The Florida Senate

Interim Project Report 2002-126 *October 2001*

Committee on Comprehensive Planning, Local and Military Affairs Senator Lee Constantine, Chairman

GROWTH MANAGEMENT

SUMMARY

Infrastructure funding is an important consideration in structuring growth management reform. Staff recommends that the coordination of school facility planning and local government comprehensive planning be addressed by linking new planning requirements to increased local funding flexibility for school construction and other types of infrastructure development. Staff also recommends that any changes to the Development-of-Regional-Impact (DRI) Program should focus not on regulatory relief, but rather on methods of integrating consideration of the impacts of DRI-scale development into local government comprehensive plans.

BACKGROUND

During the 2001 legislative session, major growth management legislation was considered, but not passed by both houses of the Legislature. The legislation addressed a number of areas including: improving intergovernmental coordination between local governments and school boards and requiring local governments to deny applications for rezonings and comprehensive plan amendments that increase the density or intensity of development if adequate school capacity is not available; streamlining comprehensive plan amendment review; exempting urban infill areas from concurrency requirements; an optional special master process for the review of quasi-judicial decisions; improving the link between water supply planning and local government comprehensive plans; and minor adjustments to Development-of-Regional-Impact (DRI) substantial deviation thresholds.

For the past several years, legislation has been sought to exempt certain types of large-scale development, i.e., marinas, airports and port facilities from the DRI review process. In addition, the Governor's Growth Management Study Commission recommended the replacement of the DRI program with an alternative process based upon the development of regional cooperation agreements. This project will also examine alternatives to DRI review with a focus on methods of integrating the review of large development projects into the local government comprehensive planning process.

During the 2001 legislative session, the public school facility planning recommendations of the Growth Management Study Commission were drafted into proposed legislation. These recommendations included the following:

> Each local government shall adopt a financially feasible public school facilities element to reflect the integration of school board facilities work programs, and the future land use element and capital improvement programs of the local government. Local governments shall ensure the availability of adequate public school facilities when considering the approval of plan amendments and rezoning that increase residential densities. Before a local government can deny a rezoning that increases density based on school capacity, the local school board must communicate to the local government that it has exhausted all reasonable options to provide adequate school facilities.[1]

Legislative language was developed and incorporated into CS/CS/CS/SB 310 2nd Engrossed and CS/HBs 1617 & 1487 2nd Engrossed. Generally, the bills required local governments in counties with school capacity problems to adopt a public educational facilities element and to enter an interlocal agreement that provides a methodology for determining whether school capacity will be available to serve development. Upon adoption of the public education facilities element and the interlocal agreement, the Senate Bill and early versions of the House Bill required local governments to deny rezonings and comprehensive

[1] The Growth Management Study Commission, "*A Liveable Florida for Today and Tomorrow*," February 2001, at p. 31.

plan amendments that increase the density or intensity of residential development.

In addition to the above, the Senate Bill provides that, before the mandate to local governments to deny rezonings and comprehensive plan amendments that increase residential density and intensity because of inadequate capacity takes effect, the local government must either levy the one-half-cent school capital outlay surtax, or an equivalent amount of new broad-based revenue from state or local sources, equivalent to the amount that would be raised from the school capital outlay surtax, is available and dedicated to the implementation work program adopted by the school board.

The Coordination of School Facility Planning and Local Government Comprehensive Planning

When the Local Government Comprehensive Planning Act was originally enacted in 1985, the provision of school facilities was identified as a type of infrastructure for which concurrency was required pursuant to s. 163.3180, F.S. However, over the years, amendments were made to the act to require a minimum level of coordination between school boards and local governments, particularly in the area of school facility siting. For example, local governments are required to identify on their future land use map, land use categories where public schools are an allowable use, including land proximate to residential development to meet the projected needs for schools. (s. 163.3177(6)(a), F.S.) In addition, the future land use element must include criteria that encourages the location of schools proximate to residential development as well as encouraging the collocation of public facilities, parks, libraries and community centers with schools.

In addition, the interlocal coordination element, required by s. 163.3177(6)(h), F.S., requires a local government to establish principles and guidelines to be used in the coordination of the adopted comprehensive plan with the plans of school boards. Finally, s. 163.3191, F.S., requiring local governments to prepare evaluation and appraisal reports, requires the coordination of the comprehensive plans and school facilities. Section 163.3191(2)(k), F.S., requires an evaluation of the coordination of the comprehensive plan with existing public schools and those identified in the 5-year school district facilities work program. The evaluation must address the success or failure of the coordination of the future land use map and associated planned residential development with public schools and joint decision making processes engaged in by the local government and the school board.

In 1998, the Legislature gave local governments the option to implement school concurrency. Section 163.3180(13), F.S., includes the minimum requirements for school concurrency. First, in order to implement concurrency on a district wide basis, all local governments within the county must adopt a public school facilities element and enter into an interlocal agreement. The public facilities element must include data including the 5-year school district facilities work plan; the educational plant survey; information on projected long-term development; and a discussion of how level-of-service standards will be established and maintained. Next, local governments implementing concurrency must adopt a financially feasible public school capital facilities program, in conjunction with the school board, that shows that the adopted level of service standards will be maintained. Finally, a local government may not deny a development permit authorizing residential development for failure to achieve the level-of-service standard for school capacity where adequate school facilities will be in place or under construction within 3 years of permit issuance.

Only two counties have attempted to implement school concurrency, Broward and Palm Beach Counties. The Broward County concurrency plan was found to be out of compliance with chapter 163, F.S., in the case of *Economic Development Council of Broward Inc. v. Department of Community Affairs, DOAH Case No. 96-6138GM*. Palm Beach County has recently transmitted to the Department of Community Affairs for review, proposed comprehensive plan amendments to adopt school concurrency within Palm Beach County. School concurrency has proved to be difficult to accomplish because of the requirement that a financially feasible capital improvements plan must basically ensure that school construction will keep pace with development. In a fast growing county, the financial resources may not be available to back up such a plan.

As an alternative to school concurrency, Orange County adopted a policy, originally advanced by former County Commission Chairman Mel Martinez in a memorandum of March 29, 2000 to the Orange County Board of County Commissioners, whereby proposed developments which require rezonings or comprehensive plan amendments that increase the density or intensity of development are denied where inadequate school capacity is available to serve the new

development. Applying the policy, the Orange County Commission has denied several rezoning or comprehensive plans amendment requests. Two of the applicants have sued the commission and one of these cases has resulted in a circuit court decision that is presently on appeal.

In the case of *Betty Jean Mann, v. Board of County Commissioners of Orange County, Florida, and Orange County Public Schools*[2], the petitioner challenged the commission's denial of her application for a change in zoning designation from agricultural to single family residential. The record for the public hearing where the commission considered the rezoning shows that the planning staff for the commission recommended denial of the application finding that the lack of adequate school capacity rendered the development plan inconsistent with two elements of Orange County's local government comprehensive plan, the Future Land Use Element and an objective of the Public Schools Facilities Element which provides that the commission may "Manage the timing of new development to coordinate with adequate school capacity." In addition, a member of the Orange County School Board testified that the attendant elementary school for the proposed development was over capacity and that the school board had no funds available to improve the facility or construct a new facility.

At trial, the petitioner argued that the Legislature's enactment of a statutory school concurrency program in s. 163.3180(13), F.S., preempts any other power the Board of County Commissioners has to deny a request based on school overcrowding. In contrast, Orange County argued that it did not deny the petitioner's zoning request based on lack of school concurrency, but based on the county's constitutional and statutory "home rule powers." In upholding the county's decision, the Court found that the county had the statutory authority to deny the zoning request based on the rezoning's inconsistencies with the elements of the county's local government comprehensive plan, rather than basing its decision on the county's home rule powers. The case is presently on appeal before the Fifth District Court of Appeal.

Chapter 235, F.S., Educational Facilities

Chapter 235, F.S., contains planning and design requirements for educational facilities. Administrative rules adopted under the authority of the chapter are currently undergoing review as part of the reorganization of educational governance for K-20. For example, under current law, s. 235.193, F.S., requires some degree of coordination between school boards and local governments. Subsection (1) of s. 235.193, F.S., requires the integration of the educational plant survey with the local comprehensive plan and land development regulations. School boards are required to share information regarding existing and planned facilities, and infrastructure required to support the educational facilities. The location of public educational facilities must be consistent with the comprehensive plan and the land development regulations of the local governing body.

Local governments are prohibited from denying site plan approval for an educational facility based on the adequacy of the site plan as it relates to the needs of the school. Further, existing schools are considered consistent with the applicable local government's comprehensive plan. If a school board submits an application to expand an existing school site, the local government "may impose reasonable development standards and conditions on the expansion only." (s. 235.193(8), F.S.)

Section 235.194, F.S., requires each school board to annually submit a school facilities report to each local government within the school board's jurisdiction. The report must include information detailing existing facilities, projected needs and the board's capital improvement plan, including planned facility funding over the next 3 years, as well as the district's unmet need. The district must also provide the local government with a copy of its educational plan survey.

Infrastructure Funding

In July 2001, the Center on Urban & Metropolitan Policy of the Brookings Institution issued a report entitled "Who Sprawls Most? How Growth Patterns Differ Across the U.S.," that identifies the factors that influence sprawl, defined in terms of density—"the population of a metropolitan area divided by the amount of urbanized land in that metropolitan area."[3] After ranking metropolitan areas based on this measure

[2] *Betty Jean Mann, v. Board of County Commissiors of Orange County, Florida and Orange County Public Schools, (9th Judicial Circuit for Orange County, Case No. CIO 00-6722, Writ No. 46), May 15, 2001.*

[3] William Fulton, Rolf Pendall, Mai Nguyen, and Alicia Harrison, The Brookings Institution, *Center on Urban 7 Metropolitan Policy: Who Sprawls Most? How Growth Patterns Differ Across the U.S.,*" July 2001.

of sprawl, the report draws several conclusions about the relationship between patterns of infrastructure spending and sprawl:

- "High-density metropolitan areas depend on sewers, not septic systems, and regions with a full complement of public infrastructure sprawl less."
- "Metropolitan areas whose school districts relied heavily on local revenue sources have lower densities."
- "Metropolitan areas whose local governments spend more of their budgets on highways urbanizes less land."[4]

Interestingly, the Brookings Report also concludes that states with growth management legislation tended to have more sprawl. The report concludes that this counterintuitive result occurred for two reasons: 1) the states lacked effective enforcement mechanisms; or 2) as is the case in Florida, inadequate infrastructure spending backed up the growth management laws:

> The second scenario is the Florida case. The state requires that infrastructure be in place before growth is permitted, but it failed to fund new infrastructure in the late 1980s and 1990s. Hence new growth has bled into rural areas that had slack infrastructure capacity, largely because growth was foreclosed in suburban areas that had some land left for higher density development but not enough road capacity.[5]

Discretionary Sales Surtaxes

Local Government Infrastructure Sales Surtax

Section 212.055, F.S., authorizes the imposition of discretionary sales surtaxes by local governments for various purposes. These surtaxes may be levied only if they are authorized by general law, and many are limited to local governments meeting specific requirements. The Local Government Infrastructure Surtax may be levied by a county at the rate of 0.5 or 1 percent, by referendum. Proceeds of the surtax are distributed to the county and the municipalities within the county. As of July 1, 2001, 3 counties were levying the infrastructure surtax at a rate of .5% and 25 counties are levying the surtax at a rate of 1%, or a total of 28 counties are levying the surtax. Beginning January 1, 2002, Alachua County will levy the infrastructure sales surtax at the rate of 1%.[6]

The proceeds of the infrastructure sales surtax must be distributed to the county and the municipalities within the county, either according to an interlocal agreement between the county, municipalities within the county representing a majority of the county's municipal population, and may include a school district, or if there is no interlocal agreement, according to a formula set forth in s. 218.62, F.S. Revenues from the infrastructure sales surtax may be used for:

- Any fixed capital outlay expenditure or fixed capital outlay used for the construction, reconstruction, or improvement of public facilities (including the construction of schools) that have a life expectancy of 5 or more years, and associated land acquisition, land improvement, design, and engineering costs;
- Public safety (fire, emergency medical, police and sheriff) vehicles that have a life expectancy of 5 years or more;
- Funding economic development purposes;
- To finance, plan, and construct infrastructure and acquire land for public recreation or conservation or protection of natural resources or to finance the closure or certain county or municipally-owned landfills; and
- Other purposes authorized for selected counties.

School Capital Outlay Surtax

District school boards may levy the School Capital Outlay Surtax, by referendum, at a rate not to exceed 0.5 percent. A school board levying the surtax must establish a freeze on non-capital local school property taxes, at the millage rate imposed in the year prior to the initiation of the surtax for a period of at least 3 years. The surtax proceeds may be used to fund:

- Fixed capital expenditures or fixed capital costs associated with the construction, reconstruction, or improvement of school facilities and campuses which have a useful life expectancy of 5 years or more years, as well as related land acquisition, land improvement, design, and engineering costs;

[4] *Ibid* at p. 13.
[5] *Ibid* at p. ES-14

[6] *Florida Legislative Committee on Intergovernmental Relations, Using Data from the Department of Revenue*.

- Costs of retrofitting and providing for technology improvements, including hardware and software; and
- Servicing of bond indebtedness used to finance authorized projects.

However, the proceeds may not be used to fund operational expenses.

To date, only 8 counties have levied the school capital sales surtax. These counties include: Bay, Escambia, Gulf, Hernando, Jackson, Monroe, Saint Lucie, and Santa Rosa.

Judicial Review of Development Orders based on Inconsistency with Comprehensive Plan

Section 163.3215, F.S., creates a civil court action for an aggrieved or adversely affected party to maintain an action for injunctive relief against a local government to prevent the local government from taking any action on a development order which: "materially alters the use or density or intensity of use on a particular piece of property that is not consistent with the comprehensive plan..."

Case law construing s. 163.3215, F.S., has limited the availability of the cause of action only to third party intervenors to the exclusion of landowners or developers who were the subject of the development order at issue. *Parker v. Leon County*, 627 So.2d 476 (Fla. 1993). However, the standard of review of actions brought under s. 163.3215, F.S., by third-party intervenors has been determined by the courts to be an original de novo review. *Poulos v. Martin County*, 700 So.2d 163 (Fla. 4th DCA 1997).

In *Board of County Commissioners v. Snyder*, 627 So. 2d 469 (Fla. 1993), the Supreme Court opined that rezoning actions that have a limited impact on the public and can be characterized as policy applications rather than policy setting, are quasi-judicial decisions. As quasi-judicial decisions, review of the local government's action is by petition for certiorari and subject to strict scrutiny. In a quasi-judicial rezoning proceeding, the landowner has the burden of proving that the rezoning is consistent with the comprehensive plan and complies with the procedural requirements of the zoning order before the burden shifts to the local government to prove that maintaining the existing zoning accomplishes a legitimate public purpose. *Id.* at 476.

As a consequence of this decision, many local governments have changed the way they conduct zoning hearings so that a factual record of their decision-making is created. Meetings of the local governing body where quasi-judicial proceedings have come to resemble court proceedings where witnesses are sworn and expert testimony is elicited. This type of proceeding is not very user friendly for individuals who wish to express their opinion in a particular rezoning or development order matter. In addition, because s. 163.3215, F.S., has been interpreted as requiring a de novo rather than certiorari review, an applicant for a development order and third-party challengers face the prospect of having to develop a factual record twice, once before the local government and a second time before the circuit judge conducting the de novo proceeding.

In the recent case of *Broward County v. G.B.V. International*, Ltd., 2001 WL 617823 (Fla. 2001), the Florida Supreme Court, in reviewing a plat approval decision made by the Broward County Commission, criticized the commission for failing to make findings, stating a formal reason for its decision, and issuing a written order, formally asked the Rules of Judicial Administration Committee of the Florida Bar to study the following question: "Whether the Court should implement a rule requiring written final decisions with detailed findings of fact in local land use actions that are subject to review in the courts." Should the courts require written decisions with written findings of fact in quasi-judicial proceedings, local governments are more likely to adopt a special master procedure for conducting such proceedings.

Developments of Regional Impact

Chapter 380, F.S., includes the Development of Regional Impact (DRI) program, enacted as part of the Florida Environmental Land and Water Management Act of 1972. The DRI Program is a vehicle that provides state and regional review of local land use decisions regarding large developments that, because of their character, magnitude, or location, would have a substantial effect on the health, safety, or welfare of the citizens of more than one county. For those land uses that are subject to review, numerical thresholds are identified in s. 380.0651, F.S., and Rule 28-24, Florida Administrative Code, (F.A.C.). Examples of the land uses for which guidelines are established include: airports; industrial plants; office development; port facilities, including marinas; hotel or motel development; retail and service development; multi-use development; and residential development. In addition,

guidelines for hospitals, mining operations, and petroleum storage facilities are established by rule of the Administration Commission by chapter 28-24, F.A.C.

Percentage thresholds are defined in 380.06(2)(d), F.S., that are applied to the guidelines and standards. First, fixed thresholds are defined where if a development is at or below 80% of all numerical thresholds in the guidelines, the project is not required to undergo DRI review. If a development is at or above 120% of the guidelines, it is required to undergo review. Rebuttable presumptions are defined whereby a development between 80 and 100% of a numerical threshold is presumed to require DRI review. A development that is at 100% or between 100-120% of a numerical threshold is presumed to require DRI review.

Section 380.06, F.S., establishes the basic process for DRI review. The DRI review process involves the regional review of proposed developments meeting the defined thresholds by the regional planning councils to determine the extent to which:

- The development will have a favorable or unfavorable impact on state or regional resources or facilities.
- The development will significantly impact adjacent jurisdictions.
- The development will favorable or adversely affect the ability of people to find adequate housing reasonably accessible to their places of employment.

The local government where the project is located must hold a public hearing and issue a development order. The development order may require the developer to contribute land or funds for the construction of public facilities or infrastructure. The issuance of a final development order vests the developer with the right to construct the development as configured.

In addition, under s. 380.06(19), F.S., any proposed change to a previously approved DRI which creates a substantial likelihood of additional regional impact, or any type of regional impact constitutes a "substantial deviation" which requires further DRI review and entry of a new or amended local development order. The statute sets out criteria for determining when certain changes are to be considered substantial deviations without need for a hearing, and provides that all such changes are considered cumulatively.

Revising the Development of Regional Impact Review Process

Integrating the DRI Review Process with the comprehensive planning process is one of the most popular and longstanding recommendations for revising the DRI program. As early as 1980, task forces and study committees began recommending integration of the two programs, and that recommendation has been repeated consistently through the history of the DRI program. For example, in 1992, ELMS III recommended that the DRI review process be better integrated into the local government comprehensive planning process and recommended termination of the program in certain jurisdictions upon implementation of new intergovernmental coordination element requirements. More recently, the Growth Management Study Commission recommended the "elimination and replacement of the Development of Regional Impact Program with a system of Regional Cooperation Agreements or Developments with Extra Jurisdictional Impact to be negotiated by the eleven regional planning councils."

On October 1, 1997, staff of the Senate Committees on Community Affairs, Governmental Reform and Oversight, and Natural Resources issued a report entitled "Streamlining the Developments of Regional Impact Review Process." This report includes a recommendation to "Consider replacing the DRI review process with specific plans as the method for addressing the extra jurisdictional impacts of large development." In addition, the report recommended that the Legislature should consider a pilot project to test the use of specific plans in Florida.

In 1997, the Legislature enacted s. 163.3245, F.S., authorizing an optional sector planning process whereby up to five local governments can develop special area plans, or sector plans. These pilot projects are intended for substantial geographic areas including at least 5,000 acres and one or more local governmental jurisdictions. An optional sector plan addresses the same issues as the development of regional impact process, including intergovernmental coordination to address extra jurisdictional impacts; however, the sector plan is adopted as an amendment to the local government comprehensive plan. When the plan amendment adopting the special area plan becomes effective, the provisions of s. 380.06, F.S., do not apply to development within the geographic area of the special area plan. To date, four sector plans are being undertaken: Clay County—Brannon Field Corridor; Orange County—Horizon West; Palm Beach County—

Central Western Communities; and Bay County—Airport Relocation.

METHODOLOGY

Staff reviewed growth management legislation considered during the 2001 legislative session and interviewed staff of the Department of Community Affairs, local governments, school boards, regional planning councils, and stakeholders involved in growth management issues.

FINDINGS

Educational Facility Planning Options:

- *Option 1*: Require all local governments to adopt educational facilities plans and to deny any rezonings or comprehensive plan amendments that increase density or intensity where there is inadequate school capacity. Condition operation of mandatory denial on: 1) adoption of the educational facilities element; 2) adoption by school board and local governments of an interlocal agreement; 3) adoption by the school board of a revised district educational facilities plan; and 4) the levy of the half-cent school capital outlay surtax, either by referendum or by a supermajority vote of the school board, or the school board obtains an equivalent amount of revenue to implement the financially feasible work program adopted by the school board. (description of 2nd ENG CS/CS/CS/SB 310) *Comments*: This approach compels local governments to deny rezonings and comprehensive plan amendments that increase density or intensity where the school board notifies the local government that capacity does not exist to serve the development, thereby circumscribing the land use authority of the local government.

- *Option 2:* Require only local governments where schools are over capacity to adopt educational facility plans and an interlocal agreement with the school board; other local governments could adopt the educational facility plans and interlocal agreements voluntarily. Clarify that local governments have the authority to deny rezoning or comprehensive plan amendments that increase the density or intensity of residential development based on lack of school capacity. Provide that if local governments adopt educational facility plans and interlocal agreements, they may levy the school capital outlay surtax without a referendum. *Comments:* This option is less prescriptive than Option 1, only local governments located within the jurisdiction of a school district with capacity problems would be required to adopt an educational facility plan and interlocal agreement. This option confirms that local governments have the authority to deny rezonings and comprehensive plan amendments where school capacity to serve the development is not available, rather than mandating that the local government deny rezonings and comprehensive plan amendments where the school board notifies the local government that capacity is not available. A local government that adopts an educational facility plan and interlocal agreement, either voluntarily or because required by statute, would be authorized to levy the school capital outlay surtax by supermajority vote, without referendum.

- *Option 3:* Define the content of an optional educational facilities element of the comprehensive plan. Offer school boards within jurisdictions that adopt an educational facilities element and interlocal agreement the option to levy the school capital outlay surtax by a supermajority vote. Clarify that local governments have the authority to deny rezonings or comprehensive plan amendments. *Comments:* Under this option, the adoption of an educational facilities element and interlocal agreement is optional, but the contents of the element and agreement are defined. Local governments who adopt the planning process are permitted to levy the school capital outlay surtax by supermajority vote.

- *Option 4:* Allow local governments that voluntarily adopt a school facilities element in their comprehensive plan or adopt voluntary school concurrency to levy the school capital outlay surtax by a supermajority vote. Do not specify contents of educational facilities element or interlocal agreement. *Comments:* This option merely provides a financial incentive, by allowing the imposition of the school capital outlay surtax by supermajority vote, for local governments to adopt the Orange County approach.

DRI Reform Options:

- *Option 1:* Minor adjustments to DRI thresholds and substantial deviation presumptions contained in 2nd Eng. CS/CS/CS/SB 310. *Comments:* This approach addresses DRI thresholds and presumptions that do no provide additional regulatory benefit, without changing the basic structure of the DRI problem.

- *Option 2:* Exempt categories of development from DRI review such as airports, marinas and ports, but require that master plans covering the categories be integrated into the local government comprehensive plans of appropriate jurisdiction in order for the exemption to take effect. *Comments*: This approach exempts types of projects that already receive significant regulatory oversight through other permitting programs while integrating a master planning approach to address that type of facility into chapter 163, F.S.

- *Option 3:* Decentralize the DRI Review process—Streamline the process for local governments to obtain review delegation from the Department of Community Affairs and/or develop an optional process open to all local governments, to adopt specific area plans, or overlays, which are integrated into the local government comprehensive plan, for DRI-scale projects. *Comments*: This approach attempts to encourage local governments to integrate a sector plan or special area approach into their local government comprehensive plan.

- *Option 4:* Do not amend chapter 380, F.S., this year.

RECOMMENDATIONS

Staff recommends that the coordination of school facility planning and local government comprehensive planning be addressed by Option 2: Require only local governments where schools are over capacity to adopt educational facility plans and an interlocal agreement with the school board. Clarify that local governments have the authority to deny rezoning or comprehensive plan amendments that increase the density or intensity of residential development based on lack of school capacity. Provide that if local governments adopt educational facility plans and interlocal agreements, they may levy the school capital outlay surtax without a referendum. Staff also recommends that any changes to the Development-of-Regional-Impact program should seek to integrate the consideration of extra jurisdictional impacts into the local government comprehensive planning process.