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CONCURRENCY AND GROWTH MANAGEMENT: A LAWYER'S PRIMER

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I. INTRODUCTION

"Buy land—they ain't making any more of it," American sage Will Rogers once said. Will, however, never dreamed of the concept of concurrency when he gave this advice. If concurrency had been explained to him, it is amusing to contemplate the sort of humor his agile mind would have produced on the topic. Humor notwithstanding, lawyers working with Florida real estate today must be able to do more with concurrency than jest about it. Because the effect of this concept on Florida realty is profound, lawyers involved in this area will find it increasingly important to acquire a good working knowledge of where concurrency came from, how it is working now, and how it is likely to affect Florida real property in the future.

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.[1] In fact, "the concurrency requirement is the teeth of the 1985 Growth Management Act."[2] The notion that roads, water lines, sewers, and other similar services should be

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1. For the purposes of concurrency, public facilities and services include roads, sanitary sewer, solid waste, drainage, potable water, parks and recreation, and mass transit. *See infra* text accompanying note 49. Collectively these public facilities and services are often referred to as infrastructure.

2. Letter from Thomas G. Pelham, Secretary of Fla. Dep't of Comm'y Affairs, to Sen. Gwen Margolis, Dem., N. Miami Beach, at 1 (Mar. 7, 1988) (on file with authors) [hereinafter Pelham letter].

planned and built before users and residents arrive seems disarmingly logical. Yet as this discussion will show, complex issues and difficult problems arise with the attempt to translate this simple concept into reality. Consider the following illustrations.

In Broward County, for example, an applicant for a single family residential building permit sought permission to begin construction of his new home.[3] Unfortunately, the drainage run-off from the proposed improvement would exceed the level allowed under the county's regulations.[4] As a result, the application failed a concurrency review, and the necessary building permit was not issued at that time.[5]

The impact of concurrency regulations is also apparent to a potential purchaser or developer who views the concurrency datamap prepared by the Tallahassee office of Transportation Consulting Group, Inc.[6] The map portrays the major roadway network of Tallahassee. Beside each roadway segment is displayed a number representing the capacity of that segment for additional vehicle trips. If the number is zero or less, a developer knows that any proposed development potentially impacting the road segment will not be allowed to proceed until capacity is available.

Before an explanation of the legal principles of concurrency, it is helpful to review concurrency's origins. Understanding how concurrency works today will be enhanced by knowing its source and development. Concurrency, under Florida law, is wedded to the State's comprehensive planning system. Accordingly, concurrency is best understood by first investigating Florida's development of comprehensive land use planning.

II. THE ORIGINS AND DEVELOPMENT OF CONCURRENCY IN FLORIDA

Since World War II, Florida has experienced phenomenal population growth. In 1950 the State's population was under three million,[7] and by 1990 the census count stood at nearly thirteen million.[8] This represents population growth of epic proportions. Therefore, it is not surprising that growth of this magnitude produced substantial changes in the physical environment where it occurred.

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3. Tape of Florida Bar Seminar, Every Which Way But Loose: Concurrency Revisited, tape (Dec. 1-2, 1989) (on file with authors).

4. *Id.*

5. *Id.*

6. TCG is a Florida based engineering firm which specializes in transportation planning and engineering.

7. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, 2 CENSUS OF POPULATION: 1950, CHARACTERISTICS OF THE POPULATION 10-6 (1952).

8. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, CENSUS AND YOU 3 (April 1991).

For the most part, Florida's local governments welcomed and encouraged growth and exercised little control. Although Florida law long has permitted local governments to use the police power to regulate land use,[9] until the late 1960s little was done toward regulating on a state-wide basis. Then in 1969, the Legislature allowed local governments the option of engaging in comprehensive land use planning but provided no state funding for the task.[10] Predictably, land use regulation by Florida's local governments was slow to develop, and as late as 1973, "two-thirds of the [S]tate had no land use controls whatsoever and ad hoc decisionmaking regarding development was rampant."[11]

A. Executive Initiatives

Eventually growth-related problems led to various initiatives. In response to the severe drought of 1970-71, Governor Reuben Askew[12] convened the South Florida Water Management Conference in September 1971.[13] One commentator noted that this was the first occasion that "a high state official [questioned the] goodness of uncontrolled growth."[14] In 1972, Governor Askew appointed the Task Force on Resource Management to follow-up on the Water Management Conference's recommendations.[15] The Task Force produced the Environmental Land and Water Management Act of 1972.[16]

Thus, the first threads of concern with public facility adequacy appeared. At about the same time, under the direction of section 370.0211, Florida Statutes, the Florida Coastal Coordinating Council

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9. *See* 7 FLA. JUR. 2D *Building, Zoning, and Land Controls* §§ 53-59 (1978).

10. Arline, *The Consistency Mandate of the Local Government Comprehensive Planning Act*, 55 FLA. B.J. 661, 661 (1981).

11. *Id.*

12. Dem., 1971-1978.

13. J. DEGROVE, LAND GROWTH & POLITICS 106-09 (1984); Finnell, *Coastal Land Management in Florida*, AM. B. FOUND. RES. J. 303, 335-36 (1980).

14. Finnell, *supra* note 13, at 336; *see also* J. DEGROVE, *supra* note 13, at 108.

15. J. DEGROVE, *supra* note 13, at 109; Finnell, *supra* note 13, at 336. The South Florida Water Management Conference had recommended that the state limit population densities within South Florida by using a comprehensive land and water use plan which would be developed and enforced by governor-appointed state and regional boards. J. DEGROVE, *supra* note 13, at 109.

16. Ch. 72-317, 1972 Fla. Laws 1162 (codified as amended at FLA. STAT. §§ 380.012-.10 (1989)); *see also infra* text accompanying notes 19-22. Besides the Environmental Land and Water Management Act of 1972, the Governor's Task Force also supported the passage of companion legislation such as the Florida State Comprehensive Planning Act and the Florida Water Resources Act of 1972. Ch. 72-295, 1972 Fla. Laws 1072; Ch. 72-299, 1972 Fla. Laws 1082. For a more thorough discussion on the role of the Task Force, see generally Finnell, *Saving Paradise: The Florida Environmental Land and Water Act of 1972*, 1973 URB. L. ANN. 103, 103-04 (1973); J. DEGROVE, *supra* note 13, at 109-10.

conducted a comprehensive review of development and its impacts in the Florida Keys.[17] With respect to public support services, the study found that "[w]ith the exception of electrical power, all of the primary support services (water supply, sewage disposal, solid waste disposal, and transportation facilities) for the Keys [were] inadequate to serve the existing population at a satisfactory level of quality."[18]

B. Statutory Development

The Florida Environmental Land and Water Management Act of 1972 established two programs which continue today: the Critical Area[19] and the Development of Regional Impact (DRI).[20] To implement these two programs, the Legislature designated a State Land Planning Agency, the Florida Department of Community Affairs (DCA),[21] and the State for the first time began close review of local growth management and land use regulation. Particularly through the DRI process, the DCA gained important insights into the impact of development on local infrastructure and learned the advisability of coordinating development through the DRI development order process to occur concurrently with the provision of public facilities and services. This experience was later reflected in the 1985 Local Government Comprehensive Planning and Land Development Regulation Act,[22] legislation which the DCA aided in drafting and passing.

To marshall the expertise for enacting additional new laws to grapple with growth, the Florida Environmental Land and Water Management Act of 1972 also established the Environmental Land Management Study Committee, or the ELMS Committee, to address

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17. *See* FLA. STAT. § 370.0211 (Supp. 1972) (since repealed). Among other directions, section 370.0211 charged the Coastal Coordinating Council to "develop a comprehensive state plan for the protection, development, and zoning of the coastal zone." *Id.* § 370.0211(4)(d). Furthermore, the statute fulfilled requirements of the National Coastal Zone Management Act of 1972. *See* 16 U.S.C.S. §§ 1451-1464 (Law. Co-op. 1984 & Supp. 1991).

18. FLORIDA COASTAL COORDINATING COUNCIL, DEP'T OF NATURAL RESOURCES, FLORIDA KEYS COASTAL ZONE MANAGEMENT STUDY EXECUTIVE SUMMARY 13 (1974).

19. FLA. STAT. § 380.05 (1989).

20. *Id.* § 380.06. The Critical Area program applies to designated areas of critical state concern, *see, e.g., id.* §§ 380.051-.0555, while the DRI program creates a process for in-depth review of major developments that exceeded certain thresholds for size and type. *See id.* § 380.06(2). For a detailed overview of the development and implementation of the Critical Area and DRI programs, see J. DEGROVE, *supra* note 13, at 117-66.

21. FLA. STAT. § 380.031(18) (1989).

22. For a discussion of the Local Government Comprehensive Planning and Land Development Act, see *infra* text accompanying notes 30-42.

land use regulation and propose solutions.[23] One proposal arising from this effort was the Local Government Comprehensive Planning Act[24] adopted by the Legislature in 1975.[25] The new law required every local government in Florida to "adopt and implement a comprehensive plan to guide and control future development."[26] The statute required each local government's plan to contain specific elements—eight elements for all plans, three other elements for jurisdictions above a certain size or located in the coastal zone, and eleven optional elements.[27] At this point in time, 1975, the statute did not contain the concurrency requirement. It did, however, contain a requirement that "[a]ll land development regulations enacted or amended shall be *consistent* with the adopted comprehensive plan or element or portion thereof."[28] Implementation of the planning act was slow and uncertain, for it created no mechanism for quality control of local plans. The DCA was authorized to offer only advisory comments on local plans, and there were no legal means by which the State or affected citizens could compel local governments to implement their plans.[29]

After the passage of the Local Government Comprehensive Planning Act of 1975, the Legislature made relatively few amendments to its planning law for a period of ten years. In 1985, however, that changed and the Legislature enacted a substantial overhaul of the State's growth management process.[30] Renamed the Local Government Comprehensive Planning and Land Development Regulation Act,[31] the Act established new requirements for local government

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23. Arline, *supra* note 10, at 661; O'Connell, *Whatever Happened to "Zoning" or What You Need to Know About "The Local Planning Act" But Don't Know What to Ask!*, 50 FLA. B.J. 46 (1976); *see also* FLA. STAT. § 380.09 (Supp. 1972), *repealed* by Ch. 77-104 § 124, 1977 Fla. Laws 245, 290.

24. Ch. 75-257, 1975 Fla. Laws 794 (codified as amended at FLA. STAT. §§ 163.3161-.3215 (1989)).

25. Arline, *supra* note 10, at 661.

26. *Id.*

27. *Id.*; FLA. STAT. § 163.3177(6)-(7) (1975) (current version at FLA. STAT. § 163.3177(6)-(7) (1989)).

28. FLA. STAT. § 163.3194(1) (1975) (current version at FLA. STAT. § 163.3194(1)(b) (1989)) (emphasis added). As indicated by the foregoing quote from the statute, the comprehensive plan has long been intended to have premiere status in Florida's land use regulation matrix. Note that all land development regulations must be consistent with the plan. This, of course, includes zoning; but the broad language of the statute covers an even wider sweep. For further discussion of this point, see McPherson, *Cumulative Zoning and the Developing Law of Consistency With Local Comprehensive Plans*, 61 FLA. B.J., July-Aug. 1987, at 71.

29. Pelham, Hyde & Banks, *Managing Florida's Growth: Toward an Integrated State, Regional and Local Comprehensive Planning Process*, 13 FLA. ST. U.L. REV. 515, 542 (1985).

30. *See* Ch. 85-55, §§ 1-18, 1985 Fla. Laws 207, 210-35 (codified as amended at FLA. STAT. §§ 163.3161-.3215 (1989)).

31. FLA. STAT. § 163.3161(1) (1985) (current version at FLA. STAT. § 163.3161(1) (1989)).

comprehensive plans.[32] More specifically, the Act provided that each of the State's over four hundred and fifty local governments submit its adopted plan to the DCA for review and approval.[33] The Act further defined and clarified the powers and duties of both the DCA and local governments. Local governments were required to adopt regulations implementing their plans,[34] and provisions were made to allow citizens to challenge the local comprehensive plan, land development regulations, and local government development orders.[35]

The comprehensive amendments adopted by the 1985 Act expressly addressed the concept of concurrency although the term itself was not used in the amendments at that time. The amendments approached the problem in two ways. First, the Act required that the local comprehensive plan contain a capital improvements element with "[e]stimated public facility costs, *including a delineation of when facilities will be needed*, the general location of the facilities, and projected revenue sources to fund the facilities."[36] Second, it required that this capital improvement element be enforced. Thus, each jurisdiction was now required to issue land development regulations within one year after submitting its revised comprehensive plan.[37] At a minimum, these regulations had to ensure that public facilities and services satisfied the comprehensive plan requirements and that they were "*available when needed for the development*, or that development orders and permits [were] conditioned on the availability of [those] public facilities and services necessary to serve the proposed development."[38] The amendments also prohibited issuance of a development order that would result in a violation of the established level of service.[39] Clearly, the statutory language in the 1985 Act required the concept of concurrency to be implemented by local governments as they managed their comprehensive plans.

It may surprise readers to learn that the concurrency notion was not a controversial topic when this concept was adopted by the Legisla-

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32. *See generally id.* § 163.3167 (current version at FLA. STAT. § 163.3167 (1989)).

33. *Id.* § 163.3184 (current version at FLA. STAT. § 163.3184 (1989)). A deadline was set for completion of the plan submission process. *Id.* § 163.3167(2)(b). After a subsequent extension of the deadline, *see* Ch. 87-338, 1987 Fla. Laws 2171, the current version of the Act scheduled the submission of the last local plan for July 1, 1991. FLA. STAT. § 163.3167(2)(b) (1989).

34. FLA. STAT. § 163.3202 (1985) (current version at FLA. STAT. § 163.3202 (1989)).

35. *Id.* § 163.3215 (current version at FLA. STAT. § 163.3215 (1989)).

36. *Id.* § 163.3177(3)(a)2. (current version at FLA. STAT. § 163.3177(3)(a)2. (1989)) (emphasis added).

37. *Id.* § 163.3202(1) (current version at FLA. STAT. § 163.3202 (1989)).

38. *Id.* § 163.3202(2)(g) (emphasis added).

39. *Id.*

ture.[40] As previously noted, the term "concurrency" was not even used in the 1985 amendments. In fact, the term was not used in the statutes until the following year when the Act was further amended by the Legislature.[41] The following language accomplished that task: "[I]t 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."[42] As is discussed in the next section, the standards for concurrency regulation were primarily left for the DCA to grapple with by promulgation of administrative rules. Operational details of implementing concurrency regulation, however, were left largely to local governments. By 1986 most of the statutory framework was complete for local government comprehensive planning in Florida.

III. ADMINISTRATIVE CODE PROVISIONS AND CONCURRENCY MANAGEMENT SYSTEMS

As is often the case in modern law, deciphering a statute regarding a particular subject is only the beginning, not the end, of legal inquiry. To understand Florida concurrency, one must search legal authority beyond the statute. The next logical place to look for more information on concurrency is the Florida Administrative Code. Under the statute, the Department of Community Affairs (DCA) was required to prepare administrative rules to implement the new comprehensive planning law by addressing a series of criteria specified by the Legislature.[43] To accomplish this task, the DCA promulgated chapter 9J-5 of the Code.[44] Chapter 9J-5 is entitled "Minimum Criteria for Review of Local Government Comprehensive Plans and Determination of Compliance," and it covers more than concurrency.

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40. The general impression that the notion of concurrency was not a controversial topic at the time of adoption was gained by the authors during two separate conversations with individuals who were actively engaged with this issue in 1985 at the time of adoption. In both cases their recollections supported the view that concurrency was not a controversial issue at the time of adoption. Telephone conversations with Linda Shelly, General Counsel, DCA (Feb.-Oct. 1985); Interview with Jim Murley, Division Dir., DCA (1985).

41. *See* Ch. 86-191, § 7, 1986 Fla. Laws 1404, 1415 (amending FLA. STAT. § 163.3177 (1985)).

42. FLA. STAT. § 163.3177(10)(h) (1989) (emphasis added).

43. *Id.* § 163.3204 (1985) (current version at FLA. STAT. § 163.3204 (1989)).

44. Chapter 9J-5 of the Code was adopted March 6, 1986, and amended October 20, 1986 and November 22, 1989. The chapter provides the last, and perhaps the most important, part of the regulation. It specifies the circumstances under which local governments may issue permits in reliance on public facilities that are not in existence on the date that the development is approved. These include facilities under construction, under contract, and those scheduled for construction. *See* FLA. ADMIN. CODE R. 9J-5.0055 (June 1991); *see also infra* text accompanying notes 45-92.

Topics such as administration, public participation, definitions, elements of comprehensive plans (both required and optional), and consistency of local plans with regional and state plans are addressed.

As might be expected, chapter 9J-5 is considerably more detailed regarding concurrency than the Local Government Comprehensive Planning and Land Development Regulation Act. Chapter 9J-5 commences where the statute ends by requiring each local government to "adopt a concurrency management system."[45] According to chapter 9J-5, a concurrency management system is "the procedures and/or process that the local government will utilize to assure that development orders and permits are not issued unless the necessary facilities and services are available concurrent with the impacts of development."[46] Chapter 9J-5 further provides that "[e]ach local government shall establish a level of service standard for each public facility located within the boundary for which such local government has authority to issue development orders or development permits."[47] Moreover, such level of service should reflect "the capacity per unit of demand for each public facility."[48] Chapter 9J-5 specifies seven public facilities and services for which a local government must establish level of service standards. They are roads, sanitary sewer, solid waste, drainage, potable water, parks and recreation, and mass transit, if mass transit is applicable.[49] The level of service requirements are developed in more detail in the requirements for the appropriate plan element.[50]

The level of service requirement for roads is unique in that the local government must take into account the Florida Department of Transportation's (DOT) adopted level of service standards for state facilities.[51] Chapter 9J-5 requires that "a local government must[,] to the maximum extent feasible as determined by the local government, adopt level of service standards for state roads that are compatible with the level of service standards established by the [DOT] for such roads."[52] If the local government's level of service standards are not compatible with DOT's standards, then the local government must justify its deviation.[53] Compatibility between state and local goals for

45. FLA. ADMIN. CODE R. 9J-5.0055 (June 1991).
46. *Id.* R. 9J-5.003(20) (Sept. 1990).
47. *Id.* R. 9J-5.005(3) (June 1991).
48. *Id.* R. 9J-5.003(45) (Sept. 1990).
49. *Id.* R. 9J-5.003(77) & 9J-5.0055(1)(a)1.-7.
50. *See, e.g., id.* R. 9J-5.008 (Oct. 1990).
51. *See id.* R. 9J-5.0055(1)(d) (Oct. 1991).
52. *Id.*
53. *Id.*

levels of service on the state highway system is a continuing source of controversy. 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.

Established levels of service are a critical part of the local government's capital improvements element. The purpose of this capital improvements element is to evaluate the need for public facilities, estimate the cost of improvements, analyze the local government's fiscal capability to fund and construct improvements, adopt financial policies for the funding of improvements, and schedule the funding and construction of these improvements.[54] Generally, a local government's capital improvements element must demonstrate that the local government will have the ability to meet three categories of need: existing deficiencies, desired future growth, and replacement of obsolete or worn-out facilities.[55]

"To ensure that facilities and services needed to support development are available concurrent with the impacts of such development, a local government must adopt a concurrency management system."[56] The details of the concurrency management system found in Rule 9J-5.0055 of the Code are by far the most important provisions for local government planning. It is here that the DCA interprets the critical legislative mandate that public facilities be "available concurrent with" the impacts of development.[57] A strict reading of "available concurrent with" would dictate that a development order or permit could not issue until the required public facilities were in existence, or that all development permits be made conditional so that development could be halted immediately if the concurrent construction of facilities such as roads, potable water, or sanitary sewers did not keep pace. The DCA did not make such a strict interpretation, however. Instead, Rule 9J-5.0055(2) sets out minimum standards under which unconditional development orders and permits may be issued in reliance upon public facilities not yet in existence. The requirements are most stringent for potable water, sewer, solid waste, and drainage.[58] For these facilities and services, permits may issue if the following is met:

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54. *Id.* R. 9J-5.016 (Oct. 1990).

55. *Id.* R. 9J-5.016(3)(b)1. (Sept. 1990).

56. *Id.* R. 9J-5.0055 (June 1991).

57. *See* FLA. STAT. § 163.3177(10)(h) (1989).

58. *Compare* FLA. ADMIN. CODE R. 9J-5.0055(2)(a) (Oct. 1990), *with id.* R. 5.0055(2)(b), *and id.* R. 9J-5.0055(2)(c). *See infra* text accompanying notes 59-63.

(1) the necessary facilities are in place;
(2) the development permit is conditional upon the facilities being in place when the development impacts occur;
(3) the necessary facilities are under construction; or
(4) the necessary facilities are guaranteed in an enforceable development agreement, such as an agreement pursuant to section 163.3220, Florida Statutes, or a development order issued pursuant to chapter 380, Florida Statutes.[59]

For parks and recreation, concurrency will be satisfied under the conditions set out above or, alternatively, if the necessary facilities are the subject of a binding executed contract or an enforceable development agreement that provides for the initiation of the construction of the required facilities or provision of services within one year of permit issuance.[60]

The most liberal provisions apply to roads and mass transit. For these facilities, concurrency may be satisfied and development permits issued in reliance upon transportation improvements included in an adequate capital improvements program.[61] To be considered "adequate" the capital improvements element must satisfy a number of criteria, some of which include implementing a realistic, financially feasible funding source based upon currently available revenue sources; regulating that actual construction of the improvements required for the development commence in or before the third year; and requiring that a plan amendment be submitted prior to eliminating, deferring, or delaying construction of any required road or mass transit facility or service.[62] Finally, Rule 9J-5.0055 specifies that a determination of concurrency for all facilities must be made prior to the approval of an application for a development order or permit "which contains a specific plan for development, including the densities and intensities of development."[63]

Chapter 9J-5 is noticeably silent on any details of technical methodology or concurrency regulation. Wide latitude has been left to local governments as they develop local regulations. In simple terms, the local government's task can be described as a bookkeeping or "checkbook" exercise. The local government must begin by determining the actual, unused capacity available in each regulated public facility. The local government adds the capacity that will become available from

59. *Id.* R. 9J-5.0055(2)(a).
60. *Id.* R. 9J-5.0055(2)(b).
61. *Id.* R. 9J-5.0055(2)(c).
62. *See id.* R. 9J-5.0055(2)(c)1.-9.
63. *Id.* R. 9J-5.0055(2)(e).

programmed improvements, to the extent allowed by chapter 9J-5, and subtracts the capacity committed to vested projects and permitted projects. It then establishes a process to distribute available capacity, if any, to new development. In most jurisdictions available capacity is distributed via a "certificate." The certificate is a reservation of capacity and a guarantee that the developer will be allowed to proceed. Certificates may be valid for six months, two years, five years, or more depending upon the jurisdiction's preference. Some jurisdictions require the developer to pay impact fees to obtain the certificate. In all cases, the local ordinance must be reviewed thoroughly because of the wide variations in methodology.

Early in the development of concurrency management systems, and before chapter 9J-5 was fully developed, there was widespread concern that a strict application of transportation concurrency requirements would lead to outright moratoria on development in these areas.[64] To date, this concern has proven to be overstated. As this article is being written, the Florida League of Cities is preparing to publish a statewide survey of concurrency management systems.[65] This study, initiated in December 1990, covered 120 cities and 26 counties that responded to a detailed questionnaire concerning the local government's concurrency management system.[66] Thirty-five percent of the jurisdictions reported significant deficiencies in one or more facilities or services.[67] Only 13% reported that permits had been denied because of deficiencies, however, and only 4% reported that temporary moratoria had been employed to maintain concurrency.[68]

The League of Cities study also reveals that concurrency management systems are still under development or are being amended in many jurisdictions. This suggests, the report states, that "an evolutionary and 'learning by doing' process is underway."[69] Surprisingly, the study reports that less than half of the surveyed jurisdictions allow developers to reserve capacity, and less than half of these local governments charge a fee for the reservation.[70] Not surprisingly, the study reports that state and county roads are the facility most often identified as deficient; 46% of the jurisdictions reported state roads defi-

64. *See generally* Pelham letter, *supra* note 2.

65. *See* Florida Institute of Government, Star Project #90-062, Classification and Legal Analysis of Local Government Concurrency Management Systems 1 (unpublished and draft copy of report sponsored by Florida League of Cities, Inc.) (on file with authors).

66. *Id.* at 4.

67. *Id.* at 7.

68. *Id.*

69. *Id.* at 5.

70. *Id.* at 6.

cient, and 32% reported county roads deficient.[71] When asked to predict future problem areas, 13% identified solid waste and 11% state and county roads.[72] When asked what techniques they would use to deal with future deficiencies, most jurisdictions first identified enforceable development agreements, followed by temporary moratoria.[73] As previously noted, however, only 4% of the jurisdictions actually have used moratoria to address their deficiencies.[74]

One problem that all local governments appear to face is identifying appropriate and defensible methods to measure transportation concurrency. The most common analytical approach of which the authors are aware is a link-by-link, intersection-by-intersection analysis based upon the prototype transportation analysis developed for analyzing developments of regional impact. This approach has been criticized as too labor intensive for reviewing every development in a jurisdiction. It is also criticized as inflexible because, in theory, if the analysis of development impacts shows even one deficient link or intersection, the permit should be denied.

At the time of this writing, the DCA is developing proposed revisions to chapter 9J-5 to allow greater flexibility in methods. The DCA is considering allowing the establishment of "transportation concurrency management areas" such as existing downtowns or redevelopment areas where compact, higher-density development is desirable and alternative transportation modes would be encouraged, thus justifying lower levels of service. In the authors' view further development of chapter 9J-5 is desirable, even to the point of allowing level of service to be averaged over a selected network of arterial roads. The DCA has apparently recognized that maintaining efficient automobile transportation throughout every jurisdiction is not necessarily good growth management. In fact, such a policy conflicts with other, arguably more important, goals such as discouraging urban sprawl.

Most jurisdictions appear to be implementing their concurrency management systems through ordinances based on the goals, objectives, and policies of the comprehensive plan,[75] but without a management system specified in the plan itself. This method is allowed by chapter 9J-5.[76] The plan must describe, however, how the program will be implemented.[77]

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71. *Id.* at 7.
72. *Id.*
73. *Id.*
74. *Id.*
75. Florida Institute of Government, *supra* note 65, at 4.
76. *See* FLA. ADMIN. CODE. R. 9J-5.005(6).
77. *Id.*

The more widely used implementing ordinance approach has obvious advantages for the local government. Implementation of concurrency may be delayed for a full year after plan submission by specifying that concurrency management regulations will be adopted no later than the required date.[78] In addition, the DCA does not automatically review the local government's non-plan regulations for compliance.[79] The DCA may require a local government to submit a regulation for review only if it has "reasonable grounds to believe that a local government has totally failed to adopt any one or more of the land development regulations required."[80] The DCA's only remedy is an action in circuit court to require adoption of the missing regulation.

Thus, the substance of a local regulation and the degree to which the local government has carried out its comprehensive plan therein is unlikely to be reviewed unless a "substantially affected person" brings a challenge under the procedures set out in the statutes.[81] The challenge must be brought within one year of the final adoption of the regulation.[82] The process begins with a preliminary filing of the petition with the local government, which has thirty days to respond.[83] Thereafter, the petitioner may file with the DCA.[84] The DCA then conducts an informal hearing and issues a written determination.[85] If the DCA agrees with the petitioner, it requests a formal administrative hearing pursuant to the Administrative Procedure Act (APA)[86] from the Division of Administrative Hearings.[87] If not, the original petitioner may request such a hearing.[88] The statute dictates that the only ground for such a challenge is inconsistency with the local comprehensive plan, and the ordinance shall not be found inconsistent if consistency is "fairly debatable."[89] The hearing officer's order is a final order appealable under the APA.[90] If the hearing officer finds the ordinance to be inconsistent with the local comprehensive plan, the order is submitted to the Administration Commission to determine

78. FLA. STAT. § 163.3202(2)(g) (1989).
79. *See id.* § 163.3202(4) (1989).
80. *Id.*
81. *Id.* § 163.3213(3).
82. *Id.*
83. *Id.*
84. *Id.*
85. *Id.* § 163.3213(4).
86. *See id.* § 120.57(1).
87. *Id.* § 163.3213(5)(b).
88. *Id.* § 163.3213(5)(a).
89. *Id.*
90. *Id*; *see also id.* § 120.68.

which sanctions available under section 163.3184(8)(a), Florida Statutes, shall be levied.[91] The statute also specifies that "[i]nitiation of . . . review . . . shall not affect the validity of the regulation or of a development order issued pursuant to the regulation."[92] The statute is silent as to whether the hearing officer's finding of inconsistency renders the ordinance invalid.

IV. CONCURRENCY AND VESTED RIGHTS

As concurrency management ordinances are implemented in Florida, certain established development rights will be exempted from the ordinances' reach. Under Florida law,

> [n]othing in [the Local Government Comprehensive Planning and Land Development Regulation Act (Act)] shall limit or modify the rights of any person to complete any development that has been authorized as a development of regional impact pursuant to chapter 380 or who has been issued a final local development order and development has commenced and is continuing in good faith.[93]

As the statute provides, approved Developments of Regional Impact (DRI) that received development orders before the local comprehensive plan was amended have the strongest "vesting" to protect against application of concurrency requirements.

The general statutory provision has been interpreted by the Department of Community Affairs (DCA) in a series of declaratory statements.[94] In general, the DCA has taken the position that a DRI developer must be allowed to complete a project as originally approved by the local government.[95] The local government may not apply new comprehensive plan provisions or land development regulations that "would so change or alter a DRI development order that it would materially or substantially affect the developer's ability to complete the development authorized in the development order."[96]

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91. *Id.* § 163.3213(6).

92. *Id.* § 163.3213(9).

93. *Id.* § 163.3167(8).

94. *See generally In re* Petition for Declaratory Statement by Orlando Cent. Park, Inc., 12 Fla. Admin. L. Rep. 944 (1990); Huckleberry Land Joint Venture v. Department of Comm'y Affairs, 11 Fla. Admin. L. Rep. 5706 (1989); ICP Assocs. v. Department of Comm'y Affairs, No. 89-DS-7 (DCA Nov. 6, 1989); American Newland Assocs. v. Department of Comm'y Affairs, 11 Fla. Admin. L. Rep. 5205 (1989); Gulfstream Dev. Corp. v. Department of Comm'y Affairs, 11 Fla. Admin. L. Rep. 1018, *clarified*, 11 Fla. Admin. L. Rep. 1047 (1988); General Dev. Corp. v. Department of Comm'y Affairs, 11 Fla. Admin. L. Rep. 1032 (1988).

95. *Gulfstream Dev. Corp.*, 11 Fla. Admin. L. Rep. at 1024; *General Dev. Corp.*, 11 Fla. Admin. L. Rep. at 1037.

96. *General Dev. Corp.*, 11 Fla. Admin. L. Rep. at 1037.

This statutory "vesting" only limits the effect of comprehensive plans newly adopted or revised to meet the requirements of the Local Government Comprehensive Planning and Land Development Regulation Act (Act). The statute does not protect DRIs approved after revised local comprehensive plans are adopted.[97] Likewise, the statute does not protect any part of a pre-approved DRI that is amended, either as a minor change or a substantial deviation,[98] after local plan approval.[99] Further, DRI vesting may be limited or eliminated by the specific language of the DRI development order. If the development order contains language that makes the development subject to future adopted regulations, the DRI may not be exempt from consistency or concurrency requirements.[100]

If the DRI development order was adopted prior to comprehensive plan revision and does not contain language that mandates compliance with a later adopted plan or land development regulations, it should be completely protected regardless of whether the developer has commenced or is continuing development. A lack of infrastructure capacity cannot halt a DRI development, except in cases of overriding health, safety, or welfare concerns.[101] However, while the statute shields the DRI development, it does not compel the local government to assign priority to the improvements necessary for the DRI development. The Act neither obligates local governments to give priority to capital expenditures necessary for buildout of approved DRIs, nor obligates local governments to provide the infrastructure necessary for a DRI before it approves other development.[102]

The Act also protects developments that have not undergone DRI review if they have been issued a "final local development order" and if development has "commenced and is continuing in good faith."[103] The DCA has not interpreted these terms, but has stated, "[e]ach local government must examine its own development order process and

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97. *Id.* at 1042.

98. The term "substantial deviation" describes a change to a DRI development that meets or exceeds statutory thresholds set out in section 380.06(19), Florida Statutes. A change that is deemed a substantial deviation must be reviewed by the regional planning council before the local government may amend the development order. FLA. STAT. § 380.06(19)(a) (1989).

99. *Huckleberry Land Joint Venture*, 11 Fla. Admin. L. Rep. at 5721; *Gulfstream Dev. Corp.*, 11 Fla. Admin. L. Rep. at 1026; *General Dev. Corp.*, 11 Fla. Admin. L. Rep. at 1044.

100. *Huckleberry Land Joint Venture*, 11 Fla. Admin. L. Rep. at 5714; *Gulfstream Dev. Corp.*, 11 Fla. Admin. L. Rep. at 1028; *General Dev. Corp.*, 11 Fla. Admin. L. Rep. at 1041.

101. *Huckleberry Land Joint Venture*, 11 Fla. Admin. L. Rep. at 5720; *Gulfstream Dev. Corp.*, 11 Fla. Admin. L. Rep. at 1028.

102. *Huckleberry Land Joint Venture*, 11 Fla. Admin. L. Rep. at 5718-20; American Newland Assocs. v. Department of Comm'y Affairs, 11 Fla. Admin. L. Rep. 5205, 5219-20 (1989).

103. FLA. STAT. § 163.3167(8) (1989).

decide at what point in its process a development order becomes final."[104] As expected, some local governments have developed vesting ordinances.[105] Generally, the vesting ordinances require that vesting applications be filed with the local government within a certain period of time after the plan takes effect. The ordinances provide for administrative proceedings to review vesting claims and enunciate parameters and criteria for the granting or denial of vested rights. As with concurrency management regulations, these programs vary widely from one local government to another, and the particular statute or ordinance that applies in the jurisdiction must be reviewed to determine if vested rights are available. Absent a valid claim of vested rights, development will be subject to the concurrency management regulation.

Often, persons or parties dissatisfied with administrative proceedings or with local governments' decisions may seek relief in the courts. Accordingly, in the next section an analysis of case law is presented to describe the legal environment in which such disputes will be resolved.

V. CASE LAW

Even though the Florida growth management concurrency requirements are creatures of state law, federal protections afforded to citizens under the United States Constitution and federal statutes—such as the right to due process of law, prohibitions against takings without just compensation, equal protection, and others—must be observed.

One of the leading cases discussing issues of this type is *Golden v. Planning Board of Ramapo*.[106] Widely cited in the literature of growth management planning, *Ramapo* addressed on a federal constitutional level whether a local government could delay, by using zoning require-

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104. *In re* Petition for Declaratory Statement by Orlando Cent. Park, Inc., No. 89-DS-9B, slip op. at 6 (DCA Mar. 26, 1990).

> In deciding whether a development order is final, a local government may use the criterion of whether it no longer has discretion in relation to the subject of the order. A local government may even conclude that there is more than one type of development order in which it executes a final discretionary act and further distinguish between those development orders for various vesting purposes. For example, a local government may conclude that approval of an unrecorded plat may constitute a final local government order for purposes of establishing density or intensity of use, but not for purposes of concurrency. In order to vest under section 163.3167(8) as to concurrency, a local government may require a developer to have received approval of infrastructure at a point further along in the process, such as final plat approval.

Id. at 6-7.

105. The League of Cities study reports that 50% of jurisdictions surveyed have enacted some form of vesting process. Florida Institute of Government, *supra* note 65, at 6.

106. 30 N.Y. 2d 359, 285 N.E. 2d 291, 334 N.Y.S. 2d 138, *appeal dismissed*, 409 U.S. 1003 (1972).

ments, new construction and development activities until specified municipal services were available to serve the population generated by the growth.[107] In this case, the local government had conceived an eighteen-year capital plan for the provision of services and the regulation of growth.[108] Based on the facts before the court, the court opined:

> [I]n 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 challenged ordinance is not violative of the Federal and State Constitutions.[109]

At first blush, the above language appears to give local governments, urban planners, and growth management regulators a very broad slice of authority under which to operate. The concept of "phased growth" was clearly approved where there was a rational basis for it. Yet, as is often the case, the discretionary authority described is by no means absolute. For example, if a local government began using growth management techniques as a subterfuge to exclude low income or minority persons from residing in the jurisdiction, judicial disapproval would follow swiftly. This point has been addressed by both a federal circuit court and the United States Supreme Court.[110] Also, if growth management regulation reaches the level of actually taking private property, then the taking entity would be required to pay just compensation pursuant to the fifth amendment of the United States Constitution. Whether a taking occurred due to growth management requirements is often a delicate question of law, and this topic is the subject of a subsequent section of this article.[111]

At the time this text was prepared, there were no Florida appellate court decisions ruling on challenges to either concurrency regulation in general or to specific concurrency or level of service requirements in particular.[112] There are, however, several Florida appellate decisions

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107. *Id.* at 376-83, 285 N.E. 2d at 301-05, 334 N.Y.S. 2d at 150-56.

108. *Id.* at 380, 285 N.E. 2d at 303, 334 N.Y.S. 2d at 154.

109. *Id.* at 383, 285 N.E. 2d at 304-05, 334 N.Y.S. 2d at 156.

110. *See generally* Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977); Construction Indus. Ass'n v. City of Petaluma, 522 F.2d 897 (9th Cir. 1975), *cert. denied*, 424 U.S. 934 (1976).

111. *See infra* text accompanying notes 120-50.

112. The authors are aware of only one concurrency management ordinance challenged for inconsistency with the comprehensive plan through the administrative procedure set out in section 163.3213, Florida Statutes. Collier County's Adequate Public Facilities Ordinance, 90-24,

which address issues related to local government comprehensive planning. Inferences can be drawn from these decisions regarding the judicial climate under which the Florida courts will consider concurrency related matters that arise in the future.

A good example of a case dealing with comprehensive planning is a 1990 decision styled *White v. Metropolitan Dade County*.[113] The dispute centered on a controversy over the use of public park land on Key Biscayne in Dade County.[114] One of the key issues was whether Dade County had complied with its own Comprehensive Development Master Plan when it constructed a tennis complex at Crandon Park.[115] While ruling that the county had not complied, the court of appeals used the following language to describe its attitude toward compliance with adopted comprehensive plans: "This court has recognized that [property] developments challenged as contrary to master plans must be strictly construed and that the burden is on the developer to show by competent and substantial evidence that the development conforms strictly to the master plan, its elements, and objectives."[116] Employment of such language gives evidence of an attitude on the part of the Third District Court of Appeal to "strictly" construe local comprehensive plans and require adherence to a plan's "elements, and objectives."[117]

The Third District Court of Appeal is not alone in this view. In two other 1990 Florida appellate cases, growth management restrictions limiting a property owner's development rights came under review.[118] In both cases, the courts upheld the local comprehensive plan or restrictions enacted pursuant to it. These cases will be examined again when the taking issue is explored subsequently,[119] but for now the point is that appellate courts throughout Florida seem disposed to

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was challenged in two petitions. The DCA also initiated a challenge after the informal hearing. The petitions were consolidated for hearing, along with related comprehensive plan challenges. The evidentiary hearing was conducted on July 22-26, 1991, in Naples, Florida. The cases are pending before the hearing officer at this time. The consolidated cases are *Citizen's Political Comm., Inc. v. Collier County*, DOAH Case No. 90-4545 GM; *Citizen's Political Comm., Inc. v. Collier County*, DOAH Case No. 90-8101 GM; *Department of Comm'y Affairs v. Collier County*, DOAH Case No. 91-0858 GM; and *Corkran v. Collier County*, DOAH Case No. 91-0994 GM (pleadings on file with Department of Administrative Hearings).

113. 563 So. 2d 117 (Fla. 3d DCA 1990).

114. *Id.* at 120.

115. *Id.* at 127.

116. *Id.* at 128.

117. *Id.*

118. *See* Glisson v. Alachua County, 558 So. 2d 1030 (Fla. 1st DCA), *review denied*, 570 So. 2d 1304 (Fla. 1990); Lee County v. Morales, 557 So. 2d 652 (Fla. 2d DCA), *review denied*, 564 So. 2d 108 (Fla. 1990).

119. *See infra* text accompanying notes 132-41.

back comprehensive plan provisions, at least when confronted with the type of factual patterns which have reached them thus far.

A. The Taking Issue

One of the bedrock principles of American jurisprudence is the protection private property owners have against governmental seizure of their property. This concept is enshrined in the fifth amendment of the United States Constitution and in article X, section 6 of the Florida Constitution.[120] Although protection against governmental taking of private property is substantial, if the government does not actually take title to a citizen's land, but instead only regulates the uses of the land, then generally no taking has occurred. If, however, governmental regulation of an individual's land goes too far, then the courts typically find that the situation is the same as if legal title had been taken and thus order the payment of just compensation anyway. Judicially separating cases where land is over-regulated and compensation is therefore due the owner from those where regulation is found to be reasonable and no compensation is due is one of the most complex problems facing the courts in the area of land use regulation and growth management planning. Insight regarding this matter can be gained by reviewing the leading United States Supreme Court decisions addressing this question.

Perhaps the best place to start is with *Pennsylvania Coal Co. v. Mahon*.[121] The Court ruled, in part that

> [g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized, some values are enjoyed under an implied limitation and must yield to the police power. . . .
>
> . . . .
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> . . . The general rule at least is, that while property may be regulated to a certain extent, if the regulation goes too far[,] it will be recognized as a taking.[122]

The general rule laid down in *Pennsylvania Coal*, allowing the government wide latitude to regulate land use without having to pay com-

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120. The fifth amendment states in part, "nor shall private property be taken for public use, without just compensation." Article X, section 6 of the Florida Constitution states in part, "[n]o private property shall be taken except for a public purpose and with full compensation therefor paid to each owner."

121. 260 U.S. 393 (1922).

122. *Id.* at 413 & 415.

pensation for diminutions in value, has survived for approximately seven decades. With the development of a new regulatory mechanism such as concurrency, however, closer analysis of cases subsequent to *Pennsylvania Coal* helps predict judicial response to the new regulatory environment. One such case is *Agins v. City of Tiburon*,[123] decided in 1980. In that decision concerning land use regulation and the taking issue, the Court stated the following:

> The application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests . . . or denies an owner economically viable use of his land. . . . The determination that governmental action constitutes a taking is, in essence, a determination that the public at large, rather than a single owner, must bear the burden of an exercise of state power in the public interest.[124]

In 1987, the Supreme Court again addressed this issue. Referring to the *Agins* analysis, *Keystone Bituminous Coal Association v. DeBenedictis*[125] reiterates that "[t]he two factors that the Court considered relevant, have become integral parts of our takings analysis. We have held that land use regulation can effect a taking if it 'does not substantially advance legitimate state interests . . . or denies an owner economically viable use of his land.'"[126] Accordingly, it seems likely that an attack on a concurrency restriction as a taking would fail unless the property owner could show that either (1) the regulation did not "substantially advance legitimate state interests" or (2) the regulation denied the property owner "all economically viable use" of the land.[127]

B. Temporary Takings

Assume for the moment that a concurrency requirement is challenged by a landowner who has been denied a building permit because of it. Further assume that the proposed development is otherwise suitable under the comprehensive plan and other applicable requirements, except for the concurrency problem. The local government informs the landowner that if the missing infrastructure were in place, the building permit would be forthcoming. Naturally, the landowner then

123. 447 U.S. 255 (1980).
124. *Id.* at 260.
125. 480 U.S. 470 (1987).
126. *Id.* at 485 (quoting Agins v. City of Tiburon, 447 U.S. 255, 260 (1980)).
127. *Id.*

would want to know when the government plans to provide the missing infrastructure. Unfortunately, this question may not have a ready answer if the construction of the infrastructure depends on taxation and budget decisions which elected officials either have not made yet or may change. Under these circumstances, has a compensable taking of the land occurred? Remember that the local government does not plan a permanent denial of the landowner's request, only a temporary delay is imposed to satisfy the concurrency requirements.

The Supreme Court addressed circumstances similar to this in *First English Evangelical Lutheran Church v. County of Los Angeles*.[128] Due to the procedural posture of the case, the Court made an assumption that the underlying land use regulation in question did deprive the owner of "all use" of the property.[129] Based on this assumption, the Court concluded that the owner would be entitled to compensation for the period of time the land was unreasonably regulated.[130] Importantly, the Court also opined that compensation would have to be paid for the lost time of excessive regulation even if the requirements subsequently were amended or corrected.[131] As a result of *First English*, it seems possible that if concurrency regulations cause an excessive delay, then compensation is payable.

Emphasis should be placed on the words "excessive delay" because this is the point at which the most important analysis of the issue must be made. Florida appellate courts have been upholding the reasonableness of the comprehensive plan and land use regulations in cases recently presented to them. Thus far the authors have located no case at either the appellate or trial level in which there was a direct challenge to a concurrency requirement. A series of district court of appeal decisions were handed down in early 1990, however, in which landowners unsuccessfully attacked land use regulations for effecting takings without just compensation.

First, in *Glisson v. Alachua County*,[132] the First District Court of Appeal reviewed the claims of landowners in the historic Cross Creek region near Gainesville who challenged portions of Alachua County's comprehensive plan.[133] The plaintiffs primarily complained that a taking without any required payment of compensation had occurred[134] when the plan substantially reduced the amount of development that

128. 482 U.S. 304 (1987).
129. *Id.* at 321.
130. *Id.* at 306-07.
131. *Id.*
132. 558 So. 2d 1030 (Fla. 1st DCA), *review denied*, 570 So. 2d 1304 (Fla. 1990).
133. *Id.* at 1032.
134. *Id.* at 1034.

could occur in the affected area.[135] The court held that "the contested regulations substantially advance legitimate state interests, in that the regulations are directed to protection of the environment and preservation of historic areas. Furthermore . . . the regulations on their face do not deny individual landowners all economically viable uses of their property."[136]

In another case, *Lee County v. Morales*,[137] the Second District Court of Appeal confronted a similar situation. There the landowner challenged the combined effect of county rezoning decisions and Lee County's comprehensive land use plan.[138] In this dispute, the plaintiff owned four lots on a barrier island called Cayo Costa which, at the time of purchase in 1978, were zoned for commercial use.[139] Through the course of time and over the property owner's objections, the lots were rezoned for agricultural/rural and residential use.[140] The court ruled against the landowner and found that the zoning authority's decision was "fairly debatable." The court stated that "[i]n order to show that an ordinance is fairly debatable, it is only necessary that there is competent, substantial evidence to support the zoning authority's decision."[141]

Finally, in March of 1990, the Third District Court of Appeal rejected an inverse condemnation claim in *Namon v. Department of Environmental Regulation*.[142] In this case, the plaintiffs purchased a six-acre parcel in Dade County under an Agreement for Deed.[143] Even though the property was in a wetland, the zoning ordinances permitted one residence per five acres.[144] It was necessary to fill in one-half acre for the house and septic tank, however, and the permit application for filling was denied.[145] Finding that the landowners had both constructive knowledge and actual knowledge of the restrictions, the court held that "[t]he property continued to exist in the state in which appellants have contracted to acquire it. . . . [T]here has been no compensable taking and no inverse condemnation."[146] Accordingly, the plaintiffs were left with a six-acre tract of wetland which they

135. *Id.* at 1032-33.
136. *Id.* at 1037.
137. 557 So. 2d 652 (Fla. 2d DCA), *review denied*, 564 So. 2d 108 (Fla. 1990).
138. *Id.* at 653-54.
139. *Id.* at 653.
140. *Id.*
141. *Id.* at 655.
142. 558 So. 2d 504, 504 (Fla. 3d DCA), *review denied*, 564 So. 2d 1086 (Fla. 1990).
143. *Id.*
144. *Id.*
145. *Id.*
146. *Id.*

could enjoy and pay taxes on, but which they presumably could not improve.

If decisions like the three just reviewed represent the current judicial philosophy regarding land use regulations and the taking issue in Florida, then challengers of concurrency restrictions appear to be headed for an uphill battle. To succeed they either would have to convince the court that the concurrency regulation did not substantially advance a legitimate state interest, or even if it did, still show that the landowner was left with no economically viable use.[147] No doubt certain extreme fact patterns may emerge in which a complainant could satisfy this test. But if landowners in Cross Creek lose when their development rights are restricted, barrier island landowners lose when they are down-zoned, and wetland owners lose when they cannot get permits to improve their property, then the judicial prognosis for upholding concurrency restrictions seems favorable.[148]

Before leaving the discussion of the taking issue, at least a brief mention of issues concerning building moratoria should be addressed. Sometimes a local government may decide to stop issuing building permits temporarily in all or perhaps a portion of its jurisdiction. This type of situation is typically referred to as a moratorium on development. Generally, Florida courts have allowed temporary moratoria to stand as long as the governmental authority could point to some objective criteria or reason for the decision to halt development within the scope of the government's police power to protect and advance public health, safety, and welfare.[149] Usually, courts also want to be sure that the governmental entity levying a moratorium has embarked on a reasonable plan to remedy the underlying cause of the crisis so that the moratorium can be lifted within a reasonable time and conditions returned to normal.[150] If a local government's decisions regarding concurrency requirements create a de facto moratorium, it is reasonable to expect that reviewing courts would be guided in resolving such disputes by the principles previously developed to adjudicate express moratoria situations. Naturally, Florida courts faced with re-

147. *See supra* notes 132-46 and accompanying text.

148. There is a Florida federal magistrate's decision in which the plaintiff was restricted to one single family unit on approximately a forty acre tract due to Lee County's comprehensive land use plan. In this case, the magistrate found that "there was a substantial deprivation of the value of Plaintiff's property resulting in a taking." Reahard v. Lee County, No. 89-227-CIV-FTM-10C, slip op. at 2 (M.D. Fla. Jan. 16, 1991). Presumably this matter is being appealed.

149. Rhodes, *Concurrency: Problems, Practicalities and Prospects*, 6 J. LAND USE & ENVTL. L. 241, 247-48 n.27 (1991).

150. Smolker & Weaver, *Implementing and Coping With Concurrency: The Legal Framework and Emerging Constitutional Issues*, FLA. B.J., May 1990, at 47, 48-51.

viewing a concurrency-based de facto moratorium would have to be sure that landowners' federal constitutional rights were protected even if the moratoria were to pass muster under Florida law.

C. *Standards of Judicial Review*

When challenges to concurrency determinations reach a court, one of the issues that the court must undoubtedly address is what standard of review should be used to measure the appropriateness of the local government action. A very instructive case on this point is *Machado v. Musgrove*.[151] In this case, the Dade County Commission approved a zoning change allowing professional offices in an area designated by the comprehensive land use plan as estate residential.[152] If the reviewing court applied the traditional "fairly debatable" standard to the actions of the zoning authority, the Commission's decision should have been left undisturbed as long as "reasonable people could differ as to its propriety."[153] On the other hand, under the more difficult standard of strict judicial scrutiny, the actions of the zoning authority could have been be more readily overturned.[154] In *Machado*, the court stated that "land use planning and zoning are different exercises of sovereign power."[155] If, for example, a case involved an attack on zoning alleged to be "inconsistent with the comprehensive land use plan," the test is whether the zoning "conforms to each element and the objectives of the land use plan."[156] Here the court stated that the "non-differential standard of strict judicial scrutiny applies."[157] Thus, if a disappointed landowner challenges a determination as inconsistent with the local comprehensive plan, the challenge probably will be reviewed under the strict judicial scrutiny standard if the view announced in *Machado* prevails. On the other hand, if a landowner attacks the concurrency management system on its face, as opposed to attacking a specific decision, the challenge must be brought as an administrative proceeding.[158] In a proceeding of this type, Florida law specifies that land development regulations will not be found inconsistent with the local plan if they are "fairly debatable."[159]

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151. 519 So. 2d 629 (Fla. 3d DCA 1987), *review denied*, 529 So. 2d 694 (Fla. 1988).
152. *Id.* at 630-31.
153. *Id.* at 632.
154. *Id.*
155. *Id.* at 631.
156. *Id.* at 632.
157. *Id. But see* Southwest Ranches Homeowners Ass'n v. Broward County, 502 So. 2d 931 (Fla. 4th DCA), *review denied*, 511 So. 2d 999 (Fla. 1987).
158. *See* FLA. STAT. § 163.3213 (1989).
159. *Id.* § 163.3213(5)(a).

VI. FUTURE REFORM

As state and local governments accumulate experience with concurrency, there will be pressure to reform concurrency requirements. In fact refinement is needed, particularly in the area of transportation concurrency. Transportation concurrency has been the most problematic of the regulated public facilities, and improved standards for transportation concurrency management are both possible and desirable.

The most popular methodology for measuring and monitoring transportation concurrency was developed in the Development of Regional Impact review program. This methodology is best suited for the review of a single large development but is not well suited for review of all developments in the jurisdiction. The Florida Department of Community Affairs should continue to explore alternatives for area-wide concurrency measurements. An area-wide measurement is a better measure of user behavior because common experience teaches that drivers do not suffer the increasing congestion of a chosen roadway if there are less congested parallel facilities available. In addition, there must be a resolution of the conflict between local governments and the Florida Department of Transportation over the level of service to be maintained on the state highway system. Local governments should not be required to maintain an artificially high level of service on roadways that the State has made accessible to local traffic. The State may wish it had constructed limited access facilities. Having failed to do so, it should not force local governments to achieve that end through land use regulations.

Beyond these operational problems, however, the legal foundation of concurrency appears to be sound. It has been suggested that concurrency suffers from constitutional infirmities: first, because the government's purpose seems to be to shift infrastructure costs to the developer, and second, because the statute does not allow development to proceed where the developer is willing to pay the cost to mitigate the impacts of its development.[160] Both of these potential defects, however, do not survive close analysis.

As to the former, the authors find no suggestion in the Local Government Comprehensive Planning and Land Development Regulation Act (Act) or in chapter 9J-5 of the Florida Administrative Code that the State wishes to shift the cost of public facility improvements to the developer. To the contrary, the Act requires detailed, responsible public facility planning. Local governments are directed to identify and

160. *See* Rhodes, *supra* note 149, at 248-50.

only rely upon financially feasible funding sources that are currently available to the local government. The emphasis here is on public funding.

The second concern is more substantial. It is suggested that the fundamental fairness considerations of due process require that a developer be allowed to proceed if the developer is willing to contribute the funds to mitigate the impacts attributable to its development without regard to whether the needed improvement will be available concurrent with the impacts of the development. This issue arises because one development's "fair share" of improvement costs is rarely sufficient to fund construction of the improvement. Roads for example cannot be widened by a fraction of a lane, and sewage treatment plants cannot be expanded economically in a series of small increments. Additional contributions or general revenue funds are required usually before the next phase of infrastructure improvement may commence. As it stands, the Act requires that development await the orderly expansion of infrastructure.

The authors believe that the Act will survive judicial scrutiny on this fundamental, public policy issue. The Act and the concurrency requirements function as a legislative declaration that public facilities and services in Florida are in short supply and that adequate levels of public facilities and services are necessary for the health, safety, and welfare of Florida's citizens. Florida courts are unlikely to differ with the Legislature on these issues. Given these premises, the Act logically requires that adequate levels of service be maintained to protect public health, safety, and welfare before additional development may proceed.

This is not to say that the rights of landowners and developers are unimportant or may be disregarded. It is important to note that there is no implication in the Act that local governments may refuse to allow growth. Nor is there any expressed purpose even to slow the rate of growth so long as adequate public facilities and services are available. To the contrary, the Act clearly requires local governments to plan for growth to accommodate projected increases in population. Properly implemented, concurrency requirements will coordinate the rate of development with the growth of public facilities to protect an adequate level of services for Florida's existing and future citizens.

VII. Conclusion

In the area of land use planning and growth management, questions about and comments on the topic of concurrency have taken center stage. Concurrency management systems are now effective in many parts of Florida and will become operative in the remainder of the

State soon. When all local jurisdictions in Florida have implemented concurrency requirements and the current reservoir of projects which are vested or otherwise exempt from concurrency begins to run dry, substantial controversy regarding this topic can be expected. Accordingly, practitioners and persons interested in growth management can profit by acquainting themselves with the statutes, administrative rules, cases, and historical backdrop undergirding concurrency which are detailed herein.

No doubt many changes regarding concurrency are to be expected in the future, but for now it is hoped that readers of this article will have completed a primer—equipping themselves to better understand concurrency and to participate in the future development of this concept.