

A HISTORY AND NEW TURNS IN FLORIDA'S GROWTH MANAGEMENT REFORM

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I. INTRODUCTION

Florida community planners have been proud of the state's early leadership in the zoning and land use regulation reform movement first chronicled in Fred Bosselman and David Callies' *THE QUIET REVOLUTION IN LAND USE CONTROL*.¹ While Florida was not one of the states studied in that book, the movement described there was extremely influential in Florida's own quiet revolution that followed immediately after the book's publication in 1971. Florida adopted and expanded upon the concepts of *THE QUIET REVOLUTION* and, particularly based on the American Law Institute's Model Land Development Code, by 1985 it had in place an integrated state, regional, and local system of land use regulation.

For twenty-five years thereafter during a period of rapid growth and development, Florida development operated under the same integrated system, with periodic adjustments and modifications, until very recently. Beginning in 2009 and through 2011, the Florida legislature substantially revised the growth management system to significantly reduce the state and regional management components of the system, and to release local communities from mandates intended to ensure that growth pays for itself and to discourage urban sprawl. Although initially justified as a response to the economic downturn of the time, this counter-revolution has ideological foundations that may be the harbinger of future changes for growth management in other states as well.

This Article describes the history of the quiet revolution in

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1. FRED P. BOSSELMAN & DAVID L. CALLIES, *THE QUIET REVOLUTION IN LAND USE CONTROL* (President's Council on Environmental Quality, 1971) [hereinafter *THE QUIET REVOLUTION*].

Florida, the general operation of the integrated growth management system once fully established, and the modifications to fine-tune the system after 1985. It also describes the new turns in the law beginning in 2009, and what they might mean for the future of growth in Florida.

A. *The Beginnings: 1972 – 1980*

THE QUIET REVOLUTION detailed examples of states which had taken back local land use control from its traditional local government basis and redirected that control to protection of state and regional interests. Although Florida was the last of the forty-eight states to adopt the Standard State Zoning Enabling Act,² when the state delegated zoning powers to local governments in 1939, the state population stood at less than 1.8 million,³ concentrated in several coastal cities. By 1972, growth had expanded exponentially and Florida was the fastest growing state in the country, with a population of approximately 6.7 million.⁴ Population pressures, a serious drought, a growing environmental movement, and a progressive state political leadership combined to propel Florida to the tier of states that reinvigorated state control over land and water use.⁵ When an extreme drought in southeast Florida created muck fires in the Everglades, record water depths in Lake Okeechobee and threat of serious saltwater intrusion in 1971, Governor Reubin Askew convened a conference on water management, which led to an appointed Task Force on Land Use. The Task Force proposed four major legislative acts that when adopted in 1972 brought the quiet revolution in full force to Florida: the Environmental Land and Water Management Act ("ELWMA"), the Water Resources Act, the State Comprehensive Planning Act, and the Land Conservation Act.⁶ Three years later another component of the Florida integrated

2. U.S. Dep't of Commerce, Advisory Comm. on Zoning, *A Standard State Zoning Enabling Act under Which Municipalities May Adopt Zoning Regulations* (rev. ed. 1926), available at <http://law.wustl.edu/landuselaw/StndZoningEnablingAct1926.pdf>. Florida's zoning act was adopted at 1939 Fla. Laws ch. 19539. See generally THOMAS G. PELHAM, *STATE LAND-USE PLANNING AND REGULATION* (1979) (noting states' use of the Standard State Zoning Enabling Act of 1922).

3. U.S. DEP'T OF COMMERCE, BUREAU OF THE CENSUS, *ESTIMATES OF POPULATION OF THE UNITED STATES* 14 (1973).

4. *Id.* An excellent and well-recognized description of Florida's growth experience leading up to that time is in LUTHER J. CARTER, *THE FLORIDA EXPERIENCE: LAND AND WATER POLICY IN A GROWTH STATE* (1974).

5. The preconditions to the Quiet Revolution in Florida, and particularly its political underpinnings, are more fully described in JOHN M. DEGROVE, *LAND, GROWTH AND POLITICS* (1984).

6. Codified, respectively, at FLA. STAT. § 380 (1972), FLA. STAT. § 373 (1972), FLA. STAT. § 186 (1972), and FLA. STAT. § 259 (1972).

system recommended by the Task Force was adopted as the Local Government Comprehensive Planning Act ("LGCPA").⁷

1. *Areas of Critical State Concern and Developments of Regional Impact*

In the case particularly of the ELWMA, the work of Fred Bosselman, and colleagues, on the American Law Institute's Model Land Development Code⁸ was evident. Bosselman was an advisor to the Task Force after having completed *THE QUIET REVOLUTION*, and while working as Associate Reporter on the draft of the Model Code.⁹ The ELWMA adopted two of the Model Code techniques¹⁰ to strengthen the state and local roles. First, the control of certain large-scale development activities or "developments of regional impact" ("DRI") involved regional planning agency analysis and recommendations by the regional planning agency for the use of the local government, which maintained the authority to approve or deny a DRI permit for the activity. The state preserved a significant role in the DRI process by selecting the types of development activities to be reviewed, maintaining standing to appeal the local permit (along with the regional agency), conducting the administrative appeal process, and ultimately approving or disapproving the local permit if challenged. The focus of this technique on types of development is similar to the direction of the statewide regulation systems of Hawaii, Vermont, and Maine described in *THE QUIET REVOLUTION*. Second, in the Florida program, the control of development in important geographic areas or "areas of critical state concern" vested even more directly with the state. The state designated the particular area, adopted principles for guiding development within the area, reviewed the local government regulations and permits for consistency with those principles, initiated a state administrative appeal of the local permitting action or regulation if necessary, and approved or disapproved the development permit or regulations if appealed. The critical area systems of Wisconsin, Massachusetts, and San Francisco Bay Conservation and Development Commission, and other agencies described in *THE QUIET REVOLUTION* are other examples of this technique. With these two authorities, the state

7. Codified at FLA. STAT. § 163 (1975).

8. MODEL LAND DEV. CODE (1975) [hereinafter MODEL CODE].

9. DEGROVE, *supra* note 5, at n.20; Gilbert Finnell, Jr., *Saving Paradise: The Florida Environmental Land and Water Management Act of 1972*, 1973 URB. L. ANN. 103 (1972). Finnell served as a member of the Task Force along with then-state Senator Bob Graham (later Governor) and Dr. John DeGrove (chair of the Task Force and later often referred to as the guru of Florida growth management).

10. See MODEL CODE, *supra* note 8, at Art. 7 n.8 (noting the development of regional impact and areas of critical state concern).

could override local government decisions that failed to consider more than local impacts of development projects.

2. State Comprehensive Planning

The 1972 State Comprehensive Planning Act was another key component of the early Florida reforms. The Act created a Division of State Planning in the State Department of Administration, where the DRI and critical area functions were also housed. The Act mandated the creation of a state plan which, once adopted by the Governor and the legislature, was intended to provide the planning and policy framework to improve management of state resources, guide growth, and inform the critical area and DRI programs.¹¹ The Act provided no mechanism for coordinating state agency actions with the state plan. The 205-page state plan, containing goals, objectives and policies for fourteen issue areas, was completed in 1978. Approved by then-Governor Askew, it was forwarded to the legislature, which adopted it as an advisory document only.¹² The state planning function was revisited in 1984 with a second attempt to strengthen the state policy framework, along with better regional planning, as described below.

3. Local Government Comprehensive Planning

The local planning component of the early Florida system was established with the 1975 Local Government Comprehensive Planning Act. The Act mandated that each local government in Florida adopt a local comprehensive plan by 1979, that all development permits and development regulations be consistent with the plan or element, and that regulations be adopted to implement the plan.¹³ In these important ways, the Florida law went beyond the Model Code, which encouraged but did not mandate local planning and did not require planning before adoption of land use regulations.¹⁴ The consistency requirement placed Florida among the few states at the time that established

11. For example, the local government was to consider the consistency of a proposed DRI with the "objectives of an adopted state land development plan applicable to the area." FLA. STAT. § 380.06(11)(a) (1977); a more recent version of the DRI law required the local government to consider whether the development is "consistent with the state comprehensive plan." FLA. STAT. § 380.06(14)(c)(1) (2007).

12. "Nothing contained in the plan or parts or revisions thereof shall have the force or effect of law or authorize the implementation of any programs not otherwise authorized pursuant to law." 1978 Fla. Laws ch. 78-287, § 3 (codified at FLA. STAT. § 23.013(2) (Supp. 1978)). See also PELHAM, *supra* note 2, at 155-58 (describing especially the content of the state plan); and DEGROVE, *supra* note 5, at 170-72 (advocating the need for a state policy framework).

13. FLA. STAT. § 163.3167 (1977); FLA. STAT. § 163.3194(1) (1977); FLA. STAT. § 163.3201 (1977).

14. MODEL CODE, *supra* note 8, at Art. 3.

the "plan as law," where primacy is given not to the implementing regulations such as the zoning code, but to the adopted plan itself.¹⁵ In addition, the LGCPA contained detailed statutory requirements for the content of specific plan elements as well as for the adoption process. It required that local plans be coordinated with state and regional plans, and that they be reviewed by state and regional agencies, but there was no mechanism for assuring compliance with these requirements.

4. Early Years of Implementation

The ambitious planning reforms of the 1970s had a slow start in actual implementation, but the programs took hold and survived despite an economic slump in the mid-1970s, modest state funding, and adjustments to the laws to satisfy political and legal challenges.¹⁶ During the decade, Florida had grown from 6.7 million to almost ten million¹⁷ and growth pressures continued. Governors Askew and Graham, and a generally progressive legislature, supported the programs and, indeed, by the mid-1980s a second phase of additional and complementary reforms took place. Political acceptance of the programs was bolstered by the active involvement of various public and private sector representatives in their formulation. The ELWMA established the Environmental Land Management Study Committee ("ELMS"),¹⁸ with fifteen members, some appointed by the Governor and some by the leaders of the Florida Senate and House. Gubernatorial appointments were required to include a broad cross section of private sector interests. The committee was given a broad mandate to review current land management processes and agencies and recommend legislation, and it built a strong coalition for reform during the first decade of the program.¹⁹

The Florida Supreme Court found the critical area program's designation process to be an unlawful delegation of legislative

15. Edward J. Sullivan & Laurence J. Kressel, *Twenty Years After: Renewed Significance of the Comprehensive Plan Requirement*, 9 URB. L. ANN. 33 (1975). Vigorous advocates of this approach at the time included Charles Haar and Daniel Mandelker. See, e.g., Charles Haar, *In Accordance with a Comprehensive Plan*, 68 HARV. L. REV. 1154 (1955); Daniel R. Mandelker, *The Role of the Local Comprehensive Plan in Land Use Regulation*, 74 MICH. L. REV. 900 (1976).

16. DEGROVE, *supra* note 5, at 166-70 (discussing the Comprehensive Plan requirement).

17. FLORIDA GOVERNOR'S TASK FORCE ON URBAN GROWTH PATTERNS, FINAL REPORT 3 (1989).

18. FLA. STAT. § 380.09 (1974). ELMS II was also tasked by the statute with reviewing the original DRI guidelines for the selection of types of development that would be subject to DRI review.

19. DEGROVE, *supra* note 5, at 122-30 (discussing the staffing and funding patterns in efforts for implementing the Land Management Act).

authority to the state executive in *Askew v. Cross Key Waterways*, 372 So. 2d 913 (Fla. 1978), but the legislature by that time already had legislatively designated the Big Cypress critical area, and immediately re-designated the remaining three critical areas, as well as expanded the designation criteria to meet the court's criticisms.²⁰ However, no other critical areas have been designated; instead, the state moved toward a more voluntary program of technical assistance and interagency coordination in a resource planning and management program. The DRI program in contrast was active very quickly. In the first five years of the program, 269 DRIs were applied for, dozens were appealed, and the legislature modified the program to address the modifications necessary for an active program.²¹ For example, processes were added to allow further review of substantial deviations to an original plan, and to allow master development approval for better phasing.²² The case of *Graham v. Estuary Properties*, 399 So. 2d 1374 (Fla. 1981), confirmed the court's acceptance of the program's objectives and use of the police power to protect natural resources, upholding the denial of a DRI against a regulatory taking challenge. The DRI program had a major impact on regional planning councils throughout the state, giving them review authority and financial resources with that authority, encouraging their technical assistance strengths in impact review, and initially inching them toward a more regulatory role by allowing them standing to appeal local government DRI decisions.

Many local governments did not meet the 1979 deadline for adopting their local comprehensive plans,²³ and as noted above, the state comprehensive plan after six years of development was greeted lukewarmly by the Florida legislature. As John DeGrove later noted, during this period despite the promising new laws, the state failed to adequately cope with escalating infrastructure needs and the environmental impacts of the rapid growth occurring in the state. "It was not until the notion [that growth paid for itself] was recognized as false that Florida began to face fully its growth management problem . . . implementation weaknesses [also] blocked attempts to solve complex and difficult problems."²⁴

20. 1978 Fla. Laws ch. 78-627 (1978). Nancy E. Stroud, *Legislative Action on Natural Resource Management*, FLA. ENVTL. & URB. ISSUES 7:1 (1979).

21. PELHAM, *supra* note 2, at 36-44 (referencing unpublished report of THE BUREAU OF LAND AND WATER MGMT., DIV. OF STATE PLANNING, FLA. DEPT OF ADMIN., DEVELOPMENTS OF REGIONAL IMPACT: A SUMMARY REPORT OF THE FIRST FIVE YEARS n.45 (July 1978)).

22. FLA. STAT. §§ 380.06(7), (13) (1977) (detailing pre-application procedures and criteria in areas of critical state concern, respectively).

23. STATE OF FLA., FINAL REPORT OF THE ENVTL. LAND MGMT. STUDY COMM. (1984) [hereinafter ELMS II Report].

24. John M. DeGrove, *Florida's Greatest Challenge: Managing Massive*

B. *The Second Phase: 1980 – 1990*

After Bob Graham's election as Governor in 1978, he continued the use of "blue ribbon" committees to advise him on the progress of the system that he as a state senator had helped put into place.²⁵ As a result of the recommendations of the 1979 Resource Management Task Force,²⁶ and the subsequent 1982 Environmental Land Management Study Committee ("ELMS II"), Graham spearheaded a revision of the laws to make a serious attempt to integrate policies at every level for a "coordinated response to manage the state's growth, without causing duplication, fragmentation or proliferation of governmental regulation."²⁷ The new laws featured an integrated policy framework, relying on a revised state comprehensive plan, regional policy plans, and a revised local planning mandate. The Regional Planning Act of 1980²⁸ required that each of the state's eleven regional planning councils adopt a comprehensive regional policy plan, a long-range guide for physical, economic and social development of the region, to be used to review DRIs and local comprehensive plans. However, funding for the plans was minimal, and many were never completed.

The legislature revisited regional planning in 1984 with the State and Regional Planning Act of 1984, which required the regional policy plans, approved by the state, to be consistent with the state comprehensive plan²⁹ and to specifically identify regional

Growth, in IMPLEMENTATION OF THE 1985 GROWTH MANAGEMENT ACT: FROM PLANNING TO LAND DEV. REGULATIONS 3 (FAU/FIU Joint Ctr. for Envtl. and Urban Problems 1989).

25. The importance of the use of such blue ribbon committees in building support for growth management initiatives is discussed in JOHN M. DEGROVE & DEBORAH A. MINESS, *THE NEW FRONTIER FOR LAND POLICY, PLANNING & GROWTH MANAGEMENT IN THE STATES* 11, 28-30 (1992) (discussing the importance of the use of such blue ribbon committees in building support for growth management initiatives).

26. RES. MGMT. TASK FORCE, INTERIM REPORT (1980), *available at* Fla. Dep't of State, Div. of Library Servs., Tallahassee, Fla.

27. Governor Graham's Charge to the ELMS II Committee, reported in Robert M. Rhodes & Robert C. Apgar, *Charting Florida's Course: The State and Regional Planning Act of 1984*, 12 FLA. ST. U. L. REV. 583 n.1 (1984) (noting Governor Graham's charge to the ELMS II committee on December 1, 1982).

28. 1980 Fla. Laws ch. 80-315 (codified at FLA. STAT. § 160 (1980)). The statute also revised the composition of the regional planning agencies, which until then had been councils of local governments with local government appointments only, to include gubernatorial appointments as a third of their boards. FLA. STAT. §§ 186.504(2)-(3) (1981). *See generally* Nancy E. Stroud, *Regionalism Reaffirmed: the 1980 Florida Regional Planning Council Act*, FLA. ENVTL. & URB. ISSUES 8:1 (1980) (discussing the effect of the Florida Regional Planning Council Act of 1980 on local planning).

29. FLA. STAT. §§ 186.007-008 (Supp. 1984). Consistency of the regional plans with the state plan was determined by the Office of the Governor,

issues for DRI review. The councils became more closely affiliated with the state, and were restructured to include one-third of their membership as gubernatorial appointees. The state plan was to be prepared as a brief statement of goals and policies that give policy direction to state and regional agencies.³⁰ The state plan, adopted by the legislature, was also to be implemented through state agency functional plans to guide the work of each state agency.³¹

By far the most significant legislation of the period was the extensive overhauling of the local planning process, in what became known as the Omnibus Growth Management Act of 1985. The 1985 legislation adopted changes to the coastal construction law and the DRI process,³² and included the new 1985 Local Government Comprehensive Planning and Land Development Regulation Act.³³ The legislation fixed some perceived weaknesses in the original local planning act of the earlier decade and set the stage for local planning that persisted for twenty-five years. With the adoption of the new state comprehensive plan the same year,³⁴ the Florida integrated growth management system proposed by the ELMS II committee was in place and arguably the most extensive manifestation of THE QUIET REVOLUTION in the states at that time.

Among the major changes in the 1985 local planning law were: a process for the state to approve local plans and plan amendments through a "compliance" process; required contents such as a mandated future land use map, financial feasibility, and capital improvements element, as set forth in an administrative rule; a detailed review process with local, state, and regional agency input; formal state administrative hearings for challenges to noncompliance and including fiscal sanctions for noncompliance; liberalized citizen standing for compliance proceedings and judicial challenges regarding local government consistency of regulations

reflecting the role of the Governor as chief planning officer of the state. FLA. STAT. § 186.508.

30. 1984 Fla. Laws ch. 84-257 (codified at FLA. STAT. § 186 (Supp. 1984)).

31. FLA. STAT. § 186.021 (Supp. 1984).

32. The first significant changes in ten years, among other things, revised categories of development, increased certainty of thresholds at which development within the categories is presumed to be a DRI, required rulemaking for aggregation (two or more developments to be treated as one development), created Preliminary Development Agreements to allow limited commencement before approval of DRI development order, created a DRI exemption for Florida Quality Developments, created a certification process to allow local governments to conduct their own DRI review, created standards for DRI conditions and exactions, further refined the substantial deviation process, and strengthened state administrative enforcement.

33. 1985 Fla. Laws 295 ch. 85-55 (codified at FLA. STAT. §§ 163.3161-3215 (Supp. 1986)).

34. 1985 Fla. Laws 295 ch. 85-57 (codified at FLA. STAT. § 187 (Supp. 1986)).

or permits with the adopted comprehensive plan; limitation of most plan amendments to a twice yearly schedule; and a one year deadline for adoption of various land development regulations (floodplain, subdivision, signs, and concurrency).³⁵ A "glitch bill" adopted in 1986³⁶ fine-tuned the 1985 law by further defining "consistency," mandating that development be approved only if certain public facilities would be available to meet the impacts of development (concurrency), and legislatively approving the administrative rule that detailed the local planning requirements, Rule 9J-5.³⁷ As stated at the time by Thomas Pelham, an author who later became the leading figure in the law's implementation, "[i]t remains to be seen whether Florida can successfully implement and operate a truly integrated statewide comprehensive planning process. While the necessary statutory framework is now in place, the real challenge for the legislature, state and regional agencies, local governments, and all of Florida's citizens, will be to make it work."³⁸

The state's primary policy interests during the early implementation of the growth management law were to encourage development patterns in a more compact urban development that included affordable housing and adequate public facilities.³⁹ The system attempted to involve all levels of government in carrying out these policies, through a system of accountability especially on the local government level, and with the assistance of enhanced citizen involvement including liberalized legal standing for citizen suits. These are challenging policy needs in any decade, but the state's rapid growth and low tax laws exacerbated the difficulties in achieving results. In 1987, the state Comprehensive Plan Committee issued a final report that estimated that \$52.9 billion would be required over the subsequent decade to provide for the anticipated new development, not counting for the existing infrastructure backlog.⁴⁰ The state's "concurrency" requirement for local government weighed heavily in the strategy for paying for

35. An extensive description of the legislation is found in Thomas G. Pelham, William L. Hyde & Robert P. Banks, *Managing Florida's Growth: Toward An Integrated State, Regional, and Local Comprehensive Planning Process*, 13 FLA. ST. U. L. REV. 515 (1985).

36. 1986 Fla. Laws 1404 ch. 86-191 (codified at FLA. STAT. § 161.053).

37. FLA. ADMIN. CODE ANN. r. 9J-5 (1986). The procedures for compliance review of the local plans were adopted at FLA. ADMIN. CODE ANN. r. 9J-11 (1987).

38. Pelham et al., *supra* note 35, at 597-98.

39. See John M. DeGrove & Nancy E. Stroud, *New Developments and Future Trends in Local Government Comprehensive Planning*, 17 STETSON L. REV. 574 (1988) (providing a history of the 1980s growth management reforms law).

40. *Id.* at 579 (citing STATE COMPREHENSIVE PLAN COMM., FINAL REPORT 27 (1987)).

growth, and shifted the historic burden of paying for growth from the local tax base to development. The State Department of Community Affairs, charged with implementing the law, took a strong early stand asserting that "the concurrency requirement is the teeth of the 1985 Growth Management Act; it distinguishes growth management from mere planning."⁴¹ Early leadership by Mr. Pelham, as Secretary of the Department appointed by Republican Governor Bob Martinez, set the tone for serious attention to the legislative mandates.⁴² The Department sought to encourage compact urban communities and to prevent sprawl by reviewing the distribution, location, and extent of different land uses in each local plan, based on the local government's analysis of the amount of land needed to accommodate the projected population. The Department also developed indicators of urban sprawl and vigorously pursued their implementation, especially in urbanized areas of the state with high growth rates. Under the state rules, local governments were required to include adequate provisions for low and moderate income households. The implementation process was controversial, and involved substantial administrative and judicial challenges, but by September 1, 1992, all but three of Florida's 458 local governments had submitted plans, and all but sixty-eight had been determined to be in compliance with the statute, with others in the process of negotiating compliance agreements with the Department.⁴³

C. Refinements: 1990 – 2009

Florida continued for almost two decades and through four governors to pursue the integrated growth management system set up in 1985, with adjustments to the laws as the state, its agencies, and local governments gained more experience in their implementation. By 1990, the state population was at almost thirteen million, and the state continued to be among the fastest growing in the country into the twenty-first century, climbing to almost sixteen million by 2000.⁴⁴ In 2010, the population had

41. *Id.* at 582 (citing Letter from Secretary Pelham to Senator Margolis (Mar. 7, 1988)).

42. See Thomas G. Pelham, *The Florida Experience: Creating a State, Regional and Local Comprehensive Planning Process*, in STATE & REGIONAL COMPREHENSIVE PLANNING, IMPLEMENTING NEW METHODS FOR GROWTH MANAGEMENT 95 (Peter A. Buchsbaum & Larry J. Smith eds., 1993) (describing the Department's early implementation priorities). Mr. Pelham was the Department Secretary from 1987-1991. *Id.*

43. *Id.* at 109.

44. This was an increase of 23.5%, both one of the largest percentage gains and actual gains of population in the country, and making Florida the fourth largest state. CITY DATA, <http://www.city-data.com/states/Florida-Population.html> (last visited Feb. 12, 2012).

grown, at the relatively slower rate of 17.6%, to 18.8 million.⁴⁵ Demand for land was just as strong, with unabated pressure on the planning system to accommodate the competing interests of developers, local governments, and citizens. Governor Bob Martinez appointed a Task Force on Urban Growth Patterns which observed in 1989 that "the proliferation of urban sprawl is creating urban growth patterns which are degrading the overall quality of life in Florida and increasing fiscal pressures on our state and local governments."⁴⁶

In 1991, Governor Lawton Chiles appointed the third Environmental Land Management Study Committee to make recommendations for improvements to the growth management system. The members of the ELMS III committee, like earlier ones, included a broad section of public and private representatives and presented proposed changes to the 1993 legislature, which adopted most of them.⁴⁷ The 1993 legislative changes reflected a bipartisan consensus to allow more flexibility in local planning, but always within a state policy framework.⁴⁸ For instance, the legislature created multiple exceptions to the transportation concurrency mandate, which had emerged as a leading implementation issue. Critics had pointed out, particularly, that the initial mandate often conflicted with state policy discouraging urban sprawl, as developers avoided traffic congestion problems by heading to cheaper and less congested rural or suburban areas. The new exceptions allowed a relaxation of the mandate for specific areas (i.e., downtowns) and projects (i.e., urban redevelopment and urban infill). The compliance review process and periodic evaluation process were streamlined, and mediation was encouraged. The planning legislation focused renewed attention on affordable housing and intergovernmental coordination. The legislature also increased the DRI thresholds for projects in urban areas to provide incentives for growth away from suburban areas.⁴⁹

The 1993 legislation also refocused the regional planning council's plan and required its adoption as a "strategic regional

45. U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/12000.html> (last visited Feb. 12, 2012).

46. Thomas G. Pelham, *Shaping Florida's Future: Toward More Compact, Efficient, and Livable Development Patterns*, 7 J. LAND USE & ENVT'L L. 321, 325 (1992).

47. 1993 Fla. Laws 1887, ch. 93-206 (amending various sections of chapter 163, Fla. Stat.). See also David L. Powell, *Managing Florida's Growth: The Next Generation*, 21 FLA. ST. U. L. REV. 223 (1993) (describing the work of the Committee and the legislative response).

48. *Id.* at 228-29.

49. 1993 Fla. Laws 1887, 1948 ch. 93-206, § 52 (amending FLA. STAT. § 380.06).

policy plan.”⁵⁰ Regional review of local plan amendments was directed toward “regional resources or facilities identified in the strategic regional policy plan.”⁵¹ It also repealed the regional council DRI appeal authority and directed the councils to a stronger coordinative role among other state regional agencies, while adding dispute resolution responsibilities.⁵² The legislation also made changes to the state comprehensive planning act, requiring biennial review, and directed the Governor to prepare a strategic “growth management portion” of the state plan, but not to include a state land use map.⁵³

In the late 1990s, adequate school facilities became a compelling issue, and several amendments to the growth management legislation incrementally addressed the issue, such as requiring the provision of school sites in the plan, and requiring certain prerequisites to the voluntary adoption of school concurrency, as several urbanized counties had begun to experiment with such programs.⁵⁴ ELMS III had hoped that better intergovernmental coordination requirements would eliminate the need for mandatory school concurrency, and even eventually eliminate the need for a DRI program, but those hopes were unrealized.⁵⁵ In 2005, the state made school concurrency mandatory (as well as potable water concurrency), requiring the amendment of local plans and regulations to so provide.⁵⁶ Seventy percent of local government plans were in compliance with this requirement by 2009.⁵⁷

50. 1993 Fla. Laws 1887, 1948 ch. 93-206, § 28 (amending FLA. STAT. § 186.503).

51. 1993 Fla. Laws 1887, 1948 ch. 93-206, § 32 (amending FLA. STAT. § 186.503).

52. 1993 Fla. Laws 1887, 1948 ch. 93-206 (amending various sections of FLA. STAT. § 186.507).

53. *Id.* (amending various sections of §§ 186.007 and 186.009).

54. Educational Facilities Act, ch. 95-341, 1995 Fla. Laws 3010-3023; Act of May 22, 1998, ch. 98-176, 1998 Fla. Laws 1556-1597. The author was counsel for Broward County School Board's attempts, in cooperation with Broward County, to establish the first county school concurrency system, which was extremely controversial and aggressively opposed by the development community. See generally Nancy E. Stroud, *School Concurrency: Lessons Learned from Broward County, Florida* (2000), available at <http://www.crp.cornell.edu/steinandschools> (outlining the Broward County concurrency program background, its necessity, legal background, and lessons learned). For a different perspective, see David L. Powell, *Back to Basics on School Concurrency*, 26 FLA. ST. U. L. REV. 451 (1999) (favoring voluntary approach).

55. Powell, *supra* note 54, at 456-57, 466-69; David L. Powell, *Growth Management: Florida's Past is Prologue for the Future*, 28 FLA. ST. U. L. REV. 519, 538-39 (2001).

56. Act of July 1, 2005, ch. 2005-290, 2005 Fla. Laws 28, 31.

57. FLA. DEP'T OF ECON. OPPORTUNITY, DIV. OF CMTY. DEV., REPORT ON SCHOOL CONCURRENCY (Mar. 9, 2012) (on file with author).

Other changes in this period took modest steps to reduce the state role. The thresholds for DRI development review were increased several times, and certain types of development were exempted from review, such as ports and airports which are master planned.⁵⁸ The legislature authorized demonstration projects to allow local government plans not to undergo state review⁵⁹ and for "sector plans" to substitute for DRI review in certain rural areas.⁶⁰

The growth management laws encouraged citizen participation. Judicial decisions throughout this period upheld the primacy of the plan under a judicial "strict scrutiny" standard showing little deference to local government interpretation of the plan.⁶¹ The combination of these forces gave growth management a firm legal and institutional foothold in the state despite political dissatisfaction that resulted in periodic legislative attempts for additional changes to scale back the law. The case of *Pinecrest Lakes, Ltd. v. Shidel*, 795 So. 2d 191 (Fla. Ct. App. 2001) is particularly instructive regarding the power of these forces in the planning mandate. In this case, the court required new apartments to be torn down upon a complaint filed by a citizen, on the basis that the county had issued permits that were inconsistent with the comprehensive plan. Yet, by 2009, the political winds shifted and the severe economic downturn brought a counter-revolution to Florida.

D. The Florida Counter-Revolution: 2009 – 2011

The 2009 legislature adopted significant changes to the growth management laws, and Governor Charlie Crist signed the legislation in what marked a harbinger of greater change two years later.⁶² Billed as an economic development tool removing unnecessary restrictions in urban areas, the amendments were passed while Governor Crist fought a hard campaign for the U.S. Senate seat, political discourse had become increasingly partisan, and one political party dominated the state legislature and

58. See FLA. STAT. § 380.06(24) (2011) (listing all statutory exemptions).

59. See ch. 2002-296, § 11; ch. 2005-157, § 15 (codified at FLA. STAT. § 163.3246 (2011)).

60. 1998 Fla. Laws 1556, ch. 98-176 (codified at FLA. STAT. § 163.3245 (2000)).

61. Nancy E. Stroud, *Commentary: The Role of the Comprehensive Plan, in PLANNING REFORM IN THE NEW CENTURY* 180-81 (Daniel R. Mandelker ed., 2006); Thomas G. Pelham, *The Role of the Comprehensive Plan as Law: Some Lessons From Florida, in PLANNING REFORM IN THE NEW CENTURY* 161-63 (Daniel R. Mandelker ed., 2006).

62. Mary E. Klas, *Florida Growth-Management Bill Awaits Governor's Signature*, TAMPA BAY TIMES, May 25, 2009, <http://www.tampabay.com/news/politics/stateroundup/article1003884.ece>. The Community Renewal Act, 2009 Fla. Laws ch. 2009-96 (2009).

executive branches. At the same time, a campaign to amend the state constitution to require referenda on any comprehensive plan change (the Amendment 4 campaign), increasingly separated the broad coalition that had historically formed around growth management initiatives.⁶³

The legislation created exemptions from transportation concurrency and from DRI review in "dense urban land areas," defined as a city (larger than 5000 persons) or county with an average population of 1000 per square mile, or a county with at least one million people.⁶⁴ Planners throughout the state noted that in reality the density of the "DULAs" was sprawl-like. Indeed, the definition in effect, even with some exemptions such as for critical areas, encompassed about eighteen million persons,⁶⁵ in a state that had grown to approximately 18.8 million.⁶⁶ Exempt jurisdictions were required to adopt strategies to support and fund multi-modal mobility, as a result of the loss of concurrency within the DULAs.⁶⁷ The legislation extended certain plan deadlines and by legislative fiat granted two year extensions to state and local development orders, upon notice by the permit holder.⁶⁸

A coalition of cities immediately challenged the legislation as an "unfunded mandate" that required local governments to rewrite their plans and pay for transportation improvements without adequate fiscal resources. The law was found unconstitutional in August 2010.⁶⁹ The legislative breakthrough against the established growth management system, however, propelled Florida toward even more significant change. In 2011, the Florida legislature substantially rewrote the state planning act, and reorganized and reduced the staff and functions of the Department

63. The Florida Supreme Court allowed the ballot to go forward in a June 2009 decision, but the measure was defeated in November 2010.

64. 2009 Fla. Laws ch. 2009-96, § 2 (codified at FLA. STAT. § 163.3164(34) (2009)).

65. See *List of Local Governments Qualifying as Dense Urban Land Areas*, STATE OF FLORIDA DEPARTMENT OF ECONOMIC OPPORTUNITY (Dec. 4, 2011), <http://www.floridajobs.org/community-planning-and-development/programs/developments-of-regional-impact-and-florida-quality-developments/list-of-local-governments-qualifying-as-dense-urban-land-areas> (listing the qualifying cities and counties).

66. *2010 Census Interactive Population Search: Florida*, U.S. CENSUS BUREAU (Feb. 2, 2012), <http://2010.census.gov/2010census/popmap/ipmtxt.php?fl=12>.

67. 2009 Fla. Laws ch. 2009-96, § 4 (codified at FLA. STAT. § 163.3180(5)(b)4 (2009)).

68. 2009 Fla. Laws ch. 2009-96, § 11.

69. *City of Weston v. Atwater*, No. 2009 CA 2639, 2010 WL 6331978 (Fla. Cir. Ct. Aug. 27, 2010). This decision was overturned by *Atwater v. City of Weston*, 64 So.3d 701, 704-05 (Fla. Ct. App. 2011), but by that time the 2010 legislature had readopted the law to cure the procedural defect found by the circuit court.

of Community Affairs.

The legislative action followed the election of Governor Rick Scott in 2010. Governor Scott, who had never held elective office and had been a resident of Florida only since 2003,⁷⁰ during his campaign blamed the state's economic woes on excess regulation and actively supported elimination of the Department which he labeled a "jobs killer."⁷¹ The "perfect storm" of the new administration, a one-party legislature, continued economic woes, and built-up friction over the years in growth management implementation,⁷² combined to precipitate the adoption of The Community Planning Act of 2011.⁷³ The Act's proponents advocated the changes to the planning community as a means to "let cities be cities" and to the development community as a way to create jobs. At least one lobbyist admitted that the Department of Community Affairs was tarred as the "boogeyman" as a way to persuade legislators to loosen or abolish rules that drive up costs.⁷⁴ Although the legislature funded regional planning councils even while reducing their authority, the Governor vetoed their state funding.⁷⁵

One major change of the Act restricts the state and regional review authority, responding to the criticism that those agencies went beyond their purviews in plan amendment reviews. The local

70. Ryan Mills, *Rick Scott: Get to Work as Florida Governor or Go Home to Naples?*, NAPLES NEWS (Aug. 21, 2010), <http://www.naplesnews.com/news/2010/aug/21/rick-scott-work-florida-governor-naples-home/>.

71. Bruce Ritchie, *Florida Growth Agency "Boogeyman" Disappearing Without Debate*, FLORIDAENVIRONMENTS.COM (May 22, 2011, 5:36 PM), <http://bruceritchie.blogspot.com/2011/05/florida-growth-agency-boogeyman.html>.

72. Linda L. Shelley & Karen Brodeen, *Home Rule Redux: The Community Planning Act of 2011*, 85-AUG FLA. B.J. 49 (2011) (explaining the bill changes as a return of home rule to local government). For another explanation, see Aaron Deslatte, *Developers Helped GOP Gut Florida's Growth Act, Records Show*, ORLANDO SENTINEL, Sept. 4, 2011, http://articles.orlandosentinel.com/2011-09-04/news/os-growth-management-gutting-20110904_1_billy-buzzett-growth-management-growth-act (noting the dismantling of Florida's growth management act).

73. 2011 Fla. Laws ch. 2011-139, §§ 4-32 (codified at FLA. STAT. §§ 163.3161-3248 (2011)). Various related laws modifying regional and state planning and the DRI process were also contained in the law.

74. Craig Pittman, *Powerful Interests Checkmated Florida's Growth Management Agency*, ST. PETERSBURG TIMES, May 21, 2011, <http://license.icopyright.net/user/viewFreeUse.act?fuid=MTI4OTMONTQ%3D>. At the same time, the Department of Community Affairs reported that since 2007 it had approved plans for 630,965 new homes on 410,126 acres. Lauren Ritchie, *Grab Your Chance to Halt Land Grabs*, ORLANDO SENTINEL, Oct. 11, 2011, http://articles.orlandosentinel.com/2009-10-11/news/0910090151_1_grab-hometown-democracy-lavish.

75. See 2011 VETO LIST, available at http://www.flgov.com/wp-content/uploads/budget/sb_2000_vetolist.pdf (noting the veto of 1495 - Special Categories - Grants and Aids - Regional Planning Councils).

plan no longer must be consistent with the state plan, and the state agency reviews of plan amendments are limited to issues within their agency jurisdiction.⁷⁶ The state planning agency review is limited in most instances to review of "important state resources and facilities," which is not defined but excludes those resources and facilities outside the purview of other agencies.⁷⁷ The regional planning council review of a local plan is limited to important regional resources and facilities identified in the regional plan, and extra-jurisdictional impacts inconsistent with the comprehensive plan of affected local governments.⁷⁸ Regional planning councils no longer are the default planners for local jurisdictions that fail to plan, although their use of that default power had been rare.⁷⁹

The state review process is also substantially diminished, so that most plan amendments are reviewed in an expedited process that does not include a compliance determination or a preliminary review by the state.⁸⁰ Third parties may challenge a local plan's compliance with the statute, but the state land planning agency is prohibited from intervening in such a challenge.⁸¹ The standard of state review gives deference to the local government in a third party compliance challenge, applying the "fairly debatable" standard rather than the past "preponderance of the evidence" standard to a challenged plan amendment.⁸² Compliance review also is limited to certain amendments, primarily resulting from the evaluations that the local government may choose to provide every seven years (these evaluations in the past were mandatory).⁸³ Plans had before been restricted to amendments only twice per year (except for certain small scale amendments); no limitation on the number of yearly amendments remains.⁸⁴ The

76. 2011 Fla. Laws ch. 2011-139, § 17 (codified at FLA. STAT. § 163.3184 (2011)).

77. 2011 Fla. Laws ch. 2011-139, § 17 (codified at FLA. STAT. § 163.3184(3)(b) (2011)).

78. 2011 Fla. Laws ch. 2011-139, § 17 (codified at FLA. STAT. § 163.3184(3)(b)3 (2011)).

79. 2011 Fla. Laws ch. 2011-139, § 7 (codified at FLA. STAT. § 163.3167 (2011)).

80. 2011 Fla. Laws ch. 2011-139, § 17 (codified at FLA. STAT. §§ 163.3184(2), (3) (2011)).

81. 2011 Fla. Laws ch. 2011-139, § 17 (codified at FLA. STAT. § 163.3184(5) (2011)).

82. 2011 Fla. Laws ch. 2011-139, § 17 (codified at FLA. STAT. § 163.3184(5) (2011)). A state initiated challenge still applies the preponderance of the evidence standard, but the state is limited to issues identified as important state resources or facilities and the state must prove its case by "clear and convincing" evidence.

83. 2011 Fla. Laws ch. 2011-139, § 20 (codified at FLA. STAT. § 163.3161(12) (2011)).

84. 2011 Fla. Laws ch. 2011-139, § 18 (codified at FLA. STAT. § 163.3187(1) (2011)).

Act also prohibits referenda for development orders or plan amendments, responding to the Amendment 4 movement.⁸⁵

The administrative rule that had governed the substance of plans was repealed, with some of the provisions incorporated into the statute.⁸⁶ Transportation, schools, parks, and recreation concurrency were made voluntary, and a local government decision to eliminate concurrency is not subject to state review.⁸⁷ If the local government retains transportation concurrency, it must allow the development to "pay and go" according to a fee formula that forgives the development from any existing road deficiencies.⁸⁸ Plans are no longer required to be financially feasible, nor based on an anticipated need for development; instead, the plan must provide for a minimum amount of land required to accommodate the state's medium-level population projection.⁸⁹ The state planning agency was instructed to dismiss or amend all pending administrative or judicial proceedings not consistent with the new legislation.⁹⁰

Other changes were made to the DRI law to reduce state oversight, such as increasing thresholds for determining whether the project has substantially deviated from its development order permit⁹¹ and changing DRI thresholds or exempting certain projects such as industrial uses, hotels, and movie theaters from review, as well as solid mineral mines where the state Department of Transportation agrees on mitigation measures for transportation impacts.⁹² The 2009 provision that exempts DRIs from "dense urban land areas" was left in place, so the continued relevance of the DRI process for the few areas that are not DULAs is in question.⁹³ The Act makes more attractive the ability to create large scale "Sector Plans" that avoid the DRI process and are evaluated under legislatively reduced anti-sprawl criteria and

(2011)).

85. 2011 Fla. Laws ch. 2011-139, § 7 (codified at FLA. STAT. § 163.3167(8) (2011)).

86. 2011 Fla. Laws ch. 2011-139, § 72. The administrative rule had been endorsed by earlier legislatures beginning in 1986.

87. 2011 Fla. Laws ch. 2011-139, § 15 (codified at FLA. STAT. § 163.3180 (2011)).

88. 2011 Fla. Laws ch. 2011-139, § 15 (codified at FLA. STAT. § 163.3180(h) (2011)).

89. 2011 Fla. Laws ch. 2011-139, § 12 (codified at FLA. STAT. § 163.3177(f) (2011)).

90. 2011 Fla. Laws ch. 2011-139, § 74.

91. 2011 Fla. Laws ch. 2011-139, § 54 (codified at FLA. STAT. § 380.06(19) (2011)).

92. 2011 Fla. Laws ch. 2011-139, § 55 (codified at FLA. STAT. § 380.0651(2011)) and § 54 (codified at FLA. STAT. § 380.06(24) (2011)).

93. 2011 Fla. Laws ch. 2011-139, § 54 (codified at FLA. STAT. § 380.06(29) (2011)).

the elimination of criteria to show need.⁹⁴ Indeed, once a Sector Plan is approved as a comprehensive plan amendment, the metropolitan planning organization's long-range transportation plan must be consistent with it, and the regional water supply plan must incorporate its water needs.⁹⁵

The Act leaves intact the requirement to plan and consistency mandate. It also continues state and regional reviews, but in a diminished capacity, and in the vast majority of instances relies on third parties such as citizen activists to enforce compliance with the state statute. It allows local jurisdictions to continue concurrency, but if they choose to do so they must allow development to proceed if it pays its proportionate fair share for transportation, as that fair share is determined by legislative formula. Implementation of what remains of the integrated growth management system is hamstrung by the demotion of the Department of Community Affairs to a division within the new Department of Economic Opportunity, and substantial reduction in staffing and funding.

II. CONCLUSION

Florida's long experiment with THE QUIET REVOLUTION has entered a new stage which is still too recent to fully appreciate. Whether local governments will abandon meaningful comprehensive planning and revert to the status of planning in the mid-1970s, or whether they will have learned the value of planning from the several decades since then is the big question. Land use planning and regulation has become far more accepted by most involved in the development process than it was in the 1970s, and every city and county in Florida now has the basic regulatory tools to manage growth, at least that growth within its own jurisdictional boundaries. Whether local jurisdictions wisely exercise their authority will of course vary. Much will depend on the activism of third parties to hold decision makers accountable to the laws, and on the continued support of the judiciary to uphold the intent of the laws.

The problem of managing inter-jurisdictional impacts—the focus of THE QUIET REVOLUTION—remains a persistent and unsolved one. The reduced scope and efficacy of the DRI process, and the moribund status of the critical areas program leaves a regulatory gap, and the remaining “sector plan” process has yet to

94. David L. Powell, *Green Light for Sector Plans*, 85-Sept./Oct. FLA. B.J. — (2011) (favorably describing Sector Plan opportunities under the legislative amendments). The Sector Plan changes are at 2011 Fla. Laws ch. 2011-139, § 28 (codified at FLA. STAT. § 163.3245 (2011)).

95. 2011 Fla. Laws ch. 2011-139, § 28 (codified at FLA. STAT. § 163.3245(4) (2011)).

prove significant results. The current retreat from meaningful state or regional authority to address those impacts is particularly worrisome, as Florida most certainly will continue to grow in the future. The state now has reduced its role to ad hoc protection of yet undefined "important state and regional resources and facilities," with minimal administrative resources devoted to the task. The Sector Plan changes anticipate that regional agencies will conform to the long-term growth plans in rural areas, not that long-term growth plans will conform to regional priorities. The ideological underpinnings of this shift reflect a larger anti-government movement that may affect not only Florida's programs, but those in other states.⁹⁶ A revitalized economy or a shift in the political makeup of the state, or simply an increased appreciation for the needs of the regions and state could bring a new generation of progressive planning to the forefront. Florida's quiet revolution may then awaken again.

96. See, e.g., Wendell Cox, *Florida Repeals Smart Growth Law*, NEW GEOGRAPHY (Oct. 7, 2011), <http://www.newgeography.com/content/002471-florida-repeals-smart-growth-law> (noting that "[l]ocal governments will still be permitted to implement growth management programs, but largely without state mandates.").