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Florida's Transportation Concurrency: Are the Current Tools Adequate to Meet the Need for Coordinated Land Use and Transportation Planning

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FLORIDA'S TRANSPORTATION CONCURRENCY: ARE THE
CURRENT TOOLS ADEQUATE TO MEET THE NEED FOR
COORDINATED LAND USE AND TRANSPORTATION
PLANNING?

*Ruth L. Steiner, Ph.D.**

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I. INTRODUCTION

A key provision of Florida's Growth Management Act (GMA) legislation stipulates that increased demand for public facilities and services related to new development be provided concurrently with the impact of that development. This requirement, known as concurrency has been characterized by Tom Pelham, then secretary of the Florida

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Department of Community Affairs (DCA)¹ as the “teeth”² of the GMA.³ The provisions for transportation concurrency have been one of the most controversial aspects of implementing the GMA.⁴ The implementation of the transportation concurrency management system (TCMS) in jurisdictions throughout the State fails to achieve a planning process that will meet the mission of the Florida Department of Transportation (FDOT)⁵ to “provide a safe transportation system that ensures the mobility of goods and people, enhance economic prosperity and preserve the quality of our environment and communities.”⁶ In particular, the TCMS is seen as reducing the quality of our environment and communities because it contributes to sprawl and fails to address community design.⁷ Since the 1985 GMA, the transportation concurrency provisions have been amended three times to address major concerns with its implementation. Yet, a 1998 Transportation and Land Use Study Committee (TLUSC) concluded after several months of study that

the underlying statutory purpose of concurrency — that adequate facilities needed to serve development are available within a reasonable time of the impacts of that development — is an important public purpose. As presently implemented, however, transportation concurrency has major shortcomings that should be addressed by the Legislature.⁸

1. Concurrency requirements are also called “adequate public facilities ordinances” or “adequate public facilities requirements.” The State of Florida is the only State to require concurrency for all local jurisdictions. The State of Washington requires concurrency for all counties participating in the State’s GMA. Washington’s largest and fastest growing counties (counties with a population over 50,000 or a population increase of over 20% in the ten years prior to the passage of the GMA in 1990) are required to participate and other local governments may choose to participate in the State’s growth management program. Wash. Rev. Code § 36.70A.120 (2001).

2. H. Glenn Boggs & Robert C. Apgar, *Concurrency and Growth Management: Lawyer’s Primer*, 7 J. LAND USE & ENVTL. L. 1, 1 (1991).

3. The 1985 legislation was not officially titled, “Growth Management Act.” James C. Nicholas & Ruth L. Steiner, *Growth Management and Smart Growth in Florida*, 35 WAKEFOREST L. REV. 645, 651 n. 50 (2000) (explaining the components of the legislation).

4. Thomas G. Pelham, *Adequate Public Facilities Requirements: Reflections on Florida’s Concurrency System for Managing Growth*, 19 FLA. ST. U. L. REV. 974, 974 (1992).

5. See *supra* Part IV.

6. Mission Statement of Florida Department of Transportation, available at <http://www.dot.state.fl.us/moreDOT/mission.htm> (last visited Apr. 3, 2001).

7. FLORIDA DEPARTMENT OF TRANSPORTATION (FDOT), THE TRANSPORTATION AND LAND USE STUDY COMMITTEE: FINAL REPORT 20 (1999).

8. *Id.* at 19.

The concept of the concurrency management system, to provide public facilities to support new development, has a solid basis in tying comprehensive planning with implementation at the local, State, and regional level.⁹ However, due to the failure of the State government to engage in planning consistent with the spirit, and indeed the goals, of the GMA, the implementation of the TCMS is failing to reduce sprawl and produce compact urban development.¹⁰ As currently implemented, the comprehensive planning process is not working because the plans lack vertical, horizontal, and internal consistency.¹¹ The plans are not vertically consistent, between local, regional, and State agencies, because of the following: (1) the State has failed to significantly update the plan since its adoption in 1985; (2) State agencies have engaged in development activities inconsistent with the planning goals of reducing sprawl;¹² and (3) the State has failed to fund the infrastructure backlog as anticipated in the 1985 GMA.¹³ Furthermore, the power of the Regional Planning Councils (RPCs) to implement the State plan was reduced when strategic regional plans were mandated in place of comprehensive regional plans.¹⁴ Horizontal consistency does not occur because the RPCs cannot force intergovernmental coordination between adjacent jurisdictions that are unwilling to cooperate voluntarily.¹⁵

Many local comprehensive plans are not internally consistent because local governments continue to allow development and do not have a financially feasible capital improvements plan.¹⁶ The DCA does not review local land development regulations (LDR) except under extraordinary circumstances.¹⁷ Unless, local governments have the resources and the political will, they may not incorporate the TCMS in the LDRs. Because of the failures in implementation, concurrency can be seen as an unfunded mandate placed upon local government by the State.¹⁸

9. Pelham, *supra* note 4, at 1028.

10. Thomas G. Pelham, *Restructuring Florida's Growth Management System: Alternative Approaches to Plan Implementation and Concurrency*, 12 U. FLA. J.L. & PUB. POL.'Y 299 (2001).

11. See *supra* Part IV A and accompanying notes.

12. Pelham, *supra* note 10.

13. Pelham, *supra* note 10; Nicholas & Steiner, *supra* note 3, at 658-62.

14. Pelham, *supra* note 10.

15. Steven Siebert's Presentation at Regional Forum on Growth Management Co-Sponsored by the Apalachee Regional Planning Council and the Florida Department of Community Affairs (Jan. 11, 2000), on file with author and available at <http://www.dca.state.fl.us/fdcp/dcp/resources/publications/forum>.

16. Pelham, *supra* note 10.

17. FLA. STAT. ANN. § 163.3202(4) (West 2000).

18. Nicholas & Steiner, *supra* note 3, at 661.

This Article discusses the implementation of the transportation concurrency requirements of the GMA. Transportation concurrency is the focus of the Article because roadways are a congestible facility for which there is no simple substitute and because much of the controversy about concurrency has been dominated by concerns about transportation. This Article will focus on transportation to the exclusion of the concurrency requirements for other public facilities and services. First, a history of the transportation concurrency requirements will be reviewed. Then, the process of implementing transportation concurrency will be discussed. Finally, the implementation will be assessed and recommendations will be made for improving the current system.

II. HISTORY OF IMPLEMENTATION OF CONCURRENCY

The GMA¹⁹ includes the first reference to concurrency, even though, it does not directly use the term.²⁰ The GMA requires that local comprehensive plans include a capital improvements element with the “[e]stimated public facility costs, including a delineation of when facilities would be needed, the general location of the facilities, and projected revenue sources to fund the facilities.”²¹ The legislation seemingly provides a tough sanction, moratorium on development, for failure to provide adequate facilities in that “a local government shall not issue a development order or permit which results in a reduction in the level of services [(LOS)] for the affected public facilities below the [LOS] provided in the comprehensive plan of the local government.”²²

In 1986, the GMA was further amended to state: “[i]t is the intent of the Legislature that public facilities and services needed to support development shall be available concurrent with the impacts of such development.”²³

While the 1985 GMA required that “public facilities and services” be available concurrently with development, the GMA did not specify what these services include.²⁴ In their rulemaking, the DCA defined the

19. See Nicholas & Steiner, *supra* note 3, at 650-57 (providing a more complete history of the Florida GMA); John M. DeGrove, *Florida's Growth Management Legislation: 1969 to 2000*, (Oct. 2000) (unpublished manuscript, on file with the *Journal of Law and Public Policy*). In this Article, the history is limited to the transportation concurrency aspects of that regulation. Pelham, *supra* note 4, at 974.

20. Boggs & Apgar, *supra* note 2, at 7.

21. FLA. STAT. ANN. § 163.3177(3)(a)2 (West 2000).

22. *Id.* § 163.3202(2)(g).

23. *Id.* § 163.3177(10)(h); see also Boggs & Apgar, *supra* note 2, at 7 (discussing the statute).

24. Boggs & Apgar, *supra* note 2, at 6.

applicable facilities to include roads, sanitary sewers, solid waste, drainage, potable water, parks and recreation, and mass transit.²⁵ This clarification of the public facilities and services covered under the concurrency management system was incorporated into the statutes with amendments to the GMA in 1993.²⁶

As the DCA began to develop the rules for concurrency, roadway concurrency was a major focus. In particular, ongoing concern developed over the following issues: (1) the establishment of LOS standards on the State highway system;²⁷ (2) the standards used for roadway concurrency; (3) the perception that transportation concurrency was causing sprawl; (4) the long lead time for building roads; (5) the backlog of transportation projects; (6) the meaning of the requirement that facilities be "available concurrent with development;" and (7) how to measure roadway concurrency.²⁸ Throughout the 1990s, the GMA was amended to begin to address some of these concerns.

In 1992, legislation was passed that allowed the creation of a Transportation Concurrency Management Area (TCMA).²⁹ The purpose of a TCMA is to "promote infill development or redevelopment within selected portions of urban areas in a manner that supports the provision of more efficient mobility alternatives, including public transit."³⁰ The TCMA may be established in "a compact geographic area with an existing network of roads where multiple, viable alternative travel paths or modes are available for common trips."³¹ An area-wide LOS may be established for facilities with similar functions serving common origins and destinations.³²

In order to address concerns about sprawl, disincentives to redevelopment, and specific types of development that were being

25. FLA. ADMIN. CODE ANN. R. 9J-5.0055(2)(a)(2000); *see also* Boggs & Apgar, *supra* note 2, at 7 (discussing the regulation).

26. Boggs & Apgar, *supra* note 2, at 6.

27. The initial concerns were about LOS standards on State roadways, including the Florida Intrastate Highway System (FIHS). The FIHS is "a system of limited access and controlled access facilities on the State Highway System which have the capacity to provide high speed and high-volume traffic movements in an efficient and safe manner." FLA. STAT. § 334.03(10).

28. Boggs & Apgar, *supra* note 2, at 10-12; Pelham *supra* note 10; David L. Powell, *Recent Changes in Concurrency*, 68 FLA. B.J. 67, 68 (1994); Robert M. Rhodes, *Concurrency: Problems, Practicalities, and Prospects*, J. LAND USE & ENVTL. L. 241, 244 (1991).

29. Powell, *supra* note 28, at 68.

30. FLA. ADMIN. CODE ANN. R. 9J-5.0055(5) (2000).

31. FLA. STAT. ANN. § 163.3180(7) (West 2000).

32. *Id.*

prevented because of the structure of the TCMS,³³ the 1993 amendments created several new exceptions. These exceptions to the basic transportation concurrency program are incorporated into local government comprehensive plans and LDRs and can be categorized as area-specific or project-specific.³⁴

Project-specific exceptions include: (1) urban redevelopment projects;³⁵ (2) *de minimis* projects;³⁶ (3) projects that promote public transportation;³⁷ (4) part-time projects;³⁸ and (5) projects for which private contributions are made.³⁹ First, urban redevelopment projects, which are located in an existing urban service area and may reduce the LOS below the adopted standard, are not subject to the concurrency requirement for up to 110% of the roadway impacts generated by prior development.⁴⁰ Second, projects can be considered *de minimis* if the impacts do not significantly degrade the existing LOS,⁴¹ and the project does not exceed 1.0% of the maximum service volume at the LOS standard. Third, local governments may exempt projects promoting public transportation, such as office buildings that incorporate transit terminals and fixed rail stations, by setting standards for granting this exception in the local comprehensive plan.⁴² Fourth, projects, such as stadiums, performing arts centers, racetracks, and fairgrounds that are located within urban infill, urban redevelopment, existing urban service areas, or downtown revitalization areas,⁴³ and pose only special part-time demands on the roads, may be exempt from concurrency.⁴⁴ Finally, local governments may allow developers to proceed with the development of land despite a failure to meet concurrency standards, and avoid a claim of a temporary taking, if developers are willing to pay their "fair share" of the cost of providing the transportation facilities necessary to serve the proposed development.⁴⁵

33. BRENNADURDEN ET AL., *Waiting for the Go: Concurrency, Takings, and Property Rights Act*, 20 NOVA L. REV. 662, 664-66 (1996).

34. *Id.* at 664.

35. FLA. STAT. ANN. § 163.3180(8) (West 2000).

36. *Id.* § 163.3180(6).

37. *Id.* § 163.3180(5)(b); FLA. ADMIN. CODE ANN. R. 9J-5.0057(7) (2000).

38. FLA. STAT. ANN. § 163.3180(5)(c) (West 2000).

39. *Id.* § 163.3180(11)(d).

40. *Id.* § 163.3180(8).

41. *Id.* § 163.3180(6).

42. *Id.* § 163.3180(5)(b); FLA. ADMIN. CODE ANN. R. 9J-5-055(7) (2000).

43. Powell, *supra* note 28, at 69.

44. FLA. STAT. ANN. § 163.3180(5)(c) (West 2000).

45. *Id.* § 163.3180(11).

In addition to the TCMA, the Legislature added two area-specific exceptions in 1993: (1) long-term transportation concurrency management systems (LTCMS);⁴⁶ and (2) a transportation concurrency exception area (TCEA).⁴⁷ LTCMS are established in areas with existing deficiencies. To eliminate the backlog, a local government develops a comprehensive plan that identifies the improvements to be made over a ten-year period, or in exceptional circumstances, over a fifteen-year period. The comprehensive plan must: (1) designate specific areas where the deficiency exists; (2) provide a financially feasible means to ensure that existing deficiencies will be corrected within the ten-year period; and (3) demonstrate how development will be accommodated and the required transportation facilities (including roads and public transit) to correct the existing deficiency.⁴⁸

The purpose of a TCEA is to "reduce the adverse impact transportation concurrency may have on urban infill and redevelopment and the achievement of other goals and policies of the State comprehensive plan, such as promoting the development of public transportation."⁴⁹ The TCEA can be established to meet three purposes: (1) promotion of urban infill development; (2) urban redevelopment; and (3) promotion of downtown revitalization. When a local government designates a TCEA, they must define a specific area that meets specific criteria for vacant developable land⁵⁰ and specific development density and intensity thresholds.⁵¹

Another important concurrency development arose in 1999 when the Legislature incorporated several recommendations of the TLUSC in amendments to the GMA. In particular, this legislation:⁵² (1) allows urban infill and redevelopment areas to be a justification for a TCEA; (2) authorizes the establishment of multi-modal transportation districts (MMTDs) and the development of rules to implement them; (3) authorizes the reduction of certain fees in MMTDs; (4) provides that the concurrency requirement does not apply to public transit facilities; (5) revises the requirement for establishment of the LOS on certain facilities on the FIHS; and (6) provides that a multiuse development of regional impact (DRI) may satisfy certain transportation concurrency requirements by payment

46. *Id.* § 163.3180(9)(b).

47. *Id.* § 163.3180(5)(b).

48. FLA. ADMIN. CODE ANN. R. 9J-5.0055(4) (2000).

49. *Id.* R. 9J-5.0055(6) (2000); FLA. STAT. ANN. § 163.3180(5)(b) (West 2000).

50. FLA. ADMIN. CODE ANN. R. 9J-5.0055(6)(a)1.a (2000).

51. *Id.* R. 9J-5.0055(6)(a)1.b.

52. H.B. 0017 (Fla. 1999).

of a proportionate-share contribution for traffic impacts under certain conditions.

III. HOW TRANSPORTATION CONCURRENCY IS IMPLEMENTED

Along with the responsibilities and constraints on local governments, the role of State government, including the DCA and the FDOT, in implementing the GMA and the TCMS has evolved over the last decade. The DCA is responsible for developing guidelines for the implementation of the GMA and for the review and approval of local government plans.⁵³ The FDOT is responsible for developing the guidelines for establishing the LOS standards. The LOS standard has evolved over the last decade and are based on the *Highway Capacity Manual*,⁵⁴ which is a standard document produced by the Transportation Research Board for planning highway capacity. The FDOT has incorporated methodologies for establishing the LOS in its *LOS Handbook*.⁵⁵ The FDOT also participates in the development of a State transportation plan and regional Unified Planning Work Programs (UPWP) as a part of the ongoing federal transportation planning process.⁵⁶

Each local government is required to complete a comprehensive plan based on a schedule and guidelines established by the DCA.⁵⁷ Of particular interest in the implementation of the TCMS is the internal consistency among three of its mandatory elements: (1) the Future Land Use Plan (FLUP) element (including the land use map); (2) the Capital Improvements Plan (CIP); and (3) the traffic circulation, or transportation, element.⁵⁸ Among other functions, the FLUP identifies areas for future development and redevelopment,⁵⁹ and by extension, areas where transportation and other roadway improvements might be needed. The transportation element defines the location of existing and future roadways to support the existing and future land uses and the LOS standards for each

53. FLA. STAT. ANN. § 163.3184(6) (West 2000).

54. TRANSPORTATION RESEARCH BOARD (TRB), *HIGHWAY CAPACITY MANUAL* (3d ed., 1998).

55. Systems Planning Office, FDOT, 1998 LEVEL OF SERVICE HANDBOOK, available at <http://www.dot.state.fl.us/planning/systems/sm/los/98los.pdf> (last visited Apr. 3, 2001).

56. FLA. STAT. ANN. § 339.175(8) (West 2000).

57. *Id.* § 163.3184.

58. *Id.* § 163.3177(6)(b), (j). Transportation elements are only required for local governments located in urbanized areas under the jurisdiction of a Metropolitan Planning Organization (MPO). *Id.* § 339.175. Other local governments are required to provide traffic circulation elements. FLA. STAT. ANN. § 163.3177(6)(b) (West 2000). The transportation element is more comprehensive.

59. FLA. STAT. ANN. § 163.3177(6)(a) (West 2000).

major roadway segment.⁶⁰ The CIP should include a list of public facilities, their estimated costs, when they are needed, their location, and the anticipated revenue sources.⁶¹ The CIP should cover, at a minimum, a five-year period and be updated yearly.⁶² Local governments then issue LDRs, which include the TCMS, to implement the comprehensive plan.⁶³ These LDRs are intended to ensure that public facilities and services satisfy the comprehensive plan requirement in that they are "available when needed for the development, or that development orders and permits are conditioned on the availability of public facilities and services necessary to serve the proposed development."⁶⁴ Like other elements of the comprehensive plan, these three elements must each be internally consistent.⁶⁵

Urban areas with a population of over 50,000 must, under federal law, engage in a continuous, comprehensive, and coordinated transportation planning process.⁶⁶ Thus, in almost half of Florida's counties, the Metropolitan Planning Organization (MPO) develops a Long Range Transportation Plan⁶⁷ approximately every five years for a twenty-year period, and an annual transportation improvements plan (TIP)⁶⁸ that is coordinated with the UPWP⁶⁹ of the FDOT. Thus, the TIP and the UPWP constitute part of the CIP for urban areas with over 50,000 in population.⁷⁰ These plans cover investments in major roadways throughout the urban area while the CIP in the local government comprehensive plan would also include building, paving and maintaining other local roadways.⁷¹

A local government has significant discretion as to how it implements a TCMS. Each local government decides which of the concurrency management strategies and area-wide and project exceptions it will allow. For major transportation facilities, each local government establishes a LOS for each of the major roadways,⁷² on a scale from A to F, with A

60. *Id.* § 163.3177(6)(b), (j).

61. *Id.* § 166.3177(3)(a)2.

62. *Id.* § 166.3177(3)(a)1.

63. FLA. ADMIN. CODE ANN. R. 9J-5.0055(1)(e) (2000).

64. FLA. STAT. ANN. § 166.3202(2)(g) (West 2000).

65. *Id.* § 163.3177(2).

66. 49 U.S.C.S. § 5303 (Law. Co-op. & Supp. 1990); FLA. STAT. ANN. § 339.175 (West 2000).

67. FLA. STAT. ANN. § 339.175(6) (West 2000).

68. *Id.* § 339.175(7).

69. *Id.* § 339.175(8).

70. *Id.* § 339.175(4).

71. *Id.* § 163.3177(6)(b), (j).

72. *Id.* § 163.3177(6)(b).

representing a free flow of traffic and F representing gridlock.⁷³ The LOS represents a ratio of the volume of traffic on a roadway compared to the total capacity available on that roadway as defined in the *LOS Handbook*.⁷⁴ Local governments then monitor the LOS. When a project is proposed, the planning staff of the local government will first determine the impacts of the development and then evaluate whether the capacity exists to accommodate those impacts. If adequate capacity exists, the application can be approved and a concurrency certificate issued. If there is insufficient capacity to accommodate the development, the planner will determine if the project is eligible for an exception based on the location of the project (i.e., it is located in an area covered by area-wide exceptions)⁷⁵ or the special characteristics of the project (i.e., the project is eligible for a project-related exception).⁷⁶ If the developer is eligible for an exception, it may still be required to meet specific conditions associated with the project.⁷⁷ Otherwise, the developer may be required to negotiate with the local government to establish conditions under which the development can be approved. Local governments are limited only by their creativity and flexibility in creating alternatives.⁷⁸

IV. ASSESSMENT OF THE TRANSPORTATION CONCURRENCY MANAGEMENT SYSTEM

Concurrency is a simple concept. Public facilities and services to support new development should be planned and built concurrently with the impact of the development. The main objective of concurrency is to ensure that new development has adequate facilities and services to support it. Implicit in this planning objective is an assumption that a well designed and implemented TCMS will be based upon a rational planning process that leads to efficient investment by both the private and public sector in transportation infrastructure. Thus, concurrency should lead to an orderly process in which the timing, sequence, and location of new investments in infrastructure are coordinated with the development of land.

73. TRB, *supra* note 54.

74. FDOT, *supra* note 55.

75. FLA. ADMIN. CODE ANN. R. 9J-5.0055(6)(A)(1) (2000); FLA. STAT. ANN. § 163.3180(5) – (9) (West 2000).

76. FLA. STAT. ANN. § 163.3180 (West 2000).

77. For example, the developer may be required to pay for specific roadway or transit facilities, or other payments based upon the agreement they negotiate with the developer.

78. IVONNE AUDIRAC ET AL., BUREAU OF ECONOMIC AND BUSINESS RESEARCH, UNIVERSITY OF FLORIDA, CONCURRENCY MANAGEMENT SYSTEMS IN FLORIDA: A CATALOG AND ANALYSIS A3-13 (1992).

Yet, planning for the transportation system has not been simple because roadways, like schools and parks, are congestible public facilities.⁷⁹ As such, developers and local governments should provide for the needs of new development through substitutes or reduced LOS. For example, a resident of a new development could be asked to pay for a membership in a recreation club, additional land adjacent to the house, or other substitutes for publicly provided parks and recreational land. People may walk, bicycle, or use transit, but these are not direct substitutes for roadway access and capacity.⁸⁰ Congestion can be seen as a means of allocating a scarce resource, roadway capacity. Thus, after a decade of implementation, problems still exist in the TCMS. Four of these will be discussed: (1) the coordination of land use and transportation decisions at the local, regional, and State level; (2) adequacy of funding for the transportation; (3) the measurement of congestion and LOS; and (4) the spatial impact and ability of concurrency to balance the broader goals of the community with the transportation investments.

A. *Coordination of Land Use and Transportation Decision Making*

A fundamental assumption of the TCMS is that the comprehensive plan is vertically, horizontally, and internally consistent.⁸¹ Vertical consistency requires that "local plans be consistent with State goals and policies."⁸² Horizontal consistency requires local plans to be coordinated with those of neighboring jurisdictions.⁸³ Local internal consistency requires that "development activities be consistent with their comprehensive plan."⁸⁴ Concurrency is a form of local internal consistency.⁸⁵ Throughout the State

79. Nicholas & Steiner, *supra* note 3, at 662.

80. While some environmentalist might argue that walking, bicycling, and living in a walkable neighborhood can substitute for the use of the automobile, most would concede that only a small percentage of the population does not use the automobile for at least a small percentage of trips. Indeed, in 1995, only 8.1% of the households in the U.S. did not own an automobile. PATRICIA S. HU & JENNIFER R. YOUNG, U.S. DEPT. OF TRANSPORTATION FEDERAL HIGHWAY ADMINISTRATION, SUMMARY OF TRAVEL TRENDS: 1995 NATIONWIDE PERSONAL TRANSPORTATION SURVEY 28-31 (1999).

81. See *infra* notes 82-90 and accompanying text.

82. RAYMOND J. BURBY ET AL., MAKING GOVERNMENT PLANS: STATE EXPERIMENTS IN MANAGING LAND USE 8 (1997). In Florida, to the extent that regional plans are prepared as a part of the elaboration of State goals in diverse regions of the State, vertical consistency also includes consistency between the local and regional plan.

83. *Id.*

84. *Id.* at 9.

85. *Id.*

of Florida, there is little consistency,⁸⁶ because the planning process is fragmented and local, regional, and State agencies that make land use and transportation decisions do not generally coordinate their activities.

Vertical consistency is not found in the planning process because the State comprehensive plan has not been updated, except with minor revisions, since it was originally approved in 1985.⁸⁷ While the State transportation plan has been updated, its policies are not consistent with local land use plans.⁸⁸ The FIHS⁸⁹ is being built to improve regional access, but it will also provide improved local access, even in areas where the policies of local government limit growth.⁹⁰ Similarly, the State government unilaterally makes land use decisions that have a significant impact on local governments without coordinating those plans with the local comprehensive plans.⁹¹

Local plans lack vertical and horizontal consistency because the regional land use and transportation planning processes are fragmented. Land use planning occurs at the local level, while much of the transportation planning occurs at the regional and State level. The State of Florida, under federal law, can designate the boundaries of each MPO as an urbanized area, a county, or a multiple county area.⁹² Some other States have adopted multi-county MPOs as a means of coordinating across neighboring jurisdictions.⁹³ In Florida, only the Orlando MPO (Metroplan) covers more than one complete county. Twenty-five separate MPOs cover all or part of thirty-one counties. The FDOT has seven district offices that work with local governments to develop the TIP and the UPWP. Eleven RPCs assist local governments and review local land use plans. Thus, while in theory the comprehensive plan of local governments should be consistent with the regional and State transportation plans,

86. See *infra* notes 91-94.

87. FLA. STAT. ANN. § 186.008(1) (West 2000); Pelham, *supra* note 10. The statute requires that "[o]n or before October 1 of every odd-numbered year, the Executive Office of the Governor shall prepare and the Governor shall recommend. . . ." The revision of the State comprehensive plan is a continuing process. FLA. STAT. ANN. § 186.007(8) (West 2000); see also *id.* § 187.201.

88. Pelham, *supra* note 10, at 7.

89. *Cf. supra* note 27.

90. RUTH L. STEINER ET AL., FLA. DEPT. OF TRANSP. OFF. OF POLICY PLANNING, THE IMPACT OF CONCURRENCY MANAGEMENT AND THE FLORIDA GROWTH MANAGEMENT ACT ON TRANSPORTATION INVESTMENTS 97-98 (1999).

91. Pelham, *supra* note 10.

92. 49 U.S.C.S. § 5303 (Law Co-op 2000); FLA. STAT. ANN. § 339.175 (West 2000).

93. The Southeastern Wisconsin RPC for the Milwaukee area and the nine-county Metropolitan Transportation Commission for the San Francisco Bay area are multi-county MPOs.

intergovernmental coordination is a weak link in the GMA.⁹⁴ RPCs have the power "to establish and conduct a cross-acceptance negotiation with local governments intended to resolve inconsistencies between applicable local and regional plans, with participation by local governments being voluntary."⁹⁵

Similarly, local internal consistency is not ensured under the existing program. Many local governments do not have the funding to support either the backlog of transportation projects or the new projects proposed in their CIP.⁹⁶ The DCA does not monitor the submission by local governments of an annual update to the CIP⁹⁷ and local governments are not required to submit their LDRs to the DCA, except in unusual circumstances.⁹⁸ Even though it is widely known that some local governments do not have the financial resources to build all the facilities in their CIP, there is little evidence of moratoria on development.⁹⁹ Thus, the implementation of concurrency effectively becomes a local matter even though the regional and State agencies perform a review of the TCMS.¹⁰⁰

B. Adequacy of Funding for Transportation Infrastructure

As is well documented elsewhere, the State of Florida has failed to provide adequate funding for infrastructure, including transportation.¹⁰¹ When the GMA was passed, policy makers had anticipated that the services tax would raise sixty percent of the infrastructure cost of the implementation for the first ten years.¹⁰² However, the services tax was repealed in 1987, within just a few months of its implementation.¹⁰³ The current funding shortfall is estimated at fifty billion dollars through 2010.¹⁰⁴ In 1985, the estimated cost for transportation projects within the first ten years of the GMA was sixteen billion dollars.¹⁰⁵

94. Siebert, *supra* note 15.

95. FLA. STAT. ANN. § 186.505(22) (West 2000).

96. Pelham, *supra* note 10.

97. Terrell Arline, *Concurrency: A Critical Link Between Planning and Development*, Paper presented at The Richard E. Nelson Symposium on Florida's Growth Management Legislation, Gainesville, Fla., (Oct. 13, 2000) (on file with author).

98. FLA. STAT. ANN. § 163.3202(4) (West 2000).

99. AUDIRAC ET AL., *supra* note 78, at 21.

100. FLA. STAT. ANN. § 163.3184 (West 2000).

101. Nicholas & Steiner, *supra* note 3, at 658-62, 668-69.

102. *Id.* at 659.

103. *Id.*

104. FDOT, *supra* note 7, at 45.

105. Nicholas & Steiner, *supra* note 3, at 658.

Furthermore, the State of Florida has not provided a means through which local governments can easily raise revenues against the wishes of a hesitant public. Without State support, funding is left to the resources of local governments. Local governments may implement local option gas taxes, or infrastructure taxes, which allow up to a one percent sales tax with the proceeds only available for "infrastructure." The infrastructure tax must be approved by referendum.¹⁰⁶ The local option gas tax can be imposed by a vote of the county commission. County commissions are cautious about voting for new taxes. The constitutional limitations¹⁰⁷ on the ability to raise taxes have prompted local governments to seek non-traditional sources of revenue. Local governments who do not have the support of voters for local taxes for infrastructure or for non-traditional sources of revenue, will be limited in their ability to develop a financially feasible CIP.¹⁰⁸

C. Measurement of Capacity and Level of Service

Finding a simple measure of LOS has not been easy, as is shown by the following statement in the *1998 LOS Handbook*:

Upon the recommendation of Florida's MMP [Mobility Management Process] Task Team, FDOT concurred that no single performance measure is robust enough to fully measure congestion or address mobility for multiple modes of transportation. A series of modal performance measures are considered superior to a single performance. At a minimum, each MMP/CMS [Congestion Management System] in Florida must include both highway and transit performance measures.¹⁰⁹

In seeming contradiction to the above-noted difficulty in developing an LOS measure, FDOT continues:

Highway level of service was deemed an adequate, convenient, and readily-understood indicator of where congestion exists and therefore, was suggested as the

106. *Id.* at 659.

107. FLA. CONST. art. VII § 1.

108. *Cf.* STEINER ET AL., *supra* note 90, at 115.

109. FDOT, *supra* note 55, at 6.

triggering device to determine where highway congestion exists.¹¹⁰

The advantage of the use of highway capacity as the LOS standard is that it is generally understood by planning professionals. However, when it is applied in a simplified manner it may not generate the desired result. Since the LOS on roadways uses the level of congestion to determine the need for additional transportation capacity, the solution, when the measure is used in its most simplified manner, will be to widen the roads. Widening roads will only lead to more congestion.¹¹¹ This counterintuitive solution results from the problem of the triple convergence. If you build additional roadway capacity, drivers will adjust their travel in time, location, or mode to consume the newly created capacity.¹¹² Furthermore, because many suburban areas in Florida are developed in an urban form that includes few major arterials with limited collector capacity, traffic will concentrate onto arterials. Thus, the levels of congestion on these roadways may be higher and the LOS worse than if the traffic could be dispersed throughout a gridded network.¹¹³

For local governments with a shortage of funding for transportation projects and a desire to continue to allow development, the TCMS may undermine any attempt to comprehensively plan the transportation system. Because of the shortage of funding, segments of the system that are, or are expected to be, short of capacity in the near future become the highest priority in the CIP. By focusing on individual segments of the local transportation system and defining congestion simplistically as the sole measure of the need for capacity, the TCMS may encourage incremental planning rather than comprehensive planning for the urban transportation systems.

The management of the TCMS is complicated by a lack of clarity over what constitutes capacity and the flexibility in determining the number of

110. *Id.* at 6.

111. ANTHONY DOWNS, *STUCK IN TRAFFIC: COPING WITH PEAK-HOUR TRAFFIC CONGESTION* (1992).

112. *Id. passim.* More recently others have added a fourth aspect to the triple convergence, that of activity pattern. The activity pattern can be strongly connected to the land-use transportation configuration. *Cf.* Erik Ferguson, *Transportation Demand Management: Planning, Development, and Implementation*, 56 J. AM. PLAN. ASSOC. 442-43 (1990). If land-use planning is a transportation demand strategy then changing the pattern of activity can be a part of the triple (or quadruple) convergence.

113. STEINER ET AL., *supra* note 90, at 100.

trips¹¹⁴ generated by new development.¹¹⁵ The TCMS, the calculation of the current LOS, and the expected future LOS bring together the transportation planning process with the permitting process. At most steps of this process, the imprecision of the calculation and the uncertainty about future demands provide many options for meeting the requirements of the TCMS. The components of the calculation of the LOS are represented in Figure 1. The LOS is calculated as a ratio of volume to capacity, where the total capacity is comprised of three components: (1) volume of trips; (2) reserved capacity; and (3) the available capacity.¹¹⁶ The current LOS compares the volume of current trips to the existing capacity (volume of trips plus reserved capacity plus excess capacity). The future LOS must consider the changes that affect both the volume and capacity of traffic. Thus, the future volume of trips will include increases or decreases in trips from four sources: (1) trips from existing development and redevelopment; (2) the change in the level of activity from existing users; (3) trips from new development outside of the segment being evaluated; and (4) trips from *de minimis* development. The future capacity will include any roadway improvements.

Transportation modeling is an accepted transportation planning practice for estimating the volume of trips in the future on a given segment of the roadway system.¹¹⁷ However, the state of modeling practice in Florida is not as advanced as in many other States.¹¹⁸ The prevailing attitude toward transportation modeling is demonstrated by a study conducted by the Center

114. A trip is usually defined as going from a point of origin to a destination. For example, a trip is taken from home to work, or grocery shopping to home.

115. See *supra* notes 113-23 and accompanying text.

116. *Id.*

117. According to the FDOT Systems Traffic Modeling Department, "urban transportation planning is the process used in urbanized areas to analyze and plan for current and future transportation needs The primary objective of travel demand forecasting is to predict the effects of various policies, programs, and projects on highway and transit facilities. These impacts are commonly quantified by representing the projected demand in terms of forecast traffic volumes and transit ridership." *An Introduction to Systems Traffic Modeling in Florida*, FLA. DEPT. OF TRANSPORTATION, available at <http://www.dot.state.fl.us/planning> (last visited Apr. 4, 2001).

118. Cf. GREIG HARVEY & ELIZABETH DEAKIN, NATIONAL ASSOC. FOR REGIONAL COUNCILS, *A MANUAL OF REGIONAL TRANSPORTATION MODELING PRACTICE FOR AIR ANALYSIS* (1993) (on file with author); CHRIS PORTER ET AL., *TRANSPORTATION MODELING IMPROVEMENT PROGRAM, Land Use and Travel Survey Data: A Survey of the Metropolitan Planning Organizations of the 35 Largest U.S. Metropolitan Areas* (1995) (on file with author). The State of Florida has taken the approach of using a standard model for the four-step transportation modeling process. This model, the Florida Standard Urban Transportation Model Structure, has the advantage of standardizing the model on a statewide basis, but it does not provide modeling to address the needs and place specific aspects of each MPO in the State.

for Urban Transportation Research reviewing the long-range transportation plans of MPOs throughout the State, which recommended that the FDOT and MPOs “place greater emphasis on difficult policy tradeoffs and less reliance on transportation planning models.”¹¹⁹ Local governments control the definition of the impact area and most limit it to a quarter of a mile, even if the trips generated by new development will travel through major intersections beyond the boundary of the impact area. Thus, without transportation planning that can project the volumes on a particular segment, the cumulative impact of new development in the community is not well planned. If the TCMS is to work, the best estimate of the projected level of traffic needs to be determined through some accepted method, such as transportation modeling, other than simple political considerations.

In anticipating the number of trips due to proposed developments, planners, who follow good planning practice, will reserve capacity for development that has been permitted but not built.¹²⁰ Most communities systematically determined which projects were vested when they implemented the TCMS and they also must continue to reserve capacity consistent with that right to develop.¹²¹ Local governments vary in their ability to track the rate and timing of new traffic from DRIs because of the long period over which they develop.

Establishing the level of reserve capacity involves subjectivity in calculating the volumes associated with new development. When evaluating the impact of a specific development proposal, trip generation rates will be taken from the *ITE Trip Generation Manual*.¹²² The manual provides a range of values, and where applicable, formulas to calculate the number of peak hour or average daily trips generated from a type of development.

How a community chooses to evaluate impacts — whether they are measured based on average daily trips generated, peak hour trips generated, or by some other method — can determine the types and

119. MARGARET A. MARSHALL & EDWARD A. MIERZEJEWSKI, UNIVERSITY OF SOUTH FLORIDA CENTER FOR URBAN TRANSPORTATION RESEARCH, A REVIEW OF THE LONG-RANGE TRANSPORTATION PLANS OF FLORIDA'S METROPOLITAN PLANNING ORGANIZATIONS 6 (1998). This view is consistent with the skepticism of many transportation planning professionals. Throughout the 1990s research was conducted through the Transportation Modeling Improvement Program to address many of the weaknesses of the transportation modeling system.

120. STEINER ET AL., *supra* note 90.

121. *Id.*

122. INSTITUTE OF TRANSPORTATION ENGINEERS (ITE), TRIP GENERATION: AN INFORMATIONAL REPORT (5th ed., 1992); ITE, TRIP GENERATION: AN INFORMATIONAL REPORT (update to 5th ed., 1995); ITE, TRIP GENERATION: AN INFORMATIONAL REPORT (6th ed., 1997).

intensities of land uses that are permitted to develop. The trip generation rates are based upon studies using cordon counts that consider only vehicle trips.¹²³ Therefore, the rates may not be representative of the characteristics of the proposal, especially if the development has an urban form that supports higher levels of walking, bicycling, and transit.¹²⁴ As defined in the *LOS Handbook*, a local government, or a consultant for the applicant, may use different assumptions to calculate the impacts of a specific development.¹²⁵

The available capacity is also subject to interpretation depending upon the status of various planned improvements. At the very least, capacity must be in place or under construction within three years of the completion of the project.¹²⁶ For the most part, the FDOT requires that the five-year UPWP remain stable for the first three years in the plan.¹²⁷ However, in communities with a backlog of projects and inadequate funding, the priority of projects can be volatile.¹²⁸ A certificate of concurrency may be approved if it appears that a transportation project will be completed within the three years of the estimated completion of a development project. However, if the transportation project is given a lower priority thereafter, the certificate of concurrency cannot be revoked.

In summary, while the calculation of the roadway LOS may be simple in concept, it is not so simple in application. Just as the trip generation rates allow for a calculation of a range of the number of trips,¹²⁹ depending upon unique characteristics of a situation, the calculation of roadway capacity should allow for considerations unique to the situation under which it is being implemented. To the greatest extent possible, the local government should model the impact of new development on each segment of a roadway to more accurately reflect the future volume of trips. Ironically, after all of these calculations, the planners may find that the community is willing to accept greater or lesser levels of congestion than the LOS standard might dictate. It is difficult, if not impossible, to determine what level of congestion the public will accept or what the trade off is between higher taxation and worse congestion on roadways.

123. Ruth L. Steiner, TRIP GENERATION AND PARKING REQUIREMENTS IN TRADITIONAL SHOPPING DISTRICTS, 1617 TRANSPORTATION RESEARCH RECORD 28-9 (1998).

124. *Id.* at 37.

125. FDOT, *supra* note 55.

126. FLA. STAT. ANN. § 163.3180(2)(c) (West 2000).

127. STEINER ET AL., *supra* note 90, at 105.

128. *Cf. id.* at 104.

129. ITE, *supra* note 122.

V. SPATIAL IMPACT AND THE ABILITY OF CONCURRENCY TO BALANCE BROADER COMMUNITY GOALS WITH TRANSPORTATION INVESTMENTS

The debates over transportation concurrency can be seen as representing the conflicts between mobility and livability, relating directly to the changing ideas about the role of the transportation system in urban areas. This is exemplified by the federal Intermodal Surface Transportation Efficiency Act of 1991¹³⁰ and its successor legislation, the Transportation Efficiency Act for the Twenty-first Century, which became law in 1998.¹³¹ As reported in the TLUSC, “[m]obility refers to the ability to travel between and through communities. Livability is defined by a set of characteristics that make better communities, including variety, safety, convenience, commerce, recreation [,] aesthetics [,] . . . a sense of place, and a sense of community.”¹³² Providing too much priority to mobility can lead to “six lane highways cutting through neighborhoods for the sake of traffic movement, putting pedestrians at risk, reducing accessibility in the neighborhood, and often making it difficult for the neighborhood children to walk to school.”¹³³ As currently stated, the State of Florida has policies that favor livability, while the TCMS generally favors mobility.

Official State policy and remarks by State officials support the idea of accommodating both livability and mobility. In his remarks to the Growth Management Study Commission, Governor Bush states that “[t]he focus should not be on managing growth but on how to create more livable communities.”¹³⁴ The land use section of the State comprehensive plan calls for the “promotion of state programs, investments, and development and redevelopment activities which encourage efficient development and occur in areas which will have the capacity to serve new populations and commerce.”¹³⁵ The land use section also calls for the “enhance[ment of] the livability and character of urban areas through the encouragement of an attractive and functional mix of living, working, shopping and recreational activities.”¹³⁶ Among the policies of the transportation element of the State comprehensive plan is the promotion of “effective coordination among various modes of transportation in urban areas to

130. Intermodal Surface Transportation Efficiency Act of 1991, Publ. No. 102-240 Title I, § 1105(c).

131. 23 U.S.C. § 101 (1998).

132. FDOT, *supra* note 7, at 21.

133. STEINER ET AL., *supra* note 90, at 90-91.

134. Governor Jeb Bush, Remarks to the Growth Management Study Commission (Aug. 28, 2000).

135. FLA. STAT. ANN. § 187.201(16)(b)1 (West 2000).

136. *Id.* § 187.201(16)(b)3.

assist urban development and redevelopment efforts.”¹³⁷ Similarly, the mission of the FDOT highlights the competing goals of the transportation system: safety, mobility of goods and people, economic prosperity, and preservation of the quality of the environment and communities.¹³⁸

When all of the weaknesses in implementation — lack of consistency in plans, lack of State funding, and the measurement of LOS — are considered, local governments face major hurdles in coordinating investments in transportation with demand from new development. The implementation of basic concurrency, in the absence of strong local intervention, will usually lead to sprawl. The basic TCMS, which uses roadway congestion to measure LOS, will favor the needs of the automobile rather than all modes of transportation. The widening of roads because of traffic congestion may be in conflict with the planning goals of neighborhood preservation and community design.¹³⁹ Furthermore, the LOS measure does not distinguish between congestion resulting from vital economic activity and congestion associated with a poorly designed transportation system and/or a lack of coordination between land use and transportation.¹⁴⁰ The TCMS only implicitly defines different standards for urban, suburban, and rural areas, but a comparable LOS in each situation is likely to have a different cause.¹⁴¹ The TCMS penalizes infill and redevelopment because excess capacity is more frequently found and is less expensive to build at the urban fringe.¹⁴²

As the TCMS has evolved in response to these concerns, new tools have been developed to address impediments to redevelopment and urban revitalization through the area-wide¹⁴³ and project-by-project¹⁴⁴ exceptions. However, in order for these exceptions to work properly, they need to be coordinated through horizontal and local internal consistency. Adjacent jurisdictions may have differing planning goals, and therefore, they may apply the exceptions differently.¹⁴⁵ To overcome this lack of horizontal consistency, local governments need to provide plans that are internally consistent.

Although the project-by-project exceptions are used in various communities, the area-wide exceptions have been used in only limited

137. *Id.* § 187.201(20)(b)15.

138. *Cf.* Mission Statement, *supra* note 6.

139. FDOT, *supra* note 7, at 21.

140. STEINER ET AL., *supra* note 90, at 111.

141. *Id.* at 118.

142. Pelham, *supra* note 10; STEINER ET AL., *supra* note 90, at 98.

143. *See supra* Part II and accompanying notes.

144. *Id.*

145. Siebert, *supra* note 15.

situations.¹⁴⁶ The TCEA has been successfully used in a few communities,¹⁴⁷ but it will not work if it is applied to an area that is too large or if it is implemented for the purpose of encouraging new development rather than for the goals of redevelopment, urban revitalization, and downtown redevelopment.¹⁴⁸ While the TCMA may be a good concept, its applicability can be limited because its requirements do not match the characteristics of the transportation system in many regions in Florida. Many urban areas in the State of Florida do not have a sufficient grid to provide alternative routes with similar functional classifications as required in the TCMA, that serve the same set of origins and destinations.¹⁴⁹ The MMTD, for which the rules are still being developed, holds promise to be used as a substitute or in combination with a TCMA, TCEA, or LTCMS, because all share the goal of planning for alternatives to the automobile. The LTCMS has not been widely used in the State of Florida.¹⁵⁰

The use of a TCMS, even with area-wide exceptions, itself does nothing to change the economic realities of the development or redevelopment of an urban site instead of a suburban, green fields site.¹⁵¹ In the absence of a political commitment to infill and redevelopment, most of the roads will continue to be built on the urban fringe. Even where there is a political will and a plan to encourage higher density infill development, neighbors who would prefer lower densities of development have used concurrency to fight infill projects.¹⁵² Furthermore, projects at the urban fringe will be built at a lower cost and without consideration of modes of transportation other than the automobile. Without a strong social, economic, and political commitment, the pattern of development is not likely to change.¹⁵³

146. As of Aug. 1999 only 21 cities and counties (out of 427 cities and 67 counties) have implemented TCEAs. Dale Eacker, *Transportation Concurrency Exception Areas as of Aug. 1999* (unpublished document on file with the Univ. of Fla.). Since then, one city has converted to a TCEA, *id.*

147. *Cf.* STEINER ET AL., *FDOT OFFICE OF POLICY PLANNING, TRAVEL IN NEW URBANIST AND TRADITIONAL COMMUNITIES: A CASE STUDY OF DOWNTOWN ORLANDO* (2000).

148. STEINER ET AL., *supra* note 90, at 117.

149. *Id.* at 110.

150. Only one in Pinellas County.

151. Compare dilemmas associated with redevelopment of urban centers. MYRON ORFIELD, *METROPOLITICS: A REGIONAL AGENDA FOR COMMUNITY AND STABILITY* (1997); ANTHONY DOWNS, *NEW VISIONS FOR METROPOLITAN AMERICA* (1994). Both texts generally discuss the dilemmas associated with the redevelopment of urban centers.

152. STEINER ET AL., *supra* note 90, at 112.

153. *Cf.* STEINER ET AL., *supra* note 147, at 79 (discussing the implementation of the TCEA in Orlando).

In the suburban context, concurrency has been blamed for its failure in community design and the lack of planning for alternative modes of transportation. In particular, concurrency, when applied simplistically, may lead to wide arterials, large land development, and non-interconnected roadways. While these characteristics may be associated with the type of planning that occurs when concurrency focuses solely on automobility, they are a part of an overall approach to planning that extends beyond concurrency. In some cases, the lower-density suburban-style development may be preferred by the community.¹⁵⁴ However, this type of development supports automobile travel to the exclusion of other modes of travel. The lack of planning for alternative modes is beginning to be addressed with the implementation of the MMTDs in both the urban and suburban context.

Ultimately, the local governments throughout Florida should work with the community to develop a vision of what the community wants to be. Then they should implement a plan, including TCMS and other land use controls, that is consistent with the comprehensive plan and that "provides for the community's projected growth, incorporates a financially feasible capital improvements program to deliver the infrastructure needed to accommodate the projected growth, provides for an adequate supply of housing for all income groups, discourages sprawling urban and suburban development patterns, and allows sufficient flexibility to avoid unconstitutional restrictions on private property."¹⁵⁵

VI. RECOMMENDATIONS FOR CHANGE

Proposals for the changes to the concurrency system need to be framed within the broader context of the implementation of the GMA. The Governor asked the Growth Management Commission (Commission) to consider how the costs of development for the developer could be aligned with the costs of development to the community.¹⁵⁶ He asked for a redefinition of the proper role of the State, regional, and local governments in the planning process.¹⁵⁷ He also said "growth management and state resources as related to making communities more livable need to move closer to where people are."¹⁵⁸ DCA Secretary Siebert identified the following four principles for reform of growth management: "(1) leave

154. ANDRES DUANY ET AL., *SUBURBAN NATION: THE RISE OF SPRAWL AND THE DECLINE OF THE AMERICAN DREAM* 42 (2000).

155. Pelham, *supra* note 4, at 981.

156. Bush, *supra* note 134, at 1.

157. *Id.* at 1-2.

158. *Id.* at 2.

matters of purely local concern to the local community; (2) clearly delineate and vigorously protect interests and resources of essential state concern; (3) examine methods to improve citizen access; and (4) develop meaningful intergovernmental coordination."¹⁵⁹

Based upon the stated goals of the DCA secretary, the recommendations for changes to the TCMS focus on the roles of the State, regional, and local governments in the implementation of transportation concurrency.

To understand the role of each local level of government, it is useful to apply the justification for centralization and decentralization of environmental regulation based upon a recent article by Paul S. Weiland in *The Harvard Environmental Law Review*.¹⁶⁰ The justifications for centralization and decentralization provide a diagnostic tool for understanding what role each level of government might take in a revamped TCMS. Any proposals for change should give due consideration to the proper level of government required to engage in a particular activity. Claims in support of centralization can be made under the following conditions: interjurisdictional externalities; lack of fiscal, institutional, and technical capacity; interest representation; uniform minimum standards; uniform maximum standards; and national moral imperative. Claims in support of decentralization can be made to account for place specificity, flexibility, innovation, responsiveness, and interjurisdictional competition.¹⁶¹

When these criteria are applied to the implementation of transportation concurrency in Florida, the justification for centralization can be found in the interjurisdictional externalities and the capacity of local government. Interjurisdictional externalities exist in the form of traffic from one jurisdiction traveling into and congesting roads in an adjacent jurisdiction. However, the capacity to perform the functions of the TCMS varies significantly across local governments.

While the State still controls the building of many roads through the metropolitan transportation planning process, the State has decentralized much of the fiscal responsibility for transportation concurrency by its repeal of the services tax.¹⁶² However, the fiscal capacity of local governments with respect to concurrency varies across local

159. Siebert, *supra* note 15.

160. Paul S. Weiland, *Comment: Federal and State Preemption of Environmental Law: A Critical Analysis*, 24 HARV. ENVTL. L. REV. 237 (2000).

161. *Id.*

162. See *supra* Part IV (B) and accompanying notes.

jurisdictions.¹⁶³ Similarly, local governments vary in their institutional capacity to plan.

As Governor Bush observed, "many parts of the state have seen an increase in the level of sophistication than existed in 1985 when growth management was established. These communities have even greater sophistication than Tallahassee does."¹⁶⁴ Based upon the diversity of approaches to implementing transportation concurrency, the current system is arguably being implemented in a decentralized fashion using procedures developed and reviewed by the State of Florida.¹⁶⁵ While some jurisdictions have a high level of sophistication in implementing the TCMS,¹⁶⁶ others still require a high level of State oversight.¹⁶⁷

Some guidance as to the role of the State of Florida can be gained by understanding the role of the State of Washington in its GMA.

[The State] provides technical and financial assistance, mediates disputes between counties and cities, establishes minimum standards to ensure consistency in regional transportation planning, and enforces the Act through sanctions and a process for identifying and managing natural resources of statewide significance. State agencies must comply with local comprehensive plans adopted under the GMA.¹⁶⁸

Arguably, some of the criteria that justify centralization can be performed at the regional level. The role of regional agencies is of importance in this discussion because regional agencies can centralize functions among local governments in place of the State. Given the limited scope of the existing RPCs, any reform of their role will need to be consistent with their fiscal, technical, and institutional capacity, and will need to consider the role that the State can realistically take under the GMA and the TCMS.

The new State role in the implementation of concurrency can build on the existing strengths of the system and seek to address some of its weaknesses through additional requirements of State agencies. The State of Florida should continue in its primary role of providing technical

163. STEINER ET AL., *supra* note 90, at 115.

164. Bush, *supra* note 134, at 2.

165. See *supra* Part IV (A) and accompanying notes.

166. Cf. STEINER ET AL., *supra* note 147, at 82; STEINER ET AL., *supra* note 90, at 74.

167. Cf. STEINER ET AL., *supra* note 90, at 56.

168. Eric S. Lashever, *An Overview of Washington's Growth Management Act*, 7 PAC. RIM L. & POL'Y J. 657, 658 (1998).

assistance on the TCMS to local governments. The DCA has worked with many local communities to develop TCMS. Likewise, the FDOT provides expertise in the establishment and monitoring of LOS standards, especially in developing tools like the TCEA, TCMA, MMTD, and LTCMS that encourage the broader range of goals for the transportation system rather than simply providing roadway capacity for automobiles. The State of Florida should continue to research and develop tools that provide for a more efficient utilization of the transportation system for all users, and other methodologies that provide tools to assess the impact of different urban forms. For example, research is needed on methodologies to calculate the trip generation and internal capture rates for DRIs, and other major developments, with a more connected street network that has the potential to reduce the concentration of traffic along major arterials.¹⁶⁹

The State of Florida should explore the use of other methods for coordinating transportation investment with land development. Examples of these methods include transit-oriented development (TOD) and nodes, centers, and subcenters,¹⁷⁰ transportation corridors,¹⁷¹ focused public investment plans (FPIP),¹⁷² and priority funding areas (PFA).¹⁷³ TOD, node, center and subcenter development, and transportation corridors concentrate higher density land development at nodes, centers, and subcenters to support higher levels of bus or fixed transit service. FPIP allow a local government to coordinate and concentrate investments for urban services into a defined area to provide full service land for development and to leverage private investment.¹⁷⁴ The concept is similar to urban redevelopment efforts to attract private investment to the central city.¹⁷⁵ PFA, which are currently used in Maryland, go a step further to force development into strategically defined areas. Local governments

169. STEINER ET AL., *supra* note 147, at 80.

170. Doug Porter, *Transit-focused Development: A Progress Report*, 64 J. AM. PLAN. ASSOC. 475, 477 (1998).

171. Robert Froelich & S. Mark White, *State and Regional Roles in Transportation and Land Use Modernizing State Planning Statutes: The Smart Growth Working Papers*, Vol. 1127-32, at 129.

172. ECONORTHWEST ET AL., OREGON DEPT. OF TRANSP. AND DEPT. OF LAND CONSERV., OREGON TGM TOOLS OF THE TRADE (1995), available at <http://www.lcd.state.or.us/tgm/pub/tools.htm> (last visited Apr. 5, 2001).

173. Maryland Office of Planning, available at www.op.state.md.us/smartgrowth/smartwhat.htm.

174. ECONORTHWEST ET AL., *supra* note 172.

175. *Id.*

designate PFA, and the State of Maryland is prohibited from funding “growth-related” activities outside PFA.¹⁷⁶

The State of Florida should have a

more clearly defined and specific strategy for shaping and guiding Florida’s growth. It should more clearly articulate the state’s commitment to curtailing sprawl and encouraging urban infill and redevelopment, promoting livable communities, and the protection and preservation of important environmental and natural resources. It should clearly identify those areas, such as transportation, for which the state has sole or major financial responsibility.¹⁷⁷

The State of Florida should be subject to local comprehensive plans in its land use and transportation planning decisions. This requirement is implicit in the PFA in the State of Maryland and in the GMA in the State of Washington. In addition, the State of Florida could set the tone for the importance of coordination of land use and transportation planning by introducing a program through which communities would be provided matching funds for projects that represent good planning of the multi-modal transportation system. This program should require a local match of funding.

The state oversight role should be decreased. “The state cannot effectively review the thousands of plan amendments proposed annually by local governments.”¹⁷⁸ Consistent with Governor Bush’s recommendations to the Commission, the State’s role in reviewing local plans should be limited to identified issues of State concern.¹⁷⁹ However, there are many issues in the TCMS that do not rise to the level of State concern, but are of greater than local concern. These issues should be addressed through improved intergovernmental coordination at the regional level. The role of the State in these issues should be limited to mediating disputes between regions, appeals of the decisions of regional agencies, and technical assistance.¹⁸⁰ However, the State of Florida should maintain the right to monitor the LDRs if “it has reasonable grounds to believe that a local government has totally failed to adopt any one or more of the land development regulations.”¹⁸¹ It should also reserve the right to

176. Lashever, *supra* note 168, at 658.

177. Pelham, *supra* note 10.

178. *Id.* at 11.

179. Bush, *supra* note 134, at 1.

180. Pelham, *supra* note 10.

181. FLA. STAT. ANN. § 163.3202(4) (West 2000).

review the consistency of those LDRs with the local comprehensive plan if the local government fails to provide local internal consistency in areas of State or regional significance.

The role of regional agencies could be defined, in many ways, to address the needs for regional coordination.¹⁸² While former DCA Secretary Tom Pelham suggests that transportation planning is of State concern,¹⁸³ arguably, many transportation decisions are of regional importance once the State truly defines which roadways are of State significance. Thus, the regional agencies need to become involved in transportation planning decisions. At a minimum, regional governance needs to be reorganized to reduce the fragmentation of government decision-making. For the purposes of transportation concurrency, regional agencies (MPOs, district DOTs, RPCs) should be organized in a manner consistent with regional boundaries. Among the duties of regional agencies should be coordination of transportation and land use decision-making across the diverse jurisdictions of the region. As such, regional agencies should have the following responsibilities: (1) to mediate disputes between local governments without the limitation of voluntary participation by local governments; (2) to prepare regional plans that implement the State comprehensive plan and the State transportation plan; and (3) to organize the local concurrency management process to be more consistent with the twenty-year horizon of the long-range transportation plans. Regional agencies should coordinate transportation planning across local jurisdictions using longer planning timeframe and encompassing true planning in the spirit of Ramapo¹⁸⁴ rather than the reactive planning that characterizes much of the implementation of the TCMS.

VII. CONCLUSIONS

Fundamentally, the TCMS should provide a system that ties comprehensive planning to its implementation at the State, regional, and local level for an orderly and rational system that provides public facilities in support of new development. The TCMS has been controversial because the tools available for its implementation have not provided for the

182. Much has been written about the need for regional planning and the limitations on its usage. Cf. ORFIELD, *supra* note 151, at 74-172; TOM DANIELS, *WHEN CITY AND COUNTRY COLLIDE: MANAGING GROWTH IN THE METROPOLITAN FRINGE* 135-57 (1999).

183. Pelham, *supra* note 10.

184. *Golden v. Planning Board of Town of Ramapo*, 285 N.E.2d 291 (N.Y. App. Ct. 1972), *appeal dismissed*, 409 U.S. 1003 (1972). *Ramapo* established the principle that public facility plans could be used to control the timing and location of development.

diversity of transportation goals. As such, the TCMS is seen as contributing to sprawl and failing to address community design.

Although the TCMS has been amended three times to provide new tools, like TCMA, TCEA, LTCMS, and MMTDs, the tools are not producing the desired results because they are not coordinated with other aspects of the planning.¹⁸⁵ In most communities, the comprehensive plan is not vertically, horizontally, or internally consistent. The State has not updated its comprehensive plan nor has it kept its commitment to providing sufficient funding for the infrastructure backlog. It has taken actions in land use and transportation that are inconsistent with the plans of local governments.

The RPCs lack the tools to enforce consistency between plans of adjacent jurisdictions. Local governments plan land uses while various and fragmented local regional and State agencies plan the transportation system. The LOS for the transportation system is based on the capacity of the roadway system rather than balancing the need for capacity with other goals, like livability, in the transportation system. Local governments have muddled through to develop a TCMS that meets their goals and needs. Some have developed a high level of sophistication in using the TCEA to coordinate their plans with new development, while others have implemented the TCMS by lowering the LOS standards on all roadways.

Any reform of the TCMS needs to consider the capabilities of each level of government in implementing concurrency. The State should continue in its role of providing technical assistance and new tools to compensate for the bias toward roadway investments. The State should be required to make land use and transportation decisions that are consistent with the local comprehensive plans. Fiscal incentives should be provided by the State to local governments that are exemplary in coordinating land use and transportation planning. Likewise, the role of the State in reviewing local plans should be restricted to items of State significance or to local governments that show that they are incapable of doing the planning on their own. The State should limit its role to mediating disputes between different regions, taking appeals of regional agencies, and providing technical assistance. At the regional level, agencies should be reorganized to reduce the fragmentation in regional transportation planning. The role of regional governments in mediating local disputes

185. *ECONORTHWEST ET AL.*, *supra* note 172. As the State of Oregon points out in their Tools Manual “[i]n principle, land-use planning, zoning, and public facility plans should prevent development in areas that lack adequate levels of urban services. In practice, however, APFRs (adequate public facility requirements) encourage better monitoring of urban service levels, and make clear the levels of service that must be available before development happens.”

should be strengthened. Finally, local governments, especially those with a high level of sophistication, should be given more tools to provide a financially feasible and implementable TCMS.

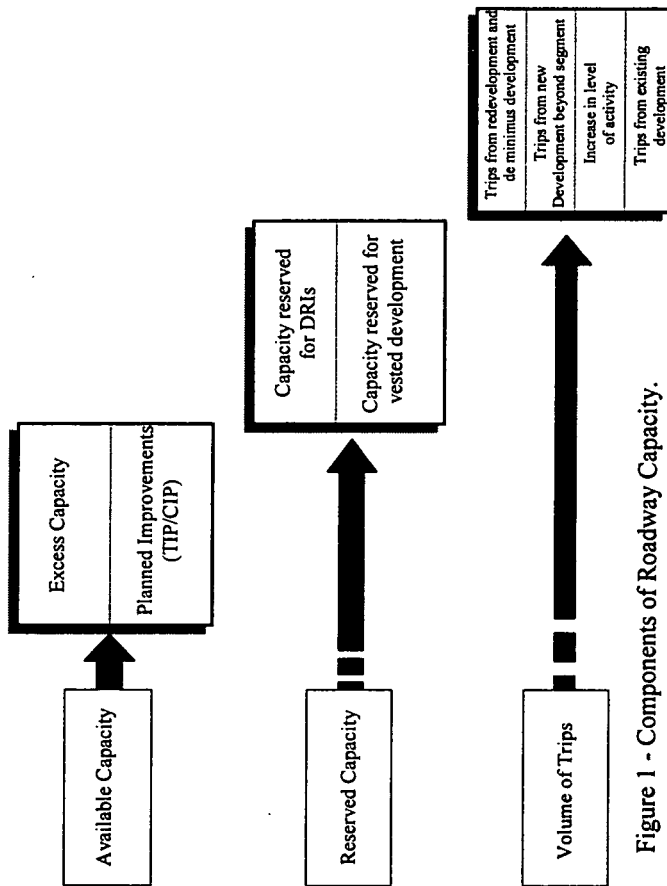


Figure 1 - Components of Roadway Capacity.

