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## And Now . . . School Concurrency

by David L. Powell and Michele Gazica

In recent years, Florida's growing population has led to overcrowded schools in many communities. Although this problem is a brick-and-mortar fiscal issue, the legislature in 2005 decided to address the problem as a regulatory matter through a new mandate aimed at the development of new neighborhoods. In doing so, lawmakers accepted Gov. Bush's recommendation to reverse a 20-year policy of allowing local communities to adopt school concurrency on a local option basis.

Under the new law, unless they fall within an exemption, all communities must set up school concurrency programs by 2008 through amendments to their local comprehensive plans, based on written agreements between local governments and the district school board.<sup>1</sup> When these programs are in place, a residential development may be denied if there will not be adequate school capacity in the area to accommodate pupils who would be housed in the project within three years of final plat or site plan approval.

Concurrency is a land use regulation which controls the timing of new real estate development so adequate public facilities will be available to accommodate the impacts of that new development. It puts "teeth and bite into growth management."<sup>2</sup> This type of timing control on development has been adopted in many communities since the seminal 1972 court decision of *Golden v. Planning Board of the Town of Ramapo*, 30 N.Y. 2d 359,

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### Implementing the legislature's new school concurrency mandate will require lengthy negotiations and technical studies, especially in Florida's urban counties.

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285 N.E. 2d 291 (N.Y. 1972), *appeal dismissed*, 409 U.S. 1003 (1972).

In 1985, the Florida Legislature required all local comprehensive plans to include an adequate public facility requirement for water, sewer, drainage, solid waste, parks, and transportation.<sup>3</sup> Basic principles of concurrency were developed in agency rulemaking and case-by-case adjudication,<sup>4</sup> and generally were ratified by the legislature in 1993.<sup>5</sup>

Local governments have been empowered to impose school concurrency at local option for years.<sup>6</sup> Because of divided governmental authority, however, school concurrency presents such daunting challenges that only one urban area – Palm Beach County – has set up a school concurrency system that

meets all state requirements.

Cities and counties plan for growth in their comprehensive plans and regulate it through zoning and development orders.<sup>7</sup> Each of the 67 school districts designs, constructs, and operates public schools.<sup>8</sup> Each district must adopt a five-year capital facilities program, to be updated annually, based on projected available revenues.<sup>9</sup> For these reasons, school concurrency is primarily a challenge in intergovernmental coordination.

The legislature has addressed these challenges over the years. In 1993, lawmakers decided that further study based on local-option experiments was necessary before school concurrency should be mandated statewide.<sup>10</sup> Lawmakers also imposed various substantive and procedural requirements for local option school concurrency.

In 1996, Broward County attempted to set up a countywide school concurrency system. Broward's comprehensive plan amendments ended up in litigation, resulting in a final order determining that the amendments were not "in compliance" with state law.<sup>11</sup>

In response, the legislature in 1997 created the Public Schools Construction Study Commission to conduct a policy review of school concurrency.<sup>12</sup> The commission recommended continuation of school concurrency at local option.<sup>13</sup> The legislature agreed and enacted the commission's recommended framework for local option school concurrency.<sup>14</sup> It was this 1998

framework which was made mandatory by the legislature in 2005, with a few noteworthy changes.

Under the 2005 law, all counties and the municipalities within them must establish a school concurrency system. The only exemption is for each county, and the municipalities within it, whose schools are operating at less than 100 percent of capacity and whose projected five-year pupil growth rate is under 10 percent.<sup>15</sup>

School concurrency must be established on a countywide basis.<sup>16</sup> There are important legal reasons for this requirement. The Florida Constitution calls for "a uniform system of free public schools."<sup>17</sup> The Florida Supreme Court has held that "there need not be uniformity of physical plant and curriculum from county to county because their requirements differ."<sup>18</sup>

In dicta in a 1991 school impact fee case, however, the court suggested that the uniform schools requirement may apply with more exacting precision in each county.<sup>19</sup> Although it presents practical challenges, countywide school concurrency is thus intended to satisfy the constitution and prevent discrimination among pupils in settled, declining, or growing areas of a district.

To achieve uniformity, all participating local governments in the county must first execute an interlocal agreement which addresses eight planning issues identified by statute.<sup>20</sup> To make school concurrency more workable, certain small municipalities are exempted so they cannot block establishment of a countywide school concurrency system for urban districts.<sup>21</sup> The criteria are tailored to exempt only those cities not having a significant impact on the demand for public schools.

Each participating city and county must include in its comprehensive plan a public school facilities element to pull together the goals, objectives, and policies set out in the interlocal agreement.<sup>22</sup> The element must meet statutory requirements<sup>23</sup> and DCA's rule-set

minimum criteria.<sup>24</sup>

An essential component of any concurrency system is the level-of-service (LOS) standard at which a public facility is expected to operate. LOS standards must be based on "capacity per unit of demand,"<sup>25</sup> in this case meaning the number of pupils to be served and not the schools' performance based on some qualitative measurement. The statute contains important provisions regarding LOS standards for school concurrency.<sup>26</sup>

As with mandatory concurrency for other public facilities and services,<sup>27</sup> the statute includes a malleable standard for evaluating locally set LOS standards for school concurrency. The statute requires school LOS standards to be "adequate and desirable,"<sup>28</sup> and to be based upon data and analysis.<sup>29</sup> Within these parameters, local governments and school boards have broad, but not unlimited, discretion.

One flash point in the 1998 school concurrency debate was the service

areas within school concurrency would be applied to new development. The legislature expressed its preference for countywide service areas<sup>30</sup> but allowed local governments to establish less-than-countywide service areas.<sup>31</sup> The 2005 legislation allows local governments to utilize a countywide service area only for the first five years. After that, each county must adopt less-than-countywide service areas, such as attendance zones.<sup>32</sup>

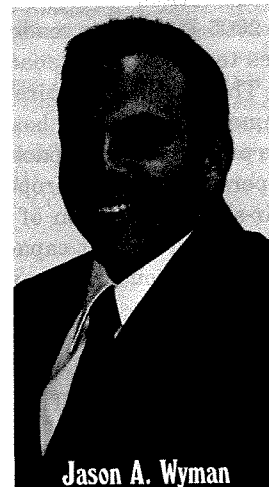
An indispensable ingredient of any concurrency system is a financially feasible plan to deliver the public facilities that are needed to achieve and maintain the adopted LOS standards throughout the planning period.<sup>33</sup> The facility provider must have the financial wherewithal to implement a capital improvements program to provide the needed facilities.<sup>34</sup> This basic tenet of concurrency is addressed in detail by the statute.<sup>35</sup>

Because concurrency is at the bottom of a timing mechanism, the

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comprehensive plan must specify when the public facility in question must be available in order to be "concurrent with" the impacts of the permitted development.<sup>36</sup> In 1998, the legislature decided a local government could not deny a development order for a residential project under local option school concurrency if adequate school space would be in place or under actual construction within three years from "permit issuance."<sup>37</sup> This standard was grounded on the conclusion that school concurrency is an exercise of the police power for the public welfare, not for health or safety.<sup>38</sup> It was based upon testimony from school officials that designing, permitting, and building a school takes from three to five years.<sup>39</sup>

In 2005, the legislature altered the statutory availability standard by providing that the three years would be measured from final subdivision plat approval or final site plan approval.<sup>40</sup> A local government may establish a more lenient standard, allowing more than three years to elapse between final plat or site plan approval and the date when the school facilities needed by the project are in use or under actual construction.

The 2005 legislation made other changes to the regimen enacted in 1998. The new law requires local governments and school boards to adopt a process and methodology for developers to pay their proportionate fair-share mitigation of school impacts if there is not capacity in the applicable concurrency service area.<sup>41</sup> By law, fair-share mitigation must be credited against school impact fees on a dollar-for-dollar basis at fair market value. This methodology is to be included in the interlocal agreement.<sup>42</sup>

The new law eliminates one accountability measure. It repeals the requirement for the boundaries of less-than-countywide concurrency service areas to be included in the comprehensive plan.<sup>43</sup> During compliance review, financial feasibility still must be demonstrated on the basis of "the service areas selected

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by the local government and the school board,"<sup>44</sup> but the statutes now do not directly address the implications of any post-compliance change in the boundaries of concurrency service areas.<sup>45</sup>

The 2005 legislation appears to overrule prior court decisions which allowed local governments to circumvent the statutory requirements for school concurrency when denying projects on grounds of inadequate school capacity. In 2000, Orange County denied a landowner's rezoning request to increase residential densities because there was not adequate classroom capacity in area schools. The county did so even though there was not a financially feasible capital facilities program to provide needed schools within a reasonable period of time. The Fifth District Court of Appeal affirmed this denial, rejecting arguments that the legislature preempted the field in 1998 with its statutory framework for local option school concurrency.<sup>46</sup>

With the 2005 law, it appears that the legislature has preempted the policy field with a detailed program to require uniform implementation of school concurrency statewide. Also, the new law provides that it "does not limit the authority of a local government to grant or deny a development permit or its functional equivalent prior to the implementation of school concurrency."<sup>47</sup>

By implication, denial of a rezoning *after* implementation of school concurrency, on grounds of inadequate school capacity, may only be based on adopted plan policies that meet the requirements of F.S. §163.3180(13).

Since 1998, only Palm Beach County and 26 participating municipalities have implemented countywide school concurrency in coordination with the district school board. This was no small feat, considering the number of governmental entities which had to agree to the basic elements of the program. Negotiating and preparing the interlocal agreement alone was an arduous process. Review by DCA and third parties raised a multitude of issues.<sup>48</sup>

The Palm Beach and Broward experiences suggest that a number of substantive and procedural issues will be important for communities that must implement the new statutory mandate for school concurrency. Among them are:

- Whether the public school facilities element and interlocal agreement are based upon best available data and analysis on population projections and projected school enrollments and are appropriately coordinated with the school board. These data and analysis must be based on appropriate assumptions and sound methodologies.

- Whether the public school facilities element and other components of the local comprehensive plan properly incorporate essential terms of the interlocal agreements negotiated by the county, school board, and participating municipalities. DCA's rules against self-amending plans require that the plan itself include essential required terms.

- Whether the school district's public schools capital facilities program is based on the same concurrency service area boundaries and LOS standards when it is evaluated by the state for compliance purposes as when it will be enforced on developers.

- Whether the school district's public schools capital facilities program is financially feasible. This issue was critical in Broward and

Palm Beach. It is important to developers who fear that school concurrency is just a strategy to force them to pay for schools that the community should pay for through general taxes.

• Whether the school district's public schools capital facilities program adequately addresses the class-size requirements of the Florida Constitution.<sup>49</sup> While DCA's minimum criteria rules do not expressly establish this issue as a minimum criterion, it was raised by a third party during review of the Palm Beach program.

Implementing the legislature's new school concurrency mandate will require lengthy negotiations and technical studies, especially in Florida's urban counties. Moreover, given the high importance of this issue to many different constituencies, a well-conceived public involvement program would be beneficial to minimize the prospect of controversy and litigation.

It's not too early to start. □

<sup>1</sup> Act effective July 1, 2005, ch. 2005-290, §5, 2005 Fla. Laws (amending FLA. STAT. §163.3180(13)(2004)). Local governments and school boards that fail to comply with the new mandate will be subject to financial sanctions.

<sup>2</sup> Robert M. Rhodes, *Concurrency: Problems, Practicalities, and Prospects*, 6 J. LAND USE & ENVTL. L. 241, 243 (1991).

<sup>3</sup> See FLA. STAT. §163.3177(3) (1986).

<sup>4</sup> See Thomas G. Pelham, *Adequate Public Facilities Requirements: Reflections on Florida's Concurrency System for Managing Growth*, 19 FLA. ST. U. L. REV. 973, 1011-23 (1992).

<sup>5</sup> See David L. Powell, *Managing Florida's Growth: The Next Generation*, 21 FLA. ST. U. L. REV. 223, 291-312 (1993).

<sup>6</sup> Prior to 1985, local governments had express authority to prohibit or limit residential projects if adequate school facilities would not be available. FLA. STAT. §235.193(4) (1984). See *S. Coop. Dev. Fund v. Driggers*, 696 F.2d 1347 (11th Cir. 1983), *affirming*, 527 F.Supp. 927 (M. Dist. Fla. 1981). This authorization was repealed in 1985. See ch. 85-55, §25, 1985 Fla. Laws 207, 238-39; ch. 85-116, §§10, 26, 27, 1985 Fla. Laws 683, 693, 717.

<sup>7</sup> FLA. STAT. ch. 163, Part II (2004).

<sup>8</sup> FLA. STAT. §1001.42 (2004).

<sup>9</sup> FLA. STAT. §1013.35 (2004).

<sup>10</sup> FLA. STAT. §163.3180(1) (1993). See also *Envtl. Land Management Study*

*Comm., Final Report: Building Successful Communities* at 66 (Dec. 1992).

<sup>11</sup> *Econ. Dev. Council of Broward, Inc. v. Dep't of Cmty. Affairs*, DOAH Case Nos. 96-6138GM, 97-1875GM, at 2. (Admin. Comm'n Final Order entered Mar. 11, 1998) (on file with clerk, Admin. Comm'n., Tallahassee, FL).

<sup>12</sup> Act effective July 1, 1997, ch. 97-152, §6, 1997 Fla. Laws at 2508, 2825; act effective July 1, 1997, ch. 97-253, §13, 1997 Fla. Laws 4935, 4951 (Specific Appropriation 1628).

<sup>13</sup> Public Schools Construction Study Comm'n, *Final Report* (Dec. 1997) at 17 [hereinafter "*Schools Report*"].

<sup>14</sup> FLA. STAT. §163.3180(12) (1998).

<sup>15</sup> Act effective July 1, 2005, ch. 2005-290, §2, 2005 Fla. Laws (amending FLA. STAT. §163.3177(12) (2004)). The new law does not specify whether "capacity" means design capacity. In a county with school concurrency, an individual municipality will be exempt from the program if it meets certain criteria carried forward from the 1998 law. Act effective July 1, 2005, ch. 2005-290, §5, 2005 Fla. Laws; see also FLA. STAT. §163.3180(12)(f)1.a-d. (1998).

<sup>16</sup> FLA. STAT. §163.3180(13) (2004).

<sup>17</sup> FLA. CONST. art. IX, §1.

<sup>18</sup> *School Bd. of Escambia County v. State*, 353 So. 2d 834, 838 (Fla. 1977). See *Coalition for Adequacy and Fairness in Sch. Funding, Inc. v. Chiles*, 680 So. 2d 400, 406 (Fla. 1996), quoting *Florida Dep't of Educ. v. Glasser*, 622 So. 2d 944, 950 (Fla. 1993) (Kogan, J., concurring).

<sup>19</sup> *St. Johns County v. N.E. Florida Builders Ass'n*, 583 So. 2d 635, 639 n.3 (Fla. 1991).

<sup>20</sup> Act effective July 1, 2005, ch. 2005-290, §5, 2005 Fla. Laws (amending FLA. STAT. §163.3180(13)(g)1-8. (2004)).

<sup>21</sup> FLA. STAT. §163.3180(13)(f)1 (2004).

<sup>22</sup> FLA. STAT. §163.3180(13)(a) (2004).

<sup>23</sup> FLA. STAT. §163.3177(12)(a)-(f) (2004).

<sup>24</sup> See FLA. ADMIN. CODE r. 9J-5.005(1)(a) (2005); see also FLA. ADMIN. CODE r. 9J-5025 (2005).

<sup>25</sup> FLA. ADMIN. CODE r. 9J-5.003(47) (2005).

<sup>26</sup> FLA. STAT. §163.3180(13)(b)1 & (b)2 (2004); see also Fla. Stat. §163.3180(13)(b)3 (2004); FLA. ADMIN. CODE r. 9J-5.005(3) & 9J-5.0055(2) (2005).

<sup>27</sup> FLA. STAT. §163.3177(3)(a)3 (2004).

<sup>28</sup> FLA. STAT. §163.3180(13)(b)3 (2004).

<sup>29</sup> FLA. STAT. §163.3180(13)(b)1 (2004).

<sup>30</sup> FLA. STAT. §163.3180(13)(c)1 (2004).

<sup>31</sup> FLA. STAT. §163.3180(13)(c)2 (2004).

<sup>32</sup> Act effective July 1, 2005, ch. 2005-290, §5, 2005 Fla. Laws (amending FLA. STAT. §163.3180(13)(c)1 (2004)).

<sup>33</sup> FLA. ADMIN. CODE r. 9J-5.0055(1)(b) (2005).

<sup>34</sup> *Schools Report* at 25.

<sup>35</sup> FLA. STAT. §163.3180(13)(d)3. (2004). Notably, the new law contains the first statutory or rule definition of "financial feasibility." Act effective July 1, 2005, 2005-290, §1, 2005 Fla. Laws (amending FLA. STAT. §163.3164(32) (2004)).

<sup>36</sup> *Schools Report* at 26. A public facil-

ity is "available" if it is "in use or under actual construction." FLA. STAT. §163.3180(2) (2004).

<sup>37</sup> FLA. STAT. §163.3180(13)(e) (2004).

<sup>38</sup> *Schools Report* at 26.

<sup>39</sup> *Id.*

<sup>40</sup> Act effective July 1, 2005, ch. 2005-290, §5, 2005 Fla. Laws (amending FLA. STAT. §163.3180(13)(e) (2004)).

<sup>41</sup> Act effective July 1, 2005, ch. 2005-290, §5, 2005 Fla. Laws (amending FLA. STAT. §163.3180(13)(g)8 (2004)).

<sup>42</sup> Act effective July 1, 2005, ch. 2005-290, §5, 2005 Fla. Laws (amending FLA. STAT. §163.3180(13)(e) (2004)).

<sup>43</sup> Act effective July 1, 2005, ch. 2005-290, §5, 2005 Fla. Laws (amending FLA. STAT. §163.3180(13)(c)2 (2004)).

<sup>44</sup> FLA. STAT. §163.3180(13)(d)3 (2004).

<sup>45</sup> Boundary changes not included in the plan can materially affect the applied financial feasibility of a capital program, as demonstrated in the *Broward* case, resulting in unfair enforcement of school concurrency during development review. State requirements for plans to be based on the best available data, see FLA. STAT. §163.3177(8) (2004), FLA. ADMIN. CODE r. 9J-5.005(2)(c) (2005), and for regular evaluation and appraisal reports, see, e.g., FLA. STAT. §163.3191(2)(c) and (2)(k) (2004), should force concurrency service area boundaries to be updated periodically in local plans, but that will address the concern only to a limited extent.

<sup>46</sup> *Mann v. Bd. of County Comm'rs*, 830 So. 2d 144 (Fla. 5th D.C.A. 2002), *rev. denied*, 844 So. 2d 646 (Fla. 2003).

<sup>47</sup> Act effective July 1, 2005, ch. 2005-290, §5, 2005 Fla. Laws (amending FLA. STAT. §163.3180(13)(h) (2004)).

<sup>48</sup> Department of Community Affairs, *Objections, Recommendations and Comments Report (regarding Palm Beach County Amendment 01-SC-1)* (Feb. 24, 2000); Florida Home Builders Ass'n, *Review and Comments Regarding the Proposed Palm Beach County Public School Concurrency Requirement and the Related Comprehensive Plan Amendments and Interlocal Agreements* (Mar. 21, 2001).

<sup>49</sup> FLA. CONST. art. IX, §1.

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*This column is submitted on behalf of the Environmental and Land Use Law Section, Robert D. Fingar, chair, and Martha M. Collins, editor.*