Adequate Public Facilities Requirements: Reflections on Florida's Concurrency System for Managing Growth

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ADEQUATE PUBLIC FACILITIES REQUIREMENTS: REFLECTIONS ON FLORIDA’S CONCURRENCY SYSTEM FOR MANAGING GROWTH

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I. INTRODUCTION

Florida’s concurrency system is our nation’s most ambitious experiment in growth management for several reasons. First, it integrates local capital improvements programming with the local land development regulatory process. The integration of these two historically distinct processes is embodied in the concurrency requirement, which provides that adequate public facilities shall be available concurrent with development. Second, this system is the first attempt to implement the concurrency concept on a statewide basis, a truly monumental task considering that Florida is the fourth largest and one of our fastest growing states. Third, this system is being implemented as part of a state, regional, and local planning process that has made Florida the uncontested leader of the ongoing national movement to reform traditional local development regulatory systems. This experiment is being watched closely by other states, and some have already borrowed from it. In Florida, with the dust still settling on the initial implementation phase, the state’s new concurrency system continues to be the subject of much debate and controversy. A detailed examination of its origins, purposes, components, and flaws should be of interest to those from other states as well as to affected Floridians.

II. OVERVIEW

The use of capital improvements controls as tools to manage growth in rapidly urbanizing areas has increased dramatically in the past two decades. These controls establish a connection between a local government’s capital improvements activities and the local land planning and regulatory process. At the planning level, local capital

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improvements planning and programming are integrated with the local comprehensive planning process. At the regulatory level, development approvals for individual projects are linked to the provision or availability of certain public facilities or services.¹

The growing popularity of capital improvements controls is primarily the result of two related trends. First, local officials and planners have increasingly recognized the critical relationship between local government capital improvement activities and the development process. Local government decisions to construct public facilities or to provide public services influence and frequently determine whether, when, how, and where development occurs. Accordingly, local governments have begun to integrate their capital improvement activities with their land development planning and regulatory processes in an effort to control the timing, type, location, and pattern of development in their communities.²

Second, the judiciary has become more receptive to the use of capital improvement controls to manage growth. Traditionally, courts treated local government facility and service providers in the same manner as privately owned public utility companies. Thus, like the public utility company, the purpose of the local government service provider was deemed to be the provision of facilities and services to accommodate growth.³ Applying the public utility model, courts initially reacted negatively to local government efforts to use their capital improvement activities to control growth.⁴ During the past two decades, however, the judiciary has begun to react more favorably to the use of capital improvement controls as tools for controlling land development, especially if they are linked to or integrated with a plan-


2. HAGMAN & JUERGENSMEYER, supra note 1, at 267-70. As another commentator has characterized the relationship: “Capital facilities are provided for land development purposes, and they significantly influence when, where, how and if growth will occur.” Deutsch, supra note 1, at 100.

3. Deutsch, supra note 1, at 61, 64-65, 96-106.

4. Id. at 66-67. Robinson v. City of Boulder, 547 P.2d 228 (Colo. 1976), overruled by Board of County Comm’rs of Arapahoe County v. Denver Bd. of Water Comm’rs, 718 P.2d 235 (Colo. 1986), is the case most often cited to illustrate this judicial approach. The City of Boulder denied the landowners’ request to connect their proposed development project to the municipal sewer and water system because the project was allegedly inconsistent with the county’s master plan. The Colorado Supreme Court ruled that the City could not refuse to serve the project for nonutility reasons such as “land use planning considerations.” Robinson, 547 P.2d at 229.
ning process.\(^\text{5}\) This change in judicial attitude, along with increased awareness of the impact of public infrastructure decisions on the development process, has prompted local governments to make greater use of capital improvement controls in their land use planning and regulatory systems.

Among the capital improvements controls devised by local governments, perhaps the most popular is the adequate public facilities requirement. This requirement makes the issuance of development approvals contingent on the availability of adequate public facilities. In some states, like Florida, the requirement is phrased in terms of ensuring that facilities are available "concurrent" with development or the impacts of development, hence the "concurrency requirement."\(^\text{6}\) The terms "concurrency," "concurrency requirement," and "adequate public facilities requirement" are used interchangeably in this Article to refer to the legal mandate that development approval be conditioned on the provision of public facilities and services.

Until recently, the enactment of adequate public facilities requirements was primarily a local government phenomenon. Following the judicial sanction of these requirements in New York in 1972 in the landmark case of Golden v. Planning Board of Ramapo,\(^\text{7}\) local adequate public facilities ordinances proliferated throughout the nation, particularly in high growth areas.\(^\text{8}\) For example, a recent survey revealed that thirty percent of California's cities have adopted an adequate public facilities requirement, making it the most commonly used local growth management technique in that state.\(^\text{9}\)

Enacted pursuant to home rule powers, traditional state zoning enabling legislation,\(^\text{10}\) or in some instances through the initiative and referendum process,\(^\text{11}\) these local regulations vary widely in stated

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5. See generally Deutsch, supra note 1, at 82-111.
6. "It is the intent of the Legislature that public facilities and services needed to support development shall be available concurrent with the impacts of such development." Fla. Stat. § 163.3177(10)(h) (1991).
10. The Ramapo ordinance establishing an adequate public facilities requirement for subdivision approval was enacted pursuant to the New York zoning enabling act for towns. Ramapo, 285 N.E.2d at 296-97.
purpose, scope, and detail and the extent to which they are linked to a comprehensive planning framework. A few local governments have enacted concurrency systems that encompass a wide range of public facilities and are used to implement a comprehensive plan and growth policy. For example, the adequate public facilities ordinance of Montgomery County, Maryland, one of the oldest and most comprehensive concurrency programs in the country,\(^ {12} \) covers roads and public transportation, sewer and water, schools, police stations, firehouses, and health clinics. It creates a process for synchronizing the timing of private development with the availability of public facilities in accordance with the county’s comprehensive plan and annual growth policy.\(^ {13} \)

Some of these locally initiated systems apply only to transportation facilities, reflecting widespread public concern and discontent with traffic congestion.\(^ {14} \) The City of Bellevue, Washington, for example, has a comprehensive concurrency system for transportation facilities.\(^ {15} \) Enacted to implement the transportation element of the city’s comprehensive plan, the municipal ordinance establishing the concurrency system provides for the adoption of transportation facilities plans, including funding mechanisms, for specific geographical areas; sets minimum level-of-service standards for streets; and prohibits issuance of development permits for projects that would reduce the level of service below those standards.\(^ {16} \)

Other local concurrency requirements, especially some of those enacted by initiative and referendum in California, have been imposed suddenly and arbitrarily without any planning basis or framework. These expressions of citizen frustration with the problems of rapid growth typically prohibit the issuance of permits for any development that would reduce the level of service for transportation or other facilities below established standards unless the property owner or the local government pays for the facility improvements needed to achieve or maintain those standards.\(^ {17} \) Because these citizen efforts are usually


\(^ {13} \) See Annual Growth Policy, supra note 12, at 3.

\(^ {14} \) Freilich & White, supra note 1, at 917 n.2, 941-45.


\(^ {16} \) Id. § 14.10.005A., 14.10.020, 14.10.030A.

\(^ {17} \) See, e.g., the ordinance discussed in Scaggs, supra note 11.
not linked to any adopted plan to pay for and provide public facilities, they have received a decidedly chilly judicial reception.\(^{18}\)

State governments have begun to take a more active role in this arena, not only to authorize local adequate public facilities requirements, but to establish guidelines for their adoption and implementation. In the *Ramapo* case the New York Court of Appeals held that zoning controls that linked the timing of development to the availability of public facilities were within the ambit of that state’s traditional zoning enabling legislation.\(^{19}\) Nevertheless, following the *Ramapo* decision, several states, to remove any doubt about this issue, amended their zoning enabling acts to expressly authorize their local governments to impose such requirements.\(^{20}\) Recently, two states—Florida and Washington—moved beyond permissive enabling legislation and mandated their local governments to adopt and implement concurrency systems pursuant to state guidelines.\(^{21}\)

In 1985 Florida became the first state to adopt mandatory concurrency legislation; it included the mandate in its landmark growth management legislation, which establishes a state, regional, and local planning process.\(^{22}\) This legislation expresses the intent “that public facilities and services needed to support development shall be available concurrent with the impacts of such development.”\(^{23}\) To meet this requirement, each of Florida’s local governments must adopt a local comprehensive plan containing a capital improvements element identifying and providing for the public facilities needed to accommodate projected growth and establishing minimum level-of-service (LOS) standards for those facilities.\(^{24}\) Local governments also must adopt implementing land development regulations that prohibit issuance of a

\(^{18}\) See, e.g., infra notes 408-10 and accompanying text.


\(^{21}\) See infra notes 26-29, 178-85, and accompanying text.


\(^{24}\) Id. § 163.3177(3)(a).
development permit that would result in a reduction of the LOS below the established standards.\(^{25}\)

In 1990 Washington became the second state to impose the concurrency requirement on its local governments.\(^{26}\) Although the Washington system is not as comprehensive as Florida’s, it does link the concurrency requirement to a mandatory local planning process. The Washington legislation requires counties that exceed specified population and growth rate thresholds, and the cities located within those counties, to adopt and implement comprehensive land use plans.\(^{27}\) To guide preparation and adoption of the local comprehensive plans and implementing regulations, the Washington statute establishes state planning goals, including one stating that adequate public facilities and services shall be available upon occupancy of development without lowering service levels below the minimum standards set by local governments.\(^{28}\) However, the Washington concurrency requirement expressly applies only to transportation. It prohibits local development approvals that would decrease the level of service on transportation facilities below the standards set in the local plan “unless transportation improvements or strategies to accommodate the impacts of development are made concurrent with the development.”\(^{29}\)

Other state and local governments are likely to consider adoption of adequate public facility requirements. Several states are engaged in planning processes\(^{30}\) or special

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25. See infra note 265 and accompanying text.
27. Id. § 4, at 1377-78. Only counties that have both a population of 50,000 or more and a growth rate of more than 10% during the past 10 years, and all cities located within such counties, and counties of any size with growth rates in excess of 20% during the past 10 years, and all cities located with such counties, must adopt local plans. However, the local legislative body of any county with a population of less than 50,000 could remove the county and all of its cities from the planning requirement by timely complying with certain procedures. Id. at 1377.
28. Id. § 2, at 1376. The state public facilities and services goal is as follows: “Ensure that those public facilities and services necessary to support development shall be adequate to serve the development at the time the development is available for occupancy and use without decreasing current service levels below locally established minimum standards.” Id. § 2(12), at 1376.
29. Id. § 7(6), at 1380 (emphasis added). “Concurrent with development” is defined to “mean that improvements or strategies are in place at the time of development, or that a financial commitment is in place to complete the improvements or strategies within six years.” Id.
30. See, e.g., 1989 Me. Legis. Serv. 377 (West). Maine’s 1989 Comprehensive Planning and Land Use Regulation Act requires local governments to adopt comprehensive plans, which are reviewed by a state agency for consistency with state statutory goals and guidelines. Id. at 381, 387. These goals include development of an “efficient system of public facilities and services.” Id. at 380. Local government must determine the facilities needed to “support growth and development,” and adopt a capital improvements program for providing those facilities. Id. at 383, 384.

New Jersey has adopted legislation requiring the State Planning Commission to develop a
programs\textsuperscript{31} that may culminate in the adoption of statewide concurrency systems. Consequently, the early experiences of states such as Florida merit serious attention and study.

From the inception of adequate public facility and concurrency controls, some land use scholars and commentators, development community representatives, and members of the judiciary have expressed a range of concerns about the use of local capital improvement controls to manage growth. First, they have questioned the wisdom of allowing local governments to use such controls without significant state and regional oversight and review.\textsuperscript{32} The fear is that such controls will promote parochialism and insularism and discourage or prevent badly needed regional planning initiatives. Second, many critics have charged that such controls are exclusionary in effect, if not in purpose, because they artificially interfere with the natural forces of growth, increase the cost of housing, and exclude low and moderate income families.\textsuperscript{33} Similarly, some have contended that these controls are a guise for no-growth policies, especially if adequate funding for infrastructure is not available, and that local governments will use them to halt growth simply by failing to provide the facilities and services that are needed to support development.\textsuperscript{34} Third, developers have complained that such controls will be used to shift to their industry the costs of eliminating existing infrastructure deficits and providing facilities and services required by new development.\textsuperscript{35} Fourth, developers have complained that these controls unduly restrict private property rights.\textsuperscript{36} Finally, some have suggested that these controls will


\textsuperscript{32} For example, in 1991 California voters enacted by referendum a law that requires cities and counties to prepare congestion management plans that prevent traffic congestion on any major segment of the regional transportation system from falling below level of service "E." Each local congestion management plan must be consistent with a regional mobility plan, designate the affected highway system and establish level-of-service standards, contain a program for evaluating the impacts of land use decisions on the regional transportation system, and set up a seven-year capital improvements program for maintaining the designated level-of-service standard. Cal. Gov't Code § 65088-89.4 (West Supp. 1990).

\textsuperscript{33} See infra notes 135-146 and accompanying text.

\textsuperscript{34} See infra notes 114-16 and accompanying text.

\textsuperscript{35} See infra notes 114-22 and accompanying text.

\textsuperscript{36} See infra notes 153-57 and accompanying text.
simply perpetuate and continue existing patterns of suburban sprawl, albeit in a phased manner and at a different pace than in the past.\textsuperscript{37}

These concerns are justified and should be taken seriously. However, if an adequate public facilities or concurrency requirement is properly conceived, designed, and implemented, these concerns can be adequately addressed and eliminated. Like other land use controls, these requirements should be subordinate to and consistent with a legally binding comprehensive plan that comports with state and regional planning goals and policies, provides for the community’s projected growth, incorporates a financially feasible capital improvements program to deliver the infrastructure needed to accommodate the projected growth, provides for an adequate supply of housing for all income groups, discourages sprawling urban and suburban development patterns, and allows sufficient flexibility to avoid unconstitutional restrictions on private property.

Although it is not without flaws, the Florida concurrency system is the nation’s most comprehensive and innovative attempt to integrate adequate public facilities requirements into the local comprehensive planning process. It recognizes the need for State guidance and supervision for such requirements, and it addresses many of the concerns that have been raised about the use of such controls. Using the Florida concurrency system as a vehicle for analysis, this Article discusses and illustrates the appropriate role of adequate public facility controls in the management of growth. First, it discusses the origins and purposes of adequate public facilities requirements and the planning and legal concerns raised by their implementation. Next, it explains and critiques the Florida concurrency system, with particular emphasis given to the state, regional, and local comprehensive planning framework within which the concurrency requirement is implemented. The Article then explores the major legal issues that may arise as the concurrency requirement results in the denial of development permits. Finally, the Article concludes with some observations about the strengths of Florida’s concurrency system and some recommendations for improving it. The author hopes that this assessment will benefit those in other jurisdictions considering the use of adequate public facilities requirements.

III. THE ADEQUATE PUBLIC FACILITIES REQUIREMENT: ORIGINS, PURPOSES, AND CONCERNS

The adequate public facilities or concurrency requirement is a growth management tool for ensuring the availability of adequate

\textsuperscript{37} See infra notes 147-52 and accompanying text.
public facilities and services to accommodate development. It seeks to coordinate the timing of development with capital improvements planning by providing for the delivery of necessary facilities simultaneously with, or within a reasonable time of, the permitting or occupation of new development. It attempts to ensure the adequacy of the facilities and services by setting minimum performance standards or measures for each facility or service category. The linchpin of the requirement is a prohibition against the issuance of a development permit unless the requisite facilities and services will be available within the prescribed time and will be adequate as measured by the established standards. However, the purpose of the requirement is not to impose a moratorium on development. Rather, it seeks to avoid the necessity for moratoria by ensuring that public facilities are available when needed.\textsuperscript{38}

Concurrency is a fundamentally sensible but frequently controversial concept. Driving the concurrency requirement is a "pay as we grow" public policy that development should not be permitted unless simultaneous financial commitments are also made to provide the public facilities and services necessary to serve the development. This policy's logic is difficult to refute. Nevertheless, concurrency evokes considerable controversy.\textsuperscript{39} The land development industry is likely to protest any application of a concurrency requirement because it controls the timing of development, a factor which traditionally has been left to the private sector and the dictates of a free market economy. The requirement also raises the specter of building moratoria because of inadequate facilities unless developers pay to upgrade inadequate infrastructure. Even among some strong proponents of land use controls, a concurrency requirement may engender considerable suspicion and criticism if it appears to be an exclusionary device or thinly disguised no-growth scheme, neglects other equally important planning goals such as affordable housing, or if it is imposed arbitrarily without the benefit of advance study and planning and the existence of adequate infrastructure funding systems.

Given the controversial nature of the concurrency concept, judicial challenges to local governments' efforts to implement the requirement are inevitable. The challengers are likely to characterize the requirement as an illegitimate means of halting growth and development, restricting private property rights, and unfairly shifting the cost of

\textsuperscript{38} Freilich & White, \textit{supra} note 1, at 941.

providing public facilities to the development industry.\textsuperscript{40} If the concurrency concept and its origins are not understood, or if the purposes of a particular concurrency system are either not clearly articulated or are suspect, a reviewing court may be persuaded by such characterizations. Accordingly, in designing, implementing, and evaluating concurrency systems, it is important to understand the origins and purposes of the adequate public facilities requirement and the concerns that land use planners and commentators, affected interests, and the courts may have about its implementation.

In jurisdictions like Florida where it has been customary to encourage growth and development while deferring the politically difficult issue of paying for it, the adequate public facilities requirement may be greeted with the same apprehension as would an invader from another planet. But although it may be perceived or portrayed by some critics as an alien regulatory species, the requirement is not a radical departure from traditional American land development controls. Concern for adequate public facilities has been manifest throughout the evolution of our land use regulatory system, commencing with the earliest state zoning enabling acts. Indeed, the 1926 Standard State Zoning Enabling Act,\textsuperscript{41} on which most state zoning enabling legislation is based, expressly provided that one of the purposes of zoning regulations is "to facilitate the adequate provision of transportation, water, sewerage, schools, parks, and other public requirements."\textsuperscript{42} Consequently, local zoning board hearings customarily include considerable discussion about the impact of a proposed rezoning for more intensive use on transportation and other public facilities and services. Judicial decisions upholding local denial of rezoning requests because of adverse impacts on public facilities are legion.\textsuperscript{43}

Public concern for the funding and delivery of infrastructure to accommodate growth became increasingly evident during the development of subdivision controls over the last several decades. Initially, subdivision controls consisted of simple platting requirements designed to make it easier to buy and sell land.\textsuperscript{44} After rampant land subdivision and speculation produced millions of vacant platted lots
lacking basic public facilities and services, state and local governments expanded their subdivision regulations in the 1920s and '30s to address infrastructure needs. This movement was aided by another model act, the Standard City Planning Enabling Act, which was published in 1928. Designed primarily to encourage adoption of local comprehensive plans, the model planning act also provided for subdivision controls and addressed the need to require internal subdivision improvements, including traffic, utilities, and parks and recreation. Although the states did not embrace the planning provisions of the model planning act with the same fervor as the earlier Standard Zoning Enabling Act, they nevertheless began to adopt more stringent subdivision controls in response to mounting infrastructure problems.

The financial pressures of providing infrastructure intensified with the rapid suburbanization of American cities following World War II. As local governments struggled to provide facilities and services to sprawling developments, they searched for ways to make new development pay for itself. Local governments began to amend their subdivision regulations to require developers to dedicate land or make monetary contributions to finance a wide range of subdivision improvements, including onsite and offsite street improvements and park and school sites. From this practice evolved impact fee systems for requiring developers to pay a pro rata share of the cost of a range of public facilities needed to accommodate new development. As a result of judicial challenges, the law of subdivision exactions and impact fees was developed by state courts to uphold the validity of these requirements so long as certain conditions were met. In addition, local governments began to deny subdivision approval for projects that would have serious unmitigated impacts on public facilities and services. The consideration of the adequacy of basic public facili-

45. Hagman & Juergensmeier, supra note 1, at 192-93.
47. Id. § 14.
49. Hagman & Juergensmeier, supra note 1, at 192-93, 202-04.
50. Id. at 276-80.
52. See generally Hagman & Juergensmeier, supra note 1, at 276-87. In Florida, the seminal case on impact fees is Contractors & Builders Ass'n v. City of Dunedin, 329 So. 2d 314 (Fla. 1976).
ties and services is now commonplace in the regulatory process for subdivision approval, and impact fees have become an increasingly popular method of paying for those facilities.

Another significant phase in the evolution of both American land use controls generally and capital improvements controls specifically began in the 1950s and ‘60s. Historically, the adoption of a separate comprehensive plan was not a legal prerequisite to the exercise of zoning and other land use regulations. However, many land use planners and commentators long advocated such a requirement. An early and leading proponent of this requirement was Harvard Law School Professor Charles Haar, who advocated, in his influential and widely cited 1955 article, "In Accordance with a Comprehensive Plan," that state enabling acts should require that zoning be in accordance with a separately adopted master plan. Inspired by such advocacy, a number of states in the 1960s and ‘70s enacted legislation requiring that local land use regulations be consistent with a separately prepared and adopted comprehensive plan. The local comprehensive plan was to become the vehicle for integrating capital improvements planning with land use planning.

In the 1960s and ‘70s a few local governments also began developing timing and sequential development controls. By linking zoning and subdivision regulations with the capital improvements elements of local comprehensive plans, these controls sought to coordinate the granting of new development approvals with the planned provision of adequate public facilities. The adoption of these controls was inspired by urban planner Henry Fagin and land use lawyer and professor Robert Freilich. In his influential article, Regulating the Timing of Urban Development, published in 1955, Fagin advocated public control of the timing and sequence of development. According to Fagin, such planning controls were needed to ensure that a high standard of public services and facilities were provided in the most economical fashion, to retain public control over the character of development,

53. HAGMAN & JUERGENSMeyer, supra note 1, at 193.
57. Id. at 1157, 1174.
59. HAGMAN & JUERGENSMeyer, supra note 1, at 259-62.
60. Henry Fagin, Regulating the Timing of Urban Development, 20 LAW & CONTEMP. PROBS. 298 (1955). Henry Fagin was apparently the first advocate of development timing controls.
and to achieve the desired balance among various land uses. He suggested that these goals could be achieved through the designation of building priority zones and control over the issuance of building permits.

Building on Fagin's ideas and suggestions, Ramapo, New York, in 1969 adopted an ordinance conditioning residential subdivision approval on the availability of adequate municipal facilities, which were to be provided in phases over an eighteen-year period in accordance with the town's adopted comprehensive plan and capital improvements program. The ordinance was drafted and defended in court by Professor Robert Freilich, who was to become the leading proponent of timing and sequential development controls. The judicial validation of the Ramapo system in *Golden v. Planning Board of Ramapo* in 1972 and the continuing advocacy of Professor Freilich gave impetus to the spread of such systems around the country.

In Florida, variations of timed or phased development controls and antecedents of the new concurrency requirement can be found in the state's special review process for large-scale projects designated as developments of regional impact (DRIs). Established in 1972, this

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61. Id. at 300-02.
62. Id. at 302-03.
63. See infra notes 79-88 and accompanying text.
64. Freilich & White, supra note 1, at 927 n.60 (discussing Professor Freilich's other writings and activities).
66. Douglas R. Porter, *Do State Growth Management Acts Make a Difference? Local Growth Management Measures Under Different State Growth Policies*, 24 Loy. L.A. L. Rev. 1015, 1020 n.20 (1991). The author describes Professor Freilich's contribution as follows: Both San Diego's and Sarasota's programs have been heavily influenced by the fertile imagination of Robert Freilich, a well-known land use attorney who has specialized over the past 20 or so years in fostering the explosive growth of his brand of growth management. . . . [A] noted author, lecturer, and consultant, he has left a paper trail of growth management proposals across the United States that would please an archaeologist wishing to trace the evolution of growth management.

Id.


67. Fla. Stat. § 380.06 (1991). A "development of regional impact" is defined as "any development which, because of its character, magnitude, or location, would have a substantial effect upon the health, safety, or welfare of citizens of more than one county." Id. § 380.06(1). The Florida Legislature has established statewide guidelines and standards for determining
process requires regional planning agencies and local governments to consider whether proposed developments of regional impact "will efficiently use or unduly burden water, sewer, solid waste disposal, or other necessary public facilities" including public transportation facilities. Local development orders approving DRIs are frequently conditioned on the availability of adequate public facilities and may contain timing or phasing provisions to ensure that development of each phase cannot commence until the availability of adequate facilities or services is assured.

The various national movements toward the integration of capital improvements planning and programming with land use planning and regulation coalesced in Florida in 1985 with the enactment of the state’s comprehensive growth management legislation. This legislation incorporates all of the features necessary to coordinate land development with the provision of infrastructure and services. It mandates the adoption of legally binding local comprehensive plans containing capital improvements elements that outline when, where, and how public facilities and services will be provided. It requires that all local government actions concerning development, including all land development regulations and development orders, be consistent with the adopted plan. It controls the timing and phasing of development by prohibiting development approvals unless adequate public facilities are available concurrent with the impacts of development and in accordance with the capital improvements element of the local plan. Finally, the Florida legislation synthesizes all of these components into a coherent and comprehensive system for managing the state’s growth.

Placed in historical context, the Florida concurrency requirement is a logical outgrowth of the zoning, subdivision, and planning controls that have evolved over the last five or six decades. It is a growth man-

whether particular developments must undergo the regional review process. Id. §§ 380.06(2)(a), .0651. For a discussion of this process, see Thomas G. Pelham, Regulating Developments of Regional Impact: Florida and the Model Code, 29 U. FLA. L. REV. 789 (1977).


69. Interview with Tom Beck, Chief, Bureau of State Planning, Fla. Dep't of Comm'y Aff. (Jan. 6, 1992) (notes available at Fla. Dep't of State, Div. of Archives, Tallahassee, Fla.). The Department of Community Affairs administers the Florida Development of Regional Impact program.

70. See supra note 22 and accompanying text.


72. Id. § 163.3177(3)(a).

73. Id. § 163.3194.

74. Id. § 163.3177(10)(h); see also infra notes 235, 266, and accompanying text.

75. See Pelham et al., supra note 22, at 521, 590.
agement tool that builds upon earlier efforts to ensure the availability of adequate public facilities to accommodate new development. Conceptually, the concurrency requirement is a neutral growth management tool; it neither encourages nor discourages growth, but it simply commands that development be accompanied by the provision of adequate public facilities. But like other land use controls, concurrency can be designed or manipulated to achieve a variety of purposes, some laudable and some suspect. Thus, while the concurrency requirement itself is not revolutionary, it is important to understand the purposes for which it is being imposed and the concerns that it engenders.

As noted earlier, Ramapo is the seminal decision establishing the legality of adequate public facilities requirements. In Ramapo the New York Court of Appeals reviewed the first comprehensive system for coordinating the timing and phasing of development with the provision of public facilities, discussed a number of concerns raised about the purposes and effects of such systems, and rejected statutory and constitutional attacks on the Ramapo system. Therefore, it is worthwhile to revisit in detail both the Ramapo approach and the rationale of the court’s decision.

The Ramapo system was built on a comprehensive planning foundation. Following a study of the community’s existing land uses, public facilities, economic base, housing needs, and projected growth, the Town adopted a master plan. To implement the master plan, it also adopted a comprehensive zoning ordinance and both a short-term and a long-term capital improvements program. The short-term program consisted of a capital budget providing for the development of facilities identified in the master plan during the initial six-year period. The long-term capital improvements program provided for the location and timing of the development of facilities specified in the master plan during the subsequent twelve-year period. Collectively, the two plans specified the capital improvements needed for maximum development of the town over an eighteen-year period consistent with the adopted master plan.

77. Based on a comprehensive survey of land use practitioners and commentators, the Ramapo decision was once ranked as the most significant land use regulation case other than Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926). Michael D. Dozier & Donald G. Hagman, Ranking Land Development and Environmental Cases and Courts, ENVTL. COMMENT, Aug. 1978, at 4, 4.
79. *Id.*
80. *Id.* at 294-95.
81. *Id.* at 295.
In order to coordinate residential development with the Town's ability to provide public facilities under its adopted capital improvements programs, the Town amended its subdivision ordinance to prohibit residential subdivision approval in the unincorporated areas of the town unless the developer first secured a special permit. Issuance of a special permit was made contingent on the availability of five public facilities or services: sanitary sewer; drainage; parks or recreation, including public schools; roads; and firehouses. The availability of the facilities and services was measured by a point system based on a sliding scale of values assigned to the specific facilities. No permit would be issued unless fifteen points were accumulated, but a developer was permitted to earn points and accelerate the date of subdivision approval by providing the facilities. At least one single-family residential dwelling was permitted on each tract of land, and provisions for vested rights, variances, and reduced property tax assessments were included to avoid unreasonable restrictions. As described by the court, the system provided "an over-all program of orderly growth and adequate facilities through a sequential development policy commensurate with progressing availability and capacity of public facilities."

Individual local landowners who had been denied subdivision approval and the county builders association contended that the Town was not authorized to adopt the amendments to its subdivision ordinance and also challenged both the purposes and the alleged effects of the amendments. First, they alleged that the regulation of population growth through timing and phasing controls was not authorized by the state's zoning enabling act. Second, they contended that the Ramapo scheme did not advance legitimate zoning purposes. Third, they argued that the ordinance, by restricting development for up to eighteen years, diminished the value of property to such an extent that it prevented any profitable or beneficial use of the landowners' property. Accordingly, the alleged effect of the ordinance was so confiscatory as to constitute a deprivation of property without due process of law and a taking of property without just compensation.

82. Id. at 295 n.2.
83. Id. at 295.
84. Id.
85. Id. at 295-96.
86. Id. at 296.
87. Id.
88. Id. at 294.
89. Id. at 298.
90. Id. at 296.
91. Id. at 294, 303.
The court rejected the *ultra vires* argument based on its interpretation of the New York zoning enabling act and its understanding of the purposes of the Ramapo ordinance. Like the Standard Zoning Enabling Act on which it was based, the New York enabling act did not specifically authorize "timing" and "sequential" development controls. But like its progenitor, the New York Act expressly authorized municipalities to enact zoning ordinances for the purpose of controlling population density and "to facilitate the adequate provision of transportation, water, sewerage, schools, parks and other public requirements." The court held that this express grant of power included, by necessary implication, the authority to control the timing and phasing of development to assure the availability of adequate public facilities.

Similarly, the court easily disposed of the attacks on the system's purposes. As land use regulations restricting the use of private property, the Ramapo ordinances were subject to the deferential standard of review enunciated in *Village of Euclid v. Ambler Realty Co.* In *Euclid* the Supreme Court ruled that land use regulations would not violate the Due Process or Equal Protection Clauses unless they "are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals or general welfare." Under this standard, the regulation must have a legitimate public purpose, and the regulation must be a reasonable means to achieve that purpose. In applying this standard, courts have traditionally shown great deference to the regulation under review; if its validity is "fairly debatable, the legislative judgment must be allowed to control."

Applying this standard of review, the New York court identified at least five "legitimate zoning purposes" of the Ramapo system.

92. *Id.* at 296.
93. *Id.* at 297 n.3, 307. As the dissenting judge in the *Ramapo* case pointed out: "The enabling acts for the several classes of municipalities in the State are substantially alike. They followed the model acts drafted by the U.S. Department of Commerce in the 1920's . . . ." *Id.* at 306-07.
94. *Id.* at 297, 300. The *Ramapo* majority concluded that there was a correlation between the regulation of "population density" and the adequate provision of transportation, water, sewerage, schools, parks and other public requirements, both of which were expressly mentioned in the New York zoning enabling legislation. *Id.* at 296 n.3. The majority also characterized the Ramapo system's provisions to ensure adequate facilities as "forms of density controls." *Id.*
95. 272 U.S. 365 (1926).
96. *Id.* at 395.
98. *Id.* at 308-09.
99. 272 U.S. at 388 (citation omitted).
First, it eliminated “premature subdivision and urban sprawl.”101 Second, it assured a minimum level of public facilities and services for each new home.102 Third, it sought “to provide a balanced cohesive community dedicated to the efficient utilization of land.”103 Fourth, it prevented premature subdivision without necessary public facilities by ensuring “continuous development commensurate with the Town’s obligation to provide such facilities.”104 Fifth, it prevented the urban blight that results when adequate public facilities and services are not provided.105 According the Ramapo scheme the traditional “presumption of validity”106 and refusing “to substitute its judgment as to the plan’s over-all effectiveness” for that of the local legislature,107 the court easily concluded that Ramapo’s system of timing and sequential development controls was a reasonable means of achieving its legitimate public purposes.108

The court almost summarily rejected the contention that the Ramapo system constituted an unlawful taking of the plaintiffs’ property. After citing its own prior ruling that a regulation which

101. Id. at 295.
102. Id. at 301. In citing this reason, the court noted Ramapo’s contention that “for want of time and money” it was unable to provide these facilities and services concurrent with the present rate of home construction. Id.
103. Id. at 302.
104. Id.
105. Id.

In sum, Ramapo asks not that it be left alone, but only that it be allowed to prevent the kind of deterioration that has transformed well-ordered and thriving residential communities into blighted ghettos with attendant hazards to health, security and social stability—a danger not without substantial basis in fact.

Id.

106. Id. at 301. “[W]e have afforded such regulations, the usual presumption of validity attending the exercise of the police power, and have cast the burden of proving their invalidity upon the party challenging their enactment.” Id. (citations omitted).
107. Id. “Implicit in such a philosophy of judicial self-restraint is the growing awareness that matters of land use and development are peculiarly within the expertise of students of city and suburban planning, and thus well within the legislative prerogative, not lightly to be impeded.” Id. (citations omitted).
108. Id. at 303. The court stated:
Considered as a whole, it represents both in its inception and implementation a reasonable attempt to provide for the sequential, orderly development of land in conjunction with the needs of the community, as well as individual parcels of land, while simultaneously obviating the blighted aftermath which the initial failure to provide needed facilities so often brings.

Id. However, the court then seemed to qualify its conclusion that there was a reasonable relationship between the purposes and means of the Ramapo system with the following statement: “In sum, where it is clear that the existing physical and financial resources of the community are inadequate to furnish the essential services and facilities which a substantial increase in population requires, there is a rational basis for ‘phased growth’ . . . .”

Id. at 304-05.
permanently precludes all reasonable use of property is a taking, the court concluded that the Ramapo restrictions, while "substantial in nature and duration," were only "temporary," even if they remained in effect for the eighteen-year life of the program. Moreover, based on the assumption that the Town would fully and timely implement its capital improvements program, and noting the various savings provisions in the Ramapo system, the court observed that landowners would be able to make reasonable use of their property within the fixed eighteen-year period. Accordingly, the court held that the ordinance did not violate either the federal or state constitutions.

Despite the New York court's validation of the Ramapo plan, many land use lawyers, planners, and commentators have expressed a variety of concerns about inappropriate purposes and undesirable effects of such systems. These concerns range from local parochialism in the management of growth, to exclusionary zoning, to the perpetuation of sprawling development patterns. The plaintiffs raised some of these concerns before the Ramapo court. Although the court addressed these concerns with varying degrees of interest, the court found none of them sufficiently compelling to warrant invalidation of the Ramapo plan.

Perhaps the most forceful criticism of the Ramapo plan and its progeny is that they are vehicles for exclusion. Left to their own devices, local governments have engaged in various exclusionary schemes. Some have sought to exclude population generally through limited or no-growth schemes. Others have attempted to exclude discrete segments of the population such as racial or minority groups or particular uses such as low-income housing. Still others have en-

109. *Id.* at 303. The case cited by the Ramapo court was Arverne Bay Construction Co. v. Thatcher, 15 N.E.2d 587 (N.Y. 1938), which declared a land use restriction to be an unconstitutional taking because it appeared to be a permanent restriction with no inference "that within a reasonable time the property can be put to a profitable use or that the present inconvenience or hardship imposed upon the plaintiff is temporary." 15 N.E.2d at 592.


111. *Id.* at 303.

112. *Id.* at 304.

113. *Id.* at 304-05.


115. For a case involving such a scheme, see City of Boca Raton v. Boca Villas Corp., 371 So. 2d 154 (Fla. 4th DCA 1979), *cert. denied*, 381 So. 2d 765 (Fla. 1980), *cert. denied*, 449 U.S. 824 (1980), in which the court invalidated a population cap that the City sought to achieve by limiting the number of dwelling units that would be permitted in the jurisdiction. The court held that the cap was arbitrary and unreasonable because it was not based on a comprehensive plan. *Id.* at 159.

116. For examples of exclusionary practices of this type, see the famous New Jersey cases,
gaged in fiscal zoning practices to maximize the local tax base through the promotion of commercial and industrial uses and the exclusion of residential uses that do not pay for themselves. Critics of the Ramapo plan have suggested that it contained all of these elements. They have noted that it afforded little opportunity for low-income housing, included virtually no multifamily development, was based on large-lot residential zoning that limited population growth, and did not apply to commercial and other nonresidential development. In commenting on the Ramapo plan and its judicial validation, Fred Bosselman, a nationally prominent land use lawyer, pointedly noted: "The wolf of exclusionary zoning hides under the environmental sheepskin worn by the stop-growth movement."

Ostensibly, the Ramapo majority did not take lightly the contention that the municipality's plan cloaked exclusionary purposes. Quoting from a famous Pennsylvania exclusionary zoning case, the court stated: "[Z]oning is a means by which a government body can plan for the future—it may not be used as a means to deny the future."

Southern Burlington County NAACP v. Township of Mount Laurel, 336 A.2d 713 (N.J.), appeal dismissed and cert. denied, 423 U.S. 808 (1975) (invalidating a local zoning ordinance because it excluded low- and moderate-income families and providing that each local government must provide its fair share of regional housing needs), and Southern Burlington County NAACP v. Township of Mount Laurel, 456 A.2d 390 (N.J. 1983), on remand, 504 A.2d 66 (N.J. Super. 1984) (holding that local governments must take affirmative inclusionary actions such as incentive zoning, density bonuses, and mandatory low-income housing set-asides to meet their fair share obligations).

117. In holding that a municipality could not exclude low-income housing for fiscal reasons, the New Jersey Supreme Court characterized the City's fiscal zoning argument as follows:

[j]he position is that any municipality may zone extensively to seek and encourage the "good" tax ratables of industry and commerce and limit the permissible types of housing to those having the fewest school children or to those providing sufficient value to attain or approach paying their own way taxwise.


119. See, e.g., David W. Silverman, A Return to the Walled Cities: Ramapo as an Imperium in Imperio, in MANAGEMENT & CONTROL OF GROWTH, supra note 118, at 52; Bosselman, supra note 118, at 245.

120. See, e.g., Franklin, supra note 118, at 91-92.

121. Herbert M. Franklin, Legal Dimensions to Controlling Urban Growth, in MANAGEMENT & CONTROL OF GROWTH, supra note 118, at 216, 234 ("In summary, the main criticism of Ramapo is that it is fiscal zoning dressed in environmental clothing."); see also Silverman, supra note 119, at 55; Franklin, supra note 118, at 93.

122. Bosselman, supra note 118, at 249.

Accordingly, the court warned that it would not tolerate any local exclusionary efforts to avoid the burdens of growth and that communities must "confront the challenge of population growth with open doors." However, impressed by the Town's comprehensive planning efforts, its commitments to provide public facilities, and its provision for low-income housing, the court concluded that the Ramapo plan was an attempt "to maximize growth by the efficient use of land" and therefore assimilated rather than excluded population. Because of its highly deferential posture, the court did not closely scrutinize the Ramapo plan's particulars, which were inconsistent with either the maximization of growth or the efficient use of land.

Consider the sharply contrasting reaction of the Pennsylvania Supreme Court to the exclusionary issue in a series of cases dealing with large-lot residential zoning. In *National Land & Investment Co. v. Kohn,* which ironically was cited and quoted by the Ramapo court, the Pennsylvania court declared unconstitutional the township's four-acre minimum residential lot size zoning restriction. Although it purported to apply Euclid's deferential due process-equal protection standard of review, the court in fact subjected the alleged purposes of the four-acre lot requirement to strict scrutiny. Closely examining and rejecting each of the purposes advanced by the Township, including such traditional zoning objectives as ensuring adequate sewage disposal and protecting water supplies, the court concluded that the requirement had an exclusionary purpose and design and was therefore invalid. In a subsequent case, using the same analytical approach, the Pennsylvania court invalidated two- and three-acre minimum residential lot sizes as exclusionary. Was it perhaps significant that unlike Ramapo the Pennsylvania towns had not adopted a comprehensive plan?

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125. Id.
126. See Bosselman, supra note 118, at 245-46.
130. Id. at 607.
131. Id. at 608.
132. Id. at 610-11.
133. In re Kit-Mar Builders, Inc., 268 A.2d 765 (Pa. 1970). Reaffirming National Land, the court stated: "We once again reaffirm our past authority and refuse to allow the township to do precisely what we have never permitted—keep out people, rather than make community improvements." Id. at 768.
134. In National Land the court stated:
A zoning ordinance whose primary purpose is to prevent the entrance of newcomers in
A second major concern relates to the perceived need for a broader geographic perspective in land use planning. The propensity of local governments to pursue their own parochial and selfish interests at the expense of their neighbors and region has been widely noted and criticized. Some critics have contended that Ramapo-type controls would further encourage those tendencies and that local governments should not be allowed to impose them without state supervision or a requirement that it be in accordance with state and regional planning goals and policies. Similarly, the dissenting judge in Ramapo opined that the municipality's plan reflected "a parochial stance without regard to its impact on the region or the State." Noting the ongoing reform efforts and projects of the American Law Institute and the New York Office of Planning Coordination, he contended that the problems of uncontrolled urban sprawl require "solution at a regional or State level." The Ramapo majority also recognized the broader geographical dimensions of urban problems, the failure of local governments to effectively address and solve those problems, and the need for a regional or statewide planning process. Nevertheless, accurately observing that "the power to zone under current law is vested in local municipalities, and we are constrained to resolve the issues accordingly," the majority declined to invalidate the Ramapo ordinance "in the wistful hope" that the various reform movements "will soon bear fruit." Based upon its construction of the New York zoning enabling act, the court held that the Town was empowered to adopt the Ramapo plan, which it characterized as "a first practical step toward controlled growth achieved without forsaking broader social purposes."

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order to avoid future burdens, economic and otherwise, upon the administration of public services and facilities can not be held valid. Of course, we do not mean to imply that a governmental body may not utilize its zoning power in order to insure that the municipal services which the community requires are provided in an orderly and rational manner.

National Land, 215 A.2d at 612.

135. See, e.g., Fred Bosselman & David Callies, The Quiet Revolution in Land Use Control (1972). The authors characterized the local land use regulatory system as "thousands of individual local governments, each seeking to maximize its tax base and minimize its social problems, and caring less what happens to all the others." Id. at 1.

136. See, e.g., Bosselman, supra note 118, at 265; Randall Scott, Comment, in MANAGEMENT & CONTROL OF GROWTH, supra note 118, at 41, 49.

137. Ramapo, 285 N.E.2d at 305.

138. Id. at 306. The dissenting opinion specifically cited the ALI Model Land Development Code, on which the Florida Environmental Land and Water Management Act of 1972, chapter 380, Florida Statutes, was based. Ramapo, 285 N.E.2d at 306. See Pelham, supra note 67, at 792-93.

139. Ramapo, 285 N.E.2d at 299-300.

140. Id. at 301.
The New York court's treatment of the regional issue in *Ramapo* should be compared to the approach taken by the California court in *Associated Home Builders of Greater Eastbay v. City of Livermore*.\(^{141}\) Through the initiative process, voters in the City of Livermore enacted an adequate public facilities ordinance prohibiting issuance of residential building permits until educational, wastewater, and water supply facilities complied with specified standards.\(^{142}\) Among the challenges brought by members of the construction industry was a claim that the ordinance unconstitutionally barred immigration to Livermore and therefore impacted not only the welfare of the city but also of the surrounding region.\(^{143}\) In response, the court ruled that such land use ordinances "are constitutional if they are reasonably related to the welfare of the region affected by the ordinance,"\(^ {144}\) established a three-step analysis for making this regional welfare determination, then remanded the case to the trial court to determine whether the Livermore ordinance complied with the regional welfare standard.\(^{145}\) One can only speculate as to why the California and New York courts responded so differently to the regional concern. Perhaps a reason is that the Ramapo ordinance was the product of a comprehensive planning process, while the Livermore ordinance was imposed suddenly and arbitrarily by citizen initiative.\(^ {146}\)

Another criticism of the Ramapo plan was that it promoted and programmed urban sprawl.\(^ {147}\) This criticism is ironic because the Ramapo system was adopted "for the alleged purpose of eliminating premature subdivision and urban sprawl."\(^ {148}\) But as some critics have pointed out, while the system discouraged the "leapfrog" variety of sprawl by requiring sequential development patterns, it perpetuated the continuing spread of low-density residential sprawl because it failed to alter the underlying spatial pattern of large-lot, single-family

\(^{141}\) 557 P.2d 473 (Cal. 1976).
\(^{142}\) Id. at 475.
\(^{143}\) Id. at 483-87.
\(^{144}\) Id. at 476.
\(^{145}\) Id. at 488-90.
\(^{146}\) See Thomas C. O'Keefe, *Time Controls on Land Use: Prophylactic Law for Planners*, in *MANAGEMENT & CONTROL OF GROWTH*, supra note 118, at 68, in which the author states:

> An initial significant distinction between time controls and other zoning devices that have been voided on exclusionary grounds is that when the time control device is linked with a bona fide comprehensive plan and a formula for gradually including low- and moderate-income housing, the whole scheme takes on an equitable, quasi-regional, and judicially palatable character.

(Citation omitted.)
\(^{147}\) See, e.g., Bosselman, supra note 118, at 248.
\(^{148}\) *Ramapo*, 285 N.E.2d at 295.
zoning.\textsuperscript{149} Therefore, according to one commentator, the Ramapo plan "merely proposes a better organized and phased pattern of suburban sprawl."\textsuperscript{150} Given the traditional presumption of validity that it afforded the Ramapo ordinance, the court was not inclined to second-guess the overall effectiveness of the Ramapo system and appeared to accept at face value the Town's contention that the purpose of the plan was to control urban sprawl.\textsuperscript{151} Nevertheless, given the Ramapo plan's almost total embrace of low-density residential zoning,\textsuperscript{152} the criticism that the plan promoted urban sprawl is a valid one.

Perhaps the most fundamental question raised about Ramapo-type plans is the nature of the local government's obligation to provide the requisite facilities.\textsuperscript{153} If development permission is contingent upon the availability of public facilities, the local government can effectively stop growth simply by failing to provide the necessary infrastructure. For this reason, Henry Fagin, who is credited with originating the concept of development timing, proposed that local governments be required to provide services in order to enforce the concept.\textsuperscript{154} The Ramapo court repeatedly refers to the Town's "obligation" to provide the facilities and its "commitment" in its adopted comprehensive plan to the construction of capital improvements.\textsuperscript{155} Impliedly, the court recognized a legal obligation on the part of the Town to provide the facilities necessary to gain development approval under the Ramapo system. The court also acknowledged the potential impact on the landowner or developer if the Town defaulted in its obligation or commitment. However, the court noted that in resolving a challenge to the facial validity of the Ramapo ordinance, it "must assume not only the Town's good faith, but its assiduous adherence to the program's scheduled implementation."\textsuperscript{156} In the event the Town later defaulted in its obligation to provide the facilities, the court observed that an aggrieved landowner could bring an action to declare the ordinance unconstitutional as applied to his property or to have the restrictions removed from the property.\textsuperscript{157} The court did not mention the possibility of an action to compel the Town to provide the facilities or

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\item \textsuperscript{149} Franklin, supra note 118, at 92; Bosselman, supra note 118, at 248-50.
\item \textsuperscript{150} Richard May, Comment, in MANAGEMENT & CONTROL OF GROWTH, supra note 118, at 49, 50.
\item \textsuperscript{151} Ramapo, 285 N.E.2d at 301.
\item \textsuperscript{152} Id. at 299 n.2.
\item \textsuperscript{153} See, e.g., Porter, supra note 8, at 36.
\item \textsuperscript{154} Fagin, supra note 60, at 303.
\item \textsuperscript{155} Ramapo, 285 N.E.2d at 198-99 n.7, 302, 304.
\item \textsuperscript{156} Id. at 299 n.7.
\item \textsuperscript{157} Id.
\end{itemize}
whether an action for damages would be available because of the Town's breach of its obligation.

The issue of local government's obligation takes on added significance when one considers Ramapo's rather dismal performance in implementing its six-year capital improvements program. Following the adoption of the Ramapo plan in 1969, the Town deferred major portions of its 1971 capital budget, did not even adopt capital budgets for 1972 and 1973, and significantly altered its 1974 budget. Perhaps not coincidentally, the number of dwelling units approved during each of the first five years of the plan was almost fifty percent less than the annual rate before adoption of the plan. In view of this record, perhaps a court reviewing a Ramapo-type plan should carefully scrutinize and analyze the financial feasibility of the local capital improvements program rather than assume a local government's good faith, as did the Ramapo court?

Closely related to the issue of the local government's obligation is the criticism that such controls can unfairly shift the burden of providing public facilities from the local government to the landowner. If a local government fails to provide the facilities necessary to obtain development approval, the developer or landowner may be forced to finance or provide the facilities, assuming this is an economically feasible option. Indeed, the Ramapo plan provided that developers could advance the date of subdivision approval for their property by providing the necessary facilities. However, the Ramapo court did not allude to any legal or equitable problem with this provision and in fact cited it as one of the safeguards in the Ramapo plan. Perhaps the challengers did not raise this issue. Nevertheless, it should not be ignored, especially when adequate facility requirements are imposed not only in largely undeveloped areas, as in the environs of Ramapo, but also in areas with some existing development, as in much of Florida. In these situations, to meet the requirement for adequate public facilities, a landowner might be asked not only to provide the facilities needed by its own project, but also to remedy existing infrastructure deficiencies. In this circumstance, the burden transferred to the developer increases significantly and therefore magnifies the legal and equitable dimensions of the problem.

Finally, the concern raised most frequently by the development community is that Ramapo-type systems unlawfully restrict private property rights. Not surprisingly, this was a major contention of the

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159. See, e.g., Franklin, supra note 121, at 230-31.
160. See supra note 76 and accompanying text.
plaintiffs in the Ramapo case. Although the New York Court of Appeals rejected these contentions and the United States Supreme Court denied review of Ramapo, the decision hardly presents an insurmountable barrier for takings claims against other adequate public facilities requirements. First, the resolution of takings claims turns on the facts of each case; courts decide takings cases by "engaging in essentially ad hoc, factual inquiries." Under this mode of analysis, the unique features, purposes, and effects of each adequate public facilities requirement will be determinative. Second, the Ramapo plaintiffs brought a facial challenge against the ordinance but presented no evidence of any diminution in the value of their land, a critical element of every takings case. Third, and perhaps most important, there have been two important developments in takings jurisprudence since the Ramapo decision in 1972 that may affect implementation of adequate public facilities requirements. In 1987 the Supreme Court recognized the concept of compensable temporary regulatory takings in First English Evangelical Lutheran Church v. County of Los Angeles and called for heightened judicial scrutiny of the rationales of land use regulations restricting private property in Nollan v. California Coastal Commission. These decisions are frequently cited as potential barriers to the implementation of Florida's concurrency system and will be discussed in Part IV.

Numerous commentators have criticized the Ramapo decision for being too deferential in its review of the Ramapo system. Undoubtedly, the traditional presumption of validity and low level of scrutiny afforded the Ramapo ordinance by the court obscured legitimate concerns about its purposes and effects. But there is more to this story than excessive judicial restraint. The court was demonstrably impressed by the Town's planning efforts. After describing in detail the Town's planning activities, including its adopted master plan and capital improvements programs, the court repeatedly used these activi-

161. 285 N.E.2d at 294.
163. Ramapo, 285 N.E.2d at 294, 303. The test for a taking claim based on a facial challenge to a regulation, i.e., an allegation that the mere enactment of the regulation constitutes a taking, is more demanding than a taking claim based on the particular impact of the regulation as applied to specific property. Keystone, 480 U.S. at 493-95, 501. In a facial attack, the challenger must show that the regulation "does not substantially advance legitimate state interests . . . or denies an owner economically viable use of his land . . . ." Keystone, 480 U.S. at 485 (quoting Agins v. City of Tiburon, 447 U.S. 255, 260 (1980)).
166. See supra notes 92-108 and accompanying text.
ties to buttress its disposition of the various issues. For example, the implementing subdivision controls "are the product of foresighted planning calculated to promote the welfare of the township," and they "conform to the community's considered land use policies as expressed in its comprehensive plan." In rejecting concerns about the substantial nature and duration of the restrictions that might operate for as long as eighteen years, the court cited the Town's planning commitment to construct capital improvements and assumed that "the Town will put its best effort forward in implementing the physical and fiscal timetable outlined under the plan." As for concerns that the Ramapo controls would be misused, the court stated that "the preeminent protection against their abuse resides in the mandatory on-going planning and development requirement, present here, which attends their implementation and use." The obvious moral of the Ramapo story is that a comprehensive plan will alleviate many judicial concerns.

In sum, the Ramapo decision teaches that a comprehensive planning foundation is important to the design, implementation, and judicial validation of regulatory systems that use adequate public facilities requirements to manage growth. It is also instructive on the point that a plan may mask improper purposes and effects if it is not truly comprehensive in scope and detail. As the following section illustrates, Florida has learned these lessons well and, as a result, has improved immeasurably on the Ramapo model.

IV. THE FLORIDA CONCURRENCY SYSTEM

The "wistful hope" of the Ramapo majority for state and regional intervention in the planning arena has become a reality in Florida. During the last twenty years, Florida has emerged as the nation's leader in reforming its land use planning and regulatory system through innovative state, regional, and local planning legislation. In 1972 it became the first state to adopt legislation based on article seven of the American Law Institute's proposed Model Land Development Code, one of the reform efforts cited in Ramapo. The Florida Land and Water Management Act of 1972 created special

168. Id. at 303.
169. Id. at 302.
170. Id. at 304.
171. Id. at 303.
172. Pelham, supra note 55, at 5.
processes for regulating Developments of Regional Impact and Areas of Critical State Concern.\textsuperscript{175} Subsequently, the Legislature enacted the nation's strongest mandatory local planning legislation, the Local Government Comprehensive Planning Act of 1975.\textsuperscript{176} This Act required each of the state's local governments to adopt a comprehensive plan by 1979 in accordance with statutory criteria.\textsuperscript{177}

Florida established a state and regional planning process and strengthened its local planning legislation in the 1980s. The Florida State and Regional Planning Act of 1984\textsuperscript{178} required preparation of the State Comprehensive Plan and established procedures for its adoption.\textsuperscript{179} It also required each of the state's eleven regional planning agencies to adopt a comprehensive regional policy plan that is consistent with the state plan.\textsuperscript{180} The Florida Legislature in 1985 adopted the State Comprehensive Plan,\textsuperscript{181} and the Local Government Comprehensive Planning and Land Development Regulation Act (1985 Act),\textsuperscript{182} which strengthened considerably the state's local planning legislation and mandated the consistency of local plans with the state and regional plans.\textsuperscript{183} The cumulative effect of these various laws was the creation of a statutory framework for an integrated state, regional, and local comprehensive planning process.\textsuperscript{184}

Florida's concurrency system is implemented within and as an integral part of this comprehensive planning process. Because the concurrency requirement intrudes sharply, visibly, and controversially into the land use regulatory process by threatening the denial of development permits, it tends to overshadow other important components of the larger planning system of which it is a part. In evaluating Florida's concurrency system, however, it is essential to understand and consider the underlying state, regional, and local planning system that supports it. Like its Ramapo precursor, the Florida concurrency sys-

\textsuperscript{175} \textit{Id.} §§ 380.05-.06. For discussion of these two processes, see Pelham, supra note 55, ch. 3 & 5.

\textsuperscript{176} Ch. 75-257, 1975 Fla. Laws 794 (codified at FLA. STAT. §§ 163.3161-.3211 (1977)).

\textsuperscript{177} For a discussion of the Act and its various requirements, see Pelham, supra note 55, at 169-90.


\textsuperscript{179} FLA. STAT. §§ 186.007-.008 (Supp. 1984).

\textsuperscript{180} \textit{Id.} §§ 186.507-.508 (Supp. 1984).

\textsuperscript{181} Ch. 85-57, § 8, 1985 Fla. Laws 295 (codified at FLA. STAT. ch. 187 (Supp. 1986)).

\textsuperscript{182} Ch. 85-55, 1985 Fla. Laws 207 (codified at FLA. STAT. §§ 163.3161-.3215 (1985)).

\textsuperscript{183} For a discussion of the 1985 amendments to the Local Government Comprehensive Planning Act of 1975, see Pelham et al., supra note 22, at 544-59.

\textsuperscript{184} Florida's integrated state, regional, and local comprehensive planning process is described and analyzed in Pelham et al., supra note 22.
tem has a strong local comprehensive planning foundation, but it also encompasses state and regional issues and addresses many of the other concerns raised about Ramapo-type systems. Unlike the Ramapo plan, a locally inspired initiative applicable only to undeveloped areas, the Florida system is State-driven and applies to all areas. Pursuant to state guidelines, every local government must adopt a concurrency system that applies to both developed and undeveloped areas. These new variations on an old theme create challenging implementation problems and some potentially thorny legal issues.

A. The Comprehensive Planning Framework

Florida has created a pyramidal planning hierarchy. At the top of the hierarchy is the State Comprehensive Plan, at middle level are comprehensive regional policy plans, and at the foundation are local comprehensive plans. The three planning levels are integrated through consistency requirements. The goals and policies of the State Comprehensive Plan must be implemented through the regional policy plans that are consistent with the state plan and through local plans that are consistent with both the state and regional plans. Local comprehensive plans must be implemented through land development regulations and development orders that are consistent with the local plan.\textsuperscript{185}

1. State and Regional Issues

The cry of the Ramapo critics for a state and regional planning system has been heeded in Florida. A state and regional perspective is injected into the local planning process in three important ways. First, local comprehensive plans must be consistent with both the state and the applicable regional policy plan.\textsuperscript{186} Second, local comprehensive plans must satisfy statutory intergovernmental coordination requirements to ensure that extraterritorial issues are adequately addressed.\textsuperscript{187} Third, the Florida Department of Community Affairs (DCA) must review and approve local plans for consistency with the state and regional plans and compliance with the intergovernmental coordination and other state requirements.\textsuperscript{188}

Sitting at the zenith of the planning pyramid, the State Comprehensive Plan is a "direction-setting document" that provides "long-range policy guidance" for regional and local plans.\textsuperscript{189} It contains twenty-

\textsuperscript{185} Pelham et al., \textit{supra} note 22, at 590.
\textsuperscript{186} FLA. STAT. §§ 163.3177(9)(c), .3184(1)(b) (1991).
\textsuperscript{187} \textit{Id.} § 163.3177(4)(a), (6)(b).
\textsuperscript{188} \textit{Id.} §§ 163.3177(9), (10), .3184(1)(b), (8)(a).
\textsuperscript{189} \textit{Id.} § 187.101(1)-(2).
seven goals with accompanying policies covering a wide range of social, economic, environmental, natural resources, conservation, and land planning issues. Of special relevance to the issue of concurrency are the goals and policies for land use and public facilities that direct the coordination of land development and capital facilities. Although the state plan "does not create regulatory authority or authorize the adoption of agency rules, criteria, or standards not otherwise authorized by law," other state legislation requires regional and local plans to be consistent with the goals and policies of the state plan.

A comprehensive regional policy plan must be adopted by each of the state's eleven regional planning agencies. The regional policy plan must set forth regional goals and policies, including growth management policies, which are consistent with and implement the goals and policies of the State Comprehensive Plan. Among other things, the regional plan must address and analyze the problems and needs of the region, especially with regard to land use, water resources, transportation, and infrastructure. The local comprehensive plan must be consistent with the applicable regional policy plan.

To further ensure that state and regional concerns will not be ignored, the 1985 Act makes intergovernmental coordination "a major objective of the local comprehensive planning process." Each local comprehensive plan must be coordinated with the plans of adjacent municipalities and counties as well as with the state and regional plans. It must contain an intergovernmental coordination element that demonstrates consideration of the local plan's impacts on adjacent local governments and the region and how coordination with the state, regional, and other local plans will be achieved.

2. The Local Comprehensive Plan

As in the Ramapo plan, implementation of Florida's concurrency requirement is linked to a local comprehensive planning process. Before imposition of the concurrency requirement, a local government

190. Id. § 187.201.
191. Id. § 187.201(16), (18).
192. Id. § 187.101(2).
193. Id. § 163.3184(1)(b).
194. Id. § 186.508.
195. Id. § 186.507(1), (3).
196. Id. § 163.3184(1)(b).
197. Id. § 163.3177(4)(a).
198. Id.
199. Id. § 163.3177(4)(a), (6)(h).
must confront and resolve the basic issues of growth and development, infrastructure needs and costs, and existing and projected revenue sources. The vehicle for addressing these threshold issues is the local comprehensive plan, which must be reviewed by DCA pursuant to the agency's minimum criteria rule for compliance with state law.

Each local government must adopt a comprehensive plan. The local plan is a blueprint for the future development of the community; it must include "principles, guidelines, and standards for the orderly and balanced future economic, social, physical, environmental, and fiscal development" of the local government's jurisdictional area. The plan must be based on and supported by the best available existing or original data, and it must be economically feasible. At a minimum, the local plan must include elements covering future land use; capital improvements generally and sanitary sewer, solid waste, drainage, potable water, and natural groundwater aquifer protection specifically; recreation and open space; housing; traffic circulation; intergovernmental coordination; coastal management (where appropriate); and mass transit (for local jurisdictions of 50,000 or more people). The elements of the plan must be internally consistent and coordinated with each other, and as previously discussed, the local plan itself must be coordinated with the comprehensive plans of adjacent communities and counties, the region, and the state.

After its adoption, the local comprehensive plan is the preeminent instrument for regulating land use in Florida. The local plan must be implemented through the adoption of land development regulations that are consistent with the plan. These regulations must include provisions to implement the concurrency requirement. All develop-

202. Id. § 163.3177(1).
203. Id. § 163.3177(8), (10)(c); Fla. Admin. Code Ann. r. 9J-5.005(2)(c) (1991).
205. Id. § 163.3177(6)(a).
206. Id. § 163.3177(3)(a).
207. Id. § 163.3177(6)(c).
208. Id. § 163.3177(6)(d).
209. Id. § 163.3177(6)(e).
210. Id. § 163.3177(6)(f).
211. Id. § 163.3177(6)(b).
212. Id. § 163.3177(6)(h).
213. Id. § 163.3177(6)(g).
214. Id. § 163.3177(6)(l), (7)(a).
215. Id. § 163.3177(2).
216. See supra notes 196-99 and accompanying text.
ment, both public and private, and all development orders approved by local governments must be consistent with the adopted local plan. 218

3. Accommodating Growth in Well-Balanced Communities

The Ramapo plan sought to maximize commercial and low-density residential development to the exclusion of other land uses, despite the Town's alleged goal of "a balanced cohesive community" and its disavowal of exclusionary motives. 219 This strategy would not be acceptable under Florida's growth management laws. The express philosophy of this state's local planning Act is that local governments must accommodate growth in well-balanced communities. 220

Each local comprehensive plan must contain a future land use plan element demonstrating that the local government is accommodating its anticipated growth and that it is planning for a full complement of land uses sufficient to serve its projected population. 221 The local government's projected growth must be based on population estimates and projections provided by state agencies or generated by the local government using professionally acceptable methodologies approved by DCA. 222 In reviewing the local plan for compliance with these state growth management requirements, DCA will determine whether the local government is planning for its anticipated growth. 223

The future land use plan element must provide for a full range of land uses, including residential, commercial, and industrial, and it must contain standards for controlling the density and intensity of de-

218. Id. § 163.3194(1)(a).
220. Section 163.3177(1), Florida Statutes, provides that the local comprehensive plan shall prescribe "principles, guidelines, and standards for the orderly and balanced future economic, social, physical, environmental, and fiscal development of the area" (emphasis added). Section 163.3177(6)(a) provides in part that the local comprehensive plan must include a future land use plan that is "based upon surveys, studies, and data regarding the area, including the amount of land required to accommodate anticipated growth [and] the projected population of the area ...." (emphasis added).
223. In reviewing local plans, the DCA applies chapter 9J-5 of the Florida Administrative Code, Minimum Criteria for Review of Local Government Comprehensive Plans and Determination of Compliance. These rules require that local plans must "be based on resident and seasonal population estimates and projections." Fla. Admin. Code Ann. r. 9J-5.005(2)(e) (1990). The future land use element of the local plan must be based on these population projections, id. at r. 9J-5.006(1)(g), and "an analysis of the amount of land needed to accommodate the projected population," id. at r. 9J-5.006(2)(c).
The distribution, location, and extent of the land uses must be depicted on a future land use plan map or map series. Both the element and the map must be based on an analysis of the amount of land needed in each of the land use categories to accommodate the projected population. With regard to concurrency, the proposed future land uses must be coordinated with the availability of public facilities and services and ensure that suitable land is available for facilities needed to support development. Again, when DCA conducts its compliance review of the local plan, it will consider whether sufficient land has been allocated in the various land use categories to support the local government's projected growth. By combining state planning criteria with State oversight and review, Florida seeks to ensure that its local governments cannot use growth management systems for exclusionary purposes.

4. Planning and Programming Capital Improvements

One of the most impressive features of Florida's local comprehensive planning system is a strong capital improvements planning and programming requirement. Local governments cannot impose the concurrency requirement until a program for providing infrastructure has been formulated and adopted as a component of the local comprehensive plan. This program must describe how, when, and where the local government will provide infrastructure to serve development allowed under the comprehensive plan. Because the capital improvements planning and programming component is the heart of each local concurrency system, its major features deserve special attention.

As mentioned previously, each local plan must contain a capital improvements element that considers "the need for and the location of public facilities in order to encourage the efficient utilization of such facilities." At a minimum, the capital improvements element must contain:

1. A component which outlines principles for construction, extension, or increase in capacity of a public facilities, as well as a component which outlines principles for correcting existing public

228. See supra note 223 and accompanying text.
facility deficiencies, which are necessary to implement the comprehensive plan. The component shall cover at least a 5-year period.

2. Estimated public facility costs, including a delineation of when facilities will be needed, the general location of the facilities, and projected revenue sources to fund the facilities.

3. Standards to ensure the availability of public facilities and the adequacy of those facilities including acceptable levels of service.\textsuperscript{230}

The element must set forth a long-term capital improvements plan covering at least a ten-year period\textsuperscript{231} and a short-term program of scheduled improvements to be provided by the local government for the first five years of the plan.\textsuperscript{232} To ensure that the element always reflects current needs and conditions, it must be reviewed annually and modified if necessary by a formally adopted plan amendment.\textsuperscript{233} Following adoption of the local comprehensive plan, all public facilities provided by the local government must be consistent with the capital improvements element.\textsuperscript{234}

The capital improvements element has several important purposes. First, it must ascertain and evaluate the community’s public facility needs as identified in the specific infrastructure elements for sanitary sewer, solid waste, drainage, potable water, recreation and open space, and transportation.\textsuperscript{235} This evaluation must include both existing deficiencies and future needs.\textsuperscript{236} Second, the element must estimate the cost of the capital improvements in the five-year schedule.\textsuperscript{237} Third, the element must analyze the local government’s capability to finance the five-year schedule of improvements by identifying and evaluating the available revenue sources by facility type.\textsuperscript{238} This analysis must show that the program is financially feasible.\textsuperscript{239} Fourth, the element must establish policies for the timing and location of public facilities to support sufficient land development patterns consistent with the future land use element.\textsuperscript{240} Fifth, the element must formulate policies for ensuring that the concurrency requirement is satisfied.\textsuperscript{241}

\textsuperscript{230} Id.
\textsuperscript{232} Id. at r. 9J-5.016(4)(a).
\textsuperscript{234} Id. § 163.3177(3)(b).
\textsuperscript{237} Id. at r. 9J-5.016(2)(c).
\textsuperscript{238} Id. at r. 9J-5.016(2)(f).
\textsuperscript{239} Id. at r. 9J-5.016(2)(f), (4)(a).
\textsuperscript{240} Id. at r. 9J-5.016(2)(a), (e).
\textsuperscript{241} Id. at r. 9J-5.016(3)(b).
In sum, the capital improvements element represents local government's obligation to provide the adequate public facilities needed to accommodate future growth consistent with its adopted land use plan, and it is designed to ensure that this obligation is fulfilled.242

Despite their impressive scope and detail, the statutory and rule provisions pertaining to capital improvements programming fail to adequately address the critically important distinction between existing infrastructure deficiencies and the demand for additional infrastructure generated by new development. Both the statute and the rule require that local governments address both existing infrastructure deficiencies and projected new infrastructure needs.243 However, they do not specify whether this is to be accomplished simultaneously or whether the elimination of existing deficiencies can be accomplished over a longer period of time. The overall import of the rule provisions is that existing infrastructure deficiencies are to be eliminated simultaneously with the provision of new infrastructure required for new development during the adopted capital improvements schedule. While it may be reasonable to require provision of infrastructure to serve new development contemporaneous with the permitting of the development, it is not realistic or feasible to cure in a short period of time existing infrastructure deficits, especially those relating to expensive facilities such as transportation and stormwater management, which have accrued over decades. Nor is it feasible to prohibit all new development until all existing infrastructure deficiencies have been eliminated. The practical solution is to provide for the long-term reduction and elimination of existing deficiencies created by previously permitted development while requiring immediate provision of new infrastructure needed to serve new development.

5. Providing Affordable Housing

As the criticisms of the Ramapo plan illustrate, growth management systems are frequently alleged to be exclusionary in purpose or effect, especially with regard to low-income groups. This problem has been considered and addressed in Florida. Recognizing the importance of housing and the possibility that growth management systems may be used for exclusionary purposes, Florida's comprehensive planning laws emphasize the provision of affordable housing for all income groups. The housing goal of the State Comprehensive Plan calls on the public and private sectors to "increase the affordability and avail-

242. See infra notes 307-17 and accompanying text.
ability of housing for low-income and moderate-income persons."

In pursuit of this goal, the local comprehensive plan must contain a housing element that gives direction to the housing efforts of the public and private sectors. The element must set forth standards and plans for providing housing for all existing and projected future residents and "adequate sites for future housing, including housing for low-income and moderate-income families." Based on data and analysis relating to the projected housing need for all "anticipated populations," the housing element must state the means by which the local government will provide housing for the projected population, with special emphasis on providing adequate housing and housing sites for low- and moderate-income households. Under these state housing requirements, local governments cannot lawfully use their comprehensive plans to exclude low-and moderate-income housing. On the contrary, they have an affirmative duty to include adequate provisions for such housing in their plans.

6. Preventing Urban Sprawl

A central policy of Florida's growth management laws is the discouragement of urban sprawl. The State Comprehensive Plan contains numerous goals and policies designed to prevent sprawling development patterns. Several of these goals and policies relate directly to the coordination of land development and the provision of public facilities. For example, the land use goal provides that "development shall be directed to those areas which have in place, or have agreements to provide, the land and water resources, fiscal abilities, and service capacity to accommodate growth in an environmentally acceptable manner." The public facilities goal directs that the State "shall protect the substantial investments in public facilities that already exist and shall plan for and finance new facilities to serve residents in a timely, orderly, and efficient manner." These goals are

248. For a discussion of the state statutory requirements for affordable housing and planning strategies for satisfying those requirements, see Department of Community Affairs, Affordable Housing Problem Deserves Careful Treatment in Local Comprehensive Plans, (Technical Memo, Vol. 5, No. 9, Oct., 1990).
251. Id. § 187.201(18)(a).
accompanied by policies promoting more efficient development patterns and the maximization of the use of existing public facilities. Collectively, these goals and policies point toward the timing and sequential development controls of Ramapo, which were designed to prevent "leapfrog" sprawl.

This state policy direction toward more compact and efficient development patterns is further reinforced by policies designed to prevent scattered and poorly planned development in rural areas. For example, the State Comprehensive Plan "encourages a separation of urban and rural land uses while protecting water supplies, resource development, and fish and wildlife habitats." It also calls for the conservation and maintenance of forests, wetlands, important habitat areas, and agricultural and natural resources.

Florida's antisprawl initiative goes beyond the prevention of leapfrogging development patterns, which was the primary thrust of Ramapo's timing and sequential controls. It also addresses the issue of excessive low-density residential or one-dimensional development patterns which, according to some commentators, was programmed by the Ramapo plan. Hence, the land use goal of the State Comprehensive Plan seeks to "[e]nhance the liveability and character of urban areas through the encouragement of an attractive and functional mix of living, working, shopping, and recreational activities."

These state goals and policies have been explicated and refined through DCA's rules and policies for the preparation and review of local comprehensive plans. Each local plan must contain a future land use element that designates future land use patterns. Among other things, the element must depict future land use patterns that are coordinated with the availability of facilities and services and that discourage the proliferation of urban sprawl. Based on the goals and policies of the State Comprehensive Plan and the well-established understanding of the term within the planning profession, the DCA, in reviewing local plans for compliance with state planning requirements, applies the following definition of urban sprawl:

The term 'urban sprawl' ... is used to describe certain kinds of growth or development patterns. It refers to scattered, untimely, poorly planned urban development that occurs in urban fringe and

252. *Id.* § 187.201(16)(b)(1), (18)(b)1.-2.
253. *Id.* § 187.201(16)(b)2.
254. *Id.* § 187.201(10)(b)1.
255. *Id.* § 187.201(16)(b)3.
257. *Id.* at r. 9J-5.006(3)(b)7., 8.
rural areas and frequently invades lands important for environmental and natural resource protection. Urban sprawl typically manifests itself in one or more of the following patterns: (1) leapfrog development; (2) ribbon or strip development; and (3) large expanse of low-density, single-dimensional development.\footnote{258}

This judicially sanctioned "consensus" definition\footnote{259} represents a comprehensive approach to the problem of urban sprawl that was lacking in the Ramapo system.

**B. The Concurrency Requirement**

Florida's concurrency requirement is an integral part of the state's comprehensive planning legislation. However, the statutory concurrency provisions offer little practical guidance for its actual implementation and application. Consequently, the regulatory parameters of the requirement have been largely developed through DCA's administrative rulemaking and local plan compliance review processes, albeit with considerable consultation with the Florida Legislature.\footnote{260} The fol-

\footnote{258. Discouraging Urban Sprawl in Local Comprehensive Plans, supra note 249, at 2; see, e.g., Department of Comm'y Aff. v. Charlotte County & City of Punta Gorda, 90 Fla. Env'tl. & L.U. Rep. 130 (Admin. Comm'n 1990) (finding Charlotte County plan not in compliance primarily because of its failure to discourage urban sprawl).}

\footnote{259. Home Builders & Contractors Ass'n of Brevard v. Department of Comm'y Aff., 585 So. 2d 965, 968 (Fla. 1st DCA 1991). Two homebuilders associations challenged the validity of DCA's urban sprawl policies on various grounds in a § 120.57(1), Florida Statutes, administrative hearing. In affirming the hearing officer's rejection of the challenge, the First District Court of Appeal upheld the hearing officer's finding that there is a "consensus on the meaning of urban sprawl" within the planning profession. The court's opinion quotes a "consensus" definition virtually identical to the definition used by DCA. Id. at 968-69.}

\footnote{260. The DCA worked closely with the Legislature in formulating its policies regarding the meaning and implementation of the concurrency requirement. For example, the agency's first major policy statement on the meaning and application of concurrency was issued in response to a formal inquiry from Senator Gwen Margolis, Democrat, North Miami Beach, Chair of the Senate Select Committee on Local Government Infrastructure Funding and Impact Fees. In her letter, Senator Margolis raised a number of questions about DCA's interpretation of the concurrency requirement. The letter raised two possible interpretations of the requirement: The opposing interpretations seem to be: (1) infrastructure must be physically present to support a development at the level of service standard set out in the comprehensive plan before development can be permitted; or (2) can construction be severed from the impact of development so that development will be permitted to proceed, recognizing that there will be a short-term reduction in the level of service, as long as there is a plan in place to provide infrastructure to meet the development's impact over time. Letter from Gwen Margolis, Chair, S. Select Comm. on Local Gov't Infrastructure Funding & Impact Fees, to Thomas Pelham, Sec., DCA (Jan. 12, 1988) (available at Fla. Dep't of State, Div. of Archives, Tallahassee, Fla.). In its response to Senator Margolis, the Department stated its position that concurrency should be implemented as a planning concept rather than as a strict regulatory requirement: The Department rejects as totally unreasonable and unworkable the position that con-}
lowing sections discuss the statutory and rule bases for the concurrency requirement, the categories of public facilities subject to the requirement, the standards used to measure the availability and adequacy of those facilities, the governmental obligation to provide the facilities and the related problem of infrastructure funding, the relationship between concurrency and other state growth management goals, and the enforcement of the concurrency requirement.

1. The Statutory and Rule Bases of the Requirement

Although the term "concurrency" did not appear in either the State Comprehensive Plan or the local planning legislation enacted in 1985, these two acts together established the statutory foundation for Florida's concurrency system. In addition to establishing the comprehensive planning framework discussed in the previous section, the 1985 legislation enunciated the basic principle of concurrency. For example, the land use goal of the State Comprehensive Plan provides that "development shall be directed to those areas which have in place, or have agreements to provide, the land and water resources, fiscal abilities, and service capacity to accommodate growth in an environmentally acceptable manner." Similarly, the public facilities goal directs currency can only mean that from the moment the concurrency requirement goes into effect, all necessary facilities must actually be in place before a development permit can be issued. The legislature could not possibly have intended such an interpretation because it is totally unrealistic and unworkable. The Department rejects that approach to the statute.

Letter from Thomas Pelham to Gwen Margolis (Mar. 7, 1988) (available at Fla. Dep't of State, Div. of Archives, Tallahassee, Fla.). The Department emphasized the need for flexibility in implementing the concurrency requirement:

We all need to keep in mind that we are dealing with a planning statute. Planning by its very nature must be flexible. No plan is ever perfect and no plan can be written today that is going to accurately reflect in every way conditions next year, much less five years from now. Any planning process, to be effective, must have flexibility. I believe that is true of the concurrency requirement as well as all other aspects of the local comprehensive planning process. "Flexibility" is not to be equated with "meaningless." The concurrency requirement must have some teeth in it; it cannot be defined as allowing the provision of adequate facilities to be postponed indefinitely or for unreasonable periods of time, nor can it be construed to allow the issuance of development permits without assurance that the necessary facilities will be available within a reasonable period of time.

Id. at 2. On numerous occasions, the author, as DCA Secretary, outlined the agency's concurrency policy to legislative committees, including the identification of the facilities subject to the concurrency requirement. See, e.g., Fla. H.R. Comm. on Comm'y Aff., transcript of proceedings at 3-5 (Feb. 25, 1988) (copy at Fla. Dep't of State, Div. of Archives, Tallahassee, Fla.) (statement of Thomas Pelham). To the author's knowledge, from 1987 through 1991, the Legislature never seriously considered any proposal to alter the basic thrust of DCA's concurrency policies.

that "Florida shall protect the substantial investments in public facili-
ties that already exist and shall plan for and finance new facilities to
serve residents in a timely, orderly, and efficient manner."\textsuperscript{262}

To effectuate these state planning goals, the 1985 Florida Legisla-
ture also enacted the Local Government Comprehensive Planning and
Land Development Regulation Act (1985 Act).\textsuperscript{263} This Act is intended
in part to "facilitate the adequate and efficient provision of transpor-
tation, water, sewerage, schools, parks, recreational facilities, hous-
ing, and other requirements and services."\textsuperscript{264} Accordingly, the 1985
Act required local governments to adopt land development regulations
that:

Provide that public facilities and services meet or exceed the
standards established in the capital improvements element required
by s. 163.3177 and are available when needed for the development... [A] local government shall not issue a
development order or permit which results in a reduction in the level
of services for the affected public facilities below the level of services
provided in the comprehensive plan of the local government.\textsuperscript{265}

In addition, the 1985 Legislature directed DCA to prepare, adopt, and
present to the 1986 Legislature for review a rule setting forth the mini-
mum criteria to be used by the agency in determining whether local
plans are in compliance with the adequate public facilities and other
state planning requirements.\textsuperscript{266}

In 1986, the concurrency requirement crystallized when the Legisla-
ture amended the 1985 Act in several important respects. First, the
Legislature added language that expressly recognizes and establishes
the concurrency requirement:

It is the intent of the Legislature that public facilities and services
needed to support development shall be available \textit{concurrent} with the
impacts of such development. In meeting this intent, public facility
and service availability shall be deemed sufficient if the public
facilities and services for a development are phased, or the
development is phased, so that the public facilities and those related

\begin{itemize}
  \item \textsuperscript{262} Id. § 187.201(18)(a). This goal is reinforced by the governmental efficiency goal which
      provides: "Florida governments shall economically and efficiently provide the amount and qual-
      ity of services required by the public." Id. § 187.201(21)(a).
  \item \textsuperscript{263} Ch. 85-55, 1985 Fla. Laws 207 (codified at FLA. STAT. §§ 163.3161-.3215 (Supp. 1986)).
  \item \textsuperscript{264} FLA. STAT. § 163.3161(3) (1991).
  \item \textsuperscript{265} Id. § 163.3202(2)(g) (1985).
  \item \textsuperscript{266} Ch. 85-55, § 6, 1985 Fla. Laws 207, 215 (codified at FLA. STAT. § 163.3177(9) (Supp.
      1986)).
\end{itemize}
services which are deemed necessary by the local government to operate the facilities necessitated by that development, are available *concurrent* with the impacts of the development. 267

Second, the Legislature provided that the concurrency doctrine must be implemented no later than one year after a local government was required to submit its comprehensive plan to DCA for compliance review. 268 Third, the Legislature reaffirmed and made even more explicit the obligation of local governments to include in their comprehensive plans level-of-service (LOS) standards for public facilities that will govern the issuance of development orders and permits. 269 Fourth, the Legislature reviewed and conditionally approved chapter 9J-5 of the *Florida Administrative Code*, the DCA’s minimum criteria rule for compliance review of local comprehensive plans. 270 Chapter 9J-5 incorporates the express statutory concurrency requirement that was added to the 1985 Act in the 1986 legislative session. 271

Although chapter 9J-5, as originally adopted by DCA, set forth detailed criteria for the preparation of the various local plan elements, it provided little or no express guidance on several threshold concurrency issues: What public facilities are subject to concurrency? What standards will be used to measure the adequacy of public facilities? When will facilities be considered available for purposes of the concurrency requirement? These issues remained for DCA to resolve through further rulemaking and the local plan compliance review process. After developing and experimenting with its concurrency policies through the compliance review process, DCA in November 1989, formally adopted a concurrency rule as an amendment to chapter 9J-5. 272 This rule identifies the categories and facilities that are subject to the concurrency requirement, establishes standards for determining when those facilities are available, and requires each local government to adopt a concurrency management system.

2. The Public Facilities Subject to Concurrency

The Florida Legislature has not satisfactorily dealt with the issue of which public facilities should be subject to the concurrency require-

268. *Id.* § 163.3202(g).
269. "The Legislature recognizes that under this section, local governments are charged with setting levels of service for public facilities in their comprehensive plans in accordance with which development orders and permits will be issued pursuant to s. 163.3202(2)(g)." *Id.* § 163.3177(10)(f).
270. *Id.* § 163.3177(10).
272. *Id.* at r. 9J-5.055 (1990).
ment. Neither the 1985 Act nor the original chapter 9J-5 expressly defines the public facilities which are subject to the concurrency requirement. The provision of the 1985 Act which contains the concurrency requirement speaks in terms of the "public facilities and services needed to support development." The definitions section of the Act defines "public facilities" generally to mean all major capital improvements. The Act contains no definition of services. On the other hand, chapter 9J-5 defines public facilities much more specifically than does the 1985 Act. However, the rule sets forth a broad definition of "services," which includes "educational, health care, social and other programs necessary to support the programs, public facilities, and infrastructure set out in the local plan or required by local, state, or federal law."

These definitions of public facilities and services are not helpful in defining the facilities that are subject to the concurrency requirement. Under the Florida system, concurrency cannot be effectively implemented without LOS standards for measuring the adequacy of the facilities and services. However, local governments are required to adopt LOS standards only for those facilities covered by mandatory plan elements. Because the 1985 Act mandates plan facilities elements only for transportation, sanitary sewer, solid waste, drainage, potable water, and recreation and open space, local governments are not required to establish LOS standards for other facilities. Accordingly, the DCA concurrency rule provides that only those facilities are subject to the state concurrency requirement. However, local governments may voluntarily subject other facilities such as educational, health, and law enforcement facilities to the concurrency requirement by including them in their local plans with LOS standards and expressly providing that they are subject to concurrency.

The definition issue has serious implications not only for the implementation of a concurrency system, but also for broader social concerns. A concurrency system covering only a few facilities is obviously easier to implement than one encompassing a broad range of infrastructure categories. Consequently, administrative convenience and practical necessity may dictate a narrow definition of facilities in the early implementation stages of a new system. However, a narrow definition can dramatically reorder funding priorities in times of limited

274. Id. § 163.3164(23).
276. Id. at r. 9J-5.003(91).
277. Id. at r. 9J-5.016(3)(c)1., 4.; Fla. Stat. § 163.3177(3)(a)3., (10)(f)-(h).
public resources. The pressure of meeting the concurrency requirement and avoiding development moratoria may tend to direct available resources to those facilities subject to the requirement. If the definition includes only basic physical infrastructure; e.g., roads, sewer, drainage, and solid waste, then “social infrastructure” such as schools, health care, social welfare programs, and the criminal justice system may be overlooked or shortchanged. On the other hand, if a broad definition is adopted without adequate general funding systems, local governments may attempt to shift even more of the burden of paying for growth to developers and new residents. These possibilities become even more likely if the concurrency requirement is imposed on local governments by a state legislature without either ensuring that adequate local revenue sources are available or without providing state funding. Consequently, the definition issue should be carefully considered and clearly resolved by any legislative body that adopts a concurrency requirement.

3. The Standards for Measuring the Adequacy and Availability of Public Facilities

The capital improvements element of a local comprehensive plan must establish “[s]tandards to ensure the availability of public facilities and the adequacy of those facilities including acceptable levels of service.” The Legislature defined “availability,” but, unfortunately, included no definition of adequacy and provided no guidance for establishing standards for measuring it other than a requirement that it must be measured in terms of LOS standards. Consequently, DCA and local governments have been compelled to develop standards through the administrative rulemaking and plan compliance review processes.

Generally, although local governments have broad discretion in setting LOS standards, DCA requires as a matter of policy that the standards must be adequate, realistic, and financially feasible. An

279. At a recent public forum on Florida’s growth problems, Dade County State Attorney Janet Reno expressed this concern in the following terms: “I came to express my deep frustration almost to the point of outrage that there is nobody up there [in Tallahassee] representing social services. It makes it seem like all you’re concerned about is pouring concrete and building things.” Heather Dewar & Michael Crook, Move Quickly to Curb Growth, State Told, MIAMI HERALD, Aug. 30, 1991, at B2.


281. FLA. ADMIN. CODE ANN. r. 9J-5.003(45) (1990); Id. at r. 9J-5.003(7) (1991).

adequate LOS standard is one that meets the public's basic needs and expectations. For example, each person needs a certain number of gallons of potable water each day and has a reasonable expectation that the local utility will provide that amount. A realistic LOS standard is one that is capable of being maintained by the local government. A local plan must demonstrate that if the LOS falls below the established standard, there is a specific plan to achieve and maintain the adopted LOS standard in the reasonably near future. A financially feasible LOS is one that the local government has the demonstrated financial ability to achieve and maintain.

Specific standards for measuring the adequacy of each facility are not as well defined. The 1985 Act does not set minimum performance standards for public facilities, nor does it contain any general intent language indicating the purpose to be achieved by setting LOS standards, such as the promotion of public health and safety. Similarly, with the exception of transportation, DCA has not adopted rules that establish statewide minimum standards for measuring the adequacy of specific facilities. For the other facilities, DCA, in its compliance review of local plans, has relied upon generally accepted national or state standards. These standards have evolved over time, based upon an accumulation of information concerning the capacity of facilities needed to serve basic human needs, the regulations or standards adopted by other state or federal agencies such as the Florida Department of Environmental Regulation and the U.S. Environmental Protection Agency, and the data and analysis presented by local governments to justify the specific level of services adopted in their local plans.

In the area of transportation, DCA has provided more specific guidance for state roads, primarily because another state agency asserts jurisdiction over the state highway system. The Florida Department of Transportation (DOT) has statutory authority for maintaining the state highway system and for setting operational LOS standards for those roads. Accordingly, DCA by rule requires that local governments, "to the maximum extent feasible as determined by the local government," adopt LOS standards for state roads that are compatible with DOT's standards. If a local government adopts a

284. Pelham, supra note 282, at 201-02.
level-of-service standard for state roads that is not compatible with DOT's standards, the burden is on the local government to demonstrate that it is not feasible to adhere to DOT's standards in the particular situation. The local government may meet this burden in various ways, including a showing that the deviation is necessary to meet other statewide planning goals and policies.287

Neither the Legislature nor DCA has provided sufficient guidance to local governments in the setting of standards for measuring the adequacy of facilities. To illustrate, the following questions are not currently addressed by statute or administrative rule: Should the criteria for measuring the adequacy of public facilities be based on minimal public health and safety considerations or can they be used to promote a higher "quality of life" or a greater degree of public convenience? For example, although only a certain amount of park and recreational space and facilities may be deemed necessary for the public health, may a particular community enrich its quality of life by adopting higher standards? Similarly, although a much lower LOS standard for transportation would be consistent with public safety, may a local government seek to enhance the public convenience by setting much higher standards? These issues are not academic; they have practical implications for the purposes and effects of local concurrency systems. Under the guise of promoting a higher quality of life, a particular community might attempt to exclude development by setting unnecessarily high standards and exacting larger impact fees from developers to meet those standards. If building permits are denied or a development moratorium is declared because of the failure to meet these higher standards, a takings claim is arguably strengthened because the regulation may not be reasonably related to the public health or safety. To avoid these problems and abuses, either the Legislature or DCA should provide more specific guidelines for the establishment of LOS standards.

By rule, DCA has established much more specific standards for determining when facilities are to be available for purposes of satisfying the concurrency requirement. Local governments may establish stricter availability standards, but at a minimum they must meet the criteria in DCA's concurrency rule.288 In establishing standards for determining availability, DCA has created three categories of facilities based upon the importance of the facility and the practical problems involved in constructing the facility. The timing of the actual provi-

287. Id. DOT's standards apply only to state roads. Local governments therefore have much broader discretion in establishing LOS standards for local roads.
sion of the facilities varies among the three categories, with the most lenient treatment accorded to transportation because it takes more time and money to provide transportation facilities.\textsuperscript{289}

Category I facilities include potable water, sanitary sewer, solid waste, and drainage, the most fundamental facilities without which development cannot be occupied without serious threats to public health and safety. To meet the statutory requirement of availability concurrent with the impacts of development, these facilities must be either: (1) in place when a development permit is issued, (2) guaranteed by a condition in the development permit to be in place by the time the development impacts occur, (3) under construction when the development permit is issued, or (4) guaranteed in an enforceable development agreement that includes one or more of these provisions.\textsuperscript{290}

Category II facilities include parks and recreation. These facilities will be deemed available concurrent with development if they comply with the standards for Category I facilities or if they are subject to a binding executed contract providing for commencement of construction within one year from the date the permit is issued.\textsuperscript{291} Parks and recreational facilities are accorded more relaxed treatment than Category I facilities\textsuperscript{292} because, while important, they are deemed less essential to public health and safety.\textsuperscript{293}

Category III facilities include roads and mass transit. These transportation facilities will meet the availability requirement if they comply with either Category I or II standards or if they are to be provided pursuant to an adopted concurrency management system based upon a financially feasible capital improvements program and concurrency regulations that meet certain other requirements established by DCA in its concurrency rule.\textsuperscript{294} Among these requirements is a five-year schedule of capital improvements that must demonstrate that construction of the necessary road or mass transit facilities is scheduled to commence in or before the third year of the five-year schedule and a provision in the local comprehensive plan that a plan amendment will be required to eliminate, defer, or delay construction of any road or

\textsuperscript{291} Id. at r. 9J-5.0055(2)(b).
\textsuperscript{292} Id.
\textsuperscript{293} As the DCA Secretary and one of the principal drafters of the concurrency rule, the author made the decision to accord parks and recreational facilities more flexible treatment based on the belief that they are less essential to public health and safety than such basic infrastructure items as water and sewer facilities.
mass transit facility needed to maintain the adopted LOS standard.\textsuperscript{295}

4. The Special Case of Transportation

For numerous reasons, transportation has been the most difficult facility category to subject to effective concurrency management. A large portion of Florida's existing infrastructure deficiencies relate to transportation facilities; the state already has many miles of backlogged roads. Transportation facilities are much costlier and take significantly more time to construct than do the other public facilities.\textsuperscript{296} Local governments are not able to internalize traffic impacts in their communities because they cannot control access to roads that cross jurisdictional boundaries. Because much highway traffic originates from outside the local government's domain, traffic congestion cannot be effectively controlled by the local development permitting process as can, for example, demand for water and sewer services.\textsuperscript{297} Methodologically, accurately measuring road capacity is a more difficult and controversial proposition than determining the capacity of water and sewer systems that have absolute and easily measurable volume limitations.\textsuperscript{298} DCA has exacerbated the problem by requiring LOS standards for each road segment.\textsuperscript{299} This approach works satisfactorily in rural areas with limited roads and traffic, but it is totally unrealistic and impracticable in urban areas where transportation systems consist of a much more complex network of roads and public transit. Finally, reflecting the lack of an effective state transportation plan, DCA's approach to transportation concurrency has emphasized and encouraged more roads and automobiles rather than the public transit and multimodal transportation systems needed in large urban areas.\textsuperscript{300}

DCA has recognized some of these problems by giving local governments much greater flexibility in dealing with transportation concurrency in their local plans. For example, recognizing the undesirability of traffic-related moratoria and the fact that traffic congestion, while it may be inconvenient, does not affect public health and safety to the same degree as inadequate water, sewer, and drainage facilities, DCA has found in compliance local plans that allow continuing develop-

\begin{itemize}
\item \textsuperscript{295} Id.
\item \textsuperscript{296} State Comprehensive Plan Committee, Keys to Florida's Future: Winning in a Competitive World 3, 13, 34-36 (1987). Among other things, the Committee stated that about 27% of all state highways are congested and that about 60% of the highways in Florida's urban areas are extremely congested, id. at 13, and that "[f]rom concept to concrete, it takes nine years to build a road in Florida." Id. at 34. See also Eggert, supra note 289, at 483-84.
\item \textsuperscript{297} Eggert, supra note 289, at 483-84.
\item \textsuperscript{298} See Timothy T. Jackson, Adequate Public Facilities: The Transportation Options, in Growth Management Summer School supra note 282, at 207.
\item \textsuperscript{299} Fla. Admin. Code Ann. r. 9J-5.005(3), .007(3)(c)1. (1990).
\item \textsuperscript{300} In recognition of this problem, DCA is now proposing an optional approach to achiev-
\end{itemize}
ment on backlogged systems while the local government eliminates existing deficiencies over a ten-, twelve-, or fifteen-year period.\textsuperscript{301} Unfortunately, however, DCA considered and then abandoned a proposed concurrency rule amendment that would have authorized the system-wide, averaging approach in designated transportation concurrency management areas in urban areas throughout the state.\textsuperscript{302} Instead, DCA—in conjunction with DOT—is now proposing a rule amendment that would give local governments total discretion to set traffic LOS standards for designated urban districts for which integrated, multimodal urban motility plans have been adopted and which produce an undefined "adequate level of mobility."\textsuperscript{303} Because of the complexity of the proposed rule and its onerous planning requirements, it will probably afford little immediate relief for most local governments. Accordingly, the Florida Legislature should authorize use of the areawide, averaging approach tied to long-range capital improvements plans of up to ten or fifteen years in urban areas that have substantial transportation infrastructure deficits.\textsuperscript{304}

In addition, the Legislature should resolve the transportation-related conflicts over concurrency between the DOT and local governments. First, DOT insisted that it should designate LOS standards for state roads despite local governments' contention that, for purposes of concurrency, these standards are the prerogative of the local authorities making development permitting decisions. The provisions of chapter 9J-5 discussed in the preceding sections represent an uneasy compromise on the issue, which the Legislature should address directly.

Second, many local officials and private developers have complained that local governments should not have to enforce the concur-

\textsuperscript{301} See, e.g., Department of Comm'y Aff. v. Pasco County, Stipulated Settlement Agreement, Case No. 89-4406GM, Exh. B, at 20 (DOAH 1990) (permitting the county to deviate from DOT's LOS standards on state roads as long as the overall road system was brought up to standard within 15 years).

\textsuperscript{302} See Department of Comm'y Aff., Proposed Transp. Concurrency Mgmt. Areas Rule (Workshop Draft, Jan. 11, 1991) (available at Fla. Dep't of State, Div. of Archives, Tallahassee, Fla.).

\textsuperscript{303} 17 Fla. Admin. Weekly 6105, 6106 (Dec. 27, 1991) (Proposed Transp. Concurrency Mgmt. Areas Rule). This proposal does have some positive and progressive features, however. See supra note 300.

\textsuperscript{304} Professor Robert Freilich recommended this approach to the City of San Diego. See Freilich & White, supra note 1, at 943-45.
rency requirement on state roads if the state government is not also required to satisfy concurrency by paying for the improvements in state roads that are needed to accommodate development.\textsuperscript{305} Legally, this is a specious argument; concurrency applies to the issuance of development permits, and local governments, not the State, grant these permits.\textsuperscript{306} Politically and practically, however, the State has traditionally assumed responsibility for the state road system that has been relied on by local governments and the private sector to support and serve locally permitted development. If full responsibility for transportation facilities to accommodate traffic generated by new development is to be shifted to local governments, the transfer should be accomplished gradually and with adequate transportation revenue sources for local governments.

Regardless of the accommodation finally reached by the state and local governments as to responsibility for transportation, it is imperative that the Legislature provide the following: (1) a state transporta-

\textsuperscript{305} See, e.g., Rhodes, supra note 40, at 245.

\textsuperscript{306} The issue of whether state government is subject to the concurrency requirement and therefore has responsibility for providing or funding facilities, surfaced during the early stages of the plan review process. Letter from Rep. C. Fred Jones, Dem., Auburndale, Chair, Fla. H.R. Comm. on Comm'y Aff., to Gov. Bob Martinez (Jan. 25, 1989) (formal letter of inquiry) (available at Fla. Dep't of State, Div. of Archives, Tallahassee, Fla.). In his response to this inquiry, Governor Martinez enunciated a key concurrency concept:

It is important to understand that the levels of service on public facilities—and therefore, concurrency—are fundamentally linked to land use decisions made at the local level. As local governments increase the densities of local land uses or the frequency of permit issuance, development pressure is placed on public facilities and levels of service may begin to degrade. If a public facility begins to significantly degrade under these circumstances, the local government has but three alternatives to comply with the concurrency requirement: it may amend its plan to adopt a lower level of service for that public facility, it may improve the management or structure of the facility or build new facilities to accommodate the impacts of new development, or it may adjust the density and intensity of [new] development that may occur under its land use plan to lessen the impacts on the facility.

Letter from Peter M. Dunbar, Gen. Coun., Office of the Gov., to Rep. C. Fred Jones, (Feb. 7, 1989) (available at Fla. Dep't of State, Div. of Archives, Tallahassee, Fla.). Because "concurrency is fundamentally tied to the zoning and permitting processes that occur at the local level," the Governor's General Counsel concluded that there is no basis or reason for subjecting state government to the concurrency requirement and accurately observed that the 1985 Act imposes the requirement only on local governments. Id. at 2-3. However, Governor Martinez emphasized in his response that the State has a responsibility to ensure that local governments satisfy concurrency at the local level:

DOT and other state agencies have a responsibility for planning public facilities and building public facilities in accordance with the state's plans, and [the] local governments should be able to rely on the commitments of those agencies when the local governments calculate the need for local infrastructure. It would be unfair and unworkable to require a level of planning and commitment from local governments that the state itself is unwilling to achieve.

\textit{Id.}
tion policy that adequately addresses the need for integrated, multimodal urban transportation systems and with which local plans and concurrency systems must be consistent; and (2) adequate funding sources for the transportation facilities needed to implement the state plan.

5. The Governmental Obligation to Provide Adequate Public Facilities

The 1985 Act does not expressly impose upon local governments a duty to provide the facilities necessary to comply with the concurrency requirement. However, this obligation is implicit in the relevant provisions of the Act and chapter 9J-5. The Act’s general intent language provides that the legislation is intended to enable local governments to "facilitate the adequate and efficient provision" of public facilities. With regard to concurrency, the express intent of the Act is "that public facilities and services needed to support development shall be available concurrent with the impacts of such development." Local governments’ obligation to provide these public facilities is also manifest in the statutory requirements for the capital improvements element of the local plan. The element must set forth at least a five-year program for providing facilities necessary to implement the comprehensive plan, estimate the cost of providing those facilities, and establish standards to ensure that those facilities will be available and adequate. Public facilities to be provided by the local government must be consistent with the capital improvements element. All development and all local development orders must be consistent with the comprehensive plan, including the capital improvements element and the future land use plan element. The statutory provisions regarding the individual facilities elements of the plan also require local governments to demonstrate how it will provide facilities and services to keep pace with its projected growth. Collectively, these statutory provisions impose on local government an obligation to provide the facilities and services needed to accommodate development consistent with the concurrency requirement, and they should be construed in this manner to accomplish the purposes and objectives of Florida’s growth management legislation.

308. Id. § 163.3177(10)(h).
309. Id. § 163.3177(3)(a).
310. Id. § 163.3177(3)(b).
311. Id. §§ 163.3177(6)(a), 3194(1)(a).
312. Id. § 163.3177(6)(b), (c), (e).
313. Section 163.3194(4)(b), Florida Statutes, provides: "It is the intent of this act that the comprehensive plan set general guidelines and principles concerning its purposes and contents and that this act shall be construed broadly to accomplish its stated purposes and objectives."
Chapter 9J-5, which was reviewed and conditionally approved by the Legislature, provides further support for this contention. Generally, the minimum criteria rule provides that the local plan must include “[r]equirements for capital improvements implementation” and that LOS standards must be established to ensure that adequate facility capacity “will be provided.” The minimum criteria for the individual facility elements require policies and implementation activities for providing the facilities needed to correct existing deficiencies and to serve new development. Perhaps the strongest expression in chapter 9J-5 of the local government’s obligation to provide the necessary facilities is found in the purpose statement for the capital improvements element. As described in the minimum criteria rule, the purpose of this element is to determine the need for public facilities as identified in the individual facilities elements, to estimate the cost of the facilities and evaluate the local government’s ability to finance and construct the improvements, “and to schedule the funding and construction of improvements in a manner necessary to ensure that capital improvements are provided when required based on needs identified in the other comprehensive plan elements.” The specific criteria for preparation and adoption of the capital improvements element also include numerous requirements that the local government ensure that the necessary facilities will be provided to satisfy the concurrency requirement.

Although the obligation of local governments to provide the adequate public facilities is implicit in the provisions of the 1985 Act and chapter 9J-5, it might be useful to make the obligation explicit by amending Florida’s growth management legislation. However, the larger issue is how the obligation can be enforced. For example, what remedies are available to the landowner if a local government’s plan commits it to provide certain facilities, but the local government defaults in its obligation and then denies development permission to a landowner because the facilities needed to meet concurrency are not available? Can the landowner be lawfully denied a development permit if the local government does not fulfill its obligation, or should the local government be compelled to issue the permit so long as the landowner pays any impact fee or other fair share or proportionate assessment that has been established in the local jurisdiction? Or can

315. See, e.g., id. at r. 9J-5.007(2), (3)(c), (transportation); id. at r. 9J-5.011(2)(b)-(c) (sewer, solid waste, drainage, and potable water).
316. Id. at r. 9J-5.016.
317. See, e.g., id. at 9J-5.016(3)(c)6., (4)(b).
the landowner bring a lawsuit to compel the local government to provide the facilities? These issues will be explored in Part IV.

6. Paying for Infrastructure

The obligation to provide adequate public facilities cannot be satisfied without adequate revenue. As the Ramapo experience illustrates, a local government's ability to fund its capital improvements program is critical to the success of adequate public facilities requirements, or at least those that are intended to accommodate rather than exclude growth. Consequently, if a state legislature mandates that local governments impose and enforce a concurrency requirement, it has a corresponding obligation to ensure that adequate revenue is available to local governments. Florida has not yet satisfactorily fulfilled this responsibility.

A state-mandated concurrency requirement propels the infrastructure funding issue to the forefront of public debate. It forces both local government and private sector decision makers to address the problem of paying for growth. Standing alone, however, such a requirement will not solve the problem. Faced with the choice of denying development or raising taxes to support growth, a local government may opt for the former rather than incur the wrath of a citizenry opposed to new taxes. On the other hand, the local government may be willing but unable to raise the additional money needed to accommodate new development because it has already exhausted its existing revenue sources or because the exercise of its available revenue options must be approved by public referendum. Additionally, if the infrastructure involved—for example, state highways—is a state responsibility and the legislature declines to appropriate money for the expansion or improvement of these facilities, the local government may have little choice but to limit development in the area. The local government may also attempt to shift the revenue burden by giving the developer the choice of having its application for development approval denied or paying for the infrastructure needed to accommodate the development. In other words, the absence of adequate and easily accessible funding sources will lead to "finger pointing" and "buck-passing" among the state, local governments, developers, and the public at large.

318. The final report of the State Comprehensive Plan Committee described the concurrency requirement in the following terms: "This statutory stop sign for growth is a powerful exercise of the state's power to regulate—and a forceful reminder of the need to pay for the continued growth of Florida. Our failure to acknowledge this need until now has made this statutory deadline necessary." STATE COMPREHENSIVE PLAN COMMITTEE, supra note 296, at 23.
Dramatizing the funding problem without solving it also raises serious questions about the purposes of concurrency. Enforcement of a concurrency requirement without adequate mechanisms for the public funding of infrastructure will either prevent development or shift disproportionately the burden of funding infrastructure to the private developer. This result may suit those opposed to growth or to paying for facilities needed to support new development, but it raises difficult issues of equity and legality. If the requirement is imposed on a system with substantial infrastructure backlogs, so that the private developer is compelled not only to pay the new infrastructure costs created by its project but also to correct existing deficiencies, the seriousness of the equitable and legal issues is compounded. The equity issue will create enormous pressure for legislative repeal of the concurrency requirement if adequate public funding is not provided and will inevitably lead to judicial challenges. Consequently, any responsible concurrency system must be supported by an adequate funding system that equitably and legally distributes between the public and private sectors the cost of both correcting existing infrastructure deficiencies and providing the additional public facilities and services required by new development.

The 1985 Florida Legislature recognized that implementation of the State Comprehensive Plan and the new growth management legislation would require additional revenue. Accordingly, the Legislature created the State Comprehensive Plan Committee and directed it to analyze the ability of the state and local governments to pay for both existing operations and the future facilities needed to implement the state plan over the next ten years and to recommend a set of tax and other financing mechanisms to produce the necessary revenue. In 1986, before the release of the final report of the State Comprehensive Plan Committee, the Legislature decided to eliminate sales tax exemptions for services on July 1, 1987, unless new laws were enacted to maintain the exemptions. Subsequently, in February 1987, the State Comprehensive Plan Committee issued its final report, which estimated that approximately $53 billion would be needed to implement the state plan at the state and local levels over the next ten years. This total did not include existing infrastructure deficits. The Committee

320. State Comprehensive Plan Committee, supra note 296, at 41; ch. 86-166, § 3, 1986 Fla. Laws 816, 819 (codified at Fla. Stat. § 212.05(1)(j) (Supp. 1986)) (imposed tax on all services); id. § 5, 1986 Fla. Laws at 824 (codified at Fla. Stat. § 212.08 (Supp. 1986)) (repealed various exemptions to the sales tax). The 1986 legislation also created the Sales Tax Study Commission to recommend to the 1987 Legislature which, if any, of the repealed exemptions should be retained. Id. § 9, 1986 Fla. Laws at 825.
recommended a variety of new funding sources, including elimination of tax exemptions for services as proposed by the 1986 Legislature.\textsuperscript{321} However, after initially approving the sales tax on services with the support of the Governor, the 1987 Legislature, following great public opposition to the tax, repealed the services tax pursuant to the Governor's recommendation.\textsuperscript{322} Consequently, the infrastructure funding issue has been a major and continuing controversy throughout the implementation of Florida's 1985 growth management legislation.

Local governments have complained loudly and with justification that they lack adequate revenue sources to meet state-imposed growth management requirements.\textsuperscript{323} With the exception of ad valorem taxes, which are reserved to local governments,\textsuperscript{324} the Florida Constitution reserves to the State all forms of taxation unless the Legislature delegates the taxing power to local governments by general law.\textsuperscript{325} Using this constitutional authorization, the Legislature has enacted approximately a dozen local option taxes, most of which are applicable in only a few jurisdictions, only four of which are available in all sixty-seven counties, and none of which can be exercised by municipalities. Only three of the local option taxes may be enacted without referendum.\textsuperscript{326} Of the four principal local option taxes available to finance infrastructure, three require approval by referendum, and the fourth may be submitted to a referendum.\textsuperscript{327} Ironically, the Legislature, which has imposed the concurrency requirement on local governments, has severely restricted their ability to comply. Furthermore, by requiring approval by referendum for the major local option infrastructure taxes, the Legislature has given tremendous leverage to the

\begin{itemize}
  \item \textsuperscript{321} State Comprehensive Plan Committee, supra note 296, at 41.
  \item \textsuperscript{323} See, e.g., Thomas J. Billitteri, Big-City Mayors: 'We've Had Enough,' Florida Trend, Nov. 1989, at 48.
  \item \textsuperscript{324} Fla. Const. art. VII, §1(a), 9(a). Ad valorem property taxes are politically difficult to raise, and they are also subject to a constitutional millage cap. Id. at art. VII, §9(b).
  \item \textsuperscript{325} Fla. Const. art. VII, § 1(a).
  \item \textsuperscript{326} Joint Adviz. Council on Intergovt. Rel., A Profile of Florida Municipal and County Revenue 107-08 (1989).
  \item \textsuperscript{327} Id. The three local option taxes requiring approval at the referendum are the Voted Gas Tax, see Fla. Stat. § 336.021 (1991); the Charter County Transit System Surtax, see id. § 212.055(1)); and the Local Government Infrastructure Surtax, see id. § 212.055(2). The fourth, the Local Option Gas Tax, see id. § 336.025, may be enacted by a majority vote of the county's governing board or by referendum. Id. § 336.025(3); Joint Adviz. Council on Intergovt. Rel., Local Government Financial Information Handbook 96-123 (1990).
\end{itemize}
no-growth forces who can now seek to exclude growth by voting against badly needed public infrastructure funding.\textsuperscript{328}

Shifting this burden to the development community is not consistent with Florida's growth management laws nor is it permissible under court-imposed guidelines. The State Comprehensive Plan contemplates that the private development community will pay only the share of infrastructure costs fairly allocated to it on the basis of benefits received and that state and local governments will shoulder the remainder of the costs.\textsuperscript{329} The provisions of chapter 9J-5 of the \textit{Florida Administrative Code} reinforce the principle that developers may only be assessed a pro rata share of the costs of adequate public facilities needed to satisfy the concurrency requirement.\textsuperscript{330} These statutory and administrative rule provisions reflect the judicially formulated rules that limit the imposition of development impact fees to a proportionate fair share of new facility needs and prohibit use of these fees to reduce existing infrastructure deficiencies.\textsuperscript{331} Accordingly, if Florida's local governments are to implement their concurrency systems consistent with the philosophy, goals, and policies of the state's growth management laws, the Florida Legislature must provide them with adequate and easily accessible public revenue sources.

7. The Relationship Between Concurrency and Other State Planning Goals and Policies

The State Comprehensive Plan contains a broad range of state planning goals and related policies. Encompassing social, economic, environmental, and physical land planning concerns, the twenty-seven goals are of equal weight and status. The state plan does not rank or give preferred status to any of the planning goals, including those relating to concurrency. Obviously, these goals may conflict when applied to particular programs and situations. Consequently, the 1985 Legislature envisioned a balancing process for applying the various goals: "The plan shall be construed and applied as a whole, and no specific goal or policy in the plan shall be construed or applied in isolation from the other goals and policies in the plan."\textsuperscript{332}

\textsuperscript{328} In 1989 and 1990 local option discretionary sales surtaxes proposed to help implement local comprehensive plans were defeated by referendum vote in Alachua, Brevard, Broward, Charlotte, and Hillsborough counties. \textsc{Local Government Financial Information Handbook}, \textsuperscript{supra} note 327, at 124.

\textsuperscript{329} \textsc{Fla. Stat.} § 187.201(18)(b)\textsuperscript{3.}, 4. (1991).

\textsuperscript{330} \textsc{Fla. Admin. Code Ann. r. 9J-5.016(2)(f), (3)(b)4., (3)(c)8. (1990)}.

\textsuperscript{331} \textit{See supra} note 51.

This balanced approach has been thwarted by the Legislature’s failure to carefully consider the impact of concurrency on other state planning goals. Mirroring the statewide planning concerns expressed in the State Comprehensive Plan, the 1985 Act required each local comprehensive plan to address a wide array of issues through its future land use, capital improvements, housing, transportation, conservation, and other mandatory elements. The provision of adequate public facilities was not accorded any higher status than other planning concerns, such as the provision of affordable housing, the conservation of natural resources, or the creation of rational and efficient land use patterns. However, the Legislature upset this delicate balance by prohibiting the issuance of development orders that would result in a LOS below the standard adopted for a particular public facility without granting local governments any express statutory authority to waive this requirement if necessary to achieve other goals. As experience has shown, a strict, uniform application of the concurrency requirement can prevent the achievement of other state goals and policies.

DCA recognized early in the local plan compliance review process that a strict and inflexible application of transportation LOS standards in urban core areas would work against achievement of state antisprawl policies. For example, if unreasonably or unrealistically high LOS standards are set for roads in the urban core where traffic capacity is already limited and road improvements will be expensive, new development will be pushed to suburban or undeveloped areas where traffic capacity is available or can be provided at less cost. Accordingly, DCA has approved local plans that deviate from the DOT’s established LOS standards for state roads in urban areas so long as the local government demonstrates that such deviations are part of an overall strategy to prevent urban sprawl or promote public transit.

Strict application of the concurrency requirement can also interfere with achievement of other state planning goals. Requiring the provision of a range of public facilities that meet minimum performance standards will undoubtedly increase the cost of housing to both the

333. See id. § 163.3177.
334. Id. § 163.3177(10)(h).
335. See, e.g., Department of Community Affairs v. Metropolitan Dade County, Stipulated Settlement Agreement, Case No. 89-0564GM, Exh. A (DOAH 1989) (authorizing Dade County to deviate from DOT’s LOS standards on state roads in urban infill areas in order to discourage urban sprawl and promote greater use of mass transit). These exemptions have been based on the provisions of chapter 9J-5 that require local adherence to state LOS standards for state roads only “to the maximum extent feasible.” FLA. ADMIN. CODE ANN. r. 9J-5.007(2)(b) (1990); see supra notes 285-86 and accompanying text.
developer and the consumer. The increased costs make the delivery of affordable housing projects more difficult. Therefore, some similar programs in other jurisdictions have exempted affordable housing projects from their adequate public facilities requirements.336 In Florida, however, there is no current statutory or rule basis for exempting affordable housing from the state-mandated concurrency requirement. The Florida Legislature should carefully review the concurrency concept and its relationship to other equally or more important state planning goals. If necessary to achieve other state goals such as affordable housing, the Legislature should authorize exemptions from, or modifications in, the concurrency requirement.

8. The Local System for Monitoring and Enforcing Concurrency

How does Florida enforce the concurrency requirement? Essentially, the State relies on the good faith of local governments and citizen actions to ensure that development permits will not be issued unless adequate public facilities will be available. Each local government must adopt a concurrency management system to monitor and enforce LOS standards.337 The local system must ensure that adequate facilities will be available as defined in DCA’s concurrency rule. In addition, the local system must develop guidelines for interpreting and applying its LOS standards to applications for development approval and must identify the point in the approval process when the concurrency test must be satisfied. DCA’s concurrency rule provides that the last point in the application process for making a concurrency determination is before the approval of a specific plan of development, which includes the densities and intensities of the proposed development.338 If adequate facility capacity will not be available, the local government has a statutory obligation to either deny an application for development approval or approve it subject to conditions that will ensure the availability of adequate facilities.339

336. See, e.g., ANNUAL GROWTH POLICY, supra note 12, at 13, exempting affordable housing from Montgomery County, Maryland’s, adequate public facilities ordinance.
337. FLA. ADMIN. CODE ANN. r. 9J-5.0055 (1991). Essentially, a concurrency management system has four phases: (1) inventories to determine the capacity of existing facilities; (2) a concurrency assessment or evaluation of each application for development approval that determines the amount of facility capacity required to serve the development; (3) issuance of development permits, assuming adequate capacity exists or will be available, and imposition of appropriate conditions that phase in the development or provide for construction of improvements to public facilities needed to maintain LOS standards; and (4) annual monitoring and disclosure to the public of the existing capacity and LOS, including any deficiencies. The Evolution and Requirements of the CMS Rule, supra note 282, at 6-9.
Ultimately, however, if a local government does not meet its obligation, enforcement of the Florida concurrency requirement is left to citizen action. After a local plan has been adopted, the State has limited statutory authority to enforce the concurrency provisions of the local plan. If the local government fails to adopt concurrency regulations, DCA is empowered to seek a court injunction to compel their adoption.\textsuperscript{340} If a local government adopts concurrency regulations that are inconsistent with the concurrency policies of its local plan, a substantially affected person may challenge the regulations for inconsistency with the local plan in a state administrative hearing following a preliminary review of the regulations by DCA.\textsuperscript{341} If a local government issues a development order that is inconsistent with the local plan's concurrency provisions, a citizen with standing may file a court action to invalidate the inconsistent development order or enjoin the development.\textsuperscript{342} Only time and experience will tell whether citizen suits are an effective enforcement mechanism, but at least the State has provided some remedy for the issuance of development permits that violate the concurrency requirement. In striking contrast, the growth management statutes provide no express remedy for the developer when local government fails to deliver the facilities that it has promised in its comprehensive plan.

V. OF BROKEN COMMITMENTS, MORATORIA, AND TAKING CLAIMS: THE NEED FOR AN EFFECTIVE LANDOWNER'S REMEDY

Florida's growth management laws address many of the concerns raised by landowners and others about the Ramapo adequate public

\textsuperscript{340} Id. § 163.3202(4). Each local government must adopt concurrency regulations within one year of submitting its proposed comprehensive plan to DCA for compliance review. Id. § 163.3201(1),(2).

\textsuperscript{341} Id. § 163.3213. If a local government fails to adopt concurrency regulations, DCA may institute a court action to compel adoption of these regulations. Id. § 163.3202(4). If a local government adopts concurrency regulations, any "substantially affected person" has the right to challenge the consistency of the regulations with the adopted local plan in an administrative review proceeding. Id. § 163.3213(1),(2)(a). The time requirements and conditions precedent for initiating such actions are outlined in § 163.3213(3)-(6), Florida Statutes, and chapter 9J-24 of the Florida Administrative Code. If a state administrative hearing officer enters a final order determining that the concurrency regulations are inconsistent with the local plan, the Administration Commission may impose sanctions. Fla. Stat. § 163.3213(5), (6) (1991). Two consistency challenges have been brought against Collier County's concurrency regulations, but no final order has been entered in the two cases. See In re: Consistency of Collier County's Adequate Public Facilities Ordinance with its Comprehensive Plan, No. 90-003 LDR (DCA Jan. 22, 1991); In re: Consistency of Collier County's Zoning Reevaluation Ordinance and Adequate Public Facilities Ordinance with its Comprehensive Plan, No. 90-002 LDR (DCA Dec. 6, 1990).

\textsuperscript{342} Section 163.3215(1), Florida Statutes, provides that an "aggrieved or adversely affected party" may bring a court action challenging the consistency of a development order with an adopted local comprehensive plan. There are presently no reported cases involving challenges to development orders for alleged inconsistency with the concurrency provisions of local plans.
facilities requirement. If properly implemented, the state, regional, and local comprehensive planning processes ensure that Florida's local governments cannot use their concurrency systems for exclusionary purposes and that they must plan for and accommodate growth with due consideration for state and regional concerns. Nevertheless, concurrency systems will still impinge on private property rights, especially if adequate public facilities are not available to satisfy the concurrency requirement. Consequently, constitutional challenges to local concurrency systems based on the Due Process, Equal Protection, and Taking Clauses are inevitable. These constitutional claims are likely to disappoint landowners in most cases.

As an exercise of the police power, concurrency and similar regulations are subject only to rationality review under the Due Process and Equal Protection Clauses. Assuming no fundamental interest is involved, courts traditionally apply the same "means-end" test to both substantive due process and equal protection challenges to land use regulations. Under this test, which was applied by the Ramapo court and discussed in Part II, the reviewing court first inquires whether the regulation has a legitimate public purpose, i.e., the protection of health, safety, morals, or general welfare. Second, the court then evaluates whether the regulation is a reasonable means to achieve this purpose. In the words the Supreme Court chose in Village of Euclid v. Ambler Realty, the land use regulation will not be deemed violative of the Due Process and Equal Protection Clauses unless it is "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals or general welfare." This standard of review is highly deferential; the regulation is presumed valid, and if its reasonableness is fairly debatable, the court will not substitute its judgment for that of the legislature.

Given the breadth of the public welfare concept and the deferential standard of judicial review, successful due process and equal protec-

343. These constitutional provisions are most often cited by developer representatives as the bases of potential challenges to the concurrency requirement. See, e.g., Rhodes, supra note 40, at 248-50.
344. Kayden, supra note 97, at 302-06.
345. Village of Euclid v. Ambler Realty, 272 U.S. 365, 395 (1926). If no fundamental right or support classification is involved, "[s]crutiny under equal protection analysis is essentially equivalent to scrutiny under due process doctrine." Lockary v. Kayfetz, 908 F.2d 543, 547 (9th Cir. 1990).
347. See supra notes 95-108 and accompanying text.
348. 272 U.S. 365 (1926).
349. Id. at 395.
350. Kayden, supra note 97, at 308-09.
tion claims against concurrency systems are likely to be a rare occurrence. The concept of the public welfare, which loosely constrains exercise of the police power, encompasses an exceedingly broad range of public purposes.\(^\text{351}\) Courts have held that such health, safety, and aesthetic objectives as controlling the rate and character of community growth; avoiding the problems caused by uncontrolled and rapid growth, such as traffic congestion, noise, and declining quality of life; preventing urban sprawl; preserving rural environments; and ensuring adequate provision of services and orderly development, are legitimate public purposes.\(^\text{352}\) A concurrency system has many of these objectives,\(^\text{353}\) and timing development to occur with the provision of facilities and services is a reasonable means of achieving them. Therefore, unless tainted by some totally irrational design feature, the system is likely to withstand scrutiny under classic due process-equal protection analysis.\(^\text{354}\)

Taking claims are more complicated than due process-equal protection cases and are equally problematic for landowner relief. The principal policy of the Taking or Just Compensation Clause is “to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a

\(^{351}\) Land use regulations “must find their justification in some aspect of the police power, asserted for the public welfare.” Euclid, 272 U.S. at 387. As described by the Supreme Court in Berman v. Parker, 348 U.S. 26, 33 (1954), “[t]he concept of the public welfare is broad and inclusive. The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.” (citations omitted); accord Village of Belle Terre v. Boraas, 416 U.S. 1, 9 (1974).


\(^{353}\) Freilich & White, supra note 1, at 951-52.

\(^{354}\) Id. at 952-55. Katherine E. Stone & Philip A. Seymour, Regulating the Timing of Development: Takings Clause and Substantive Due Process Challenges to Growth Control Regulations, 24 Loy. L.A. L. Rev. 1205, 1224-29 (1991). For a case involving an improper design requirement, see Begin v. Town of Sabattus, 409 A.2d 1269, 1276 (Me. 1979) (invalidating local growth control measure on equal protection grounds because its discriminatory treatment of manufactured housing construction was not rationally related to alleviating traffic congestion and demand on public services).
Determining when governmental action violates this policy can be difficult and confusing because the Supreme Court has not developed any "set formula" for deciding taking claims. Three lines of authority have emerged for making this determination. The first line of authority is clear, unequivocal, and easily applied: If governmental action results in "[a] permanent physical occupation" of private property, a per se taking occurs to the extent of the occupation, "without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner." Of very recent origin, a second line of authority emanating from Agins v. City of Tiburon establishes a two-pronged disjunctive test: a land use regulation constitutes a taking if it "does not substantially advance legitimate state interests, or denies an owner economically viable use of his land." The "substantially advancing" prong has generally been considered identical to traditional due process-equal protection analysis. In lieu of a disjunctive test, the third line of authority, which crystallized in Penn Central Transportation Co. v. New York City, uses an ad hoc, factual inquiry that focuses on the particular facts of each case and that evaluates factors such as the regulation’s economic impact, its interference with distinct investment-backed expectations, and its nature or character.

To this already complex jurisprudential stew, the Supreme Court added more ingredients in 1987. In First English Evangelical Lutheran Church v. County of Los Angeles, the Court reaffirmed that a land use regulation may go so far as to effectuate a taking and recognized the concept of temporary regulatory takings. Even more important, the Court held that if a regulation does rise to the level of a taking, invalidation of the ordinance is not a sufficient remedy, although it does render the taking a temporary—rather than a permanent—deprivation of property rights. The Just Compensation Clause of the Fifth Amendment, as made applicable to the states by the Fourteenth

356. Penn Central, 438 U.S. at 124.
359. Id. at 260 (citations omitted, emphasis added).
360. Id.
362. Id. at 124; see also Keystone Bituminous Coal Ass’n v. DeBenedictis, 480 U.S. 470, 495 (1987).
364. Id. at 311-12.
Amendment, requires compensation "for the period during which the taking was effective."\(^{365}\) Significantly, however, the Court did not modify its previously enunciated taking tests or decide whether the regulation in question constituted a taking.\(^{366}\) Furthermore, it held that preliminary activities leading up to adoption of a regulation do not constitute a taking and expressly refrained from addressing issues arising from "normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like which are not before us."\(^{367}\)

After thickening the taking stew with *First English*, the Court then tossed *Nollan v. California Coastal Commission*\(^{368}\) into the pot. In *Nollan*, the Court reviewed a coastal construction permit conditioned on the provision by the Nollans of a ten-foot-wide lateral access easement allowing the public to traverse the private beach on their ocean-front lot.\(^{369}\) The Court characterized the access easement as a "permanent physical occupation" of private property.\(^{370}\) Thus, under the line of authority previously mentioned, if the Nollans had not been seeking a permit, requiring them to convey the easement without compensation clearly would have violated the Taking Clause.\(^{371}\) However, because a land use regulation was involved, the Court referred to the second line of authority and focused on the first prong of the Euclid-derived *Agins* test: specifically, does the regulation "substantially advance legitimate state interests?"\(^{372}\) Applying this "means-ends" analysis, the Court assumed, without deciding, that the Coastal Commission's alleged purpose of protecting the public's visual access to the beach was legitimate.\(^{373}\) The Court then stated that the permit condition must substantially advance that purpose, a relationship which the Court characterized as an "essential nexus."\(^{374}\) Concluding that the lateral access easement totally failed to advance that purpose, the Court held that the permit condition constituted a taking without just compensation.\(^{375}\)

\(^{365}\) *Id.* at 321.

\(^{366}\) *Id.* at 313.

\(^{367}\) *Id.* at 321.

\(^{368}\) 483 U.S. 825 (1987).

\(^{369}\) *Id.* at 831.


\(^{371}\) *See supra* text accompanying note 357. In *Nollan* the Court stated: "We have repeatedly held that, as to property reserved by its owner for private use, 'the right to exclude [others is] "one of the most essential sticks in the bundle of rights that are commonly characterized as property."' 483 U.S. at 831 (citations omitted) (quoting *Loretto*, 458 U.S. at 434).


\(^{373}\) *Nollan*, 483 U.S. at 835.

\(^{374}\) *Id.* at 837.

\(^{375}\) *Id.* at 837-39.
Standing alone, this analysis and holding would have contributed meat but little zest to the ever-simmering stew of taking decisions. However, in dictum, Justice Scalia, writing for the Nollan majority, provided the spice. Although he applied the Agins “substantially advancing” test, which is directly traceable to the “substantial relation,” due process-equal protection test of Euclid, Justice Scalia concluded in a footnote that the relationship between “means and ends” in taking claims has always required greater scrutiny than in due process and equal protection cases. Although Justice Scalia’s contention has provoked much debate and disagreement about its accuracy and import, Nollan provides new ammunition for those who seek heightened judicial scrutiny of land use regulations.

Local concurrency systems may result in delays in obtaining development approval for some projects, building moratoria for some areas, and attempts to exact even greater infrastructure payments from developers. Brandishing their new First English and Nollan weaponry, landowners and developers are likely to claim that such delays, moratoria, and exactions deny them due process and equal protection of the law or constitute temporary takings of their property without just compensation. However, with the limited exception of exactions, which will be discussed momentarily, the challengers may find that they are firing blanks or that the local comprehensive plan provides an effective shield against their constitutional artillery.

First English does not stand for the proposition that a temporary delay in the right to develop property automatically constitutes a temporary taking. As mentioned above, the Court in First English did not modify its previously adopted tests for determining the taking issue. Under those tests, courts have frequently held that a temporary, as

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376. Id. at 834-35. “We have long recognized that land-use regulation does not effect a taking if it ‘substantially advance[s] legitimate state interests’ and does not ‘den[y] an owner economically viable use of his land,’” Id. at 834 (citation omitted) (quoting Agins v. City of Tiburon, 447 U.S. 255, 260 (1980)). For an excellent analysis of Nollan that traces the Agins test employed in Nollan to Village of Euclid v. Ambler Realty Co., see Kayden, supra note 97, at 313-16.

377. Nollan, 483 U.S. at 834-35 n.3.

As indicated earlier, our cases describe the condition for abridgment of property rights through the police power as a ‘substantial advancing’ of a legitimate state interest. We are inclined to be particularly careful about the adjective where the actual conveyance of property is made a condition to the lifting of a land-use restriction, since in that context there is a heightened risk that the purpose is avoidance of the compensation requirement, rather than the stated police power objective.

Id. at 841.

opposed to a permanent, restriction on the use of property does not constitute a taking. Recall that the Ramapo court determined that a restriction on development of up to as much as eighteen years was temporary and therefore not a taking.79 Further, on remand in the First English case, the California Court of Appeal held that the interim regulation prohibiting construction in the flood plain did not constitute a taking even though it had been in effect for eight years.80 According to the California court, First English does not convert “moratoriums and other interim land use restrictions into unconstitutional ‘temporary takings’ requiring compensation unless, perhaps, if these interim measures are unreasonable in purpose, duration or scope.”81 Some commentators interpret Keystone Bituminous Coal Ass’n v. DeBenedictis,82 decided the same year as First English and Penn Central, to mean that deprivation of present use will not necessarily constitute a taking if future use remains.83 Arguably, then, when temporary restrictions are involved, the appropriate question should be whether there will be “a reasonable use of property measured over a reasonable period of time.”84 Consequently, the temporary taking doctrine of First English will probably afford much less relief from temporary, concurrency-induced moratoria than it might appear to offer at first glance.

The strong comprehensive planning foundation on which concurrency is grounded will also diminish the chances for relief based on taking and other constitutional grounds. A comprehensive plan prepared and adopted under Florida’s growth management laws will help to insulate concurrency regulations from constitutional attacks in several ways. First, because it provides “a solid scientific, statistical basis” for the regulations,85 the comprehensive plan will help to refute

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81. Id.
84. Bozung & Alessi, supra note 383, at 1017.
85. Beck v. Town of Raymond, 394 A.2d 847, 849 (N.H. 1978) (quoting Patenaude v. Town of Meredith, 392 A.2d 582, 585 (N.H. 1978)). In declaring invalid the town’s “low growth” ordinance because it had not been adopted in accordance with the state’s comprehensive planning and zoning legislation, the New Hampshire Supreme Court stated: “Comprehensive planning with a solid scientific, statistical basis is the key element in land use regulation in New Hampshire.” Id.
charges of arbitrariness and irrationality. Second, as a document demonstrating that the local government proposes to accommodate its projected growth in a balanced and well-planned manner, the comprehensive plan will constitute persuasive evidence that the concurrency system is not tainted by exclusionary motives or efforts. Third, through its goals, policies, and objectives, which must be consistent with the goals and policies of the legislatively enacted state growth management laws, the comprehensive plan establishes the legitimate public purposes of the concurrency system. Fourth, with its capital improvements program for addressing both existing infrastructure deficiencies and estimated future needs, the comprehensive plan represents the local government's good faith intent and efforts to provide the facilities and services needed to accommodate growth. It also constitutes evidence that the landowner will be able to develop in the future when facilities are eventually provided. For these various reasons, courts have frequently cited a comprehensive plan or planning process in rejecting constitutional attacks against growth controls and other land use regulations.\textsuperscript{386}

A few hypotheticals will illustrate the difficulty which constitutional claims against applications of the concurrency requirement will encounter. Consider first the situation, as in\textit{Ramapo}, where land in urban fringe or rural areas is not programmed to receive the public facilities and services necessary to satisfy concurrency immediately or even in the foreseeable future. Suppose, for example, that pursuant to its state-approved local comprehensive plan, which is designed to curtail urban sprawl, a local government decides not to provide public facilities—under either its short-term or long-term capital improvements plan—\textsuperscript{387} to support urban type development on land outside its designated urban services area. Finding it financially unfeasible to provide all of the facilities and services necessary to satisfy concurrency, a landowner who desires to develop outside the urban services area brings suit to invalidate the concurrency requirement or compel

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\textsuperscript{386} See, e.g., Wincamp Partnership v. Anne Arundel County, Md., 458 F. Supp. 1009 (D. Md. 1978) (rejecting substantive due process and takings claims and citing county's ongoing planning activities); Smoke Rise, Inc. v. Washington Suburban Sanitary Comm'n, 400 F. Supp. 1369, 1382-85, 1388-90 (D. Md. 1975) (rejecting substantive due process and takings claims and citing ongoing comprehensive planning activities for infrastructure); Dateline Builders, Inc. v. City of Santa Rosa, 194 Cal. Rptr. 258 (Cal. Dist. Ct. App. 1983) (rejecting substantive due process claim and citing local comprehensive plan); see also\textsuperscript{ supra} notes 167-71 and accompanying text (discussing the emphasis the\textit{ Ramapo} court gave to the local comprehensive plan in rejecting substantive due process and takings claims).
\textsuperscript{387} See\textsuperscript{ supra} text accompanying notes 231-32.
\end{flushright}
the local government to provide the necessary facilities and services.\textsuperscript{388} Will the landowner win?

Assuming the local plan and its application are otherwise reasonable and defensible,\textsuperscript{389} the concurrency requirement should withstand such attacks. The Ramapo decision itself is persuasive authority for the validity of this planning strategy, especially if the local plan permits the landowner to meet concurrency by providing the necessary facilities.\textsuperscript{390} Cases like Dateline Builders, Inc. v. City of Santa Rosa provide additional support.\textsuperscript{391} In Dateline Builders, the comprehensive plan adopted by both the City and Sonoma County incorporated a compact land use and development policy to prevent urban sprawl. Among other goals, this policy was intended to curb the proliferation of fragmented sewer systems by extending utilities in an economically efficient manner and "in accordance with orderly development instead of urban sprawl."\textsuperscript{392} The builders proposed to develop a "leap-frog" housing project in an agricultural area beyond the municipal boundaries and requested permission to connect the project to the City's existing sewer trunk line. After the City refused to permit the connection even though it had adequate sewer capacity, the builders sought a court order compelling the City to permit the connection. Applying the traditional due process and equal protection rationality test, the court upheld the City's refusal to provide the service on the ground that the proposed development was inconsistent with the Ci-

\textsuperscript{388} This hypothetical assumes that the local plan designates the land for the uses that the landowner proposes to undertake as in the Ramapo plan. Of course, this problem may be avoided by designating the land for nonurban, rural type uses.

\textsuperscript{389} FLA. STAT. § 163.3194(4)(a) (1991).

\textsuperscript{390} See supra notes 88-113 and accompanying text.


\textsuperscript{392} Id. at 261 (emphasis omitted). According to the court, the city and county plan had the following goals:

(1) to encourage a compact growth pattern and discourage inefficient sprawl through out the planning area; (2) to provide safe convenient traffic ways linking living areas with shopping and employment centers and recreation areas; (3) to further develop the public utility system in a manner to serve the growing metropolitan area most economically and efficiently; (4) to schedule utility extensions in a manner to help insure compact, efficient growth patterns with maximum economy; and (5) to encourage cooperation between all governmental agencies responsible for development occurring in the planning area.

\textit{Id.} The court also made the following observation:

Unfortunately, the experience of many communities in this state has been that when planning is left to developers, the result is urban sprawl. The City's express and reiterated reason for denying the certificate was that Builders' proposed development violated its policy of orderly compact development from the urban core, and would result in a "leap-frog" development and "urban sprawl." A municipality cannot be forced to take a stake in the developer's success in the area.

\textit{Id.} at 265.
ty's and County's adopted policy of compact development, which is a legitimate public purpose.\textsuperscript{393}

Under a properly devised local comprehensive plan, courts may reject constitutional challenges even if the local plan does not permit the landowner to obtain development approval by providing its own facilities. \textit{Construction Industry Ass'n v. City of Petaluma}\textsuperscript{394} involved such a growth management plan. The Petaluma plan imposed an annual limit of 500 residential units that could be constructed in housing projects of more than four units. These 500 units were to be allocated in accordance with a point system based on the availability of public facilities and services and other land use criteria that allowed the City to deny development approval even when facilities and services were available.\textsuperscript{395} Especially relevant to the hypothetical situation posed here, the plan also established an urban service area beyond which the City would not provide services for at least fifteen years.\textsuperscript{396} Unlike the Ramapo plan, the Petaluma plan contained no guarantee of ultimate development approval within a definite time period and designated areas in which the City would provide no services at all. Nevertheless, the court, in rejecting due process and other constitutional attacks on the plan, held that the City's planning goals of preserving its "small town character" and avoiding "the social and environmental problems caused by an uncontrolled growth rate" were legitimate police power objectives.\textsuperscript{397} Under this rationale, as long as the landowner is allowed any reasonable use, whether present or future, the local plan may be able to prohibit the use of private systems pending future governmental provision of public facilities and services.\textsuperscript{398}

Should there be a different result if development moratoria occur in areas for which the local plan has committed to provide the necessary

\textsuperscript{393} \textit{Id.} at 260. The court strongly intimated that the result might have been different in the absence of a previously adopted comprehensive plan. \textit{Id.} at 266.

\textsuperscript{394} 522 F.2d 897 (9th Cir. 1975), cert. denied, 424 U.S. 934 (1976).

\textsuperscript{395} \textit{Id.} at 900-01.


\textsuperscript{397} 522 F.2d at 906-09. The court stated that while "the Plan may frustrate some legitimate regional housing needs, the Plan is not arbitrary or unreasonable." \textit{Id.} at 908.

\textsuperscript{398} See also Smoke Rise, Inc. v. Washington Suburban Sanitary Comm'n, 400 F. Supp 1369 (D. Md. 1975) (rejecting constitutional attacks on a county comprehensive plan prohibition on the use of private sewer systems in areas where the local government was not scheduled to provide public facilities in the foreseeable future). \textit{Id.} at 1382, 1386, 1390. The court held that the prohibition was a reasonable means of achieving the legitimate public purpose of staging development and guiding growth in an environmentally efficient manner pursuant to the county comprehensive plan. \textit{Id.} at 1391-92. The court stated that if it invalidated the restrictions on the use of private systems, "then private development would be permitted to build new communities at random throughout the county, irrespective of the engineering, environmental, and economic inefficiencies occasioned by haphazard, unplanned growth." \textit{Id.} at 1392.
facilities and services? To illustrate, assume that a development company owns land designated under the local plan for medium-density residential use so long as public sewer and water are available. After completing preliminary planning activities for a large residential subdivision, the company seeks site plan approval and a certificate of concurrency compliance. Suppose that the concurrency certificate is denied because of inadequate sewer capacity, because, although the capital improvements element of the local plan had originally scheduled delivery of the necessary public sewerage facilities during the next fiscal year, the local government will not be able to meet this commitment because of unforeseen circumstances. Furthermore, suppose that the local planning department informs the company that although revised plans are being developed to provide the facilities, it may be two or three years or even longer before wastewater facilities are available for this area. Can the development company get relief through a constitutional attack on the de facto moratorium?

Smoke Rise, Inc. v. Washington Suburban Sanitary Commission suggests that in the absence of unique circumstances, the development company is unlikely to prevail. In Smoke Rise, homebuilders challenged various moratoria on public sewer connections that had been in effect for five years. Rejecting the homebuilders’ substantive due process and taking claims, the court upheld the moratoria. Applying traditional due process analysis, the court found that the moratoria were reasonable as to both purpose and duration. The moratoria were enacted for the legitimate public purpose of preventing pollution of the state’s waters by inadequate sewage treatment plants. The five-year duration was deemed reasonable in view of the sewer problem’s complexity and interjurisdictional nature.

The court rejected the takings claim for two primary reasons. First, the sewer moratoria were imposed to prevent a public harm to the waters of the state and not to create a public benefit; hence the moratoria were an exercise of the police power and not of the eminent domain power. Second, the moratoria created only temporary, not permanent, restrictions. According to the court, because the homebuilders would be in “an advantageous position to reap high profits”

400. Id. at 1382, 1386, 1390.
401. Id. at 1383-90.
402. Id. at 1383 (“The legitimacy of the state’s purpose in protecting its waters from contamination by sewage overflows requires little discussion.”).
403. Id. at 1383-90. The court noted that a moratorium on development must be limited to a reasonable duration, but that the reasonableness of the duration must be measured by the scope of the problem. Id. at 1386.
once the moratoria were lifted, their property had not been rendered so useless as to effectuate a taking.\textsuperscript{404}

Reminiscent of \textit{Ramapo}, the \textit{Smoke Rise} court placed great weight on comprehensive planning.\textsuperscript{405} It cited the local government's good faith, ongoing planning activities, and its extensive and detailed sewer plans as a basis for upholding the reasonableness of the moratoria's five-year duration and for finding that the moratoria were not enacted to improperly exclude growth and development.\textsuperscript{406} Although it made no express reference to the local plan in its disposition of the taking claim, the court was clearly influenced by the existence of the ongoing planning activities when it found that the moratoria created only a temporary restriction.

Let us alter the facts of our hypothetical scenario. The development company owns land on a major arterial road that is designated by the local comprehensive plan and the implementing zoning code for commercial use. The local plan has established traffic level-of-service "D" for the road; the capital improvements element has programmed road and other traffic-related improvements for the area, which if timely completed will maintain the "D" level of service through the projected development of the area.\textsuperscript{407} Suppose that after the company applies for site plan approval and a certificate of concurrency compliance for its proposed retail shopping complex, the local planning department informs the company that it will recommend denial of the application unless the company is willing to pay several million dollars for traffic-related improvements over and above the local traffic impact fee assessment. The basis for this recommendation will be that there is inadequate road capacity to accommodate the projected automobile trips generated by the proposed project because the existing level of service has already fallen to "E." Upon further investigation, the company discovers that because of unforeseen budgetary

\footnotesize{404. \textit{Id.} at 1383.}

\footnotesize{405. "The comprehensive plan is the tool whereby design and rationality can replace the chaotic sprawl which has too often characterized metropolitan development." \textit{Id.} at 1379.}

\footnotesize{406. \textit{Id.} at 1384-85, 1388-89. The court's consideration of the reasonableness of the purpose and duration of the moratoria and its emphasis on the role of comprehensive planning is consistent with the approach taken by most courts. \textit{See, e.g.}, \textit{Schafer v. City of New Orleans}, 743 F.2d 1086 (5th Cir. 1984); \textit{Wincamp Partnership v. Anne Arundel County, Md.}, 458 F. Supp. 1009 (D. Md. 1978); \textit{Almquist v. Town of Marshan}, 245 N.W.2d 819, 826 (Minn. 1976); \textit{Deal Gardens, Inc. v. Board of Trustees of Loch Arbour}, 226 A.2d 607 (N.J. 1967).}

\footnotesize{407. Roadway levels of service (LOS) are rated on a scale from "A" to "F", with "A" representing the highest LOS (free-flow conditions) and "F" the lowest (extreme congestion or gridlock). \textsc{Center for Urban Transportation Research, Roadway Level-of-Service Determination 5-7} (1991). For a concise explanation of how roadway LOS is defined, see \textit{Freilich & White, supra} note 1, at 942-43.}
problems the local government has failed to make certain road improvements for the area that were programmed under the local plan. Moreover, the company is informed that it is possible that these improvements will not be made for at least three years unless the company pays for them. After the Company declines to pay for the improvements necessary to restore a "D" level of service and accommodate its proposed project, the company's application is officially denied. Will the Company's constitutional claims fare any better under this scenario?

This situation presents the exaction issue mentioned earlier. The local government is attempting to exact from the development company the funds needed both to eliminate existing traffic deficiencies and mitigate the impacts of its own project. A recent California case, *Marblehead v. City of San Clemente*, involved a voter-approved initiative that established an adequate public facilities requirement and conditioned development approval on the achievement and maintenance of designated LOS standards for traffic and other facilities. The trial court interpreted the initiative as requiring the property owner, as a condition of development approval, to mitigate the impact of his development and improve existing levels of service. Citing *Nollan*, the court upheld the property owner's contention that the initiative requirement violated the federal Taking and Equal Protection Clauses. According to the court, the requirement to improve existing levels of services lacked the substantial nexus required by the *Nollan* decision.

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409. *Id.* at 1-4.

The Initiative is facially defective. Its plain meaning requires property owners to mitigate conditions not only caused by their development (a proper goal) but also to cure the inadequacies of those who developed their property before them. It is the latter requirement of improvement of the existing levels of service that fails the nexus test. Would it be proper to require the last parcel of land to be developed to bear the entire expense of all the arterial highways, all the police and fire response times, all the one hundred year flood control, all the animal migration corridors, all the aesthetic cones of vision, and/or all the park/recreational facilities which have been neglected by prior city councils and real property owners?

410. *Id.* at 4-5.

410. *Id.* The court stated: "The *Nollan* nexus analysis requires a direct connection between the burden imposed by the regulatory condition and the benefit received by the property owner."* Id.* at 4. However, the court also observed that this was a requirement of California law even before the *Nollan* decision. *Id.* at 5. Florida law also required such a nexus before *Nollan*. See, e.g., Contractors and Builders Ass'n v. City of Dunedin, 329 So. 2d 314 (Fla. 1976), cert. denied, 444 U.S. 867 (1979). Two other California trial courts invalidated similar initiative measures for the same reasons. McGavran v. City of Costa Mesa, No. 58-3796 (Cal. Super. Ct. June 7, 1989); Kaiser Dev. v. City of San Juan Capistrano, No. 57-7043 (Cal. Super. Ct. Mar. 10, 1989).
Under this analysis, the development company can avoid payment of the exaction for existing deficiencies. However, if the local government abandons this part of the exactions policy and still denies development approval until it can make the traffic improvements required to achieve the established level of service, where does this leave the developer? The local government may take an even longer period of time to make the necessary traffic improvements notwithstanding the commitments in its local comprehensive plan. Consequently, the development company's project will be "temporarily" delayed for several years. However, any due process or taking claim will be considered in light of the purpose and duration of the delay, the temporary nature of the restriction on use, the scope and complexity of the problem, and the local government's good faith planning efforts to correct the problem. Accordingly, the development company's chances of success are problematic at best.

Because of Florida's growth management requirements, especially the concurrency requirement, a local comprehensive plan imposes substantial restrictions on the use of property. As the foregoing discussion indicates, except in truly egregious cases, constitutional attacks on these restrictions will bring little relief for landowners, in part because of the comprehensive plan that imposes the restrictions. It would be both ironic and unfair if a local government that uses its comprehensive plan as a shield against constitutional challenges to concurrency restrictions could also avoid any liability or accountability for failing to fulfill the very funding commitments on which its plan is based. Invalidation of the concurrency restriction, as some courts have suggested, is not a desirable remedy because it would defeat the public purposes for which the concurrency requirement is imposed. Thus, should not the landowner be allowed to enforce the local government's statutory obligation to provide the facilities and services in accordance with its adopted local plan, even though the governmental breach of the obligation has not risen to the level of a constitutional violation?

Traditionally, as discussed in Part II, local government utility providers have been held to a duty to anticipate and satisfy future demand for their services. A classic statement of this duty is found in Reid Development Corp. v. Parsippany-Troy Hills Township:

A public water company [here the Township] is under a duty as a public utility to supply water to all inhabitants of the community who apply for the service and tender the usual rates. The obligation

includes the establishment of a distributive plant adequate to serve the needs of the municipality and the enlargement of the system to meet the reasonable demands of the growing community. The utility is under a duty to serve all within the area who comply with fair and just rules and regulations applicable to all alike. The obligation is enforceable by mandamus. 412

Under the traditional rule, local governments could not refuse to provide services for nonutility-related reasons such as "growth control and land use planning considerations." 413 One commentator has severely criticized this rule because it does not take into consideration that a local government, unlike a privately owned utility company, possesses and exercises the police power, which is much broader than the powers accompanying a utility franchise. 414 As reflected in such decisions as Ramapo and Dateline Builders, a modern rule has evolved that recognizes that a local government may refuse to provide services to areas that are not programmed to receive them under the local comprehensive plan. The modern rule is essential if local governments are to effectively use their police powers to plan and regulate for the public welfare. Conversely, if local plans are to be meaningful and fair, the traditional rule should remain in effect and enforceable in areas in which the local government has committed to provide facilities and services under its plan. Consequently, a developer should have the right to enforce the plan commitments through court actions for injunctive relief and compensatory damages.

The courts that have considered the possibility of such actions usually have avoided the issue or reacted with caution. For example, in Ramapo the court vaguely hinted at remedial measures if the Town did not fulfill its obligations but the court specifically mentioned only invalidation of restrictions that become "absolute prohibitions." 415 The court in Smoke Rise, without elaboration, stated that if, after imposing the sewer moratorium, the local government failed to correct the sewerage problem "with dispatch," the property owner could bring suit to compel remedial action as well as for damages. 416 Faced with similar circumstances, the same court, in Wincamp Partnership

412. Id. at 669 (emphasis added).
413. Robinson v. City of Boulder, 547 P.2d 228, 229 (Colo. 1976), overruled by Board of County Comm'rs of Arapahoe County v. Denver Bd. of Water Comm'rs, 718 P.2d 235 (Colo. 1986).
414. See Deutsch, supra note 1.
v. Anne Arundel County,\(^{417}\) considered an action for monetary damages and an injunction directing state and local governmental entities "to devise a detailed plan and timetable for the prompt provision of sewage service to plaintiffs' property."\(^{418}\) Finding no contractual or statutory basis for the claim, the court denied the action.\(^{419}\) In Charles v. Diamond,\(^{420}\) the New York Court of Appeals expressed its sympathy for claims of unreasonable governmental delay in a statement that succinctly summarizes the crux of the problem:

> [W]here the municipality has affirmatively barred substantially all use of private property pending remedial municipal improvements, unreasonable and dilatory tactics, targeted really to frustrate all private use of property, are not justified. The municipality may not, by withholding the improvements that the municipality has made the necessary prerequisites for development, achieve the result of barring development, a goal that would perhaps be otherwise unreachable. Development may not be zoned out of a community by the indirection of needless municipal delay in providing the essentials for construction.\(^{421}\)

Nevertheless, the court declined to recognize an action for consequential damages caused by the local government's delay.\(^{422}\) It should be noted, however, that none of these cases occurred under a regime of state comprehensive planning legislation such as Florida's, which clearly imposes an obligation on local government to plan for and timely provide the public facilities and services needed to accommodate development.

Florida courts should recognize a landowner's cause of action for injunctive relief, and for damages where appropriate, to enforce local plan commitments to provide the facilities and services necessary to satisfy concurrency. A landowner can compel issuance of a development order that is consistent with the local plan.\(^{423}\) Similarly, the landowner should be entitled to compel provision of facilities and services for an otherwise permissible development that may be unreasonably

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418. Id. at 1015-16.
419. Id. at 1031.
421. Id. at 1301 (citations omitted).
422. Id. at 1304-05 (1977). The court refused to consider whether a temporary regulatory taking had occurred.
423. See Snyder v. Board of County Comm'rs of Brevard County, 16 Fla. L. Weekly 3057 (Fla. 5th DCA 1991) (reversing the county commission's denial of a rezoning that was determined by the court to be consistent with the county's comprehensive plan).
delayed for concurrency reasons because of the local government’s failure to deliver the facilities in accordance with its plan. In appropriate cases a court could order the local government to adopt and implement a new plan to provide the necessary facilities within a specified period of time and could also award damages if warranted by the facts, such as in situations involving gross neglect or bad faith. The local government could present evidence of circumstances beyond its control and other mitigating factors as defenses which should be closely scrutinized by the courts. Alternatively, the Florida Legislature could provide statutory guidelines and parameters under which local governments may impose concurrency-related moratoria or which govern actions against the local government for injunctive and monetary relief. For example, the local government could be required to certify the reasons for any moratoria and to adopt a judicially enforceable plan to correct the deficiencies necessitating the moratoria.

Recognition of this landowner’s remedy would have several salutary effects. First, it would underscore local government’s obligation to provide the facilities and services needed to satisfy concurrency. Second, it would provide a potent incentive to meet this obligation and a deterrent to abuses of the concurrency requirement. Third, it would furnish local governing bodies with a persuasive explanation for their constituents as to why local governments must fund and implement their local plans. Fourth, it would promote greater stability and reliability in the local planning process for the development community, thereby offsetting to some extent the plan’s considerable restrictions on the use of private property. In sum, it would reinforce and enhance the status of the local comprehensive plan as a truly balanced and comprehensive constitution for land use planning and regulation that creates corresponding rights and responsibilities for both the public and private sectors.

VI. Conclusions and Recommendations

The adequate public facilities requirement is becoming the most popular land use control in rapidly growing urban areas. A technique for controlling the timing and sequencing of development through the coordinated use of local government’s fiscal and police powers, the requirement prohibits the granting of development approvals unless adequate public facilities are available to accommodate the development. However, the requirement is legitimately used only if it is based on a comprehensive planning and capital improvement programming system for providing the necessary public facilities. Although the adequate public facilities requirement engenders fears of development moratoria, it is actually a means of avoiding the necessity for morato-
ria. Development moratoria are customarily imposed because of inadequate facilities. The purpose of a properly designed and implemented adequate public facilities requirement is to ensure that infrastructure is available when needed for development.

In 1972 the adequate public facilities requirement was judicially sanctioned in the landmark case of *Golden v. Planning Board of Ramapo*. The New York Court of Appeals upheld Ramapo’s plan for coordinating development approval with the availability of adequate public facilities and rejected contentions that the Ramapo system was exclusionary, indifferent to regional concerns, and unduly restrictive of private property rights. Critics claimed the plan was an exclusionary, fiscal zoning device that promoted commercial uses at the expense of low- and moderate-income housing, perpetuated existing patterns of low-density residential sprawl, and unfairly shifted the burden of providing public facilities to the private sector. In retrospect, the critics also should have questioned the financial feasibility of the plan.

Florida’s growth management laws establish state guidelines to ensure that local governments adequately address the criticisms and concerns raised about the use of adequate public facilities requirements. Each local concurrency system is based on an integrated state, regional, and local comprehensive planning process. The mandatory local comprehensive plan, which must incorporate a concurrency system for managing growth, must also be consistent with state and regional planning goals and policies. Local plans cannot be exclusionary. To be consistent with these goals and policies, the local plan must accommodate the jurisdiction’s projected growth and provide adequate housing for all income groups, especially low- and moderate-income persons. The local government has an obligation to provide the facilities needed to serve its projected growth, and this obligation must be reflected in the local plan’s financially feasible capital improvements element, which indicates when and where the facilities will be provided. Finally, the provision of public facilities must be coordinated with a future land use plan that is designed to prevent the various forms of urban sprawl. To ensure that the local government complies with these requirements, the Department of Community Affairs, as the state land planning agency, must review and approve the local comprehensive plan.

Nevertheless, Florida’s state-mandated concurrency system still has imperfections resulting from the Legislature’s failure to consider and

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address a number of fundamental issues. In the absence of adequate statutory guidance, DCA has struggled valiantly with these issues, but the Legislature is the proper body to resolve the question of which public facilities should be subject to the concurrency requirement. Although the development process arguably should not be encumbered by applying the concurrency requirement to nonphysical, "social" infrastructure, the Legislature should consider how this omission affects local planning and funding for social and human services. The Legislature should also provide adequate guidelines for establishing standards for determining the adequacy and availability of the facilities and services subject to concurrency. One solution is to set minimum state standards for facilities vital to public health and safety, such as water, sewer, solid waste, and drainage, while giving local governments broad discretion in setting standards for facilities that are matters of public convenience or "quality of life," such as parks and recreation, libraries, and transportation (except possibly state facilities).

"Health and safety" facilities should be in place when development is ready for use, but longer-term plans for providing less essential facilities might be acceptable if financial commitments for providing them are made at the time of development approval. In order to avoid successful constitutional challenges to the concurrency system, the Legislature should draw a clearer distinction between the elimination of existing infrastructure deficiencies and the provision of new facilities and services required by new development. More time should be given to cure existing deficiencies, especially in the area of transportation, unless the facility deficiency is creating serious public health and safety problems. The Legislature should also consider the relationship between concurrency and other state planning goals and provide for appropriate exemptions from the concurrency requirement when necessary or desirable to achieve the other goals.

Transportation has been the bane of concurrency's brief existence for a variety of reasons. The construction of transportation facilities is costly and time consuming, existing transportation deficiencies are substantial, and local governments cannot control the volume of traffic on roads that do not stop at jurisdictional boundary lines. Establishing appropriate levels of service for traffic is and has been a matter of great controversy, and the state and local governments have vigorously disagreed over whether the responsibility for setting those standards and funding transportation should be a state or local responsibility.

However these jurisdictional disputes are resolved, Florida needs to take a different and more realistic approach to transportation concur-
rency, especially in urban areas. The Legislature should authorize an areawide approach in urban areas that permits the designation of transportation concurrency management districts, the determination of concurrency by reference to a districtwide, average level of service rather than on a road segment-by-segment basis, the limitation of existing deficiencies over a ten- or fifteen-year period, and the approval of a development project so long as the developer contributes his or her proportionate fair share of the costs of any traffic improvements required by the development. This more flexible approach is justified by the complexity of the transportation problem and by the fact that traffic congestion is largely a matter of public convenience rather than public health or safety. It would also help to avoid or defeat constitutional attacks on transportation concurrency requirements. As with any other approach to transportation, this approach should be linked to a modern state transportation plan that recognizes the need for integrated, multimodal transportation systems with much greater emphasis on public transit.

The most glaring defect in the Florida concurrency system is the Legislature’s failure to resolve the issue of infrastructure funding. As the Ramapo experience demonstrates, concurrency requirements cannot be implemented without adequate revenue for local capital improvement programs, on which legitimate adequate public facilities requirements must be based. In Florida the Legislature has failed not only to provide adequate state funding for infrastructure, particularly transportation, but it has also greatly restricted local revenue sources by requiring public referendum approval for the major local option infrastructure taxes, making it difficult for local governments to comply with this mandate. If local concurrency systems are to accommodate rather than exclude growth and development, the Legislature must remove the referendum requirement for local option taxes and complete the unfinished business of creating adequate state funding sources for infrastructure.

Local comprehensive plans adopted under Florida’s growth management laws, and especially the concurrency systems which form their core, may result in substantial restrictions on private property rights. Consequently, constitutional challenges to concurrency based on the Due Process, Equal Protection and Taking Clauses are inevitab-

425. The Legislature did make some significant progress in funding transportation in the 1990 legislative session when it enacted a four-cent gas tax in most counties. Ch. 90-351, 1990 Fla. Laws 2960. However, this tax increase, which is expected to produce about $4 billion dollars of transportation funding, is not nearly enough to cover Florida’s estimated transportation needs during the 1990s. Rhodes, supra note 40, at 36; State Comprehensive Plan Committee, supra note 296, at 33-34.
ble. However, the highly deferential standard of review afforded local regulations under due process and equal protection jurisprudence militates against successful constitutional attacks except in the rare case of highly irrational regulations. Similarly, the tests for evaluating taking claims against concurrency regulations make success unlikely even under the temporary takings doctrine of *First English*, except in egregious cases of prolonged moratoria or governmental bad faith or where the burden of curing existing infrastructure deficits is shifted to the landowner as a condition of development approval. Properly designed concurrency regulations can anticipate and avoid most of these constitutional challenges.

A more effective landowner's remedy is needed to emphasize and enforce local government's statutory obligation to provide the facilities and services required by concurrency and to discourage inappropriate use of development moratoria. The Florida judiciary should recognize a landowner's right to enforce the local government's commitment to timely provide the facilities needed to satisfy concurrency in accordance with the adopted capital improvements program. In appropriate cases the landowner should be able to seek both injunctive relief to compel provision of the facilities and compensatory damages for totally unjustifiable delays. The Florida Legislature could establish guidelines for such landowner actions. The Legislature should further specify the conditions under which concurrency-related moratoria can be imposed and require local governments to adopt judicially enforceable corrective actions or plans in order to terminate moratoria as quickly as possible. Recognition of these landowner remedies and protections would help to ensure that the comprehensive plans used to justify substantial restrictions on private property will in fact be implemented.

Despite its flaws and some early difficulties in implementation, the Florida concurrency system is an impressive achievement in both scope and design. With little experience from other states to guide them, Florida and its local governments are putting in place the plans and regulations designed to ensure that the state grows in a financially responsible manner. In a state accustomed to "building now and paying later," the new concurrency system has engendered much controversy. Nevertheless, it continues to enjoy strong public

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426. As of January 20, 1992, all 457 of Florida's local governments had submitted plans to the DCA for review. Two hundred seventy-six local plans have been found in compliance with state law; 134 have been found not in compliance and 33 of those were the subject of negotiated agreements with the DCA to bring them into compliance. The DCA was still reviewing the remaining 47 plans. William E. Sadowski, *Changes Proposed for Florida's Growth Management System*, (Technical Memo, Vol. 7, No. 1, Feb. 1992), at 1, 1-2.
and broad bipartisan support. Seven years after its enactment in 1985, the statutory concurrency provisions remain undiluted despite intense pressure on the Legislature to weaken them. In the author's view, the survival of Florida's growth management legislation during the early implementation years was due to strong continuing support from the public, the statewide media, key state legislators, and Governor Bob Martinez. Governor Martinez strongly supported the efforts of the DCA to implement the state's growth management program, and he consistently opposed proposals to weaken the legislation, particularly the concurrency requirement.

Now the question is whether Florida government, both state and local, can sustain the political will necessary to implement, fund, and enforce the concurrency system it has created. In other words, will Florida's commitment to its grand experiment be equal to the grand ambition that launched it? As this Article goes to press, Florida's resolve is being tested by a severe economic recession that is being attributed by some to the concurrency requirement. It is imperative that Florida's political leaders resist such short-term pressures. As Governor Lawton Chiles recently stated in a letter to the Legislature:

Growth management is not just for good economic times, or when it's easy or convenient. It's intended to change the way we do business in Florida so that we don't repeat the mistakes of the past, or suffer even greater economic distress in the future to the detriment of our environment, our economy and our quality of life. 427

If the state's political leadership stays the course, the nation's most ambitious growth management system, with some refinements and proper funding, could also become its most successful.