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## Recent Changes in Concurrency

**F**lorida must continually adjust its planning and growth management programs to reflect its experiences in implementing regulation of physical growth and development. In 1993, the legislature gave its most specific direction to local governments regarding the concurrency doctrine—the requirement that adequate public facilities be available on a timely basis to accommodate the impacts of new development.<sup>1</sup> These measures came from a year-long policy review by the third Environmental Land Management Study (ELMS III) Committee,<sup>2</sup> and constituted legislative ratification of decisions made earlier by the Department of Community Affairs (DCA), as well as major refinements of the concurrency doctrine.

Concurrency is a timing mechanism similar to adequate public facilities ordinances such as the one at issue in the seminal decision of *Golden v. Planning Board of Town of Ramapo*, 30 N.Y. 2d 359, 334 N.Y. Supp. 2d 138 (1972).<sup>3</sup> It seeks to ensure that infrastructure is ready when needed. Concurrency is the “teeth” of Florida’s growth management system.<sup>4</sup>

### The Framework of Concurrency

The origins of concurrency are in two landmark growth management measures enacted by the legislature in 1985, the State Plan<sup>5</sup> and the Growth Management Act of 1985,<sup>6</sup> which included important requirements for comprehensive planning by Florida’s 458 local governments. Together, these statutes provided the legal foundation for concurrency.<sup>7</sup> The 1986 Legislature adopted intent language which provided the broad outline and name for this mandate, but little more.<sup>8</sup>

Because so much of the concurrency

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by David L. Powell

doctrine was developed by DCA, there long was a dearth of legislative direction on the subject. Among the DCA decisions confirmed in 1993 was that concurrency applies as a matter of state law to only seven forms of infrastructure: potable water, sanitary sewer, solid waste, drainage, parks and recreation facilities, roads and, in certain local jurisdictions, mass transit.<sup>9</sup> Those are the only public facilities and services for which local governments are required by law to adopt level of service (LOS) standards, which are the linchpin for implementation of concurrency. The 1993 legislation expressly provides that only the legislature may extend concurrency on a statewide basis to additional public facilities.<sup>10</sup>

Two other principal issues of concurrency implementation addressed by the 1993 legislation are the “adequacy” of

the covered facility or service and when it must be “available.” The issue of adequacy focuses on the specific LOS standard for a particular facility or service. The 1993 legislation does not expressly provide a standard for determining the adequacy of LOS standards,<sup>11</sup> except for some roadway levels of service.<sup>12</sup> The 1993 legislation’s confirmation of the key provisions of DCA’s concurrency rules suggests that pre-existing policy and practice should not be disturbed. The new statutory standards for determining availability based on considerations of the public health, safety, or welfare also provide important guideposts for determining the adequacy of LOS standards.<sup>13</sup>

Availability is practically an attempt to define the word “concurrent.” Sanitary sewer, solid waste, drainage, and potable water facilities are held to the most stringent availability standard because they are essential to human habitation on grounds of public health and safety. They must be in place and available to serve new development no later than the issuance of a certificate of occupancy.<sup>14</sup>

The other two forms of infrastructure—parks and recreation facilities and transportation facilities—are held to a more lenient availability standard based on the public welfare. Parks and recreation facilities must be in place or under actual construction no later than one year after issuance of a certificate of occupancy, but this requirement may be met by a new pay-and-go provision.<sup>15</sup> Roads and, where applicable, mass transit must be in place or under actual construction no later than three years after issuance of a certificate of occupancy.<sup>16</sup> They will be deemed so if included in the first three years of either the capital improvements element or the Department of

Transportation (DOT) five-year work program.<sup>17</sup>

### The Special Problem of Transportation

Perhaps the most significant features of the state's new concurrency requirements relate to transportation. More than any other aspect of concurrency, the application of the doctrine to roads and, in large locales, mass transit has been fraught with uncertainty.<sup>18</sup> Not the least of the complicating factors is the sheer magnitude of Florida's urban transportation needs. Making transportation concurrency even more difficult is the division of authority and responsibility for certain roads among various state and local agencies.

The setting of LOS standards for roads on the state highway system has been one challenge. Local governments previously had to establish the appropriate level of service for all public facilities and services, subject to DCA review.<sup>19</sup> DOT, however, was responsible for maintaining state roads and setting operational standards for them.<sup>20</sup>

DCA attempted to resolve this apparent conflict by requiring local governments, "to the maximum extent feasible as determined by the local government," to adopt LOS standards for roads on the state highway system that were compatible with the adopted DOT standards.<sup>21</sup> The local government had to justify any departure from a DOT standard.

The 1993 legislation sought to allocate authority for roadway levels of service in a manner that would reduce the potential for conflict between state and local officials. For all roads on the Florida Intrastate Highway System (FIHS),<sup>22</sup> the local government must enforce the DOT-established LOS standard. For all other roads on the state highway system, the local government may set a level of service without reference to the DOT standard, so long as it is "adequate."<sup>23</sup> Local governments were granted greater flexibility over standard setting for most state roads within their jurisdictions in exchange for giving up their circumscribed authority to set LOS standards on roads on the FIHS.

### New Planning Tools

The 1993 legislation contains a num-

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ber of new tools for local governments. Two provisions are intended to facilitate redevelopment in an "existing urban service area" where public facilities and services are in place.<sup>24</sup> Such areas must be defined and included on a map in the local plan.<sup>25</sup> In such an area, the allowable road trips for an existing structure will be vested for purposes of transportation concurrency and receive a 10 percent bonus when the existing building is demolished and rebuilt or substantially renovated.<sup>26</sup> This provision prevents transportation concurrency from prohibiting redevelopment in an existing urban service area so long as the new project's traffic impacts are no more than "110 percent of the actual transportation impact caused by the previously existing development," even if the redevelopment project would reduce levels of service on an affected road below the adopted LOS standard.<sup>27</sup>

The other provision intended to facilitate redevelopment in existing urban service areas authorizes de minimis impacts to roads in those areas so long as the additional impacts do not "cause significant degradation of the existing level of service."<sup>28</sup> A de minimis impact may not "exceed 0.1 percent of the maximum serviced volume at the adopted level of service standard for the peak hour of the affected transportation facility."<sup>29</sup> Further, the impact must be caused by "an increase in the density or intensity of less than or equal to twice the density or intensity of the existing development or, for the development of a vacant parcel of land, at a residential density of less than four dwelling units per acre or, for

nonresidential uses, at an intensity of less than 0.1 floor area ratio."<sup>30</sup> The cumulative total impact may be no more than three percent of the maximum service volume at the adopted LOS standard if the facility is not at the minimum.<sup>31</sup> A single-family residence may be built on a residential lot of less than one-quarter acre in a residential area.<sup>32</sup>

Local governments and DCA have resorted to a number of creative techniques for concurrency management in areas where roads are severely backlogged. One frequently cited example is DCA's agreement to allow Pasco County to deviate from state LOS standards on state roads as long as the county's overall road system will meet standards within 15 years.<sup>33</sup> DCA did not standardize this practice or set forth the parameters within which it could be employed by local governments with transportation backlogs.

The 1993 legislation authorizes a local government to adopt a long-term transportation concurrency management system with a planning period of up to 10 years.<sup>34</sup> The system must be prepared for a specific geographic district in which a significant transportation backlog exists. It must include a transportation improvements schedule intended to correct existing deficiencies within the planning period. It also must be financially feasible and consistent with other portions of the local comprehensive plan. It may utilize interim LOS standards.

The 10-year transportation improvements schedule in the plan may serve as a basis for issuance of development orders within the district. This planning tool provides more latitude than the general availability standard for roads to address backlogged roads and provide new facilities without halting development. Recognizing that 10 years may not be a sufficient period to remedy the transportation backlog in some areas, DCA may approve a long-term transportation concurrency management system with a 15-year planning period in an area with an unusually severe backlog.<sup>35</sup>

The 1993 legislation was not the first attempt to provide new tools to achieve flexibility in concurrency. DCA in 1992 authorized local governments to designate transportation concurrency management areas (TCMA's) that would utilize areawide LOS averaging.<sup>36</sup> The

TCMA rule was criticized for its complexity, expense, and "onerous planning requirements"<sup>37</sup> which put this tool beyond the reach of many local governments.

ELMS III recommended legislative authorization for TCMA's but a thorough revision of the 1992 TCMA rule.<sup>38</sup> The 1993 legislation authorizes area-wide LOS averaging in "a compact geographic area with an existing network of roads where multiple, viable alternative travel paths or modes are available for common trips."<sup>39</sup> A local government must justify the level of service chosen, show how urban infill development or redevelopment would be promoted by the TCMA, and demonstrate how mobility will be accomplished. DCA has adopted a new TCMA rule that imposes fewer prerequisites for creation of a TCMA than did its predecessor.<sup>40</sup>

### Transportation Concurrency Exceptions

Perhaps the most significant departure from the existing concurrency system under the 1993 legislation is the creation of formal exceptions from the requirement for transportation concurrency. The public policy rationale for transportation concurrency exceptions is that "countervailing planning and public policy goals may come into conflict with" the requirement that adequate transportation facilities be available to serve new development.<sup>41</sup> In other words, transportation concurrency may discourage the very kind of urban development that is supported in the state's compact urban development policy.<sup>42</sup> Transportation concurrency exceptions resolve that conflict in favor of compact urban development.

This new local planning mechanism was initially developed and recommended by ELMS III,<sup>43</sup> but it underwent extensive revision in the legislative process. The 1993 legislation creates two classes of exceptions from transportation concurrency—area-specific and project-specific.

There are three kinds of area-specific exceptions, or transportation concurrency exception areas (TCEA's). Each constitutes a distinct geographic area in which the concurrency requirement will not apply to any development insofar as transportation facilities are concerned. Within an approved TCEA, all land uses and types of development

will qualify for this treatment.<sup>44</sup>

The first kind of TCEA is intended to promote urban infill development in otherwise built-up areas which already have public facilities in place.<sup>45</sup> No more than 10 percent of the land in a designated urban infill area may be developable vacant land. Specific development density and intensity thresholds must be met.<sup>46</sup> The second kind of TCEA is intended to promote "urban redevelopment" consisting of demolition and reconstruction or renovation of existing buildings or infrastructure in certain areas.<sup>47</sup> It may be located only in an area designated for urban infill or as an "existing urban service area,"<sup>48</sup> which may contain no more than 40 percent developable vacant land.<sup>49</sup> The third kind of TCEA is intended to promote development in a central business district designated for "downtown revitalization."<sup>50</sup>

The 1993 legislation also creates project-specific exceptions from transportation concurrency. The first project-specific exception is for "projects that promote public transportation such as office buildings that incorporate transit terminals or fixed-rail stations."<sup>51</sup> Local governments will determine projects that qualify for this exception.<sup>52</sup> There is no statutory requirement that the project bear any specific relationship to current or planned public transportation corridors.<sup>53</sup>

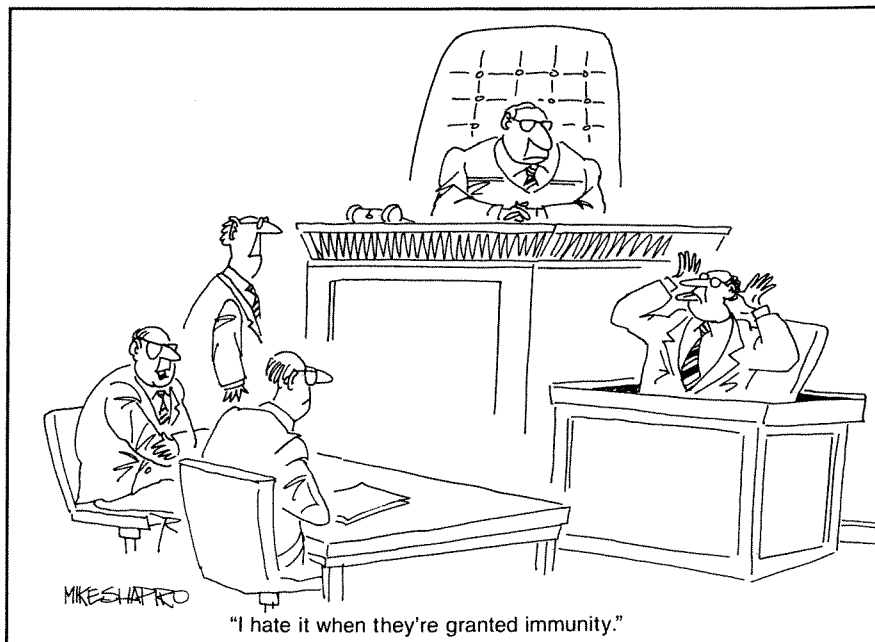
The second project-specific exception is for development creating only "special part-time demands" on transporta-

tion facilities.<sup>54</sup> Such a project may be of any type of land use, but must meet other criteria. It may not have more than 200 scheduled events during any calendar year, or affect the 100 highest traffic volume hours. It will most commonly apply to a stadium, performing arts center, racetrack, or fairground and will only be available in a designated urban infill, urban redevelopment, downtown revitalization, or existing urban service area, but it would not be necessary in one otherwise designated as a TCEA.

A local government may establish transportation concurrency exceptions by amendment to its local comprehensive plan.<sup>55</sup> Any plan amendment designating a TCEA must specify the boundaries of the applicable area.<sup>56</sup> Of particular significance, a plan amendment to create a TCEA must consider and evaluate transportation impacts on the FIHS attributable to creation of the TCEA.<sup>57</sup> During the compliance review on a plan amendment to create a TCEA, DCA should weigh the adverse consequences to the state's system for statewide and regional movement of people and goods against other important planning goals which the TCEA process is intended to promote.

### Conclusion

Concurrency is "our nation's most ambitious experiment in growth management."<sup>58</sup> It requires a trial-and-error approach to ensure that it protects and enhances the state's quality



of life without unduly hindering the economic growth which Florida needs to prosper. The 1993 legislative changes to concurrency are the latest step down that road. □

<sup>1</sup> FLA. STAT. §163.3180 (1993). For a review of major features of the 1993 growth management legislation, see David L. Powell, *Managing Florida's Growth: The Next Generation*, 21 FLA. ST. U. L. REV. 223 (1993).

<sup>2</sup> ENVIRONMENTAL LAND MANAGEMENT STUDY COMMITTEE, FINAL REPORT: BUILDING SUCCESSFUL COMMUNITIES 61-75 (Recommendations 88-116) (Dec. 1992) (hereinafter ELMS III REPORT).

<sup>3</sup> See also Douglas R. Porter, *The APF Epidemic*, URBAN LAND at 36 (Nov. 1990).

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

Concurrency must be determined by the local government prior to approval of an application for a development order or permit which contains a specific plan of development, including densities and intensities of use. FLA. ADMIN. CODE r. 9J-5.0055(1)(d) (1994).

<sup>5</sup> FLA. STAT. ch. 187 (1993).

<sup>6</sup> 1985 Fla. Laws ch. 85-55, §§1-20 (current version at FLA. STAT. ch. 163, Part II (1993)).

<sup>7</sup> Thomas G. Pelham, *Adequate Public Facilities Requirements: Reflections on Florida's Concurrency System for Managing Growth*, 19 FLA. ST. U. L. REV. 973, 1011-1014 (1992).

<sup>8</sup> FLA. STAT. §163.3177(10)(h) (1993).

<sup>9</sup> FLA. STAT. §163.3180(1) (1993). See also FLA. ADMIN. CODE r. 9J-5.0055(1)(a) (1994).

<sup>10</sup> FLA. STAT. §163.3180(1) (1993).

<sup>11</sup> FLA. ADMIN. CODE ANN. r. 9J-5.005(3) (1992). FLA. STAT. §163.3177(3)(a)3, requires "acceptable" levels of service to be set by the local government.

<sup>12</sup> FLA. STAT. §163.3180(10) (1993). See also FLA. ADMIN. CODE r. 9J-5.0055(2)(c) (1994).

<sup>13</sup> FLA. STAT. §163.3180(2)(a)-(c) (1993).

<sup>14</sup> FLA. STAT. §163.3180(2)(a) (1993).

<sup>15</sup> FLA. STAT. §163.3180(2)(b) (1993). Under the pay-and-go provision, acreage for park and recreation facilities to serve new development must be dedicated or acquired by the local government, or funds in the amount of the developer's fair share must be committed when the development order is issued. FLA. ADMIN. CODE r. J-5.0055(3)(b)2 (1994).

<sup>16</sup> FLA. STAT. §163.3180(2)(c) (1993).

<sup>17</sup> FLA. ADMIN. CODE r. 9J-5.0055(3)(c)2 (1994).

<sup>18</sup> H. Glen Boggs & Robert C. Apgar, *Concurrency and Growth Management: A Lawyer's Primer*, 7 J. LAND USE & ENVTL. L. 1, 25 (1991).

<sup>19</sup> FLA. STAT. §163.3177(3)(a)3 (1992 Supp.).

<sup>20</sup> FLA. STAT. §334.044(1), (10), .045(1) (1991). These standards are adopted by

rule. FLA. ADMIN. CODE ANN. r. 14-94.003 (1992).

<sup>21</sup> FLA. ADMIN. CODE ANN. r. 9J-5.0055(1)(d) (1992), repealed by FLA. STAT. §163.3180(10) (1993).

<sup>22</sup> See FLA. STAT. §338.001 (1993).

<sup>23</sup> FLA. STAT. §163.3180(10) (1993). Adequacy will be determined in part by reference to "the existing and future land uses as demonstrated by the supporting data and analysis in the comprehensive plan." FLA. ADMIN. CODE r. 9J-5.0055(2)(c) (1994).

<sup>24</sup> FLA. STAT. §163.3164(29) (1993).

<sup>25</sup> FLA. ADMIN. CODE r. 9J-5.0055(3)(c)5 (1994).

<sup>26</sup> FLA. STAT. §163.3180(8) (1993).

The "previously existing development is the actual previous built use which was occupied and active within a time period established in the local government comprehensive plan." FLA. ADMIN. CODE r. 9J-5.0055(3)(c)5 (1994).

<sup>27</sup> FLA. STAT. §163.3180(8) (1993).

<sup>28</sup> FLA. STAT. §163.3180(6) (1993).

<sup>29</sup> FLA. ADMIN. CODE r. 9J-5.0055(3)(c)6b (1994).

<sup>30</sup> FLA. ADMIN. CODE r. 9J-5.0055(3)(c)6a (1994).

<sup>31</sup> FLA. ADMIN. CODE r. 9J-5.0055(3)(c)6c (1994).

<sup>32</sup> FLA. ADMIN. CODE r. 9J-5.0055(3)(c)6a (1994).

<sup>33</sup> Pelham, *supra* note 7, at 1021 n.301.

<sup>34</sup> FLA. STAT. §163.3180(9)(a) (1993). See also FLA. ADMIN. CODE r. 9J-5.0055(4) (1994).

<sup>35</sup> FLA. STAT. §163.3180(9)(b) (1993).

<sup>36</sup> FLA. ADMIN. CODE ANN. r. 9J-5.0057 (1992), modified by FLA. ADMIN. CODE r. 9J-5.0055(5) (1994). See, e.g., Rhodes, *Concurrency: Problems, Practicalities and Prospects*, 6 J. LAND USE & ENVTL. L. 241, 253 (1991).

<sup>37</sup> Pelham, *supra* note 7, at 1021 (commentary on the TCMA rule in draft form).

<sup>38</sup> ELMS III REPORT, *supra* note 2, at 72 (Recommendation 110).

<sup>39</sup> FLA. STAT. §163.3180(7) (1993).

<sup>40</sup> FLA. ADMIN. CODE r. 9J-5.0055(5) (1994).

<sup>41</sup> FLA. STAT. §163.3180(5)(a) (1993).

<sup>42</sup> See, e.g., *Home Builders and Contractors Ass'n of Brevard County, Inc. v. Dep't of Comm'y Affairs*, 585 So. 2d 965 (Fla. 1st D.C.A. 1991).

This side effect of transportation concurrency has received considerable attention in the literature. E.g., JOHN M. DEGROVE & DEBORAH A. MINESS, LINCOLN INSTITUTE OF LAND POLICY, *THE NEW FRONTIER FOR LAND POLICY: PLANNING AND GROWTH MANAGEMENT IN THE STATES* 17-20 (1992).

<sup>43</sup> ELMS III REPORT, *supra* note 2, at 68 (Recommendation 99).

<sup>44</sup> FLA. ADMIN. CODE r. 9J-5.0055(6) (1994).

<sup>45</sup> FLA. STAT. §163.3164(27) (1993).

<sup>46</sup> FLA. ADMIN. CODE r. 9J-5.0055(6)(a)1 (1994).

<sup>47</sup> FLA. STAT. §163.3164(26) (1993).

<sup>48</sup> FLA. STAT. §163.3164(29) (1993).

<sup>49</sup> FLA. ADMIN. CODE r. 9J-5.0055(6)(a)2 (1994).

<sup>50</sup> FLA. STAT. §163.3164(25) (1993). See also FLA. ADMIN. CODE r. 9J-5.003(11) (1994). Within the designated urban central business district of certain locales, intensive development is also promoted by the relaxa-

tion of thresholds for the development of regional impact (DRI) program under the 1993 legislation. FLA. STAT. §380.06(2)(e) (1993).

<sup>51</sup> FLA. STAT. §163.3164(28) (1993).

<sup>52</sup> FLA. ADMIN. CODE r. 9J-5.0055(7) (1994).

<sup>53</sup> This feature of the 1993 legislation is clearly inferior to the ELMS III recommendation to authorize creation of TCEA's for areas encompassed by and adjacent to public transportation corridors designated by DOT pursuant to FLA. STAT. §339.155(6)(a)4. ELMS III REPORT, *supra* note 2, at 68 (Recommendation 100).

Under the ELMS approach, a linear corridor along a designated public transportation route, running through one or more jurisdictions, would be freed from transportation concurrency in order to promote intensive development that ultimately could provide sufficient population density to support mass transit. See also FLA. STAT. §§163.3177(6)(j)8, 186.507(12) (1993).

<sup>54</sup> FLA. STAT. §163.3180(5)(c) (1993).

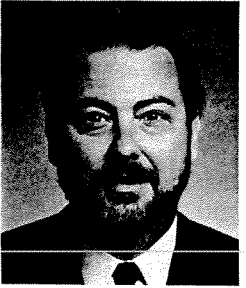
<sup>55</sup> FLA. STAT. §163.3180(5)(d) (1993); FLA. ADMIN. CODE r. 9J-5.0055(6)(c) (1994).

<sup>56</sup> FLA. ADMIN. CODE r. 9J-5.0055(6)(a) (1994).

<sup>57</sup> FLA. STAT. §163.3180(5)(d) (1993).

<sup>58</sup> Pelham, *supra* note 7, at 974.

## AUTHOR



David L. Powell is a shareholder in the Tallahassee law firm of Hopping Boyd Green and Sams, and represents clients in both the public and private sectors in matters involving land use, growth management, facility siting and administrative law. He received his J.D. with high honors in 1986 from Florida State University, where he was editor-in-chief of the law review. Mr. Powell served as executive director of the third Environmental Land Management Study (ELMS III) Committee which recommended the statutory changes to Florida's growth management programs that were enacted by the legislature in 1993 and are addressed in this column.

This column is submitted on behalf of the Environmental and Land Use Law Section, David Scott Dee, chair, and Sid F. Ansbacher, editor.

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