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Transportation Congestion and Growth Management: Comprehensive Approaches to Resolving America's Major Quality of Life Crisis

Robert H. Freilich

S. Mark White

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**TRANSPORTATION CONGESTION AND
GROWTH MANAGEMENT:
COMPREHENSIVE APPROACHES TO
RESOLVING AMERICA'S MAJOR
QUALITY OF LIFE CRISIS†**

*Robert H. Freilich**
*S. Mark White***

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* Senior Partner, Freilich, Stone, Leitner & Carlisle, Los Angeles, California and Kansas City, Missouri; Editor, *The Urban Lawyer*, National Journal of the American Bar Association, Section of Urban, State & Local Government Law; Professor of Law Emeritus, University of Missouri-Kansas City School of Law; A.B. University of Chicago; L.L.B. Yale Law School; L.L.M., J.S.D. Columbia University School of Law.

** Associate, Freilich, Stone, Leitner & Carlisle; B.A. Bethany College; J.D., M.R.P. University of North Carolina at Chapel Hill.

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I. TRAFFIC CONGESTION AND LAND USE PLANNING: THE QUALITY OF LIFE CRISIS

A. *The Adverse Impacts of Traffic Congestion*

The growth of the nation's major metropolitan areas has overwhelmed the capacity of federal, state and local governments to utilize traditional capital improvement finance programs implemented through the techniques of taxation, eminent domain and regulation to service the growing population with adequate public facilities—particularly in transportation.¹ The automobile has exerted a tremendous influence over the development of American cities and suburbs in this century. While the automobile serves as the primary means of mobility, it is also a catalyst for numerous land use problems. Such problems include traffic congestion and deterioration of metropolitan air quality. Traffic congestion is a function of the imbalance between the capacity of roadway facilities and the demand for those facilities created by increasing automobile reliance and new growth and development.

In many rapidly growing areas, citizens perceive traffic congestion as the greatest public problem, outdistancing crime, the economy and housing shortages.² The political fallout caused by the failure of federal, state and local governments to plan adequately for traffic congestion is staggering.³ One consequence has been an explosion of anti-growth sentiment in some areas over the past several decades.⁴ Traffic congestion now constitutes a predominant motivating factor behind recent growth

1. Freilich & Chinn, *Transportation Corridors: Shaping and Financing Urbanization Through Integration of Eminent Domain, Zoning and Growth Management Techniques*, 55 UMKC L. REV. 153, 154 (1987).

2. See, e.g., Billiter, *The Times Orange County Poll: Surf Drowns Out City's Drawbacks*, L.A. Times, Feb. 18, 1991, at B1, col. 5 (Huntington Beach, Cal.); Schreiner, *Traffic Congestion Named Top Problem*, San Francisco Chron., Sept. 17, 1990, at A1, col. 1 (San Francisco Bay Area, Cal.). American cities face six major crises as a result of insensitive urbanization policies within major metropolitan areas since 1965. These crises are central city decline, environmental degradation, energy shortfall, fiscal insolvency and tax revolts, agricultural land consumption and housing affordability. R. FREILICH & E. STUHLER, *THE LAND USE AWAKENING, ZONING LAW IN THE SEVENTIES* 5 (1981); Freilich, *Managing Energy Conservation Under Planned Growth*, in *ENERGY & LAND USE* 453, 454-56 (1982).

3. M. KAPLAN, *HARD CHOICES, A SUMMARY REPORT OF THE NATIONAL INFRASTRUCTURE STUDY PREPARED FOR THE JOINT ECONOMIC COMMITTEE OF THE UNITED STATES CONGRESS* 1, 2-3 (1984).

4. Cannon, *Nevada, Fastest Census Gainer, Sees More Congestion, Pollution*, Washington Post, Jan. 7, 1991, at A4, col. 1 (Reno and Las Vegas, Nev.); Pelline, *Changing Political Climate in an Anti-Growth City*, San Francisco Chron., Jan. 7, 1991, at A6, col. 1 (Santa Barbara, Cal.); Padilla, *Mayor Insists Santa Clarita's Growth Is Under Control*, L.A. Times, Sept. 21, 1990, at B4, col. 1 (Santa Clarita, Cal.); Yasuda, *Home Costs Still Rise, But Pace Has Slowed*, L.A. Times, Apr. 10, 1990, at D2A, col. 1 (San Diego, Cal.); see Salvesen, *Growth Management Tempe Style*, URB. LAND, Aug. 1990, at 20, 23.

control movements in rapidly growing states such as California, Florida and New Jersey.⁵

The United States Department of Transportation released a national policy statement in 1990 identifying the continuing problems associated with automobile congestion and encouraging governmental reliance on user charges and transportation trust funds.⁶ In 1987, over sixty-five percent of peak-hour travel on urban interstates occurred under heavily congested conditions.⁷ Highway travel hours annually consume over two billion hours and result in lost economic production.⁸ Inefficient suburban land development patterns are partly to blame.⁹

Local governments can reduce or eliminate the environmental and economic costs and the general deterioration in quality of life caused by traffic congestion through the careful use of planning and growth management techniques. By addressing facility needs on a multi-modal basis and by taking into consideration public policies affecting and affected by traffic congestion—such as affordable housing and environmental concerns—effective, comprehensive planning becomes possible.

The relationship between transportation facilities and development is well established. New roadways are a major stimulant of develop-

If it is not careful, however, Tempe could become a victim of its own success. As building densities rise to accommodate the influx of jobs and residents, so does the number of cars on the roads. Tempe is already the most densely populated city in the region. Its reliance on the automobile, coupled with cut-through traffic from neighboring cities, has led to frequent traffic snarls and deteriorating air quality. And if there is one thing that makes residents cry out for growth limits, it's traffic. Predicts director of community development Terry Day, "I can see no-growth sentiment on the horizon."

Salvesen, *supra*, at 23.

5. A recent survey of California cities identified quality of life and traffic reduction as the predominant reasons for growth control measures. Glickfeld & Levine, *The New Land Use Regulation "Revolution": Why California's Local Jurisdictions Enact Growth Control and Management Measures*, in EVALUATING LOCAL AND STATE GROWTH MANAGEMENT PROGRAMS: WHAT CAN WE LEARN FROM OUR EXPERIENCE? 34-35 (1990); *Bumper to Bumper in the 'Burbs*, ZONING NEWS, Oct. 1987, at 1, 1-2; Certero, *Unlocking Suburban Gridlock*, 52 J. AM. PLAN. A. 389, 403-04 (1986); DeGrove, *The Battle Over Land Use: A Second Wave Emerges*, ST. GOV'T NEWS, May 1988, at 8, 9; Downs, *The Real Problem with Suburban Anti-Growth Policies*, BROOKINGS REV., Spring 1988, at 23, 23; Hull, *Not in My Neighborhood*, TIME, Jan. 25, 1988, at 24, 24; Perlman, *Traffic Tie-Ups Have Moved to the Suburbs*, CITY & STATE, May 23, 1988, at 3, 28; Skaggs, *Walnut Creek Says Nuts to Growth*, URB. LAND, Oct. 1988, at 34, 34; *What's Happening to Our Town?*, NEWSWEEK, Aug. 15, 1988, at 28, 29.

6. U.S. DEP'T OF TRANSP., MOVING AMERICA 5, 26-27 (Feb. 1990).

7. *Id.* at 24.

8. *Id.*

9. *Id.* at 25.

ment.¹⁰ The construction of roadways in outlying urban areas for the past generation has fostered urban sprawl, which represents an inefficient growth pattern with enormous economic, housing and environmental costs. Furthermore, urban sprawl induces the consumption of natural resources and environmentally sensitive land.¹¹ Suburban low-density shopping, office activity centers, and residential development also contribute to traffic congestion.¹² The traditional pattern of low-density residential development induces automobile reliance by consuming land on the urban fringe and minimizing the density needed to make public transit financially feasible.¹³ Consequently, such housing fails to facilitate public transportation.

Traffic congestion creates enormous societal costs in the form of environmental pollution, energy consumption, decreases in economic productivity, and a general decline in citizens' quality of life. Automobile fuel combustion emits pollutants such as sulfur oxides, nitrogen oxides and hydrocarbons.¹⁴ In the Southern California air basin alone, an estimated eighty-seven percent of carbon monoxide emissions are caused by fuel combustion from automobile use,¹⁵ while fifty-two percent of nitrogen oxide-reactive organic emissions are caused by on- and off-road vehi-

10. See NATIONAL COMM'N ON URBAN PROBLEMS, *BUILDING THE AMERICAN CITY* 231 (1968) [hereinafter NATIONAL COMM'N]; REAL ESTATE RESEARCH CORP., *THE COSTS OF SPRAWL: LITERATURE REVIEW AND BIBLIOGRAPHY* 28 (1974).

11. D. CALLIES & R. FREILICH, *CASES AND MATERIALS ON LAND USE* 795-97 (1986 & Supp. 1988); R. FREILICH & E. STUHLER, *supra* note 2, at 32-33; REAL ESTATE RESEARCH CORP., *THE COSTS OF SPRAWL: DETAILED COST ANALYSIS* 4 (1974); see NOBLE, *A PROPOSED SYSTEM FOR REGULATING LAND USE IN URBANIZING COUNTIES* 16 (1967). Noble noted that:

Controlling sprawl by redirecting growth would benefit existing central city and suburban dwellers, would be environmentally beneficial by preserving agricultural land and open space, aid in reducing energy consumption and would by limiting the area over which services must be extended, reduce the cost of services to suburbanites and aid in the fiscal solvency of local governments.

Id. at 16.

12. Yarrow, *Commuters Agonize as Road Repairs Spread*, N.Y. Times, Sept. 24, 1990, at A1, col. 2. "Despite one of the nation's most extensive mass-transit networks and relatively slow population growth, traffic in the New York region increased substantially in the 1980's [sic], largely because of greater commuting from one suburb to another, rather than to and from New York City. Yarrow notes a sense of urgency that if the region's traffic problems are not eased soon, it will pay a price in quality of life and economic competitiveness." *Id.*; see also Weiner, *Please Stay, Morgan Stanley*, N.Y. Times, Jan. 10, 1991, at A19, col. 1 (lamenting overdevelopment in Stamford, Conn.).

13. SENATE OFFICE OF RESEARCH, *DOES CALIFORNIA NEED A POLICY TO MANAGE URBAN GROWTH?: A REPORT FROM THE CALIFORNIA SENATE URBAN GROWTH POLICY PROJECT* 24-25 (June 1989) [hereinafter PRESLEY REPORT].

14. F. ANDERSON, D. MANDELKER, A. TARLOCK, *ENVIRONMENTAL PROTECTION: LAW AND POLICY* 146-48 (1990).

15. 55 Fed. Reg. 36,458 (1990) (to be codified at 40 C.F.R. §§ 51-52).

cles.¹⁶ Moreover, "[t]ransportation accounts for more than a quarter of total national energy consumption and close to two-thirds of the petroleum used in the United States each year."¹⁷

Land use policies and concomitant growth patterns marked by increasing suburbanization, decentralization and a jobs-housing imbalance,¹⁸ substantially contribute to traffic congestion. Additionally, federal funding for mass transit and other traffic systems management programs has declined dramatically during the past decade. Structural solutions, such as freeway construction, high-occupancy vehicle lanes and ramp metering, are increasingly recognized as ineffective when used in isolation.

The purpose of this Article is to describe how structural engineering,¹⁹ public finance²⁰ and regulatory control alternatives²¹ must be jointly used to combat traffic congestion. The traditional government response to traffic congestion has been to use one category in isolation—most notably, the expansion or construction of highways. Instead of considering these techniques in isolation, state and local governments

16. *Id.*

17. U.S. DEP'T OF TRANSP., *supra* note 6, at 99; *see also* Freilich, *supra* note 2, at 453-54 (post-war energy abundance contributed to metropolitan sprawl).

18. A jobs-housing imbalance occurs where an area or region lacks sufficient housing opportunities for persons working there, or where an area or region lacks sufficient employment opportunities for persons living there. SOUTHERN CAL. ASS'N OF GOV'TS, REGIONAL GROWTH MANAGEMENT PLAN VI-1 (1989). A recent report authored by California State Senator Robert Presley (D-Riverside), contends that:

As jobs and housing continue to spread further apart, average commute time statewide could increase from 45 minutes today to two hours in the next twenty years. . . .

. . . .

According to the Association of Bay Area Governments, housing demand in the Bay Area will total 440,000 new units over the next fifteen years, to meet the needs of new residents and changing household characteristics. Much of this demand is generated by employment growth from commercial development, especially in the Silicon Valley and other major employment centers. Yet local government plans would allow at most 380,000 units in the same time period, much of it in areas such as Solano and Sonoma Counties remote from growing job centers. The result is a jobs/housing imbalance, and rapid growth in Tracy, Manteca and other Central Valley communities as housing demand spills over from the Bay Area.

PRESLEY REPORT, *supra* note 13, at 13, 16 (footnote omitted).

19. Structural engineering alternatives generally include the construction, reconstruction or reconfiguration of existing and programmed transportation facilities. *See infra* notes 54-67 and accompanying text.

20. Public finance alternatives include the use of revenue-raising devices to finance the acquisition of land and the construction or improvement of capital facilities needed to alleviate congestion. *See infra* notes 68-99 and accompanying text.

21. Regulatory control alternatives involve the use of police power techniques by state and local governments to mitigate the effect of new and existing development on transportation facilities. *See infra* notes 100-296 and accompanying text.

should use a combination of techniques under each category in order to develop a truly effective, comprehensive strategy addressing traffic congestion. Government must apply land use and public finance mechanisms as part of a comprehensive program to resolve traffic congestion and resultant air quality degradation.

B. The Relationship Between Traffic Congestion and Land Use

The relationship between traffic congestion and economic growth and development is well documented.²² As a result, developers and local governments commonly institute cooperative financing arrangements, benefit assessment districts, impact fees, joint development and voluntary associations to add roadway capacity and to encourage the use of mass transit.²³ Furthermore, traffic congestion is a major factor in the quality of life in a city. Congestion contributes to neighborhood deterioration, psychological discomfort, increased response times for police, fire and medical services, and reduced economic productivity and mobility.

Increases in traffic congestion are caused by a combination of factors, including land use patterns, changes in travel behavior and modal split.²⁴ Urban decentralization and the imbalance between jobs and housing are major contributors to congestion. Population growth on the urban fringe increases trip lengths to job destinations in the urban core and introduces congestion to once-quiet suburban neighborhoods. In addition, the imbalance between jobs and housing forces consumers to in-

22. Planners and market researchers utilize standardized models involving the spatial relationship between trip generators and trip attractors to predict the level of economic activity in a given area. This is normally referred to as the "gravity" model. F. CHAPIN & E. KAISER, *URBAN LAND USE PLANNING* 545-57 (3d ed. 1979).

23. See Freilich & Morgan, *Municipal Strategies for Imposing Valid Development Exactions: Responding to Nollan*, 10 *ZONING & PLAN. L. REP.* 169, 174-75 (1987); Orski, *Suburban Mobility: The Coming Transportation Crisis?*, 12 *CURRENT MUN. PROBS.* 383, 388-96 (1986). For example, in *Committee of Seven Thousand v. Superior Court*, the building industry defended the use of a regional impact fee used to fund nearly 60% of the cost of three freeways in Orange County, California. 45 Cal. 3d 491, 498-99, 754 P.2d 708, 711-12, 247 Cal. Rptr. 362, 365-66 (1988); see also Orski, *supra*, at 390 (fees assessed on developments located within highway corridors in proportion to projected traffic attributable to each development). Similarly, in *J.W. Jones Cos. v. City of San Diego*, the Construction Industry Federation and the Building Industry Association filed amicus curiae briefs in defense of an innovative financial technique, called a facilities benefit assessment, which combines the features of traditional assessment and impact fees. 157 Cal. App. 3d 745, 203 Cal. Rptr. 580 (1984). The facilities benefit assessment required developers to participate in the pro-rata cost of new capital facilities necessitated by new development. *Id.* at 749-50, 203 Cal. Rptr. at 583. For a discussion of facility benefit assessments, see D. CALLIES & R. FREILICH, *supra* note 11, at 388-94.

24. "Modal split" refers to the distribution of trips between alternative transportation models, such as automobile and transit. CALTRANS, *CONGESTION MANAGEMENT PROGRAM RESOURCE HANDBOOK* app. C-5 (1990).

crease automobile trip lengths on freeways.²⁵ Suburban employment centers, with their liberal parking requirements and auto-intensive commercial and retail uses, create an incentive for congestion by making automobile commuting more attractive than public transit.²⁶ Decentralization and the jobs-housing imbalance, when combined with the relative accessibility of automobiles and fuel, have combined to make the United States the most auto-reliant nation in the world.²⁷

The financial structure of transportation planning also adds to urban sprawl and traffic congestion. By failing to tax the inefficiencies of sprawl, federal, state and local governments overlook important sources of funds for public transit.²⁸ Most noticeable is the evisceration of federal support from the Urban Mass Transit Act.²⁹ Such a reduction of funds is unfortunate since the construction of public transit could promote growth in urban centers while discouraging urban sprawl and decentralization.

C. *Lack of Regional, State or Federal Solutions*

Roads do not generally stop at municipal borders; therefore, transportation is widely viewed as a regional problem. Effective solutions to the traffic congestion quandary, however, have not emerged from federal or state governments. Despite the rising interest in regional and state-wide controls in many regions, little has been done to change the fundamental fact that the regulation of land use resides primarily at the local level.³⁰ State and regional land use controls have been confined to significant environmental and natural resources.³¹

25. R. CERVERO, *SUBURBAN GRIDLOCK* 73-79 (1986).

26. See R. CERVERO, *AMERICA'S SUBURBAN CENTERS: A STUDY OF THE LAND USE-TRANSPORTATION LINK* 34-41 (1988).

27. See Pucher, *Capitalism, Socialism, and Urban Transportation: Policies and Travel Behavior in the East and West*, 56 J. AM. PLAN. A. 278 (1990).

28. Some local governments, however, have considered higher parking fees and other charges as a means to reduce traffic. See, e.g., MONTGOMERY COUNTY PLANNING DEP'T, MARYLAND-NAT'L CAPITAL PARK AND PLANNING COMM'N, *ALTERNATIVE TRANSPORTATION SCENARIOS AND STAGING CEILINGS* 41-42 (proposing parking fee increases, set-asides at parking garages for high-occupancy and private parking tax).

29. 49 U.S.C. app. §§ 1601-1621 (1988).

30. See, e.g., 36 D. FRIZELL & H. POZYCKI, *NEW JERSEY PRACTICE* III 18A (1989).

31. See, e.g., *Askew v. Cross Key Waterways*, 372 So. 2d 913 (Fla. 1978) (state land use controls over areas of "critical state concern" defined, in part, as area containing environmental, historical, natural or archeological resources); California Coastal Zone Management Act, CAL. PUB. RES. CODE §§ 30000-30900 (West 1986 & Supp. 1991) (created coastal commission with oversight powers on any development impinging on coastal recreation areas, the marine environment and land resources); see also F. BOSSELMAN & D. CALLIES, *THE QUIET REVOLUTION IN LAND USE CONTROLS* 3-4 (1972) (state and regional land use controls result from growing awareness that states are the only political entities capable of devising innovative

The issue of whether land use controls should be exercised at the local or regional level has been raised in nearly every major land use decision.³² Metropolitan regional solutions originated with the Federal-Aid Highway Act of 1962,³³ which provided that federal funding for urban highways must be "based on a continuing comprehensive planning process."³⁴ Nevertheless, regional oversight of highway construction has gradually eroded,³⁵ thereby leading to the non-binding oversight of local metropolitan planning organizations.³⁶

The federal regulations implementing the transportation planning requirement were amended in 1975.³⁷ The 1975 regulations mandated a

techniques to solve problems such as pollution and destruction of fragile natural resources); J. DEGROVE, *LAND GROWTH & POLITICS* 99-108, 177-234 (1984) (describing how Florida and California developed comprehensive land use controls in response to compelling state wide environmental concerns). See generally Fulton, *In Land-Use Planning, a Second Revolution Shifts Control to the States*, *GOVERNING*, Mar. 1989, at 40.

32. See, e.g., *Village of Euclid v. Amber Realty Co.*, 272 U.S. 365, 389-90 (1926) (zoning ordinance of suburb valid where it diverted development coming from adjoining larger city); *Associated Home Builders v. City of Livermore*, 18 Cal. 3d 582, 604, 557 P.2d 473, 486, 135 Cal. Rptr. 41, 54 (1976) (local initiative ordinance to limit issuance of building permits upheld); *Southern Burlington County NAACP v. Township of Mt. Laurel*, 92 N.J. 158, 238, 456 A.2d 390, 430 (1983) (regional general welfare is mandatory, not permissive); *Golden v. Planning Bd. of Ramapo*, 30 N.Y.2d 359, 383, 285 N.E.2d 291, 304-05, 334 N.Y.S.2d 138, 158 (inadequate local resources sufficient to justify zoning ordinance), *appeal dismissed*, 409 U.S. 1003 (1972).

33. Pub. L. No. 87-866, § 9(a), 76 Stat. 1145, 1148 (codified as amended at 23 U.S.C. § 134(a) (1988)).

34. *Id.*

35. The decline of truly effective regional planning is demonstrated by the demise of the A-95 review process. Prompted by the rise of councils of governments and regional planning agencies in the 1960s, the federal Office of Management and Budget (OMB) issued *Circular No. A-95, OFFICE OF MANAGEMENT & BUDGET, CIRCULAR NO. A-95* (1969), under the authority of section 401(c)(3) of the Intergovernmental Cooperation Act of 1968, 42 U.S.C. § 4231(c) (repealed 1982), and section 204 of the Demonstration Cities and Metropolitan Development Act of 1966, 42 U.S.C. § 3334 (1989). Brussat, *A-95 Review System: Can Be an Asset*, in 3 *MANAGEMENT AND CONTROL OF GROWTH* 298, 298 (1975). *Circular No. A-95* required the review of local and private applications for federal assistance by state and regional agencies acting as clearinghouses. D. MANDELKER, D. NETSCH & P. SALSICH, *STATE AND LOCAL GOVERNMENT IN A FEDERAL SYSTEM* 181 (2d ed. 1983). Although clearinghouse comments were merely advisory and not binding on applicants or federal agencies, the process allowed a wide range of interested jurisdictions affected by a potential project to review and comment on the potential effects. *Id.* However, *Circular No. A-95* was revoked by the Reagan Administration in 1983. Executive Order No. 12,372, 3 C.F.R. 197 (1983), *reprinted in* 31 U.S.C. § 6506 (1988).

36. Metropolitan Planning Organizations (MPOs) are advisory planning organizations created by states in order to receive funds and to develop transportation plans and transportation improvement programs pursuant to the Federal-Aid Highway Act of 1962, 23 U.S.C. § 134(a) (1990), and the Urban Mass Transportation Act of 1964, 49 U.S.C. §§ 1601-1621 (1990). See, e.g., HAW. REV. STAT. § 279E-1 (1985).

37. See 23 C.F.R. §§ 450.100-.320 (1976); 49 C.F.R. §§ 613.100-.300 (1976).

comprehensive planning process containing: (1) an analysis of the economic and environmental effects of highway construction; (2) coordination with air quality planning; (3) public involvement; (4) considerations of civil rights; (5) mass transit with special services for the elderly and handicapped; (6) energy conservation; (7) an analysis of existing private mass transit services; and, (8) technical activities.³⁸

The planning process was to identify alternative transportation system management improvements and achieve consistency with local land use and urban planning goals, transportation corridors, staging policies and urban development monitoring.³⁹ The process was to culminate in a comprehensive transportation plan, with a transportation system management (TSM) element, as well as a long-range planning element.⁴⁰ The TSM element would identify short-range transportation needs, methods effectively to utilize existing road capacity, engineering capabilities, public transit, regulatory and pricing schemes, management, operations and other techniques.⁴¹ The long-range element would identify long-range transportation needs, policies and changes in major facilities.⁴² The plan was to be consistent with local comprehensive land use planning and urban development objectives, overall social, economic and environmental needs and energy conservation objectives.⁴³ The 1975 regulations were substantially eroded during the Reagan Administration.⁴⁴

The absence of federal leadership in the area of land use controls is also illustrated by the failure of transportation control plans (TCPs) under the Clean Air Act⁴⁵ to gain political acceptability. The 1977 Amendments to the Clean Air Act removed language that authorized the Environmental Protection Agency (EPA) to require states to include

38. 23 C.F.R. § 450.120 (1976).

39. *Id.*

40. *Id.* § 450.116.

41. *Id.* § 450.116(b).

42. *Id.* § 450.116(c).

43. *Id.* § 450.116(d).

44. *See id.* §§ 450.100-.114 (1981) (requiring comprehensive transportation planning process resulting in development of urbanized area as condition to receiving federal operating assistance); 23 C.F.R. §§ 450.200-.212 (1983) (establishing regulations for content of transportation improvement program in urbanized area); U.S. DEP'T OF HOUSING & URBAN DEV., THE PRESIDENT'S NATIONAL URBAN POLICY REPORT 69-70 (1984). *See* Citizens Comm. Against Interstate Route 675 v. Lewis, 542 F. Supp. 496 (S.D. Ohio 1982), for an illustration of the process of planning and constructing a major highway against the backdrop of the National Environmental Policy Act of 1969, 42 U.S.C. § 4332 (1988), and how the federal requirements changed during the Reagan Administration.

45. 42 U.S.C. §§ 7401-7642 (1989); 40 C.F.R. §§ 52.01-52.29 (1976). The TCPs were elements of state implementation plans (SIPs) representing states' proposed efforts to achieve compliance with federally mandated air quality standards. 42 U.S.C. § 7410.

TCPs in their state implementation plans (SIPs).⁴⁶ Only recently has the Clean Air Act been amended to deal with the air quality impacts of traffic congestion.⁴⁷ The Environmental Protection Agency, however, continues to recognize that local government is the appropriate forum for implementing transportation-related land use controls.⁴⁸

States almost universally delegate land use control powers to local governments.⁴⁹ A handful of states have adopted vertically integrated planning systems,⁵⁰ while others, such as California, have mandatory planning.⁵¹ The primary responsibility for the implementation of state, regional and local land use goals, however, lies with local governments.⁵²

46. 42 U.S.C. § 7410.

47. The 1990 Clean Air Act amendments require states containing "Serious," "Severe" or "Extreme" ozone non-attainment areas to include designated transportation control measures in their SIPs, including mandatory transportation demand management for certain employers. Pub. L. No. 101-549, § 103, 104 Stat. 2399, 2423-52. See also *infra* notes 256-82 and accompanying text for a discussion of transportation demand management.

48. See 55 Fed. Reg. 36,458 (1990) (to be codified at 40 C.F.R. §§ 51-52) (recognizing value of local initiatives by approving in part and disapproving in part California's SIP for the South Coast Air Basin, and acknowledging infeasibility of federally-implemented land use control alternatives).

49. D. FRIZELL & H. POZYCKI, *supra* note 30, at III 18A.

50. See, e.g., FLA. STAT. ANN. §§ 163.3161-3215 (West 1990 & Supp. 1991); OR. REV. STAT. §§ 197.005-215.337 (1985 & Supp. 1990); OREGON LAND CONSERVATION & DEV. COMM'N, OREGON LAND USE GOALS AND GUIDELINES REGULATIONS, *reprinted in* [6 State Solid Waste-Land Use] Env't Rep. (BNA), at 1286:2501-2525 (Sept. 21, 1990). Vertically integrated planning systems involve state wide planning agencies, which prescribe planning goals and objectives. OR. REV. STAT. § 197.005(2), (4). The systems also provide for review of state agency, city, county and special district land conservation and development plans. *Id.*

51. See, e.g., CAL. PUB. RES. CODE §§ 30000-30009 (West 1986); DEL. CODE ANN. tit. 7, §§ 7001-7013 (1985 & Supp. 1990); FLA. STAT. ANN. §§ 380.012-380.12 (West 1988); see Freilich & Chinn, *supra* note 1, at 167 n.54. Most states limit the regional planning mechanisms to non-urban critical or environmental areas. See, e.g., CAL. GOV'T CODE §§ 66800-67132 (West 1990 & Supp. 1991) (creating the Tahoe Regional Planning Agency to preserve scenic beauty and recreational opportunities); Tahoe Regional Planning Agency Act, NEV. REV. STAT. ANN. §§ 277.190-.200 (Michie 1990) (creating the Tahoe Regional Planning Agency to preserve natural beauty and economic productivity of region); New Jersey Hackensack Meadowlands Development Commission Act, N.J. STAT. ANN. §§ 13:17-1 to -86 (West 1979 & Supp. 1990) (creating the Hackensack Meadowlands Development Commission to oversee conservation of salt water swamps, meadows and marshes); New Jersey Pinelands Protection Act, N.J. STAT. ANN. §§ 18A-1 to -49 (West 1979 & Supp. 1990) (creating the Pinelands Environmental Council to protect water resources and natural assets of Pinelands region); New Jersey Coastal Area Facility Review Act, N.J. STAT. ANN. §§ 13:19-1 to -21 (West 1979 & Supp. 1990) (authorizing state Department of Environmental Protection to review existing facilities' pollution impact on coastal areas); New York Adirondack Park Agency Act, N.Y. EXEC. LAW §§ 800-820 (West 1982 & Supp. 1991) (creating the Adirondack Park Agency to preserve natural resources and open space in Adirondack Park); North Carolina Coastal Area Management Act of 1974, N.C. GEN. STAT. ANN. §§ 113A-100 to -134 (Michie 1990) (creating the Coastal Resources Advisory Council to preserve coastal areas, particularly estuaries).

52. D. CALLIES & R. FREILICH, *supra* note 11, at 901.

Consequently, the issue of regionalism is generally raised as a red herring by developers or landowners contesting a local regulatory scheme, rather than as a means to encourage development of regional institutions to deal with transportation problems.⁵³ Until effective regional planning and implementation becomes a reality, such a position would leave citizens entirely unprotected from the adverse affects of unregulated development.

II. STRUCTURAL ALTERNATIVES: ADDING CAPACITY THROUGH CONSTRUCTION, ENGINEERING AND TRAFFIC FLOW MEASURES

A. *New Construction and Use of Existing Capacity*

The traditional solution to traffic congestion has been to construct new roadways. This solution, however, is no longer viable in many situations because of financial constraints, environmental restrictions, community opposition to roadway expansion and changing traffic patterns.⁵⁴ In fact, it is well established that construction of additional roadways often exacerbates congestion by making travel by automobile more accessible.⁵⁵

As an alternative to roadway expansion, transportation engineers and planners have devised methods to alter travel behavior and traffic patterns by changing the ways in which roadways are used. Supply-side mechanisms to increase the effective capacity of roadways, without building or expanding roadways, are commonly referred to as TSM.⁵⁶ TSMs generally includes the following measures: (1) congestion detection and

53. Ironically, while developers often challenge local growth controls on regional rational basis and general welfare grounds, a study commissioned by a group of home builders in response to Florida's vertically integrated planning system has recently called for "[m]ore direct, local control." Orosz, *New Governor Reviews Florida Growth Law*, PLANNING, Jan. 1991, at 30, 30.

54. Kozlak, *Traffic Congestion: A Major Public Policy Issue in the Twin Cities Area*, 10 HAMLINE J. PUB. L. & POL'Y 219, 223 (1989); Weiner, *supra* note 12, at A19, col. 1.

55. See Kolata, *What if They Closed 42d Street and Nobody Noticed?*, N.Y. Times, Dec. 25, 1990 (Science), at 14, col.1.

56. The California Streets and Highways Code defines TSM projects as "those projects designed to increase the number of person-trips which can be carried on the highway system in a peak period without significantly increasing the designed capacity of the highway system when measured by the number of vehicle-trips and without increasing the number of through traffic lanes." CAL. STS. & HIGH. CODE § 164.1 (West 1990). Flexible congestion relief projects are defined as "those projects designed to reduce or avoid traffic congestion on existing routes by increasing the capacity of the transportation system, including new facilities." *Id.* § 164.2. TSM differs from transportation demand management (TDM) policies in that it attempts to influence travel behavior through supply-side policies, such as by reserving highway lanes for carpools. TDM policies are designed to directly influence the demand side of traffic congestion through the land development or regulatory process. See *infra* notes 256-82 and accompanying text.

monitoring systems; (2) ramp metering; (3) high-occupancy vehicle lanes; (4) freeway diversion; (5) signalization improvements; (6) reversible traffic lanes; and, (7) parking management.⁵⁷ While such solutions should be a part of any transportation congestion management program, they are ineffective in rapidly growing areas, absent growth management controls.

B. Organizing Frameworks

1. Capital improvement programming

A capital improvement program (CIP) is a schedule of capital improvements to be provided over a definite period of time.⁵⁸ CIPs show the location and cost of the proposed facility construction; expansions in facility capacity; the need for such facilities; when the facilities will be provided; the sources available for financing the facility additions; adopted level of service standards; and, a statement of the capacity provided by programmed facility expansions.⁵⁹ The CIP may also include a long-term capital facilities plan to be implemented by a series of short-term, staged budgets.

The CIP is an essential component of any structural, public finance or regulatory program, and particularly of any growth management program tying development approval to the adequacy of public facilities supporting new development.⁶⁰ If growth management programs are

57. See generally INSTITUTE OF TRANSP. ENG'RS, A TOOLBOX FOR ALLEVIATING TRAFFIC CONGESTION (1989) (discussing coordinated plan to alleviate traffic congestion); SOUTH COAST AIR QUALITY MANAGEMENT DIST. & SOUTHERN CAL. ASS'N OF GOV'TS, AIR QUALITY MANAGEMENT PLAN (Mar. 1989) (discussing Air Quality Management Plan).

58. See, e.g., FLA. STAT. ANN. § 163.3177(3) (West Supp. 1990).

59. See, e.g., *id.* § 163.3177(3)(a).

60. D. CALLIES & R. FREILICH, *supra* note 11, at 836; see *Golden v. Planning Bd. of Ramapo*, 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138, *appeal dismissed*, 409 U.S. 1003 (1972). *Golden* established the constitutionality of adding sequencing and timing dimensions to land use regulation, in addition to the traditional use and location controls. The *Golden* plan linked the availability of adequate public facilities to development potential by pacing subdivision approval with an eighteen-year CIP within a comprehensive plan. *Id.* at 368-69, 285 N.E.2d at 295-96, 334 N.Y.S.2d at 143-44. The case was of critical constitutional significance because it enlarged the concept of "reasonable use" enunciated in *Village of Euclid v. Amber Realty Co.*, 272 U.S. 365 (1926), and *Nectow v. City of Cambridge*, 277 U.S. 183 (1928), to that of reasonable use over a reasonable period of time, as measured by a comprehensive plan. *Golden*, 30 N.Y.2d at 382, 285 N.E.2d at 304, 334 N.Y.S.2d at 155-56. After a comprehensive survey of commentators and land use practitioners, Dozier and Hagman ranked *Golden* as the most significant land use regulation case, next to *Village of Euclid*. Dozier & Hagman, *Ranking Land Development and Environmental Cases and Courts*, 4 ENVTL. COMMENT 4 (1978).

Professor Freilich, who authored the *Golden* plan, drafted the ordinance and argued the case through the courts, has elaborated on the development of the case and its constitutional

coupled with a realistic CIP, courts will presume that local governments provided the facilities and services needed for growth in good faith.⁶¹ CIPs may also form the basis for development exactions, conditioning development approval on the provision of public facilities and services in proportion to the impact created by the new development.⁶² If a growth control mechanism is ostensibly based on public facility concerns, yet is not supported by a realistic CIP, courts are likely to be skeptical of the program's underlying motives and may invalidate it on exclusionary zoning or takings grounds.⁶³

2. Transportation corridors

Both transportation corridors⁶⁴ and CIPs can serve as unifying frameworks for the construction and use of transportation facilities, financing mechanisms and regulatory techniques. Transportation corridors serve as an organizing framework for financial and growth management tools by:

- (1) . . . acting as the focus for coordinated transportation improvements within major travel corridors and enhancing system efficiency;
- (2) [p]romot[ing] the development of multi-modal transportation systems that integrate highways, air, mass transit and other transportation modes;

significance. See Freilich & Greis, *Timing and Sequencing Development: Controlling Growth*, in *FUTURE LAND USE, ENERGY, ENVIRONMENT AND LEGAL CONSTRAINTS* 59, 65-84 (1975); Freilich & Ragsdale, *Timing and Sequential Controls—The Essential Basis for Effective Regional Planning: An Analysis of the New Directions for Land Use Control in the Minneapolis-St. Paul Metropolitan Region*, 58 *MINN. L. REV.* 1009, 1011 (1974). See also *infra* notes 140-255 and accompanying text for a discussion of adequate public facilities ordinances.

61. See *infra* notes 228-34 and accompanying text.

62. See, e.g., *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987); *Beaver Meadows v. Board of County Comm'rs*, 709 P.2d 928 (Colo. 1985). See *infra* notes 107-10 and accompanying text for a discussion of developer exactions.

63. See, e.g., *Q.C. Constr. Co. v. Gallo*, 649 F. Supp. 1331, 1338 (D.R.I. 1986); *Associated Home Builders v. City of Livermore*, 18 Cal. 3d 582, 604-07, 557 P.2d 473, 486-87, 135 Cal. Rptr. 41, 54-55 (1976); *Westwood Forest Estates v. Village of South Nyack*, 23 N.Y.2d 424, 428, 244 N.E.2d 700, 702, 297 N.Y.S.2d 129, 133 (1969).

64. A transportation corridor is a specific geographic area containing the maximum right-of-way needed to meet projected population and employment growth, and encompassing all adjacent areas impacted by the corridor plan and reasonably necessary to accomplish it. Freilich & Chinn, *supra* note 1, at 165. The transportation corridor concept relies upon advance acquisition through eminent domain, freeing the public sector from the "necessity" limitation on eminent domain and demonstrating a present need for the proposed acquisition. Callies & Duerksen, *Value Recapture as a Source of Funds to Finance Public Projects*, 8 *URB. L. ANN.* 73, 81-82 (1974); see *Department of Transp. v. Fortune Fed. Sav. & Loan Ass'n*, 532 So. 2d 1267, 1270 (Fla. 1988) (recognizing cost savings as legitimate public purpose in excess condemnation).

- (3) [p]romot[ing] a comprehensive transportation planning process which coordinates state, regional and local transportation plans;
- (4) [a]ssist[ing] in the construction of infrastructure, including state, county and local streets and highways through fees generated by new developments . . . ;
- (5) [r]educ[ing] . . . the costs for acquisition of right-of-way and construction of new and expanded transportation facilities;
- (6) [a]ct[ing] as a focus for joint public-private development at major interchanges or multi-modal junctions to enhance the state's economic and development activity, including research, technology, office, commercial and industrial site location in order to promote the expansion of employment and assure the continued growth of the . . . economy;
- (7) being the site for higher density residential development, including affordable housing, day care centers, public and non-profit service facilities, housing and accessible facilities for the elderly and handicapped;
- (8) [p]rotect[ing] . . . fragile environmental and natural resources . . . including agricultural lands, open space, scenic vistas and historic or archaeologically significant properties and sites, through cluster development, average density, planned unit development, air rights transfers and transfers of development capacity from non-corridor areas to appropriate recipient areas within transportation corridors; and
- (9) [a]ssist[ing] in the maintenance of clear distinctions between urban and non-urban areas to provide effective growth management in accordance with the goals and objectives of the [comprehensive] plan, including but not limited to energy conservation, efficient provision of capital infrastructure and governmental services, and enhanced development of existing built-up urban areas of the state.⁶⁵

Broad-based planning efforts that integrate transportation congestion solutions with broader planning objectives, such as adopting goals to

65. Freilich & Chinn, *supra* note 1, at 170-71; *see also* *Montgomery County v. Woodward & Lothrop, Inc.*, 280 Md. 686, 693-94, 376 A.2d 483, 488 (1977) (upholding comprehensive downzoning to implement "wedges and corridors" strategy designed to increase densities along major transportation corridors and to preserve areas between corridors).

combat the six major urban crises,⁶⁶ make the congestion management program more effective and legally defensible. Such efforts enhance not only the structural mechanisms, but also the financial and regulatory mechanisms, by reasonably advancing the legitimate public purpose of alleviating traffic congestion.⁶⁷

III. PUBLIC FINANCE ALTERNATIVES

Enormous backlogs in roadway and public transit needs, the rising costs of construction and maintenance, and voter resistance to *ad valorem* property and sales tax increases, have forced local governments to search for new ways to finance transportation facilities. While some local governments have found novel ways to apply established techniques, such as special assessments, new devices are also emerging to fund transportation facilities. Although local governments have successfully exercised their police powers⁶⁸ to recover the public facility costs necessitated by new development, the legal constraints associated with this technique triggered a search for additional funding sources. This section describes the innovative revenue-raising techniques being used to fund the capital and maintenance costs of transportation.

A. Special Assessments

Special assessments are revenue-raising devices designed to recover the cost of capital improvements directly benefiting properties within a designated "benefit area."⁶⁹ They may be collected from owners of both new and existing developments. Unlike impact fees and mandatory dedications imposed under a local government's police and land use control powers, special assessments may be used to pay for existing infrastructure deficiencies.

66. These crises are: central city decline, environmental degradation, energy shortfall, fiscal insolvency, agricultural land consumption and lack of affordable housing. See R. FREILICH & E. STUHLER, *supra* note 2, at 5.

67. See *Nollan*, 483 U.S. at 836-38; see also *Lawton v. Steele*, 152 U.S. 133, 137 (1894) (police power measures valid if they adopt reasonable means to lawful end).

68. Police power exactions such as mandatory dedications and impact fees imposed as a condition of land development approval are not taxation devices. Such exactions are designed to recover the cost of capital facilities necessitated by the regulatory approval of new development. Accordingly, these techniques are described separately. For a discussion of impact fees, see *infra* notes 289-96 and accompanying text. For a discussion of mandatory dedications, see *infra* notes 107-10 and accompanying text.

69. 14 E. MCQUILLIN, *THE LAW OF MUNICIPAL CORPORATIONS* 77-78 (J. Reinholdt 3d ed. 1987).

In San Diego, special assessments and impact fees are integrated with the city's "tiered" growth management system.⁷⁰ New developments within the planned urbanizing area (PUA) are required to participate in the financing of public infrastructure needs.⁷¹ The tier system divides San Diego into three areas: (1) the Urbanized Area, including the central city and built-up areas, in which growth is actively encouraged; (2) the PUA, in which land is opened for urbanization in a staged, continuous manner through the orderly extension of public facilities; and, (3) Future Urbanizing Areas, where land is held in "urban reserve," pending the development of the PUA. The city's facilities benefit assessment (FBA) is a special assessment applied to new development in the PUA that apportions the cost of traffic, park, library, school, fire and other facilities to each new unit of residential, commercial and industrial development.⁷² Payment of the FBA is postponed until the building-permit stage and is enforceable by a lien on the property. Use of FBAs from 1979 to 1983 resulted in a major shift in development to the Urbanized Area, thereby achieving one of the major goals of San Diego's 1979 General Plan.⁷³

Special assessments are generally available only for capital improvements that "directly benefit" property within a delineated benefit area, in contrast to "general improvements" conferring area-wide benefits. As a result, using special assessments for major public projects may pose unique problems. For example, courts have split on the issue of whether a "special benefit" can be shown for the construction of a city-wide or regional mass transit system.⁷⁴

70. R. FREILICH, A FIVE-TIERED GROWTH MANAGEMENT PROGRAM FOR SAN DIEGO 2-7 to 2-11 (1976).

71. *Id.*; see Witt & Sammartino, *Facility Financing in the 1990s: The Second Step in Urban Growth Management*, 38 WASH. U.J. URB. & CONTEMP. L. 115 (1990).

72. San Diego's FBA was challenged on state constitutional grounds and upheld in the California appellate courts. *City of San Diego v. Holodnak*, 157 Cal. App. 3d 759, 763, 203 Cal. Rptr. 797, 800 (1984); *J.W. Jones Cos. v. City of San Diego*, 157 Cal. App. 3d 745, 757-58, 203 Cal. Rptr. 580, 589 (1984).

73. Freilich & Chinn, *supra* note 1, at 164 n.52. The General Plan's goal was to redistribute growth and transfer a greater portion of new growth to the urbanized area. *Id.* Growth in the city over that period increased from 9,000 building permits per year, of which only 900 were in the 100 square mile Urbanized Area, to 16,000 building permits per year, with more than 50% in the Urbanized Area. This increase in the number of permits granted revitalized the depressed neighborhoods in the downtown and waterfront areas. *Id.*

74. *Compare* *Southern Cal. Rapid Transit Dist. v. Bolen*, 219 Cal. App. 3d 1446, 269 Cal. Rptr. 147 (special assessment district to finance 18.6 mile subway connection from Los Angeles to North Hollywood held to be violation of equal protection clause of fourteenth amendment), *review granted*, 797 P.2d 1179, 274 Cal. Rptr. 1 (1990) *with* *Anema v. Transit Constr. Auth.*, 788 P.2d 1261 (Colo. 1990) (assessments for construction of fixed rail rapid transit system held valid special fee) *and* *Committee of Seven Thousand v. Superior Court*, 45 Cal. 3d

B. Transportation Utility Fees

Transportation utility fees (TUFs) are recent innovations that capture the costs of street operations and maintenance from both existing and new development.⁷⁵ Unlike special assessments, TUFs may be used to recover operation and maintenance costs and need not be tied to direct benefits received from the use of roadways within a local jurisdiction.

A TUF, which applied only to developed properties, was adopted in 1984 by Fort Collins, Colorado and recently upheld by the Colorado Supreme Court in *Bloom v. City of Fort Collins*.⁷⁶ A Transportation Utility was created within a special services fund for maintaining local streets.⁷⁷ The TUF was calculated by multiplying a city-wide "base rate" per foot of frontage by a "traffic generation factor," which varied depending upon whether the property was single-family residential, multi-family residential or non-residential.⁷⁸ For lots using utilities, the fee was billed with the normal monthly utility bill; lots not using utilities were billed separately.⁷⁹ These fees were enforceable through a lien on the property.⁸⁰ The revenues generated by the fees were used for the "cost of operation, administration, maintenance, repair, improvement, renewal, replacement and reconstruction of the local street network of the city and costs incidental thereto."⁸¹

The *Bloom* court considered whether the fee could be classified as an *ad valorem* tax, excise tax, special assessment or special fee.⁸² First, the court rejected the classification of the fee as an *ad valorem* tax because it was not calculated on the basis of property value.⁸³ Second, classification as an excise tax was similarly rejected on the basis that the fee was not "conditioned on the performance of an act, event, or occurrence."⁸⁴ Finally, the court dismissed the classification of the fee as a special assessment because the maintenance of streets throughout Fort

491, 754 P.2d 708, 247 Cal. Rptr. 362 (1988) (upholding regional freeway impact fees for Orange County).

75. Cf. *Teter v. Clark County*, 104 Wash. 2d 227, 704 P.2d 1171 (1985) (upholding drainage utility fee).

76. 784 P.2d 305, — (Colo. 19—).

77. FORT COLLINS, COLO. CODE § 108A-1 (1984).

78. *Id.* § 108A-7.

79. *Id.* § 108A-8.

80. *Id.* § 108A-10.

81. *Id.* § 108A-8. The code provision allowed excess revenues to be applied to "any other fund of the city." *Id.* This particular provision was invalidated and severed from the remainder of the ordinance. *Bloom*, 784 P.2d at 311.

82. *Bloom*, 784 P.2d at 307-09.

83. *Id.* at 309.

84. *Id.* at 310.

Collins did not, as noted on the face of the ordinance, enhance the value of particular properties.⁸⁵ Instead, the court concluded that the fee was a "special fee."⁸⁶

Upholding the special fee, the court found that the fee was "reasonably designed to meet the overall cost of the service for which the fee [was] imposed."⁸⁷ In addition, the owners of properties within Fort Collins were found to have received a benefit from the maintenance of city streets, because of the "access to and from residences, buildings, and other areas within [Fort Collins]."⁸⁸ The court declined to invalidate the fee on the ground that it was involuntary, distinguishing cases applying this standard on the ground that those cases arose within the context of statutory authority.⁸⁹

C. Development Excise Taxes

A number of cities collect excise taxes on the business of real estate development to raise revenues for public facilities.⁹⁰ Unlike impact fees or mandatory dedication, the use of excise taxes avoids the need for studies to determine the nexus between transportation facilities and new development.⁹¹ In order to survive judicial scrutiny, the municipality must have authority to enact the excise tax.⁹² Furthermore, the tax must be designed to raise revenue for a legitimate public purpose, rather than to regulate land use.⁹³ Because the express purpose of a tax is to raise revenue, the fifth and fourteenth amendments of the United States Constitu-

85. *Id.*

86. *Id.* at 310-11.

87. *Id.*

88. *Id.* at 310.

89. *Id.* at 310 n.8 (citing *National Cable Television Ass'n v. United States*, 415 U.S. 336, 341 (1974); *Federal Power Comm'n v. New England Power Co.*, 415 U.S. 345 (1974); *City of Vanceburg v. Federal Energy Regulatory Comm'n*, 571 F.2d 630, 644 n.48 (D.C. Cir. 1977), *cert. denied*, 439 U.S. 818 (1978)). This conclusion directly contradicts the recent decision in *Eastern Diversified Properties v. Montgomery County*, 319 Md. 45, 55, 570 A.2d 850, 855 (1990) (invalidating county's impact fees as involuntary tax). Because Fort Collins is a home rule city, the court had little trouble with the question of authority. See *Bloom*, 784 P.2d at 305-08.

90. See, e.g., *City of Mesa v. Home Builders Ass'n*, 111 Ariz. 29, 523 P.2d 57 (1974); *Westfield-Palos Verdes Co. v. City of Rancho Palos Verdes*, 73 Cal. App. 3d 486, 141 Cal. Rptr. 36 (1977); *Newport Building Corp. v. City of Santa Ana*, 210 Cal. App. 2d 771, 26 Cal. Rptr. 797 (1962); *Cherry Hills Farm v. City of Cherry Hills Village*, 670 P.2d 779 (Colo. 1983); *Oregon State Homebuilders Ass'n v. City of Tigard*, 43 Or. App. 791, 604 P.2d 886 (1979); BOULDER, COLO. REV. CODE §§ 3-8-1 to 3-8-8 (1987).

91. Strauss & Leitner, *Financing Public Facilities with Development Excise Taxes: An Alternative to Exactions and Impact Fees*, 11 ZONING & PLAN. L. REP. 17, 21-22 (1988).

92. *City of Mesa*, 111 Ariz. at 30, 523 P.2d at 58.

93. Strauss & Leitner, *supra* note 91, at 19-22.

tion are rarely used to invalidate a tax solely because of its magnitude.⁹⁴ In states with special tax limitations, such as California, an excise tax may require voter approval.⁹⁵

D. Joint Development

Joint development⁹⁶ may be used along state and interstate highways, transit stations on mass transit lines and multi-modal connection points within transportation corridors. Development activity along these points is attractive because of the presence of transportation facilities.⁹⁷ Local governments may initiate partnerships with private developers through the advance acquisition of parcels surrounding transportation facilities. Revenues may be derived from lease revenues, connection fees, concession fees and negotiated private sector investments, such as right-of-way dedications.⁹⁸ While the money must be expended for a public rather than a private purpose,⁹⁹ it may be used flexibly as a source of funds for all types of public facility needs. The earmarking and proportionality limitations applicable to impact fees do not apply to revenues derived from joint development projects.

IV. REGULATORY CONTROLS

Transportation facility backlogs in rapidly growing areas have been exacerbated by the demand for roadways and public transit created by new development. As soaring population growth and urban decentralization have precipitated a decline in service levels on roadways, local governments have searched for ways to manage the traffic impacts of new growth and development. The use of land use controls to alleviate traffic congestion raises unique questions of statutory authority and constitutional interpretation. While "traditional" techniques, such as zoning and subdivision controls, have long been applied to combat traffic congestion, these techniques often fail and, as in the case of large-lot zoning, may

94. *City of Pittsburgh v. Alco Parking Corp.*, 417 U.S. 369, 373 (1974); *A. Magnano Co. v. Hamilton*, 292 U.S. 40, 44 (1934); *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 411 (1928); *Alaska Fish Salting & By-Products v. Smith*, 255 U.S. 44, 48-49 (1921); *Tanque Verde Enters. v. City of Tucson*, 142 Ariz. 536, 540, 691 P.2d 302, 306 (1984).

95. See CAL. CONST. art. XIIA, § 1; see Freilich & Chinn, *supra* note 1, at 176.

96. Joint development is "the pairing and cooperation of public and private resources to achieve an end that will benefit both the private developer and the public sector." Freilich & Nichols, *Public-Private Partnership in Joint Development: The Legal and Financial Anatomy of Large Scale Urban Projects*, 7 MUN. FIN. J. 5, 6 (1986).

97. Freilich & Chinn, *supra* note 1, at 183.

98. *Id.* at 187 n.113; Freilich & Nichols, *supra* note 96, at 6-7.

99. *Nollan v. California Coastal Comm'n*, 825 U.S. 825, 841 (1987); U.S. CONST. amend. V.

even exacerbate the traffic congestion problem. Accordingly, new techniques, such as adequate public facilities and transportation systems management ordinances, have emerged.

A. First-Generation Land Use Control Techniques

1. Zoning

From the promulgation of the Standard Zoning Enabling Act in 1924,¹⁰⁰ courts have consistently approved the use of zoning to alleviate traffic congestion.¹⁰¹ Zoning techniques typically include use districting, density and lot regulations, and parking requirements.

Zoning techniques—especially large-lot zoning—have come under increasing criticism because of their negative effects on traffic congestion. Many commentators and planning experts now assert that large-lot zoning actually induces traffic congestion by making service by public transit nearly impossible and creating or adding to jobs-housing imbalance, through greater trip lengths.¹⁰² Parking requirements also lead to congestion by increasing the relative convenience of automobile commuting. Finally, mixed-use zoning¹⁰³ is now commonly used to create the “internal capture” of trips originating from an on-site residence and ending at an on-site non-residential building.

The numerical and geographical relationships between jobs and housing have been addressed in some jurisdictions by using “point” sys-

100. STANDARD ZONING ENABLING ACT § 3 (U.S. Dep't of Commerce Tent. Draft No. 1, 1968), reprinted in 5 R. ANDERSON, AMERICAN LAW OF ZONING 3D § 32.01, at 4-9 (1986).

101. See, e.g., *LaSalle Nat'l Bank v. County of DuPage*, 54 Ill. App. 3d 387, 394-95, 369 N.E.2d 505, 511 (1977) (important purpose of zoning is to alleviate traffic congestion); see also 6 P. ROHAN, ZONING AND LAND USE CONTROLS § 34.02[2] (1990) (“[c]ontrol of traffic flow is generally considered a legitimate concern . . . of zoning laws”); Fonoroff, *The Relationship of Zoning to Traffic-Generators*, 20 LAW & CONTEMP. PROBS. 238 (1955) (object of zoning ordinance was to protect New York City from misplaced land uses and resulting traffic). But see *Lindsey v. City of Fayetteville*, 256 Ark. 352, 357, 507 S.W.2d 101, 104 (1974) (traffic congestion, although not in itself sufficient to justify zoning change, is important factor).

102. See Cervero, *Jobs-Housing Balancing and Regional Mobility*, 55 J. AM. PLAN. A. 136, 139 (1989). The Southern California Association of Governments (SCAG) predicted that “[m]ost of the new jobs [in Southern California] between now and 2010 will locate in the highly urbanized areas of Los Angeles and Orange counties, while most of the new housing will be built in the urbanizing regions of Riverside, San Bernardino, and Southeast Orange Counties.” SOUTHERN CAL. ASS'N OF GOV'TS, REGIONAL GROWTH MANAGEMENT PLAN III-1 (1989). SCAG has identified jobs-housing performance goals for the region and suggested implementation measures for local governments. These measures include transportation system management, siting employment-generating land uses near transportation corridors and residential areas, and mixed-use zoning. *Id.* at VII-5.

103. Mixed-use zoning allows both residential and non-residential development to be included within a unified development plan, reducing or eliminating the spatial separation between workers and employment destinations. See Cervero, *supra* note 102, at 145-46.

tems during the development review process or by creating special mixed-use districts.¹⁰⁴ A survey of development management techniques in 260 jurisdictions found that approximately four percent of the respondents used mechanisms designed to attain a numerical and/or geographic balance between jobs and housing.¹⁰⁵ Among the jobs-housing balance strategies were the following: (1) building permit allocation systems or other development review systems basing development approval on attaining a designated "point" score, with positive points awarded for projects with favorable jobs-housing criteria, such as the creation of employee housing, and negative points assigned to those projects adding to the jobs-housing imbalance; (2) "linkage" policies tying office or commercial construction approval to the construction of new housing or payment of money into a housing trust fund; and, (3) mixed-use overlay districts.¹⁰⁶

2. Subdivision approval

Local governments traditionally use subdivision approval to condition new development on the suitable design and location of internal roadways.¹⁰⁷ Courts in most states permit the conditioning of subdivision approval and, more recently, site plan approval, for developments not fitting within the conventional scope of subdivision regulations.¹⁰⁸ These approvals often are based on the adequacy of off-site roadways to accommodate the impact of the project, which may be enhanced by the developers dedicating off-site roadway facilities or paying money in lieu of dedication.¹⁰⁹ While subdivision approval may be denied due to the

104. Freilich, Stone, Leitner & Carlisle, *Advice on Alternative Building Permit Allocation Strategies* 114-15 (Draft Interim Report Oct. 27, 1988) (submitted to City of Los Angeles, Cal.) (unpublished report on file at Loyola of Los Angeles Law Review).

105. *Id.* at 114.

106. *Id.* at 114-15.

107. R. FREILICH & P. LEVI, *MODEL SUBDIVISION REGULATIONS: TEXT AND COMMENTARY* 103-29 (1975); 7 P. ROHAN, *supra* note 101, § 45.02[4][a].

108. *See, e.g.*, *Lindberg/Dahl Investors v. City of Garden Grove*, 179 Cal. App. 3d 956, 963, 225 Cal. Rptr. 154, 158 (1986) (city council denied developer's site plan because private streets within development were too long and narrow); *Yamhill County v. Ludwick*, 294 Or. 778, 789, 663 P.2d 398, 404 (1983) (county ordinance required existing legal lot of record as prerequisite to granting conditional use permit); *see also* 5 P. ROHAN, *supra* note 101, §§ 33C.01-33C.05 (describing authority, scope and rationale of site plan review).

109. D. CALLIES & R. FREILICH, *supra* note 1, at 363-97; R. FREILICH & P. LEVI, *supra*, note 107, at 103-29; *see* *Associated Home Builders v. City of Walnut Creek*, 4 Cal. 3d 633, 636, 484 P.2d 606, 609, 94 Cal. Rptr. 630, 633 (1971); *Ayres v. City Council of Los Angeles*, 34 Cal. 2d 31, 34-35, 207 P.2d 1, 4 (1949); *Frisco Land & Mining Co. v. State*, 74 Cal. App. 3d 752, 753-54, 141 Cal. Rptr. 820, 830, *cert. denied*, 436 U.S. 918 (1977); *Bethlehem Evangelical Lutheran Church v. City of Lakewood*, 628 P.2d 668, 673 (Colo. 1981); *City of Carbondale v. Brewster*, 78 Ill. 2d 111, 115, 398 N.E.2d 829, 831-32 (1979), *appeal dismissed*, 446 U.S. 931

inadequacy of roadway facilities, local governments must carefully structure mandatory dedications to demonstrate the nexus between the transportation facilities and the impacts of the development.¹¹⁰

3. Flexible zoning, environmental review and developments of regional impact

Implementing flexible zoning procedures permits local governments to avoid the rigidity of the density and use standards of "as-of-right" zoning by imposing conditions directly related to transportation goals and policies. The earliest form of flexible zoning involved "contract"¹¹¹ or "conditional"¹¹² zoning, generally conducted on an ad-hoc basis. Special use permits specify the conditions placed on particular uses, within the terms of the zoning ordinance.¹¹³ A more recent form of flexible zoning is the planned unit development.¹¹⁴ An outgrowth of the expanding role of bargaining within the development approval process is the adoption of legislation authorizing local governments to enter into

(1980); *Krughoff v. City of Naperville*, 68 Ill. 2d 352, 358, 369 N.E.2d 892, 895 (1977); *Land/Vest Properties v. Town of Plainfield*, 117 N.H. 817, 820, 379 A.2d 200, 202 (1977); *Divan Builders v. Planning Bd.*, 66 N.J. 582, 588, 334 A.2d 30, 33 (1975); *Robert Mueller Assocs. v. Buffalo Township Bd. of Supervisors*, 30 Pa. Commw. 386, 389, 373 A.2d 1173, 1174-75 (1977); cf. *Pearson Kent Corp. v. Bear*, 28 N.Y.2d 396, 398, 271 N.E.2d 218, 219, 322 N.Y.S.2d 235, 237 (1971) (county planning commission may deny subdivision plat approval where project's location poses danger to nearby residents).

110. See *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 837 (1987); *Beaver Meadows v. Board of County Comm'rs*, 709 P.2d 928 (Colo. 1985); Freilich & Morgan, *supra* note 23, at 169-75.

111. Contract zoning involves a rezoning pursuant to a contract between the local government and the developer, whereby the developer agrees to subject his property to deed restrictions in exchange for the rezoning. Freilich, *Development Timing, Moratoria, and Controlling Growth*, 1974 INST. ON PLAN. ZONING & EMINENT DOMAIN 147, 185.

112. Conditional zoning arises where the local government, without committing itself, obtains a promise from the developer to dedicate property or to limit the use to which a property will be put. *Id.* For a thorough treatment of the legal issues surrounding conditional and contract zoning, see Wegner, *Moving Toward the Bargaining Table: Contract Zoning, Development Agreements, and the Theoretical Foundations of Government Land Use Deals*, 65 N.C.L. REV. 957 (1987).

113. D. HAGMAN & J. JUERGENSMEYER, *URBAN PLANNING AND LAND DEVELOPMENT CONTROL LAW* § 6.11, at 183 (2d ed. 1986). A special use permit is a permit required pursuant to local zoning authority, whereby a designated use may be allowed subject to specified conditions or criteria. *Id.* §§ 4.7-9, at 83-88.

114. A planned unit development is a design concept allowing the flexible mixture of land uses and use-to-use relationships on a single parcel pursuant to a site plan. Freilich, *Awakening the Sleeping Giant: New Trends and Developments in Environmental and Land Use Controls*, 1974 INST. ON PLAN. ZONING & EMINENT DOMAIN, *supra* note 111, at 46.

development agreements providing for private infrastructure commitments, in exchange for certain regulatory guarantees.¹¹⁵

Flexible zoning procedures allow local governments to review the traffic impact of development proposals on a case-by-case basis. The approval of special use permits may be linked to the level of service (LOS) on surrounding roadways, forming the basis for mitigative measures, such as the dedication of facilities or transportation demand management programs.¹¹⁶ As with subdivision controls, these conditions must be related to the impact of the project. Developers may be required to bear the burden of reasonable public facility improvements only to the extent that they are necessitated by the development.¹¹⁷

Government bodies increasingly require special reviews of developments that generate substantial traffic because of their size or unique features.¹¹⁸ For example, the California Environmental Quality Act (CEQA)¹¹⁹ requires public agencies to prepare an environmental impact report (EIR) to determine whether a proposed project creates a significant environmental impact.¹²⁰ Local governments may not approve projects subject to CEQA unless feasible mitigation measures have been produced.¹²¹ CEQA is not limited to public construction, but also ap-

115. See CAL. GOV'T CODE §§ 65864-65869.5 (West 1990 & Supp. 1991); Florida Local Government Development Agreement Act, FLA. STAT. ANN. §§ 163.3220-3243 (West 1990); NEV. REV. STAT. ANN. §§ 278.0201-0207 (Michie 1990); see also Taub, *Development Agreements*, LAND USE L. & ZONING DIG., Oct. 1990, at 3, 3; Wegner, *supra* note 112, at 994-1027.

116. The ability to tailor mitigative conditions to specific development proposals is limited in jurisdictions that apply a restrictive view of conditional zoning. In these jurisdictions, LOS standards may be enforceable only through the denial of permit approval. See, e.g., Ghidorzi Constr. v. Town of Chapel Hill, 80 N.C. App. 438, 440-41, 342 S.E.2d 545, 547 (1986) (upholding denial of special use permit because of inadequate traffic levels of service, despite fact that future improvements would render LOS adequate); Rodriguez v. Prince George's County, 79 Md. App. 537, 553-54, 558 A.2d 742, 750, cert. denied, 566 A.2d 101 (1989) (invalidating transportation demand management and development staging conditions attached to rezoning proposal to implement adequate public facilities standards).

117. *Nollan*, 483 U.S. at 828; *Transamerica Title Ins. Co. v. City of Tucson*, 23 Ariz. App. 385, 390, 533 P.2d 693, 698 (1975); *Scrutton v. County of Sacramento*, 275 Cal. App. 2d 412, 421-22, 79 Cal. Rptr. 872, 879-80 (1969); *Cherry Hills Resort Dev. v. City of Cherry Hills Village*, 790 P.2d 827, 832 (Colo. 1990); *Beaver Meadows v. Board of County Comm'rs*, 709 P.2d 928, 935 (Colo. 1985).

118. See, e.g., Connecticut Council on Environmental Quality, Special Report: Recommendations for Improving State Environmental Regulation of Large Traffic Generators 3 (Sept. 1990) (unpublished report on file at Loyola of Los Angeles Law Review).

119. CAL. PUB. RES. CODE §§ 21000-21177 (West 1986 & Supp. 1991).

120. *Id.* §§ 21002.1, 21061, 21100, 21100.1; see M. REMY, T. THOMAS, S. DUGGAN & J. MOOSE, GUIDE TO THE CALIFORNIA ENVIRONMENTAL QUALITY ACT 2 (5th ed. 1991).

121. CAL. PUB. RES. CODE § 21081.

plies to the issuance of permits or other entitlements,¹²² as well as to the adoption or amendment of land use regulations and general plans.¹²³

Moreover, the EIR must address the environmental effect of public or private projects that may stimulate growth, such as road construction.¹²⁴ Projects that will "cause an increase in traffic which is substantial in relation to the existing traffic load and capacity of the street system" are expected to significantly affect the environment.¹²⁵ Consequently, applications for development approval are often subject to CEQA review because of their effect on nearby roadways. Mitigation measures may include conditions limiting the development's size¹²⁶ or intensity, as well as requiring the developer to rectify the project's effect.¹²⁷

A similar approach for evaluating large-scale development proposals is the development of regional impact (DRI) process. The DRI concept is derived from the *Model Land Development Code*.¹²⁸ The DRI process has been used extensively in Florida.¹²⁹ Florida's DRI regulations require developments having an impact beyond the borders of the local

122. *Friends of Mammoth v. Board of Supervisors*, 8 Cal. 3d 247, 262, 502 P.2d 1049, 1059, 104 Cal. Rptr. 761, 771 (1972).

123. OFFICE OF PLANNING & RESEARCH, STATE OF CAL., CEQA: THE CALIFORNIA ENVIRONMENTAL QUALITY ACT § 15378(a)(1) (1986) [hereinafter CEQA].

124. *City of Antioch v. City Council*, 187 Cal. App. 3d 1325, 1338, 232 Cal. Rptr. 507, 515 (1986); CAL. PUB. RES. CODE § 21100(g).

125. CEQA, *supra* note 123, app. (G)(l). In *Twain Harte Homeowners Ass'n v. County of Tuolumne*, 138 Cal. App. 3d 664, 188 Cal. Rptr. 233 (1982), a California court invalidated the circulation element of a general plan and supporting environmental impact report (EIR) because it did not correlate with the land use element. *Id.* at 702, 188 Cal. Rptr. at 254. The court's discussion illustrates the factors that must be considered when evaluating the relationship between future land use and traffic congestion:

[T]he circulation element does not attempt to describe or discuss the changes or increases in demands on the various roadways or transportation facilities of the County as a result of changes in uses of land which will or may result from implementation of the decision system [used as the criteria for the designation of land uses] and the general plan. . . . "The [EIR does] not address the important issues such as the demographic center of the county, the population centers, the movement habits of users or the traffic counts of the main roads and intersections."

Id. at 701, 188 Cal. Rptr. at 256 (quoting letter from unnamed individuals to the County of Tuolumne).

126. The ability to reduce the number of housing units in a development project is limited somewhat by the effect of section 15041(c) of CEQA. *See* CEQA, *supra* note 123, § 15041(c). Section 15041(c) prohibits the reduction of housing units as a mitigation measure or project alternative if other mitigation measures or alternatives would have a comparable mitigative effect. *Id.*

127. CAL. PUB. RES. CODE §§ 21002, 21081(a); CEQA, *supra* note 123, §§ 15002(a)(3), 15021(a)(2), 15091(a)(1).

128. MODEL LAND DEV. CODE §§ 7-301 to -305 (1976).

129. *See* FLA. STAT. ANN. § 380.06 (West 1988).

government to undergo a special review process involving state, regional and/or local agencies.¹³⁰

Florida has refined the DRI concept to account for the traffic demands created by large-scale developments. Qualified developers may prepare "areawide DRIs" that include a CIP and provisions for staging development "contingent on availability of public facilities and services."¹³¹ Florida requires mitigation measures when a DRI project absorbs a specified percentage of peak-hour traffic on regionally significant roadways.¹³² Mitigation measures may include the construction of roadway links or intersections, payment of "proportionate share" fees, or project phasing commensurate with the availability of public facilities and services.¹³³

Special review requirements allow regional agencies to analyze the impacts of projects having unusual effects on the roadway system because of their large size. While this provides a useful mechanism for avoiding sudden increases in traffic congestion, environmental or DRI review does not address the cumulative effect of smaller projects that are often excluded from review. Therefore, environmental or DRI review should supplement, rather than replace, other land use controls.

Flexible zoning procedures, negotiated exactions and special review requirements give local governments the ability to address traffic congestion through the regulatory approval process. It is imperative, however, that the use of negotiated exactions flow from the principle that local governments may deny development permits that would cause a decline in established facility standards.¹³⁴ Establishing a mechanism for denying regulatory approval sets the stage for imposing mitigating conditions. In addition, by taking a firm stand on regulatory approvals, local governments evaluate the underlying standards governing such approvals in a balanced manner. Clear standards mandate local governments to require existing community residents to contribute to alleviating traffic congestion through the elimination of deficiencies created by deferred capital investments and rising automobile use. Adequate public facilities and concurrency regulations provide a mechanism for linking transportation planning, traffic congestion standards, public finance and regulatory approvals to combat traffic congestion.

130. *Id.*

131. *Id.* § 380.06(25).

132. FLA. ADMIN. CODE ANN. r. 29F-3.011(8), 9J-2.0255(7) (1990).

133. *See, e.g.*, FLA. ADMIN. CODE ANN. r. 9J-2.0255 (state Division of Resource Planning and Management requirements); *id.* r. 29F-3.0118 (East Central Florida Regional Planning Council requirements).

134. *See Nollan*, 483 U.S. at 836.

*B. Adequate Public Facilities Ordinances or "Concurrency"
Regulations: Linking Planning, Regulatory
and Fiscal Powers*

Adequate public facilities ordinances (APFOs) tie land development approvals to the ability of transportation facilities to serve new development. Local governments should coordinate APFOs with a CIP process in order to assure landowners that they will be able to develop their projects within a reasonable period of time.¹³⁵ APFOs are not intended to serve as development moratoria,¹³⁶ but rather constitute timing and sequencing devices. Specifically, they are long-term programs designed to ensure that the pace of development does not surpass a local government's ability to provide necessary public services and facilities.¹³⁷ APFOs represent a bifurcated technique, relying on a city's police powers to regulate the timing and sequency of development and its fiscal powers to provide public services and facilities.¹³⁸ Several states have adopted enabling legislation authorizing local governments to adopt APFOs.¹³⁹

135. *See, e.g.*, *Golden v. Planning Bd. of Ramapo*, 30 N.Y.2d 359, 380, 285 N.E.2d 291, 303, 334 N.Y.S.2d 138, 154, *appeal dismissed*, 409 U.S. 1003 (1972).

136. *See* D. CALLIES & R. FREILICH, *supra* note 11, at 822 ("Moratoria are enacted under the police power, as distinguished from zoning authority, on an emergency basis for the preservation of the public health and safety such as inadequacy of sewer and water treatment facilities which are posing an immediate threat to the environment."); *see also* *Donohoe Constr. Co. v. Montgomery County Council*, 567 F.2d 603, 608 (4th Cir. 1977) (sewer incapacity), *cert. denied*, 438 U.S. 905 (1978); *Swanson v. Marin Mun. Water Dist.*, 56 Cal. App. 3d 512, 524, 128 Cal. Rptr. 485, 493 (1976) (threatened water shortage).

137. Freilich, *supra* note 111, at 161-62.

138. For a discussion of police and fiscal power functions in development management, see MONTGOMERY COUNTY PLANNING DEP'T, MARYLAND NAT'L CAPITAL PARK & PLANNING COMM'N, PLANNING, STAGING AND REGULATING: FIFTH ANNUAL GROWTH POLICY REPORT 1-2 (1979).

139. *See, e.g.*, MD. ANN. CODE art. 66B, § 10.01 (1988) (authorizing enactment of ordinances requiring planning, staging or provision of adequate public facilities); N.H. REV. STAT. ANN. §§ 674:21-:22 (1986 & Supp. 1990) (authorizing timing and sequencing provisions where city has adopted a CIP). Florida now mandates adequate public facilities through its concurrency requirement, forbidding the issuance of a land development permit that would cause LOS standards to fall below those adopted in the Comprehensive Plan. FLA. STAT. ANN. § 163.3202(2)(g) (West 1990). The concurrency requirement demands that those facilities be available concurrent with the impacts of the development, as measured by adopted LOS standards. *Id.* §§ 163.3177(10)(h), 163.3202(2)(g). Washington recently adopted similar legislation. Economic Development Act, ch. 17, 1990 Wash. Laws 1375 (to be codified in scattered sections of WASH. REV. CODE). Some older cases invalidated restrictive land use controls premised on the future, cumulative demands on transportation systems. *See, e.g.*, *National Land & Inv. Co. v. Kohn*, 419 Pa. 504, 527, 215 A.2d 597, 609-10 (1965). The land-use controls considered in *National Land* are distinguishable from modern techniques in that they involved a large-lot zoning scheme and were not integrated with a CIP. *See id.* at 518, 215 A.2d at 605.

1. Impact analysis and adequate public facilities

Development greatly impacts roadway links, intersections and public transit facilities; consequently, a detailed "impact analysis" has become an essential component of the land development review process.¹⁴⁰ Impact analysis does not necessarily refer to a particular type of land use control, but rather to the method of evaluating a development's impact on transportation facilities when considering whether to issue a land use approval or determining the scope and extent of conditions and mandatory dedications.¹⁴¹ Impact analysis is widely used in imposing traffic mitigation requirements on a case-by-case basis.¹⁴²

LOS standards are generally used to define the operational characteristics of a roadway, intersection or transit system. They provide the starting points for the development of an APFO. LOS is measured by comparing the volume¹⁴³ of traffic to the roadway system capacity.¹⁴⁴ Such standards may be used to evaluate the change in roadway performance resulting from single or incremental project proposals, or the aggregate capacity of a transportation network on an areawide basis. Roadway LOS analyses generally describe conditions such as "speed and travel time, freedom to maneuver, traffic interruptions, comfort and convenience, and safety." The LOS is rated on a scale from "A" to "F,"

140. See, e.g., CAL. PUB. RES. CODE §§ 21100, 21100.1 (West 1986).

141. See, e.g., Transportation Planners Council, Inst. of Transp. Eng'rs, Traffic Access and Impact Studies for Site Development 1-2 (Sept. 1989) (draft of final unpublished report on file at Loyola of Los Angeles Law Review).

142. See Orski, *Traffic Mitigation and Developers*, URB. LAND, Mar. 1988, at 16. Traffic engineers use several primary sources when evaluating the impact of new development on roadways and intersections. See generally TRANSPORTATION RESEARCH BD., NAT'L RESEARCH COUNCIL, HIGHWAY CAPACITY MANUAL (1985) (delineating method by which roadway performance is measured and classified, using LOS concept); INSTITUTE OF TRANSP. ENG'RS, TRIP GENERATION (4th ed. 1987) (setting forth standard trip generation rates for various types of land uses based on national averages, which may be modified based on local conditions); INSTITUTE OF TRANSP. ENG'RS, TRANSP. RESEARCH CIRCULAR No. 212 (Jan. 1980) (describing intersection capacity utilization method for evaluating capacity of intersections); Taub & Bricklemeyer, *Transportation Considerations*, in 2 FLA ENVTL. & LAND USE L. 24-1 (1989).

143. Volume is defined as the "total number of vehicles that pass over a given point or section of a lane or roadway during a given time interval." TRANSPORTATION RESEARCH BD., HIGHWAY CAPACITY MANUAL 1-5 (1985).

144. "Capacity" is defined as "the maximum hourly rate at which persons or vehicles can reasonably be expected to traverse a point or uniform section of a lane or roadway during a given time period under prevailing roadway, traffic, and control conditions." *Id.* at 1-3.

The Highway Capacity Manual also defines LOS in terms of speed and density. Speed is "a rate of motion expressed as distance per unit [of] time." *Id.* at 1-4. Speed is generally expressed in miles per hour, while density is expressed in vehicles per mile (vpm). *Id.* at 1-4. Density is defined as the "number of vehicles occupying a given length of a lane or roadway, averaged over time." *Id.* at 1-6.

with "A" representing free-flow conditions and "F" representing forced or breakdown conditions.¹⁴⁵

2. Example: Montgomery County, Maryland APFO

Montgomery County enforces its APFO through the subdivision process, imposing adequate public facilities requirements at the preliminary plan stage.¹⁴⁶ The county employs a two-tiered review system. First, LOS standards are assigned within policy areas.¹⁴⁷ A staging ceiling is established for the policy area, based on the carrying capacity of existing transportation facilities and those scheduled in the county and state CIPs.¹⁴⁸ A special ceiling allocation is established for affordable housing.¹⁴⁹ The policy area LOS standards reflect the geographic coverage, route density, service frequency and accessibility of transit facilities, as heavy congestion increases the likelihood that transit facilities will be utilized.¹⁵⁰

Second, "Local Area Transportation Review" is applied where: (1) the project is above a certain threshold size; (2) the project is near a congested intersection; or, (3) the policy area is within five percent of the staging ceiling.¹⁵¹ This level of review is required because some projects could otherwise satisfy policy area review while causing local congestion.

3. Example: Proposed City of San Diego Transportation Congestion Management and Development Phasing Ordinance

The City of San Diego recently considered an ordinance that establishes an annualized phasing limit, confining new development to the capacity of existing transportation facilities and new facilities included in a

145. *Id.* at 1-3 to 1-4.

146. MONTGOMERY COUNTY, MD., CODE ch. 50, § 50-35(k) (1973). For a discussion of the Montgomery County APFO, see D. GODSCHALK, D. BROWER, L. MCBENNETT, B. VESTAL & D. HERR, CONSTITUTIONAL ISSUES OF GROWTH MANAGEMENT 309-27 (rev. ed. 1979); Christeller, *Wrestling with Growth in Montgomery County, Maryland*, in GROWTH MANAGEMENT: KEEPING ON TARGET? 84 (D. Porter ed. 1986); Porter, *Montgomery County's Growth Fracas*, URB. LAND, June 1982, at 34; Tierney, *Maryland's Growing Pains: The Need for State Regulation*, 16 U. BALT. L. REV. 201, 226-27 (1987).

147. Policy areas are aggregations of traffic zones based on their transportation characteristics. MONTGOMERY COUNTY, MD., FY 90 ANNUAL GROWTH POLICY 5 (July 27, 1989).

148. *Id.* at 3.

149. *Id.* at 9.

150. *Id.* at 5, 25; MONTGOMERY COUNTY PLANNING DEP'T, *supra* note 138, at 1-14.

151. MONTGOMERY COUNTY PLANNING DEP'T, MARYLAND-NAT'L CAPITAL PARK AND PLANNING COMM'N, LOCAL AREA TRANSPORTATION REVIEW GUIDELINES 1-3 (JULY 14, 1988).

twenty-year CIP.¹⁵² The ordinance is designed to gradually alleviate traffic congestion while avoiding a moratorium on development by using realistic LOS standards. First, the LOS standards are achieved based upon a capital facilities plan (CFP) covering a twenty-year horizon.¹⁵³ Therefore, all growth need not be eliminated pending the attainment of preferred levels of service, and some growth may occur while the city plans for infrastructure. Second, the length of service is an average LOS,¹⁵⁴ so the LOS does not have to be attained on every roadway link and intersection. Requiring a preferred, uniform length of service on all roadway intersections in most major urban areas would be unrealistic, given travel behavior and environmental, fiscal and political limitations on the city's ability to expand certain facilities.

The ordinance establishes an annualized development phasing limit applicable throughout the city.¹⁵⁵ A developer wishing to build sooner than anticipated may either produce the facilities needed to avoid a deterioration in the planned length of service or voluntarily advance a payment to cover the cost of the facilities.¹⁵⁶

To support the development phasing requirements and to correct existing infrastructure deficiencies, a separate ordinance establishes a CFP showing the capacity-adding roadway and transit facilities to be made over a twenty-year period.¹⁵⁷ The CFP is categorized into facilities needed to correct existing deficiencies and those needed to serve new growth.¹⁵⁸ The CFP ordinance specifically forbids the use of impact fees or mandatory dedications as a source of funding for existing deficiencies.¹⁵⁹ Thus, the growth management plan uses a realistic, twenty-year

152. City of San Diego, Emergency Transportation Congestion Management and Development Phasing Ordinance of 1990 § 5(A) (draft of July 5, 1990) (unpublished proposal on file at Loyola of Los Angeles Law Review) (prepared by Freilich, Stone, Leitner & Carlisle) [hereinafter Congestion Management Ordinance].

153. City of San Diego, Emergency Capital Facilities Plan Ordinance of 1990, § 1(C)(2) (draft of July 6, 1990) (unpublished proposal on file at Loyola of Los Angeles Law Review) [hereinafter CFP Ordinance].

154. See Congestion Management Ordinance, *supra* note 152, § 1(B)(32).

155. An annualized phasing limit is the maximum number of average daily trips that may be created by development throughout the city over a twenty-year period without exceeding preferred LOS standards. *Id.* § 5(A).

156. *Id.* § 6.

157. See CFP Ordinance, *supra* note 153, § 1(C)(2).

158. *Id.* § 1(D)(2)(a).

159. *Id.* § 1(D)(2)(b). Several ordinances requiring the correction of existing LOS deficiencies as a condition of development approval have been stricken at the trial court level in California on takings grounds. See *McGavran v. City of Costa Mesa*, No. 58-37-96 (Orange County Super. Ct. June 7, 1989); *Kaiser Dev. Co. v. City of San Juan Capistrano*, No. 57-74-03 (Orange County Super. Ct. Feb. 21, 1989); *Marblehead v. City of San Clemente*, No. X-55-11-82 (Orange County Super. Ct. Oct. 18, 1988), *aff'd on other grounds*, 91 Daily Journal

horizon which recognizes that correcting infrastructure deficiencies and creating the capacity needed to serve new growth involve time-consuming processes.

4. Constitutional issues

APFOs must comply with constitutional limitations on the police power imposed through the fifth and fourteenth amendments of the United States Constitution. In particular, landowners and developers often claim that the delay in development approval is tantamount to a temporary taking of property, requiring compensation. This section describes the law in these areas and discusses how these issues may be resolved.

a. *the takings clause*

APFOs may lead to takings claims in several distinct situations. First, as with any restriction on development, the value of the project in monetary terms may be reduced, especially for projects on the urban fringe that may not be serviced for a long period of time. Additionally, APFOs may interfere with the landowner's plans to build on the property. Finally, classic versions of APFOs include an escape clause, allowing developers to avoid a waiting period by constructing the necessary facilities themselves.¹⁶⁰

A regulation, as opposed to a physical occupation¹⁶¹ or an exaction on development permission, constitutes a taking where "it imposes too heavy a burden on property rights to be sustained as a police power regulation."¹⁶² A regulation requires compensation under the fifth amendment when it (1) does not substantially advance legitimate state interests, or (2) denies a landowner the economically viable use of his

DAR 1005 (Cal. Ct. App. Jan. 22, 1991), *modified*, 91 Daily Journal DAR 1475 (Cal. Ct. App. Jan. 31, 1991); Eggert, *Traffic-Linked Growth Control in California*, 16 *ECOLOGY L.Q.* 481, 486 (1989).

160. See, e.g., *Golden*, 30 N.Y.2d at 368-69, 285 N.E.2d at 296, 334 N.Y.S.2d at 144. Escape clauses should be part of a program whereby development is phased in or denied on the basis of the adequacy of public facilities, rather than an unlawful exaction requiring developers to pay for existing facility deficiencies.

161. Regulatory takings must be distinguished from physical occupations, which are takings regardless of the legitimacy of the public purpose served. See *Loretto v. Teleprompter Manhattan Corp.*, 458 U.S. 419, 426 (1982).

162. D. HAGMAN & J. JUERGENSMEYER, *supra* note 113, § 10.7. The classic statement of this facet of the takings analysis is "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

property.¹⁶³ The first test balances the interests asserted by the government against the regulation's economic impact.¹⁶⁴ This test determines whether the government violated the policy of the takings clause—to avoid the transfer of public burdens to a relatively small group of property owners.¹⁶⁵ The second test focuses on whether the landowner has been deprived of all reasonable use of the property.¹⁶⁶

The determination that a regulation amounts to a taking is essentially a factual finding that the local government is attempting to avoid the use of eminent domain powers through confiscatory regulation.¹⁶⁷ When the regulation does not involve an outright transfer of property or physical occupation, courts will examine (1) the nature of the government's action, and (2) the "reciprocity of advantage" conferred by the ordinance.¹⁶⁸ The use of regulations to prevent injury to the health, safety and welfare of the community exemplifies the distinction between the police power and eminent domain power, regardless of the extent to which the use or value of the property is impaired. Thus, the government may demonstrate that temporary delays in development approval are needed to prevent a public danger, such as the failure of a sewer treatment plant¹⁶⁹ or the creation of flood-prone conditions due to inadequate drainage facilities.¹⁷⁰ The lesser the relationship between the required facilities and public health or safety, however, the greater is the likelihood that the regulation will be invalidated.

The validity of an APFO under the second inquiry—whether a landowner has been deprived of all reasonable use of his or her property—is determined by considering the economic impact of the regulation and the extent to which the landowner's "investment-backed expectations" have been defeated.¹⁷¹ Mere fluctuations in value or the

163. *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 485 (1987); *Estate of Friedman v. Pierce County*, 112 Wash. 2d 68, 78 n.1, 768 P.2d 462, 467 n.1 (1989).

164. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 123-24 (1978); see Freilich & Chinn, *Finetuning the Taking Equation: Applying It to Development Exactions, Part I*, LAND USE L., Feb. 1988, at 3, 9.

165. *Keystone*, 480 U.S. at 492; *Agins v. City of Tiburon*, 447 U.S. 255, 260-61 (1980).

166. *Penn Cent.*, 438 U.S. at 136-37.

167. See F. BOSSELMAN, D. CALLIES & J. BANTA, *THE TAKING ISSUE* 254 (1973).

168. *Pennsylvania Coal*, 260 U.S. at 414-15; see also *Plymouth Coal Co. v. Pennsylvania*, 232 U.S. 531 (1914). "Reciprocity of advantage" is used to describe the relationship between the burdens and benefits of a regulation. "While each of us is burdened somewhat by such restrictions, we, in turn, benefit greatly from the restrictions that are placed on others." *Keystone*, 480 U.S. at 491.

169. See *Estate of Scott v. Victoria County*, 778 S.W.2d 585, 592 (Tex. Ct. App. 1989).

170. *Sun Ridge Dev. v. City of Cheyenne*, 787 P.2d 583, 585 (Wyo. 1990).

171. *Penn Cent.*, 438 U.S. at 124; *Estate of Friedman*, 112 Wash. 2d at 78-79, 768 P.2d at 467.

loss of anticipated profits are not considered takings.¹⁷² To establish takings liability, the landowner must prove that all reasonable use of property has been destroyed.¹⁷³ Courts have consistently upheld land use regulations designed to thwart urban sprawl, despite enormous deprivations in the economic value of the properties affected.¹⁷⁴

APFOs commonly allow developers to advance public facilities and services to avoid delays occasioned by development phasing requirements.¹⁷⁵ Requiring a developer to provide all scheduled public improvements to rectify the existing LOS deficiencies may trigger a takings challenge if the requirement is disproportionate to the development's impact.¹⁷⁶ The question is whether the ordinance is truly designed to relieve the harshness of a valid regulation, or whether the local government is using its police powers to extort payments from the developer for existing deficiencies that will not be caused by the development. Where the APFO is coupled with a realistic, financially feasible CIP, including funding sources other than developer contributions, there is little doubt that the ordinance is designed to achieve legitimate growth management and public facilities goals. On the other hand, where a CIP is lacking, or where mandatory dedications or impact fees represent the sole source of capital improvements funding, the ordinance may not survive judicial scrutiny.

In the aftermath of two United States Supreme Court takings cases, *First English Evangelical Lutheran Church v. County of Los Angeles*¹⁷⁷ and *Nollan v. California Coastal Commission*,¹⁷⁸ developers have increasingly challenged the constitutionality of temporarily delaying development approval to avoid public congestion.¹⁷⁹ While *First English* and *Nollan* both held that regulatory takings are subject to the fifth amend-

172. *Agins*, 447 U.S. at 263 (1980); *Andrus v. Allard*, 444 U.S. 51, 66 (1974); *Moore v. City of Costa Mesa*, 886 F.2d 260, 263 (9th Cir. 1989), *cert. denied*, 110 S. Ct. 2588 (1990).

173. *Keystone*, 480 U.S. at 498; *see also Moore*, 886 F.2d at 263.

174. *See, e.g., Haas & Co. v. City & County of San Francisco*, 605 F.2d 1117 (9th Cir. 1979), *cert. denied*, 445 U.S. 928 (1980) (reduction in value from \$2,000,000 to \$100,000 not a taking); *Orsetti v. City of Fremont*, 80 Cal. App. 3d 961, 146 Cal. Rptr. 75 (1978) (upholding open-space regulations causing reduction in value from \$445,000 to \$187,000); *Brown v. City of Fremont*, 75 Cal. App. 3d 141, 142 Cal. Rptr. 46 (1977) (upholding open-space restrictions causing reduction in value from \$3.5 million to \$675,000).

175. *See, e.g., Golden*, 30 N.Y.2d at 368-69, 285 N.E.2d at 296, 334 N.Y.S.2d at 144.

176. *See supra* note 159 and accompanying text.

177. 482 U.S. 304 (1987).

178. 483 U.S. 825 (1987).

179. *See, e.g., Berger, Happy Birthday, Constitution: The Supreme Court Establishes New Ground Rules for Land-Use Planning*, 20 URB. LAW. 735, 772-78 (1988) (arguing that temporary deferral of development approval is temporary taking).

ment's compensation requirement,¹⁸⁰ they did nothing to stultify the range of public purposes recognized as sufficiently important to justify substantial diminutions in property values without compensation.

In *First English*, the United States Supreme Court discussed whether temporary bans on construction, such as moratoria and interim development controls, may require compensation under the fifth amendment.¹⁸¹ The Court held that a landowner could receive compensation for restrictions imposed by a flood plain development moratorium adopted by the City of Los Angeles, provided that the landowner could demonstrate that the restrictions amounted to a confiscatory taking.¹⁸² The Supreme Court's decision did not address the issue of when a taking occurs, but only discussed the appropriate remedy once takings liability has been established.¹⁸³ The Court decided for the first time that compensation may be awarded for a regulatory taking, even if the regulation is subsequently repealed.¹⁸⁴ Under *First English*, if the restriction upon

180. See *Nollan*, 483 U.S. at 841-42; *First English*, 482 U.S. at 307.

181. *First English*, 482 U.S. at 306-07. Pre-1987 sewer moratoria and interim development control cases upholding restraints on development for significant, but non-permanent periods of time, have been held not to constitute a taking. For sewer moratoria cases, see *Donohoe Constr. Co. v. Montgomery County Council*, 567 F.2d 603 (4th Cir. 1977), *cert. denied*, 438 U.S. 905 (1978); *Wincamp Partnership v. Anne Arundel County*, 458 F. Supp. 1009 (D. Md. 1978); *Smoke Rise, Inc. v. Washington Suburban Sanitary Dist.*, 400 F. Supp. 1369 (D. Md. 1975); *Candlestick Properties v. San Francisco Bay Conservation & Dev. Comm'n*, 11 Cal. App. 3d 557, 89 Cal. Rptr. 897 (1970); *Cappture Realty Corp. v. Board of Adjustment*, 126 N.J. Super. 200, 313 A.2d 624 (1973), *aff'd*, 133 N.J. Super. 216, 336 A.2d 30 (1975); *City of Dallas v. Crownrich*, 506 S.W.2d 654 (Tex. Civ. App. 1974). For interim development control cases, see *Russian Hill Improvement Ass'n v. Board of Permit Appeals*, 66 Cal. 2d 34, 423 P.2d 824, 56 Cal. Rptr. 672 (1967); *Collura v. Town of Arlington*, 367 Mass. 881, 329 N.E.2d 733 (1975); *Almquist v. Town of Marshan*, 308 Minn. 52, 245 N.W.2d 819 (1976); *Rubin v. McAlevey*, 54 Misc. 2d 338, 282 N.Y.S.2d 564 (N.Y. Sup. Ct. 1967), *aff'd*, 29 A.D.2d 874, 288 N.Y.S.2d 519 (N.Y. App. Term. 1968); *Valley View Indus. Park v. City of Redmond*, 107 Wash. 2d 621, 733 P.2d 182 (1987). For a general discussion of interim development controls, see Freilich, *Interim Development Controls: Essential Tools for Implementing Flexible Planning and Zoning*, 49 J. URB. L. 65 (1971); Heeter, *Interim Zoning Controls: Some Thoughts on Their Uses & Abuses*, in 2 MANAGEMENT AND CONTROL OF GROWTH, *supra* note 35, at 411. For post-1987 cases, see, e.g., *First English*, 482 U.S. 304 (temporary moratorium denying landowner of all uses would require compensation if in effect for an unreasonable period of time); *Zilber v. Town of Moraga*, 692 F. Supp. 1195 (N.D. Cal. 1988) (open-space moratorium not a taking even if effective for an indefinite period); *Friel v. Triangle Oil Co.*, 76 Md. App. 96, 543 A.2d 863 (1988) (temporary zoning moratorium held not a taking); *Estate of Scott*, 778 S.W.2d at 585 (mere expectancy of sewer service, in absence of contract, not a property right; thus temporary loss thereof held not a taking).

182. *First English*, 482 U.S. at 306-07.

183. *Bozung & Alessi, Recent Developments in Environmental Presentation and the Rights of Property Owners*, 20 URB. LAW. 969, 1015 (1988); *Roddewig, Recent Developments in Land Use, Planning and Zoning Law*, 22 URB. LAW. 719, 770 (1990).

184. Previous Supreme Court cases avoided the issue of whether the appropriate remedy for a regulatory taking is compensation or simply invalidation of the ordinance. See *Williamson*

the property is not permanent, a court will consider the remaining use after the restriction terminates when determining the level of compensation due the landowner.¹⁸⁵ The Court also stressed the importance of distinguishing between the time during which a taking may have occurred—from the date of enactment of the ordinance¹⁸⁶—and the time period considered to determine whether a taking has occurred in the first place.¹⁸⁷

On remand, the California Court of Appeal found that the interim ordinance prohibiting construction within the flood plain did not rise to the level of a taking.¹⁸⁸ The court made this finding despite the eight-year period between the time of original adoption of the interim ordinance and the time the case reached the United States Supreme Court.¹⁸⁹ The court held that time is but one factor in the takings equation: "We do not read the U.S. Supreme Court's decision in *First English* as converting moratoriums and other interim land use restrictions into unconstitutional 'temporary takings' requiring compensation unless, perhaps, if these interim measures are unreasonable in purpose, duration or scope."¹⁹⁰ In the same vein, two commentators observed, "Even before *First English*, a group of distinguished land-use lawyers and scholars had warned that if the temporary regulatory theory espoused by Justice Brennan in *San Diego Gas & Electric Co.* were adopted, then 'a way must be found to avoid tossing development moratoria on the judicial ash heap.'"¹⁹¹

The *First English* Court expressly recognized the validity of normal delays in the development approval process.¹⁹² Since *First English*, sev-

County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 199-200 (1985); *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 633 (1981); cf. *Agins v. City of Tiburon*, 24 Cal. 3d 266, 273, 598 P.2d 25, 28, 157 Cal. Rptr. 372, 375 (1979) (remedy for regulatory taking is invalidation), *aff'd*, 447 U.S. 255 (1980).

185. See Bozung & Alessi, *supra* note 183, at 1014-30; Freilich, *Solving the "Taking" Equation: Making the Whole Equal the Sum of Its Parts*, 15 URB. LAW. 447, 477-80 (1983).

186. *First English*, 482 U.S. at 319-20.

187. *Id.* at 320.

188. *First English Evangelical Lutheran Church v. County of Los Angeles*, 210 Cal. App. 3d 1353, 1374, 258 Cal. Rptr. 893, 906-07 (1989), *cert. denied*, 110 S. Ct. 866 (1990).

189. *First English*, 482 U.S. at 304-07.

190. *First English*, 210 Cal. App. 3d at 1373, 258 Cal. Rptr. at 906.

191. Bozung & Alessi, *supra* note 183, at 1014 (quoting Williams, Smith, Simon, Mandelker & Babcock, *The White River Junction Manifesto*, 9 SUP. CT. REV. 193, 218 (1984) (citing *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 636-61 (1981) (Brennan, J., dissenting)). *But see* Berger, *The Supreme Court Lays Down the Law (Land Use Style)*, in 1989 ZONING & PLANNING LAW HANDBOOK 197, 208-12 (M. Dennison ed.) (failing to distinguish between temporary restraints on development and ordinances that amount to temporary takings).

192. *First English*, 482 U.S. at 321.

eral courts have upheld moratoria involving such delays despite takings claims.¹⁹³ Thus, when a regulation is temporary, all reasonable use has not been denied because future use remains.¹⁹⁴

For APFOs, the test is whether the regulation has left a reasonable use over a reasonable period of time.¹⁹⁵ The United States Supreme Court identified this principle as the non-segmentation theory. This theory provides that in determining whether a taking has occurred, the property interest, both present and future, must be viewed in its entirety.¹⁹⁶ As two commentators suggested:

Keystone and *Penn Central* require that present use and future use be recognized solely as separate strands in the bundle of rights that comprise property. Thus, the loss of the present use strand, standing alone, does not constitute a facial taking. Even if all present use is denied, there is no taking because future use rights remain. When the time dimension in property is taken as a whole, property rights are accorded their constitutional pro-

193. See, e.g., *Estate of Scott*, 778 S.W.2d at 592 (moratorium on sewer operation permits was reasonable, given developers' continual violation of permit requirements); *Sun Ridge Dev.*, 787 P.2d at 590 (37-day moratorium on sewer permits was reasonable, given developer's failure to comply with drainage regulations). See *supra* note 181 for a listing of post-*First English* takings cases involving moratoria.

In fact, moratoria have been invalidated subsequent to *First English* only where expressly designed to reduce the value of property in anticipation of condemnation, a practice which has always been considered a taking. See *Joint Ventures v. Department of Transp.*, 563 So. 2d 622 (Fla. 1990) (recording of highway reservation map precluding issuance of building permits held to be a taking of private property); *Seawall Assocs. v. City of New York*, 74 N.Y.2d 92, 109 n.9, 542 N.E.2d 1059, 1067 n.9, 544 N.Y.S.2d 542, 550 n.9 (where property still profitable and only two percent of local mining barred by statute, owners failed to demonstrate "any deprivation significant enough" to constitute regulatory taking (citing *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 493 (1987))).

194. See *Agins*, 447 U.S. at 263 n.9.

195. *First English*, 482 U.S. at 318; *Golden*, 30 N.Y.2d at 381, 285 N.E.2d at 304, 334 N.Y.S.2d at 155; *Freilich & Greis*, *supra* note 60, at 71-73.

196. See *Keystone*, 480 U.S. at 501 (total prohibition of mining of coal in support estate not a taking when entire mineral estate considered); *Andrus*, 444 U.S. at 66 (restrictions on sale or disposition of eagle feathers not a taking where property can still descend through inheritance); *Penn Cent.*, 438 U.S. at 130-31 (no taking where regulation prohibited construction of building in air space but allowed property owner to transfer development rights); *Gorieb v. Fox*, 274 U.S. 603, 608 (1927) (upholding zoning setback laws, despite total loss of setback area); *Deltona Corp. v. United States*, 657 F.2d 1184, 1192 (Ct. Cl. 1981) (no taking of three fingers of land where total restriction on development is required pursuant to federal wetlands regulations and development of two fingers out of five is allowed), *cert. denied*, 455 U.S. 1017 (1982); *Presbytery of Seattle v. King County*, 114 Wash. 2d 320, 335, 787 P.2d 907, 915 (partial taking where regulation required buffer area of one-third of lot for open-space preservation) (overruling *Allingham v. City of Seattle*, 109 Wash. 2d 947, 749 P.2d 160 (1988)), *cert. denied*, 111 S. Ct. 284 (1990).

tection due if the landowner is given a reasonable use of property measured over a reasonable period of time.¹⁹⁷

On remand, the court of appeal in *First English* found that the plaintiff failed to state a cause of action despite the outright prohibition of construction on the property.¹⁹⁸ The court's discussion of the balance between public necessity and private deprivation is particularly relevant to the issues raised by APFOs. First, the court distinguished the goal of preventing premature urbanization—which was recognized as a significant purpose in *Agins v. City of Tiburon*¹⁹⁹—from the goal under consideration in *First English*, which was the preservation of life and health.²⁰⁰ The court then observed:

If there is a hierarchy of interests the police power serves—and both logic and prior cases suggest there is—then the preservation of life must rank at the top. Zoning restrictions seldom serve public interests so far up on the scale. More often these laws guard against things like “premature urbanization,” preserve open spaces, or contribute to orderly development and the mitigation of environmental impacts. When land use regulations seek to advance what are deemed lesser interests such as aesthetic values of the community they frequently are outweighed by constitutional property rights. Nonetheless, it should be noted [that] even these lesser public interests have been deemed sufficient to justify zoning which diminishes—without compensation—the value of individual properties.²⁰¹

Thus, the goals of preserving life and health would support the deprivation of all use of a landowner's property, while the goal of preventing premature urbanization would not.

APFOs serve a number of purposes related to public health and safety, as well as “minor” concerns related to urban design. Tying the level of growth to the adequacy of water and sewer, transportation, fire and school facilities promotes both the physical and psychological well-being of the local inhabitants. Premature urbanization, which in *Agins* was considered merely an aesthetic goal,²⁰² is only one justification for APFOs. Instead, an APFO is designed to preserve the ability of a com-

197. *Bozung & Alessi, supra* note 183, at 1017 (discussing *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987); *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978)).

198. *First English*, 210 Cal. App. 3d at 1373-74, 258 Cal. Rptr. at 905-07.

199. 447 U.S. 255 (1980).

200. *First English*, 210 Cal. App. 3d at 1366, 258 Cal. Rptr. at 901.

201. *Id.* at 1370, 258 Cal. Rptr. at 904 (citations omitted).

202. *Agins*, 447 U.S. at 261.

munity to provide public facilities and services essential to individual health, safety and welfare, and to avoid congestion by maintaining a balance between development and infrastructure. Arguably, this multiplicity of purposes should rank higher than the zoning restrictions mentioned in *First English*.

b. the equal protection clause

Equal protection issues arise from public facilities requirements where different standards are imposed on properties that are similarly situated.²⁰³ Thus, developers may raise equal protection claims when: (1) different standards are imposed on different types of new development; (2) different standards are imposed by geographic area; or, (3) different standards are imposed on existing and new residents. When cities use "tier" systems, properties closer to the central city (in "urbanized" areas) are subject to relatively lenient development standards, while properties on the urban fringe (the "planned urbanizing" areas) are subject to adequate public facilities review.²⁰⁴

In the context of land use regulation, courts sustain regulations as long as they bear a rational relationship to a legitimate public purpose.²⁰⁵ Therefore, where studies establish the relationship of the APFO to orderly development and public health and welfare, equal protection challenges should not prove successful. Only where a local government utterly fails to advance a legitimate basis for distinguishing between different classes of development will an equal protection challenge prevail, especially where the APFO is based on exclusionary motives. For example, in *Begin v. Town of Sabattus*,²⁰⁶ a Maine state court invalidated an annual building permit limit for manufactured housing under a slow-growth ordinance.²⁰⁷ The court found that limiting manufactured housing construction, but not other residential uses, was not rationally related

203. See U.S. CONST. amend. XIV, § 1.

204. See *supra* notes 70-73 and accompanying text for a discussion of San Diego's "tier" system.

205. *Begin v. Town of Sabattus*, 409 A.2d 1269, 1276 (Me. 1979). Courts have recognized that developers are not a suspect class meriting heightened scrutiny and that land development is not a fundamental interest. See, e.g., *Candid Enters. v. Grossmont Union High School Dist.*, 39 Cal. 3d 878, 890, 705 P.2d 876, 885, 218 Cal. Rptr. 303, 312 (1985); *Russ Bldg. Partnership v. City & County of San Francisco*, 199 Cal. App. 3d 1496, 1507, 246 Cal. Rptr. 21, 26 (1987); *Loup-Miller Constr. Co. v. City & County of Denver*, 676 P.2d 1170, 1173 (Colo. 1984).

206. 409 A.2d 1269 (Me. 1979).

207. *Id.* at 1276.

to the purpose of slowing growth to alleviate traffic congestion and strains on services.²⁰⁸

Begin demonstrates that LOS standards should apply uniformly within classes of development unless (1) the particular subclass of development imposes a higher demand on public facilities and services than do other types of development, or (2) a legitimate public purpose is offered for imposing stricter or looser restrictions on a particular type of development, and the variable restriction is rationally related to that purpose.²⁰⁹

c. the due process clause

Substantive due process requires that land use regulations further the public health, safety and welfare.²¹⁰ This is a two-tiered requirement. First, the land use regulation must deal with a legitimate public purpose.²¹¹ Second, the means selected to achieve that purpose must further the purpose selected.²¹² The United States Supreme Court recognized the legitimacy of growth control objectives in *Village of Belle Terre v. Boraas*.²¹³

A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land-use project addressed to family needs. . . . The police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people.²¹⁴

In the case of challenges to regulations or regulatory conditions not involving a physical occupation or transfer of title to the government, courts apply the rational basis test.²¹⁵

208. *Id.*

209. For example, Montgomery County, Maryland, consistent with equal protection constraints, exempts low- and moderate-income projects from growth limits (based on adopted LOS standards) to promote the legitimate public purpose of encouraging the development of affordable housing. MONTGOMERY COUNTY, MD., *supra* note 147, at 9-10.

210. *Village of Euclid v. Amber Realty Co.*, 272 U.S. 365, 394 (1926).

211. *Village of Belle Terre v. Boraas*, 416 U.S. 1, 7-9 (1974); *Euclid*, 272 U.S. at 387-88.

212. *Belle Terre*, 416 U.S. at 9; *Ybarra v. City of Los Altos*, 503 F.2d 250, 254 (9th Cir. 1974).

213. 416 U.S. 1 (1974).

214. *Id.* at 9.

215. *See, e.g., Lake Lucerne Civic Ass'n v. Dolphin Stadium Corp.*, 878 F.2d 1360 (11th Cir. 1989) (property owner has no claim for just compensation through inverse condemnation for injuries sustained by unreasonable zoning ordinance later declared invalid), *cert. denied*, 110 S. Ct. 1132 (1990); *Barancik v. County of Marin*, 872 F.2d 834 (9th Cir. 1989) (applying an "arbitrary and capricious" standard, court upheld 60-acre zoning scheme that was coupled

Developers often assert right-to-travel challenges against growth control regulation, alleging that local regulations which slow the rate of growth interfere with citizens' abilities to relocate.²¹⁶ Such claims are usually rejected for lack of standing.²¹⁷ If a developer avoids dismissal for lack of standing and successfully claims interference with the right to travel, the government must present a compelling government interest.²¹⁸ Courts may also reject right-to-travel challenges by finding that the regulation in question does not stop growth, but rather temporarily shifts the growth to another location.²¹⁹

Courts in some states have reformulated constitutional principles into a regional general welfare standard. Such a standard requires communities to consider the regional interests affected by growth control ordinances.²²⁰ The regional general welfare standard requires a locality to

with development rights transfer provision designed to protect agricultural areas); *Lemke v. Cass County*, 846 F.2d 469 (8th Cir. 1989) (decision must be so irrational as to bear no relationship whatsoever to merits of pending matter); *Coniston Corp. v. Village of Hoffman Estates*, 844 F.2d 461 (7th Cir. 1988) (violation of state law, without more, is not denial of substantive due process); *Pace Resources v. Shrewsbury Township*, 808 F.2d 1023 (3d Cir.) (lower court decision must be more than arbitrary or capricious; rather, it must be invidious or irrational), *cert. denied*, 482 U.S. 906 (1987); *ABN 51st St. Partners v. City of New York*, 724 F. Supp. 1142 (S.D.N.Y. 1989) (legislative scheme implicit in law found to be rationally related to stated goals; court relied upon previous decision which found similar ordinances unconstitutional for lack of foundation in "any thought or consideration whatsoever"). *Compare D. HAGMAN & J. JUERGENSMEYER*, *supra* note 113, § 10.7, at 324 (solution to taking puzzle based on assumption that issue of remedy is separate from issue of taking claim) *with Nollan*, 483 U.S. at 841 (use of police power abridging property rights must substantially advance legitimate state interest).

216. *See, e.g.*, *Shapiro v. Thompson*, 394 U.S. 618, 630 (1969) (United States Constitution does not explicitly protect right to travel). Growth management systems are rarely challenged by those seeking entry into the community.

217. *See, e.g.*, *Construction Indus. Ass'n v. City of Petaluma*, 522 F.2d 897, 904-05 (9th Cir. 1975), *cert. denied*, 424 U.S. 934 (1976).

218. *Shapiro*, 394 U.S. at 643 n.4.

219. *See Associated Home Builders v. City of Livermore*, 18 Cal. 3d 582, 557 P.2d 473, 135 Cal. Rptr. 41 (1976); *Builders Ass'n v. Superior Court*, 13 Cal. 3d 225, 529 P.2d 582, 118 Cal. Rptr. 158 (1974), *appeal dismissed*, 427 U.S. 901 (1976).

220. *See Associated Home Builders*, 18 Cal. 3d at 604-08, 557 P.2d at 485-87, 135 Cal. Rptr. at 53-56; *Southern Burlington County NAACP v. Township of Mt. Laurel*, 92 N.J. 158, 208-09, 456 A.2d 390, 415 (1983). Some states impose regional general welfare standards by statutory direction addressing growth controls. *See, e.g.*, CAL. EVID. CODE § 669.5 (West Supp. 1991) (creating presumption in land use litigation that numerical growth restrictions affect regional housing needs); CAL. GOV'T CODE § 65302.8 (West 1983) (annual residential construction limits imposed through general plan amendments must be accompanied by findings regarding regional housing needs); N.H. REV. STAT. ANN. § 674:22 (1986) (requiring consideration of "regional development needs" prior to adoption of adequate public facilities ordinance); *see also Leshar Communications v. City of Walnut Creek*, 52 Cal. 3d 531, 539 n.7, 802 P.2d 317, 321 n.7, 227 Cal. Rptr. 1, 4 n.7 (1990) (statute establishing building moratorium to prevent high traffic density was invalid due to its inconsistency with current development plan); *Building Indus. Ass'n v. City of Camarillo*, 41 Cal. 3d 810, 817, 718 P.2d 68, 71, 226

consider the effect of an ordinance limiting intrajurisdictional population growth on regional housing needs. It also requires the adjustment of development controls so that community access by low- or moderate-income persons is not impeded.²²¹ This essentially requires a balancing test between the benefits of growth controls and regional housing needs.²²² Courts in states with strong regional general welfare standards have generally declined to hold development timing ordinances per se invalid.²²³

While commentators criticized APFOs for their potential exclusionary effects,²²⁴ such criticisms were primarily directed at the earlier ordinances.²²⁵ These ordinances often excluded residential developments having a large impact on community facilities and services, but failed to exclude commercial or office projects due to their positive impact on local finances. In contrast, LOS controls restrict commercial, as well as residential, development, thereby avoiding claims by excluded parties.

d. the good faith requirement

A municipality's transportation congestion management program must be accompanied by good faith efforts to resolve existing deficiencies, in addition to efforts to mitigate the externalities of new growth-related impacts. Two essential rationales support this requirement. First, the takings clause requires that new development can only be compelled to mitigate its proportionate impact.²²⁶ In this way, new developments are

Cal. Rptr. 81, 84 (1986) (statute requiring local government to balance housing needs with public service needs did not apply to ordinances adopted by initiative).

221. *Associated Home Builders*, 18 Cal. 3d at 607-09, 557 P.2d at 488-89, 135 Cal. Rptr. at 55-56.

222. The courts have split on whether this is an appropriate inquiry. Compare, e.g., *Win-camp*, 458 F. Supp. at 1026-27 (upholding refusal to expand capacity of sewage treatment plant) with *Urban League v. Mahwah Township*, 207 N.J. Super. 169, 195-99, 504 A.2d 66, 79-81 (1984) (rejecting planning expert's testimony that preservation of "community character" justified postponement of phasing in community's fair share obligations). Where existing land use regulations adequately accommodate regional housing needs, however, it has been held that cities may adopt restrictive land use regulations, provided they do not preclude the accommodation of those needs. See, e.g., *DeCaro v. Washington Township*, 21 Pa. Commw. 252, 257-58, 344 A.2d 725, 728-29 (1975).

223. See *Associated Home Builders*, 18 Cal. 3d at 603-04, 557 P.2d at 482-83, 135 Cal. Rptr. at 52-53; *Southern Burlington*, 67 N.J. at 188 n.20, 336 A.2d at 732 n.20.

224. See, e.g., Bosselman, *Can the Town of Ramapo Pass a Law To Bind the Rights of the Whole World?*, 1 FLA. ST. U.L. REV. 234, 247-50 (1973).

225. See NATIONAL COMM'N, *supra* note 10, at 212-13 (criticizing fiscal zoning).

226. *Paradyne Corp. v. State Dep't of Transp.*, 528 So. 2d 921, 926 (Fla. Dist. Ct. App. 1988); *Unlimited v. Kitsap County*, 50 Wash. App. 723, 727, 750 P.2d 651, 653 (1988). Justice Scalia, dissenting in *Pennell v. City of San Jose*, 485 U.S. 1 (1988), elaborated on the "nexus" requirement set forth in his majority opinion in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987). Observing that the fifth amendment's takings clause bars government from

not burdened for ills not of their making. Second, without an even-handed approach to apportioning infrastructure shortfalls between existing residents and new development, courts may search for an improper, ulterior motive.²²⁷

Courts have consistently upheld growth controls imposed pursuant to a balanced and even-handed comprehensive plan designed to resolve infrastructure deficiencies.²²⁸ When a comprehensive plan is not in place, but studies to develop such a plan are under way, courts presume a good faith effort.²²⁹ Such studies also defeat allegations of hidden illegal motives to deter growth.²³⁰

These principles are illustrated by a series of New York cases, holding that new development can be denied pending resolution of deficien-

forcing certain parties to bear public burdens which, in all fairness and justice, should be borne by the public at large, Justice Scalia noted:

Traditional land-use regulation (short of that which totally destroys the economic value of property) does not violate this principle because there is a cause-and-effect relationship between the property use restricted by the regulation and the social evil that the regulation seeks to remedy. Since the owner's use of the property is (or, but for the regulation, would be) the source of the social problem, it cannot be said that he has been singled out unfairly. Thus, the common zoning regulations requiring subdividers to observe lot-size and set-back restrictions, and to deduct certain areas to public streets, are in accord with our constitutional traditions because the proposed property use would otherwise be the cause of excessive congestion.

Pennell, 485 U.S. at 19-20 (Scalia, J., dissenting).

227. See 303 W. 42nd Street Corp. v. Klein, 58 A.D.2d 778, 396 N.Y.S.2d 385 (1977). In 303 W. 42nd Street, the Mayor of the City of New York "declared war" on businesses exploiting sexually oriented material. *Id.* at 779, 396 N.Y.S.2d at 387-88. To further these efforts, the Buildings Department required that the plaintiff expand the existing sprinkler system to cover all floors in the building. *Id.* at 778, 396 N.Y.S.2d at 386. In a bitter dissent, Judge Silverman questioned whether New York was using the public safety rationale to eliminate a legitimate—although politically unpopular—use. *Id.* at 778-80, 396 N.Y.S.2d at 386-87 (Silverman, J., dissenting). California courts often scrutinize development restrictions for illegal exclusionary purposes. See, e.g., *Associated Home Builders*, 18 Cal. 3d 582, 557 P.2d 473, 135 Cal. Rptr. 41.

228. See *Golden*, 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138 (town adopted 18-year capital improvement program demonstrating where capital facilities to deal both with new growth and deficiencies would be located); *Matter of Brous v. Smith*, 304 N.Y. 164, 106 N.E.2d 503 (1952).

229. See, e.g., *Conway v. Town of Stratham*, 120 N.H. 257, 259, 414 A.2d 539, 540-41 (1980) (slow growth ordinance limiting number of lots that may be approved by town's planning board upheld); *Beck v. Town of Raymond*, 118 N.H. 793, 801, 394 A.2d 847, 852 (1978) (good faith efforts to increase capacity of municipal services accompanying growth controls).

230. In *Wincamp Partnership v. Anne Arundel County*, 458 F. Supp. 1009 (D. Md. 1978), the court rejected a substantive due process challenge. In doing so, the court noted the county's comprehensive planning efforts. *Id.* at 1029. The county had appropriated substantial sums of money towards other wastewater treatment plants in the current budget and instituted a \$100 million "capital facilities program" for wastewater treatment. *Id.* at 1026-27. The *Wincamp* court noted that "the comprehensive plans to improve wastewater facilities belied any hidden purpose to hinder growth." *Id.* at 1027 (citing *Smoke Rise, Inc. v. Washington Suburban Sanitary Comm'n*, 400 F. Supp. 1369 (D. Md. 1975)).

cies if the city demonstrates good faith efforts to address those deficiencies.²³¹ Such a denial is permitted notwithstanding constitutional restrictions on development controls requiring new construction to pay for existing deficiencies.²³² Denial of new development, however, is an unconstitutional taking if the city has not taken good faith steps to provide an adequate system.²³³ Denial would likewise constitute a taking if the ban was not adopted pursuant to a comprehensive plan.²³⁴

5. Evaluation of APFOs

APFOs enjoy many advantages over their traditional counterparts and other innovative land use controls. APFOs directly control the level of population and employment growth, which represent a major source of roadway demand. Construction is prohibited unless it can be accommodated within the capacity of existing and planned public facilities. Once a development is approved or denied, no additional oversight is needed.²³⁵

An APFO integrates a local government's police and fiscal powers in order to address traffic congestion. Under an APFO, the government can deny new development if roadway or transit LOS standards will not

231. *E.g.*, *Belle Harbor Realty Corp. v. Kerr*, 35 N.Y.2d 507, 323 N.E.2d 697, 364 N.Y.S.2d 160 (1974); *Golden*, 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138; *Westwood Forest Estates v. Village of South Nyack*, 23 N.Y.2d 424, 244 N.E.2d 700, 297 N.Y.S.2d 129 (1969); *accord* *Beaver Meadows v. Board of County Comm'rs*, 709 P.2d 928 (Colo. 1985) (county could deny Planned Unit Development approval for lack of adequate off-site road capacity but could not apportion cost of building facilities disproportionately to developer).

232. *See supra* note 159 and accompanying text.

233. *See* *Charles v. Diamond*, 41 N.Y.2d 318, 360 N.E.2d 1295, 392 N.Y.S.2d 594 (1977) (denying landowners permission to tie into city sewer system held unconstitutional taking).

234. *See* *Q.C. Constr. Co. v. Gallo*, 649 F. Supp. 1331 (D.R.I. 1986) (invalidating moratorium pending the resolution of sewer system inadequacies), *aff'd*, 836 F.2d 1340 (1st Cir. 1987); *Westwood Forest Estates*, 23 N.Y.2d at 427, 244 N.E.2d at 701-02, 297 N.Y.S.2d at 132 (invalidating outright ban on multi-family construction that had been imposed to alleviate burden on city's sewage disposal plant, where plant had capacity and problem predated advent of new construction). Noting that the sewer system expansion had occurred in a piece-meal fashion, rather than pursuant to a comprehensive plan, the *Q.C. Construction* court required "measurable" efforts to improve the system. *Q.C. Constr.*, 649 F. Supp. at 1335-36 (citing *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962)). The court cited a number of other cases approving development restrictions or moratoria imposed under a comprehensive plan to remedy deficiencies and which would not impose a permanent ban on development. *Id.* at 1337-38 (citing *Schaffer v. City of New Orleans*, 743 F.2d 1086 (5th Cir. 1984); *Wincamp Partnership v. Anne Arundel County*, 458 F. Supp. 1009 (D. Md. 1976); *Smoke Rise, Inc. v. Washington Suburban Sanitary Comm'n*, 400 F. Supp. 1369 (D. Md. 1975); *Golden v. Planning Bd. of Ramapo*, 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138, *appeal dismissed*, 409 U.S. 1003 (1972)).

235. This is in contrast to TDM ordinances, which introduce enforcement and administrative difficulties not presented by APFOs. *See infra* text accompanying note 280.

adequately serve the anticipated increase in population. APFOs also establish ascertainable criteria against which new development will be reviewed. Accordingly, APFOs can serve as the springboard for other innovative land use controls, such as TDM ordinances, transfer of development rights, negotiated exactions and impact fees. In addition, APFOs may be used to integrate transportation goals with other comprehensive planning goals relating to urban development patterns and affordable housing.

APFOs recognize that new development is not solely responsible for traffic congestion. The national increase in automobile use and delays in needed capital investments contribute to congestion even in the absence of new growth. CIPs add the capacity needed to address existing congestion problems by using timing and sequencing controls to ensure that new development does not disrupt the balance between roadway supply and demand. APFOs, however, have been criticized by commentators concerned about the effect of growth management on urban decentralization, housing and property rights. The following sections examine the arguments commonly raised against APFOs.

a. effect on traffic congestion

Some commentators argue that strict growth limits merely force development pressures outside the enacting jurisdiction, thereby exacerbating the traffic congestion by increasing the spatial separation between jobs and housing. This situation allegedly exacerbates the congestion problem that the concurrency standard was intended to resolve.²³⁶ For several reasons, these concerns do not affect the reasonableness of an APFO per se. First, while the objection is commonly raised at public hearings, commentators generally direct it toward *moratoria* rather than APFOs.²³⁷ Second, adequate public facility requirements bear no less of a relationship to the alleviation of traffic congestion than the traditional large-lot zoning requirements which have been accorded enormous judicial deference. The fact that concurrency is innovative does not make it less effective.

Third, it is pure speculation to assert that a developer will relocate simply because a timing and sequencing mechanism is imposed. Traffic is indicative of a jurisdiction's relative attractiveness for real estate development, and many site location decisions are based on increased traffic

236. See *infra* note 237.

237. See, e.g., D. CURTIN, CALIFORNIA LAND-USE AND PLANNING LAW 242 (11th ed. 1991); Cervero, *supra* note 5, at 403-04 (discussing Walnut Creek's LOS-based moratorium); Note, *Traffic-Linked Growth Control in California*, 16 *ECOLOGY L.Q.* 481, 496-97 (1989).

demands. Outlying jurisdictions often lack the agglomeration economies that render urban-scale development possible.²³⁸ For a developer to build elsewhere suggests that he or she traded the decision to build on a more marketable tract of land for a decision to build at an earlier time. With the time commitment required to secure financing and other governmental approvals, developers could potentially use the delay to their advantage. This argument implies that developers always equate innovative land use regulations with restrictive land use regulations. In reality, developers realize that timing and sequencing mechanisms are no more restrictive than the traditional land use controls normally applied to combat traffic congestion. Timing and sequencing mechanisms can be, and often are, coupled with less restrictive underlying zoning schemes.

Fourth, in some jurisdictions, especially those heavily beset by traffic, there are no other places to build. Land absorption and the growth management programs of other outlying jurisdictions may preclude such alternative sites. In addition, such jurisdictions may not have the public facilities and services or complementary businesses to render a project buildable or marketable.

Fifth, an APFO may be structured to eliminate potential effects on trip length. Many ordinances apply only to residential or non-residential growth. Assuming that developments affected by an APFO could economically locate beyond the offending jurisdiction and that the alternative location is feasible, applying restrictive controls could add to a jobs-housing imbalance. Such an imbalance further extends trip lengths and exacerbates traffic congestion. Assuming that developers would relocate outside the jurisdiction in response to an APFO, if both jobs and housing are restricted in an even-handed manner—as in Montgomery County and the proposed San Diego program—both jobs and housing would relocate elsewhere.²³⁹ Such relocations would maintain a balance between trip origins and trip destinations.²⁴⁰ In Montgomery County, the development phasing limits are established separately for jobs and housing in order to maintain an appropriate balance.²⁴¹

Some jurisdictions, such as Montgomery County, adopt lower levels of service in areas close to the urban core, where traffic congestion is

238. This point is conceded by one economist, who argues that restrictive zoning contributes to decentralization. W. FISCHER, *THE ECONOMICS OF ZONING LAWS: A PROPERTY RIGHTS APPROACH TO AMERICAN LAND USE CONTROLS* 270 (1985).

239. See *supra* notes 146-51 and accompanying text.

240. Chinitz, *Growth Management: Good for the Town, Bad for the Nation?*, 56 J. AM. PLAN. A. 3, 7 (1990).

241. MONTGOMERY COUNTY, MD. *supra* note 147, at 6.

heaviest, or where public transportation is available.²⁴² This is consistent with other comprehensive planning goals and reflects consumer expectations. Other jurisdictions may exempt affordable housing to correct jobs-housing imbalances.

b. effect of concurrency regulations on housing

The abundance of low-cost land on the urban fringe, combined with the scarcity of affordable housing in urbanized areas, has contributed to urban decentralization. In Southern California, this situation has forced many commuters to travel for up to two hours in each direction for home-to-work trips.²⁴³ Growth limits and restrictive development controls are commonly blamed for contributing to rising housing costs.²⁴⁴ Instead of using growth controls to exclude low- or moderate-income families, local governments can establish exemptions or preferential treatment for qualified affordable housing projects to create an incentive for development.²⁴⁵ A recent study of California cities found no significant relationship between housing prices in communities with growth management programs and those without such programs.²⁴⁶

Several state courts, including the California Supreme Court, have determined that municipal land use regulations must be reasonably related to the welfare of the region, including the accommodation of regional housing needs.²⁴⁷ In California, courts analyze: (1) the effect and

242. See Christeller, *supra* note 146, at 84.

243. Fulton, *The Long Commute*, PLANNING, July 1990, at 4, 4.

244. Section 105(b)(4) of the Cranston-Gonzalez National Affordable Housing Act requires local governments to identify the effect of land use controls and growth limits on housing and to develop strategies "to remove or ameliorate" the effect of those policies on affordable housing, as a condition to receiving direct federal assistance for housing. Cranston-Gonzalez National Affordable Housing Act, Pub. L. No. 101-625, § 105(b)(4), 104 Stat. 4079, 4089 (1990). The Department of Housing and Urban Development, however, cannot use the "adoption or continuation" of restrictive land use policies as grounds for the denial of housing assistance. *Id.* § 105(c)(1).

245. See White, *Development Fees and Exemptions for Affordable Housing: Tailoring Regulations to Achieve Multiple Public Objectives*, 6 J. LAND USE & ENVTL. L. 25, 51-52 (1990).

246. Glickfeld & Levine, *supra* note 5, at 36, 39; see also *Studies Refute Cliches About Growth Control*, CAL. PLAN. DEV. REP., Sept. 1990, at 1, 3 (survey of more than 500 California cities and counties found little relationship between community wealth and likelihood of growth control). The Florida Department of Community Affairs encourages local governments to reserve capacity or to adopt preferential concurrency standards for affordable housing projects when developing an APFO. *Strategies to Address Affordable Housing Needs*, TECHNICAL MEMO, Oct. 1990, at 16, 19.

247. See, e.g., *Associated Home Builders*, 18 Cal. 3d at 589, 557 P.2d at 476, 135 Cal. Rptr. at 44; see *supra* note 32 and accompanying text; see also CAL. EVID. CODE § 669.5 (West Supp. 1991) (shifting burden of proof on local governments to justify growth numeric controls).

duration of the restriction; (2) the competing interests affected by the restriction; and, (3) whether the ordinance represents a reasonable accommodation of those interests.²⁴⁸

Because APFOs are tied to CIPs designed to expand the capacity of public facilities, their goal is to accommodate, rather than to impede, growth and development. In *Associated Home Builders v. City of Livermore*,²⁴⁹ the California Supreme Court considered a local moratorium that was to remain effective pending the resolution of LOS deficiencies for schools, sewer treatment and water facilities.²⁵⁰ The court upheld the ordinance, distinguishing large-lot zoning ordinances, which "impede the ability of low or moderate income persons to immigrate to a community but permit largely unimpeded entry by wealthier persons," from growth rate mechanisms tied to the availability of public facilities.²⁵¹ APFOs would satisfy even the most restrictive regional general welfare tests, if coupled with a realistic, financially feasible CIP.

c. adequate public facilities ordinances distinguished from moratoria

A common response to the traffic congestion problem in California has been the use of moratoria prohibiting all development pending the resolution of LOS deficiencies.²⁵² The flaw in this approach is the failure to couple land use regulations with structural and fiscal measures to increase facility capacity. Because new growth represents only one variable in the traffic congestion equation, withholding development approvals will not solve the traffic congestion problem absent complementary structural and fiscal measures. Instead, traffic will continue to increase due to rising automobile use by existing residents. Additionally, if a developer faces a permanent ban on development rather than a delay, development pressures could indeed be forced beyond the jurisdiction.

Moratoria can be a useful planning device when carefully limited in duration and coupled with diligent efforts to resolve the problems leading to their adoption.²⁵³ Several states prohibit moratoria absent a showing

248. *Associated Home Builders*, 18 Cal. 3d at 608-09, 557 P.2d at 488-89, 135 Cal. Rptr. at 56-57.

249. 18 Cal. 3d 582, 557 P.2d 473, 135 Cal. Rptr. 41 (1976).

250. *Id.* at 590, 557 P.2d at 476, 135 Cal. Rptr. at 44.

251. *Id.* at 606, 557 P.2d at 487, 135 Cal. Rptr. at 55. In his dissent, Justice Mosk noted that the Livermore ordinance lacked a CIP, "provid[ing] no timetable or dates by which the public services are to be made adequate." *Id.* at 616, 557 P.2d at 493, 135 Cal. Rptr. at 61 (Mosk, J., dissenting). Consequently, Justice Mosk would have invalidated the ordinance as exclusionary. *See id.* at 623, 557 P.2d at 497, 135 Cal. Rptr. at 65 (Mosk, J., dissenting).

252. *See id.* at 590, 557 P.2d at 476, 35 Cal. Rptr. at 44; Eggert, *supra* note 159, at 496-97.

253. Freilich, *supra* note 11, at 151-57; Freilich, *Interim Development Controls—For Flexible Planning/Zoning*, in 2 MANAGEMENT & CONTROL OF GROWTH, *supra* note 35, at 401-02.

of a compelling need, because they are frequently misused.²⁵⁴ Oregon recognizes that moratoria carefully limited in duration may be desirable if coupled with comprehensive growth management systems that consider state and local comprehensive goals.²⁵⁵

C. *Transportation Demand Management Ordinances*

Transportation demand management (TDM) ordinances seek to minimize the adverse impact of development on traffic. They frequently encompass non-residential development only. Most TDM ordinances apply to all employers—new or existing—and may be enforced against new development through the subdivision process. Mandatory TDM ordinances are, in part, an outgrowth of the increasing use of transportation management associations by private businesses promoting traffic mitigation programs.²⁵⁶

Most TDM measures spread traffic throughout the day with staggered work hours and flex-time requirements. TDM programs rely on ridesharing, parking management and other measures to reduce the number of trips generated and to limit when those trips occur.²⁵⁷ Developers and existing employers are often required to implement various types of measures to alleviate traffic congestion.²⁵⁸ These measures include:

1. Staggered work hours, thereby reducing traffic during the peak hours;
2. Ridesharing alternatives, such as carpooling or vanpooling;
3. Facilitating use of alternative transportation modes, such as bicycles;
4. Parking management;
5. Park and ride lots; and,

254. See, e.g., N.J. STAT. ANN. § 40:55D-28 (West Supp. 1990); OR. REV. STAT. §§ 197.505-.540 (1985); see also CAL. EVID. CODE § 669.5 (West Supp. 1991) (placing burden of proof on local governments to justify numeric growth controls).

255. OR. REV. STAT. § 197.510(2).

256. R. DUNPHY & B. LIN, *TRANSPORTATION MANAGEMENT THROUGH PARTNERSHIPS* 43-66 (1990); Orski, *Transportation Management Associations: Battling Suburban Congestion*, *URB. LAND*, Dec. 1986, at 3.

257. See Ferguson, *Transportation Demand Management: Planning, Development, and Implementation*, 56 J. AM. PLAN. A. 442, 447-48 (1990); Kozlak, *supra* note 54, at 230-31. For a discussion of how TDM ordinances are structured and implemented, see generally GREATER PRINCETON TRANSP. MGMT. ASS'N, *TRAFFIC MANAGEMENT TECHNIQUES: A PLANNING GUIDE* (1989).

258. See generally GREATER PRINCETON TRANSP. MANAGEMENT ASS'N, *supra* note 257.

6. Transportation Management Organizations, which “provide and promote transportation services and . . . implement various travel demand management services.”²⁵⁹

Pleasanton, California, a suburb of San Francisco, adopted the nation’s first TDM ordinance.²⁶⁰ The ordinance requires all employers with ten or more employees to implement a TDM information program.²⁶¹ The information is submitted to the city transportation coordinator.²⁶² All employers with more than fifty employees are required to implement a TDM program applying a combination of TDM measures, such as transit-related programs, ridesharing, non-vehicular commute modes, and staggered workhour programs.²⁶³ The ordinance aims for a forty-five percent reduction in peak-hour single-occupant vehicle trips per complex.²⁶⁴ Finally, the city council may impose fines for non-compliance, and expend revenues from such fines on traffic-related improvements.²⁶⁵

Montgomery County, Maryland combines TDMs with a development staging approach. For example, in the Silver Spring redevelopment area, the county established a special staging ceiling, which relies on TDM measures to facilitate its commuting goals.²⁶⁶ An advisory committee is appointed to administer the program.²⁶⁷ New development projects and employers with more than twenty-five employees must submit a traffic mitigation plan.²⁶⁸ As a condition of subdivision approval pursuant to the APFO, the employer must submit a traffic mitigation plan, including a transportation coordinator, parking space limitations, participation in the construction of off-site transportation facilities, carpools, vanpools, subsidized transit passes, preferential parking or peak-hour parking charges.²⁶⁹ The program combines incentives²⁷⁰ with preferential treatment for carpools and vanpoolers.²⁷¹

259. Kozlak, *supra* note 54, at 231.

260. Pleasanton, Cal., Ordinance 1154 (Aug. 20, 1984).

261. Pleasanton, Cal., Ordinance 1154, § 17.24.050(A) (Nov. 1990).

262. *Id.*

263. *Id.* § 17.24.060.

264. *Id.* § 17.24.120.

265. *Id.* § 17.24.150.

266. MONTGOMERY COUNTY, MD., CODE §§ 42A-10 to -20 (1988).

267. *Id.* § 42A-13. The voting members of this committee are all business representatives.

268. *Id.* § 42A-15.

269. *Id.* §§ 42A-16(a)-(b).

270. Incentives take the form of subsidized alternatives to auto travel, such as transit and bus passes and taxi vouchers. *Id.* § 42A-16(b)(5).

271. *Id.* § 42A-16(b)(4).

In 1990, Arizona enacted a mandatory travel reduction program²⁷² applicable to counties with populations exceeding 1.2 million people.²⁷³ The program applies only to the major employers.²⁷⁴ Major employers must: (1) provide information to employees on alternative travel modes and trip reduction measures; (2) participate in reporting and monitoring efforts with a county task force; and, (3) prepare and implement a travel reduction plan.²⁷⁵ Like the Montgomery County measures, Arizona's traffic reduction measures include commuter matching services, subsidies and incentives for vanpooling and carpooling, cooperation with transportation providers to provide bus services, subsidized bus fares, adjusted work hours and provisions for walking and bicycling.²⁷⁶

Additionally, the Arizona program's goal for employers includes a five percent reduction of commuting single-occupant vehicles by the end of the first year, and an additional five percent reduction in the second year.²⁷⁷ Civil penalties may be imposed on an employer for failure to adopt the required implementation measure or to achieve the travel reduction goals.²⁷⁸ If the employer "is attempting in good faith to meet the goals," failure to meet the goals does not constitute a violation.²⁷⁹

Because TDM requirements impose continuous obligations on developers, they present enforcement and administration problems not present in traditional land use regulations. For example, Seattle's TDM requirements, imposed as a condition of environmental review,²⁸⁰ have proven ineffective due to enforcement difficulties.²⁸¹ Enforcement mechanisms generally include the withholding of certificates of occupancy or fines. Withholding certificates of occupancy, however, has limited impact because it is difficult to monitor compliance before a project is occu-

272. Travel Reduction Program, ch. 362, 1990 Ariz. Sess. Laws 1596 (codified at ARIZ. REV. STAT. ANN. §§ 49-581 to -593 (Supp. 1990)).

273. ARIZ. REV. STAT. ANN. § 49-582 (Supp. 1990).

274. *Id.* § 49-581(10). Major employers are defined as employers that employ "one hundred or more employees working at or reporting to a single work site during any twenty-four hour period for at least six months during the year." *Id.*

275. *Id.* § 49-588. The travel reduction plan must include a transportation coordinator, employee information programs and travel reduction measures. *Id.*

276. *Id.* § 49-588(A)(3).

277. *Id.* § 49-588(D).

278. *Id.* § 49-593(B).

279. *Id.* § 49-593(C).

280. Washington State Environmental Policy Act, WASH. REV. CODE ANN. §§ .21C.010-.21C.914 (1983 & Supp. 1991).

281. *Cf.* McCutcheon & Hamm, *Land Use Regulations to Promote Ridesharing: An Evaluation of the Seattle Approach*, 11 CURRENT MUN. PROBS. 143, 152-53 (1984) (since ridesharing measures cannot be evaluated until building is completed and occupied, they present "greater opportunity for violation and fewer avenues of enforcement").

ped. Furthermore, assessing and collecting fines after project approval is expensive and cumbersome. Instead, project approval should be directly tied to the traffic demand created by the development, as in an APFO. Such a standard would encourage developers to initiate realistic and permanent traffic control measures.²⁸²

D. Transfer of Development Rights

Transferable development rights (TDRs) are most commonly used to preserve historic resources,²⁸³ protect environmentally sensitive lands²⁸⁴ and guard agricultural areas.²⁸⁵ In addition, TDRs have also been successfully applied to facilitate traffic mitigation strategies. TDRs involve the transfer of development rights from "sending" or "control" zones, with restrictive land use controls, to designated "receiving" or "development" zones located at nodes along transportation corridors.²⁸⁶ This transfer compensates the property owner for the property value loss resulting from restrictive growth regulations.²⁸⁷ Transfers of development rights have been successfully used to implement growth controls, such as density caps, in order to alleviate traffic congestion.²⁸⁸

E. Transportation Impact Fees

Impact fees represent an innovative approach to land use regulation. Such fees are founded on the principle that those creating the need for and benefiting from new facilities should pay for the facilities. Financing approaches utilizing private sector resources are also encouraged.²⁸⁹ In

282. R. DUNPHY & B. LIN, *supra* note 256, at 99 (implementation of TDM measures pursuant to APFO in order to mitigate impact of development in surrounding roadways).

283. *See, e.g.*, *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 108-14 (1978).

284. *See, e.g.*, *Glisson v. Alachua County*, 558 So. 2d 1030 (Fla. Dist. Ct. App. 1990) (transfer development rights sufficient to protect sensitive wetlands, upland habitat, hammock and active use zones). *But see* *Corrigan v. City of Scottsdale*, 149 Ariz. 538, 720 P.2d 513 (1986) (restrictions on only hilly terrain within city limits held unconstitutional taking).

285. *West Montgomery County Citizens Ass'n v. Maryland-Nat'l Capital Park & Planning Comm'n*, 309 Md. 183, 522 A.2d 1328 (1987) (involving county zoning ordinance to preserve open space and agricultural area).

286. *See* *Freilich & Chinn, supra* note 1, at 166.

287. TDRs often safeguard restrictive regulatory schemes from challenges that all reasonable use has been taken under the fifth amendment. *See Penn Cent.*, 438 U.S. at 137; *Glisson*, 558 So. 2d at 1035-38.

288. *See also* *City of Hollywood v. Hollywood, Inc.*, 432 So. 2d 1332 (Fla. Dist. Ct. App. 1983) (transfer of development rights within large oceanfront property to limit traffic density not a taking). *See generally* *Freilich & Senville, Takings, TDRs, and Environmental Preservation: "Fairness" and the Hollywood North Beach Case*, LAND USE L. & ZONING DIG., Sept. 1983, at 4 (discussing that TDR concept used to avoid finding that restrictive land use regulations results in unconstitutional taking of private property).

289. *See* *Freilich & Nichols, supra* note 96, at 6-7.

addition, the Bush Administration recently proposed major changes to federal highway legislation that would "require major cities to establish detailed transportation improvement programs addressing land use, mass transit and congestion."²⁹⁰ Such programs would receive partial federal funding and broaden the use of innovative traffic congestion solutions which do not rely on highway construction.

In many states, enabling legislation authorizes impact fees for roads and traffic signalization.²⁹¹ Some states do not expressly limit the types of capital facility costs recoverable through impact fees.²⁹² Section 66484.3 of the California Government Code²⁹³ delegates to Orange County cities the authority to impose impact fees for major thoroughfares.²⁹⁴ Impact fees raise several legal issues, including constitutional nexus requirements²⁹⁵ and, at the state court level, whether or not the authority to impose impact fees is explicitly or impliedly included in the state impact fees enabling legislation.²⁹⁶

290. Cushman, *U.S. Plans a Shift on Road Spending*, N.Y. Times, Nov. 23, 1990, at A1, col. 1.

291. See, e.g., ARIZ. REV. STAT. ANN. § 11-1102(A) (Supp. 1990) (development fees); CAL. GOV'T CODE § 66002(c)(6) (West Supp. 1991) (capital improvement plan); GA. CODE ANN. §§ 23-45 to -4513 (Supp. 1990) (development impact fees); ILL. ANN. STAT. ch. 121, para. 5-904 (Smith-Hurd Supp. 1990) (transportation impact fees); ME. REV. STAT. ANN. tit. 30, § 4961-A(3) (1989) (impact fees); VA. CODE ANN. §§ 15.1-498.1 to -498.10 (1989) (road impact fees); WASH. REV. CODE §§ 39.92.010-.92.901 (Supp. 1991) (impact fees).

292. See, e.g., ARIZ. REV. STAT. ANN. § 9-463.05 (1990); VT. STAT. ANN. tit. 24, § 5201(2) (Supp. 1990); see also Morgan, *Recent Developments in the Law of Impact Fees with Special Attention to Legislation*, in 1990 INST. ON PLAN. ZONING & EMINENT DOMAIN § 4.01, § 4.04[2][d] (noting broad enabling statutes that define public facilities or capital improvements).

293. CAL. GOV'T CODE § 66484.3 (West Supp. 1991).

294. *Id.*

295. See D. GODSCHALK, D. BROWER, L. MCBENNETT, B. VESTAL & D. HERR, *supra* note 146, at 53-64.

296. State courts are divided on the issue of whether or not explicit enabling legislation is required for the enactment of local impact fees. *Home Builders & Contractors Ass'n v. Board of County Comm'r*, 446 So. 2d 140, 142-43 (Fla. Dist. Ct. App. 1983) (since there is no specific limitation in state constitution, county may enact impact fee without explicit enabling legislation). *But see* *Eastern Diversified Properties v. Montgomery County*, 319 Md. 45, 48-52, 570 A.2d 850, 853-55 (1990) (impact fee is tax which county had no authority to impose, as general taxing power is reserved to states); *New Jersey Builders Ass'n v. Bernards Township*, 108 N.J. 223, 233, 528 A.2d 555, 562 (1987) (township cannot allocate cost of road improvement plan on basis of anticipated impact without enabling legislation); *Albany Area Builders Ass'n v. Town of Guilderland*, 74 N.Y.2d 372, 376-79, 546 N.E.2d 920, 921-23, 547 N.Y.S.2d 627, 628-30 (1989) (state legislature enacted comprehensive scheme for highway funding and thereby preempted town law requiring use of impact fees).

V. COMPREHENSIVE PLANNING FOR TRAFFIC CONGESTION: EMERGING STATE AND REGIONAL APPROACHES

The seriousness and complexity of the traffic congestion problem in urban areas demands that cities use all structural, financial and regulatory tools at their disposal. Cities cannot solve, nor escape from, traffic congestion problems by simply placing the entire responsibility with transportation engineers, taxpayers or the development industry. The only effective solution will be found in comprehensive planning schemes. This section explores how some states require and authorize local governments to apply comprehensive planning to mitigate traffic congestion.

A. California

The California legislature recently adopted a far-reaching transportation planning statute²⁹⁷ which was buttressed by a voter-approved comprehensive transportation funding package.²⁹⁸ Designated county agencies are required to prepare congestion management programs (CMPs) for every city within the county.²⁹⁹ Each CMP must include: (1) minimum traffic level of service standards; (2) a trip reduction and travel demand element; (3) transit standards; (4) a program for analyzing the impact of land use decisions on traffic LOS; and, (5) a seven-year regional transportation improvement program.³⁰⁰ This revolutionary restructuring of the land use approval and transportation financing process may signal a trend toward comprehensive solutions in other states.

At the local government level, the statute requires a traffic circulation element in all local government general plans.³⁰¹ The circulation element must be coordinated with the land use element.³⁰² Specifically, the circulation element must correlate the land use element with "the general location and extent of existing and proposed major thoroughfares, transportation routes, terminals, and other local public utilities and facilities"³⁰³ Finally, other transportation elements may be in-

297. Transportation Funding-Katz-Kopp-Baker-Campbell Transportation Blueprint for the Twenty-First Century, ch. 106, §§ 1-27, 1989 Cal. Legis. Serv. 863, 864-86 (West).

298. See Traffic Congestion Relief and Spending Limitation Act of 1990 (amending CAL. GOV'T CODE §§ 65088-65089.6 (West Supp. 1991)) (approved by voter initiative on June 5, 1990).

299. CAL. GOV'T CODE § 65089 (West Supp. 1991).

300. *Id.*

301. *Id.* § 65302(b).

302. *Id.*; see also *Concerned Citizens v. Calaveras County Bd. of Supervisors*, 166 Cal. App. 3d 90, 99-100, 212 Cal. Rptr. 273, 277 (1985) (circulation element and land use plan must be consistent).

303. CAL. GOV'T CODE § 65302(b).

cluded, such as location of rights-of-way, terminals, viaducts and grade separations.³⁰⁴

B. Florida

Florida's far-reaching Local Government Comprehensive Planning and Land Development Regulation Act (the Florida Act),³⁰⁵ adopted in 1985,³⁰⁶ requires local governments to prepare and adopt a traffic circulation element and, if applicable, a mass transit element.³⁰⁷ The traffic circulation element must describe "the types, locations, and extent of existing and proposed major thoroughfares and transportation routes, including bicycle and pedestrian ways."³⁰⁸ Furthermore, the Department of Community Affairs, charged with administering the Florida Act,³⁰⁹ requires (1) an inventory of existing facilities; (2) levels of service based on roadway design capacities; and, (3) expansion needs, as well as prospective needs, based on the Future Land Use map and adopted LOS standards.³¹⁰ The transportation goals and policies must consider the plans of MPOs, public transportation authorities, regional plans and the State Transportation Department's five-year plan.³¹¹ LOS is based on peak-hour traffic.³¹²

The LOS standards required in the traffic circulation element must be coordinated with a schedule of capital improvements contained in a separate element of the comprehensive plan.³¹³ The capital improvements element contains principles for the construction and extension of public facilities, elimination of facility deficiencies, costs and revenue sources and LOS standards.³¹⁴

In turn, the LOS standards are given "teeth" through the mandatory "concurrency" requirement. The concurrency requirement demands that transportation facilities be available, as measured by adopted LOS standards, concurrent with the impacts of new develop-

304. *Id.* § 65303.

305. FLA. STAT. ANN. § 163.3161-.3215 (West 1989).

306. Ch. 85-55, 1985 Fla. Laws 207 (codified as amended at FLA. STAT. ANN. § 163.3161-.3215 (West 1990)).

307. FLA. STAT. ANN. § 163.3177(3), (6)(b), (7)(b).

308. *Id.* § 163.3177(6)(b).

309. *Id.* § 163.3177(9)-(10).

310. FLA. ADMIN. CODE ANN. r. 9J-5.007 (1990).

311. *Id.* r. 9J-5.007(b).

312. *Id.* r. 9J-5.007(4)(c)(1).

313. *Id.* r. 9J-5.007(3)(A)-(B).

314. FLA. STAT. ANN. § 163.3177(3).

ment.³¹⁵ Local governments are not permitted to issue any development order that would cause a reduction in adopted LOS standards.³¹⁶

C. Maine

The Comprehensive Planning and Land Use Regulation Act (the Maine Act),³¹⁷ adopted in 1989,³¹⁸ requires local governments to adopt a growth management program.³¹⁹ The Maine Act established a "top-down" process,³²⁰ as in Florida.³²¹ Local comprehensive plans are reviewed for consistency with the statutory goals and guidelines by the state Office of Comprehensive Land Use Planning.³²² The statutory goals include: (1) the efficient use of public services and facilities; (2) the prevention of urban sprawl; and, (3) the development of an "efficient system of public facilities and services."³²³ Other state agencies, including the Department of Transportation, must conduct their activities in a manner consistent with the goals of the Maine Act.³²⁴ Implementation of the goals established at the state and regional level, however, lies primarily with local governments.³²⁵ Funds for the improvement, expansion or construction of public facilities may only be allocated to municipalities with adopted comprehensive plans and implementation programs.³²⁶

Comprehensive planning and implementation requirements include urban service areas,³²⁷ regional coordination,³²⁸ impact fees³²⁹ and temporary moratoria.³³⁰ Local governments must inventory and analyze existing transportation systems, including roadway capacities and pedestrian and parking facilities.³³¹ They must also assess the capital facilities needed to "support growth and development and to protect the

315. *Id.* §§ 163.3177(10)(h), 163.3202(2)(g).

316. *Id.*; *see supra* note 139.

317. ME. REV. STAT. ANN. tit. 30-A, §§ 4311-4344 (West Supp. 1990).

318. Ch. 187, 1989 Me. Laws 447 (codified as amended at ME. REV. STAT. ANN. tit. 30-A, §§ 4311-4344 (Supp. 1990)).

319. ME. REV. STAT. ANN. § 4324(1).

320. *Id.* § 4324(1)-(9).

321. *See* FLA. STAT. ANN. § 163.3177 (West 1990).

322. ME. REV. STAT. ANN. tit. 30-A, § 4343(2).

323. *Id.* § 4312(3)(A)-(B).

324. *Id.* § 4342(2)(G).

325. *Id.* § 4324.

326. *Id.* § 4344(8).

327. *Id.* § 4326(1).

328. *Id.* § 4326(4).

329. *Id.* § 4354.

330. *Id.* § 4356.

331. *Id.* § 4326(1)(G).

environment and health, safety and welfare of the public and the costs of those facilities."³³² Each local government must develop an implementation strategy dividing the jurisdiction into growth areas and rural areas.³³³ The strategy must also provide for a CIP for public facilities serving new growth and development.³³⁴ A regional coordination program must be prepared to manage shared facilities, such as transportation facilities, to foster uniformity with the comprehensive plans of other local governments.³³⁵

The Maine Act offers critical funding support for local growth management systems. It allows creation of a "municipal growth management and capital investment fund" to assist local governments in carrying out the legislation's mandates.³³⁶

D. New Jersey

While growth management is generally seen as a "sunbelt" issue, New Jersey became the first industrial state to enact a comprehensive, state wide planning system in 1985 (the New Jersey Act).³³⁷ The state's experience with traffic congestion resulted from inefficient growth patterns, rapid suburbanization and increasing reliance on the automobile. New Jersey has a tradition of regional planning, which has generally been limited to areas of environmental concern.³³⁸ Its courts have developed the most extensive "regional general welfare" doctrine of any state.³³⁹ A State Development Guide Plan, developed by the State De-

332. *Id.* § 4326(1)(K).

333. *Id.* § 4326(3)(A).

334. *Id.* § 4326(3)(B).

335. *Id.* § 4326(4).

336. Municipal Growth Management and Capital Investment—Fund and Programs, ch. 631, § 3, 1990 Me. Legis. Serv. 29, 29-31 (to be codified at ME. REV. STAT. ANN. tit. 5, §§ 13112-13114).

337. State Planning Act, ch. 398, §§ 1-12, 1985 N.J. Laws 1674, 1675-82 (codified as amended at N.J. STAT. ANN. §§ 52:18A-196 to -207 (West Supp. 1990)) (effective Jan. 2, 1986); see also Guskind, *New Jersey Says, 'Enough'*, PLANNING, June 1988, at 24, 25-26 (predicting that New Jersey's move will catalyze the rest of the United States into action); Lawrence, *New Jersey's Controversial Growth Plan*, URB. LAND, Jan. 1988, at 18, 18.

338. See, e.g., Hackensack Meadows Reclamation and Development Act, N.J. STAT. ANN. §§ 13:17-1 to -86 (West 1979 & Supp. 1990); Pinelands Protection Act, N.J. STAT. ANN. §§ 13:18A-1 to -49 (West Supp. 1990); Coastal Area Facility Review Act, N.J. STAT. ANN. §§ 13:19-1 to -21 (West 1979 & Supp. 1990); see also Meadowlands Regional Dev. Agency v. State, 63 N.J. 35, 304 A.2d 545 (1973) (upholding Hackensack Meadowlands Reclamation and Development Act); Orleans Builders & Developers v. Byrne, 186 N.J. Super. 432, 453 A.2d 200 (1982) (upholding Pinelands Protection Act).

339. New Jersey requires all local governments to consider regional housing needs when developing and implementing local land use controls. See Southern Burlington County NAACP v. Township of Mount Laurel, 92 N.J. 158, 209-10, 456 A.2d 390, 415 (1983) [herein-

partment of Community Affairs in 1980, identified areas in the state suitable for growth, limited growth, and agricultural and environmental preservation.³⁴⁰

The New Jersey Act implemented a cooperative, statewide planning process to "conserve [New Jersey's] natural resources, revitalize its urban areas, protect the quality of its environment, and provide needed housing and adequate public services at a reasonable cost while promoting beneficial economic growth, development and renewal . . ." ³⁴¹ The legislation established a State Planning Commission charged with: (1) developing a State Development and Redevelopment Plan (SDRP) for statewide growth and development, including the designation of areas most appropriate for growth, and (2) an Infrastructure Needs Assessment to provide information on the conditions, needs and costs of public facilities, including transportation.³⁴²

The SDRP ensures adequate public facilities, including transportation, in several ways. First, it includes mechanisms to encourage development in areas where infrastructure can be provided with minimal public costs.³⁴³ Second, the SDRP identifies areas for growth and limited growth.³⁴⁴ Finally, it establishes statewide planning objectives for land use, transportation and public facilities and services.³⁴⁵

Traffic congestion served as a major impetus for the adoption of the SDRP. Due to rapid development in commercial corridors and burgeoning residential suburban growth, sixty percent of the state's urban arterials were operating at or above peak capacity in 1985.³⁴⁶ Several public opinion polls revealed deep concern over deteriorating traffic con-

after *Mount Laurel II*]; Southern Burlington County NAACP v. Township of Mount Laurel, 67 N.J. 151, 174, 336 A.2d 713, 724 [hereinafter *Mount Laurel I*], cert. denied, 423 U.S. 808 (1975). In order to implement the mandates of *Mount Laurel I* and *Mount Laurel II*, the state legislature enacted the Fair Housing Act in 1985. Fair Housing Act, ch. 222, §§ 1-28, 31, 1985 N.J. Laws 966, 966-91, 993-94 (codified as amended at N.J. STAT. ANN. §§ 52:27D-301 to -329 (West 1986 & Supp. 1990)). This Act was upheld in *Hills Dev. Co. v. Township of Bernards*, 103 N.J. 1, 25, 510 A.2d 621, 634 (1986).

340. N.J. STAT. ANN. §§ 13:1B-15.52 (West 1979). In *Mount Laurel II*, the New Jersey Supreme Court relied upon the plan to determine the housing obligations of local governments consistent with the regional general welfare doctrine. *Mount Laurel II*, 92 N.J. at 247-48, 456 A.2d at 435.

341. N.J. STAT. ANN. § 52:18A-196(a) (West Supp. 1990).

342. *Id.* § 52:18A-199(a)-(b).

343. *Id.* § 52:18A-200.

344. *Id.*

345. *Id.*

346. 1 N.J. STATE PLANNING COMM'N, COMMUNITIES OF PLACE: A LEGACY FOR THE NEXT GENERATION 7 (1988).

ditions.³⁴⁷ A budget of \$13.8 billion, spread over twenty-five years, was assigned to provide facilities needed to serve projected growth.³⁴⁸ An additional \$750 million was allocated to accommodate existing traffic demands.³⁴⁹

To combat escalating traffic congestion and automobile dependency, the preliminary SDRP included a tiered growth control system and a nodes and corridors strategy. The nodes and corridors strategy directed new growth and development toward areas that could be efficiently served by existing roadway and transit facilities. At the same time, the strategy attempted to draw growth away from outlying areas and to consolidate development into mixed-use nodes, where development pressures are highest and transit can be provided in an efficient and cost-effective manner.³⁵⁰

The SDRP embraces the concurrency concept, encouraging local governments to develop adequate public facilities regulations to restrict

347. GALLUP ORG., NEW JERSEY LAND USE PLANNING: A SURVEY OF PUBLIC OPINION (New Jersey State Planning Commission Technical Reference Document No. 86-3, 1986); RUTGERS UNIV. EAGLETON INST. OF POLITICS, CENTER FOR PUB. INTEREST POLLING, THE CROWDED ROAD: A SURVEY OF NEW JERSEYANS' OPINIONS ABOUT TRANSPORTATION, GROWTH, AND DEVELOPMENT 13 (1988) (prepared for the New Jersey Department of Transportation).

348. Guskind, *supra* note 337, at 26.

349. *Id.*

350. 1 N.J. STATE PLANNING COMM'N, *supra* note 346, at 11, 18-19. The seven tiers were divided into "Growth Areas" and "Limited Growth Areas." The Growth Areas included:

Tier One—Redeveloping Cities and Suburbs;

Tier Two—Stable Cities and Suburbs;

Tier Three—Suburban and Rural Towns; and

Tier Four—Suburbanizing Areas.

Id. at 19-20. The Limited Growth Areas included:

Tier Five—Future Suburbanizing Areas;

Tier Six—Agricultural Areas; and

Tier Seven—Environmentally Sensitive Areas.

Id. at 20. In developing the tier system, the State Planning Commission examined several alternative growth scenarios, such as the continuation of existing trends, policies concentrating growth in existing urban areas, and corridors and nodes. *Id.* at 11. The corridors and nodes scenario was selected as the most desirable, since corridor growth would not compete with urban growth and because corridor growth would also encourage growth in a manner serviceable by public transit. *Id.* at 13.

After identifying the state's growth management goals, the State Planning Commission considered four alternative implementation systems. The alternatives were: (1) the current system of fragmented local land use decision-making; (2) a "facility driven" system granting service providers primary responsibility for growth management; (3) an "areas of critical concern" strategy, with all levels of government participating in protecting environmentally critical areas; and, (4) the tier system, defined as "gradations of levels of public service based upon desirable intensities of use necessary to achieve both public service efficiency and environmental quality goals." *Id.* at 19. The tier system was selected as the most versatile system for achieving the multiple objectives of New Jersey's planning system. *Id.*

the level of development to that serviceable by existing and planned public services.³⁵¹ Detailed policies coordinate land use and transportation, using public-private partnerships to encourage development in transportation corridors. Such policies encourage the development of multi-modal transportation systems and describe TDM regulations encouraging non-peak-hour travel and ridesharing. These policies also require new development applicants to submit transportation impact statements, integrate capital investment and expansion policies to encourage more efficient development patterns, and acquire abandoned rights-of-way to preserve rights-of-way for future transit facilities.³⁵²

While the SDRP goals and objectives have gained widespread support from both business and environmental interests, the New Jersey Act has been criticized for lacking an adequate enforcement mechanism.³⁵³ Local governments are not required to implement the state plan.³⁵⁴ Instead, the plan's primary implementation mechanism is a negotiated "cross-acceptance" procedure, whereby areas of agreement or disagreement with state planning objectives are included in local plans.³⁵⁵ While the state policies contain detailed directions for transportation master plans based upon LOS standards,³⁵⁶ these plans are not mandated by the state.³⁵⁷

Recognizing the critical role that transportation plays in the development of a coordinated regional growth management system, the legislature amended the New Jersey Act to ensure the multi-jurisdictional development of transportation corridors consistent with comprehensive planning requirements.³⁵⁸ The 1989 legislation allows the State Department of Transportation, at the request of a county, to designate a transportation development district (TDD).³⁵⁹ A transportation im-

351. 2 N.J. STATE PLANNING COMM'N, COMMUNITIES OF PLACE: STRATEGIES AND POLICIES 7 (1988); 3 N.J. STATE PLANNING COMM'N, COMMUNITIES OF PLACE: PLANNING STANDARDS AND GUIDELINES I-28 to I-29 (1989) (Policy 1.3).

352. 2 N.J. STATE PLANNING COMM'N, *supra* note 351, at 14-15 (Policies 1.1-2.9); 3 N.J. STATE PLANNING COMM'N, *supra* note 351, at I-79 to I-98 (Policies 1.1-2.9).

353. Comment, *Statewide Planning in New Jersey: Putting Some Teeth into the State Planning Act*, 20 RUTGERS L.J. 721, 722 (1989).

354. N.J. STAT. ANN. § 52:18A-202 (West Supp. 1990).

355. *Id.*

356. 3 N.J. STATE PLANNING COMM'N, *supra* note 351, at I-79 to I-84 (Policies 1.1 & 1.3).

357. N.J. STAT. ANN. § 52:18A-202.

358. New Jersey Transportation Development District Act of 1989, ch. 100, 1989 N.J. Sess. Law Serv. 317 (West) (codified as amended at N.J. STAT. ANN. §§ 27:1C-1 to -18 (West Supp. 1990)). See generally R. Freilich, Comments on New Jersey Transportation Development District Act (Nov. 1, 1986) (unpublished manuscript on file at Loyola of Los Angeles Law Review) (in-depth analysis of draft version of act).

359. N.J. STAT. ANN. § 27:1C-1.

provement plan (TIP) is then developed within the TDD.³⁶⁰ The TIP must be consistent with the SDRP, the State Transportation Master Plan and local master plans.³⁶¹ The State Department of Transportation may designate a TDD upon the failure or refusal of a county to do so.³⁶²

Development impact fees represent the primary implementation mechanism for the TDD.³⁶³ The Department of Transportation may prescribe a formula to calculate impact fees, and impact fees may not be used to fund existing infrastructure deficiencies.³⁶⁴ The impact fees may be reduced to promote related public policies.³⁶⁵ Such public policies include efficient development patterns in core areas and peak-hour automobile trip reduction plans submitted by developers.³⁶⁶ Mixed use developments or developments located near labor pools may adopt a peak-hour automobile trip reduction plan and receive reduced impact fee assessments.³⁶⁷ Affordable housing projects constructed pursuant to the Fair Housing Act³⁶⁸ are exempt from the impact fee provisions.³⁶⁹ Finally, intergovernmental coordination is authorized for TIP planning and construction of public facilities.³⁷⁰

E. Oregon

The Oregon Land Use Goals and Guidelines Regulations establish a Public Facilities and Services Element goal,³⁷¹ as well as a Transportation goal.³⁷² Goal 14 requires local governments to delineate urban growth boundaries.³⁷³ Within these urban growth boundaries, public facilities and services are extended to separate urbanizable from rural land.³⁷⁴ Capital investment policies buttress the separation of urban areas from non-urban areas. The boundary requires local governments to

360. *Id.* § 27:1C-5.

361. *Id.* §§ 27:1C-4(a)(4), :1C-5(b).

362. *Id.* § 27:1C-13(a).

363. *Id.* § 27:1C-7.

364. *Id.* § 27:1C-8.

365. *Id.* § 27:1C-7(f).

366. *Id.* These reduction plans may include site designs which accommodate transit facilities, as well as ridesharing and pedestrian-access designs. *Id.*

367. *Id.*

368. N.J. STAT. ANN. §§ 52:27D-301 to -329 (West 1986 & Supp. 1990).

369. N.J. STAT. ANN. § 52:27D-301.

370. N.J. STAT. ANN. § 27:1C-12.

371. OREGON LAND CONSERVATION AND DEV. COMM'N, *supra* note 50, Goal 11.

372. *Id.* Goal 12.

373. *Id.* Goal 14.

374. *Id.*

design and locate transportation facilities to encourage growth in urbanized areas and discourage growth in rural areas.³⁷⁵

The transportation section emphasizes the relationship between transportation and land use.³⁷⁶ Specifically, the number and location of transportation facilities must be consistent with "state or local land use plans and policies designed to direct urban expansion to areas identified as necessary and suitable for urban development."³⁷⁷ Plans for new facilities or the expansion of existing facilities must identify the impact on local land use patterns and existing transportation systems.³⁷⁸ Furthermore, the planning of transportation systems with land development policies favoring the use of existing transportation facilities is encouraged.³⁷⁹

One innovative provision of Goal 12 requires the improvement of transportation services for the "transportation disadvantaged."³⁸⁰ This requirement should reduce reliance on transportation systems centered on the automobile.

F. Vermont

Vermont has a relatively long-standing tradition of regional growth management. A statewide land use regulation scheme, adopted in 1970,³⁸¹ created a state environment board and several District Environmental Commissions to review development proposals.³⁸² This statute requires the board to consider the development's financial capacity to accommodate both the total growth and the rate of growth resulting from new development, including highway access and maintenance costs.³⁸³ In an administrative hearing involving the issuance of the permit, the developer bears the burden of proof if the local government has a CIP.³⁸⁴

375. *Id.* Guideline 14(B)(2). These transportation facilities include air, marine, rail, mass transit, highways, bicycle and pedestrian facilities. *Id.* Guideline 14(B)(2).

376. *See id.* Goal 12.

377. *Id.* Guideline 12(B)(1).

378. *Id.* Guideline 12(B)(2).

379. *Id.* Guideline 12(A)(2).

380. *Id.* Goal 12. The "transportation disadvantaged" are defined as "those individuals who have difficulty in obtaining transportation because of their age, income, physical or mental disability." *Id.* Goal 12. In contrast to Goal 12, transportation networks relying primarily on automobiles fail to consider the needs of those who are physically unable to drive or financially unable to afford automobiles. *See, e.g.,* FLA. STAT. ANN. §§ 427.011-.017 (West 1986 & Supp. 1991).

381. Act 250, ch. 151, 1969 Vt. Laws 250 (Adjourned Sess.) (codified as amended at VT. STAT. ANN. tit. 10, §§ 6001-6108 (1984 & Supp. 1990)).

382. VT. STAT. ANN. tit. 10, §§ 6021-6044 (1984 & Supp. 1990).

383. *Id.* § 6086(a)(9)(A).

384. *Id.* § 6088.

Vermont's growth management scheme adopts statewide planning goals and criteria, provides for the creation of regional planning agencies and authorizes local governments to adopt comprehensive plans.³⁸⁵ Impact fees may require new development to pay a proportionate share of new growth-related facilities.³⁸⁶ The state goals permit local governments to control the rate and location of development to ensure that new development does not "exceed the ability of [local governments] to provide facilities and services."³⁸⁷

The state goals discourage scattered development and encourage compact urban growth.³⁸⁸ To mitigate the physical and visual impact of highway construction, transportation facilities may be expanded only within existing rights-of-way.³⁸⁹ Furthermore, transportation elements of regional³⁹⁰ and local³⁹¹ comprehensive plans are required. These elements must depict present and proposed facilities, as well as prioritized CIPs.³⁹² Regional planning commissions may undertake capacity studies for transportation³⁹³ to measure the potential of transportation facilities to absorb land development.³⁹⁴

G. Washington

Washington recently passed growth management and planning legislation (the Washington Act).³⁹⁵ The legislation seeks to reduce urban sprawl by encouraging growth where "adequate public facilities and services can be provided in an efficient manner."³⁹⁶ The Washington Act also endeavors to provide "efficient multimodal transportation systems" and to "[e]nsure that those public facilities and services necessary to support development shall be adequate to serve the development at the time the development is available for occupancy and use without decreasing current service levels below locally established minimum standards."³⁹⁷

385. Vermont Planning and Development Act, VT. STAT. ANN. tit. 24, §§ 4301-4495 (1975 & Supp. 1990).

386. *Id.* §§ 5200-5206.

387. *Id.* § 4302(c)(12)(B).

388. *Id.* § 4302(c)(1).

389. *See id.* § 4302(4)(A).

390. *Id.* § 4348(a).

391. *Id.* § 4382(a)(3).

392. *Id.*

393. *Id.* § 4325(4).

394. *Id.* § 4303(20).

395. Act approved Apr. 24, 1990, ch. 17, 1990 Wash. Legis. Serv. 1375 (West).

396. *Id.* § 2(1), at 1375.

397. *Id.* § 2(12), at 1375-76.

Thus, the Washington legislation recognizes the concurrency concept and its implementation at the local level of government.

Cities and counties with specified population and growth rate characteristics must adopt a comprehensive plan, including a mandatory transportation element containing comprehensive structural, financial and police power strategies founded on concurrency principles.³⁹⁸ The transportation element must include: (1) an inventory of land use assumptions pertaining to travel; (2) an inventory of facilities and services needs, including LOS standards, actions for correcting LOS deficiencies and the relationship between the location, timing and capacity needs of future traffic based upon the land use plan; (3) a financial element identifying funding sources and needs; (4) intergovernmental coordination efforts; and, (5) demand-management strategies, including ordinances prohibiting development approvals which would reduce the adopted levels of service.³⁹⁹

Development may proceed if transportation improvements or trip reduction strategies are available concurrent with the development.⁴⁰⁰ This concurrency requirement is satisfied if either the improvements or strategies are in place at the time of development or if a financial commitment has been made to complete the improvements within six years.⁴⁰¹

Additionally, the comprehensive planning process incorporates structural techniques by providing for the use of transportation corridors.⁴⁰² Furthermore, the comprehensive plan must identify "lands useful for public purposes," including transportation corridors.⁴⁰³ Detailed revisions were made to the impact fee enabling legislation to ensure that the impact fees are calculated and assessed in accordance with constitutional principles and that "adequate facilities are available to serve new growth and development."⁴⁰⁴ The Washington Act expressly recognizes the continuing authority of local governments to impose transportation

398. *Id.* § 7(6), at 1379-80. Section 4 provides that the Act applies only to (1) counties exceeding populations of 50,000 and with a 10-year historic growth rate exceeding 10%, and (2) counties experiencing growth rates exceeding 20% in the preceding 10 years. *Id.* § 4, at 1377.

399. *Id.* § 7(6), at 1379-80. The latter requirement is similar to the "concurrency" requirement imposed by Florida's Local Government Comprehensive Planning and Land Development Regulation Act, FLA. STAT. ANN. §§ 163.3161-.3243 (West 1990).

400. Act approved Apr. 24, 1990, ch. 17, § 7(6), 1990 Wash. Legis. Serv. at 1380. Transportation improvements or trip reduction strategies include public transportation service, ride sharing programs, demand management and other transportation systems management strategies. *Id.*

401. *Id.*

402. *Id.* § 15, at 1382.

403. *Id.*

404. WASH. REV. CODE § 82.02.050(1)(a) (Supp. 1991).

impact fees⁴⁰⁵ pursuant to section 39.92 of the Revised Code of Washington.⁴⁰⁶

The growth management legislation establishes a regional transportation planning process recognizing the multi-jurisdictional control and interconnectedness of the state transportation system.⁴⁰⁷ The statute establishes regional transportation planning organizations,⁴⁰⁸ and local transportation plans must be consistent with the regional transportation plan.⁴⁰⁹ Finally, comprehensive road programs consistent with the comprehensive plan must be created at the county and municipal level.⁴¹⁰

VI. CONCLUSION

Decentralized land development patterns, increases in per capita automobile usage, and the continued growth and development in metropolitan areas will cause traffic congestion problems to continue to escalate. Cities must plan for this problem by following a multi-dimensional approach. An effective transportation management program, however, requires extensive study, political compromises and careful implementation. During a real estate boom, vested rights issues and time pressures may impede efforts to develop a transportation management program. Thus, jurisdictions experiencing declines in real estate activity are well advised to plan for growth before the next upsurge in real estate activity exacerbates congestion.

This Article has focused on the significant problems that federal, state, regional and local governments encounter when addressing the transportation congestion problem. Although each technique plays a significant role in resolving the crisis facing rapidly growing metropolitan areas, the full panoply of growth management techniques must be unleashed to combat traffic congestion.

405. *Id.* § 82.02.020.

406. *Id.*

407. Act approved Apr. 24, 1990, ch. 17, §§ 53-60, 1990 Wash. Legis. Serv. at 1397-1401.

408. *Id.* § 54, at 1398.

409. *Id.*

410. *Id.* §§ 57-60, at 1399-1401.