GROWTH MANAGEMENT AND THE CONCEPT OF CONCURRENCY: FLORIDA'S EXPERIENCE

Florida's experimentation with an innovative form of land use planning regulation is intended to bring the level of service (LOS) of public facilities in line with new real estate development.

by H. Glenn Boggs, II and Robert C. Apgar

"It was the best of times, it was the worst of times. . . ." Charles Dickens' observation concerning the state of revolutionary France in the late 19th century may be applied to the problems of managing growth in Florida at the close of the 20th century.[1] Florida's quick, massive growth has produced the best of times for business and the economy but the worst of times in recent memory for the environment.

Florida's problems in managing growth are due to a profound tension between two generally laudable goals. Most citizens enjoy the benefits of business and economic growth—job production, real estate price appreciation and fiscal prosperity—but many citizens openly advocate continued growth. Some residents are voicing concerns about the dangers of business and economic growth to the pure water and natural environment that ensure the tranquil conditions in which they wish to live. They are advocating slower, more regulated growth. The pro-growth advocates often complain that environmental restrictions will stifle growth and ruin the economy, while environmentalists insist that continued growth at the current pace will destroy the quality of life that fosters economic development.

No doubt most members of the general public want *both* a job in a robust economy and a clean, pleasant environment in which to live and work. Inevitably, public policy in this area demands compromise and balance. The Sunshine State appears to be on the cutting edge of experimentation with growth-related public policy. This article discusses Florida's attempt to achieve an equitable public policy that will bring economic growth into balance with the state's ability to absorb new development.

The Background

Florida's growth and the problems it has created are widely known. Florida is one of the fastest growing states in the nation.[2] However, while its total population has increased rapidly, the percentage of the population living in central cities has declined. In its final report published in June, 1989, the Governor's Task Force on Urban Growth Patterns reported that the rate of population growth in 17 of Florida's 21 metropolitan areas greatly exceeded the rate of growth in the central cities. The city of Orlando, for example, grew by 61% between 1970 and 1988, but the surrounding metropolitan area grew by 117%. The task force reported that the number of counties that are part of metropolitan areas increased from 12 in 1970 to 32 in 1989. The task force

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concluded that this growth trend "is indicative of the urban development pattern known as urban sprawl—scattered, unplanned, low density development that is not functionally related to adjacent land uses—a development pattern that has come to characterize Florida in the minds of many."[3] Although this trend is not limited to Florida, it does reflect the expectation of most new residents of the state: that they will find homes in low density urban settings that preserve green space, beaches, clean water and areas of natural beauty.

While rapid growth takes place, Florida's state and local governments are struggling to fashion an effective statewide growth management program. These efforts have followed two major directions: First, Florida implemented a number of environmental-permitting programs that were designed to protect the fragile natural environment. State statutes and regulations were instituted to protect wetlands, air quality and stormwater discharge, to name but a few. Second, in 1974 the Florida legislature adopted the Local Government Comprehensive Planning Act which required each local government to devise a comprehensive plan for controlling and directing growth.

It became clear in the early 1980s that local comprehensive plans in Florida were, except in a few instances, wholly inadequate for controlling private sector development. In 1985, the legislature made major amendments to the planning act, including detailed requirements for the scope and content of local plans and a requirement that each local government submit its completed comprehensive plan to the state for review and approval.[4] This process is underway and will be completed in 1991, and local governments' continued eligibility for certain state funds will depend on successful completion of state review.

The most controversial addition to the planning act is a provision requiring local governments to ensure that necessary public facilities would be made available *concurrent* with the impacts of new development. This requirement is known as the "concurrency standard" or simply as "concurrency," and it is new in Florida law and in the nation. An analysis of Florida concurrency law is the centerpiece of this discussion.

> The concept of concurrency is deceptively simple. It is expressed in the statute as follows:
>
> It 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.[5]

Concurrency has been described as the "teeth" of Florida's new planning and growth management laws.[6] Concurrency is the only element of the Planning Act that requires local governments to control the timing, as well as the location and physical layout, of development.

To implement this concept, the Planning Act requires each local government in Florida to include in its comprehensive plan a capital improvements element with:

> Standards to ensure the availability of public facilities and the adequacy of those facilities including acceptable levels of service.[7]

Finally, and most importantly, the act mandates that Florida's local governments review every proposed development and ensure that public facilities will not be degraded below an established level of service of public facilities, commonly abbreviated as LOS, before they issue a development order:

> Not later than one year after its due date. . . a local government shall not issue a development order or permit which results in a reduction in the *level of services* for the affected public facilities below the level of services provided in the comprehensive plan of the local government. (Emphasis added.)[8]

Because of this legislation, the level of services (LOS), has become Florida's newest land use regulatory standard. LOS joins zoning, subdivision regulation, building codes and environmental performance standards in the local regulation arsenal. However, it differs fundamentally from these other regulations in that it concerns primarily the timing of development.

Administrative Policy

Initially, the concurrency concept was met by strong opposition from the private sector because of the fear that concurrency would be applied in a draconian fashion and would bring growth in Florida to a screeching halt. Probably, development interests throughout the nation harbored the same fear. Early in the implementation process, however, Thomas G. Pelham, Florida's Secretary of the Department of Community Affairs, emphasized that concurrency would be applied "with common sense in a reasonable and flexible manner. . . ." In a letter to Florida State Senator Gwen Margolis of North Miami Beach, Secretary Pelham stated that "taking an unreasonable and inflexible approach would, in my opinion, result in a very quick collapse of our new comprehensive planning process."

In the same letter, Secretary Pelham indicated that the state intended to provide local governments with a means of avoiding involuntary moratoria because of existing over-capacity. He recognized that in many places in Florida public facilities did not meet a minimum LOS even for existing development. He therefore proposed that the Department of Community Affairs would allow local governments to proceed as if they had an under-capacity, as long as existing facilities did not threaten public health or safety and the local government developed and implemented a realistic plan for bringing the LOS within an acceptable range in a reasonable period of time.[9]

Florida Administrative Code

The Department of Community Affairs has interpreted the concurrency requirement as an administrative rule that requires local governments to adopt LOS standards for six public facilities or services: roads, potable water, sanitary systems and sewers,

solid waste disposal, drainage, parks and recreation. A standard for mass transit also must be adopted if the population governed by a local government exceeds 500,000.[10] The LOS standards must be adequate to meet the public's basic needs, and they must be realistic. If a facility currently does not meet the adopted LOS, the local government must have a plan to achieve the LOS by a certain time.

The primary focus of this administrative rule is to set minimum standards for local governmental review of proposed developments. For example, for potable water, sewer, solid waste disposal and drainage, the local government may issue a development permit only if:

1. The necessary facilities are in place;
2. The permit is conditional on the facilities being in place when development impacts occur;
3. The necessary facilities are under construction; or
4. The necessary facilities are guaranteed in an enforceable development agreement.[10]

The standard for parks and recreation facilities is more liberal. Development is allowed if the construction of parks and recreation facilities is scheduled to begin within one year of the date of issuance of a development permit, pursuant to an executed contract or an enforceable development agreement.[11]

The local government is granted the most latitude for the construction of roads and mass transit. In addition to the situations described above, improvements may be planned if they are included in the first three years of the Florida Department of Transportation five-year work program or if they are included in local capital improvements that meet financial feasibility requirements.[12]

Interestingly, the rule contains no guidance or requirements for developing or applying LOS standards; it simply states that "the local government must develop guidelines."[13] The state thus allows wide divergence among local governments, which is a major concern in the area of transportation. The only available models for local governments are the sophisticated computer modeling methodologies developed to study developments of regional impact and major developments subject to state and regional review under Florida statutes.

However, these methodologies are undesirable for an entire jurisdiction. They focus on one project at a time and typically analyze every roadway link and intersection for which a project is predicted to contribute more than 10% of a specified LOS capacity. Some jurisdictions carry the analysis to a 5% impact. These methodologies require local governments to analyze every project in their jurisdiction and may lead local governments to deny permits for minor impacts on unimportant roadway links or intersections where no improvements are scheduled or desired. To address this problem, several jurisdictions have proposed newer models that allow impacts to be averaged over a transportation corridor or district. The Department of Community Affairs appears to be close to approving an averaging approach in at least one county, and it seems inevitable that some averaging method will be accepted to replace the facility-by-facility techniques.

As may be expected, a major and continuing dispute regarding transportation LOS revolves around the competing priorities of state and local governments over the state road system. The 1985 planning act was unclear about who would establish the LOS on the state road system. The state insisted on higher LOS, arguing that it must maintain an efficient intrastate system despite the existing congestion on many state highways. Local governments feared that enforcing the state standards would drastically curtail development that would impact state roads. To resolve this dispute, the Department of Community Affairs amended its rules to allow local governments to set the LOS on all public facilities within their jurisdiction,[14] but it requires the local government to consider and meet the Department of Transportation's LOS standard "to the maximum extent feasible as determined by the local government. . ."[15] Later, the Department of Community Affairs announced a new policy:

> ". . .when a state road is operating below the acceptable LOS, the local government must plan for improvements or plan to meet the need on a parallel corridor. The local government must also prevent further degradation in service on the road. In other words, if a local government makes land use decisions that adversely impact LOS on a state road, the local government must take responsibility for making the needed improvements."[16]

This dispute is ongoing.[17]

Local Concurrency Management Systems

Florida's concurrency rule requires each local government to establish a "concurrency management system." Simply stated, a concurrency management system is an accounting system through which the local government measures the capacity that is available in each affected public facility, subtracts the capacity that is committed to vested or approved projects and derives the remaining capacity, if any, that is available for new projects. The local government then establishes a permitting process for evaluating the impacts of proposed development and making commitments to service capacity. The concurrency rule requires that:

> The latest point in the application process for the determination of concurrency is prior to the approval of an application for a development order or permit which contains a specific plan for development, including the densities and intensities of development.[18]

In some circumstances, the local government may include the capacity on public improvements that are under construction or under contract to begin construction or on improvements that are guaranteed by an enforceable development agreement between a developer and the local government.

The jurisdictions that have adopted concurrency regulations typically create a concurrency "certificate" or similar permit. They issue the certificate

based upon a determination of available capacity and guarantee that the necessary capacity will be reserved for the developer's project for periods that may vary from six months to two years.

Experience has shown that the transportation LOS is the most problematic. Florida is experiencing a major backlog of transportation improvements. In many places, the strict application of concurrency regulations would make it impossible to obtain a development permit. The Department of Community Affairs allows local jurisdictions some flexibility in these cases. For example, if a jurisdiction has a funded capital improvements plan that will improve the LOS on a road to an acceptable degree, it may allow additional development that will not add more than 10% of the existing traffic load. Alternatively, the local government may set a "two-tier" LOS: a temporary lower LOS followed by a higher LOS to be achieved at a certain date. Although each jurisdiction is required to meet the minimum standards of the concurrency rule, the ordinances may be more restrictive.[19]

How Will Florida Courts Respond?

At the time of this writing, no Florida court has ruled on a challenge to the concurrency regulation in general or to any specific LOS standard. Accordingly, a discussion of this issue will necessarily involve an attempt to anticipate future judicial decisions that will resolve controversies in this area and construe applicable statutes, administrative rules and ordinances.

First, however, it is desirable to describe the judicial climate that exists in this area of law, since current decisions and prevailing judicial philosophy undoubtedly will influence future judicial determinations. Perhaps the vanguard case that illustrates the present judicial climate in the area of planned growth management is *Golden v. Planning Board of Town of Ramapo* which was decided in 1977 by the New York state courts.[20]

In *Golden v. Town of Ramapo*, zoning requirements prohibited specified development activities until municipal services were available to accommodate the new growth. The town had an 18-year capital plan to provide the services.[21] In considering the constitutionality of a planned growth system like this, the court said:

> In sum, where it is clear that the existing physical and financial resources of the community are inadequate to furnish the essential services and facilities which a substantial increase in population requires, there is a rational basis for "phased growth" and hence, the challenged ordinance is not violative of the Federal and State Constitution.[22]

Before leaving the discussion of *Golden v. Town of Ramapo*, a word of caution should be sounded regarding judicial approval of local planned growth systems. It must be clear to the reviewing courts that a local government's motive for adopting this type of regulation does not stem from a desire to exclude low income or minority citizens from taking up residence in the community. Instead, planned growth ordinances need to be based on reasonable criteria which provide the capital improvements that are required to serve new residents in an orderly and economically feasible manner.[23]

In addition to challenges of planned growth ordinances from low income groups or minorities, property owners who are dissatisfied by governmental rejection of their development or construction plans also are prone to legally attack ordinances of this type. Of course, the Fifth Amendment to the U.S. Constitution requires the government to pay property owners "just compensation" before taking their private property for a public purpose. However, if the government only regulates the use of property, has it actually taken property and brought Fifth Amendment principles into play? This question, known as "taking issue," is one of the thorniest problems in the area of land use regulation.

One cardinal principle was laid down by the U.S. Supreme Court in 1922 in *Pennsylvania Coal Company v. Mahon*. In an often-quoted opinion, Justice Oliver W. Holmes announced the court's ruling as follows:

> The general rule at least is, that while property may be regulated to a certain extent, if the regulation goes too far it will be recognized as a taking.[24]

Earlier in the opinion, he also wrote:

> Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized, some values are enjoyed under an implied limitation and must yield to the police power.[25]

The problem for property owners and for persons analyzing the Florida concurrency requirements is how to decide when regulations that adversely affect property go "too far" and amount to a taking. In recent years, two U.S. Supreme Court cases have shed more light on this question. The first was *Agins v. City of Tiburon* in which the court said:

> The application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests,. . . or denies an owner economically viable use of his land. . . .The determination that government action constitutes a taking is, in essence, a determination that the public at large, rather than a single owner, must bear the burden of an exercise of state power in the public interest.[26]

More recently in 1987, the U.S. Supreme Court approved the *Agins* principles while deciding *Keystone Bituminous Coal Association v. DeBenedictus*.[27] Indeed, the court probably elevated the stature of the *Agins* rationale by stating (when referring to *Agins*):

> The two factors that the Court considered relevant, have become *integral parts of our taking analysis*. We have held that land use regulation can effect a taking if it "does not substantially advance legitimate state interests,. . .or denies an

owner economically viable use of his land." (Emphasis added.)[28]

Therefore, Florida courts would be obliged to rule in favor of an aggrieved landowner when and if the challenged regulation was found to ". . .not substantially advance legitimate state interests,. . .or denies an owner economically viable use of his land." The U.S. Supreme Court also has ruled that even when a "taking" by regulatory action is temporary, the state must pay just compensation to the property owner for the period of time that the offending regulation was in effect. This decision was reached in 1987 in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*.[29] In this case, the court assumed (because of the procedural posture of the case) that the regulation in question denied the plaintiff "all use" of the property. Under these circumstances, if they proved to be true, the court held that compensation would be required for the period of time the land was over-regulated, even if the regulation was subsequently diminished by repeal or amendment.[30]

If and when challenges to concurrency requirements reach the Florida state courts, the U.S. constitutional principles just described should provide protection for property owners. Much latitute for state court decision-making will still exist regarding the procedures for implementing concurrency (without offending federal requirements) and for deciding whether protections for landowners, in addition to those required under federal law, will be erected in keeping with the state's constitution, statutes, ordinances and administrative regulations.

Hints about what to expect from the courts can be gleaned from decisions that have resolved disputes concerning local governments' adoption of comprehensive plans and zoning decisions. For example, in the 1990 decision of *J. T. Glisson v. Alachua County*, the Florida First District Court of Appeals was called upon to resolve property owners' claims that the Alachua County Comprehensive Plan illegally deprived them of rights to use and develop their property. Citing a number of cases, including *Agins v. City of Tiburon*, the court decided that:

> To succeed in a regulatory taking claim, a property owner must demonstrate (1) that a regulation is unreasonable or arbitrary, or (2) that it denies a substantial portion of the beneficial use of the property. . .
>
> A police power regulation is not invalid simply because it denies the highest and best use of the property, . . .or because it dramatically diminishes the value of the property. . .
>
> Rather, "[i]f the regulation is a valid exercise of the police power, it is not a taking if a reasonable use of the property remains."[31]

If the logic developed by the First District Court in *Glisson v. Alachua County* is applied to concurrency disputes, it leaves local governments with a wide range of concurrency implementation options which would probably survive an attack based on a regulatory taking argument. For example, if an owner's request for an intensive development is denied on concurrency grounds but the local regulation is neither unreasonable nor arbitrary and if the local authorities are prepared to permit some less intensive use of the land, then no regulatory taking should occur.

Another question likely to arise is how to determine whether a concurrency regulation is either "unreasonable" or "arbitrary." When a court is called upon to evaluate a particular concurrency rule, what standard of review should the court use? There appears to be a choice between two possibilities. Courts could follow the process that has already been developed to review traditional local government zoning decisions (not involving a comprehensive plan) or that has been used to measure land use planning decisions. In the 1987 case of *Machado v. Musgrove*, the court held that: "land use planning and zoning are different exercises of sovereign power, . . .therefore, a proper analysis, for review purposes, requires that they be considered separately."[32] Historically and traditionally, local government land use decisions implementing zoning ordinances have been given considerable weight by reviewing courts, and challenges have been successful only when the local body did not have even "fairly debatable" evidence to support its decisions.[33] On the other hand, when a land use decision has been challenged as inconsistent with the comprehensive plan, local decisions have been accorded considerably less deference because decisions that implement the comprehensive plan must be *consistent* with the plan.[34] Accordingly, the standard of review has been the ". . .non-differential standard of strict judicial scrutiny."[35] If this view is followed, then:

> . . .the burden is on the applicant for rezoning to show by *competent and substantial evidence* that the requested rezoning conforms to. . .the plan. (Emphasis added.)[36]

Since concurrency decisions must be made in accordance with the dictates of the local comprehensive plan, it seems likely that the correct standard for judicial review will be the same one that governs zoning decisions that implement the plan—namely, "strict judicial scrutiny." Accordingly, if the concurrency requirements in a particular jurisdiction adhere to the adopted comprehensive plan, then the likelihood that they will be judged either "arbitrary" or "unreasonable" should be low. However, reviewing courts that follow the "strict judicial scrutiny" concept probably will cast a sharp judicial eye on local governments in this respect when a case is presented for resolution.

Before leaving this topic, some mention also should be made regarding a local government's decision to adopt concurrency requirements that will become, in effect, a moratorium on development because the government's LOS requirements are high enough that almost any development would cause them to be violated. Generally, local governments have had the power to adopt a moratorium when the government has been making reasonable progress toward solving some *bona fide* crisis and when the moratorium has been temporary.[37] Once again, even

assuming a moratorium passes judicial muster under a state law analysis, federal concepts also must be met to avoid an unconstitutional regulatory taking of a citizen's property. The issue of whether concurrency requirements in some localities have caused a *de facto* and allegedly illegal moratorium will very likely receive judicial attention in the foreseeable future.

Conclusion

Concurrency management is a new and unique form of land use planning regulation. The full impact of this type of regulation will not become clear until Florida's cities and counties have accumulated experience in concurrency management. We can say, however, that the application of concurrency regulations may result in lengthy delays in development. No Florida court has yet ruled on a direct challenge to the state's concurrency regulation. Based upon previous court cases that have challenged Florida's planning laws, however, it seems unlikely that concurrency management will be invalidated. It also seems unlikely that concurrency will be eliminated because the concept has broad public support in Florida. The challenge for developers and local governments will be to work out fair and equitable methods for applying concurrency management.

NOTES

1. Dickens, Charles, *A Tale of Two Cities* (Dodd, Meade & Co., Inc., 1942): 3.
2. Florida's rapid population growth is well known. For example, preliminary indications from the 1990 census indicate that Florida may receive four new seats in the U.S. House of Representatives.
3. Governor's Task Force on Urban Growth Patterns, Final Report (June 1989):9.
4. Florida Statutes Section 163.3184(6).
5. Florida Statutes Section 163.3177(10) (h).
6. Kobrin and Rubin, "Concurrency," *The Florida Bar Journal* (January 1990): 55.
7. Florida Statutes Section 163.3177(3) (2) 3.
8. Florida Statutes Section 163.3202 (2) (g).
9. Secretary Pelham's objectives were implemented in the Department of Community Affairs' rules, Chapter 9J-5, Florida Administrative Code *Chapter 9J-5*.
10. Florida Administrative Code Rule 9J-5.0055(2)(a).
11. Florida Administrative Code Rule 9J-5.0055(2)(b).
12. Florida Administrative Code Rule 9J-5.0055(1)(c).
13. Florida Administrative Code Rule 9J5.0055(2)(e).
14. Florida Administrative Code Rule 9J-5.0055(2)(b).
15. Florida Administrative Code Rule 9J-5.007(2)(b).
16. Florida Department of Community Affairs. *Technical Memo* (Winter, 1989).
17. See Spikowski, *Transportation Levels of Service: Evolving State & Local Rules*, Newsletter of the Florida Chapter of the American Planning Division.
18. Florida Administrative Code Rule 9J-5.0055(2)(e).
19. Florida Administrative Code Rule 9J-5.0055(1)(c).
20. 30 N.Y. 2d 359, 334 N.Y.S. 2d 138, 285 N.E. 2d 291 (1972).
21. *Id.*
22. *Id.*
23. For a further discussion of this issue in addition to *Town of Ramapo*, see also *Construction Industry Association, Sonoma City v. City of Petaluma*, 522 F.2d 897 (9th Cir. 1975) and *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977).
24. 260 U.S. 393 (1922).
25. *Id.*
26. 447 U.S. 255 (1980).
27. 480 U.S. 470 (1987).
28. *Id.*
29. 107 S. Ct. 2378 (1987).
30. *Id.*
31. 558 So. 2nd 1030 (Fla. 1st D.C.A. 1990).
32. 519 So. 2d 629 (Fla. 3rd D.C.A. 1987).
33. *Id.* at 632.
34. *Id.*
35. Id. See also *Southwest Ranches Homeowners Association v. Broward County*, 502 So. 2d 931 (Fla. 4th D.C.A. 1987) for a different view of this point.
36. *Id.* at 635.
37. For a more detailed discussion of this area of the law see: Smolker and Weaver, "Implementing and Coping with Concurrency: The Legal Framework and Emerging Constitutional Issues," *The Florida Bar Journal* (May, 1990) p: 47.