INFRASTRUCTURE AND THE LAW: FLORIDA'S PAST, PRESENT AND FUTURE

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I. INTRODUCTION

In the 1960s, Florida's local governments began to experiment with ways in which to shift responsibility for funding infrastructure from the community in general (for example, themselves) to the development community. The result has been that, for nearly fifty years, Florida has been the laboratory and battlefield for the struggle to legally require new development to partially or totally fund major items of infrastructure needed to service it as a prerequisite for obtaining development permission. This Article will discuss the development of infrastructure funding techniques—particularly in Florida—as well as the current status of the law in regard to those techniques and will then predict and advocate the future evolution of these concepts.

The emphasis on infrastructure availability as a precondition for obtaining development permission is the major characteristic of most growth management programs. The Ramapo, New York program and the litigation over it[1] was perhaps the beginning of the

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growth management movement, and some would label it the first growth management program and the first "growth management" judicial decision. Under the Ramapo plan, a point system was established based on the availability and proximity of infrastructure. Applicants for development permission had to have a requisite number of points before they could obtain development approval.

In recent years, growth management has evolved into smart growth.[2] Even though smart growth goes beyond growth management and adds emphasis on design and quality of life, it continues to emphasize—or perhaps it is better to say *assumes*—the availability of necessary infrastructure. It also broadens the meaning of infrastructure through its emphasis on preservation of natural and cultural resources and a full range of transportation, housing, and employment options. Furthermore, the development of the concurrency requirement,[3] sometimes called "adequate public facilities requirements," which straddles growth management and smart growth programs, further emphasizes the importance of developer infrastructure funding requirements in current legal and planning practice.

II. INFRASTRUCTURE FUNDING: FLORIDA'S PAST AND PRESENT

With the help of others, I have written much[4] about Florida's

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1. Golden v. Planning Bd. of Town of Ramapo, 285 N.E.2d 291 (N.Y. 1972). Professor Robert Freilich was the architect of the program and has discussed the program at length in ROBERT H. FREILICH, FROM SPRAWL TO SMART GROWTH: SUCCESSFUL LEGAL, PLANNING, AND ENVIRONMENTAL SYSTEMS (1999). A classic analysis of *Ramapo*'s implications is given in Fred P. Bosselmann, *Can the Town of Ramapo Pass a Law to Bind the Rights of the Whole World?*, 1 FLA. ST. U. L. REV 234 (1973). A recent analysis that ties the plan to the smart growth movement is John R. Nolon, Golden *and Its Emanations: The Surprising Origins of Smart Growth*, 35 Urb. Law. 15 (2003). *See generally*, JULIAN CONRAD JUERGENSMEYER & THOMAS E. ROBERTS, LAND USE PLANNING & DEVELOPMENT REGULATION LAW § 9.2 (Practitioner Treatise Series, 2d ed. 2007).

2. The American Planning Association (APA) has described "smart growth" as follows:

> Smart growth means using comprehensive planning to guide, design, develop, revitalize and build communities for all that: have a unique sense of community and place; preserve and enhance valuable natural and cultural resources; equitably distribute the costs and benefits of development; expand the range of transportation, employment and housing choices in a fiscally responsible manner . . . .

AM. PLANNING ASS'N, POLICY GUIDE ON SMART GROWTH 1 (2002), *available at* http://www.planning.org/policyguides/pdf/smartgrowth.pdf.

3. Florida's statutory expression of the concept is "public facilities and services needed to support development shall be available concurrent with the impacts of such development" FLA. STAT. §163.3177(10)(h) (2007).

4. *See, e.g.,* 2 JULIAN C. JUERGENSMEYER, FLORIDA LAND USE LAW: DEVELOPMENT, GROWTH MANAGEMENT, SUBDIVISIONS, AND ZONING (1999); Julian Juergensmeyer & James

requirements for developer funding of infrastructure that a brief summary should suffice to set the stage for the primary purpose of this Article, which is to predict and advocate future developments and the evolution of current programs.

In many states, the history of required infrastructure finance by the private sector begins with the required dedications and in lieu payments contained in subdivision regulations.[5] Local governments commonly required dedication of streets (internal roads) and utility easements as a prerequisite of plat approval. Judicial acceptance of such requirements was widespread at first on the "privilege theory" that considered platting a privilege conferred by government that developers had the option but not the requirement of pursuing. Under the privilege theory, local governments were permitted to impose any conditions they wished without much attention to such issues as reasonableness, equity, and protection against excessive regulation or regulatory takings. Since the theory was that the developer could always subdivide by metes and bounds if she considered the dedication requirements unacceptable, courts saw little need to formulate protective principles. The privilege theory soon lost judicial favor as it became increasingly evident that the choice was ephemeral,[6] and the courts eventually applied the same reasonable exercise of the police power requirements to subdivision regulation as to zoning and other land

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C. Nicholas, *Impact Fees Should Not Be Subjected to Takings Analysis*, *in* TAKING SIDES ON TAKINGS ISSUES: THE PUBLIC AND PRIVATE PERSPECTIVES (Thomas E. Roberts ed., 2002); Julian Conrad Juergensmeyer, *The Development of Regulatory Impact Fees: The Legal Issues*, *in* DEVELOPMENT IMPACT FEES: POLICY RATIONALE, PRACTICE, THEORY, AND ISSUES (Arthur C. Nelson ed.,1988); Julian Conrad Juergensmeyer, *The Legal Issues of Capital Facilities Funding*, *in* PRIVATE SUPPLY OF PUBLIC SERVICES: EVALUATION OF REAL ESTATE EXACTIONS, LINKAGE, AND ALTERNATIVE LAND POLICIES (Rachelle Alterman ed., 1988); JULIAN JUERGENSMEYER, FUNDING INFRASTRUCTURE: PAYING THE COST OF GROWTH THROUGH IMPACT FEES AND OTHER LAND REGULATION CHANGES, (James C. Nicholas ed., 1985); JAMES C. NICHOLAS , ARTHUR C. NELSON & JULIAN C. JUERGENSMEYER, A PRACTITIONER'S GUIDE TO DEVELOPMENT IMPACT FEES (1991); Julian Conrad Juergensmeyer, *Drafting Impact Fees to Alleviate Florida's Pre-Platted Lands Dilemma*, 7 FLA. ENVTL. & URB. ISSUES 7 (1980); Julian Conrad Juergensmeyer & Robert Mason Blake, *Impact Fees: An Answer to Local Governments Capital Funding Dilemma*, 9 FLA. ST. U. L. REV. 415 (1981); Tyson Smith & Julian Conrad Juergensmeyer, *Development Impact Fees 2006: A Year in Review*, 89 PLAN & ENVTL. L., Feb. 2007, at 3.

5. *See* JUERGENSMEYER & ROBERTS, *supra* note 1, at 252-98.

6. Florida courts were unenthusiastic about mandatory platting. The struggle culminated in the decision of the Florida Supreme Court in *Kass v. Lewin*, 104 So. 2d 572, 577 (Fla. 1958), in which the court held mandatory platting to violate the common law doctrine of restraints on alienation. The decision, which has still not been overruled, led to creative ways of making platting necessary from a practical if not a legal standpoint. For example, Charlotte County forbade sellers of subdivided but unplatted land to post on-site "for sale" signs. This and other obvious ruses received the approval of Florida courts but did not result in *Kass* being overruled. *See* County of Escambia v. Herring, 343 So. 2d 63 (Fla. 1st DCA 1977); Prescott v. Charlotte County, 263 So. 2d 623 (Fla. 2d DCA 1972); *see also* JUERGENSMEYER, FLORIDA LAND USE LAW, *supra* note 4, § 12.03.

use regulatory programs.[7]

The power of local governments in Florida to require platting and thereby regulate the subdivision of land was not clarified until after the movement to require developer funding of infrastructure began. As a result, developer funding requirements were never confined to the subdivision process nor greatly influenced by the privilege theory.[8] Instead, Florida's concepts of infrastructure funding requirements were more grounded in "impact analysis" and inspired by the emphasis on measuring the impact of development,[9] which culminated in the environmental arena with the environmental impact study requirements adopted in the National Environmental Policy Act of 1969.[10] In the Florida land use control law arena, the concept saw implementation primarily through the formulation of developer funding requirements through impact fees.

Although impact fees existed in Florida at least as early as the 1960s, the early litigation dates from the early- and mid-1970s. At first, such developer funding requirements fared poorly in the Florida courts.[11] The tide turned in the late 1970s with the Florida Supreme Court's decision in *Contractors & Builders Ass'n v. City of*

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7. *See* JUERGENSMEYER & ROBERTS, *supra* note 1, at 252-98.

8. The power of local governments in Florida to adopt subdivision regulations was unclear for many years. Early subdivision regulation authority came from the so-called population acts. A county that wished to exercise subdivision control got the Florida Legislature to authorize subdivision regulations for counties of a stated population range—which only included the requesting county. The Legislature thereby avoided a general authorization of the exercise of subdivision control but preserved the legal fiction of uniformity of state laws (for example, the prohibition of passing an act that applied to only one county). *See* JUERGENSMEYER, FLORIDA LAND USE LAW, *supra* note 4; Grover C. Herring & Tully Scott, *Land Subdivision Control in Florida*, 8 U. FLA. L. REV. 486 (1955).
The difficulties presented by population acts (which were not codified in the Florida statutes and were therefore difficult to "find" and as populations skyrocketed needed to be repealed and re-enacted with current population data) and the increased desire of fast-growing local governments to exercise subdivision control authority led to the enactment in 1969 of the County and Municipal Planning for Future Development Act. *See* 1969 Fla. Laws 642 (1969) (repealed 1985). The act was optional but conferred subdivision regulatory power on those local governments which chose to comply with its planning requirements. The Act was repealed in 1985 with the adoption of Florida's Growth Management Act (GMA) since the GMA was considered to authorize local governments to exercise subdivision control authority. 1985 Fla. Laws 235 (1985).

9. Professor Fred Bosselman expressed the concept in the mid-1980s. *See* JUERGENSMEYER & ROBERTS, *supra* note 1, at 474 & n.16.

10. National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-47 (2000).

11. In *Venditti-Siravo, Inc. v. City of Hollywood*, 39 Fla. Supp. 121 (Fla. 17th Cir. Ct. 1973) the city's "charge" for a special fund for acquisition and development of parks was labeled an invalid tax. *Compare* Venditti-Siravo, Inc. v. City of Hollywood, 418 So. 2d 1251 (Fla. 4th DCA 1982). Broward County's $200 per dwelling unit fee for roads and bridges met a similar fate in *Broward County v. Janis Development Corp.*, 311 So. 2d 371, 376 (Fla. 4th DCA 1975). Also in 1975, the Third DCA invalidated the City of Miami's fire line "hook-up" fee as facially unconstitutional because the funds collected were not specifically earmarked. *See* City of Miami Beach v. Jacobs, 315 So. 2d. 227, 228 (Fla. 3d DCA 1975).

Dunedin.[12] The court there found an impact fee for sewer and water treatment facilities was not a tax but rather a valid land use regulation.[13] Lower courts followed with pro-impact fee decisions that made Florida's legal climate fertile ground for developing into perhaps the leading state for police power based impact fees.[14] The trend reached its culmination when the Florida Supreme Court approved educational facility impact fees in the *St. Johns* case.[15] Surveys indicate that Florida's local governments have now collected billions of dollars of impact fees.[16]

Not only has Florida proved to be fertile ground for developer funding requirements through impact fees, it has also taken the lead in developing and applying what is probably the ultimate developer funding requirement, the concept of concurrency. The controversy it has engendered is perhaps the best indication of its potential to stop development unless infrastructure funding responsibilities are comprehensively confronted.[17]

III. INFRASTRUCTURE FUNDING: THE FUTURE

As already indicated, the principle purpose of this Article is to predict future developments within Florida and the nation in regard to infrastructure funding trends and techniques. To call them predictions is perhaps self-serving since they are also what I advo-

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12. 329 So. 2d 314 (Fla. 1976).

13. *Id.* at 321.

14. *See, e.g.*, Hollywood, Inc. v. Broward County, 431 So. 2d 606, 607 (Fla. 4th DCA 1983); Town of Longboat Key v. Lands End, Ltd., 433 So. 2d 574, 576 (Fla. 2d DCA 1983); Home Builders & Contractors Ass'n v. Bd. of County Comm'rs, 446 So. 2d 140 (Fla. 4th DCA 1983).

15. St. Johns County v. Ne. Fla. Builders Ass'n, 583 So. 2d 635, 642 (Fla. 1991).

16. Between 1993 and 2004, counties accounted for the largest amount of impact fee revenue collections, at $3.5 billion. Municipalities followed with $1.2 billion in impact fee revenue collections. Prior to 2002, school districts reported very few impact fee revenue collections. Since 2002, however, school districts have become a major beneficiary of impact fees with $500 million in impact fees collected. FLA. IMPACT FEE REV. TASK FORCE, FLA. LEGIS. COMM. ON INTERGOVERNMENTAL REL., FINAL REPORT AND RECOMMENDATIONS 3 (2006). The figures given are misleadingly low because they do not include those collected prior to 1993 (twenty years for some local governments) and do not include utility infrastructure impacts fees—the oldest of those collected in Florida.

17. Florida's statutory expression of the concept is "public facilities and services needed to support development shall be available concurrent with the impacts of such development." FLA. STAT. § 163.3177(10)(h) (2007). Leading discussions of the concurrency concept include JOHN M. DEGROVE, PLANNING POLICY AND POLITICS: SMART GROWTH AND THE STATES ch. 3 (2005);Thomas G. Pelham, *From the Ramapo Plan to Florida's Statewide Concurrency System:* Ramapo*'s Influence on Infrastructure Planning*, 35 URB. LAW. 113 (2003); Thomas G. Pelham, *Adequate Public Facilities Requirements: Reflections on Florida's Concurrency System for Managing Growth,* 19 FLA. ST. U. L. REV. 973 (1992); Robert M. Rhodes, *Concurrency: Problems, Practicalities, and Prospects*, 6 J. LAND USE & ENVTL. L. 241 (1991).

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A. Prediction I: Unification of Developer Funding Requirements

Currently, there are various approaches to a local government requiring developer funding of infrastructure. These include required dedication, in lieu fees, user fees, impact fees, and rezoning conditions. The legal frameworks for these various approaches have developed in different time periods and in different contexts, and they are therefore often subjected to different standards and legal requirements. While treating them differently and in a parallel manner has probably been helpful in obtaining their legal and political acceptability, the time has come to "unify" them for several reasons.

First, from a developer perspective there is a possibility that by treating them differently the developer may be required to make overlapping "contributions" that—unless proper credit is given for one against the other—the developer could end up paying more than once for the same impact.[18] This is usually avoided through credit provisions of impact fee programs that require previously made dedications or payment to be deducted from the impact fees otherwise due.[19] Nonetheless, the coordination is not always clear or totally effective. Second, in some jurisdictions, the funding required of the development may vary based on the stage in the development process that it is "collected" or required. This is not fair to either the developer (vis a vis other developers) or to the local government since, if they are mutually exclusive, the local government may not be able to collect for the total impact the development has on infrastructure needs.

Third, treating them separately may limit the "options" of both the developer and the local government in making the contributions as palatable as possible to the developer and as economically effective as possible for the local government. Finally, from a legal perspective, coordination and assimilation of the various methods should result in clearer and more consistent standards for the various approaches that will increase fairness and efficiency for developers and local governments.

A new approach based on coordinating the various "methods" of developer funding requirements is beginning to emerge in Florida and elsewhere in regard to affordable and workforce housing pro-

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18. In Florida, this has particularly been a problem because of the infrastructure provision requirement imposed on the DRI approval process. *See supra* note 17.

19. ARTHUR C. NELSON, JAMES C. NICHOLAS & JULIAN C. JUERGENSMEYER, IMPACT FEES: PRINCIPLES AND PRACTICE (forthcoming 2008).

grams. An interesting model is found in the recently adopted workforce housing ordinance by the City of Islamorada, Florida[20] and in a similar program that would be established by the adoption of a recently proposed workforce housing program ordinance for the City of Destin, Florida.[21]

Under the Destin ordinance, the workforce housing obligation of a developer may be satisfied in one of the following possible ways: (1) onsite construction of workforce housing, (2) offsite construction of workforce housing, (3) conversion of market rate housing to work force housing, (4) payment of an in lieu fee determined on the basis of the cost of construction, or (5) payment of money by the developer to a nonprofit organization (such as the Habitat for Humanity), which is then obligated to provide the workforce housing units required of the developer. Since the determination of which approach will be used involves negotiation between the city and the developer, the optimum flexibility and adaptation to the particular site and circumstances of the proposed development can be achieved.

As discussed below, synthesizing the legal and planning principles and frameworks for the various developer funding approaches should aid and be aided by the development of a Florida statute—similar to various impact fee enabling acts which now exist in many states[22]—which would provide consistent standards, consistent procedures, and greater integration through clear crediting requirements of all developer funding approaches.

B. Prediction II: Expanding the Base and Scope of Infrastructure Funding Requirements

Two expansions of current developer funding of infrastructure requirements need to occur. First, social and green infrastructure needs to be added to traditional (sometimes referred to as "physical") infrastructure. Originally, developer funding requirements related to hard or physical infrastructure items such as roads, parks, water and sewer treatment facilities, and public safety facilities. In fact, even today most judicial decisions in regard to re-

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20. ISLAMORADA, FLA., VILLAGE ORDINANCES 07-23 (2007).

21. CITY OF DESTIN, FLA., DESTIN ATTAINABLE HOUSING ORDINANCE 13 (2007) (draft ordinance) *available at* http://www.cityofdestin.com/clientuploads/Documents/commdev/Im-
pact_Linkage_Fees/4Ordinance_Draft1.pdf?PHPSESSID=4d71ecde0b82349c6a316a8d80ffd
e45.

22. NELSON, NICHOLAS & JUERGENSMEYER, *supra* note19.

quired dedications, impact fees, and in lieu fees center around these items of infrastructure.[23]

In the long run, the quality of life that Floridians seek requires much more than that because new development usually also creates the need for new or expanded "social"[24] and "'green"[25] infrastructure. Roads, parks, and schools may be obvious needs created by new development but childcare facilities, healthcare facilities, and workforce housing are also essential. Particularly in Florida, the preservation and protection of green infrastructure such as beaches, aquifer recharge areas, open space, and environmentally sensitive lands are also key to the quality of life Floridians have taken for granted. Several Florida local governments have already recognized the need for developer funding of both social and green infrastructure.[26]

Not only must the scope of infrastructure be expanded in order to correctly assess the true costs and impacts of growth, but the types of development which cause impact and should therefore share in its provision must be expanded. For example, it is often the practice in Florida and elsewhere to confine developer funding

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23. Consider the leading Florida cases and the infrastructure they involved: St. Johns County v. Ne. Fla. Builders Ass'n, 583 So. 2d 635 (Fla. 1991) (dealing with schools); Town of Longboat Key v. Lands End, Ltd., 433 So. 2d 574 (Fla. 2d DCA 1983) (dealing with parks infrstructure); Hollywood, Inc. v. Broward County, 431 So. 2d 606 (Fla. 4th DCA 1983) (dealing with parks infrastructure); Home Builders & Contractors Ass'n v. Bd. of County Commn'rs, 446 So. 2d 140 (Fla. 4th DCA 1983) (dealing with roads); Contractors & Builders Ass'n v. City of Dunedin, 329 So. 2d 314 (Fla. 1976) (dealing with sewer and water infrastructure).

24. "Developer funding requirements designed to raise capital funds for the "soft" or "social" infrastructure items are usually referred to as "linkage fees . . . ." JUERGENSMEYER & ROBERTS, *supra* note 1, at 540. "Underlying every linkage program is the fundamental concept that new downtown development is directly 'linked' to a specific social need. The rationale is fairly simple: Not only does the actual construction of the commercial buildings create new construction jobs, but the increased office space attracts new businesses and workers to fill new jobs. The new workers need places to live, transit systems, day care facilities, and the like." Christine I. Andrew & Dwight H. Merriam, *Defensible Linkage*, *in* DEVELOPMENT IMPACT FEES, *supra* note 4, at 227. The leading judicial decisions which "accept" the linkage concept include Commercial Builders v. City of Sacramento, 941 F.2d 872 (9th Cir. 1991); Russ Bldg. P'ship v. City and County of San Francisco, 246 Cal. Rptr. 21 (Cal. Ct. App. 1987); Holmdel Builders Ass'n v. Township of Holmdel, 583 A.2d 277 (N.J. 1990).

25. Green infrastructure is that which relates to protecting environmentally sensitive lands from the effects of development. The term usually employed to refer to developer funding requirements related to green infra structure is environmental mitigation fees. JUERGENSMEYER & ROBERTS, *supra* note 1, at 543; *see also* Thomas W. Ledman, *Local Government Environmental Mitigation Fees: Development Exactions, the Next Generation*, 45 U. FLA. L. REV. 835 (1993); Arthur C. Nelson, James C. Nicholas & Lindell Marsh, *Environmental Linkage Fees Are Coming*, 58 PLANNING 1 (1992); James C. Nicholas & Julian Conrad Juergensmeyer, *Market Based Approaches to Environmental Preservation: Mitigation Fees and Beyond*, 43 NAT. RES. J. 837 (2003).

26. For social infrastructure, see the workforce housing ordinances recently enacted by the City of Islamorada, *supra* note 20, and the proposed attainable housing ordinance of the City of Destin, *supra* note 21.

requirements for parks and schools to residential development. This practice places an inequitable burden on residential developers because commercial and industrial developments also "use" school facilities (for example, hurricane shelter, adult education, recreation, libraries) and parks (for example, corporate athletic teams, office picnics, and sports competitions).[27]

C. Prediction III: Innovative Funding Programs: TIFs, CDDs, Private/Public Partnerships and Profit Sharing

Thus far, the land use control power has been largely used to require developers to fund infrastructure either by paying money in the form of impact fees, user fees, or in lieu fees or to dedicate or convey land to the local government which is obligated to use the money or land to provide infrastructure. Often the developer is permitted or even encouraged to build infrastructure instead of making payments or dedications.

In the future, many more varied and sophisticated approaches should and will be used. The combination of traditional devices designed to give the development community choices and options has already been discussed above[28] using the proposed City of Destin workforce housing program. Under the Destin program, the workforce housing obligation can be fulfilled by the payment of a fee (in lieu), through construction of workforce housing onsite or offsite, through conversion of market rate housing to workforce housing, or even by giving money to a non-profit organization that will assume the developer's obligation to construct or provide workforce housing.

In many states, there is already increased usage of a variant form of infrastructure provision by the development community through tax increment financing (TIF).[29] In this approach the developer or development authority retains or receives the taxes attributable to the developmentally-caused increased value of the property to repay the costs of providing infrastructure for the new

27. *See* Smith & Juergensmeyer, *supra* note 4.

28. *See supra* note 21 and accompanying text.

29. Authorized by enabling legislation in thirty-eight states, tax increment financing uses the increase in value that results from redevelopment, which the public financed in whole or in part. The *ad valorem* taxes levied on a redevelopment area are divided into two parts. That levied on the base value (assessed value at the time a project begins) is allocated to cities, counties, schools and other taxing districts, as usual. The tax levied on the increment (excess of assessed value over base value) goes to the redevelopment authority where the money may be used to finance public costs of the redevelopment or to repay bonds previously issued to raise revenue for the redevelopment.

JUERGENSMEYER & ROBERTS, *supra* note 1, at 117; *see also* Alyson Tomme, Note, *Tax Increment Financing: Public Use or Private Abuse?*, 90 MINN. L. REV. 213 (2005).

development for a specified period of time.[30] The justification is that the local government is relieved of the need to provide infrastructure to support the new development, and after the TIF period is over, the local government will receive increased revenues based on the new and increased value of the property. TIFs give the developer an incentive to make speedy, efficient, and adequate provision of the infrastructure needed by the new development.

Florida is one of the states with a statutory provision for the creation of Community Development Districts (CDDs).[31] CDDs somewhat parallel the TIF approach. Private developers are authorized to organize CDDs which become "mini" local governments for many purposes with the power to tax property within the district to pay for construction and maintenance of infrastructure and provision of other governmental services. The Act thereby provides an alternative, streamlined method for financing the construction of infrastructure needed by the new development.[32]

Still another approach, which is currently only in its infancy, is for developers and the local governments to enter into public-private partnerships in which the local government provides all or a portion of the infrastructure needed by the new development in return for an equity or profit-sharing interest in the development. The basics of this concept are already being partially used in some transit-oriented developments (TODs)[33] in which the public transit authority "furnishes" the land for the development and the mass transit infrastructure in return for lease payments from the developer that can be keyed to the development's financial successes.

Further development of the "profit sharing" approach seems

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30. *See* Tomme, *supra* note 29; Gary P. Winter, *Tax Increment Financing: A Potential Redevelopment Financing Mechanism for New York Municipalities*, 18 FORDHAM URB. L.J. 655 (1991). The TIF is conceptually related to enterprise zones. *See* David L. Callies & Gail M. Tamashiro, *Enterprise Zones: The Redevelopment Sweepstakes Begins*, 15 URB. LAW. 231 (1983); Jennifer Forbes, Note, *Using Economic Development Programs as Tools for Urban Revitalization: A Comparison of Empowerment Zones and New Markets Tax Credits*, 2006 U. ILL. L. REV. 177 (2006).

31. *See* FLA. STAT. § 190 (2007).

32. *Compare* Thomas J. Wilkes, Jr., *Community Development Districts: The Delusion that Tax-Exempt Financing for Developers Improves Growth Management*, 10 FLA. ENVTL. & URB. ISSUES 8 (1983) (arguing that community districts do not contribute to growth management, but on the contrary, promote undesirable development), *with* Ken van Assenderp, *Community Development Districts: An Alternative Way for the Private and Public Sectors to Enhance Growth Management*, 11 FLA. ENVTL. & URB. ISSUES 14 (1983) (arguing that community development districts foster growth management).

33. *See* JUERGENSMEYER & ROBERTS, *supra* note 1, § 9.12; Michael S. Bernick & Amy E. Freilich, *Transit Villages and Transit-Based Development: The Rules Are Becoming More Flexible—How Government Can Work with the Private Sector to Make It Happen*, 30 URB. LAW. 1 (1998); Robert H. Freilich, *The Land-Use Implications of Transit-Oriented Development: Controlling the Demand Side of Transportation Congestion and Urban Sprawl*, 30 URB. LAW. 547 (1998).

both equitable and inevitable. The developer is relieved of providing through equity or loans a significant portion of the capital that would otherwise be needed for the development (land costs and transportation infrastructure) and has the local government as a "partner" financially interested in the financial well being of the project. The local government or transit authority gets the advantage of a stream of future revenue with possibly fewer strings attached than if it collected impact, user, or in lieu fees from the developer. The developer is also freed from the need (and expense) to borrow the money to pay the fees up front as well as to purchase outright the land needed for the project.

Adapting this approach to non-TODs present challenges since the beauty of the TOD is that the contribution from the local government is clear—land and transit facilities—while in non-TODs the local government may not own land or have existing transportation or other infrastructure to provide to the development. Nonetheless, if the local government is willing and able to supply a large range of infrastructure (roads, parks, schools, libraries, . . . etc.) that it could otherwise require the developer to pay for, through an impact fee, for example, then the local government's "investment" is as valuable to the developer as the cash it would receive from a private equity investor. Once again the possible advantages to the local government are many: it has an income flow that it may receive indefinitely and it may be less restrained in how that revenue can be spent than if it came as exactions from the development.

D. Prediction IV: State and Regional Impact Fees

This Article, like most that discuss infrastructure finance, has emphasized local governments as the source of developer funding requirements. Unfortunately, this accurately corresponds to current practices. Leaving infrastructure provision to local governments ignores current realities and encourages—or even mandates—inequitable imposition of the burden on new growth based on its jurisdictional location. In the long run local governments cannot be given the responsibility for infrastructure that needs to be provided on a regional or even state-wide basis. Thus far, Florida has escaped somewhat the infrastructure disaster faced by many large metropolitan areas that is created by myriad units of local government, many of which refuse to assume or even recognize regional infrastructure needs. Atlanta, Georgia, is a good example. The Atlanta region, depending on how it is defined, has at least 168 different local governments.[34] With no regional or state authority to enact or require developer funding requirements on a region-wide basis, a hodgepodge of largely inadequate infrastructure is inevitable.

In the famous decision of the Supreme Court of New Jersey in the *Mount Laurel* case,[35] the Court recognized the concept of regional welfare and required the Village of Mount Laurel to bear its fair share of the need for affordable housing in the region in which it was located. If Florida is not to suffer more infrastructure inequities as its metropolitan areas expand, the Florida courts or legislature must recognize the regional or state-wide need for infrastructure and require the adoption of developer funding programs which ensure that each government entity will bear its fair share of the infrastructure burden of the region in which it is located.[36]

E. Prediction V: The Florida Comprehensive Developer Funding of Infrastructure Act

As discussed above, unlike the situation found in many other states, the law of developer funding requirements, particularly impact fees, has developed and evolved in Florida without significant statutory guidance. Although Florida became one of the leading impact fee jurisdictions as early as the 1970s, and arguably the leading state at the beginning of the twenty-first century, there is still no enabling act or comprehensive statutory expression of standards. Although the Florida legislature has adopted several statutory references approving impact fees in various contexts over the years,[37] it was not until 2006 that it adopted an impact fee

34. ATLANTA MSA GROWTH STATISTICS, 2005 ANNUAL REPORT, Metro Atlanta Chamber of Commerce, *available at http://www.investmentinrealty.com/documents/Atlanta-MSAGrowthStatsReport2005.pdf*.

35. S. Burlington County NAACP v. Twp. of Mt. Laurel, 336 A.2d 713 (N.J. 1975).

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> *[W]hose* general welfare must be served or not violated in the field of land use regulation[?] Frequently the decisions in this state, including those just cited, have spoken only in terms of the interest of the enacting municipality, so that it has been thought, at least in some quarters, that such was the only welfare requiring consideration. It is, of course, true that many cases have dealt only with regulations having little, if any, outside impact where the local decision is ordinarily entitled to prevail. However, it is fundamental and not to be forgotten that the zoning power is a police power of the state and the local authority is acting only as a delegate of that power and is restricted in the same manner as is the state. So, when regulation does have a substantial external impact, the welfare of the state's citizens beyond the borders of the particular municipality cannot be disregarded and must be recognized and served.

Id. at 726.

37. *See, e.g.*, FLA. STAT. § 163.3202(3) (2007). *See generally* JUERGENSMEYER, *supra*

statute. However, the current statute is short and non-comprehensive.[38]

From the standpoint of local governments wanting to use impact fees and other developer funding approaches, the advantage was that impact fees were left to generally approving courts for fine tuning and were not restricted by comprehensive[39] and limiting statutes as is (and has been for many years) the case in many jurisdictions. For example, the so called "impact fee enabling acts" of other jurisdictions generally limit impact fees to certain infrastructure types. The Georgia Development Impact Fee Act, for example, does not include educational infrastructure as a permissible subject for impact fees.[40] Of course the negative of not having an enabling act in Florida is that the rules, as well as the subject matter, for impact fees were left to the courts. From most perspectives this has been a positive for the development of impact fee law. As discussed above, the Florida courts were early in their adoption of the dual rational nexus concept, for example.[41] Also, the appropriateness of educational infrastructure as a subject of impact fees, which is controversial in many states,[42] was resolved favorably by the Supreme Court of Florida in the *St. Johns* case.[43]

I have long been an advocate of the status quo in Florida—that is, I am opposed the adoption of an impact fee statute in Florida for fear that both the scope and the effectiveness of impact fees would be frozen or back-tracked. The time has come, however, to recant this position and call for a comprehensive Florida statute that will codify existing impact fee law in Florida and extend it to other types of developer funding requirements so as to coordinate, clarify, integrate, and make more equitable the application of developer funding requirements. While this recanting is made with some trepidation in regard to the possibility of limiting the evolu-

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note 6, at §22.06.

38. FLA. STAT. § 163.31801 (2007).

39. For a list of current state impact fee enabling acts and their key provisions, see the website maintained by Clancy Mullen of Duncan and Associates, IMPACT FEES, http://www.impactfees.com (last visited Mar. 10, 2008).

40. *See* GA. CODE ANN. § 36-71-4 (1) (2007). Under the Georgia Act, impact fee programs may only be adopted for libraries, parks and recreation, water supply, roads and bridges, public safety, wastewater treatment, and storm water management.

41. *See* St. Johns County v. Ne. Fla. Builders Ass'n, 583 So.2d 635 (Fla. 1991); Hollywood, Inc. v. Broward County, 431 So. 2d 606 (Fla. 4th DCA 1983); Town of Longboat Key v. Lands End, Ltd., 433 So. 2d 574 (Fla. 2d DCA 1983); Home Builders Contractors Ass'n v. Bd. of County Comm'rs, 446 So. 2d 140 (Fla. 4th DCA 1983).

42. *See*, *e.g.*, Derek J. Williams, *Rethinking Utah's Prohibition on School Impact Fees*, 22 J. LAND RES. & ENVTL. L. 489 (2002).

43. St. Johns County v. Ne. Fla. Builders Ass'n, 583 So. 2d 635 (Fla. 1991); *see also* Volusia County v. Aberdeen at Ormond Beach, 760 So. 2d 126 (Fla. 2000).

tion of Florida impact fee law, the worst possible situation seems to be on the horizon. Now that there is a "picky" statute on the books, the temptation to constantly amend it with further picky and confusing provisions may be inevitable,[44] and the advantage of a truly comprehensive statute on point may well outweigh the risks inherent in limiting the evolution of impact fee principles by the courts. The opportunities that a comprehensive statute would provide to coordinate and integrate all developer funding requirements and specify the applicability of dual rational nexus and proportionate share principles to all of them is a tempting possible advantage. Such a statute should provide definitions, rules and standards, and coordination for developer provided/funded infrastructure requirements including:

- Dedication and Construction Requirements
- Mitigation Requirements
- Required Contributions
- Concurrency Requirements
- Consistency Standards

Hopefully it will be possible to establish a unified developer infrastructure funding concept that will combine and take the place of the approaches listed above. It is interesting to note that one of Florida's leading experts on growth management law—in fact one of its founding fathers—has recently called for the abolition of concurrency requirements and their replacement "with a uniform program of proportionate fair share impact mitigation exactions, with no exceptions."[45] The goal of the new statute should be to replace all of the fragmented and conflicting current devices used to require develop funding of infrastructure with an impact mitigation requirement that can be met in various ways to meet the specific needs of both the development community and the citizenry of Florida.

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44. The process has already started. *See* S.B. 578, 2007 Leg., Reg. Sess. (Fla. 2007)—which did NOT pass.

45. Robert M. Rhodes, *Florida Growth Management: Past, Present, Future*, 9 FLA. COASTAL L. REV. 109, 123 (2007). Although I am almost always in agreement with Mr. Rhodes, I must take issue with his proposal that the Florida State Comprehensive plan should be repealed. *See id.* at 122. Instead, I suggest that the State Comprehensive Plan should be strengthened to specify state and regional involvement in infrastructure finance and a uniform program of proportionate fair share impact mitigation exactions.

F. Prediction VI: State and Federal Funding to Cure Infrastructure Deficiencies

As pointed out earlier, infrastructure funding by the private and public sectors is often viewed as the province and responsibility of local governments. In the future there must be a greater state role. Increased state funding of infrastructure is absolutely essential to prevent the deterioration of the infrastructure of Florida and other states. Even if local governments use developer funding approaches to fund 100% of the cost of providing infrastructure adequate to finance the construction of the infrastructure required by new development—a very unlikely scenario!—local governments have no adequate revenue source to pay for remedying existing deficiencies, or what in impact fee terminology is often called the unfunded deficit.[46]

The money needed to remedy or meaningfully alleviate existing infrastructure deficiencies in Florida is, even by the most conservative estimates, upward of forty billion dollars.[47] The cost of "catching up" or raising the level of existing unacceptably low standards for infrastructure—congested roads for example—cannot be passed to new development.[48] From the early days of growth management to today there have been myriad unfulfilled "promises" of financial aid in regard to infrastructure deficiencies made by the State of Florida to its local governments, but the needs have been largely unfilled.[49] The situation must change if Florida's growth is going to continue even at a considerably re-

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46. *See* NICHOLAS, NELSON & JUERGENSMEYER, *supra* note 4.

47. This estimate is derived from the Florida State Comprehensive Plan Committee Final Report of 1987. With increased growth and increased costs it could have easily more than doubled in the last twenty years. *See* KEYS TO FLORIDA'S FUTURE: WINNING IN A COMPETITIVE WORLD, THE FINAL REPORT OF THE STATE COMPREHENSIVE PLAN COMMITTEE 13-30 (1987), *available at* http://www.dca.state.fl.us/fdcp/DCP/publications/zwick1.pdf.

48. The first prong of the dual rational nexus test as well as general equitable and political principles totally forbids this. JUERGENSMEYER & ROBERTS, *supra* note 2, § 9.9.

49.

> The 1985 Growth Management Act was based upon certain expectations about the availability of funding for infrastructure and land acquisition. The legislation was drafted on the assumption that these funds would be available and that concurrency would then be a matter of timing. New development would be timed to occur as needed infrastructure was provided and infrastructure provision was in turn timed to be in accord with the availability of funds. At the time the Act was passed, anticipated funding included a "services" tax and a ten cent per gallon increase in motor fuels taxes. However, the failure to implement these two sources of new revenues has fundamentally undercut the basic approach of the state's growth management legislation.

James C. Nicholas & Timothy S. Chapin, *The Fiscal Theory and Reality of Growth Management in Florida*, *in* GROWTH MANAGEMENT IN FLORIDA: PLANNING FOR PARADISE 51, 51 (Timothy S. Chapin et al. eds., 2007) (citations omitted).

duced rate.

It is unlikely that the State of Florida, or its sister states, alone will be able and willing to pay a major portion of the bill from a political and revenue standpoint.[50] It therefore seems inevitable and necessary that the federal government must also return to its past practice of providing funding for local government infrastructure.[51]

Proposals for federal funding in this area are not new. One of the first and most interesting was proposed by Senator Gary Hart of Colorado and others in 1985. Known as S. 849, it was a bill to establish a National Infrastructure Fund to provide funds for interest-free loans to State and local governments for construction and improvement of local infrastructure.[52] Currently, several bills are pending before Congress designed to accomplish goals similar to the Hart proposal.

Perhaps the closest to the old Hart proposal is the Rebuilding America's Infrastructure Act[53] introduced in August 2007 by Rep. Kucinich. The findings stated in the Bill closely coincide with the discussion above of current infrastructure deficiencies:

> (a) Findings-The Congress finds as follows:
>
> (1) Citizens chronically complain about the state of Amer-

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> At the time of passage of the 1985 legislation [the Growth Management Act], the state promised a "new fiscal reality," one in which the state was to be the primary agency for raising revenues to fund needed public capital improvements. This was going to be done by extending the sales tax to the highest growth sector of Florida's economy—services. These revenues would be growth elastic, that is, keep up with the growth of the state and its industries. In addition, increased state motor fuels taxes and revenues from other sources would help to pay for the state's two-thirds share of this estimated $53 billion bill. Had this fiscal theory been fulfilled, there would indeed have been a new fiscal reality in Florida.
>
> However, as discussed earlier the new fiscal reality initially outlined has never come to pass. The funding role for the state remains largely as it was before the landmark 1985 legislation. While enabling and encouraging a variety of new revenue streams for local governments, the Legislature has remained committed to a low impact system of taxation. This system ranks among the bottom third of the fifty states (35th in overall tax burden and 44th in taxes as a percent of personal income according, to Florida Tax Watch, 2006), despite population levels and growth rates that place Florida among the nation's leaders. As a consequence, local governments were and remain the primarily agent for infrastructure funding.

Id. at 59.

51. A major reason usually given for the current infrastructure crisis at the local government level is the federal government's cessation of infrastructure funding to states and their local governments. JUERGENSMEYER & ROBERTS, *supra* note 1, § 9.8.

52. S. 849, 99th Cong. (1985).

53. H.R. 3400, 110th Cong. (2007).

ica's public capital—about dilapidated school buildings, condemned highway bridges, contaminated water supplies, and other shortcomings of the public infrastructure.

(2) In addition to inflicting inconvenience and endangering health, the inadequacy of the public infrastructure adversely affects productivity and the growth of the economy since public investment, private investment, and productivity are intimately linked.

(3) For more than 2 decades, the United States Government has retreated from public investment.

(4) State and local governments, albeit to a lesser extent, have also slowed public investments and State and local taxpayers are frequently reluctant to approve bond issues to finance public infrastructure.

(5) In the early 1970s, nondefense public investment accounted for about 3.2 percent of gross domestic product but it now accounts for only 2.5 percent.

(6) Widespread neglect of maintenance has contributed substantially to the failure of the stock of public capital assets to keep pace with the Nation's needs.

(7) Net of depreciation, the real nondefense public capital stock expanded in the past 2 decades at a pace only half that set earlier in the post-World War II period.

(8) Evidence of failures to maintain and improve infrastructure is seen every day in such problems as unsafe bridges, urban decay, dilapidated and over-crowded schools, and inadequate airports.

(9) The State departments of education collected data that reveals at least $300,000,000,000 worth of unmet school infrastructure needs.[54]

The Act would "provide up to $50,000,000,000 a year on average for mortgage loans, at zero percent interest, to State and local governments for capital investment in types of infrastructure projects specified by Congress" and would establish a Federal Bank for Infrastructure Modernization to administer the funds.[55] Other pending acts are much less ambitious and more specific. They include The National Infrastructure Improvement Act of 2007[56] and the Regional Economic and Infrastructure Development Act of 2007.[57]

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54. *Id.*
55. *Id.*
56. S. 775, 110th Cong. (2007).
57. H.R. 3246, 110th Cong. (2007).

IV. CONCLUSION

The title of this Article is deliberately ambiguous. It can be taken to mean that the Article is designed to discuss the past and future of infrastructure funding law in Florida, or it can mean that it is intended to discuss the past and future of the State of Florida. Both are intended because it is my belief that Florida's past and future are closely tied to the provision of infrastructure in the State. Florida's incredible growth from a population of 500,000 in 1900 to over 18,000,000 in 2008 was originally largely attributable to the "natural" infrastructure—sun, sand, surf, natural beauty, and climate. As transportation infrastructure, such as railways and highways, was constructed, the growth accelerated. Today, both the enjoyment and the very existence of the natural infrastructure is threatened by the need for supportive physical infrastructure that has totally failed to keep pace with the demands of the growth caused by the millions who have come to enjoy it.

Future growth as well as the continued quality of life of those already here to enjoy it are threatened by the inadequacy of the physical, social, and green infrastructure needed to enjoy it. A recent *Wall Street Journal* article highlighted the threat to the future vitality of the State with an article entitled "*Is Florida Over?*"[58] While the article incorrectly analyzes the threat almost entirely in terms of the increased costs to current and future residents of living in Florida,[59] it indirectly highlights the problem created by the dearth of adequate infrastructure and the tremendous costs facing the State in providing that infrastructure. If Florida is not over, solutions must be found to require new growth to pay for the infrastructure needed to serve and maintain it and for the public sector to pay for existing deficiencies. Legal requirements for developer infrastructure funding—their adequacy and equity—seem even more key to Florida's future than at any time in the past.

58. Conor Dougherty, *Is Florida Over?*, WALL ST. J., Sept. 29, 2007, at A1.
59. "Florida's pull has been weakened mostly by rising costs." *Id.*