 101).

486. Fla. HB 503, § 1 (1993).

487. Ch. 93-206, § 8, 1993 Fla. Laws 1887, 1899 (to be codified at FLA. STAT. § 163.3180(5)(a)).

488. *Id.* This side-effect of transportation concurrency has received considerable attention in the literature and official analyses. See, e.g., DEGROVE & MINNESS, *supra* note 1, at 17-20; House Staff Analysis, *supra* note 27, at 4. See also *supra* note 98.

concurrency authorized by the 1993 Act is to resolve that policy conflict in favor of compact urban development.<sup>489</sup>

*a. Urban Development*

One class of exceptions authorized by the 1993 Act is intended to promote development in certain parts of urban areas. Exceptions of this class are to be available only for projects located within an area designated in the comprehensive plan for "urban infill development,"<sup>490</sup> "urban redevelopment,"<sup>491</sup> or "downtown revitalization."<sup>492</sup> The statute permits a local government to make an exception from transportation concurrency for a project in such a designated area so long as the project is otherwise consistent with the local plan.<sup>493</sup>

*b. Promotion of Public Transportation*

A second class of exceptions from transportation concurrency is authorized for "projects that promote public transportation."<sup>494</sup> In order to qualify for an exception of this class there is no geographic limitation on where such projects may be located, other than in a specific area designated by the local government in its plan. There is no statutory requirement that the area bear any relationship to current or planned public transportation systems. For these reasons, this provision may prove of limited usefulness.

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489. DEGROVE & MINNESS, *supra* note 1, at 17-20.

490. "Urban infill" development means:

the development of vacant parcels in otherwise built-up areas where public facilities such as sewer systems, roads, schools, and recreation areas are already in place and the average residential density is at least five dwelling units per acre, the average non-residential intensity is at least a floor area ratio of 1.0 and vacant, developable land does not constitute more than 10 percent of the area.

Ch. 93-206, § 2, 1993 Fla. Laws 1887, 1892 (to be codified at FLA. STAT. § 163.3164(27)).

491. "'Urban redevelopment' means demolition and reconstruction or substantial renovation of existing buildings or infrastructure within urban infill areas or existing urban service areas." *Id.* (to be codified at FLA. STAT. § 163.3164(26)).

492. "'Downtown revitalization' means the physical and economic renewal of a central business district of a community as designated by local government, and includes both downtown development and redevelopment." *Id.* (to be codified at FLA. STAT. § 163.3164(25)).

493. *Id.* § 8, 1993 Fla. Laws at 1899 (to be codified at FLA. STAT. § 163.3180(5)(b)).

494. "Projects that promote public transportation" means "projects that directly affect the provision of public transit, including transit terminals, transit lines and routes, separate lanes for the exclusive use of public transit services, transit stops (shelters and stations), and office buildings or projects that include fixed-rail or transit terminals as part of the building." *Id.* § 2, 1993 Fla. Laws at 1892 (to be codified at FLA. STAT. § 163.3164(28)). The list contained in the definition is illustrative only.

It is this provision which shows the greatest divergence of the 1993 Act from the ELMS Committee's recommendations on transportation concurrency exceptions; the Legislature eviscerated one of the Committee's most far-sighted sets of recommendations. The ELMS Committee recommended that promotion of public transportation be one of three grounds for a concurrency exception.<sup>495</sup> However, it recommended that the exception be available not for individual transit-related projects, but rather for all development within and adjacent to a public transportation corridor designated by the Department of Transportation under its pre-existing authority.<sup>496</sup>

Marrying DOT's public transportation corridor process to concurrency exceptions in the growth management program was intended to promote sufficient population densities along an entire public transportation route, not just to make it easier to permit an individual structure at an isolated location. These measures in turn were coordinated with regional and local planning provisions of the 1993 Act. One provision authorizes regional planning councils to recommend minimum population densities along designated public transportation corridors to coordinate land planning in neighboring jurisdictions.<sup>497</sup> Another provision requires each local government within an urbanized area to set forth in a new consolidated transportation element the densities and intensities of use which will, among other things, promote public transportation in designated public transportation corridors.<sup>498</sup>

The proposed coordination of the public transportation corridor process and the transportation concurrency exception process should be reconsidered by legislators and other policymakers at the earliest opportunity.

### c. *Special Part-time Demands*

The 1993 Act authorizes another class of exceptions from transportation concurrency for projects with "special part-time demands."<sup>499</sup> House Bill 503 addressed the issue of these facilities by proposing to authorize local governments to grant an exemption from transportation concurrency for a stadium, performing arts center, racetrack, or fairground within its jurisdiction, provided the facility was consistent with the local plan and met certain statutory criteria relating to fre-

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495. ELMS III REPORT, *supra* note 16, at 68 (Recommendation 100).

496. See FLA. STAT. § 339.155(6)(a)4. (Supp. 1992).

497. See *supra* text accompanying note 238.

498. See *supra* text accompanying notes 325-28.

499. Ch. 93-206, § 8, 1993 Fla. Laws 1887, 1899 (to be codified at FLA. STAT. § 163.3180(5)(c)).

quency of use.<sup>500</sup> There was no geographical limitation on where an exempt facility could be located.

The 1993 Act authorizes exceptions from transportation concurrency for any project, regardless of its character, which "does not have more than 200 scheduled events during any calendar year, and does not affect the 100 highest traffic volume hours."<sup>501</sup> Exceptions for special part-time facilities are to be available only in designated urban infill, urban redevelopment, existing urban service, or downtown revitalization areas.<sup>502</sup>

#### *d. Procedure for Exceptions*

The 1993 Act sets forth certain procedural requirements for transportation concurrency exceptions.<sup>503</sup> A local government may authorize the granting of exceptions only by means of policies included in its comprehensive plan. Therefore, to implement these provisions of the 1993 Act, a local government must prepare a plan amendment which would be subject to a compliance review. A local government may elect not to offer any exceptions to transportation concurrency.<sup>504</sup>

Any plan amendment authorizing exceptions must specify on the future land use map the precise geographical area in which the exceptions would be available. Although not expressly required to do so by statute, the local government should identify whether the area is to be considered an urban infill, urban redevelopment, downtown revitalization, or existing urban service area. It must set forth the process to be utilized by applicants for an exception.<sup>505</sup> The plan amendment must require consideration of transportation impacts on the Florida Intrastate Highway System attributable to exceptions.<sup>506</sup>

#### *4. Other Special Provisions*

Two other provisions were drawn from the legislation prepared by Representative Geller and Senator Forman and incorporated into the 1993 Act. Both provisions were intended to facilitate development in

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500. Fla. HB 503, § 1 (1993) (proposed amendment to FLA. STAT. § 163.3177(10)(h)2.b).

501. Ch. 93-206, § 8, 1993 Fla. Laws 1887, 1899 (to be codified at FLA. STAT. § 163.3180(5)).

502. *Id.*

503. *Id.* (to be codified at FLA. STAT. § 163.3180(5)(d)). These procedural requirements were based on the ELMS Committee's recommendations. ELMS III REPORT, *supra* note 16, at 69-70 (Recommendations 102-03).

504. Ch. 93-206, § 8, 1993 Fla. Laws 1887, 1899 (to be codified at FLA. STAT. § 163.3180(5)(b)).

505. *Id.*

506. *Id.* (to be codified at FLA. STAT. § 163.3180(5)).

an "existing urban service area,"<sup>507</sup> where transportation concurrency has presented difficult challenges.

*a. De Minimis Impacts*

The 1993 Act expressly sanctions de minimis impacts to roads in certain areas so long as the additional impacts do not "cause significant degradation of the existing level of service."<sup>508</sup> In effect, the statute establishes a threshold of traffic impact below which a project would be permitted for concurrency purposes regardless of its actual effect on the level of service.

The 1993 Act provides this definition of a de minimis impact:

A de minimis impact is one that would not affect more than 0.1 percent of the maximum volume at the adopted level of service standard of the affected transportation facility as determined by the local government, and that is caused by an increase in density or intensity that is less than or equal to twice the density or intensity of the existing land use or, in the case of vacant land, is a density of less than 1 dwelling unit per quarter acre or a floor area ratio of 0.1 for nonresidential uses.<sup>509</sup>

A local government should "encourage" de minimis impacts within an existing urban service area, however, the cumulative total of such impacts on any road may not exceed three percent of the maximum volume at the adopted LOS standard for the affected facility.<sup>510</sup>

Pre-existing law did not prohibit de minimis impact policies in local plans, and DCA has upheld such policies in some local plans. This provision is intended to foster de minimis impact policies in local comprehensive plans "to accommodate smaller developments that in themselves would not appreciably erode the capacity of the transportation system."<sup>511</sup>

*b. Vesting Allowable Trips for Redevelopment*

The 1993 Act also seeks to foster renewal of existing urban service areas by in effect vesting allowable road trips with a ten percent bonus

507. An "[e]xisting urban service area" means built-up areas where public facilities and services such as sewage treatment systems, roads, schools, and recreation areas are already in place." *Id.* § 2, 1993 Fla. Laws at 1892 (to be codified at FLA. STAT. § 163.3164(29)).

508. *Id.* § 8, 1993 Fla. Laws at 1899-1900 (to be codified at FLA. STAT. § 163.3180(6)).

509. *Id.* This degree of impact would ordinarily be attributable to a duplex or quadraplex on most city streets.

510. *Id.*

511. Memorandum from Rep. Steven Geller, Dem., Hallandale, to Interested Parties 3 (Dec. 22, 1992) (discussing draft of Fla. HB 503 (1993)) (on file with the *Florida State University Law Review*).

for any development project which involves "demolition and reconstruction or substantial renovation of existing buildings or infrastructure."<sup>512</sup>

The statute provides that a concurrency management system may not preclude redevelopment of property in an existing urban service area so long as the project's traffic impacts are no more than "110 percent of the actual transportation impact caused by the previously existing development," even if the redevelopment project reduces the LOS on an affected road below the adopted standard.<sup>513</sup> The local government has no discretion in the matter, but may assess appropriate impact fees and take account of the impacts in its concurrency management system.<sup>514</sup>

This provision is intended to create an incentive for redevelopment in urbanized areas "instead of the current situation, which in some cases causes a developer to face unrealistic concurrency goals if they expand, or to lose system trip capacity if they demolish a building."<sup>515</sup> It does not alter any pre-existing statutory provisions on vested rights.<sup>516</sup> It does not preclude a property owner from redeveloping property with a land use that is different from the previously existing development.

### 5. Long-Term Backlog Reduction Plans

One of the principal problems in transportation concurrency, primarily on state roads, is reconciling the need for new development in certain areas with the existing transportation backlog. "The core problem with concurrency is that the State uniformly imposed this planning and regulatory standard on an already overburdened and

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512. Ch. 93-206, § 2, 1993 Fla. Laws 1887, 1892 (to be codified at FLA. STAT. § 163.3164(26)). The renovation or addition of an existing structure without any demolition falls within this definition and is considered redevelopment.

Although the definition of urban redevelopment applies to development activities in urban infill areas and existing urban service areas, the operative provision which requires vesting of allowable trips requires its application only in existing urban service areas. *Id.* § 8, 1993 Fla. Laws at 1900 (to be codified at FLA. STAT. § 163.3180(8)).

513. Ch. 93-206, § 8, 1993 Fla. Laws 1887, 1900 (to be codified at FLA. STAT. § 163.3180(8)). This provision is internally inconsistent. The first sentence requires a local government to "reserve" 110 percent of the impacts of an applicable development for the purpose of redevelopment. The second sentence prevents a concurrency management system from prohibiting a redevelopment "requiring less than 110 percent" of the pre-existing development. *Id.* (emphasis added).

514. *Id.*

515. Memorandum from Rep. Steven Geller, Dem., Hallandale, to Interested Parties 3 (Dec. 22, 1992) (discussing draft of HB 503 (1993)) (on file with the *Florida State University Law Review*).

516. *Id.*



deficit-ridden service system without a strategy to cure past neglect and accommodate new needs."<sup>517</sup>

To address this problem, DCA and local governments have resorted to a number of creative techniques for concurrency management in areas where roads are severely backlogged. One frequently cited example was DCA's agreement to allow Pasco County to deviate from state LOS standards on state roads as long as the county's overall road system was brought up to standard within fifteen years.<sup>518</sup> However, DCA has not standardized this practice by rule nor set forth the parameters within which it may be employed by local governments with transportation backlogs.

To address this need, the ELMS Committee recommended that the Legislature expressly authorize local governments to adopt special long-term plans for reducing the backlog on transportation facilities within their jurisdictions.<sup>519</sup> These plans could utilize interim LOS standards and provide a basis for issuance of development orders so long as certain criteria were met. The Committee recommended express statutory authorization for a planning tool similar to the long-term concurrency management system rule drafted by DCA in 1992, but never adopted by the agency.<sup>520</sup>

The 1993 Act authorizes a local government to adopt as a component of its comprehensive plan a long-term transportation concurrency management system with a planning period of up to ten years.<sup>521</sup> The system must be prepared for a specific geographic district where a significant transportation backlog exists.<sup>522</sup> The system must include a transportation improvements plan intended to correct existing deficiencies within the planning period, and it must be financially feasible and consistent with other portions of the local comprehensive plan.<sup>523</sup> The system may utilize interim LOS standards.<sup>524</sup> With respect to development, the ten-year transportation improvements schedule in the

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517. Rhodes, *supra* note 405, at 244.

518. Pelham, *supra* note 405, at 1021 n.301; Rhodes, *supra* note 405, at 251 n.37. See also Robert H. Freilich & S. Mark White, *Transportation Congestion and Growth Management: Comprehensive Approaches to Resolving America's Major Quality of Life Crisis*, 24 *Loy. L.A. L. REV.* 915, 943-45 (1991).

519. ELMS III REPORT, *supra* note 16, at 72-73 (Recommendations 111-12). For an additional endorsement of long-term concurrency management plans, see Pelham, *supra* note 405, at 1021.

520. Proposed FLA. ADMIN. CODE r. 9J-5.0055(3) (May 26, 1992 workshop draft).

521. Ch. 93-206, § 8, 1993 Fla. Laws 1887, 1900 (to be codified at FLA. STAT. § 163.3180(9)(a)).

522. *Id.*

523. *Id.*

524. *Id.*

plan may serve as a basis for issuance of development orders within the district.<sup>525</sup>

Recognizing that ten years may not be sufficient for remedying the transportation backlog in some areas, the 1993 Act authorizes DCA to approve a long-term transportation concurrency management system with a fifteen-year planning period for those jurisdictions with an unusually severe backlog.<sup>526</sup> The statute directs DCA to base its decision regarding an extension on a "general comparison between that local government and all other similarly situated local jurisdictions."<sup>527</sup> It specifies four factors for DCA to consider in conducting the comparison.<sup>528</sup>

#### D. The "Pay-and-Go" Options

Some landowners and developers have argued that the concurrency requirement should be modified to allow a development to proceed in spite of a project's failure to satisfy concurrency, so long as the project pays its fair share of any necessary improvements, based upon its impacts. This concept is generally known as "pay-and-go."<sup>529</sup> The prospect that it will become a central feature of concurrency management seems remote at present because "it cuts too broad an exemption from the policy."<sup>530</sup> However, in order to address two specific concerns, the 1993 Act authorizes limited pay-and-go options for parks and recreation facilities and for transportation facilities.

##### 1. Parks and Recreation Facilities

One of the new pay-and-go provisions applies to parks and recreation facilities. The provision is based on the ELMS Committee's recommendation that pay-and-go be allowed for parks and recreation facilities because the length of time necessary to acquire and construct regional complexes can delay a development beyond the general standard of being available within one year after issuance of a certificate

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525. *Id.*

526. *Id.* (to be codified at FLA. STAT. § 163.3180(9)(b)).

527. *Id.*

528. *Id.*

529. See Boggs & Apgar, *supra* note 9, at 26. The proposal for "pay-and-go" is generally traced to DCA's rule to authorize "pipelining" of transportation exactions for developments of regional impact. See FLA. ADMIN. CODE ANN. r. 9J-2.0255(7) (1992). As explained by one commentator: "Pipelining enables local governments to apply transportation exactions to satisfy the most pressing service and facility needs. It channels or pipelines dollars to build or pay for a few facilities or services, rather than spreading dollars piecemeal among numerous services and facilities affected by the project." Rhodes, *supra* note 405, at 252-53.

530. Rhodes, *supra* note 405, at 253.

of occupancy or its functional equivalent.<sup>531</sup> Such a delay would be unwarranted in light of the less stringent public welfare standard utilized to set the availability standards for park and recreation facilities.

To address this concern, the 1993 Act provides an exception to the general availability standard for parks and recreation facilities, based on the pay-and-go idea.<sup>532</sup> It allows a development to proceed notwithstanding the fact that a park and recreation facility will not be available until more than one year after issuance of a certificate of occupancy or its functional equivalent, so long as either the land necessary for the facility is dedicated or otherwise acquired by the local government prior to issuance, or the developer makes a binding commitment for her fair share of the cost of the park or recreation facility prior to issuance.<sup>533</sup>

## 2. *Transportation Facilities*

The other pay-and-go provision is intended as a safety valve to limit the liability of local governments which fail fully to implement their plans. It is also intended to serve the reasonable expectations of landowners. It was recommended by the ELMS Committee to address the limited circumstance where a development project cannot proceed for failure to satisfy transportation concurrency when that failure is attributable to the local government's failure to implement its adopted local plan through no fault of the landowner.<sup>534</sup>

The 1993 Act creates a landowner's remedy in this situation and relies on pay-and-go as an essential ingredient. The remedy is intended to result only in issuance of a development order by the local government, not the award of damages.<sup>535</sup> It does not duplicate the constitutional guarantees of due process or require the landowner to demonstrate that denial of development authorization will result in a taking. Issuance of a development order pursuant to this provision would serve as an affirmative defense to a consistency challenge to the development order pursuant to section 163.3215, *Florida Statutes*, to the extent the consistency issues relate to transportation concurrency.

To invoke this remedy, a landowner must make a showing on five issues. First, the local government with jurisdiction over the specific

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531. ELMS III REPORT, *supra* note 16, at 67-68 (Recommendation 98).

532. Ch. 93-206, § 8, 1993 Fla. Laws 1887, 1898 (to be codified at FLA. STAT. § 163.3180(2)(b)).

533. *Id.*

534. ELMS III REPORT, *supra* note 16, at 73-74 (Recommendation 113). See also Pelham, *supra* note 405, at 1040-44.

535. For that reason, it should be available in either a judicial proceeding or a quasi-judicial proceeding.

property at issue must have adopted a local comprehensive plan which is in compliance pursuant to section 163.3184, *Florida Statutes*.<sup>536</sup>

Second, the local plan must include a financially feasible capital improvements element which would provide the transportation facilities needed to serve the proposed development, and the local government must have failed to implement the element.<sup>537</sup> The statute does not require any showing on this issue other than failure to implement the plan; the reason for the failure is irrelevant.

Third, the proposed project as set forth in the application for the development order must be consistent with the adopted local comprehensive plan.<sup>538</sup>

Fourth, the local government must have established a method for the landowner to be assessed her fair share of the cost of providing the transportation facilities necessary to serve the proposed development.<sup>539</sup> A transportation impact fee ordinance would satisfy this requirement.

Fifth, the landowner must have made a binding commitment to pay her fair share of the transportation facilities necessary to serve her proposed development.<sup>540</sup> Such a commitment could be contingent on issuance of the development order.

The ELMS Committee recommended that a local government have the authority to deny a development order for a project where these criteria have been satisfied if the local government could demonstrate that "the project would endanger the public safety in the absence of the transportation improvement otherwise required."<sup>541</sup> This provision was included in original versions of the ELMS legislation,<sup>542</sup> but was removed solely because it was deemed redundant of a local government's existing authority to protect the public safety pursuant to the police power.

## VI. PROGRAMS PRE-DATING THE GROWTH MANAGEMENT ACT OF 1985

The most difficult issues considered by the ELMS Committee and addressed by the Legislature in the 1993 Act related to programs, primarily the development of regional impact (DRI) program, estab-

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536. Ch. 93-206, § 8, 1993 Fla. Laws 1887, 1901 (to be codified at FLA. STAT. § 163.3180(11)(a)).

537. *Id.* (to be codified at FLA. STAT. § 163.3180(11)(c)).

538. *Id.* (to be codified at FLA. STAT. § 163.3180(11)(b)).

539. *Id.* (to be codified at FLA. STAT. § 163.3180(11)(d)).

540. *Id.* (to be codified at FLA. STAT. § 163.3180(11)(e)).

541. ELMS III REPORT, *supra* note 16, at 74 (Recommendation 113).

542. Fla. SB 1166, § 8 (1993); Fla. H.R. Comm. on Comm'y Aff., PCBCA 93-01, § 8 (1993).

lished prior to the 1985 Act. Those early programs reflected the realities of another time and place.

Florida was very different then. There was no consistent local land use regulation; county or municipal authority was typically derived from one of more than 1,200 special acts of the Legislature. Fewer than half the state's sixty-seven counties had any authority to regulate land use. Of those counties which had such authority, several were allowed to exercise it only in limited geographic areas, such as within a specified number of miles from the county seat or along certain major roads. Many smaller municipalities, and some larger ones, had no local land use regulations at all.<sup>543</sup>

Altogether, more than fifty percent of Florida's land area was not subject to local land use control. And few of the local land use regulatory programs that did exist were grounded in a local comprehensive plan. It was a situation befitting the state which was the last in the nation to grant general zoning authority to municipalities, and then only by accident.<sup>544</sup>

The framework for addressing growth-related issues in Florida has undergone dramatic change since then. In 1972, the Legislature enacted the Florida Environmental Land and Water Management Act.<sup>545</sup> This landmark measure, based upon a draft of article seven of the American Law Institute's Model Land Development Code, reasserted a state role in land development decisions through the creation of two programs.<sup>546</sup> The DRI program represented a new process for land use decisionmaking with regard to certain development projects. The critical areas program provided intensive state oversight in specific geographic areas where there were threats to significant resources.<sup>547</sup>

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543. Ernest R. Bartley, *Status and Effectiveness of Land Development Regulation in Florida Today*, in SUMMARY REPORT OF THE ENVIRONMENTAL LAND MANAGEMENT STUDY COMMITTEE'S CONFERENCE ON LAND USE 4, 8-9 (James C. Nicholas ed., 1973).

544. *Id.* ELMS I found that general municipal authority to zone land had been utilized by some cities, but that most local governments which sought to control land use relied upon special acts.

Only a few of the local or population acts have represented what may be called "planning acts." Most of the over 1,200 special or population acts have been concerned with conferring authority to zone or regulate subdivisions on a particular unit of local government, with no or not much regard to the requirement of true comprehensive planning as a prerequisite to adoption of land use control regulations.

ENVIRONMENTAL LAND MANAGEMENT STUDY COMMITTEE, FINAL REPORT: ENVIRONMENTAL LAND MANAGEMENT 20 (Dec. 1973) [hereinafter ELMS I REPORT].

545. Ch. 72-317, 1972 Fla. Laws 1162.

546. Robert M. Rhodes, *Florida's Environmental Land and Water Management Act Implements Article 7 of the Proposed American Law Institute Model Code*, AIP NEWSLETTER, Jan. 1974, at 7.

547. *Id.* at 7-9.

As the integrated planning and growth management system has evolved, especially in the years since 1985, policymakers and interest groups have questioned whether there is a continuing role for Florida's first-generation land use programs. A re-examination of the DRI program in particular was sought by Governor Chiles when he created the ELMS Committee in 1991,<sup>548</sup> and was mandated by the Legislature in 1992.<sup>549</sup>

### A. *Developments of Regional Impact*

Because in 1972 Florida did not require municipalities or counties to adopt a local comprehensive plan to guide future growth and development, the creation of the DRI program as a means for performing an impact analysis on large-scale projects "was both desirable and necessary."<sup>550</sup> The DRI program also provided a way to review and mitigate the extrajurisdictional impacts of certain local land use decisions.

The DRI program was never intended to address all development, only certain large-scale projects. Historically, only about ten percent of the development in the state was believed to be addressed by the DRI program.<sup>551</sup> More recent assessments have sought to play up the significance of the program in certain high-growth areas.<sup>552</sup> A recent analysis concluded that seventy percent of the 588 DRI development orders rendered between July 1, 1980, and June 30, 1992, were from only four urban regions: Tampa Bay, East Central Florida, South

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548. Fla. Exec. Order No. 92-291, § 3 (Nov. 19, 1991).

549. The Legislature required DCA to conduct a policy review for submittal prior to the 1993 Regular Session to address whether the DRI program should be "replaced, repealed, or incorporated in whole or in part" into the local planning program. Ch. 92-129, § 17, 1992 Fla. Laws 1030, 1047.

550. Thomas G. Pelham, *Regulating Developments of Regional Impact: Florida and the Model Code*, 29 U. FLA. L. REV. 789, 827 (1977).

551. This statistic is cited frequently in the literature. *E.g.*, DEGROVE & MINESS, *supra* note 1, at 9-10. It appears to be derived from studies by ELMS II which found that, in some counties, the DRI program rarely covered as much as 10 percent of residential development. ENVIRONMENTAL LAND MANAGEMENT STUDY COMMITTEE, FINAL REPORT 40 (Feb. 1984) [hereinafter ELMS II REPORT].

552. *E.g.*, Department of Comm'y Aff., The Status of Growth Management: A Snapshot (Dec. 18, 1991) (unpublished briefing paper for ELMS Committee).

It is often cited that DRIs comprise 5-10 percent of all development approved in Florida since 1974. However recent research and information provided by regional planning councils indicate that DRIs may comprise 25-50 percent of the development in certain central and south Florida counties or in high growth regions at the urban fringe in these counties. Thus, it may be that the DRI process impacts more development than previously thought.

Florida, and Southwest Florida.<sup>553</sup> Nevertheless, the DRI program was not a comprehensive planning or growth management program.

Early during implementation of the DRI program, policymakers concluded that the state would be best served by mandatory local comprehensive planning, both to provide land planning for decisions regarding growth in then-unregulated local jurisdictions and as a basis for local land use regulations in then-regulated jurisdictions.<sup>554</sup> Florida continued its march toward an integrated planning and growth management system with enactment of the Local Government Comprehensive Planning Act of 1975.<sup>555</sup>

Even as the local planning program was being implemented, it was understood that the impact analysis required for large-scale projects under the DRI program would result in wasteful and "unnecessary duplication" of local comprehensive planning.<sup>556</sup> As one commentator explained at the time:

A comprehensive plan considers a broad range of environmental, social, and economic values and makes the necessary trade-offs [across the jurisdiction]. Impact analysis, which assesses a specific project in relation to its surroundings, entails consideration of the same factors as a comprehensive plan, But the difference . . . is that under impact analysis, in contrast to comprehensive planning, each individual project must be studied anew.<sup>557</sup>

Thus, from its earliest days the local planning program was considered a potential, and preferable, substitute for the DRI program.

Notwithstanding the hopes for local comprehensive planning, ELMS II concluded in 1984 that the new program did not provide an effective statewide approach.<sup>558</sup> This study found that the DRI program was the state's chief tool for addressing land development, but that it was "not designed to take in all growth management decisions."<sup>559</sup> Those conclusions helped provide the impetus for thorough reform of the local comprehensive planning program in the 1985 Act, but with a continued role for the DRI program.

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553. DEPARTMENT OF COMM'Y AFF., DEVELOPMENT OF REGIONAL IMPACT REPORT 14 (Jan. 1993) [hereinafter DCA DRI REPORT]. The four-county Tampa Bay region was the center of DRI activity; almost half the 787,000 acres addressed by DRI development orders during the study period were located in the Tampa Bay region, or 20 percent of its land area. *Id.* at 13.

554. ELMS I REPORT, *supra* note 544, at 18-60; Rhodes, *supra* note 546, at 8.

555. Ch. 75-257, 1975 Fla. Laws 794.

556. Pelham, *supra* note 550, at 827.

557. *Id.*

558. ELMS II REPORT, *supra* note 551, at 18-19.

559. *Id.* at 2.

Both the advantages and disadvantages of the DRI program have been widely debated over the years. ELMS II concluded in 1984 that the DRI program was an effective method for development review, but that it was expensive and unfairly burdensome to DRI developers and, in any event, ultimately should be incorporated into the integrated planning system.<sup>560</sup> The Governor's Growth Management Advisory Committee in 1986 suggested that the future of the DRI program should be seriously considered by the Legislature in 1993, following adoption of revised local comprehensive plans in all cities and counties.<sup>561</sup> The stage was thus set for ELMS III to discuss the future of the DRI program.

### *1. Termination of the DRI Program in Certain Jurisdictions*

The local planning program established under the 1985 Act created, at least in theory, a substitute for the impact analysis function performed on certain developments by the DRI program. But local planning did not create a surrogate to the DRI program for the assessment and mitigation of extrajurisdictional impacts or of impacts to state or regional resources.<sup>562</sup> That public interest was the crux of the problem regarding complete replacement of the DRI program by local comprehensive planning.

Accordingly, the ELMS Committee recommended improvements to the intergovernment coordination elements of local comprehensive plans so they could serve as an adequate substitute for the DRI program.<sup>563</sup> DCA made an identical recommendation.<sup>564</sup> With only minor changes, the Legislature adopted these recommendations. These changes are among the principal achievements in the legislation.

#### *a. Criteria and Requirements for Termination*

The 1993 Act establishes new requirements for the local planning program, which serve as criteria that a local government must satisfy in order to terminate the DRI program within its jurisdiction. The local government must adopt certain required amendments to the intergovernmental coordination element of its local plan, and the

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560. *Id.* at 37, 41-42.

561. GOVERNOR'S GROWTH MANAGEMENT ADVISORY COMMITTEE, FINAL REPORT 39 (Dec. 1986).

562. ELMS III REPORT, *supra* note 16, at 77-79 (Recommendation 117); DCA DRI REPORT, *supra* note 553, at 23.

563. ELMS III REPORT, *supra* note 16, at 78-79 (Recommendation 117).

564. DCA DRI REPORT, *supra* note 553, at 25-27 (Recommendation 1).



amendments must be determined to be in compliance.<sup>565</sup> The new provisions must address the determination of certain impacts of development, the mitigation of those impacts, the resolution of any disputes regarding impact determinations and mitigation, and changes to development orders for approved DRIs.<sup>566</sup>

Another prerequisite for termination is the local government's adoption of land development regulations (LDRs) to implement the new plan policies.<sup>567</sup> Except for certain smaller and rural jurisdictions, the new plan policies and LDRs are to be in effect no later than December 31, 1997.<sup>568</sup> Finally, the 1993 Act requires the local government's comprehensive plan to be otherwise in compliance as defined in section 163.3184(1)(b).<sup>569</sup>

All local governments are required to adopt these plan amendments and LDRs according to a schedule to be adopted by rule by DCA.<sup>570</sup> However, a city or county with statutory authority to retain the DRI program through the "opt-in" provision of section 380.06(27)(c) may defer adoption and implementation of the new policies on intergovernmental coordination until its review pursuant to the EAR process.<sup>571</sup>

The 1993 Act specifies the process to be followed in terminating the DRI program. When a local government meets the statutory criteria for termination set forth in section 380.06(27)(a), it must render a certificate to that effect to DCA and serve a copy of the certificate on the appropriate regional planning council.<sup>572</sup> Thus, DCA will have a record of the status of all local governments in Florida on this issue. The certificate must identify with specificity the adopted LDRs which implement the required plan policies.<sup>573</sup>

565. Ch. 93-206, § 52, 1993 Fla. Laws 1887, 1955 (to be codified at FLA. STAT. § 380.06(27)(a)).

566. *Id.* § 6, 1993 Fla. Laws at 1894-95 (to be codified at FLA. STAT. § 163.3177(6)(h)1.a.-d.). For a discussion regarding the refinements to the intergovernmental coordination elements, see *supra* text accompanying notes 287-303.

567. *Id.* § 52, 1993 Fla. Laws at 1955 (to be codified at FLA. STAT. § 380.06(27)(a)).

568. *Id.* § 6, 1993 Fla. Laws at 1895 (to be codified at FLA. STAT. § 163.3177(6)(h)6.). The ELMS Committee recommended that implementation be accomplished by December 31, 1995. ELMS III REPORT, *supra* note 16, at 78 (Recommendation 117). DCA recommended a similar target date, but suggested as an alternative that implementation be accomplished through the EAR process, resulting in a likely target for completion of 1999. DCA DRI REPORT, *supra* note 553, at 26 (Recommendation I). The 1997 date was a compromise arrived at in the legislative process.

569. Ch. 93-206, § 52, 1993 Fla. Laws 1887, 1955 (to be codified at FLA. STAT. § 380.06(27)(a)2.).

570. *Id.* § 6, 1993 Fla. Laws at 1895 (to be codified at FLA. STAT. § 163.3177(6)(h)6.).

571. *Id.* A county or municipality which elects to retain the DRI program must terminate it when the jurisdiction no longer satisfies the statutory population criterion. *Id.* § 52, 1993 Fla. Laws at 1955-56 (to be codified at FLA. STAT. § 380.06(27)(c)).

572. *Id.* (to be codified at FLA. STAT. § 380.06(27)(b)).

573. *Id.* The purpose of the requirement for a listing of the implementing LDRs is to assure

The DRI program will be terminated within a local jurisdiction effective on the date that DCA enters its written acceptance of the local government's certification.<sup>574</sup> As of that date, section 380.06, *Florida Statutes*, shall be inoperative within the jurisdiction except for five subsections.<sup>575</sup>

First, section 380.06(4) regarding issuance of binding letters will remain in effect in a non-DRI jurisdiction.<sup>576</sup> The purpose of retaining this provision is to provide an owner, developer, or local government with a formal means for obtaining a determination from DCA as to whether the local development order for a specific project would be subject to an appeal to the Florida Land and Water Adjudicatory Commission pursuant to section 380.07(3).

Second, section 380.06(17) regarding local monitoring would remain in effect.<sup>577</sup> The purpose of retaining this provision is to ensure that the local government which issued the development order for an approved DRI continues to monitor the project and enforce the terms of the development order.

Third, section 380.06(18) regarding annual reports would remain in effect.<sup>578</sup> Thus, an approved DRI subject to the annual reporting requirement would continue to report on its development activities to appropriate agencies. Among other things, this requirement would help assure adherence to the terms of the applicable DRI development order.

Fourth, section 380.06(20) regarding vested DRI rights would remain in effect.<sup>579</sup> The purpose of retaining this provision is to ensure that the statutory changes in the 1993 Act are not inadvertently construed as adversely affecting the legal and equitable rights of vested DRIs.

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proper implementation of the new plan policies by facilitating any consistency challenges.

The 1993 Act does not expand the oversight authority of DCA with respect to LDRs. The consistency of the LDRs with the plan amendments may be reviewed in an administrative proceeding upon petition of a substantially affected person pursuant to section 163.3213. *Id.*

The 1993 Act does not render ineffective any development order issued pursuant to an LDR which is challenged within the 12-month period established by section 163.3213 and determined to be inconsistent with the amendments to the intergovernmental coordination element. However, such a development order may be subject to challenge in a civil action by an aggrieved and adversely affected person pursuant to section 163.3215, *Florida Statutes*.

574. *Id.* The 1993 Act does not impose a time requirement for DCA to provide written acceptance of the certification.

575. *Id.* (to be codified at FLA. STAT. § 380.06(27)(a)). In addition, the Florida Quality Developments (FQD) program, which was intended to provide an alternative to DRI review for certain projects, will be rendered inapplicable in the jurisdiction. *Id.* § 53, 1993 Fla. Laws at 1956 (amending FLA. STAT. § 380.061(2) (1991 & Supp. 1992)).

576. *Id.* § 52, 1993 Fla. Laws at 1955 (to be codified at FLA. STAT. § 380.06(27)(a)).

577. *Id.*

578. *Id.*

579. *Id.*

Fifth, section 380.06(26) regarding abandonment of approved DRIs would remain in effect.<sup>580</sup> The purpose of retaining this provision is to ensure that the owner or developer of an approved DRI has a means to abandon the project subject to appropriate safeguards.

An especially sensitive issue in termination of the DRI program is the status of projects with DRI development orders.<sup>581</sup> The ELMS Committee concluded that the termination of the DRI program should not affect the status of an approved DRI for two reasons.

First, a DRI developer complied with a legal requirement that most likely imposed significant costs in time and money; the development rights received as a result of that review should be protected for reasons of equity. Second, a DRI developer most likely agreed to or was required to accept certain conditions on the development plan in exchange for development approval; those conditions in favor of the public interest should be protected.<sup>582</sup>

The 1993 Act provides that a DRI development order shall remain in full force and effect following termination of the DRI program within the applicable local jurisdiction.<sup>583</sup> It may be enforced and abandoned as provided by chapter 380.<sup>584</sup> Any subsequent change to the development order would be subject to review pursuant to the new ICE development review process rather than the substantial deviation provisions of section 380.06(19).<sup>585</sup>

#### *b. New State Authority in Conjunction With Termination*

As additional protection for state and regional interests following termination of the DRI program in a local jurisdiction, the ELMS Committee recommended new state oversight and enforcement authority regarding DRI-scale developments.<sup>586</sup> The 1993 Act contains two safeguards that are intended to be the functional equivalent of pre-existing judicial and administrative remedies in the DRI program.

The first safeguard is authorization for an appeal to the Florida Land and Water Adjudicatory Commission of a local development order for any project which but for termination of the DRI program in

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580. *Id.*

581. ELMS III REPORT, *supra* note 16, at 81-82 (Recommendation 120).

582. *Id.* at 82 (Recommendation 120).

583. Ch. 93-206, § 52, 1993 Fla. Laws 1887, 1956 (to be codified at FLA. STAT. § 380.06(27)(d)).

584. *Id.*

585. *Id.* § 6, 1993 Fla. Laws at 1895 (to be codified at FLA. STAT. § 163.3177(6)(h)1.d.).

586. ELMS III REPORT, *supra* note 16, at 80-81 (Recommendation 119).

that jurisdiction would be classified as a DRI and therefore be subject to appeal pursuant to section 380.07(2).<sup>587</sup> The development order for such a project must be rendered to DCA as prescribed by DCA rule. DCA, the owner, or the developer will have forty-five days after rendition to initiate an appeal.<sup>588</sup>

The only grounds for appeal pursuant to section 380.07(3) are that the development order (1) is inconsistent with the adopted local comprehensive plan, the applicable regional policy plan, the State Comprehensive Plan, or the State Land Development Plan or (2) results in inadequately mitigated adverse impacts to state or regional resources or facilities identified in the applicable regional policy plan, the State Comprehensive Plan, or the State Land Development Plan.<sup>589</sup>

The second safeguard is the extension of the enforcement powers authorized by section 380.11 to address projects which but for termination of the DRI program in a local jurisdiction would be subject to all the provisions of section 380.06.<sup>590</sup> DCA and the state attorney may seek equitable relief in circuit court for violations of chapter 380, part I, or any rules, regulations, orders, or development orders issued with respect to such a DRI-scale project.<sup>591</sup> In addition, DCA may institute an administrative proceeding against any responsible party to enforce chapter 380, part I, or any binding letter, agreement, rule, order, or development order issued with regard to a project which but for termination of the DRI program in a local jurisdiction would require DRI review.<sup>592</sup>

The reach of these new powers depends upon the revisions to the DRI guidelines and standards required by the 1993 Act.<sup>593</sup> Modifications of the guidelines and standards to add, delete, or alter certain land uses or size of projects will necessarily expand or contract the scope of these powers.

### c. *Opt-In Provision for Small and Rural Jurisdictions*

The ELMS Committee concluded that certain local governments, primarily smaller cities and counties and those located in rural areas of the state, rely upon the DRI program to receive technical assistance

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587. Ch. 93-206, § 56, 1993 Fla. Laws 1887, 1960 (to be codified at FLA. STAT. § 380.07(3)).

588. *Id.* The regional planning council, an affected local government, or any citizen may request DCA to appeal and, if the request is received within 45 days of rendition, DCA must consider the request. *Id.* This provision does not limit DCA's discretion to initiate an appeal.

589. *Id.*

590. *Id.* § 57, 1993 Fla. Laws at 1960-61 (to be codified at FLA. STAT. § 380.11(1)(b)).

591. *Id.*

592. *Id.* (to be codified at FLA. STAT. § 380.11(2)(e)).

593. *Id.* § 76, 1993 Fla. Laws at 1973-74. See *infra* text accompanying notes 627-33.

for developments which their professional staffs might not otherwise be equipped to address.<sup>594</sup> Accordingly, the Committee recommended that certain such jurisdictions have the opportunity to retain the DRI program even after implementing the enhancements to their intergovernmental coordination elements.<sup>595</sup>

The ELMS Committee recommended that all counties under 100,000 population, and all municipalities within those counties, be given the opportunity to "opt-in" to the DRI program instead of terminating it.<sup>596</sup> Thirty-eight counties met that population criterion in the 1990 Census; DCA determined that those areas accounted for only ten percent of the DRI activity in the state from 1980 to 1992, based on the number of applications for development approval.<sup>597</sup>

The Legislature accepted the ELMS Committee's recommendation but, at the request of the Florida League of Cities, expanded the opt-in provision to include municipalities of less than 2,500 in counties in excess of 100,000 population.<sup>598</sup> In all cases, eligibility will be determined by reference to annual population estimates prepared by the Executive Office of the Governor.

The 1993 Act contains precise directions regarding the procedure to be followed by a qualifying local government which wishes to opt-in to the DRI program. Section six of the legislation provides that a qualifying local government wishing to opt-in to the DRI program must notify DCA to that effect no later than the date established by the agency for transmittal of the required amendments to the intergovernmental coordination element.<sup>599</sup> Upon doing so, the local government will be relieved of the duty to adopt the amendments and to implement them with LDRs until its next required EAR review, notwithstanding the December 31, 1997 deadline.<sup>600</sup>

Section fifty-two of the 1993 Act provides that a city or county electing to retain the DRI program must exercise its option by adopting an ordinance or resolution to that effect and rendering it to DCA and the regional planning council.<sup>601</sup> It does not specify a deadline for this action; however, logic dictates that the notification should occur

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594. ELMS III REPORT, *supra* note 16, at 79 (Recommendation 118).

595. *Id.*

596. *Id.*

597. DCA DRI REPORT, *supra* note 553, at 27 (Recommendation II).

598. Ch. 93-206, § 52, 1993 Fla. Laws 1887, 1955-56 (to be codified at FLA. STAT. § 380.06(27)(c)).

599. *Id.* § 6, 1993 Fla. Laws at 1895 (to be codified at FLA. STAT. § 163.3177(6)(h)6.).

600. *Id.* If the jurisdiction exceeds the population criteria for the opt-in provision prior to its EAR review, it must adopt and implement the appropriate plan amendments within a reasonable period of time so that it can terminate the DRI program as required by section 380.06(27)(c).

601. *Id.* § 52, 1993 Fla. Laws at 1955-56 (to be codified at FLA. STAT. § 380.06(27)(c)).

no later than submittal of the certification which would result in automatic termination of the DRI program when accepted by DCA.

Because these provisions address the same topic—replacement of the DRI program by new policies in the intergovernmental coordination elements of local plans—they must be read together. The pertinent language in section six establishes the principal procedural requirements for a local government wishing to opt-in to the DRI program,<sup>602</sup> while pertinent language in section fifty-two adds supplementary details: that the local government's action must be by resolution or ordinance, and that a copy must be submitted to the regional planning council.<sup>603</sup>

If the DRI program is retained in a jurisdiction, all projects which satisfy the guidelines and standards then in effect must undergo DRI review. The DRI program may not be deemed applicable to some DRI-scale projects but not others.<sup>604</sup> A DRI-scale development located partially within a jurisdiction which has elected to retain the DRI program and partially within a jurisdiction which has terminated the DRI program shall be subject to section 380.06.<sup>605</sup>

A city or county which elects to retain the DRI program under the opt-in provision must terminate the DRI program within its jurisdiction as soon as the population of the county meets or exceeds 100,000 or, in the case of a municipality of fewer than 2,500 in a county in excess of 100,000, as soon as the municipality attains a population of 2,500.<sup>606</sup> In addition, the local government may elect to terminate the DRI program even though it still meets the criteria for the opt-in provision.<sup>607</sup> In all cases, the local government may not terminate the DRI program if it has not satisfied the criteria in section 380.06(27)(a).<sup>608</sup>

## 2. *Reform of the DRI Program*

In light of the fact that the DRI program will remain operative in all local jurisdictions during the next few years and in some jurisdictions beyond that, the ELMS Committee recommended a series of reforms to the program.<sup>609</sup> Some reforms were deemed so desirable that

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602. *Id.* § 6, 1993 Fla. Laws at 1895 (to be codified at FLA. STAT. § 163.3177(6)(h)6.).

603. *Id.* § 52, 1993 Fla. Laws at 1955-56 (to be codified at FLA. STAT. § 380.06(27)(c)).

604. *Id.*

605. *Id.*

606. *Id.*

607. *Id.*

608. *Id.*

609. ELMS III REPORT, *supra* note 16, at 82-84 (Recommendations 121-28). These reforms were endorsed by DCA. DCA DRI REPORT, *supra* note 553, at 28-32 (Recommendations III-VII).

the Committee recommended immediate implementation; others were considered revisions that should be made over a longer term, allowing for more study and preparation. In general, the reforms address two concerns—the projects that are to be subjected to DRI review, and the review they must undergo. DCA endorsed the reforms recommended by the ELMS Committee.<sup>610</sup>

*a. Guidelines and Standards*

When the DRI program was established in 1972, the Legislature defined a DRI as a development warranting enhanced state, regional, and local review by virtue of its “character, magnitude, or location.”<sup>611</sup> When the program was implemented, the need for precision resulted in the adoption of guidelines and standards for certain land uses to determine when a project would receive DRI review.<sup>612</sup> Most of the guidelines and standards utilized numerical “thresholds,” providing greater certainty for regulators and regulated alike.<sup>613</sup> This approach was expanded upon in the 1985 Act with implementation of the “banded thresholds” to create a series of presumptions regarding DRI status, depending upon the magnitude of the project in comparison to the numerical thresholds.<sup>614</sup>

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610. Compare DCA DRI REPORT, *supra* note 553, at 28-32 (Recommendations III-VII) with ELMS III REPORT, *supra* note 16, at 82-84 (Recommendations 121-28). One reform recommended by the Committee, but not by DCA, and included in the 1993 Act provides an opportunity for development at a deepwater port to be exempted from DRI review. *Id.* The statute provides: “As an incentive for promoting plan consistency, a deepwater port may opt out of the development-of-regional-impact program if it successfully completes an alternative comprehensive development agreement with a local government pursuant to ss. 163.3220-163.3243.” Ch. 93-206, § 7, 1993 Fla. Laws 1887, 1891 (to be codified at FLA. STAT. § 163.3178(5)). The 1993 Act provides no further details on this exemption, however, such a development agreement must be consistent with the local comprehensive plan and land development regulations. FLA. STAT. § 163.3231 (1991).

DCA also recommended renewal of the aggregation statute which allows DCA to combine certain projects for purposes of DRI review. DCA DRI REPORT, *supra* note 553, at 33 (Recommendation VIII). The Legislature reenacted the statute, Ch. 93-135, § 2, 1993 Fla. Laws 787, 788-90 (reenacting FLA. STAT. § 380.0651(4) (Supp. 1992)).

611. Ch. 72-317, § 6, 1972 Fla. Laws 1162, 1173 (current version at FLA. STAT. § 380.06(1) (Supp. 1992)).

612. Rhodes, *supra* note 546, at 7.

613. To review the original DRI guidelines and standards, see FLA. ADMIN. CODE ANN. r. 28-24.001-.012 (1989). These guidelines and standards were not effective on or after October 1, 1985.

614. FLA. ADMIN. CODE ANN. r. 28-24.014 (1989). The 1985 Act substantially revised the pre-existing guidelines and standards. *Id.* 28-24.015-.032. See also Robert M. Rhodes, C. Laurence Keesey & Thomas G. Pelham, *The Environmental Land and Water Management Act of 1972, Areas of Critical State Concern, and Developments of Regional Impact*, in II FLORIDA ENVIRONMENTAL AND LAND USE LAW 4-27 (Fla. Bar 1989).

Guidelines and standards have been adopted for fourteen specific land uses that are addressed by the DRI program, depending upon the project.<sup>615</sup> The ELMS Committee recommended changes to some of these guidelines and standards; the Legislature adopted those recommendations and made additional revisions.

As an incentive for local governments to bring their local comprehensive plans into compliance, and in furtherance of the compact urban development policy, the ELMS Committee recommended increases in the guidelines and standards for residential, hotel, office, retail, and multi-use projects in certain developed areas.<sup>616</sup> These changes are included in the 1993 Act and are applicable in local jurisdictions whose plans are in compliance.

Residential, hotel, office, and retail land uses are increased by fifty percent in urban central business districts and regional activity centers of cities and counties whose plans are in compliance.<sup>617</sup> With respect to multi-use projects, the guidelines and standards are increased by 100 percent in urban central business districts and regional activity centers of cities and counties whose plans are in compliance, provided that one land use of such a project is residential and amounts to not less than thirty-five percent of the residential threshold that ordinarily would be applicable in that jurisdiction.<sup>618</sup> This provision in effect doubles the existing multi-use thresholds for applicable multi-use projects.

The 1993 Act also increases by 150 percent the guidelines and standards for certain hotels in urban central business districts and regional activity centers of cities and counties whose plans are in compliance.<sup>619</sup> This increased threshold is only available "for a proposed resort or convention hotel located in a county with a population greater than 500,000" where the local government certifies the project will serve an existing convention center of more than 250,000 gross square feet built prior to July 1, 1992.<sup>620</sup> This increase is not in addition to the hotel threshold increase also provided in the 1993 Act.

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615. Those land use categories are: airports; attractions and recreation facilities; hospitals; industrial plants and industrial parks; mining operations; office development; petroleum storage facilities; port facilities; residential developments; schools; retail, service and wholesale development; hotel or motel development; recreational vehicle development; and multi-use development. FLA. ADMIN. CODE ANN. r. 28-24.015 - .032 (1990).

616. ELMS III REPORT, *supra* note 16, at 82-83 (Recommendation 122).

617. Ch. 93-206, § 52, 1993 Fla. Laws 1887, 1948 (to be codified at FLA. STAT. § 380.06(2)(e)).

618. *Id.* The calculations should be based upon the number of units in the residential threshold for the jurisdiction after increasing it by 50 percent because the site is located in an urban central business district or a regional activity center.

619. *Id.*

620. *Id.*



In order to implement these changes, the Administration Commission must by December 1, 1993, adopt rules which describe the characteristics of "urban central business districts" and "regional activity centers."<sup>621</sup> The designation "urban" was intended to ensure that the increased thresholds will be available in the established downtowns of the state's larger counties. An example of a regional activity center envisioned for application of the increased thresholds is the Westshore district of Tampa.

The 1993 Act includes two other changes to the DRI guidelines and standards. With respect to airports, the 1993 Act provides that the "expansion of existing terminal facilities at a non-hub or small hub commercial service airport shall not be presumed to be a development of regional impact."<sup>622</sup> This provision has two significant features. First, it applies only to commercial airports. Second, it only creates a presumption; in an appropriate case, such a development project could be determined to be a DRI due to impacts which are significant enough to overcome the presumption.

With respect to waterports and marinas, the legislation creates two new exceptions to the general rule requiring DRI review of such facilities. The first exception applies to a waterport and marina which provides "wet or dry storage or mooring of fewer than 150 watercraft on or adjacent to an inland freshwater lake except Lake Okeechobee or any lake which has been designated an Outstanding Florida Water."<sup>623</sup>

The second exception applies to a waterport or marina which provides "wet or dry storage or mooring of fewer than 50 watercraft of 40 feet in length or less," whether for sport, pleasure, or commercial use.<sup>624</sup> As with the three pre-existing exceptions to the requirement for DRI review of port facilities, these new exceptions apply only if the DEP issues an order that the waterport or marina will not adversely impact Outstanding Florida Waters or Class II waters, and that it will not contribute boat traffic which will have an adverse effect on an area known or likely to be frequented by manatees.<sup>625</sup>

The 1993 Act contains a new limitation on the availability of exceptions to the general requirement for DRI review of port facilities. The exceptions are not available for a waterport or marina "located within or which serves physical development located within a coastal barrier resource unit on an unbridged barrier island designated" as part of

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621. *Id.*

622. *Id.* § 54, 1993 Fla. Laws at 1958 (to be codified at FLA. STAT. § 380.0651(3)(a)2.a.).

623. *Id.* § 55, 1993 Fla. Laws at 1959 (to be codified at FLA. STAT. § 380.0651(3)(e)1.d.).

624. *Id.* (to be codified at FLA. STAT. § 380.0651(3)(e)1.e.).

625. FLA. STAT. § 380.0651(3)(e) (1991).

the Coastal Barrier Resources System.<sup>626</sup> Therefore, all such facilities are subject to DRI review.

Perhaps the most important provision of the 1993 Act relating to the guidelines and standards is not a change. In response to criticisms that the DRI process has become a "numbers game" which focuses inordinately on project magnitude as the means for determining which projects should be subjected to DRI review, the ELMS Committee recommended that DCA review the entire regimen of guidelines and standards and recommend appropriate revisions.<sup>627</sup> The 1993 Act contains such a mandate, requiring DCA to submit specific proposals to implement the general recommendations of the ELMS Committee regarding DRI guidelines and standards. The report is due December 1, 1993.<sup>628</sup>

DCA's report is required to address three principal issues. First, the report must "recommend changes to increase the importance of character and location, and decrease the significance of magnitude, when determining whether a proposed development is a development-of-regional-impact . . . ."<sup>629</sup> Second, the report must address whether any specific land uses should be eliminated from the guidelines and standards and thus from the DRI program.<sup>630</sup> Third, the report must address whether any specific land uses not currently addressed by the guidelines and standards should be included within the DRI program.<sup>631</sup> In addressing these issues, DCA expressly may consider recommendations from regional planning councils regarding specific locations or activities where DRI review would be appropriate.<sup>632</sup>

This policy review, intended to culminate in legislative consideration during the 1994 Regular Session, is of major importance for several reasons. One reason is that any change to the guidelines and standards will affect the type of projects which are subject to DRI review in cities and counties where the DRI program remains in effect.

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626. Ch. 93-206, § 55, 1993 Fla. Laws 1887, 1959 (to be codified at FLA. STAT. § 380.0651(3)(e)1. e.). The Coastal Barrier Resources System was created by federal law. 16 U.S.C. § 3501 (1982).

627. ELMS III REPORT, *supra* note 16, at 82 (Recommendation 121).

628. Ch. 93-206, § 76, 1993 Fla. Laws 1887, 1973-74.

629. *Id.* DCA endorsed this revision of the guidelines and standards and has forecast some of the changes it might recommend. "It is anticipated that some DRI thresholds in certain areas would be increased to encourage certain types of development, such as urban infill, which implement state policies. The DRI thresholds for developments proposed for environmentally sensitive locations, such as unbridged barrier islands and rural areas, could likely decrease." DCA DRI REPORT, *supra* note 553, at 28.

630. Ch. 93-206, § 76, 1993 Fla. Laws 1887, 1973-74.

631. *Id.*

632. *Id.*

For another, any change to the guidelines and standards will necessarily define the universe of local development orders that may be appealed to the Florida Land and Water Adjudicatory Commission from cities and counties where the DRI program has been terminated.<sup>633</sup>

*b. The DRI Review Process*

The process for conducting DRI reviews also is changed by the 1993 Act. Most of the changes enacted by the Legislature were based on recommendations from the ELMS Committee with the intention of simplifying the process to make it less onerous on developers, thus minimizing the incentive for developers to avoid it. Other changes were made in conjunction with the attempt to refocus regional planning councils, which play a central role in the DRI program, on their planning role and to ensure that they address appropriate regional matters during a DRI review.

The ELMS Committee recommended that a proposed DRI which is consistent with the local comprehensive plan should be eligible for a reward for seeking to conform to public policy.<sup>634</sup> The 1993 Act contains several procedural reforms to implement this recommendation.

In jurisdictions where the local comprehensive plan is in compliance, the 1993 Act provides that a local government may certify to DCA that the proposed development is consistent with the plan and will not require a plan amendment.<sup>635</sup> The statute does not require that the certification decision be made by the governing board; however, it does require that the decision be made at a duly noticed public meeting.<sup>636</sup> The determination could be made by a local planning agency or a duly authorized planning commission.<sup>637</sup> If an individual administrator is authorized to make the determination, she must do so at a public meeting and provide appropriate advance notice of the meeting even though she would not otherwise be subject to the open meetings law.<sup>638</sup>

Once the certification has been submitted to DCA, the developer is entitled to receive expedited DRI review.<sup>639</sup> The rationale for this

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633. See *supra* text accompanying notes 588-92.

634. ELMS III REPORT, *supra* note 16, at 84 (Recommendation 127).

635. Ch. 93-206, § 52, 1993 Fla. Laws 1887, 1950 (to be codified at FLA. STAT. § 380.06(7)(a)). The statute "allows" a developer to utilize this procedure for a qualifying project. House Staff Analysis, *supra* note 27, at 46. In effect, the developer will choose this alternative by seeking certification.

636. Ch. 93-206, § 52, 1993 Fla. Laws 1887, 1950 (to be codified at FLA. STAT. § 380.06(7)(a)).

637. *Id.*

638. *Id.*

639. *Id.*

treatment is that "certain fundamental land use issues should already be adequately addressed in the local plan."<sup>640</sup> The 1993 Act establishes three ways in which review is to be expedited. First, the developer may submit only a short-form application for development approval, eliminating issues already addressed by the local plan.<sup>641</sup> Second, the regional planning council is limited to making only two sufficiency requests for further information, unless the developer agrees to more than two.<sup>642</sup> Third, the local government's public hearing on the application must be held no more than ninety days after the regional planning council notifies the local government that the application is sufficient for purposes of conducting the regional review, although the developer may request an extension.<sup>643</sup>

The 1993 Act does not authorize DCA or any other party to contest a local government's consistency certification. However, the statute does not alter the requirement that a DRI development order must be consistent with the local comprehensive plan.<sup>644</sup> Therefore, DCA would have grounds to appeal such an adopted development order on grounds of an inconsistency. Moreover, the 1993 Act does not affect the authorization for an aggrieved or adversely affected party to file a consistency challenge in circuit court to prevent the local government from taking "any action on a development order . . . which materially alters the use or density or intensity of use on a particular piece of property that is not consistent with the comprehensive plan."<sup>645</sup>

The ELMS Committee also recommended that the DRI program and the local planning program be better coordinated for those projects requiring both a DRI development order and a local plan amendment.<sup>646</sup> The 1993 Act establishes a more coordinated procedure which a developer may choose instead of the conventional plan amendment and DRI authorization processes.<sup>647</sup> It does so through five steps.

First, if the developer wishes to follow the coordinated DRI/plan amendment process, she must provide written notification to DCA, the regional planning council, and the local government with jurisdiction of the project regarding her intention to seek a comprehensive

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640. DCA DRI REPORT, *supra* note 553, at 29 (Recommendation IV).

641. Ch. 93-206, § 52, 1993 Fla. Laws 1887, 1950 (to be codified at FLA. STAT. § 380.06(7)(a)1.).

642. *Id.* (to be codified at FLA. STAT. § 380.06(7)(a)2., (10)(b)).

643. *Id.* (to be codified at FLA. STAT. § 380.06(7)(e)3., (11)(d)).

644. FLA. STAT. § 380.06(14)(b) (Supp. 1992).

645. FLA. STAT. § 163.3215 (1991).

646. ELMS III REPORT, *supra* note 16, at 84 (Recommendation 128).

647. Ch. 93-206, § 52, 1993 Fla. Laws 1887, 1949-50 (to be codified at FLA. STAT. § 380.06(6)(b)1.-7.). The statute "allows" this procedure for qualifying projects so the developer has the choice of whether to utilize it. House Staff Analysis, *supra* note 27, at 46.

plan amendment in connection with the application for development approval or the request for approval of a proposed change.<sup>648</sup> This notification must be submitted no later than the date of a preapplication conference on the application or the proposed change.<sup>649</sup>

Second, upon filing the application or the proposed change, the developer must include a written request for any plan amendments that are necessary.<sup>650</sup> The filing must include all data and analysis necessary to support the proposed plan amendment.<sup>651</sup>

Third, the local government must advertise a public hearing on the proposed plan amendment within thirty days after the developer has filed the application for development approval or the request for approval of the proposed change.<sup>652</sup> The local government must decide whether to transmit the proposed plan amendment to DCA within sixty days after the application or proposed change was filed, although the developer may agree to an extension.<sup>653</sup> The plan amendment process set forth in section 163.3184(3)-(6) will apply, including the provisions authorizing regional planning councils and affected persons to require an intergovernmental review of the proposed amendment.<sup>654</sup>

Fourth, the local government may not hold a public hearing on the application for development approval, the request for approval of a proposed change, or the proposed local plan amendment until thirty days following receipt "of the response from the state land planning agency pursuant to [section] 163.3184(6)." <sup>655</sup> A "response" for purposes of this provision should mean either a report of DCA's objections, recommendations, and comments, or a determination that such a report will not be prepared as provided by section 163.3184(3).<sup>656</sup>

Fifth, the local government must consider at the same public hearing both the DRI application or the proposed change and the proposed local plan amendment.<sup>657</sup> However, the local government must act separately on the application or proposed change for purposes of the DRI program and the proposed amendment for purposes of the local planning program. Following these local government actions, the

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648. Ch. 93-206, § 52, 1993 Fla. Laws 1887, 1949 (to be codified at FLA. STAT. § 380.06(6)(b)1.).

649. *Id.*

650. *Id.* (to be codified at FLA. STAT. § 380.06(6)(b)2.).

651. *Id.*

652. *Id.* (to be codified at FLA. STAT. § 380.06(6)(b)3.).

653. *Id.*

654. *Id.* (to be codified at FLA. STAT. § 380.06(6)(b)4.).

655. *Id.* (to be codified at FLA. STAT. § 380.06(6)(b)5.).

656. *Id.*

657. *Id.* (to be codified at FLA. STAT. § 380.06(6)(b)6.).

normal process and timetables would apply for a potential appeal of the DRI development order and for compliance review of the adopted local plan amendment.<sup>658</sup>

Another reform of the DRI review process recommended by the ELMS Committee addressed the scope of the regional report to be prepared by the regional planning council for a proposed DRI or a substantial deviation from a DRI development order.<sup>659</sup> Section 380.06(12) previously set forth six criteria upon which the regional planning council should base its report and recommendations on the project.<sup>660</sup> Five of these six criteria are repealed by the 1993 Act.<sup>661</sup>

In place of the pre-existing criteria, the Legislature has directed that the regional report and recommendations address only three issues. First, the regional planning council must determine whether, and the extent to which, the project would have a favorable or unfavorable impact on state or regional resources or facilities identified in the State Comprehensive Plan, the State Land Development Plan, or the appropriate regional policy plan.<sup>662</sup> Second, the regional planning council must determine whether, and the extent to which, the project would have a significant impact on other local jurisdictions, including those which are adjacent.<sup>663</sup> Third, the regional planning council must consider whether, and the extent to which, the project would favorably or adversely affect the ability of people to find adequate housing reasonably accessible to their workplaces.<sup>664</sup>

Because one purpose of this revision is to "avoid the potential for duplication of local government reviews,"<sup>665</sup> the regional planning council may review and comment on local issues only upon the request of the local government with jurisdiction over the project.<sup>666</sup> Smaller and rural jurisdictions in particular may wish to utilize the

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658. *Id.* (to be codified at FLA. STAT. § 380.06(6)(b)7.).

659. ELMS III REPORT, *supra* note 16, at 83 (Recommendation 123).

660. FLA. STAT. § 380.06(12) (1992 Supp.).

661. *Compare id.* with ch. 93-206, § 52, 1993 Fla. Laws 1887, 1952 (to be codified at FLA. STAT. § 380.06(12)).

662. Ch. 93-206, § 52, 1993 Fla. Laws 1887, 1952 (to be codified at FLA. STAT. § 380.06(12)(a)1.). Until replaced by a new strategic regional policy plan, the pre-existing comprehensive regional policy plan will be the appropriate regional planning document for purposes of this review. *Id.*

663. *Id.* (to be codified at FLA. STAT. § 380.06(12)(a)2.).

664. *Id.* (to be codified at FLA. STAT. § 380.06(12)(a)3.). This provision in effect reenacts the pre-existing provision regarding affordable housing issues in DRI reviews. *Compare id.* with FLA. STAT. 380.06(12)(a)5. (Supp. 1992).

665. ELMS III REPORT, *supra* note 16, at 83 (Recommendation 123).

666. Ch. 93-206, § 52, 1993 Fla. Laws 1887, 1952 (to be codified at FLA. STAT. § 380.06(12)(a)2.).

regional report as a means to obtain technical assistance in the evaluation of local issues raised by a development proposal.

Another procedural change affecting the role of regional planning councils in DRI reviews is the repeal of the councils' authority to appeal a DRI development order to the Florida Land and Water Adjudicatory Commission.<sup>667</sup> That provision is discussed above<sup>668</sup> as a means for focusing regional planning councils on their planning and coordination roles and shifting them away from activities that are regulatory in nature.<sup>669</sup>

Another major revision of the process is uniform statewide standards for the review of DRIs. This reform was proposed by both the ELMS Committee and DCA.<sup>670</sup> The intention of this reform is to eliminate one source of confusion and contention in the process. As DCA explained the need for this change:

Much of the dissension involving the DRI process has centered around the differing set of established rules and policies at the local, regional and state levels. This can result in various reviewing entities disagreeing on what needs to be done to adequately mitigate the impacts of a proposed project. To alleviate this situation, one set of state and regional standards should be established by the DCA for use by all entities in the review process.<sup>671</sup>

The 1993 Act requires DCA to adopt rules by January 1, 1994, establishing uniform statewide standards for DRI reviews.<sup>672</sup> In establishing these standards, DCA has suggested it might set forth which matters are appropriate for state or regional consideration and which are local in nature.<sup>673</sup>

The 1993 Act eliminates all authority of regional planning councils to establish their own standards for DRI reviews, as well as to set forth "regional issues" to be considered in DRI reviews.<sup>674</sup> The only matters to be addressed in regional reports are those required by section 380.06(12) or set forth in the uniform standards adopted by

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667. *Id.* § 56, 1993 Fla. Laws at 1959-60 (amending FLA. STAT. § 380.07(2) (1991)).

668. *See infra* Part III.A.2.f.

669. *See supra* text accompanying notes 203-10.

670. ELMS III REPORT, *supra* note 16, at 83 (Recommendation 125); DCA DRI REPORT, *supra* note 553, at 30-31 (Recommendation V).

671. DCA DRI REPORT, *supra* note 553, at 30 (Recommendation V).

672. Ch. 93-206, § 52, 1993 Fla. Laws 1887, 1954 (amending FLA. STAT. § 380.06(23)(c) (Supp. 1992)).

673. DCA DRI REPORT, *supra* note 553, at 30-31 (Recommendation V).

674. Ch. 93-206, § 52, 1993 Fla. Laws 1887, 1953-54 (amending FLA. STAT. § 380.06(23) (Supp. 1992)).

DCA. DCA may adopt by rule a different review standard for a specific comprehensive planning district if the regional planning council requests such a regional variation and DCA enters a finding that the statewide standard is inadequate to protect or promote the state or regional interest at issue.<sup>675</sup> The standards must be applied by regional planning councils, water management districts, and all other agencies for purposes of DRI reviews.<sup>676</sup>

The Legislature included in the 1993 Act two provisions which were not considered by the ELMS Committee or DCA in its policy review. With one provision, the Legislature sought to protect the rights of vested DRIs when redevelopment is undertaken. The 1993 Act provides that, where all or a portion of a vested DRI project is "demolished and reconstructed within the same approximate footprint of buildings and parking lots," the demolition and reconstruction shall not serve to divest the project of its vested DRI rights unless the change in the size of the development exceeds the substantial deviation criteria of section 380.06(19)(b).<sup>677</sup>

The Legislature also addressed an issue with respect to the abandonment of an approved DRI. The 1993 Act provides that, if an owner or developer has not proceeded with development authorized by a DRI development order at the time of a proposed abandonment, and the owner or developer does not propose to undertake any of the approved development after abandonment, the local government may not require the owner or developer to contribute any land, moneys, or public facilities as a condition of the abandonment.<sup>678</sup> Such exactions may not be required even if they were set forth as conditions of the development authorized by the DRI development order.

### B. Areas of Critical State Concern

Where the DRI program focuses on specific land development projects, the critical areas program focuses on discrete geographic areas which are facing extraordinary growth-related concerns. It is by far the most intrusive program in the planning and growth management system because of the extent to which it limits the home rule powers

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675. *Id.* (to be codified at FLA. STAT. § 380.06(23)(c)). One example of such a variation in existing law, the DRI Hurricane Preparedness Rule. FLA. ADMIN. CODE ANN. r. 9J-2.0257 (1990), recognizes the Southwest Florida Regional Planning Council's jurisdiction as a special hurricane preparedness district for purposes of DRI review. DCA DRI REPORT, *supra* note 553, at 30 (Recommendation V).

676. Ch. 93-206, § 52, 1993 Fla. Laws 1887, 1953-54 (to be codified at FLA. STAT. § 380.06(23)(c)).

677. *Id.* at 1949 (amending FLA. STAT. § 380.06(4)(f) (Supp. 1992)).

678. *Id.* at 1954-55 (amending FLA. STAT. § 380.06(26) (Supp. 1992)).



of local governments. For this reason, no more than five percent of the land under the state's jurisdiction may be placed in designated areas of critical state concern.<sup>679</sup>

Since the inception of the program, five areas of critical state concern have been designated—the Big Cypress Swamp, the Green Swamp, the Florida Keys, the City of Key West, and the Apalachicola Bay.<sup>680</sup> Despite the implementation of local comprehensive planning throughout the state, the ELMS Committee observed that the critical areas program integrated state and local regulations with state oversight by DCA and the Administration Commission.<sup>681</sup> This unique blend of governmental authority prompted the Committee to conclude that, with several refinements, the critical areas program should be continued because “a local comprehensive plan cannot be as effective at protecting an especially sensitive State or regional resource” as the critical areas program.<sup>682</sup>

The 1993 Act includes only two of the major statutory changes to the critical areas program recommended by the ELMS Committee.<sup>683</sup> They include provisions which address what the Committee described as “one of the program's major disappointments”<sup>684</sup>—the failure to achieve permanent de-designation of any of the five critical areas designated since 1972. The changes also are intended to foster increased coordination of state regulatory programs with the critical area program.

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679. FLA. STAT. § 380.05(20) (1991).

680. House Staff Analysis, *supra* note 27, at 8-9.

681. ELMS III REPORT, *supra* note 16, at 85.

682. *Id.*

683. The 1993 Act also includes a provision, recommended by the ELMS Committee, which is intended to promote utilization of state land acquisition programs for the purchase of heavily restricted private lands within designated areas. Ch. 93-206, § 45, 1993 Fla. Laws 1887, 1942 (amending FLA. STAT. § 253.023(3) (Supp. 1992)). See also ELMS III REPORT, *supra* note 16, at 87 (Recommendation 134). The statutory change may not in fact implement the Committee's recommendation.

In addition, the ELMS Committee recommended an enlargement of the critical areas program. ELMS III REPORT, *supra* note 16, at 86-87 (Recommendations 130-32). For example, it recommended allowing a critical area designation for a local government that is in a financial emergency or which has consistently failed to adopt a local comprehensive plan which is in compliance. These recommendations were opposed by local governments and ultimately were dropped from the legislation.

684. ELMS III REPORT, *supra* note 16, at 86 (Recommendation 129). The City of Key West Area of Critical State Concern was designated by the Administration Commission in 1975, but the designation was invalidated by the Florida Supreme Court in the landmark case, *Askew v. Cross Key Waterway*, 372 So. 2d 913 (Fla. 1978). The area was redesignated by the Legislature in 1979, de-designated by the Administration Commission in 1983, and redesignated by the Administration Commission in 1985. House Staff Analysis, *supra* note 27, at 9.

### 1. *Timely De-designation*

The ELMS Committee observed that the original intention for the critical areas program was for each designation to last as short a time as possible consistent with achievement of the purposes of the designation. "A critical area designation is not intended to be permanent."<sup>685</sup> And yet the program has not succeeded in achieving its objectives in the areas designated to date, allowing de-designation. In contrast to this failure of the critical areas program, the ELMS Committee examined the Wekiva River Protection Act<sup>686</sup> and concluded that it was "an important model for showing how a State response to a sensitive State or regional resource can be identified and implemented with prompt elimination of the State role."<sup>687</sup> The Committee recommended several revisions of section 380.05 based on the Wekiva River Protection Act. These provisions were included in the 1993 Act.

When a critical area is designated by rule, the 1993 Act requires the Administration Commission to take certain steps to facilitate the area's eventual de-designation.<sup>688</sup> Under pre-existing law, the Administration Commission was expressly required to specify in its designation rule only the boundaries of the area and the principles for guiding development.<sup>689</sup> The 1993 Act sets forth four additional requirements for a designation rule adopted by the Administration Commission.

First, the rule must set forth "[a] clear statement of the purpose for the designation."<sup>690</sup> The purpose of the statement is to put all parties on notice as to the ends of the designation. The statement need not be lengthy, although some detail would be beneficial. The key feature of the purpose statement must be its lack of ambiguity.

Second, the rule must include "a precise checklist of actions which, when implemented, will result in repeal of the designation by the Administration Commission, and the agencies or entities responsible for taking those actions."<sup>691</sup> The purpose of the checklist is to require the

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685. ELMS III REPORT, *supra* note 16, at 86 (Recommendation 129).

686. FLA. STAT. § 369.301-.309 (1991).

687. ELMS III REPORT, *supra* note 16, at 86 (Recommendation 129).

688. The 1993 Act imposes these requirements on the Administration Commission but does not purport to establish them as requirements for future statutory designations because one legislature may not impose binding requirements on another. However, any statute designating a critical area in the future should seek to incorporate the same provisions the Legislature imposed upon the Administration Commission.

689. FLA. STAT. § 380.05(1) (1991).

690. Ch. 93-206, § 50, 1993 Fla. Laws 1887, 1945 (to be codified at FLA. STAT. § 380.05(1)(b)3.).

691. *Id.* (to be codified at FLA. STAT. § 380.05(1)(b)4.). In any recommendation to the Administration Commission for designation of a critical area, DCA must include, in addition to those items required by pre-existing law, a recommendation on "actions which the local govern-

Administration Commission to specify the steps which will result in de-designation. This feature of the rule would allow governmental entities, primarily the affected local government, to know how de-designation can be achieved. The checklist will be tantamount to a statement of the planning or regulatory strategy which is intended to achieve the purpose of the designation.

Third, the rule must contain a "list of those issues or programs for which mechanisms must be in place to assure ongoing implementation of the actions taken to result in repeal of the designation."<sup>692</sup> The purpose of this provision is to ensure that the governmental entities, primarily the local government, know the extent of ongoing planning or regulatory activities that are necessary for de-designation so they may establish appropriate programs or agencies to bear those responsibilities.

Fourth, the rule must identify the state agencies which administer programs which may affect the purpose of the designation.<sup>693</sup> The purpose of this requirement is to facilitate another new provision, discussed below, which is intended to promote closer coordination of state agency regulatory programs with the critical area program.

The 1993 Act seeks to promote de-designation in another way. Under pre-existing law, the Administration Commission was required to repeal a designation no less than twelve months and no more than thirty-six months following approval by DCA or adoption by the Commission of all required land development regulations and local comprehensive plans as required by section 380.05.<sup>694</sup> A new factor is added to this list of steps which, when taken, require de-designation—"the implementation of all the actions listed in the designation rule for repeal of the designation."<sup>695</sup> The purpose of this provision is to assure all governmental agencies, primarily the affected local government, that taking the required steps in the designation rule checklist will result in de-designation. A failure of the Administration Commis-

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ment and state and regional agencies must accomplish in order to implement the principles for guiding development." *Id.* (to be codified at FLA. STAT. § 380.05(1)(a)). The purpose of this requirement is to assist the Administration Commission in evaluating a recommendation for designation and, if adopted, to provide guidance and direction to agencies whose programs can help bring about de-designation. See text accompanying *infra* notes 701-10.

692. Ch. 93-206, § 50, 1993 Fla. Laws 1887, 1945 (to be codified at FLA. STAT. § 380.05(1)(b)5.).

693. *Id.* (to be codified at FLA. STAT. § 380.05(1)(b)6.). In any recommendation to the Administration Commission for designation of a critical area, DCA must specify, in addition to those items required by pre-existing law, "the state agencies with programs that affect the purpose of the designation." *Id.* (to be codified at FLA. STAT. § 380.05(1)(a)).

694. FLA. STAT. § 380.05(15) (1991).

695. Ch. 93-206, § 50, 1993 Fla. Laws 1887, 1946 (amending FLA. STAT. § 380.05(15) (1991)).

sion to abide by this requirement could be remedied by injunctive relief.

## 2. *Coordination with State Regulatory Programs*

The ELMS Committee also considered an anomaly of pre-existing law regarding the critical areas program. This anomaly was the lack of adequate coordination of state regulatory programs with the critical areas program. Section 380.05(1)(b) directed each designation rule to "require state and regional agencies to coordinate their plans and to conduct their programs and regulatory activities consistent with the adopted principles for guiding development, *within the scope of statutory authority granted to the state land planning agency by the Legislature.*"<sup>696</sup> However, the Committee received testimony that state agency regulatory programs still were not coordinated with the critical areas program. It recommended several statutory changes intended to foster that coordination.<sup>697</sup>

The 1993 Act requires each state agency with rulemaking authority for a program that affects a designated critical area to review that program for consistency with the purpose of the designation and the principles for guiding development.<sup>698</sup> Each agency is required to submit a report to the Administration Commission within six months after the effective date of a rule or statute designating a critical area; the report is required to address "the effect of the reporting agency's programs upon the purpose of the designation."<sup>699</sup>

The 1993 Act also seeks to bring about changes in those programs which affect a critical area in order to further the purpose of a designation and thereby bring about de-designation. Each state agency with rulemaking authority for a program that affects a designated critical area is required to set forth in the report any recommended changes to "permitting standards or criteria, or other changes to the program," which are necessary to further the purpose of the designation and are consistent with the principles for guiding development.<sup>700</sup> The recommendations regarding different permitting standards or criteria must be explained and justified by the reporting agency.<sup>701</sup>

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696. FLA. STAT. § 380.05(1)(b) (1991) (emphasis added), amended by ch. 93-206, § 50, 1993 Fla. Laws 1887, 1945.

697. ELMS III REPORT, *supra* note 16, at 87 (Recommendation 133).

698. Ch. 93-206, § 50, 1993 Fla. Laws 1887, 1946 (to be codified at FLA. STAT. § 380.05(22)(a)1.).

699. *Id.*

700. *Id.* (to be codified at FLA. STAT. § 380.05(22)(a)2.).

701. *Id.*

The Administration Commission is assigned the role of coordinating all agency rule changes which are intended to further the purpose of a critical area designation.<sup>702</sup> The recommendations regarding agency rule changes in a critical area are to be reviewed by the Administration Commission, which must accept with or without modification or reject each agency's recommendations.<sup>703</sup> If it accepts the agency's recommendations with or without modification, the Administration Commission must direct the agency to proceed with rulemaking and specify the rules to be promulgated to further the purpose of the designation; the agency may not proceed to rulemaking without the Commission's directive.<sup>704</sup> This provision thus places the Administration Commission in a position to ensure that its planning and regulatory strategy for the designated area will be implemented.

The rule changes may not go beyond the scope of each agency's statutory authority without legislative action. The 1993 Act expressly requires each agency to specify any statutory changes necessary to implement permitting standards or criteria which would further the purpose of the designation but which are not within the scope of the agency's existing authority.<sup>705</sup> If the Administration Commission accepts the recommendation for a statutory change, it shall submit the report with its recommendations to the Legislature.<sup>706</sup>

All rules adopted to implement this provision must apply only within the boundaries of the designated area and must be consistent with the principles for guiding development.<sup>707</sup> A copy of the adopted rule must be filed with the Administration Commission and DCA.<sup>708</sup>

With respect to those critical areas in existence on July 1, 1993, the 1993 Act requires that certain state agencies prepare and submit reports to the Administration Commission evaluating the effect of permitting standards and programs on the purpose of each critical area designation.<sup>709</sup> The reports are to be submitted no later than January 1, 1994, and the legislation specifies which agencies are required to prepare reports for each designated critical area.<sup>710</sup> For each report, DCA is required to prepare "the background and reasons for the designation and the progress made in meeting the goals of the designation."<sup>711</sup>

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702. *Id.*

703. *Id.*

704. *Id.*

705. *Id.* (to be codified at FLA. STAT. § 380.05(22)(a)3.).

706. *Id.*

707. *Id.* (to be codified at FLA. STAT. § 380.05(22)(a)2.).

708. *Id.*

709. *Id.* (to be codified at FLA. STAT. § 380.05(22)(b)).

710. *Id.*

711. *Id.* (to be codified at FLA. STAT. § 380.05(22)(b)6.).

## VII. CONCLUSION

In its 1993 Regular Session, the Legislature made the most significant modifications to Florida's integrated planning and growth management system since the second-generation of growth management programs won legislative approval in 1984 and 1985. These modifications were the product of a far-reaching policy review conducted by the third Environmental Land Management Study Committee with the active involvement of the constituencies and governmental agencies that have a stake in the system. The 1993 modifications represent not only the fine-tuning of many programs to address real or potential problems within the growth management system, but also bold steps forward in its continued evolution and maturation. When these changes are implemented, the legal system should be in place for the next generation of growth management in Florida.

The immediate challenge that lies ahead is the successful implementation of the 1993 Act. In general, the task of implementation will be carried out in the trenches—by state and regional administrative agencies and, most of all, by local governments. Much additional work remains to be done on matters that did not result in fruitful recommendations from the ELMS Committee or action by the Legislature. In coming years, for example, policymakers should increase the reliance on incentives, further coordinate planning programs in urban areas to foster the development of public transportation, speed the approval process for development that is consistent with local comprehensive plans, and make the promotion of economic growth an integral component of the growth management system.

Growth management continues to enjoy broad public support in Florida. On balance, the state's planning and growth management system furthers important public policies related to natural resource protection, the provision of adequate public facilities, and community development. As important as these purposes may be, however, the system can cause economic dislocations, unfair burdens on individuals, and excessive state involvement in local affairs. When one of these problems arises, it should be addressed and remedied for reasons of equity as well as the long-term stability of the growth management system. A fragile equilibrium should be maintained.

Policymakers have sought to maintain this equilibrium by following a moderate course throughout the evolution of Florida's growth management system. They have done so because "we have learned through the years that growth management, to work effectively, must balance the affected but often competing interests of *all* our people."<sup>712</sup> In the next generation of growth management in Florida, this

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712. Letter from Lawton Chiles, Gov., Fla., to Rep. Bolley L. Johnson, Speaker, Florida

commitment to making the growth management system the servant of everyone—and not a captive of any single constituency at the expense of others—may present the most daunting challenge of all. Surely it will be the most important.

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House of Representatives (Feb. 19, 1993) (copy on file with the *Florida State University Law Review*).