

1999

## Back to Basics on School Concurrency

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# FLORIDA STATE UNIVERSITY LAW REVIEW



BACK TO BASICS ON SCHOOL CONCURRENCY

*David L. Powell*

VOLUME 26

WINTER 1999

NUMBER 2

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Recommended citation: David L. Powell, *Back to Basics on School Concurrence*, 26 FLA. ST. U. L. REV. 451 (1999).

# BACK TO BASICS ON SCHOOL CONCURRENCY

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## I. INTRODUCTION

In recent years, Florida's burgeoning public school enrollment has led to overcrowded schools in urban areas. One response by state and local leaders has been to find additional means to finance classroom construction. Another has been to look for ways to economize on capital outlays for educational facilities. Although school overcrowding is in essence a brick-and-mortar fiscal issue, a third response has been to

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search for a regulatory strategy directed at those who develop and build new neighborhoods where families reside.<sup>1</sup>

This third response prompted the Florida Legislature in 1998 to revisit the issues of how school districts plan for educational facilities in relation to expected land development and how Florida's integrated planning and growth management system can be used to coordinate the timing of new residential development and new public schools. Lawmakers enacted a complete state policy to coordinate residential development with the construction of new schools.<sup>2</sup> By doing so, the Legislature addressed the latest public policy challenge presented by Florida's rapid growth and development, and reaffirmed important basic policies of Florida's concurrency system for managing growth.

## II. CONCURRENCY

The "teeth" of Florida's growth management system is the requirement that adequate public facilities be available on a timely basis to accommodate the impacts of development—the "concurrency" requirement.<sup>3</sup> As generally described by two commentators: "Concurrency is land use regulation which controls the timing of property development and population growth. Its purpose is to ensure that certain types of public facilities and services needed to serve new residents are constructed and made available contemporaneously with the impact of new development."<sup>4</sup>

Adequate public facilities requirements have been adopted in many locations around the country in recent years.<sup>5</sup> Henry Fagin laid the theoretical basis for this planning tool in an influential 1955 article in which he made the case that land development regulations should in-

1. See, e.g., Evan Perez, *As Suburbs Spread Westward, County's School Crunch Grows*, TALL. DEM., Apr. 11, 1997, at B9 (stating that Broward County school enrollment is growing by 10,000 each year).

2. See Act effective July 1, 1998, ch. 98-176, §§ 4-9, 1998 Fla. Laws 1556, 1559-67 (amending scattered sections of FLA. STAT. ch. 163 and ch. 235 (1997)); Act effective May 22, 1998, ch. 98-176, §§ 10-11, 1998 Fla. Laws 1556, 1567-68. Although most of the Act was effective on the date it became law, the sections dealing with school concurrency became effective on July 1, 1998. See Act effective July 1, 1998, ch. 98-176, §§ 4-9, 1998 Fla. Laws 1556, 1559-67. The 1998 Legislature also refined the state laws on school facility planning. See *id.* §§ 7-9, 1998 Fla. Laws at 1566-67 (amending FLA. STAT. §§ 235.185, .19, .193 (1997)). For a discussion of how the 1998 legislation altered prior school concurrency procedures, see *infra* Part III.

3. See Florida Dep't of Comm'y Aff., *The Evolution and Requirements of the CMS Rule*, TECHNICAL MEMO, Aug. 1991, at 4; see also FLA. STAT. § 163.3177(10)(h) (Supp. 1998); David L. Powell, *Managing Florida's Growth: The Next Generation*, 21 FLA. ST. U. L. REV. 223, 291 (1993). The concurrency requirement takes its name from a provision enacted in 1986 declaring that "[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." FLA. STAT. § 163.3177(10)(h) (Supp. 1986) (emphasis added).

4. H. Glen Boggs, II & Robert C. Apgar, *Concurrency and Growth Management: A Lawyer's Primer*, 7 J. LAND USE & ENVTL. L. 1, 1 (1991).

5. See Douglas R. Porter, *The APF Epidemic*, URB. LAND, Nov. 1990, at 36, 36.

clude both spatial and temporal controls.<sup>6</sup> Fagin argued, "It is my belief that until the science of planning invents greatly improved methods for regulating the timing of urban development, many attempts at space coordination must continue to fail—master plans remaining unrealized, zoning ordinances ineffectual and rapidly obsolescing."<sup>7</sup> Fagin's theory of land use timing controls was put into practice some years later in a small town in New York named Ramapo, and his theory was validated in 1972 by the New York Court of Appeals in the landmark case of *Golden v. Planning Board of Ramapo*.<sup>8</sup>

Florida's concurrency requirement originated in two statutes enacted by the Legislature in 1985. The State Comprehensive Plan<sup>9</sup> provides general policy direction intended to achieve closer coordination in timing land development with the availability of infrastructure.<sup>10</sup> The Local Government Comprehensive Planning and Land Development Regulation Act<sup>11</sup> refines those broad principles into specific requirements related to capital improvements planning<sup>12</sup> and development permitting<sup>13</sup> by general-purpose local governments. The breadth and magnitude of Florida's concurrency requirement was viewed as a trail-blazing policy for other states to emulate, but in hindsight, this bold experiment was perhaps less commendable because "the practical implications of this seemingly simple and politically seductive policy were not fully understood when it was enacted in 1985."<sup>14</sup>

During implementation of this new statewide policy, the Department of Community Affairs (DCA)<sup>15</sup> utilized case-by-case adjudication to translate those provisions into the nuts-and-bolts machinery of mandatory concurrency for potable water, sanitary sewer, drainage,

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6. See Henry Fagin, *Regulating the Timing of Urban Development*, 20 LAW & CONTEMP. PROBS. 298, 298 (1955).

7. *Id.* at 298-99.

8. 285 N.E.2d 291, 305 (N.Y. 1972) (holding constitutionally valid the town's zoning amendment that imposed developmental growth restrictions until adequate municipal services were available).

9. See Act effective May 31, 1985, ch. 85-87, 1985 Fla. Laws 295 (current version at FLA. STAT. ch. 187 (1997)). The State Comprehensive Plan is required by statute to be reviewed biennially, although in practice it has not been.

10. See FLA. STAT. § 187.201(16)(a) (1997) (directing development to areas having environmentally friendly infrastructure), (18)(a) (stating the goal of planning and financing new public facilities in a "timely, orderly, and efficient manner"). The State Comprehensive Plan is the Legislature's enactment of 26 specific goals for the state with supporting policies. The plan is not regulatory, see *id.* § 187.101(2), and implementation of the policies requires separate legislative action unless otherwise provided by law, see *id.* § 187.101(1).

11. Ch. 85-55, 1985 Fla. Laws 207 (current version at FLA. STAT. ch. 163, Part II (1997 & Supp. 1998)).

12. See FLA. STAT. § 163.3177(3) (Supp. 1998).

13. See *id.* § 163.3202(2)(g).

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

15. The DCA is the reviewing agency for local government comprehensive plans to ensure compliance with the state law. See FLA. STAT. § 163.3184 (Supp. 1998).

solid waste, parks and recreation, roads, and in certain jurisdictions, mass transit.<sup>16</sup> In the ensuing years, the basic principles necessary to establish a constitutionally sound concurrency system were established in the DCA's rules and later in statutory law. Foremost among these basic principles was that a concurrency system must be grounded on a financially feasible capital improvements plan to provide the needed public facilities at specified service levels in order to prevent a development moratorium.<sup>17</sup> Most agree that the basic principles of concurrency must be included when concurrency is extended to other types of public facilities.<sup>18</sup>

### A. *The Governmental Framework*

Because the authority of the governmental actors is divided, school concurrency presents challenges not found in most forms of mandatory concurrency. Cities and counties have some of the powers and duties implicated by school concurrency, while school districts have others. School concurrency is, therefore, primarily a challenge in intergovernmental coordination.

#### 1. *Cities and Counties*

Cities and counties have one set of powers essential in a school concurrency system: they plan for and regulate the development of land within the parameters of Florida's integrated planning and growth management system. This duty arises under the Local Government Comprehensive Planning and Land Development Regulation Act.<sup>19</sup> Each city and county is required to adopt and enforce a local comprehensive plan for its jurisdiction that establishes the future land uses and the densities and intensities of each use.<sup>20</sup> The comprehensive plan must be implemented through land development regulations that are consistent with the plan.<sup>21</sup> In addition, development permits issued pursuant to the land development regulations must be consistent with the plan.<sup>22</sup> Thus, a local comprehensive plan is more than a plan: it is an instrument for regulating land development, and residential land development is the heart of the school concurrency issue. Section 163.3180(1), *Florida Statutes*, provides that any local government may

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16. 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 (1992).

17. See Boggs & Appgar, *supra* note 4, at 6.

18. See, e.g., Powell, *supra* note 3, at 294.

19. See FLA. STAT. ch. 163, Part II (1997 & Supp. 1998).

20. See FLA. STAT. § 163.3177(6)(a) (Supp. 1998).

21. See *id.* § 163.3194(1)(b) (1997) (legal status of comprehensive plan); see also *id.* § 163.3202 (Supp. 1998) (land development regulations).

22. See *id.* § 163.3194(1)(a) (1997).

extend the concurrency requirement so that it applies to additional public facilities in its geographic jurisdiction.<sup>23</sup>

## 2. School Districts

School districts possess the other powers vital for a school concurrency system: they design, construct, and operate the public schools that serve new development within the confines of a statewide educational system.

Florida has a unified system of public education; the Legislature has declared that education is primarily a state responsibility.<sup>24</sup> The chief policymaker and coordinator for this state system is the State Board of Education.<sup>25</sup> The Commissioner of Education carries out a variety of duties as the chief educational officer of the state,<sup>26</sup> and the Department of Education is the administrative and supervisory agency for the system under the direction of the State Board of Education.<sup>27</sup> The Department's duties and powers are related to the planning and construction of educational facilities.<sup>28</sup>

Each countywide school district is part of the state system but has a certain degree of local autonomy.<sup>29</sup> Each school district is responsible for operating its schools in conformity with state rules and minimum standards.<sup>30</sup> Ultimate local authority rests with the district school board.<sup>31</sup> This local authority includes preparing and implementing "plans for the establishment, organization, and operation of the schools of the district," including the location of individual schools and the attendance zones that will be served by each school.<sup>32</sup> Each district school board is required to adopt a five-year capital building program, to be updated annually, based on a periodic state-supervised educational plant survey and projected available revenues.<sup>33</sup> In this way, the school districts exercise the other power that is at the heart of school

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23. See *id.* § 163.3180 (Supp. 1998).

24. See *id.* § 229.011. (1997).

25. See FLA. CONST. art. IX, § 2 (organization and supervision authority of state board); see also FLA. STAT. § 229.053 (1997) (general powers of state board).

26. See FLA. STAT. § 229.512 (1997).

27. See *id.* § 229.75.

28. See *id.* § 235.014 (functions of the Department); see also *id.* § 235.19 (site planning and selection).

29. See *id.* § 228.041(2). In fact, school boards are considered state agencies for certain purposes. See, e.g., FLA. STAT. § 120.52(1) (Supp. 1998) (including educational units among the Administrative Procedure Act agency definitions); *Canney v. Board of Public Instruction*, 278 So. 2d 260, 263-64 (Fla. 1973) (holding that school boards function as part of the legislative branch of state government).

30. See FLA. STAT. § 230.01 (1997).

31. See FLA. CONST. art. IX, § 4 (school board membership and duties); see also FLA. STAT. § 230.03(2) (1997) (statutory grant of control authority).

32. FLA. STAT. § 230.23(4) (1997).

33. See *id.* § 235.185 (Supp. 1998).

concurrency: they deliver the public school capacity that is essential to serve new residential development.

### B. Prior Legislation

The Legislature addressed the unusual challenges posed by school concurrency several times in the years preceding the 1998 legislation. In each instance, the Legislature sought to establish statutory guidelines without prescribing a complete regimen for school concurrency because the subject was both complex and primarily one that had been left to local discretion.

#### 1. The 1993 ELMS III Legislation

In 1992 concurrency in general and school concurrency in particular were addressed by the third Environmental Land Management Study Committee (ELMS III), a blue-ribbon commission established by Governor Chiles to review and propose improvements to the state's integrated planning and growth management system.<sup>34</sup> Most of ELMS III's recommendations were enacted into law in 1993.<sup>35</sup> These statutory changes included legislative confirmation of the basic framework for concurrency that had been developed by the DCA through case-by-case adjudication and formal rulemaking.<sup>36</sup>

ELMS III specifically considered whether to extend the concurrency requirement to include public schools as well as other forms of infrastructure. It recommended against enlarging the statewide concurrency requirement to include public schools<sup>37</sup> and against requiring local governments to adopt education elements in their local comprehensive plans.<sup>38</sup> ELMS III proposed that further study of school concurrency be undertaken on a local basis with state funds before school concurrency was imposed in Florida.<sup>39</sup>

Rather than a statewide regulatory response to growth pressures on public schools, ELMS III sought to address the need for better coordination of land development and educational facility construction as a challenge in intergovernmental coordination. ELMS III proposed a series of measures intended to bring about more coordinated planning by local governments and school districts. Foremost among them was a

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34. See generally ENVIRONMENTAL LAND MGMT. STUDY COMM., FINAL REPORT: BUILDING SUCCESSFUL COMMUNITIES (1992) (on file with Dep't of Comm'y Aff., Tallahassee, Fla.) [hereinafter ELMS III REPORT].

35. Compare Act effective July 1, 1993, ch. 93-206, 1993 Fla. Laws 1887 (codified in scattered sections of FLA. STAT. (1993)), with ELMS III REPORT, *supra* note 34. For an account of the concurrency provisions in the 1993 legislation, see Powell, *supra* note 3, at 293.

36. See Powell, *supra* note 3, at 293.

37. See ELMS III REPORT, *supra* note 34, at 66 (Recommendation 95).

38. See *id.* at 37 (Recommendation 40).

39. See *id.* at 67 (Recommendation 96).



proposal that each county, all the municipalities in that county, and that county's school district enter into a formal agreement—an interlocal agreement—to achieve closer coordination in planning for new development and new schools.<sup>40</sup>

The Legislature went further than recommended by ELMS III. It adopted the proposed intergovernmental coordination requirements, including the interlocal agreement requirement now codified at section 163.3177(6)(h)(2), *Florida Statutes*.<sup>41</sup> However, the Legislature also specifically provided that before school concurrency could be imposed by a local government, “it should first conduct a study to determine how the requirement would be met and shared by all affected parties.”<sup>42</sup> This requirement was intended to promote a dialogue in the pre-planning stage of local policy development to ensure that any foreseeable financial burdens would be equitably distributed.

## 2. *The 1995 Educational Facilities Legislation*

In 1995, with overcrowded schools becoming a more compelling issue in urban areas,<sup>43</sup> the Legislature enacted additional measures to ensure “the coordinated and cooperative provision of educational facilities.”<sup>44</sup> These changes enlarged the collaborative planning measures enacted in the ELMS III legislation of 1993 and specified additional requirements for a local-option school concurrency system so it would be consistent with the basic policies regarding public facilities and services subject to the mandatory concurrency requirement.

First, the 1995 legislation required school districts to coordinate their information related to school facilities and development with information used by local governments in the comprehensive planning process, thus strengthening the 1993 mandate of section 163.3177(6)(h)(2), *Florida Statutes*, for common population projections.<sup>45</sup> Coordinated planning data and analysis helps ensure that school districts plan enough schools for the amount of development projected by local governments.

Second, the 1995 legislation required school districts to furnish each local government in its jurisdiction with an annual educational facilities report identifying projected needs for existing schools and a capital improvements plan showing planned facilities with assured funding for

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40. See *id.* at 38-39 (Recommendation 45).

41. See Act effective July 1, 1993, ch. 93-206, § 6, 1993 Fla. Laws 1887, 1893 (amending FLA. STAT. § 163.3177(6) (Supp. 1992)). For additional history and explanation of interlocal agreements, see *infra* Part III.C.1-2.

42. Act effective July 1, 1993, ch. 93-206, § 8, 1993 Fla. Laws 1887, 1898, *repealed by* Act effective July 1, 1998, ch. 98-176, § 5, 1998 Fla. Laws 1556, 1561-66.

43. See Florida Dep't of Comm'y Aff., *Ask DCA: Planning for Public Schools*, COMMUNITY PLANNING, Dec. 1995, at 9-11.

44. Act effective June 16, 1995, ch. 95-341, § 13, 1995 Fla. Laws 3010, 3022.

45. Compare FLA. STAT. § 163.3177(6)(h)(2) (1993) with FLA. STAT. § 235.193 (1995).

construction over the next five years.<sup>46</sup> This information exchange would help local governments understand the school needs created by planned development as well as the financial ability of school districts to meet those needs.

Third, the 1995 legislation required local governments by October 1, 1996, to identify land use districts where schools would be allowed<sup>47</sup> and to direct school districts to build schools only on sites that are consistent with local land use designations.<sup>48</sup> Although the mandate to local governments was undermined by the lack of an enforcement mechanism to make the deadline meaningful, these complementary requirements together were to provide greater predictability for the siting of new schools to serve development.

Finally, the 1995 legislation required that each local planning agency establish guidance for a local government in formulating its comprehensive plan to provide "opportunities for involvement" by the school district.<sup>49</sup> This requirement promotes a dialogue between local planning and school officials to identify and resolve issues at the pre-planning or planning stages.

Consistent with this emphasis on collaboration between local governments and school districts to meet Florida's need for new schools, the 1995 Legislature amended section 163.3180(1)(b), *Florida Statutes*, expressly to require local governments to satisfy the interlocal agreement requirement of section 163.3177(6)(h)(2), *Florida Statutes*, as a prerequisite to the imposition of school concurrency.<sup>50</sup>

The premise of this last change was that school concurrency should only be imposed in communities where there is both an adequate countywide planning basis for doing so, with all local jurisdictions adhering to coordinated population, enrollment, and school facility projections, and a political consensus supporting this regulatory requirement by all the local governments that must enforce it with the attendant risks of liability.

46. See Act effective June 16, 1995, ch. 95-341, § 4, 1995 Fla. Laws 3010, 3016 (codified at FLA. STAT. § 235.194(2) (1995)).

47. See *id.* § 10, 1995 Fla. Laws at 3021 (amending FLA. STAT. § 163.3177(6)(a) (1993)).

48. See *id.* § 3, 1995 Fla. Laws at 3014 (amending FLA. STAT. § 235.193(3) (1993)).

49. *Id.* § 9, 1995 Fla. Laws at 3020 (amending FLA. STAT. § 163.3174(1) (1993)).

50. See *id.* § 12, 1995 Fla. Laws at 3022 (amending FLA. STAT. § 163.3180(1)(b)(2) (1993)).

In 1996 the Legislature rectified an apparent omission by amending section 163.3180(1)(b)(2) expressly to provide that a local government also must satisfy the coordination requirements of section 163.3177(6)(h)(1) as a prerequisite to imposition of school concurrency. See Act effective June 6, 1996, ch. 96-416, § 3, 1996 Fla. Laws 3186, 3191 (codified at FLA. STAT. § 163.3180(1)(b)(2) (Supp. 1996)).

### C. Prelude to the 1998 Legislation

Several school-siting disputes in urban areas throughout the state, plus two developments during 1997 that were related to school concurrency, set the stage for the 1998 legislation. One was the protracted litigation over the efforts to establish a countywide school concurrency system in Broward County. The other was the Legislature's decision, in light of the gravity of the dispute over school concurrency in Broward County, to suspend the authority of local governments elsewhere to establish school concurrency systems while a policy review was conducted by a blue-ribbon commission.

#### 1. The Broward County Case

Florida's school-age population boomed during the 1990s due to continued immigration of new residents from other states and the entry of the Baby Boom generation into their child-rearing years, a phenomenon sometimes called the "Baby Boom Echo." These trends have created pressures on school facilities throughout the state.<sup>51</sup> The first community to seek a regulatory response to this phenomenon was Broward County, a charter county with countywide land use authority vested in the Board of County Commissioners and a countywide planning council.<sup>52</sup>

In 1996 Broward County adopted amendments to its comprehensive plan to establish a new countywide school concurrency system.<sup>53</sup> These amendments included a new Public School Facilities Element, in addition to amendments to the Capital Improvements Element, the Inter-

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51. See Perez, *supra* note 1, at B9.

52. See *City of Coconut Creek v. Broward County Bd. of County Comm'rs*, 430 So. 2d (Fla. 4th DCA 1983) (holding that a county with a charter specifically vesting it with land use regulatory power had final land use authority in a conflict between county and municipalities); *Kane Homes, Inc. v. City of N. Lauderdale*, 418 So. 2d 451 (Fla. 4th DCA 1982) (upholding the city's decision to follow the direction of the county planning board to deny a developer's building permit).

53. See *Economic Dev. Council of Broward County, Inc. v. Department of Comm'y Aff., 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, Fla.) [hereinafter *Broward Final Order*]. The Broward amendments were not the first attempt in Florida to make public schools subject to the concurrency requirement. An early effort in Monroe County failed. See Thomas G. Pelham, *The Legal and Practical Implications and Difficulties of School Concurrency 6* (undated) (unpublished manuscript, on file with author).

In 1995 (prior to the enactment of the 1995 legislation), the City of Coral Springs attempted to implement school concurrency. The DCA found the Coral Springs plan not in compliance with state law because the city was unable to establish a cooperative interlocal agreement with the Broward County School Board and the plan did not include a financially feasible implementation method. See *Florida Dep't of Comm'y Aff., supra* note 43, at 10-11; see also text accompanying *infra* note 178. The city abandoned its unilateral efforts in 1997. See Ty Tagami, *Springs Bows to District Plan*, FT. LAUD. SUN SENT., July 29, 1997, at B1.

governmental Coordination Element, and the Broward County Land Use Plan.<sup>54</sup>

The DCA entered a notice of intent to find the Broward school concurrency amendments in compliance.<sup>55</sup> After a formal administrative hearing brought by third-party challengers, the administrative law judge entered a recommended order which concluded that the amendments were not in compliance on a variety of grounds.<sup>56</sup> Accepting most but not all legal conclusions recommended by the administrative law judge, the DCA acknowledged the error of its initial determination and recommended that the Administration Commission (the Governor and the Cabinet) find the amendments not in compliance.<sup>57</sup> On March 11, 1998, the Administration Commission did so, prescribing an extensive list of remedial actions that would be necessary to bring the amendments into compliance.<sup>58</sup>

As of this writing, the final order entered by the Administration Commission is on appeal at the First District Court of Appeal.<sup>59</sup> The issue on appeal is whether Broward County may impose school concurrency in its local comprehensive plan and, solely on the basis of a provision in its charter, bind all municipalities within the county without all the Broward municipalities executing the interlocal agreement between Broward County and the Broward School Board.<sup>60</sup>

The appellants, Economic Development Council of Broward County, Inc. and the Building Industry Association of South Florida, contend that sections 163.3177(6)(h)(2) and 163.3180(1)(b)(2), *Florida Statutes*, require the interlocal agreement to be signed by all municipalities in order for the agreement to be the basis for a school concurrency system. The appellees, the Broward County Board of County Commissioners, the Broward County School Board, and the

54. See Broward Final Order, *supra* note 53, at 2.

55. See *id.*

56. See *id.* at 3; Economic Dev. Council of Broward County, Inc. v. Department of Comm'y Aff., DOAH Case Nos. 96-6138GM, 97-1875GM (Recommended Order entered Oct. 8, 1997) [hereinafter Broward Recommended Order]; see also Bill Hirschman, *Ruling Stuns School Officials*, FT. LAUD. SUN SENT., Oct. 10, 1997, at B4.

57. See Broward Recommended Order, *supra* note 56, at 3; see also Economic Dev. Council of Broward, Inc. v. Department of Comm'y Aff., DOAH Case Nos. 96-6138GM, 97-1875GM, at 23 (Department of Comm'y Aff.'s Determination of Non-Compliance and Recommendation to Admin. Comm'n, Nov. 21, 1997) (copy on file with author). For an account of the Broward school concurrency case by two lawyers who participated on behalf of the challengers through issuance of the DCA's recommendation, see Ronald L. Weaver & Mark D. Solov, *Current Developments in Public School Concurrency*, FLA. B.J., Feb. 1998, at 47.

58. See Broward Final Order, *supra* note 53, *passim*.

59. See Economic Dev. Council of Broward County, Inc. v. Florida Admin. Comm'n, No. 98-989 (Fla. 1st DCA filed July 17, 1998). The author filed a brief on behalf of the Association of Florida Community Developers, Inc., as amicus curiae in support of the appellants' position.

60. See *infra* Part III.C.

Department of Community Affairs for the Administration Commission, contend that the Broward charter provides the necessary authority, and due to the provisions of sections 163.3171(2) and 163.3174(1)(b), *Florida Statutes*, an interlocal agreement signed by all municipalities is not required as the basis for school concurrency.<sup>61</sup>

## 2. *The Public Schools Construction Study Commission*

In response to the controversy over the Broward County school concurrency case, as well as unrelated school siting disputes in Leon and Hillsborough counties, the 1997 Legislature initiated a policy review by a blue-ribbon commission. In the General Appropriations Act, the Legislature created the seventeen-member Public Schools Construction Study Commission (Schools Commission) and charged it to "study in detail and recommend appropriate reforms related to the planning, and siting, of public schools, and reforms related to school concurrency," with a final report due by January 1, 1998.<sup>62</sup> In conjunction with this policy review, the Legislature suspended the legal authority of local governments, other than in Broward County, to impose school concurrency until July 1, 1998.<sup>63</sup>

With respect to school concurrency, the Schools Commission initially confronted the issue of whether the state had a legitimate role in addressing how such a regulatory requirement was imposed and enforced by local governments. The Schools Commission concluded that the state has an interest in school concurrency because public education is a state responsibility.<sup>64</sup> In addition, the state has an interest in school concurrency due to the state's leadership role in the administration of the statewide planning and growth management system.<sup>65</sup>

Further, the Schools Commission concluded that the then-existing state policy on school concurrency was incomplete.<sup>66</sup> Unanswered ques-

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61. *See id.*

62. Act effective May 28, 1997, ch. 97-152, § 6, 1997 Fla. Laws 2508, 2825 (Specific Appropriation 1628). The Schools Commission was appointed by the Governor, the Senate President, and the Speaker of the House. *See id.* The members were David L. Brandon, Palm Harbor; J. Thomas Chandler, Orlando; Scott A. Glass, Ocoee; William G. Graham, Lake Clarke Shores; Calvin D. Harris, Clearwater; James Horne, Jacksonville; John Long, Land O'Lakes; Richard "Skeet" Jernigan, Fort Lauderdale; Patricia S. McKay, Tallahassee; Karen Marcus, West Palm Beach; Bob Moss, Fort Lauderdale; Myra Mueller, Boca Raton; Benton R. Murphey, Lutz; G. Steven Pfeiffer, Tallahassee; Linda S. Sparks, Jacksonville; and Robert T. Urban, Sanford. The Governor appointed the author to serve as chairman.

63. *See* Act effective May 30, 1997, ch. 97-265, § 13, 1997 Fla. Laws 4935, 4951. The suspension of local government authority to impose school concurrency was highly controversial. *See* John Kennedy & Cory Lancaster, *Halt Growth Till Schools Catch Up?*, ORLANDO SENT., Nov. 23, 1997, at B1.

64. *See* PUBLIC SCH. CONSTR. STUDY COMM'N, FINAL REPORT 18 (1997) (on file with Dep't of Comm'y Aff., Tallahassee, Fla.) [hereinafter SCHOOLS COMM'N REPORT].

65. *See id.*

66. *See id.* at 19.

tions about how school concurrency could be imposed and implemented at the local level and the standards against which a school concurrency system would be judged for purposes of determining whether it was in compliance with state law<sup>67</sup> created a lack of predictability for local governments, school boards, and private citizens, resulting in the prospect of increased conflict and litigation over local-option school concurrency.

For these reasons, the Schools Commission recommended extensive changes and additions to state law on school concurrency. As amended, these recommendations were contained in Committee Substitute for House Bill 4031 by Representative Ken Pruitt<sup>68</sup> and Committee Substitute for Senate Bill 2474 by Senator Tom Lee.<sup>69</sup> The Senate version of the bill was enacted into law and signed by Governor Chiles on May 22, 1998.<sup>70</sup>

### III. SCHOOL CONCURRENCY

Since 1985 local governments have had authority to impose school concurrency on a local-option basis as part of their overall authority to plan for and regulate the development of land.<sup>71</sup> The 1998 legislation revisited the basic policies implicated by concurrency; it confirmed these policies in the context of school concurrency and elaborated on certain statutory requirements.

67. Florida's comprehensive planning laws require provisions of a comprehensive plan to be found in compliance with state law in order to become legally effective. See FLA. STAT. § 163.3189(2)(a) (1997). The term "in compliance" is defined in section 163.3184(1)(b), *Florida Statutes*. See *id.* § 163.3184(1)(b) (Supp. 1998).

68. Repub., Port St. Lucie.

69. Repub., Brandon.

70. See Act effective May 22, 1998, ch. 98-176, 1998 Fla. Laws 1556.

71. Prior to 1985, local governments had purported authority to prohibit or limit residential development if adequate school facilities would not be available. Florida law provided that "[t]he local government is empowered to reject development plans when public school facilities made necessary by the proposed development are not available in the area which is proposed for development or are not planned to be constructed in such area *concurrently with the development*." FLA. STAT. § 235.193(4) (1983) (emphasis added). Arguably, this authority was limited by the constitutional restrictions on moratoria. See David M. Layman, *Concurrency and Moratoria*, FLA. B.J., Jan. 1997, at 49, 51-52 (noting that even a temporary moratorium may be an unconstitutional regulatory taking).

This statutory authority was tested when Manatee County denied approval of a preliminary plat partly on grounds of lack of school capacity. The county was reversed. While other considerations were plainly evident in the decision, the trial court held that this provision did not authorize denial of a plat that otherwise conformed to the county's subdivision regulations. See *Southern Coop. Dev. Fund v. Driggers*, 527 F. Supp. 927, 929 (M.D. Fla. 1981), *aff'd*, 696 F.2d 1347 (11th Cir. 1983).

Section 235.193, *Florida Statutes*, was amended in 1985 in conjunction with enactment of the Local Government Comprehensive Planning and Land Development Regulation Act. See ch. 85-55, § 25, 1985 Fla. Laws 207, 238-39. Subsection four was then repealed later in that session. See Educational Facilities Act, ch. 85-116, §§ 10, 26, 27, 1985 Fla. Laws 683, 693, 717. The meager legislative history sheds no light on the specific purpose of the repeal. Presumably it was undertaken in light of the nascent concurrency requirement.

### A. Local Option

The threshold policy issue was whether the Legislature should continue to allow school concurrency to be imposed at local option within a framework of statewide requirements, mandated for statewide application, or be prohibited altogether. The Schools Commission received extensive testimony on this issue and recommended that the existing policy of local-option school concurrency be continued.<sup>72</sup> There were important policy and political reasons for this choice.

First, notwithstanding the reassertion of a state interest in physical growth and development issues since 1972, Florida has a strong tradition of home rule by local governments when it comes to land development regulation. In recent years, however, the Legislature has enacted an array of planning and regulatory programs in which local exercise of the police power for land development regulation is limited by a state role in certain decisions. This reassertion of the state's role in regulating land development began with the enactment of the Florida Environmental Land and Water Management Act of 1972<sup>73</sup> and continued with the enactment of the Florida State and Regional Planning Act of 1984<sup>74</sup> and the Local Government Comprehensive Planning and Land Development Regulation Act<sup>75</sup> in 1985.

Programs using shared state and local decision making inevitably create tensions on both the policy and implementation levels. Given the importance of land development decisions in a fast-growing state like Florida, however, these programs are the best method yet devised to reconcile the various competing interests affected by these issues. The continuation of local-option school concurrency within clearly defined state-set parameters fits well within this emerging tradition.

Second, continuation of the existing policy was the path of least political resistance in 1998. Strong opposition was evident from both the public and private sectors to any suggestion that school concurrency be mandated statewide. Local governments and school boards did not want lawmakers mandating a new regulatory program, particularly because no state financial support for implementation was likely to be forthcoming, and private interests opposed any new regulatory requirements on residential development.<sup>76</sup>

Local governments presented strong political opposition to any suggestion that school concurrency be prohibited altogether.<sup>77</sup> Local gov-

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72. See SCHOOLS COMM'N REPORT, *supra* note 64, at 17.

73. See ch. 72-317, 1972 Fla. Laws 1162 (current version at FLA. STAT. §§ 380.012-.10 (1997)).

74. See ch. 84-257, 1984 Fla. Laws 1166 (current version at FLA. STAT. ch. 187 (1997)).

75. See ch. 85-55, §§ 1-20, 1985 Fla. Laws 207, 210-35 (current version at FLA. STAT. ch. 163, Part II (1997 & Supp. 1998)).

76. See SCHOOLS COMM'N REPORT, *supra* note 64, at 17.

77. See *id.* The Florida Association of Counties, the Florida League of Cities, and the Florida School Boards Association made it a high priority to ensure that the temporary

ernments generally object to legislative limitations on their policy choices. In the case of school concurrency, this normal sensitivity was heightened by the temporary suspension of authority enacted by the Legislature in 1997 and the fact that a school concurrency system had already been adopted in Broward County and serious discussions regarding school concurrency were underway in Palm Beach County. When considered together, these factors strongly favored continuation of the current basic policy with some refinements. The Legislature agreed in the 1998 legislation.<sup>78</sup>

### B. Countywide School Concurrency

At the same time that it continued the local-option policy, the 1998 Legislature expressly required that school concurrency be imposed only on a countywide basis.<sup>79</sup> The 1995 educational facilities legislation established this requirement by implication because it provided that the satisfaction of the intergovernmental coordination requirement of section 163.3177(6)(h)(2), *Florida Statutes*, was a prerequisite for imposing school concurrency.<sup>80</sup> This requirement included entry into an interlocal agreement by the county, all the municipalities within the county, and the school district to establish "joint processes for collaborative planning and decisionmaking on population projections and public school siting, the location and extension of public facilities subject to concurrency, and siting facilities with countywide significance."<sup>81</sup>

There were compelling reasons to make the statute expressly require that school concurrency be established countywide. The Florida Constitution requires "a uniform system of free public schools."<sup>82</sup> The Florida Supreme Court has eschewed a construction of this provision that would purport to achieve a rigid uniformity of public schools on a statewide basis;<sup>83</sup> it has opined that "there need not be uniformity of physical plant and curriculum from county to county because their re-

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suspension of local authority to impose school concurrency, enacted by the Legislature in 1997, would not be extended beyond July 1, 1998. See Kennedy & Lancaster, *supra* note 63, at B1.

78. See Act effective July 1, 1998, ch. 98-176, § 5(12), 1998 Fla. Laws 1556, 1562 (codified at FLA. STAT. § 163.3180(12) (Supp. 1998)).

79. See *id.*

80. See Act effective June 16, 1995, ch. 95-341, § 3, 1995 Fla. Laws 3010, 3014, (amending FLA. STAT. § 235.193 (1993)); *id.* § 11, 1995 Fla. Laws at 3022.

81. FLA. STAT. § 163.3177(6)(h)(2) (1995).

82. FLA. CONST. art. IX, § 1.

83. Indeed, the Florida Supreme Court has sought to avoid giving a precise interpretation of the uniform public schools requirement, going so far as to sanction "a broad degree of variation" among the state's schools. *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)). In so doing, it has deferred to the legislative branch. See FLA. CONST. art. II, § 3 (requiring separation of powers); *Glasser*, 622 So. 2d at 947.



quirements differ.”<sup>84</sup> Rather, the court reasoned that the mandate for uniform public schools is satisfied “when the constituent parts, although unequal in number, operate subject to a common plan or serve a common purpose.”<sup>85</sup>

In dicta, the court suggested that the uniformity requirement may apply with more exacting precision to all public school facilities within a county. In *St. Johns County v. Northeast Florida Builders Ass’n*,<sup>86</sup> the court reviewed a countywide school impact fee imposed on new residential development by St. Johns County to finance new schools. The impact fee was implemented in unincorporated areas immediately upon adoption by the county and in a municipality upon that municipality entering into an interlocal agreement with the county.<sup>87</sup>

In a case of first impression, the court held that the impact fee must apply to “substantially all of the population of St. Johns County” in order to satisfy the second prong of the dual rational nexus test applicable to impact fees.<sup>88</sup> Such an action would ensure that the funds collected from the impact fee were expended to provide facilities to serve those who paid the fees and that municipal residents not subject to the fees would not receive a “windfall” facility at the expense of the other county residents. However, the court observed, “Even if the ordinance were amended to limit expenditures to schools serving areas subject to the impact fee, we are led to wonder why this would not implicate the requirement of a uniform system of public schools.”<sup>89</sup> In this way, the court has suggested that the uniform public schools requirement may establish a standard to be applied to all public schools within a county.

An express requirement that school concurrency generally be imposed countywide will ensure that such a regulatory program, where established, will not lead to discrimination among pupils in settled, declining, or growing areas of a particular district in the provision of educational facilities. When read in conjunction with provisions relating to other key components of a school concurrency system, this policy provides enough flexibility to tailor a school concurrency system in any county while also safeguarding the right of all its children to equal edu-

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84. *School Bd. of Escambia County v. State*, 353 So. 2d 834, 838 (Fla. 1977).

85. *Id.*

86. 583 So. 2d 635 (Fla. 1991).

87. *See id.* at 637.

88. *Id.* at 639. The dual rational nexus test requires the local government imposing the impact fees to demonstrate: (1) a reasonable connection between the need for new facilities and the demand created by the proposed development; and (2) an assurance that impact fees collected from the proposed development will be used to finance facilities that will benefit the specific area. *See id.* at 637 (citing *Hollywood, Inc. v. Broward County*, 431 So. 2d 606, 611-12 (Fla. 4th DCA 1983)). For the seminal Florida decision on the dual rational nexus test applicable to impact fees, see *Contractors and Builders Ass’n v. City of Dunedin*, 329 So. 2d 314 (Fla. 1976).

89. *St. Johns County*, 583 So. 2d at 639 n.3.

cational opportunity. In this way, the 1998 legislation allows a workable school concurrency system that will meet constitutional muster.

Implementation of the requirement for countywide school concurrency also raises a number of practical issues. Some were addressed by the Schools Commission; others were answered by the Legislature after additional negotiations among the interested constituencies, such as local governments, school districts, developers, homebuilders, realtors, and other advocacy groups interested in growth management issues.

First, all public schools in the county must be included in the school concurrency system so that the total school capacity will be taken into account in determining whether level-of-service standards will be met.<sup>90</sup> This requirement presents obvious challenges for measuring levels of service and preparing the necessary public school capital facilities program to ensure the adopted level-of-service standard will be achieved and maintained throughout the planning period.

Second, residential development throughout the county, whether located in a municipality or in the unincorporated area, generally must be subject to school concurrency.<sup>91</sup> This requirement squarely presents the challenge of coordinating county and municipal planning and permitting programs, a challenge which the interlocal agreement requirement of section 163.3177(6)(h)(2), *Florida Statutes*, should meet.

Third, generally all local governments in the county must adopt the necessary comprehensive plan amendments to establish the school concurrency system and must execute and submit the interlocal agreement.<sup>92</sup> Both the plan amendments and the interlocal agreement must be submitted to the DCA for review and be found in compliance in order for the school concurrency system to become legally effective.<sup>93</sup>

### C. Intergovernmental Coordination

With one modification, the 1998 legislation carries forward the requirement of section 163.3177(6)(h)(2), *Florida Statutes*, that a prerequisite for school concurrency is entry into an interlocal agreement by the county, the school district, and all municipalities in the county to set forth "collaborative planning and decisionmaking on population projections and public school siting," in addition to other issues.<sup>94</sup>

90. See FLA. STAT. § 163.3177(12)(a) (Supp. 1998).

91. Municipalities in which residential development is expected to have a de minimis effect on the demand for public school facilities are exempted from this requirement. See *infra* Part III.C.3.

92. Again, the only exception is municipalities in which residential development is expected to have a de minimis effect on the demand for public school facilities. See *infra* Part III.C.3.

93. See *infra* Part III.C.4.

94. Act effective July 1, 1998, ch. 98-176, § 5(12)(g), 1998 Fla. Laws 1556, 1565 (codified at FLA. STAT. § 163.3180(12)(g) (Supp. 1998)).

This issue was one of the key disputes before the Schools Commission. Proponents of school concurrency argued that the interlocal agreement requirement meant one city could block implementation of countywide school concurrency by refusing to enter into the agreement. They sought to change the requirement in significant ways. Others, including municipalities and private interests, argued that the interlocal agreement requirement served a vital purpose and should not be watered-down or eliminated.<sup>95</sup>

### 1. *Origins of the Interlocal Agreement Requirement*

Particularly in the context of school concurrency, the issue of which governmental entities must be signatories to the interlocal agreement required by section 163.3177(6)(h)(2), *Florida Statutes*, cannot be divorced from the “substantial legislative policy reasons” for requiring such an agreement.<sup>96</sup>

The interlocal agreement requirement originated in the recommendations of ELMS III. In light of the controversy and litigation from implementation of the historic 1985 growth management legislation, ELMS III placed a high priority on conflict avoidance, particularly at the planning stages of development, and conflict resolution.<sup>97</sup> This emphasis was reflected in the recommendations concerning improved intergovernmental coordination generally and school planning in particular.<sup>98</sup>

After evaluating criticisms that the then-existing intergovernmental coordination elements were weak and ineffectual, ELMS III proposed that local governments and school boards enter into formal agreements to coordinate population projections and school site locations so they could jointly assess the effect of planned growth on the need for new schools.<sup>99</sup> As refined by the Legislature, the key step for effectuating this approach at the local level was a required agreement—executed by the county, all municipalities in the county, and the school district—to set forth “collaborative planning and decisionmaking.”<sup>100</sup> This interlocal agreement was to ensure that the school district planned enough schools to serve new development projected in *all* local comprehensive plans in the county and that the local governments, in turn, would site the planned schools to serve those new residents.

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95. See SCHOOLS COMM'N REPORT, *supra* note 64, at 28; see also *infra* Part III.C.2.

96. *Holly v. Auld*, 450 So. 2d 217, 219 (Fla. 1984) (noting that “it is not the court’s duty or prerogative to modify or shade clearly expressed legislative intent in order to uphold a policy favored by the court”).

97. See ELMS III Report, *supra* note 34, at 6-7.

98. See *supra* Part II.B.1.

99. See ELMS III REPORT, *supra* note 34, at 38-39 (Recommendation 45).

100. Act effective July 1, 1993, ch. 93-206, § 6(6)(h)(2), 1993 Fla. Laws 1887, 1893 (amending FLA. STAT. § 163.3177 (Supp. 1992)).

This legislative scheme recognized the constitutionally divided responsibilities between local governments and school districts. It also represented a judgment that the preferred way to meet the need for new schools caused by continued growth was not through a coercive regulatory regime, but through a collaborative plan-based approach. Thus, "all affected entities" were to be parties to the agreement and to sign it.<sup>101</sup>

## 2. *The Requirement as a Basis for School Concurrency*

The interlocal agreement addresses the essential tasks posed by school concurrency: to ensure that the school district plans for and builds enough schools to meet the needs of development projected by *all* local governments in the district and that the local governments site the planned schools to serve new residents.

In the context of school concurrency, the interlocal agreement is intended to be a bridge. On one side are plan policies on school concurrency and the "principles and guidelines" for intergovernmental coordination by local governments and the school district.<sup>102</sup> On the other side are the regulatory programs administered by local governments through their concurrency management systems<sup>103</sup> to enforce school concurrency—the regulatory requirement that new residential development be permitted only when the developer can show adequate school capacity will be available concurrent with the impacts of that development.

School concurrency proponents contended that the existing requirement gave each municipality a veto over whether school concurrency would be established in that county.<sup>104</sup> Because school overcrowding was most prevalent in large urban counties with many municipalities, the interlocal agreement requirement was politically unrealistic because one small city could block implementation of countywide school concurrency by refusing to enter into the required interlocal agreement. School concurrency proponents advocated several alternatives to establish school concurrency countywide without letting a single city block the effort.<sup>105</sup>

Other interests, including the Florida League of Cities and the Palm Beach County Municipal League, contended that the interlocal agree-

101. *Id.*

102. See FLA. STAT. § 163.3177(6)(h)(1) (Supp. 1998).

103. For the minimum criteria for concurrency management systems to be found in compliance with state law, see FLA. ADMIN. CODE ANN. r. 9J-5.0055 (1998).

104. See SCHOOLS COMM'N REPORT, *supra* note 64, at 28. Even before the recent interest in school concurrency, commentators have remarked upon the political difficulties of getting a county and all its municipalities to agree on a common course of action in the field of growth management. See, e.g., C. Allen Watts, *Beyond User Fees? Impact Fees for Schools and . . .*, FLA. B.J., Feb. 1992, at 56, 59-60.

105. See SCHOOLS COMM'N REPORT, *supra* note 64, at 28.

ment served the vital purpose of promoting coordination and expressing political support for the program. They placed a high value on ensuring that municipalities obligated to enforce school concurrency through their land development regulations—and thus obligated to incur potential liability for denial of a building permit on grounds of inadequate school capacity—had a voice in the establishment of such a program.<sup>106</sup> The Schools Commission arrived at a compromise that modified the interlocal agreement requirement by creating an exception.<sup>107</sup>

### 3. *The De Minimis Exception*

In order to help make school concurrency a more realistic option in urban counties with many municipalities without sacrificing the intended coordination and political benefits of the required interlocal agreement, the Schools Commission recommended that the interlocal agreement requirement be refined to allow exclusion of municipalities not expected to have a significant effect on demand for public school facilities.<sup>108</sup> It proposed specific criteria to determine which municipalities should fit within that exception.<sup>109</sup>

The Legislature agreed with this basic approach and refined the Commission's recommended criteria to provide the following:

- a. The municipality has issued development orders for fewer than 50 residential dwelling units during the preceding 5 years, or the municipality has generated fewer than 25 additional public school students during the preceding 5 years.
- b. The municipality has not annexed new land during the preceding 5 years in land use categories which permit residential uses that will affect school attendance rates.
- c. The municipality has no public schools located within its boundaries.

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106. *See id.*

107. *See id.* (Recommendation 12). As part of the compromise, the Schools Commission did not take an official position on a key issue in the Broward County school concurrency litigation, namely, whether the interlocal agreement requirement of section 163.3180(1)(b)(2), *Florida Statutes*, applied to a charter county where the county charter purports to provide a legal basis for school concurrency without municipal consent through entry into the interlocal agreement. *See supra* Part II.C.1. Thus, the Schools Commission took no position on the merits of any individual school concurrency or siting dispute. *See* SCHOOLS COMM'N REPORT, *supra* note 64, at 5.

108. *See* SCHOOLS COMM'N REPORT, *supra* note 64, at 28 (Recommendation 12). This compromise was not well-received by some school concurrency proponents. *See* Larry Barzowski, *Cities May Get Say in School Crowding*, FT. LAUD. SUN SENT., Jan. 2, 1998, at B4 (quoting a Broward County school official as saying the compromise was "meaningless").

109. *See* SCHOOLS COMM'N REPORT, *supra* note 64, at 28 (Recommendation 12).

d. At least 80 percent of the developable land within the boundaries of the municipality has been built upon.<sup>110</sup>

Any municipality that satisfies all four criteria is not required to sign the interlocal agreement as a prerequisite for school concurrency and therefore will not be in a position to block the establishment of school concurrency in its county. Nor will it be required to participate in the otherwise countywide school concurrency system. Because these criteria are narrow and tailored to exclude only those areas not having a significant impact on the demand for public school facilities, the de minimis exception can be reconciled with the uniform public schools requirement.

Any municipality that meets these criteria must determine in its periodic evaluation and appraisal report whether it continues to meet the criteria for not having a significant impact on the demand for public school facilities. In a county that has previously established school concurrency, a municipality that does not meet the criteria at the time of a subsequent evaluation and appraisal report is required to take two steps to begin enforcing school concurrency. First, it must adopt a public school facilities element with goals, objectives, and policies that are consistent with the comprehensive plans establishing school concurrency in other local governments within the county. Second, as required by section 163.3177(6)(h)(2), *Florida Statutes*, it must enter into the existing interlocal agreement.<sup>111</sup>

A municipality that fails to take these steps will be subject to automatic suspension of its right to amend its comprehensive plan as provided by section 163.3191, *Florida Statutes*, on the grounds that it has not completed the evaluation and appraisal report process.<sup>112</sup>

#### 4. *Minimum Criteria and Review*

In addition to the issue of which governmental entities must be signatories to the required interlocal agreement, the 1998 legislation provides a much-needed description of the contents of an interlocal agreement for purposes of school concurrency. The statute also addresses the review procedure for such an agreement for purposes of school concurrency. Because neither the Legislature nor the DCA had ever addressed either issue, there were many unanswered practical questions about how the interlocal agreement requirement could be satisfied in the establishment of a school concurrency system.

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110. Act effective July 1, 1998, ch. 98-176, § 5(12), 1998 Fla. Laws 1556, 1564 (amending FLA. STAT. § 163.3180(12) (1997) and codified at FLA. STAT. § 163.3180(12)(f)(1) (Supp. 1998)).

111. See FLA. STAT. § 163.3180(12)(f)(2) (Supp. 1998).

112. See *id.*

The 1998 legislation requires that an interlocal agreement acknowledge the respective duties and powers of local governments and the school district.<sup>113</sup> It also sets forth eight specific planning issues that must be addressed in an interlocal agreement for purposes of school concurrency.<sup>114</sup>

Several procedural questions relating to the interlocal agreement are addressed in the legislation and reflect the agreement's importance in a school concurrency system. The 1998 legislation marks a noteworthy change in policy by requiring the interlocal agreement to be submitted to the DCA pursuant to section 163.3184, *Florida Statutes*, for a compliance review.<sup>115</sup> No such review was previously required because the agreement was intended to be a measure to implement the "principles and guidelines" for intergovernmental coordination set forth in local comprehensive plans.<sup>116</sup> The 1998 legislation also provides that "if the agreement is terminated or suspended, the application of school concurrency shall be terminated or suspended."<sup>117</sup>

These substantive and procedural provisions were not developed by the Schools Commission,<sup>118</sup> but were the outgrowth of a follow-up working group recommended by the Commission and convened by the DCA under the leadership of Assistant Secretary G. Steven Pfeiffer.<sup>119</sup>

#### D. Public School Facilities Element

The 1998 legislation also addressed bringing together the planning policies implicated by school concurrency—land use, capital facilities, and intergovernmental coordination—into a coherent body of policy in the local comprehensive plan.

Local governments have long had authority to adopt an optional public buildings and related facilities element in their local comprehen-

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113. See Act effective July 1, 1998, ch. 98-176, § 5(12)(g), 1998 Fla. Laws 1556, 1565 (amending FLA. STAT. § 163.3180(12)(g) (1997)).

114. See *id.* The following are the eight issues: (1) the establishment of coordination methods; (2) population growth projections; (3) siting criteria; (4) level-of-service standards; (5) capital facilities financial feasibility; (6) geographic scope of service areas; (7) implementation, monitoring, and evaluation procedures; and (8) amendment and termination provisions. See *id.*

115. See *id.* The 1998 legislation, however, does not address whether the interlocal agreement must be found in compliance, as defined in section 163.3184(1)(b), *Florida Statutes*, to be legally effective, or whether such a compliance determination regarding the interlocal agreement is necessary only for school concurrency to take effect.

116. FLA. STAT. § 163.3177(6)(h)(2) (Supp. 1998).

117. Act effective July 1, 1998, ch. 98-176, § 5(12)(g)(8), 1998 Fla. Laws 1556, 1566 (amending FLA. STAT. § 163.3180(12)(g)(8) (1997)).

118. See SCHOOLS COMM'N REPORT, *supra* note 64, at 27.

119. FLORIDA DEPT' OF COMM'Y AFF., PUBLIC SCHOOLS CONSTRUCTION WORKING GROUP, FINAL REPORT AND CONSENSUS TEXT (Mar. 9, 1998) (on file with DCA) [hereinafter PUBLIC SCHOOLS, FINAL REPORT].

sive plans that could address public educational facilities;<sup>120</sup> however, the DCA had never adopted minimum criteria for such optional elements.<sup>121</sup> This absence of official guidance on the contents of such elements has made it more difficult to craft optional components for local plans.

The Schools Commission recommended that a local government imposing school concurrency be required to adopt a public school facilities element in its local comprehensive plan as the policy basis for school concurrency.<sup>122</sup> To address the concern that local governments would have difficulty complying with such a mandate without the sort of minimum criteria that guide the preparation of and compliance determinations for mandatory plan elements, the Schools Commission recommended criteria for such elements when adopted as the basis for a school concurrency system.<sup>123</sup>

The Legislature imposed the requirement for a public school facilities element as the planning basis for school concurrency,<sup>124</sup> and it refined the suggested minimum criteria and enacted them into law.<sup>125</sup> It also required that DCA adopt a rule to expand upon those statutory criteria.<sup>126</sup> In this way, the Legislature intended to provide answers to questions that, if unaddressed, could provide the basis for litigation in future compliance proceedings over school concurrency systems.

The Legislature went beyond the Schools Commission's recommendations in another way. To address a practical question arising from its decision to require that school concurrency only be implemented on a countywide basis, the Legislature made clear that each local government enforcing school concurrency in a county must adopt a public school facilities element as part of its comprehensive plan and that all

120. See FLA. STAT. § 163.3177(7)(f) (1975). The Schools Commission was influenced by the contemporaneous review and adoption of a public school facilities element by Orange County that addressed a range of land-use and educational facility issues but did not resort to school concurrency as a regulatory response to school overcrowding. Its principal purpose was to coordinate the activities of Orange County and the Orange County School Board to ensure that schools were the focal point for neighborhood development.

121. Much of what little guidance existed in the DCA rules was repealed in 1996 as part of Governor Chiles' campaign to eliminate agency rules. See FLA. ADMIN. CODE R. 9J-5.018 (1996) (repealed). The only remaining minimum criterion for optional elements is a requirement that an optional element be consistent with the mandatory elements of the adopted comprehensive plan. See FLA. ADMIN. CODE ANN. r. 9J-5.005(5) (1998).

122. See SCHOOLS COMM'N REPORT, *supra* note 64, at 20-21.

123. See *id.*

124. See Act effective July 1, 1998, ch. 98-176, § 5(12)(a), 1998 Fla. Laws 1556, 1562 (codified at FLA. STAT. § 163.3180(12)(a) (Supp. 1998)).

125. See *id.* § 5(12)(a)-(f), 1998 Fla. Laws at 1562-64 (amending FLA. STAT. § 163.3180 (1997) and codified at FLA. STAT. § 163.3180(12)(a)-(f) (Supp. 1998)). The minimum criteria include: public schools facilities element, level-of-service standards, service areas, financial feasibility, an availability standard of three years, and intergovernmental coordination. See *id.*

126. See *id.* § 5(13), 1998 Fla. Laws at 1566 (codified at FLA. STAT. § 163.3180(13) (Supp. 1998)).



"local government public school facilities plan elements within a county must be consistent with each other" in order for the school concurrency system to become legally effective.<sup>127</sup>

The preexisting requirement for a preliminary feasibility study for school concurrency was repealed.<sup>128</sup> While the requirement had originally been intended as a mechanism for ensuring that the financial burdens of school concurrency would be equitably distributed, the Schools Commission determined that it had never been adequately described by statute or rule, resulting in confusion about the scope of, or methodology for, such a study.<sup>129</sup>

Equally significant, under the preexisting statute, any plan amendments adopted to implement school concurrency were not required to be based upon the study, and completion of the study did not alter the requirement that any subsequent plan amendments to impose school concurrency be supported by the best available data and that analysis "collected and applied in a professionally acceptable manner."<sup>130</sup> The Schools Commission recommended the repeal of the preliminary feasibility study requirement because it did not serve a useful purpose, and no public benefit was derived from a purposeless requirement.<sup>131</sup> The Legislature concurred and incorporated this recommendation in the 1998 legislation.<sup>132</sup>

### E. Level-of-Service Standards

An essential component of any concurrency system is the level-of-service standard at which a public facility or service is expected to operate. A level of service is defined as "an indicator of the extent or degree of service provided by, or proposed to be provided by a facility based on and related to the operational characteristics of the facility. Level of service shall indicate the capacity per unit of demand for each public facility."<sup>133</sup>

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127. *Id.* § 5(12)(a), 1998 Fla. Laws at 1562 (codified at FLA. STAT. § 163.3180(12)(a) (Supp. 1998)).

128. *See id.* § 5(1), 1998 Fla. Laws at 1561 (repealing FLA. STAT. § 163.3180(1)(b) (1997)).

129. *See* SCHOOLS COMM'N REPORT, *supra* note 64, at 20; *see also* FLA. ADMIN. CODE ANN. r. 9J-5.0055(2)(b) (1998). This deficiency was cogently discussed by the administrative law judge in the *Broward County* hearing, and the prior failure to elucidate clear requirements for the preliminary study resulted in this prerequisite to school concurrency being rendered nugatory. *See* Broward Recommended Order, *supra* note 56, at 85-86, ¶ 254 (stating that "nothing requires that the 'study' be reduced to writing or contained in a single document").

130. FLA. ADMIN. CODE ANN. r. 9J-5.005(2)(a) (1998).

131. *See* SCHOOLS COMM'N REPORT, *supra* note 64, at 20.

132. *See* Act effective July 1, 1998, ch. 98-176, § 5(1), 1998 Fla. Laws 1556, 1561 (repealing FLA. STAT. § 163.3180(1)(b) (1997)).

133. FLA. ADMIN. CODE ANN. r. 9J-5.003(65) (1998). In light of this definition, the logical conclusion is that a level-of-service standard for public schools must be based upon the "capacity per unit of demand," which is the number of pupils to be served, rather than on

The 1998 legislation contains three provisions regarding level-of-service standards for purposes of school concurrency. Each must be considered in light of other legal considerations. First, local governments and school boards must jointly establish the level-of-service standards for purposes of school concurrency.<sup>134</sup> The Legislature decided in 1993 that a governmental entity may not establish a binding level-of-service standard for a facility it does not provide for, finance, operate, or regulate.<sup>135</sup> Accordingly, only the school board may establish level-of-service standards for school concurrency that will be binding on that school district because, ultimately, the school board must raise and spend the public moneys to construct and operate public schools. Each local government must adopt the level-of-service standards in its comprehensive plan in order to enforce them through its concurrency management system.<sup>136</sup>

Second, level-of-service standards must apply to all schools of the same type throughout the county.<sup>137</sup> This provision, like others in the 1998 legislation, is intended to ensure compliance with the constitutional requirement for a uniform system of public schools.<sup>138</sup> Elementary, middle, and high schools are examples of types of schools for level-of-service purposes. Other groupings may be permissible based on the educational mission of the particular schools involved, such as magnet schools or other special-purpose facilities.<sup>139</sup>

Third, local governments and school boards may utilize tiered level-of-service standards to allow time to address a public school backlog.<sup>140</sup> The express authorization for tiered level-of-service standards recognizes that in some rapidly growing counties there is a severe backlog of

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the basis of the school's performance as determined by the level of pupil achievement or some other qualitative measurement.

134. See Act effective July 1, 1998, ch. 98-176, § 5(12)(b)(1), 1998 Fla. Laws 1556, 1562 (codified at FLA. STAT. § 163.3180(12)(b)(1) (Supp. 1998)).

135. See Act effective July 1, 1993, ch. 93-206, 1993 Fla. Laws 1887. This statutory requirement was recommended by ELMS III after its policy review determined that, for purposes of concurrency, some regional planning councils were attempting to impose their own preferred level-of-service standards on local governments through the consistency requirement in section 163.3184(1)(b), *Florida Statutes*. See ELMS III REPORT, *supra* note 34, at 70 (Recommendation 104).

136. See Act effective July 1, 1998, ch. 98-176, § 5(12)(b)(1), 1998 Fla. Laws 1556, 1562 (codified at FLA. STAT. § 163.3180(12)(b)(1) (Supp. 1998)).

137. See *id.* § 5(12)(b)(2), 1998 Fla. Laws at 1562 (codified at FLA. STAT. § 163.3180(12)(b)(2) (Supp. 1998)). This statutory directive is consistent with the existing rule that provides for level-of-service standards to be "set for each individual facility or facility type and not on a systemwide basis." FLA. ADMIN. CODE ANN. r. 9J-5.005(3) (1998) (emphasis added).

138. See FLA. CONST. art. IX, § 1. For an earlier analysis reaching the same conclusion, see Watts, *supra* note 104, at 59-60.

139. See SCHOOLS COMM'N REPORT, *supra* note 64, at 23.

140. See Act effective July 1, 1998, ch. 98-176, § 5(12)(b)(3), 1998 Fla. Laws 1556, 1562 (codified at FLA. STAT. § 163.3180(12)(b)(3) (Supp. 1998)); see also FLA. ADMIN. CODE ANN. r. 9J-5.0055(2) (1998) (data and analyses requirements).

public school needs, and that meeting those needs may take time to achieve an adequate and desirable level of service over the course of the planning period.<sup>141</sup>

As with mandatory concurrency for specified public facilities and services,<sup>142</sup> the Legislature had previously established a vague standard for determining whether locally set level-of-service standards for school concurrency are in compliance.<sup>143</sup> The 1998 legislation provides that level-of-service standards in a school concurrency system be "adequate and desirable"<sup>144</sup> and based upon data and analysis.<sup>145</sup> Within these broad guidelines, local governments and school boards have ample leeway to establish level-of-service standards that are best suited for their particular communities.

#### F. Service Areas

One flash point in the school concurrency policy debate was the extent to which the Legislature should limit the authority of local governments to establish service areas for purposes of applying a school concurrency requirement to proposed development. While the 1998 legislation requires that school concurrency be established on a districtwide basis, how a county, school district, and the municipalities agree to apply concurrency to proposed development determines the measuring point for whether adequate school capacity would be available based on the adopted level-of-service standard. Perhaps more than any other policy issue, this one brought into focus the conflict that can arise between educational and growth management objectives when a school concurrency system is established.

An essential ingredient in any concurrency system is a designation of the area within which the level of service will be measured when an application for a development permit is reviewed.<sup>146</sup> This delineation is also important in determining the financial feasibility of the capital improvements program adopted to deliver the facilities projected to be necessary to achieve and maintain the adopted level-of-service standard.

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141. See SCHOOLS COMM'N REPORT, *supra* note 64, at 23.

142. See FLA. STAT. § 163.3177(3)(a)(3) (1997).

143. See *id.* § 163.3184(1)(b) (Supp. 1998).

144. *Id.* § 163.3180(12)(b)(3). This standard is consistent with the requirement for school boards to establish "adequate educational facilities for all children without payment of tuition." FLA. STAT. § 230.23(4)(c) (1997). Given the judiciary's willingness to defer to legislative determinations regarding the "adequacy" of schools, see *Coalition for Adequacy and Fairness in Sch. Funding, Inc. v. Chiles*, 680 So. 2d 400, 405 (Fla. 1996), it also should be consistent with the constitutional mandate for the Legislature to make "adequate provision" for public schools. FLA. CONST. art. IX, § 1.

145. See Act effective July 1, 1998, ch. 98-176, § 5(12)(b)(1), 1998 Fla. Laws 1556, 1562 (codified at FLA. STAT. § 163.3180(12)(b)(1) (Supp. 1998)).

146. See *id.* § 5(12)(c), 1998 Fla. Laws at 1562 (codified at FLA. STAT. § 163.3180(12)(c) (Supp. 1998)).

The Schools Commission's discussion on school concurrency service areas brought into focus two alternative approaches. One option involved a single countywide service area coextensive with the school board's geographic jurisdiction. The other option involved multiple service areas of less-than-countywide size.<sup>147</sup> The result of this debate was a compromise. The Legislature expressed its clear preference for countywide service areas but, consistent with the local-option nature of school concurrency, allowed local governments to establish less-than-countywide service areas so long as they satisfied certain statutory requirements.<sup>148</sup>

### 1. Countywide Service Areas

Local governments are encouraged "to apply school concurrency on a districtwide basis so that a concurrency determination for a specific development will be based upon the availability of school capacity districtwide."<sup>149</sup> This legislative preference was established for several reasons.

First, countywide service areas are most consistent with the uniform public schools requirement. Florida's school systems are organized and operated on a countywide basis.<sup>150</sup> This principle is reflected in the geographical jurisdiction of each of the sixty-seven school districts<sup>151</sup> and in the way political power is allocated within the district.<sup>152</sup> A school concurrency system with less-than-countywide service areas may carry a higher risk of not meeting that constitutional standard; certainly, it presents a challenge of proving compliance that would not exist with a countywide service area. In light of the dicta in *St. Johns County v. Northeast Florida Builders Ass'n*,<sup>153</sup> a countywide service area appears

147. See SCHOOLS COMM'N REPORT, *supra* note 64, at 24. The principal model for less-than-countywide service areas was the attendance zones set by a school board to determine the enrollment at each school. While by no means the only type of less-than-countywide service area, school attendance zones were the chief candidate in this category because they seemed logically linked to the purpose of school concurrency, namely preventing overcrowded schools, and because they were the basis for the Broward school concurrency system. See Broward Recommended Order, *supra* note 56, at 51, ¶ 141.

148. See Act effective July 1, 1998, ch. 98-176, § 5(12)(c), 1998 Fla. Laws 1556, 1562 (codified at FLA. STAT. § 163.3180(12)(c) (Supp. 1998)).

149. *Id.* § 5(12)(c)(1), 1998 Fla. Laws at 1562 (codified at FLA. STAT. § 163.3180(12)(c)(1) (Supp. 1998)).

150. See FLA. CONST. art. IX, § 4(a) (defining county school districts); FLA. STAT. § 230.02 (1997) (scope of district system).

151. See FLA. STAT. § 230.01 (1997).

152. Generally school board members are nominated and elected by a countywide vote, see *id.* §§ 230.08, .10, even though each may be required to live in a specific residence area, see *id.* § 230.04. School board members may be chosen on the basis of single-member districts provided such a system is established by countywide vote. See *id.* §§ 230.105-.106. In any event, school board members are charged by law to "represent the entire district." *Id.* § 230.11.

153. 583 So.2d 635 (Fla. 1991).

to be the most legally prudent method for establishing a school concurrency system.<sup>154</sup>

Second, a countywide service area provides the best means for avoiding the conflict that can arise between educational and growth management objectives. Under Florida law, school boards must prepare and adopt "plans for the establishment, organization, and operation of the schools of the district."<sup>155</sup> These plans must "[p]rovide adequate educational facilities for all children without payment of tuition."<sup>156</sup> They are to include enrollment plans for individual schools and "may include school attendance areas" to determine which pupils attend specific schools.<sup>157</sup> The assignment of pupils to individual schools is one of the few clearly identified general powers for each school board.<sup>158</sup>

On the other hand, concurrency is intended to achieve maximum utilization of brick and mortar with both public and private interests alike wanting to maximize the utilization of capital facilities. Public interests want maximum utilization in order to minimize the need for additional capital outlay with the attendant political risks associated with raising those funds from taxpayers.<sup>159</sup> Private interests want maximum utilization because they do not want to be blocked from development through a concurrency-based moratorium due to inadequate infrastructure, especially when under-utilized capacity exists elsewhere in the system.

A countywide service area allows development permitting to be conditioned upon the availability of school capacity within the entire county without putting school boards under pressure to achieve maximum utilization of the capacity at each school in order to avoid a development moratorium.<sup>160</sup> It gives school officials a freer hand to draw school attendance area boundaries without regard to possible adverse effects on land development.

## 2. *Less-Than-Countywide Service Areas*

Notwithstanding the rationale for a countywide service area, the 1998 legislation allows local governments to establish less-than-countywide service areas for school concurrency so long as certain statutory requirements are met.<sup>161</sup> Service areas could be school atten-

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154. See *id.* at 639 (stating that the impact fee must apply to "substantially all" of the county population to be constitutional); see also *supra* Part III.B.

155. FLA. STAT. § 230.23(4) (1997).

156. *Id.* § 230.23(4)(c).

157. *Id.* § 230.23(4)(a).

158. See *id.* § 230.22(6).

159. The emphasis on maximum utilization also is reflected in general school law. See *id.* §§ 235.436-.4391.

160. See SCHOOLS COMM'N REPORT, *supra* note 64, at 24.

161. See FLA. STAT. § 163.3180(12)(c)(2) (Supp. 1998).

dance zones or larger areas (for example, the northern, southern, eastern, and western quadrants of a county) so long as the service areas, when taken together, generally are coterminous with the entire geographic area of the county. In choosing to recommend this option, the Schools Commission yielded to arguments that it may be a better choice in some jurisdictions.<sup>162</sup> The Legislature concurred and included the recommended option in the 1998 legislation.<sup>163</sup>

Less-than-countywide service areas may be more effective at preventing individual schools from becoming overcrowded.<sup>164</sup> This approach minimizes the disparities in school overcrowding within a school district. Other than the new statutory exception allowing school capacity in contiguous service areas to be taken into account when making a concurrency determination, unused capacity in another service area would not be considered when determining whether a school was overcrowded to the point of imposing a development moratorium. Less-than-countywide service areas may also prevent a countywide moratorium if the particular service area has inadequate capacity.

The 1998 legislation allows less-than-countywide service areas provided that certain requirements are met.<sup>165</sup> These guidelines were established to ensure compliance with both the uniform public schools requirement of the Florida Constitution and basic policies on comprehensive planning and concurrency. These measures also provide a practical compromise to any conflict between educational and growth management objectives.

First, the 1998 legislation requires that the standards for setting and changing less-than-countywide service area boundaries must be adopted as part of the comprehensive plan provisions establishing the system in the required public school facilities element.<sup>166</sup> Inclusion of these standards in the plan will create a basis for evaluating the initial service area boundaries and for evaluating subsequent changes to service area boundaries. In both instances, specific boundary lines will be evaluated against the adopted standards in light of the requirement that comprehensive plans be internally consistent.<sup>167</sup>

Second, the 1998 legislation requires local governments to identify and establish the specific boundaries for less-than-countywide service

162. See SCHOOLS COMM'N REPORT, *supra* note 64, at 24.

163. See Act effective July 1, 1998, ch. 98-176, § 5(12)(c), 1998 Fla. Laws 1556, 1562 (codified at FLA. STAT. § 163.3180(12)(c) (Supp. 1998)).

164. See SCHOOLS COMM'N REPORT, *supra* note 64, at 24.

165. See Act effective July 1, 1998, ch. 98-176, § 5(12)(c), 1998 Fla. Laws 1556, 1562 (codified at FLA. STAT. § 163.3180(12)(c) (Supp. 1998)).

166. See *id.* § 5(12)(c)(2), 1998 Fla. Laws at 1563 (codified at FLA. STAT. § 163.3180(12)(c)(2) (Supp. 1998)).

167. See FLA. ADMIN. CODE ANN. r. 9J-5.005(5)(a) (1998).

areas in the comprehensive plan.<sup>168</sup> In keeping with the long-standing rule against self-amending comprehensive plans,<sup>169</sup> the service area boundaries may not be incorporated by reference so as to allow their future change without a subsequent plan amendment. Any subsequent changes to the service area boundaries must be adopted into the plan to be effective for school concurrency purposes, and therefore must independently satisfy all requirements to be in compliance. Therefore, service area boundary changes must be internally consistent with the rest of the plan, and to the extent that they alter the public school capital facilities program, they must be financially feasible.

Third, the local government must provide data and analysis that demonstrate that the less-than-countywide service areas utilize school capacity to the greatest extent possible.<sup>170</sup> This should preclude the establishment of a school concurrency system to block development as a method of inducing exactions from developers to pay for additional school capacity that otherwise should be provided by the general public.

The maximum-utilization requirement has enough flexibility for service area boundaries to be drawn in light of appropriate educational and safety considerations. The legislation provides that, when establishing less-than-countywide service areas, consideration can be given to the cost and convenience of transporting pupils and to the imperatives of "court-approved school desegregation plans."<sup>171</sup> The extent to which these or other considerations are the basis for service area boundaries that do not maximize school capacity is an issue to be judged against the basic requirement for appropriate data and analysis, gathered and applied in a professionally acceptable manner.

Fourth, the 1998 legislation includes a rule of application that mandates how less-than-countywide service areas are to be applied:

Where school capacity is available on a districtwide basis but school concurrency is applied on a less than districtwide basis in the form of concurrency service areas, if the adopted level-of-service standard cannot be met in a particular service area as applied to an application for a development permit and if the needed capacity for the particular service area is available in one or more contiguous service areas, as adopted by the local government, then

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168. See Act effective July 1, 1998, ch. 98-176, § 5(12)(c)(2), 1998 Fla. Laws 1556, 1563 (codified at FLA. STAT. § 163.3180(12)(c)(2) (Supp. 1998)).

169. See FLA. ADMIN. CODE ANN. r. 9J-5.005(8)(j) (1998).

170. See Act effective July 1, 1998, ch. 98-176, § 5(12)(c)(2), 1998 Fla. Laws 1556, 1563 (codified at FLA. STAT. § 163.3180(12)(c)(2) (Supp. 1998)).

171. *Id.* The phrase "court-approved desegregation plans" should be narrow enough to apply only in counties with a bona fide ongoing legal dispute about school desegregation that warrants court supervision. It should be broad enough to encompass desegregation plans developed and imposed by the court as well as those negotiated by interested parties without direct court supervision and established by judicial decree.

the development order shall be issued and mitigation measures shall not be exacted.<sup>172</sup>

This provision provides more flexibility in the administration of a school concurrency system with less-than-countywide service areas. Its chief benefit is that it provides a justification for not forcing an immediate revision of school attendance zones—perhaps the most politically charged decision made by any local governmental entity—in order to reallocate surplus school capacity between neighboring attendance zones in order to prevent a development moratorium, but it does so in a way that does not penalize private interests who otherwise might be confronted by a moratorium.

### G. Financial Feasibility

An indispensable ingredient of any concurrency system is a financially feasible plan to deliver the public facilities needed to achieve and maintain the adopted level-of-service standard throughout the planning period.<sup>173</sup> Accordingly, the facility provider, usually a local government, must have the financial wherewithal to implement its capital improvements plan. This basic policy of concurrency—the financial feasibility of the underlying capital improvements program—was foremost among the basic policies reaffirmed by the Schools Commission and the Legislature in 1998.<sup>174</sup> It ensures that the program to deliver the needed facilities is genuine, not illusory.

Financial feasibility became the touchstone for adequate public facilities ordinances partly as an outgrowth of the *Ramapo* decision. The New York Court of Appeals grounded its affirmance of the town's adequate public facilities ordinance on a capital facilities program which was designed to deliver "the capital improvements projected for maximum development" set forth in the town's comprehensive plan.<sup>175</sup> Primarily because of this planning foundation, the court held that the town's attempt "to phase residential development to the Town's ability to provide" infrastructure withstood constitutional muster.<sup>176</sup>

The desire for concurrency to be on sound constitutional footing gave definition to Florida's mandate from the beginning and provided the impetus for the financial feasibility standard for evaluating local capi-

172. Act effective July 1, 1998, ch. 98-176, § 5(12)(c)(3), 1998 Fla. Laws 1556, 1563 (codified at FLA. STAT. § 163.3180(12)(c)(3) (Supp. 1998)).

173. See FLA. ADMIN. CODE ANN. r. 9J-5.0055(1)(b) (1998).

174. See Act effective July 1, 1998, ch. 98-176, § 5(12)(d), 1998 Fla. Laws 1556, 1563 (codified at FLA. STAT. § 163.3180(12)(d) (Supp. 1998)); SCHOOLS COMM'N REPORT, *supra* note 64, at 25.

175. *Golden v. Planning Board of Ramapo*, 285 N.E.2d 291, 294-95 (N.Y. 1972).

176. *Id.* at 295.



tal improvements programs.<sup>177</sup> One of the earliest pronouncements on concurrency posited:

The local plan must contain a capital improvements element and a five-year capital improvement schedule which, in addition to meeting all of the other statutory rule requirements, is financially feasible. It cannot simply be a wish list of facilities that the local government puts forward without any real hope or expectation of being able to fund or implement during the five-year capital improvements program.<sup>178</sup>

While financial feasibility has never been defined per se,<sup>179</sup> these early policies are reflected in the minimum criteria that the DCA later adopted by rule for making compliance determinations of local comprehensive plans.<sup>180</sup> Local governments are required to satisfy these criteria for capital improvements programs that provide the basis for mandatory concurrency on potable water, sanitary sewer, drainage, solid waste, roads, parks and recreation and, where applicable, mass transit.<sup>181</sup>

In 1995 the Legislature sought to ensure that a school concurrency system would be based upon the same kind of predictable capital facilities program required for mandatory concurrency. The 1995 legislation required the following:

Public school level-of-service standards *shall* be adopted as part of the capital improvements element in the local comprehensive plan, which *shall* contain a financially feasible public school capital facilities program established in conjunction with the school board that will provide educational facilities at an adequate level of

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177. An early description of the emerging concurrency requirement explained the importance of a strong planning basis for an adequate public facilities ordinance:

The key to a successful approach to the concurrency requirement is having a sound plan for effectively eliminating existing deficits and providing infrastructure for new development within a reasonable period of time. A court which reviews a temporary deviation from the minimum level-of-service standard in the context of a very weak comprehensive plan which does not set forth an effective way of dealing with infrastructure is likely to find the concurrency requirement has not been satisfied. On the other hand, a court which considers a plan which, according to all the evidence, is a sound, well-thought-out comprehensive plan based on adequate data is likely to uphold any reasonable, good faith effort to achieve concurrency.

Letter from Thomas G. Pelham, Secretary, DCA, to Sen. Gwen Margolis 4 (Mar. 7, 1988) (on file with author).

178. *Id.* at 6.

179. See Broward Recommended Order, *supra* note 56, at 102, ¶ 312.

180. See, e.g., FLA. ADMIN. CODE ANN. r. 9J-5.016(1)(c); .016(2)(b), (c), (f); .016(3)(b)(3), (5); .016(3)(c)(1)(c), (f); .016(4)(a)(2) (1998).

181. See FLA. STAT. § 163.3177(3) (1997) (listing capital improvements element requirements); FLA. ADMIN. CODE ANN. r. 9J-5.016(1)(c) (1998) (detailing costs, data, and analysis requirement for the capital improvements element).

service necessary to implement the adopted local government comprehensive plan.<sup>182</sup>

Despite this mandate, a question persisted as to whether a public school capital facilities program adopted to satisfy section 163.3180(1)(b)(1), *Florida Statutes*, must meet the same financial feasibility standards as are applied to capital improvements plans established for mandatory concurrency.<sup>183</sup> In order to prevent any erosion in the financial feasibility requirement that is integral to mandatory concurrency, the 1998 legislation answers that question in the affirmative.<sup>184</sup>

The 1998 legislation expressly requires that the financial feasibility of a public school capital facilities program be determined on the basis of the service areas selected by the school district and the local governments for purposes of implementing school concurrency.<sup>185</sup> In this way, local governments will be held to the same financial feasibility standard when making a compliance determination regarding a public school capital facilities program as developers are when they pull a building permit and must show that adequate school capacity will be available.<sup>186</sup>

182. Act effective June 16, 1995, ch. 95-341, § 12, 1995 Fla. Laws 3010, 3022 (codified at FLA. STAT. § 163.3180(1)(b)(1) (1995) (emphasis added)).

183. See Broward Final Order, *supra* note 53, at 27-29, ¶¶ 29-31; Broward Recommended Order, *supra* note 56, at 100-04, ¶¶ 306-18.

One reason for the difficulty in applying the financial feasibility standard in the *Broward* hearing was that the DCA failed to object to Broward's school concurrency system on financial feasibility grounds during the initial review. See Memorandum from Mike McDaniel, DCA, to Steve Pfeiffer, DCA, and Charles Pattison, DCA 1 (Aug. 21, 1996) (on file with author). Therefore, the DCA could not base an ultimate compliance determination on Broward County's failure to base its school concurrency system on a financially feasible public school capital facilities program as required by section 163.3180(1)(b)(1), *Florida Statutes*. See FLA. STAT. § 163.3184(8)(a)(1) (Supp. 1998).

The lack of a financially feasible capital plan to provide adequate school capacity was a key reason for the noncompliance determination for the City of Cape Coral's school concurrency system. Even though Cape Coral's system was evaluated prior to the 1995 legislation, it was tested against the general financial feasibility requirement of rule 9J-5.0055(1)(b), *Florida Administrative Code*. See Memorandum from Mike McDaniel, DCA, to Jim Murley, DCA 4 (Dec. 1, 1995) (on file with author).

184. See Act effective July 1, 1998, ch. 98-176, § 5(12)(d)(2), 1995 Fla. Laws. 1556, 1564 (codified at FLA. STAT. § 163.3180(12)(d)(2) (Supp. 1998)).

185. See *id.* § 5(12)(d)(3), 1995 Fla. Laws at 1564 (codified at FLA. STAT. § 163.3180(12)(d)(3) (Supp. 1998)).

186. This requirement was added to expressly disapprove of the analysis offered by Broward County in the compliance proceeding over that county's school concurrency system. Broward sought to demonstrate the financial feasibility of its public school capital facilities program by reference to all school capacity accumulated on a districtwide basis even though the concurrency requirement would be enforced against developers on the basis of the capacity in individual school attendance zones. See Broward Recommended Order, *supra* note 56, at 103-04, ¶¶ 314-18. Thus, capacity that the local governments were allowed to count toward meeting the financial feasibility requirement of the capital facilities program in the initial compliance determination would not necessarily be counted when a developer actually sought development approval in a specific service area.

### H. Availability Standards

Because concurrency is, at bottom, a timing mechanism, any concurrency system must specify when the public facility in question must be available in order to be “concurrent with” the impacts of the permitted development.<sup>187</sup> For public facilities and services subject to Florida’s mandatory concurrency requirement, state law establishes minimum availability standards based upon the particular interest protected by the police power that is addressed by the concurrency requirement for that particular type of facility.<sup>188</sup> Local governments are free to establish more stringent availability standards.

In the case of school concurrency, the Schools Commission recommended a statutory requirement that a local government could not set an availability standard any more stringent than three years from issuance of a final development permit.<sup>189</sup> The Legislature accepted this recommendation. Therefore, under the 1998 legislation, a local government may not deny a development permit for a residential development under a local-option school concurrency system if adequate school facilities will be in place or under actual construction within three years after permit issuance.<sup>190</sup> A more lenient availability standard—more than three years after permit issuance—is permissible.

This standard was grounded on the conclusion that school concurrency is an exercise of the police power for the public welfare, not to vindicate more compelling public health or safety interests.<sup>191</sup> This standard was based upon testimony to the Schools Commission from local school officials that the planning, design, permitting, and construction of a public school in Florida generally takes three to five years.<sup>192</sup>

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The administrative law judge disapproved of this approach. *See id.* at 103-04, ¶¶ 314-18. So did the Administration Commission. *See* Broward Final Order, *supra* note 53, at 28-29, ¶ 31. On fairness grounds, the Schools Commission recommended that such sleight of hand be prohibited by law. *See* SCHOOLS COMM’N REPORT, *supra* note 64, at 25.

187. SCHOOLS COMM’N REPORT, *supra* note 64, at 26. Defining “availability” is another crucial task in establishing a concurrency system. Florida law describes a public facility as being “available” if it is “in use or under actual construction,” thus striking a balance between certainty that the facility will be built and flexibility on precisely when it will be in place. FLA. STAT. § 163.3180(2) (Supp. 1998).

188. For example, potable water, sanitary sewer, drainage, and solid waste facilities are necessary for human habitation, and therefore it is consistent with the public health and safety to require that they be in place or under actual construction upon issuance of a certificate of occupancy. *See* FLA. STAT. § 163.3180(2)(a) (Supp. 1998). Roads, parks, and recreation facilities, being matters of public convenience rather than health and safety, are subject to more relaxed availability standards, which allow reliance on projects listed in a financially feasible capital improvements element to demonstrate concurrency. *See id.* § 163.3180(2)(b)-(c).

189. *See* SCHOOLS COMM’N REPORT, *supra* note 64, at 26.

190. *See* Act effective July 1, 1998, ch. 98-176, § 5(12)(e), 1995 Fla. Laws. 1556, 1564 (codified at FLA. STAT. § 163.3180(12)(e) (Supp. 1998)).

191. *See* SCHOOLS COMM’N REPORT, *supra* note 64, at 26.

192. *See id.*

While it was unusual for the Legislature to deny a local government the discretion to establish its own availability standard for local-option concurrency, the Legislature was justified because establishing a statewide limitation on availability standards protects landowners and developers from arbitrary availability standards being adopted as leverage to obtain exactions. It also eliminates a potentially contentious issue from local negotiations over establishment of school concurrency systems.

### I. Transition Provisions

Three aspects of the 1998 legislation are noteworthy for purposes of implementing the new school concurrency requirements. One was the legislative directive for the DCA to adopt, by rule, minimum criteria for the review and compliance determination of a public school facilities element adopted for purposes of establishing a school concurrency system.<sup>193</sup> The DCA was required to adopt these minimum criteria by October 1, 1998.<sup>194</sup> Although the legislation did not expressly require it, the DCA began the rulemaking process with the consensus recommendations of the working group, which followed-up from the work of the Schools Commission.<sup>195</sup> This directive was unusual because it is a rare, if not unprecedented instance of the Legislature to require the DCA to establish minimum criteria for an optional comprehensive plan element.

A second implementation issue was whether the requirements of the 1998 legislation would apply to the Broward school concurrency system, which was in litigation when the legislation was enacted and as of this writing. On grounds of fairness, the Legislature provided that Broward "may implement its public school facilities element in accordance with the general law concerning public school facilities concurrency in effect when the final order was entered and in accord with the final order consistent with any appellate court decision."<sup>196</sup> This provision is consistent with the Legislature's decision in 1997 to exempt Broward from the temporary suspension of authority to impose school concurrency.<sup>197</sup>

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193. See Act effective July 1, 1998, ch. 98-176, § 5(13), 1995 Fla. Laws 1556, 1566 (codified at FLA. STAT. § 163.3180(13) (Supp. 1998)).

194. The proposed rule (9J-5.025) was noticed for adoption on Aug. 28, 1998, and became effective by operation of law on Oct. 20, 1998. See 24 Fla. Admin. W. 4627 (Aug. 28, 1998). New rules to implement additional procedural requirements for school concurrency (9J-11) were noticed for adoption by the DCA on Nov. 6, 1998. See 24 Fla. Admin. W. 5965 (Nov. 6, 1998).

195. See PUBLIC SCHOOLS, FINAL REPORT, *supra* note 119; see also SCHOOLS COMM'N REPORT, *supra* note 64, at 29.

196. Act effective May 22, 1998, ch. 98-176, § 11, 1998 Fla. Laws 1556, 1568.

197. See Act effective May 30, 1997, ch. 97-265, § 13, 1997 Fla. Laws 4935, 4951.

Thus, the Broward school concurrency system may be implemented by adoption of the remedial amendments specified in the Administration Commission's final order. In addition, Broward County, the Broward School Board, and all municipalities in the county must enter into the interlocal agreement required by section 163.3180(1)(b)(2), *Florida Statutes*, if the final order is reversed on that issue on appeal. Finally, the Broward school concurrency system would have to be revised to conform to the 1998 legislation at the time of the county's next evaluation and appraisal report.<sup>198</sup>

A third implementation issue was not expressly addressed by the 1998 legislation. The 1997 Legislature's temporary suspension of local government authority to impose school concurrency in sixty-six of Florida's sixty-seven counties expired automatically on July 1, 1998.<sup>199</sup> The scheduled expiration of this prohibition was as essential to the passage of the 1998 legislation as the issues that were included in the measure because local governments insisted that, as part of the compromise worked out by the Schools Commission, their home rule authority in the field of growth management be restored to its prior scope. This insistence was based in part on a fear that the temporary suspension of their authority to impose school concurrency would be extended or that it would create a precedent for additional limitations on other governmental powers.<sup>200</sup>

#### IV. CONCLUSION

After five years of legislation that addressed only some pieces of the puzzle, the 1998 legislation contains a complete state policy on local-option school concurrency. It also reaffirms the basic concurrency policies hammered out more than a decade ago to serve as the foundation for Florida's bold experiment in growth management. The 1998 legislation is a "back-to-basics" approach.

Foremost among the basic policies revisited is the mandate that concurrency be grounded in a financially feasible capital improvements program designed to deliver the public facilities needed to achieve and maintain the adopted level-of-service standard throughout the planning period. Also significant is the requirement for an availability standard recognizing the length of time necessary to deliver the needed facilities and the particular prong of the police power to be served by a school concurrency requirement. Balancing growth management objectives against equally important educational considerations is a final hallmark of the 1998 legislation.

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198. See FLA. STAT. § 163.3191(2)(e) (1997), *amended and reworded* by Act effective Oct. 1, 1998, ch. 98-176, § 14(2)(f), 1998 Fla. Laws 1556, 1572 (codified at FLA. STAT. § 163.3191(2)(f) (Supp. 1998)).

199. See Act effective May 30, 1997, ch. 97-265, § 13, 1997 Fla. Laws 4935, 4951.

200. See *supra* note 77.

Now that Florida has a complete school concurrency policy that coordinates all levels of government, a remaining challenge is to find the money to pay for the facilities needed to educate Florida's children. With the constitutional limitations on exactions in the land development process, lawmakers, local governments, school districts, and parents cannot rely on a regulatory system for that. They will have to look to the same place they have always looked—to all of us.