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FLORIDA GROWTH MANAGEMENT: PAST, PRESENT, FUTURE

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*Robert M. Rhodes**

I am often asked whether Florida's growth management program has made a difference. Has it produced better development'?

My answer: the program absolutely has made a difference, primarily by granting local governments' processes and tools to make better decisions and to ensure that these decisions are more transparent and accountable to the public. Of course, sound decisions cannot be legislatively mandated. And the quality of decisions will largely depend on the ability and good sense of locally elected and appointed officials and an engaged public sector. But, a state program can set the contextual tone and substantive table for better local decision making and I believe Florida's program has done so.

Consider that, in 1972, when the first growth management legislation was enacted, twenty-eight of Florida's sixty-seven counties, comprising a significant portion of the state's land area, lacked minimum zoning or subdivision regulation, while many others had not even adopted local comprehensive plans.

Today, all local governments have adopted plans to guide growth management decisions and some form of development regulations to carry forward their plans. And local plan decisions are subject to citizen participation and overview and state scrutiny.

So yes. over time, the state program has evolved, matured. and has helped produce better growth management decisions.

Professor Julian C. Juergensrneyer's kind invitation offers an opportunity to reflect and draw on my personal thirty-seven year experi-

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ence in addressing Florida's growth management program: past, present. and future.

I will focus particularly on what I believe Florida has done right, and not so right, in developing and implementing our program, and then offer a look at the future.

First: "Rights?"

Establishing a balanced, intergovernmental program, anchored by a meaningful state role was right.

Like many southern states, Florida has a strong, local home-rule tradition, and its 467 cities and counties have traditionally enjoyed broad discretion to adopt local plans and regulations, and if they did, determine their character and legal status.

Nonetheless, in the mid-seventies, Florida joined "the quiet revolution in land use control" by enacting the state's first mandatory local planning legislation.

By joining "the revolution," the state re-couped some of the power previously explicitly or implicitly delegated to locals to plan and regulate land use.

The Local Government Comprehensive Planning Act was developed by the first of several broadly representative state commissions, the First Environmental Land Management Study Committee (ELMS I). This legislation was an important milestone that blazed a path for later legislation, but was not a startling success.

Faced with a broadly worded state mandate to produce local comprehensive plans with minimal state policy guidance, little technical and financial assistance, and no penalties for non-compliance, most local governments adopted loosely worded advisory plans.

And, although state policy required consistency between local plans and development approvals, this policy was largely ignored.

The result: the first planning act produced more plans, but no significant improvement in planning and growth management practice.

Concern about ineffectiveness of the initial program prompted appointment in the mid-eighties of a blue ribbon committee, the Second Environmental Land Management Study Committee (ELMS II).

ELMS II reviewed the state's programs and concluded: if Florida wants effective growth management, the state must actively take the lead, chart a policy course, and then seriously administer its programs.

Plainly stated: state government needed to engage.

The Governor and Legislature agreed, and legislation was enacted over a two-year period that directed the Governor to produce, and the Legislature to adopt, a state comprehensive policy plan and statutory guidelines for regional planning councils to develop regional policy plans.

These plans would pour the foundation for Florida's Local Government and Comprehensive Planning and Development Regulation Act, popularly termed the Growth Management Act, which includes:

- Minimum state standards for local plans and plan amendments;
- A requirement that local plans and amendments be based on solid data and analysis;
- State review of local plans and amendments for compliance with state standards;
- Available state sanctions for non-complying localities;
- A frequency limit for amendments to local plans;
- Broad opportunities for citizen participation in plan development;
- A stronger requirement that development approvals be consistent with adopted local plans;
- Rights for citizens to enforce growth management act requirements; and
- A requirement that localities adopt land development regulations to implement their plans.

The Legislature also enacted concurrency, Florida's adequate public facilities policy.

These remarkable legislative initiatives energized the state program, and ultimately produced workable and moderately effective growth management.

But, because growth management policy is relatively new and organic, the state program was reassessed in the early nineties.

The Third Environmental Land Management Study Committee (ELMS III) recommended, and the Governor and Legislature later agreed to, several changes to refine the Growth Management Act:

- The state's overview role was loosened and certain small-scale plan amendments were exempted from state review:
- Local governments were granted some flexibility to vary from uniform state standards, so their plans could better reflect local circumstances and preferences;
- Ground rules for concurrency were crafted and enacted into law, and concurrency exceptions were conditionally authorized in urban areas;
- Florida's eleven regional planning councils were reoriented toward a planning role focused on several key regional issues; and
- New opportunities for informal dispute resolution were adopted.

This brief historic snapshot shows how, over the years, the role of the state in growth management has shifted.

In the seventies, the state's role was relatively weak. In the eighties, the state's role was strengthened, and then moderately reduced in the nineties.

But, all considered, Florida's growth management programs could not have achieved much success without a relatively strong state supervisory role.

That said, I am not suggesting the state's present role or policies be forever fixed.

Just as the state role was appropriately expanded in the eighties, and adjusted in the nineties, it should be periodically compared to current growth management goals, past performance, local government capability, and, if appropriate, modified and refreshed.

However, I believe Florida should and will preserve a meaningful state role in growth management.

The state's role should be less prescriptive, more focused on protecting and promoting important state interests in rural and growing areas. and offer greater technical assistance to localities . . . but it will be meaningful.

My second "right" is effective opportunities for citizen participation in growth management decision-making.

Florida's program provides abundant public notice and hearing opportunities when local plans are adopted, amendments proposed, and land development regulations considered.

Expansive public access promotes citizen buy-in and support and enhances local government accountability.

It encourages citizens to become more knowledgeable about growth management and educates community leaders. And it enables concerns about new policies and projects to surface early in the process, which facilitates less antagonistic decision–making.

Florida's public participation opportunities are broad, but we can do more, particularly to involve citizens more actively in planning their neighborhoods and to ensure citizen views are heard by project applicants and decision makers.

For example, neighborhood and area visioning exercises can refine and "localize" generally applicable plan policies. Local ordinances creating a neighborhood bill of rights can provide citizens with adequate information and time to comment on new development proposals at

public hearings, as well as direct developers to meet with citizens to discuss plans and resolve issues before a proposal is voted on by elected officials.

Open and informed public participation also can reduce citizen disaffection from policy and help cure "Initiativitis."

"Initiativitis" is a public policy virus often characterized by ill-conceived initiatives, mounted by narrowly focused special interests to short circuit the accepted processes for adopting local plans and development regulations and replace them with public referendum.

This type of initiative undermines the comprehensive integrity of local plans, particularly the requirement that comprehensive plans be internally consistent. It encourages ballot box planning and invites spot planning and uneven regulation.

"Initiativitis" often reflects the frustration of citizens who believe they are excluded from a distant and insider-controlled decision-making process, which is starting to infect growth management in Florida.

A citizen's initiative campaign has begun that would amend the state constitution to require all local plan changes be approved by local referendum before they are effective.

The harm to serious growth management that would occur if up to 10,000 local plan amendments were voted on annually is obvious.

Unfortunately, this state initiative has spawned several local knockoffs, which propose to condition various local land use decisions on voter approval.

So. "Initiativitis" has infected Florida, and if it becomes an epidemic, ballot box planning may well undermine our growth management program.

That said, "Initiativitis" may spur localities to enhance their efforts to educate citizens about local growth management decisions and

encourage more effective public participation in the decision-making processes.

It also may prompt state review of the numerous legislative exceptions to the original intent of the Growth Management Act to limit the frequency of plan amendments. Many of these exceptions are good faith efforts to encourage and promote desired state policy. Other exceptions grant localities flexibility to implement new, required state policy through plan amendments. The exceptions should be reviewed to ensure that they do not undercut the ability of local governments and the public to consider proposed amendments carefully, cumulatively, and within the comprehensive framework of the local plan.

My third right is a delicate right.

By any measure, Florida affords citizens and interest groups liberal third party standing in administrative proceedings to enforce the Growth Management Act by challenging local and state action on plan amendments.

Florida's standing provisions carefully balance public and private rights to promote desirable program goals, while not inviting spurious, harassing challenges.

And, as noted, standing is broad.

Affected persons with standing include property owners, residents, and owners or operators of a business in the local government. To perfect standing, a person must submit oral or written comments, recommendations, or objections to a local government during the plan review process.

Allowing affected citizens to enforce state policy and ensure local compliance with state standards encourages community buy-in: it also enhances local government accountability to its citizens.

Growth Management Act standing provisions remain virtually unchanged since enactment in 1985, a testament to their balance and fairness.

My fourth right is required consistency between adopted local plans and all development approvals.

Consistency is right because it provides the link necessary to ensure plans are implemented and that they do not simply become shelf filling future prophesies.

And, Florida's consistency policy has "teeth." Citizens and governments with standing can judicially challenge a development approval as inconsistent with a local plan.

The fifth right is now a Florida growth management mantra: one size does not, and should not, fit all governments. But, it should be characterized as "a mostly right."

After many years, we finally figured out that what is good for one locality is not necessarily good for another, and rigid uniform application of state guidelines does not always accomplish program goals.

This common sense flexibility recognizes local government differences and abilities, and to some degree, enables localities to tailor their policies to accommodate particular local conditions.

But, again, we can do more.

With overall state policy now fairly well established and local government plans found in compliance with state standards, urban areas and mostly built-out localities should be subject to less state overview. Different policy and state review standards should be developed for rural and urban areas.

This would allow the state to better focus its efforts and resources on policies and projects that affect important state interests in growing and rural areas, and to assist local governments that have limited growth management staff and resources.

Sixth: Florida's programs offer several informal conflict resolution processes.

These provisions recognize that growth management disputes frequently involve many parties with varied interests, which implicate numerous public policies.

These disputes are not best resolved adversarially in litigation. They are better solved with people meeting and trying to accommodate different interests before more adversarial processes are triggered.

Facilitated discussion, consensus building, and mediation have become valuable components of the growth management programs, together with the dispute resolution training and services offered by several universities. such as the Florida Conflict Resolution Consortium.

Seventh: Florida complements its growth management programs with well-funded programs to acquire land and land interests for conservation and recreation purposes.

The state currently spends $300 million annually and has spent over $4 billion to conserve over four million acres of land for conservation since 1972.

Conservation and recreation land purchases preserve environmentally sensitive land, provide community recreation opportunities, and often encourage better land use patterns by taking land off the market that might otherwise encourage sprawl.

These programs can also provide a constitutional safety valve for stringent regulation of valuable environmentally sensitive property that might affect an unconstitutional taking.

Finally: state property rights legislation.

Property rights debate is an emotional contact sport. For years, it has been argued philosophically, practically, and economically, and full implementation of the Growth Management Act and certain state environmental permit programs fueled the debate.

To their credit, state officials in the early nineties appointed study groups that thoroughly reviewed property rights policy.

They considered numerous alternatives and developed The Bert Harris Act, which was enacted in 1995.

The Bert Harris Act created a new cause of action and judicial relief, including potential compensation for landowners who suffer inordinate regulatory burdens to existing or reasonably foreseeable land uses.

The Act has not produced a rash of litigation or damage awards.

Instead, the availability of this remedy has instilled in prudent government regulators a sense of caution and a renewed concern for carefully assessing up front, at the analysis stage, the effects of proposed new regulations on use of private property.

Additionally, numerous disputes have been settled amicably, informally, and expeditiously by special masters working with interested parties and governments, under the dispute resolution part of the legislation.

Experience to date suggests that those interests and commentators, who opposed and criticized enactment of this legislation over concern it would provoke environmental and growth management Armageddon, simply were wrong.

What about "not rights?"

First, although constructing a meaningful state role in our intergovernmental program is right, the policy foundation for this role, the State Comprehensive Plan, is not right.

Recall: Florida's program is supposed to be driven by a state policy plan.

The plan is a fuzzily worded collection of feel good statements that are not connected or complementary. It lacks an implementation plan, and it is largely ignored by both the executive and legislative branches.

This plan needs an overhaul. Indeed, this state policy vehicle should be traded in for a limited number of clear, concise, performance-based planning policies and goals that would promote important state interests.

The revised policies and goals should define, drive, and circumscribe the state's role in its growth management program.

Second, we continue to view our policies as stand-alone and independent; yet. most important growth management policies are multifaceted and interdependent.

Consider efforts to discourage urban sprawl, and encourage urban redevelopment, which are key tenets of "smart or sustainable growth" and new urbanism.

Strong urban centers can help combat unchecked sprawl.

But communities cannot build strong urban centers unless they attack crime, promote public schools, encourage jobs, advance economic development, rebuild rundown infrastructure, and address a host of cultural and social issues.

These actions are linked.

People must want to live and work in urban infill areas and redeveloped city cores. But they simply will not come unless conditions change in many areas.

Similarly, developers must want to build in targeted urban areas. And, so they must be offered attractive and economic densities and intensities, mixed uses, buildable areas, greenspaces, and tax and economic incentives, as well as practical zoning and building codes tailored to urban projects.

In short, it takes more than attention to a single policy priority, no matter how popular the policy may be at the time, to achieve complex growth management goals. This requires greater emphasis and insistence on the "comprehensive" nature of local policy plans and better analysis of policy linkage.

Attainment of these goals often will necessitate hard choices and trades for communities. Once again, consider anti-sprawl policies. Discouraging sprawl by encouraging more intense urban core development may produce more traffic congestion for targeted urban areas. increased public costs to refurbish decrepit infrastructure, higher property prices. less affordable and more expensive housing, and significant air pollution increases.

These real effects of growth management must be thoroughly understood and debated by communities before new policy is adopted, and government and growth management advocates can do a better job of helping citizens understand these effects.

Third: concurrency, Florida's statewide adequate public facilities policy.

This policy mandates that sewer, solid waste, drainage, potable water, parks, schools, and transportation services and facilities required by new development be available at established levels of service to mitigate development impacts when these impacts are generated.

If not available when needed at the established service levels, a project cannot be approved, unless the developer is willing to pay the entire amount required to maintain the city or county service level. In other words, the last one in after service capacity is exhausted, pays the total bill.

Requiring developers and builders to pay to mitigate growth impacts certainly was not new to Florida when concurrency was enacted in the mid-eighties.

But, applying a statewide, mandatory service availability policy, tied solely to maintaining a service level as an absolute development stopper to all growth management decisions with no exceptions, was new.

Funding was critical because concurrency was imposed on an already overburdened, deficit-ridden, infrastructure and public services system that needed a $50 billion makeover.

Funding was promised and a state funding program was enacted and initially funded, but ultimately redirected to other programs.

And although concurrency dollars disappeared, concurrency's stringent service availability prescription remained, and not surprisingly, lack of public funding undercut the program's effectiveness.

Fortunately, over the years, a number of useful statutory exceptions and flexibility provisions, and practical but sometimes creative local practices, have moderated concurrency's initial harsh impact.

But exceptions and creative application are only half steps that manage around concurrency's policy failure.

The fact is, mandatory concurrency has not produced better infrastructure planning or service delivery; but, it has produced unfair financial roadblocks for new development that is otherwise consistent with local plans.

This is due primarily to the public sector's failure to adequately fund its portion of concurrency needs. And, after more than twenty years, prospects are nil that adequate public funds will be available to meet government's share of concurrency. We are still $80 billion in the red.

The depth of our infrastructure-funding deficit will be illuminated starkly when localities must produce "financially feasible" capital improvement plans next year.

It is time to scrap state mandated concurrency and replace it with a state policy that would require all developers of new projects to pay their proportionate fair share of new project infrastructure costs.

The fair share payment would be paid once, and to preclude double payment, it would provide credits against other development exactions and impact fees localities impose on new projects.

Fair share payments would be determined by applying a professionally accepted impact assessment model, which. at least for urban

areas, should aim to achieve mobility goals as opposed to rigid levels of service.

Timing for infrastructure provisions and scope of improvements financed by fair share payments would be driven by the capital improvement element of local plans.

This developer-pays policy would apply to all new development. Unlike concurrency, there would be no exceptions. And, compared to concurrency, a developer-pays policy would be much simpler to compute, much simpler to uniformly administer and monitor, and more difficult to avoid.

In short, our present concurrency policy is not fixable and is being swallowed by exceptions and creative application. Let us move on, and replace this "ready, fire, aim" policy with one that holds developers financially responsible for *their* fair share of impacts caused by *their* projects, and which then allows them to proceed once they pay.

We are making progress. The 2005 Legislature authorized local governments to apply proportionate share mitigation for roads and schools. This policy was clarified and confirmed by the 2007 Legislature.

Although transportation fair share mitigation for roads may be used for projects that are not a development of regional impact only in urban areas and within urban service boundaries, this is a positive start that may serve as a predicate for expanding the policy.

My fourth not right: Florida's programs mostly rely on command and control edicts, and proscriptions and prescriptions that focus more on achieving regulatory compliance than desired results.

This command and control model encourages loophole finding and avoidance.

It is negative and creates friction among constituencies that harm long-term relationships. It is not as effective as market and regulatory incentives that encourage and reward desired action.

For example, if we want "smart growth," let's set public policy performance goals and challenge the private sector to work creatively and cooperatively with government to achieve these goals. And, let's reward superior planning by offering development bonuses, tax and other economic incentives, priority government program funding, accelerated project review, and appropriate regulatory variances and waivers.

These strategies will be far more effective than simply prohibiting someone's definition of "dumb" growth.

Finally, the fifth not right: intergovernmental and regional cooperation and coordination.

Big problems and opportunities often transcend local boundaries, and very few significant growth management issues can be addressed effectively by local action alone.

Florida's Growth Management Act requires local plans to include an intergovernmental coordination element. Locals prepare and adopt these policies to comply with state requirements. The state typically finds them in compliance, and they usually are ignored.

This is because directing localities to cooperate and rationalize their often-conflicting growth policies will not work.

It is tantamount to asking local officials to perform unnatural acts.

So, how do we get local governments to come together, cooperate. develop a bigger, and ideally, regional view, and act upon mutual interests and concerns?

I believe intergovernmental conversation can set the stage for stronger intergovernmental cooperation.

A recent Urban Land Institute study of regional cooperation in Florida underscored the importance for the state to take the lead, and develop and help fund regional programs, to facilitate common interest discussions among public and private stakeholders.

This would be followed by an action plan to turn collective interests into mutual opportunities. Development of regional visions would be encouraged.

The bottom line: we have tried mandating local intergovernmental cooperation. We have also tried mandating adoption of meaningful regional policy plans. Both top-down mandates have failed.

An inclusive, collaborative, bottom-up process to encourage intergovernmental and regional conversation and cooperation offers much more promise.

And, fortunately, several productive examples of this type of actions are now ongoing in Florida.

They must be nurtured and rewarded by state decision-makers, because regional cooperation will lay the foundation for the next major reform of Florida's growth management program.

And what would this reform look like?

My view of Florida growth management—2012:

*State **role:***

- Repeal the State Comprehensive Plan;
- Focus on protecting important state interests to be identified by the Governor, implemented through state planning principles and goals, and measured annually by applying performance indicators;
- Significantly reduce state overview in urban areas and mostly built out localities and direct state review to growing and rural areas;
- Revise Rule 9J-5, F.A.C. to:
  - Base state review of local plan amendments on protection and promotion of important state interests;
  - Provide separate plan amendment review policies for urban and rural areas, and

- Base state review of local plan amendments on planning policy and rely on project development orders to assess and provide mitigation for impacts;
- Replace concurrency with a uniform program of proportionate fair share impact mitigation exactions, with no exceptions;
- Establish transportation mobility standards for urban areas;
- Review and assess the policy that requires local capital improvement plans to be financially feasible;
- Develop new, innovative ways to fund state, regional and local infrastructure; and
- Provide technical assistance and resources to growing and rural localities.

Regional Role:

- Facilitate and, when appropriate, mediate regional dialogue and identification of common intergovernmental interests; and
- Develop regional visions to inform strategic regional policy plans.

Local *Role*:

- Enhance opportunities for citizen information and participation in planning and project approval processes before decisions are made;
- Refine local plans through neighborhood visions; and
- Develop flexible, incentive based programs to encourage and reward innovative planning that furthers local plan priorities.

In closing, I will share with you one of Henry Adams's observations, which, I believe, applies to public policy: "All experience is an arch, to build upon."

Florida's growth management program is the product of a thirty-seven year process of policy development — with demonstrable benefits.

But all government programs have components that outlive their usefulness. deliver unintended consequences, or just do not work.

Another assessment of our growth management program is underway.

As part of this review, I hope we will continue to build our growth management experience arch, and that we will fix what is broken, but not break what is working.