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Concurrency: Problems, Practicalities, and Prospects

Cover Page Footnote

This speech was delivered as the Journal's 1991 Distinguished Lecture on February 28, 1991. The author thanks Donna Blanton and Cathy Sellers for their assistance with this article.

CONCURRENCY: PROBLEMS, PRACTICALITIES, AND PROSPECTS*

ROBERT M. RHODES**

Since passage of the Growth Management Act (GMA) in 1985,¹ the one thing I believe we can all agree on is that it will never again be development business as usual. And for the most part that's positive, for if nothing else our communities finally are forced to deal with their respective visions of the future and to plan and pay for implementing these visions.²

Intergovernmental planning consistency and concurrency are the twin engines that drive the GMA. Local plans must be consistent with, that is, further and complement regional and state policy plans.³

Required, coordinated, intergovernmental planning makes sense, but our state and regional planning polestars need thorough review.⁴ The state plan is hardly a coherent, articulated vision of Florida's future. It is vague and internally inconsistent. The plan's role in state level decision making is potentially strong and practically weak. In short, the purpose, substance, and commitment to this plan screams for thorough analysis.

The quality of regional plans is varied.⁵ These "policy" plans reflect the tenuous and ambiguous position of regional planning councils in our intergovernmental planning structure—part global planner, part regulator, and full time technical assistant to, and financial de-

* This speech was delivered as the *Journal's* 1991 Distinguished Lecture on February 28, 1991.

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1. Ch. 85-55, 1985 Fla. Laws 207 (codified at FLA. STAT. §§ 163.3161-.3215 (1989)). The Local Government Comprehensive Planning and Land Development Regulation Act, popularly known as the Growth Management Act, later was expanded to include sections 163.3161 through .3243 of the Florida Statutes.

2. Growth management has the potential to shift the critical decisions of the what, when, and where of development away from the private sector and toward the public sector because it requires government to anticipate, plan for, and, with the private sector, accommodate new growth in an orderly manner.

3. FLA. STAT. § 163.3177(2) (1989).

4. See generally Rhodes & Apgar, *Charting Florida's Course: The State and Regional Planning Act of 1984*, 12 FLA. ST. U.L. REV. 583 (1984). The State Comprehensive Plan is codified at chapter 187, Florida Statutes. FLA. STAT. 187.101-.201 (1989 & Supp. 1990).

5. Comprehensive regional policy plans are authorized by section 186.507, Florida Statutes.

pendent of, constituent local governments.⁶ Once the councils' role is clarified and their mission better articulated, more relevant plans can be adopted.

And what about the local planning efforts? According to the Department of Community Affairs' (DCA) box score, as of January 7, 1991, more than 380 local plans have been prepared, approximately 280 have been adopted, and 262 have been reviewed for compliance. Of the adopted plans, 160 have been found in compliance with state requirements and an additional 61 plans are subject to compliance agreements, which, if implemented, should bring these plans into compliance. Only forty-one plans are not in compliance and are not subject to a compliance agreement.⁷

Former DCA Secretary Tom Pelham believes this is a "remarkable record."⁸ I believe Mr. Pelham did an outstanding job in birthing the GMA, and DCA's numbers are impressive. Localities have produced plans and many have already adopted implementing regulations. But what is the quality of these plans and regulations? Do they achieve the lofty goals of the GMA to enhance our quality of life and reform undesirable growth patterns? Some think not.

Land use lawyers Charles Siemon and Michelle Zimet characterize adopted local plans as negative, reactive instruments that "are by and large dull, unimaginative compendia of data and statements that offer little insight into or vision of the future."⁹ They observe that slavish adherence to the state minimum criteria rule 9J-5,¹⁰ described as a "microwave planning cookbook," has converted the GMA "from a planning act into an engineering act, or planning 'by the numbers.'"¹¹

I agree to a point, but the Siemon/Zimet critique must be tempered by public administration reality. My experience in administering chap-

6. Pursuant to sections 186.502 and 186.504, Florida Statutes, 11 regional planning councils have been created to address planning and development issues of greater than local scope, including local comprehensive planning and development of regional impact issues. FLA. STAT. §§ 186.502, .504 (1989). Administrative rules governing each regional planning council are codified in chapter 29 of the Florida Administrative Code. Section 186.507(1), Florida Statutes, authorizes the regional planning councils to adopt comprehensive regional policy plans establishing regional goals, objectives, and policies to guide long-range physical, economic, and social development within the region. FLA. STAT. § 186.507(1) (1989).

7. Pelham, *A Tribute to Florida's Local Governments*, FLORIDA DEP'T OF COMMUNITY AFFAIRS TECHNICAL MEMO, Jan. 1991, at 1, 2.

8. *Id.*

9. Siemon & Zimet, *Public Places as "Infrastructure,"* ENVTL. & URBAN ISSUES, Winter 1991, at 1, 2.

10. *Id.* Pursuant to section 163.3177(10), Florida Statutes, chapter 9J-5, Florida Administrative Code, establishes the minimum criteria to be used by the Department of Community Affairs to review and determine whether local government comprehensive plans and plan amendments are in compliance with the requirements of the Growth Management Act.

11. Siemon & Zimet, *supra* note 9, at 2.

ter 380 in its infancy suggests that initial emphasis must be placed on attaining recognition of and adherence to the new process.¹² This is particularly important for intergovernmental regulatory programs that aim to modify ingrained governmental habits. Only after a new program has developed minimum credibility and acceptance through adherence can administrative focus shift to qualitative goals.

It is now time to start the needed transition from "planning by the numbers" to planning more livable communities. First generation planning under the GMA has been dominated by State insistence on local plan acceptance of concurrency, and local concern with satisfying the State at almost any cost, thereby avoiding political embarrassment and loss of state dollars. Second generation planning must start with a thorough examination of concurrency.

Concurrency requires that public services such as roads, sewers, and parks be made available to alleviate the public service impacts of new development when those impacts occur, and that new development not reduce established levels of public services.¹³

Without question, concurrency provides teeth and bite to growth management.

Yet, the practical implications of this seemingly simple and politically seductive policy were not fully understood when it was enacted in 1985.¹⁴ And its potential impact was virtually ignored for several years thereafter.

We are now starting to experience concurrency reality. It's not surprising there is growing concern and uncertainty in the regulated community, already bloodied by a plummeting economy, as unattainable levels of service produce *de facto* moratoria, local governments place areas in "deferred development zones" due to inadequate services, and localities grant concurrency compliance permits for short time periods, thus requiring continuous, future reviews for longer term projects.

This uncertainty is reflected in an unsettling national image of Florida as an unstable business climate, and a consequent impact on the state's already troubled economy. The hard fact is: businesses simply

12. Chapter 380, Florida Statutes, known as the Florida Land and Water Management Act of 1972, establishes the development of regional impact (DRI) and area of critical state concern programs, which are administered by the Department of Community Affairs (formerly the Division of State Planning). See Rhodes, *Florida's Environmental Land and Water Management Act Implements Article 7 of the Proposed American Law Institute Model Code*, AM. INST. PLAN. NEWSL., Jan. 1974, at 7.

13. FLA. STAT. §§ 163.3177(10)(h), .3202(2)(g) (1989).

14. See Rhodes, *A Business Perspective on Florida's 1985 Growth Management Act*, in PERSPECTIVES ON FLORIDA'S GROWTH MANAGEMENT ACT OF 1985, at 48 (1986).

are not going to undertake major projects, in Florida or anywhere else, unless they can understand and fairly estimate development costs. This cannot be done in many localities because of concurrency unknowns, and in those localities where a price tag can be placed on concurrency satisfaction, front-end infrastructure costs appear prohibitive.

The core problem with concurrency is that the State uniformly imposed this planning and regulatory standard on an already overburdened and deficit-ridden service system without a strategy to cure past neglect and accommodate new needs. Thus, a new project seeking approval cannot necessarily pay its fair share of needed services and meet concurrency. Concurrency holds *all* new projects accountable for past sins and halts *all* new approvals until the concurrency piper is paid. Because local governments are strapped financially and are generally unwilling to spend money to cure deficits to meet new level of service standards, businesses are faced with a lose-lose situation—pay exorbitant up-front service costs far exceeding their fair share, or walk away from the project. Given this choice, new businesses are walking to other states.

Politics aside, there is little genuine dispute as to the extent of the deficit or the need for new infrastructure funding sources, particularly for transportation.¹⁵ And with the federal government passing to

15. See generally STATE COMPREHENSIVE PLAN COMMITTEE, KEYS TO FLORIDA'S FUTURE: WINNING IN A COMPETITIVE WORLD (1987). The report generally is referred to as the Zwick Commission Report in honor of the committee's chairman, Charles J. Zwick, former Chairman of Southeast Banking Corporation. Noting that Florida's problems include jammed highways, polluted natural resources, struggling schools, poorly-paid teachers, teeming jails, neglected children, needy senior citizens, inadequate health care, a shortage of affordable housing, and a declining quality of life, the report found that financing Florida's orderly growth would take an additional \$52.9 billion over the next 10 years. *Id.* at 3. The report recommended a stable source of revenue for state government that would keep pace with Florida's growth. *Id.* at 42.

The Florida Department of Transportation recently prepared a report to the Florida Transportation Commission estimating that \$14.6 billion in additional revenue—\$7.6 billion for state roads and \$7 billion for local transportation modes—would be needed over the next five years to bring transportation systems up to DOT standards. See FLORIDA DEPT. OF TRANSPORTATION, 1991 FLORIDA TRANSPORTATION PLAN 19 (available from the Department of Transportation).

In response to the Zwick Commission Report, the Florida Legislature created the State Infrastructure Fund in 1987 to help pay for the State's capital needs. The fund was to consist of an annual allocation of \$500 million in sales tax revenue that could be used only for construction of several kinds of public facilities, right-of-way acquisition, matching grants to local governments to help meet comprehensive planning requirements, revenue bonds to finance state capital projects, and affordable housing programs. Because demands for operating expenses in numerous areas of state government are so extensive, however, lawmakers have not adhered to the fund's limited, permitted uses. In 1989, the Legislature reduced the automatic allocation of general sales tax revenue to the fund from \$500 million to \$350 million. In 1990, the permitted uses of the fund were expanded to include financing recurring Department of Corrections programs and facility operations. Of the \$350 million in sales tax revenue allocated to the fund in 1990, \$116

states and localities even more infrastructure responsibilities, it's not a question of *whether* these resources will be provided, it's only a question of how bad our economic situation becomes before decision-makers finally act.¹⁶

Another fundamental weakness in concurrency is the failure to close the critical intergovernmental link; localities are subject to concurrency, the State is not. DCA rules require local levels of service for state roads to be consistent with state standards "to the maximum extent feasible."¹⁷ But because state standards are exempt from concurrency, state road service standards—unlike local standards—need not be financially feasible, or based on "currently available" revenue sources,¹⁸ or grounded on a program to cure present level of service deficiencies. Moreover, these roads are notoriously congested, reflecting years of funding neglect.

Nonetheless, in most cases, localities are pressed through state review of their plans to accept state standards, thus ensuring application of infeasible standards to facilities over which localities and local developers exert no funding control, and the promise of future local moratoria or significant relaxation of state service standards.¹⁹

Proper administration of concurrency raises other concerns. Concurrency management systems must be able to monitor committed development impacts on infrastructure, determine available capacity, and measure potential impacts of new development on those capacities. These systems are complex, costly, and beyond the means of

million was used to pay *salaries* of employees in the Department of Corrections. During the entire four years the fund has been in existence, only \$5.2 million has been allocated to transportation improvements. Clearly, the State Infrastructure Fund has not served the purpose for which it was originally intended. See HOUSE COMMITTEE ON APPROPRIATIONS, STATE INFRASTRUCTURE FUND (available from the Committee).

16. The possible economic effects of concurrency without new funding sources have recently been reported by Florida TaxWatch. The effect on residential construction, employment, and personal income is startling. But, most depressing is that State and local sales tax revenues over the decade of the 90's are expected to be \$1.9 billion less than anticipated, making it even more difficult to pay for needed public facilities and services with existing revenues, and further exacerbating existing backlogs. The report estimates various costs of implementing concurrency without funding transportation. Among the major findings are that residential construction would drop 24% below the "Base Case" projected levels in 1990, the value of commercial permits would drop by 13%, total employment growth would fall by almost 28%, the cumulative loss in total personal income from 1990 to 1998 would be \$56.6 billion, the cumulative loss in state and local sales tax revenues from 1990 to 1998 would be \$1.9 billion, and the dollar volume of mortgages for new and existing homes would be \$82 billion less during the period from 1990 to 1998. FLORIDA TAXWATCH INC., THE COST OF NOT ACTING: THE ECONOMIC IMPACT OF IMPLEMENTING CONCURRENCY WITHOUT NEW TRANSPORTATION FUNDING ii (Apr. 1990).

17. FLA. ADMIN. CODE ANN. r. 9J-5.007(2)(b) (1990).

18. See *id.* r. 9J-5.0055(2)(c)(3) (1990) (applying only to local governments).

19. See *infra* note 37.

many local governments. Without these systems, one cannot attain a simple, expeditious answer from government whether a proposed project will meet or fail concurrency mandates.²⁰ If government cannot provide this information, the private sector must, and "concurrency audits," performed by a multi-disciplinary professional team, are in vogue.²¹ These audits necessarily are equivocal, tentative and generally do not provide conclusions that can be taken to the bank. And, of course, bankers, along with local regulators, must be satisfied with audit findings.

Strict application of concurrency also raises troublesome legal questions, particularly in regard to indefinite moratoria and related issues of substantive due process.

At bottom, concurrency is a mechanism for timing development with available services. It is one of numerous "adequate public facilities" programs growing nationwide.²² The national precedent for this type of land use regulation was established in an early 1970's New York case which arose in the town of Ramapo.²³ Ramapo adopted a

20. The Broward County TRIPS traffic monitoring system and Los Angeles County Development Monitoring System (DMS) are useful examples. Los Angeles' DMS analyzes all infrastructure needs, while Broward County's TRIPS model applies only to roads. Both systems are computer-based, and monitor service levels by adding development impacts to existing committed demands and then comparing the results with capacity. This determination provides the basis for approval, denial, or approval with conditions. If a proposed project generates a deficiency in any service, the developer must mitigate the problem by scaling back the project size, delaying or phasing the development, or expanding the existing facility at the developer's expense. Without this mitigation, the project cannot proceed. For an overview of Broward County's system, see *Concurrency Management Systems Examined*, DEP'T OF COMMUNITY AFFAIRS TECHNICAL MEMO, Fall 1989, at 1, 8-9. For a summary of the Los Angeles system, see *Managing Concurrency*, DEP'T OF COMMUNITY AFFAIRS TECHNICAL MEMO, Spring 1989, at 4, 5.

21. Audits require several determinations including:

1. Whether a project is vested and not subject to concurrency.
2. A determination of project capacity needs for each of the six concurrency services and facilities, and mass transit, if applicable.
3. An evaluation and determination of existing and committed government capacity.
4. A determination whether capacity can be reserved.
5. An evaluation of government's scheduled improvements.
6. A determination of capacity deficiencies.
7. An assessment of the cost to remedy deficiencies.
8. An examination of ways to satisfy deficiencies.
9. A determination of other likely exactions.

Florida Land Design & Engineering, Inc., *The Florida Growth Management Act's Concurrency and Consistency Requirements: Staying a Step Ahead by Protecting Your Interests Now* (Mar. 30, 1989) (developer's strategy planning seminar on the 1985 Growth Management Act requirements).

22. See Porter, *The APF Epidemic*, URBAN LAND, Nov. 1990, at 36, 36.

In one of the quieter evolutions in the field of land use regulations over the past 20 years, such requirements are emerging as one of the most common forms of growth

growth management system that gave priority development approval to projects that could meet service availability standards incorporated in the town's capital budget and plan.²⁴ Approvals were deferred until a minimum level of service availability was attained. Importantly, the town committed that all land could be developed at some time within an eighteen year period. Ramapo's phased growth ordinance was challenged as violating substantive due process, and was ultimately judicially upheld.²⁵ In validating the ordinance, New York's highest court held:

In sum, where it is clear that the existing physical and financial resources of the community are inadequate to furnish the essential services and facilities which a substantial increase in population requires, there is a rational basis for "phased growth" and hence, the ordinance is not violative of the Federal and State Constitutions.²⁶

Unlike *Ramapo*, which guaranteed that all land could be developed at *some* point over a known time frame, concurrency does not assure that development can take place at all until levels of service are achieved and facilities made available, outcomes that may be beyond the control or legitimate responsibility of an individual owner or the capability of local government. So, the possibility of a concurrency driven moratorium of indefinite duration and unknown resolution is real.²⁷

management in rapidly growing communities. In fact, a recent survey by the League of California Cities found that 30 percent of all California communities employ APF provisions—the most common technique for managing growth.

Id.

23. *Golden v. Planning Bd.*, 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138, *appeal dismissed*, 409 U.S. 1003 (1972).

24. The town of Ramapo's ordinance addressed the availability of sewer, drainage, parks and recreation, roads, and fire services. *Id.* at 368, 285 N.E.2d at 285, 334 N.Y.S.2d at 143-44. Ramapo failed to meet the need for continued capital improvements, and, as a result, dampened development, which was the town's prime objective. Porter, *supra* note 22, at 36.

25. The case set the stage for expanded use of adequate public facilities regulatory programs. Porter notes that:

The Ramapo case coincided with an increasingly widespread public belief that development ought to pay its own way. In most communities that principle translates into requirements that developers pay impact fees and contribute exactions to provide the public facilities necessary to support their developments. It is a small step from those requirements to their flip side: development should not be permitted until facilities are available for its support.

Porter, *supra* note 22, at 36.

26. *Golden*, 30 N.Y.2d at 383, 285 N.E.2d at 304-305, 334 N.Y.S.2d at 156.

27. Compare this situation with Florida case law which generally upholds local moratoria if

Concurrency raises other constitutional issues. The relatively recent United States Supreme Court cases, *First English Evangelical Lutheran Church v. County of Los Angeles*²⁸ and *Nollan v. California Coastal Commission*,²⁹ reflect renewed judicial sensitivity to regulations, development conditions, and exactions³⁰ that disproportionately shift economic burdens to individual property owners to remedy or improve general community conditions. In *Nollan*, Justice Scalia notes that one of the principal constitutional protections of due process is to bar government from forcing some people alone to bear public burdens which appropriately should be borne by the general public:

If the Nollans were being singled out to bear the burden of California's attempt to remedy those problems [of beach access], although they had not contributed to it more than other coastal landowners, the State's action, even if otherwise valid, might violate either the incorporated Takings Clause or the Equal Protection Clause. One of the principal purposes of the Takings Clause is "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."³¹

These federal cases also underscore the need for a "substantial nexus" between a development exaction and the exactee's impacts. This principle tracks Florida case law which holds that a payor can only be required to pay his proportionate fair share of public services reasonably attributable to his development, and that exactions and impacts be linked by a rational nexus.³²

Against the backdrop of these federal and state constitutional principles, consider whether a developer whose project is consistent with a local government plan and who is willing to mitigate his fair share of

the approval freeze is necessary to protect the public health, safety, and welfare, is reasonably limited in scope and duration, and government makes reasonable progress to remedy the problem driving the need for the moratorium. See *Leisure Properties, Ltd. v. Franklin Co.*, No. 78-195 (Fla. 2d Cir. Ct. Apr. 9, 1981), *aff'd in part, rev'd in part*, 430 So. 2d 475 (Fla. 1st DCA 1983). See also Gougelman & Taub, *Moratoria and Interim Growth Management*, in 2 FLORIDA ENVIRONMENTAL AND LAND USE LAW 5-1 (1987).

28. 482 U.S. 304 (1987).

29. 483 U.S. 825 (1987).

30. Development exactions are those aspects of development regulation that require a builder or developer to give something to the city or county. Exactions also include regulations requiring something to be turned over to a common maintenance entity such as a property owners' association. Frank & Rhodes, *Introduction*, in DEVELOPMENT EXACTIONS 2 (1987).

31. 483 U.S. at 835 n.4 (1987) (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)).

32. *Contractors & Builders Ass'n v. City of Dunedin*, 329 So. 2d 314 (Fla. 1976), *cert. denied*, 444 U.S. 867 (1979).

project-generated impacts can be prohibited from going forward until and unless he either: (1) pays a disproportionate part, or all, of the infrastructure costs necessary to meet concurrency; or (2) government or another yet to be identified third party pays these costs.

If due process and equal protection: (1) demand only that a developer be responsible for mitigating a fair share of his own project impacts; (2) ensure that a developer not be responsible for curing general community problems; and (3) reinforce government's traditional responsibility to plan for and provide public facilities pursuant to its own plans and standards,³³ should not the fundamental fairness heart of these constitutional principles bar a locality from prohibiting this developer from going forward even though a particular impacted facility can not meet concurrency? Possibly so, and this is the type of case that will test concurrency's constitutional vitality.

A similar case is progressing through the California courts. In *Marblehead v. City of San Clemente*,³⁴ the trial court invalidated a city growth management initiative because it required a property owner, as a condition of development approval, to mitigate not only the impacts of *his* development, but also improve the existing, deficient level of service. The court declared:

The initiative is facially defective. Its plain meaning requires property owners to mitigate conditions not only caused by their development (a proper goal) but also to cure the inadequacies of those who developed their property before them. It is the latter requirement of improvement of the existing levels of service that fails the nexus test. Would it be proper to require the last parcel of land to be developed to bear the entire expense of all the arterial highways, all the police and fire response times, all the one hundred year flood control, all the animal migration corridors, all the aesthetic cones of vision, and/or all the park/recreational facilities

33. See Porter, *supra* note 22, at 36.

What tends to get lost in this formulation is governments' traditional responsibility to plan and provide public facilities—one of the primary roles of governments around the world. Most adequate facilities provisions are silent on the issue of *who* is responsible for making certain that public facilities are maintained in reasonable equilibrium with public needs. By implication, adequate facilities requirements appear to relieve local governments of that responsibility and shift it to the private sector. (A corollary implication is that developers, rather than demographic and economic trend, create the need for those facilities.)

Id.

34. No. X-551182 (Cal. Super. Ct. Oct. 18, 1988), *aff'd on other grounds*, 226 Cal. App. 3d 1504, 277 Cal. Rptr. 550 (Cal. Ct. App.), *opinion modified*, 91 CDOS 1003, 91 Daily J. 1475 (1991).

which have been neglected by prior city councils and real property owners?³⁵

The case recently was affirmed on appeal by California's intermediate appellate court, albeit on other grounds.

Concurrency plainly suffers from potential constitutional infirmities exacerbated by Florida's failure to properly fund infrastructure needs. It is also plain we cannot yet determine the results of concurrency. The nation is in a recession, lenders are in disarray and hard pressed, credit availability is slim to none, the real estate market is severely suffering, population growth has slowed, and most new projects are vested or exempt from concurrency. So the true effects of concurrency are not known. We're in a lull before the crunch which offers an opportunity for necessary adjustment.

What can we do?

First, we must recognize that growth management and particularly concurrency will not achieve its promise without adequate transportation funding. The gas tax remains the best funding source because it's a true user fee paid by all drivers, and ensures that tourists pay their fair share. The 1990 Legislature made significant progress by enacting a four-cent gas tax for most of the counties needing additional transportation revenue. It's not nearly enough. This \$4 billion-plus package only dents Florida's massive road needs which are estimated at \$25 billion for the 1990's.³⁶

Following Florida's recent gas tax increase, the federal government increased its motor fuel tax. Thus, near term additional state gas tax increases or local option gas tax initiatives may not be politically feasible, and we may need to find other, perhaps broader based, long term recurring revenue sources that can be earmarked for state and local transportation needs.

Stable state and local revenue sources are the heart of the solution. But complimentary measures, which—together with local option revenue sources—will enable local government and the private sector to row while the State steers the Good Ship Concurrency, merit consideration. Of particular note are removing the referendum requirement on the local option seventh-cent gas tax, authorizing private toll facilities, and private funding of needed state transportation facilities with subsequent state reimbursement.

35. *Id.*, slip op. at 4-5.

36. See STATE COMPREHENSIVE PLAN COMMITTEE, KEYS TO FLORIDA'S FUTURE: WINNING IN A COMPETITIVE WORLD (1987).

In sum, transportation planning and funding of facilities identified in local plans as needed to satisfy concurrency must continue to be a top policy concern.

Second, we must review concurrency's application to state roads. Localities should not have to reject projects because of lack of capacity on state roads that—unlike local roads—are not subject to concurrency and financially feasible level of service standards. Cities and counties should be responsible for facilities they can control; they should not be obligated short term to cure the State's long term failure to adequately fund state road needs. Ideally, state roads should not have been subject to concurrency until the State developed a financially feasible transportation plan founded on financially attainable levels of service and a strategy to cure deficits. This, of course, is not the present case and the concurrency genie is out of the political bottle.

If the issue of state roads cannot be addressed directly, conflicts between local plans and state road standards should be subject to mandatory accommodation and mediation efforts, and if this fails, to informal, but ultimate resolution by the Governor and Cabinet. At minimum, DCA should continue to practically interpret its "maximum extent feasible" state/local level of service consistency standard to ensure that otherwise sound local plans that promote worthwhile state goals are not artificially gutted by mandatory application of infeasible state concurrency standards.³⁷

Third, we must inject more certainty and predictability into concurrency management systems. Local governments must develop systems that can produce simple, expeditious determinations as to whether a proposed project can meet concurrency mandates. Developers and lenders need government confirmation that concurrency is met and

37. Examples of state approved flexible approaches to satisfying transportation concurrency include: Dade County's tiered standards which establish more liberal levels of service for roads in urban infill areas and stricter standards in rural areas, Department of Community Affairs v. Metropolitan Dade County, Stipulated Settlement Agreement, Case No. 89-564 GM, Division of Administrative Hearings, Exhibit A, at i; Pasco County's ability to degrade certain roads as long as the overall road system shows improvement over a 15-year period, Department of Community Affairs v. Pasco County, Stipulated Settlement Agreement, Case No. 89-4406 GM, Division of Administrative Hearings, exhibit B, at 20; Volusia County's program permitting peak hour traffic volumes on certain backlog thoroughfares to increase by 20% over state standards, Volusia County Comprehensive Plan, Ordinance No. 90-10, Policy 2.2.1.7, pp. 2-9 Mar. 15, 1990; and DCA's initial conceptual approval of Broward County's Proposed Plan Amendment enabling increased degradation of roads in certain areas of the county's urban core in order to promote urban redevelopment and affordable housing, see generally Department of Community Affairs memorandum regarding Broward County Draft ORC Plan Amendment 90-2, Oct. 21, 1990.

that projects will not be stopped mid-stream; privately contracted concurrency audits cannot fulfill this responsibility.

Also, regarding certainty, many local governments require several concurrency reviews during the development approval process. Not only is this bad policy, it is not required by DCA's rule 9J-5. This rule states that the *latest* point in the application process for determination of concurrency is *prior to* approval of an application that contains a specific site plan, including densities and intensities.³⁸ Typically this occurs upon PUD or plat approval, not at the building permit stage.

Similarly, once development approval is granted and concurrency determined, it should be valid for the life of the project or a term satisfactory to lenders, and should benefit successors in interest, provided the project progresses and complies with development order conditions. Granting short duration compliance permits undermines any possibility of project certainty, discourages construction financing except for small projects, and imperils the viability of long-term, master-planned projects. Localities concerned with developer follow-through on concurrency obligations can confirm them in statutorily authorized development agreements,³⁹ which can include appropriate monitoring and development stoppers.

Fourth, we need to inject more implementation flexibility into concurrency.

Concurrency applies uniformly to all new and non-vested projects, everywhere—there are no exceptions.

Service availability requirements, similar to concurrency, have long applied to Developments of Regional Impact (DRI)—regional-scale, long-term buildout projects that are normally developed in increments or phases. Such a policy is reasonable for these projects because it enables them to commence, to produce revenue over time, and to direct project revenues to needed services and facilities for the next phase.

But it's altogether different to impose such a policy on *every* project, no matter the size or impact, in every locality.

The State's DRI service availability policy for transportation was acceptable primarily because DCA allowed the transportation impacts of a project to be alleviated through "pipelining."⁴⁰ Pipelining enables local governments to apply transportation exactions to satisfy the most pressing service and facility needs. It channels or pipelines dol-

38. FLA. ADMIN. CODE ANN. r. 9J-5.0055(2)(e) (1990).

39. See FLA. STAT. §§ 163.3220-3243 (1989). See also Rhodes, *The Florida Local Government Development Agreement Act*, FLA. B.J., Oct. 1988, at 81.

40. FLA. ADMIN. CODE ANN. r. 9J-2.0255(7) (1990).

lars to build or pay for a few facilities or services, rather than spreading dollars piecemeal among numerous services and facilities affected by the project.

Pure pipelining—or “pay and develop”—is not likely to supplant concurrency; it cuts too broad an exemption from the policy. But we should build on this DRI concept by developing a planning-based, area-specific local option to satisfy concurrency.

Concurrency Management Area Planning would require a locality to divide its jurisdiction into Concurrency Management Areas, similar to impact fee zones. Each area would have areawide designated level of service standards and an area plan.

A developer would be able to satisfy concurrency by paying or providing its fair share of needed services and facilities within a concurrency management area. The exaction standard would be fair share, but voluntary payments of greater than fair share exactions could be rewarded by market-driven development incentives offered within the particular area keyed to area market demand.

Payments or exactions could be used anywhere within the area in which they are collected, and need not be restricted exclusively to alleviating the impact on facilities affected by the payors' project.

The area's plan and monitoring would confirm service level maintenance.

Concurrency Management Area Planning would ensure no single project would be denied because of pre-existing service or facility deficits. This will help buttress concurrency against legal challenges, particularly those based on lack of rational nexus and an indefinite moratorium. Moreover, the concept gives localities needed flexibility to creatively satisfy concurrency on a manageable scale.

Area planning for concurrency for transportation was included in growth management legislation that, unfortunately, was not enacted by the 1990 Legislature.⁴¹ Fortunately, the Department of Community Affairs is developing a transportation concurrency management area rule incorporating the general legislative concept.⁴²

In 1985, the state overloaded its comprehensive planning and regulatory system in a pique of well-intentioned policy activity. It produced a classic example of “ready, fire, aim” public policy. This kind of policy making often is inspirational; it's also very risky. It challenges the traditional public administration dogma of developing goals, options, and the best solution. It can be successful when the

41. Fla. CS for SB 1794 (1990); Fla. HB 3863 (1990).

42. See 16 Fla. Admin. W. 6117 (Dec. 28, 1990).

initial "good idea" is evaluated after preliminary implementation and refined and modified based on experience.

And this is where we are with concurrency—we are trying to make this "good idea" work rationally and fairly and to avoid unintended consequences. It's going to take time and, above all, a willingness to make reasonable, appropriate adjustments to the original concurrency concept.

To facilitate this action, the new state administration should appoint a broadly representative commission to thoroughly and expeditiously review concurrency implementation and to make appropriate recommendations. This commission can help build a consensus on the need for concurrency adjustments. It will not be easy. Growth management is a mainstream political issue and concurrency is the stream's channel. Nonetheless, it's time to look beyond the politically safe facade of growth management and critically analyze real effects. The concurrency emperor may not be wearing clothes, and we must be prepared to accept and respond to this possible conclusion.