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S. Mark White

Elisa L. Paster

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S. MARK WHITE\* & ELISA L. PASTER\*\*

## Creating Effective Land Use Regulations through Concurrency

### ABSTRACT

*As communities struggle with mushrooming municipal growth, they are using a variety of tools to manage where, when, and how such growth will occur. One of these tools is concurrency regulations or adequate public facility ordinances (APFOs). An APFO is a land use regulation that is designed to ensure that necessary public facilities and services to support new development are available and adequate, based on adopted level of service standards, at the time that the impacts of new development occur. APFOs are designed to manage the timing, not the location or quality, of new development. Actual concurrency regulations will be different in each community depending on local planning needs and local law. One thing is clear, however; concurrency regulations are more advantageous than other traditional land use controls because they are more flexible and deal directly with population levels and employment growth, thereby controlling roadway demand. While they will not stop growth, down zone property, deter economic development, or raise housing prices; nor are they a catchall solution to growth management. They are one tool in the planning toolbox to help a community meet their expectation of growth and visions for the future.*

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\* Mark White is a partner at the Kansas City, Missouri, law firm of Freilich, Leitner, & Carlisle. He is recognized as an expert in zoning and subdivision law, land use and takings litigation, and the development of comprehensive growth management plans and implementation strategy. Mr. White received his Bachelor of Arts degree, magna cum laude, in History and Political Science from Bethany College in Lindsborg, Kansas, and holds a Juris Doctorate and Master of Regional Planning from the University of North Carolina at Chapel Hill. Currently, he is a member of the North Carolina and Missouri Bars, the American Institute of Certified Planners, the American Planning Association, and the Institute of Transportation Engineers.

\*\* Elisa Paster is an associate at Freilich, Leitner, & Carlisle, a Kansas City, Missouri law firm specializing in municipal and land use law across the country. She received a Bachelor of Arts degree, cum laude, in the Growth and Structure of Cities from Bryn Mawr College in Philadelphia, Pennsylvania, and a Master of Science degree, highest honors, from the University College of London in London, England. She holds a Juris Doctorate, cum laude, from the University of New Mexico. Ms. Paster worked as a city planner for the City of Albuquerque and now specializes in land use, planning, and municipal law.

## INTRODUCTION

Communities throughout the nation are struggling with the issue of municipal growth. These communities must consider how much growth should occur, how quickly it should proceed, how it should look, and who should be responsible for the costs. One of the issues relating to new development in the community is the timing and phasing of development. As new development occurs, it places demands upon infrastructure and changes the character of a community. Rapid development often creates demands that exceed the capacity of existing infrastructure such as roads, water, sewer, drainage, schools, and parks. In a growing number of jurisdictions, local governments use their police powers to regulate the timing and sequencing of development related to infrastructure capacity. These regulations are typically known as "concurrency" regulations or "adequate public facilities ordinances."

This article discusses how concurrency or adequate public facilities ordinances can be used to manage the timing and sequencing aspects of growth and reviews the legal considerations for such ordinances. Concurrency ordinances in several jurisdictions throughout the nation are discussed, with the final section applying these concepts to demonstrate how Albuquerque/Bernalillo County, New Mexico, could benefit from such an ordinance.

### Adequate Public Facilities Ordinances

An adequate public facilities ordinance (APFO)<sup>1</sup> is a land use regulation that is designed to ensure that necessary public facilities and services to support new development are available and adequate, based on adopted level of service (LOS) standards, at the time that the impacts of new development occur. APFOs are designed to manage the timing, not the location or quality, of new development.<sup>2</sup> For example, if infrastructure capacity is limited, an APFO might require an applicant to delay the construction of part of a development. However, an APFO does not normally control where a development is located (as do zoning districts) or the design or layout of buildings (as do architectural design standards).

An APFO is generally implemented by a local government, which exercises land use regulatory authority, whether or not that unit of government is the facility or service provider. Implementation is

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1. An APFO is often referred to as a "concurrency" regulation. Both terms are used interchangeably in this article.

2. S. MARK WHITE, AM. PLANNING ASS'N, PUB. NO. 465, ADEQUATE PUBLIC FACILITIES ORDINANCES AND TRANSPORTATION MANAGEMENT 5 (1996).

through the land use regulatory process (*i.e.*, master plan amendments, subdivision approval, re-zonings, development plans and/or building permits), and a capital improvements program (CIP) for public facilities.

In practice, most communities tie some development approvals to infrastructure capacity on an ad hoc basis. Rezoning and subdivision plats are routinely denied in many communities based on "traffic congestion" or other capacity shortfalls. The APFO simply expands and refines concepts already enforced by most municipalities by integrating them with comprehensive plan policies and providing certainty and predictability for the private development community and service providers.

An APFO augments a municipality's comprehensive plan—which often incorporates goals and policies regarding adequacy of public facilities and services—and the land development regulations. While comprehensive plans often reference the necessity for availability of public facilities as a condition of development approval, those plans do not further the objectives of an APFO because (1) no LOS standards are included by which "adequacy" can be measured, (2) there are no present measurements of facility capacity to determine whether capacity is "available" to serve a proposed development, and (3) there is no formal mechanism for adequate public facilities review as a systemic part of the development review and approval process.<sup>3</sup>

An APFO is one component of modern land use controls based on "Smart Growth," an emerging concept designed to address planning capacity and quality, urban form, and infrastructure with a supportive decision-making process.<sup>4</sup> Some of the characteristics of Smart Growth include planning capacity that anticipates and provides for development and growth, compact urban forms, protection of natural resources, infill development, mixed use, walkable neighborhoods, variety and choice in housing, balanced multi-modal transportation systems, maximization of existing infrastructure, timely and fairly funded new infrastructure, and

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3. See, *e.g.*, ALBUQUERQUE/BERNALILLO COUNTY PLANNING DIVISION, ALBUQUERQUE/BERNALILLO COMPREHENSIVE PLAN, Policies II.B.2.a.4, at 50 (1988) (phasing in Planned Communities in Reserve Area with respect to CIP); *Id.*, Policies II.B.4.a.7 & b.3, at 58-59 (using CIP to implement development objectives and guide development through facilities plans in Semi-Urban Area); *Id.*, Policy II.D.1.d, at 98 (reviewing zoning requests for compliance with "service level performance standards"); *Id.*, Policy II.D.4.c.2, at 106 (amending land development regulations to provide "service levels and performance standards for streets and intersections").

4. ROBERT H. FREILICH, FROM SPRAWL TO SMART GROWTH: SUCCESSFUL LEGAL, PLANNING, AND ENVIRONMENTAL SYSTEMS 32 (1999); AM. PLANNING ASS'N, GROWING SMART LEGISLATIVE GUIDEBOOK: MODEL STATUTES FOR PLANNING AND THE MANAGEMENT OF CHANGE (Stuart Meck ed., 2002), available at <http://www.planning.org/growingsmart> (last updated Feb. 13, 2002).

improved development processes with reasonable and predicable results.<sup>5</sup>

Concurrency regulations are often criticized by Smart Growth advocates based on a perception that they encourage sprawling, low-density development patterns. Opponents claim that developers in jurisdictions with concurrency regulations seek locations in remote areas where facilities are relatively uncongested or seek to develop in other jurisdictions without concurrency requirements.<sup>6</sup> Second, transportation-related concurrency requirements tend to focus on streets and other automobile-related infrastructure.<sup>7</sup> This can encourage service providers to widen roads and expand roadway capacity in response to growth demands, thereby creating further automobile dependence and sprawling development patterns.<sup>8</sup> Finally, to the extent that concurrency slows growth, it is often accused of driving up housing costs or reducing affordable housing options in a community.<sup>9</sup> While these observations are not drawn from empirical evidence,<sup>10</sup> an APFO can have consequences relating to urban form depending upon how it is drafted.

While timing and sequencing of growth is not synonymous with Smart Growth, an APFO does accomplish many Smart Growth objectives. The seven major objectives of an APFO are the following:

(1) To link the provision of key public facilities and services with the type, amount, location, density, rate, and timing of new development.

(2) To properly manage new growth and development so that it does not outpace the ability of service providers to accommodate the development at established LOS standards.

(3) To coordinate public facility and service capacity with the demands created by new development.

(4) To discourage sprawl and leapfrog development patterns and to promote more infill development and redevelopment.

(5) To encourage types of development patterns that use infrastructure more efficiently, such as New Urbanist or transit-oriented development.

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5. Uri P. Avin & David R. Holden, *Does Your Growth Smart?* 66 PLANNING, Jan. 2000, at 27-28.

6. STATE OF FLORIDA, FINAL REPORT OF THE TRANSPORTATION AND LAND USE STUDY COMMITTEE 20 (Jan. 15, 1999) [hereinafter LUSC REPORT], available at <http://www.dot.state.fl.us/planning/publications/landusestudy.pdf>.

7. *Id.*

8. See, e.g., WHITE, *supra* note 2, at 5; Robert H. Freilich & S. Mark White, *Transportation Congestion and Growth Management: Comprehensive Approaches to Resolving America's Major Quality of Life Crisis*, 24 LOY. L.A. L. REV. 915, 917 (1991).

9. WHITE, *supra* note 2, at 31.

10. LUSC REPORT, *supra* note 6, at 19.

(6) To require that the provision of public facilities and services to new development does not cause a reduction in the levels of service provided to existing residents.

(7) To provide an approach for providing necessary infrastructure for new residents.

The major structural components of an APFO are as follows:<sup>11</sup>

(1) *The areas, and sub-areas, of the community within which the APFO will apply.* APFO regulations may or may not be appropriate for every area of a community depending on the present service capacity of each area and sub-area and a community's long-range planning goals.

(2) *The public facilities and services that will be included in the APFO.* In many jurisdictions, the APFO only applies to roadways and intersections, though these ordinances can be expanded to include water, schools, pedestrian and public transit facilities, or other community infrastructure needs depending on local needs and legal authority. Communities may also consider if facilities funded and constructed in the jurisdiction by state and federal agencies, such as highways, should be included.

(3) *The LOS standard for each public facility or service to be included in the APFO.* An LOS standard measures the capacity and performance characteristics of each facility included in a concurrency ordinance. It governs the rate and amount of development approvals, the quality of infrastructure, and the capital investment needed to correct existing deficiencies and to accommodate new growth.

(4) *Current and projected public facility and service capacities.* The ordinance should indicate the current LOS standards and plan for future capacities as identified in a CIP.

(5) *The types of developments/land uses to which the APFO will apply.* The ordinance should describe the types of permitting actions to which the ordinance applies. For example, the ordinance could apply to re-zonings, subdivision plats, or other types of permits. The ordinance may exempt certain types of development, such as projects that have minimal effects on public facilities.

(6) *The types of development approvals/permits to which the APFO will apply.* Concurrency regulations should not apply to construction activities that do not affect public facilities (e.g., signs).

(7) *The point in the development approval process when adequacy of public facilities will be determined.* The municipality must determine at what stage or stages in the development approval process a

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11. This article does not discuss every component of an APFO. For a more detailed discussion of the components of a concurrency ordinance, see WHITE, *supra* note 2.

determination can be made of whether facilities are adequate to accommodate the impacts of development.

(8) *The effect of failing to meet an LOS standard.* Development projects and permits may be denied if they fail to meet LOS standards. The ordinance should define criteria for whether projects will be denied or conditioned and specify appropriate mitigation measures.

(9) *The conditions and mitigation requirements that may be attached to concurrency approval.* Developers whose projects are denied approvals under concurrency regulations might choose to advance those facilities in order to allow the project to proceed or to mitigate the impacts of the project. The ordinance should include criteria to evaluate the proposed mitigation measures and the regulations governing the reservation of capacity as facilities are advanced.

(10) *The reservation of facility capacity.* When developments are approved or exempted, the demand for public facilities created by those developments is debited against available facility capacity. The ordinance should indicate the duration for which the capacity can be debited and address other issues of facility capacity.

### Components of an Adequate Public Facilities Ordinance

The cornerstone of an APFO is the adoption of an LOS standard for each facility subject to the ordinance. The adopted level of service will govern the amount and timing of growth and development that will be permitted as well as the level of public/private investment needed in order to achieve and maintain that standard. In Florida, where concurrency has been part of the state's growth management legislation for nearly a decade, "level of service" is defined as follows:

"Level of service" means an indicator of the extent or degree of service provided by, or proposed to be provided by a facility, based on and related to the operational characteristics of the facility. Level of service shall indicate the capacity per unit of demand for each public facility.<sup>12</sup>

For example, transportation engineers use an alphabetical rating system for streets based upon traffic volumes compared to the rated capacity of the street.<sup>13</sup> For water or sewer service, level of service may be stated as an average or peak gallons per capita per day of demand. Whatever measurement the jurisdiction uses, it should be tied to units or increments of demand created by new development.

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12. FLA. ADMIN. CODE ANN. r. 9J-5.003(62) (2001).

13. Freilich & White, *supra* note 8, at 942-43.

As a means of measuring performance, an LOS standard should take into consideration both the capacity of a public facility and the demand currently placed and potentially placed on the public facility from existing development, approved developments, and projected future growth. By comparing the demand to the capacity of a public facility, a community may determine how much of the capacity of a given facility may be allocated to development within a designated area upon project approval.<sup>14</sup>

Once the applicable LOS standard has been identified for purposes of issuing development orders and initiating capital investment and budgeting strategies, the local government must resolve the issue of when the level of service must be attained in order for development to proceed. The critical policy issue is the amount of "lag time" the community will tolerate between the construction and occupancy of the development and the availability of the public facilities needed to serve the development. The question of when public facilities must be available and how they will be guaranteed is referred to as the "minimum requirements" for concurrency. The minimum requirements issue is distinguishable from the level of service that must be attained when those facilities are available. While the adopted LOS standard could affect the community's policy decision regarding the minimum requirements imposed for concurrency, and vice versa, the standards are distinguishable. The former refers to the capacity and/or quality of the public facilities while the latter refers to when the facilities must be available and, if not presently available, how provision of the public facilities will be guaranteed to be provided at the time of actual development.<sup>15</sup>

Once a community adopts the LOS standards, difficulties might occur if existing public facilities are determined to be insufficient to accommodate the impacts of a proposed development. Where that is the case, a community has four options: (1) building permits may be deferred pending the availability of public facilities and services at the

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14. For example, the APFO in Palm Beach County, Florida, provides "that new development permits shall not cause the county's total mass transit capacity to fall below that which can accommodate three quarters of one percent (0.75%) of the total County transportation trips." See WHITE, *supra* note 2, at 20.

15. See, e.g., *Annapolis Market Place, L.L.C. v. Parker*, 802 A.2d 1029, 1044 (Md. 2002). The landowner's neighbors sought judicial review of a county board of appeals decision to permit rezoning from a residential to a commercial district. The court of appeals held that (1) adequate facilities are not "programmed for construction" when the developer agrees to construct them at rezoning; (2) the developer's agreement thus does not satisfy a county ordinance that prohibits rezoning without finding that facilities, infrastructure systems, and schools are adequate to serve uses allowed by the new zoning classification are either in existence or programmed for construction, and (3) the county board of appeals failed to make adequate findings.



adopted LOS, (2) the applicant may agree to reduce the density or intensity of the proposed development within the parameters of available facility capacity, (3) the applicant may agree to a phasing schedule, or (4) the developer may agree to provide those public facilities needed (or a payment to construct these facilities) to attain the adopted LOS, provided they will be available when the impacts of the development occur. The deferral of development approval or the provision of public facilities by the developer can be addressed through appropriate conditions.

A prerequisite to allocating available capacity is determining how much capacity is available and how much capacity is used by specific types of development. Most communities allocate capacity on a first-come, first-served basis as development applications are processed. However, where available capacity is constricted, the community might consider allocating capacity only to those projects that achieve important goals and objectives of the comprehensive plan or that should be granted preferential treatment for hardship or other reasons.

Allocation of capacity might be achieved through a set-aside. Under a set-aside system, a percentage of available capacity is reserved for certain types or categories of development. For example, in Montgomery County, Maryland, projects defined as affordable housing may be approved where the available capacity threshold in the applicable impact area has been exceeded. This approval is conditioned on review of the projects for impacts on localized facilities, such as nearby intersections and roadway links.<sup>16</sup> New Jersey's Council on Affordable Housing, which administers that state's housing policies for local governments, authorizes a similar policy.<sup>17</sup> In addition, Montgomery County's program allocates capacity to residential and non-residential projects within each impact area in such a manner as to maintain a favorable ratio between jobs and housing. This is accomplished by computing a separate development threshold within each area for employment and housing.

A second alternative would be a "point system" that enables the reviewing agency to balance concurrency review with other public policies and that could include a "weighting system" on the capacity and availability of public facilities for purposes of concurrency review. For example, the community could assign point scores for the availability of

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16. Freilich & White, *supra* note 8, at 943; WHITE, *supra* note 2, at 24, 31, 33-34.

17. N.J. ADMIN. CODE § 5:92-8.6(c) provides, "Notwithstanding the prohibitive cost of adequate public facilities and infrastructure at the time a municipality petitions for substantive certification, the municipality shall reserve and set aside new infrastructure capacity, when it becomes available for low and moderate income housing on a priority basis."

a specified amount of capacity for each public facility and/or for the achievement of other public policies such as the provision of affordable housing. Thus, a project that would create a deficiency in one public facility, such as transportation, could receive approval if a compensating point score is achieved for other public facilities and/or for the provision of other public benefits. Care must be taken, however, to assure that minimum standards are met.<sup>18</sup>

Where public facilities are currently operating below the adopted LOS, developers may be allowed to proceed with their development if the facilities needed to attain the LOS standards and to accommodate the marginal impacts of the proposed development are provided. The alternative would be to await the provision of facilities as scheduled in the CIP, which may result in a delay. Provisions for the advancement of public facilities and services are a mechanism to alleviate the hardship of undue delay and have been approved by courts in some states.<sup>19</sup> It is good public policy to allow developers to advance facility capacity in a manner consistent with timing and sequencing policies. The advancement policy can provide funding for infrastructure and allow developers to proceed with project approval. However, advancement is a voluntary mechanism providing relief from timing and sequencing controls, not a mandatory infrastructure financing policy.

The community may vary the LOS standards applicable to each public facility by geographic area, over time, or by type of development project. The LOS standards may vary by geographic area in order to allow flexibility in the achievement of other public objectives, such as promoting infill development. The LOS standards may also be varied by geographic area where substantial deficiencies exist or where environmental or other constraints prevent facility expansion (these are sometimes referred to as "backlogged" or "constrained" facilities). For example, levels of service may be "tiered" over time in order to avoid the effect of an immediate, high level of service on growth and development in the jurisdiction. To achieve this result, one LOS standard can be set for purposes of review for a specified period of time subsequent to adoption of the APFO, with a higher standard taking effect at a specified future date.

A differential LOS standard is one in which the LOS varies based upon the location of development, the type of development, or other

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18. See, for example, a related practice in Austin, Texas, which used a Smart Growth criteria matrix that assigned points to proposed developments based on achieving objectives such as mixed use, streetscape treatment, transit oriented development, etc. City of Austin, *Smart Growth Matrix Results* (2000), available at <http://www.ci.austin.tx.us/smartgrowth/matrix> (last visited Oct. 14, 2003).

19. *Golden v. Planning Bd. of the Town of Ramapo*, 285 N.E.2d 291, 305, *appeal dismissed for want of a substantial federal question*, 409 U.S. 1003 (1972).

policy considerations. The most typical response is the establishment of higher LOS standards in rural areas in order to discourage sprawl development. LOS standards can be adjusted to encourage infill, redevelopment, the production of affordable housing, or other public policies. However, the LOS standards must be justified, be supported by data and analysis, and bear a rational relationship to a legitimate public purpose, as discussed further below.

## LEGAL ISSUES

Implementation of APFOs requires enabling legislation and adherence to constitutional principles regarding takings, equal protection, and due process. This section addresses those issues generally, though each state will have specific case law that will direct particular ordinances.

### Enabling Legislation

Local land use authority is typically derived from enabling legislation.<sup>20</sup> Enabling legislation is a statute that typically establishes local authority to exercise a certain power (such as zoning) and then describes the conditions by which the power may be exercised (for example, notification, hearings, and applicability).

Enabling legislation is the threshold issue for APFOs, because local governments are creatures of the state and the authority to adopt land use legislation must be granted by the state.<sup>21</sup> Only Maryland has specific APFO enabling legislation,<sup>22</sup> though Florida,<sup>23</sup> Vermont,<sup>24</sup> and Washington<sup>25</sup> mandate concurrency at the state level by prohibiting new development where the impact would have adverse effects on specified facilities or a reduction in adopted levels of service. New Hampshire's legislation allows development-timing ordinances subject to preparation of a master plan and CIP.<sup>26</sup>

While explicit enabling legislation for APFOs is rare, such authority is often found implicitly through traditional zoning or

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20. 8 MCQUILLIN MUNICIPAL CORPORATIONS § 25.37 (3d. ed. 2000). Some local governments derive land use authority directly from a state constitution or a municipal charter, but enabling legislation is the most common source of authority.

21. 1 ARDEN H. RATHKOPF & DAREN A. RATHKOPF, *THE LAW OF ZONING AND PLANNING*, § 2.02 (4th ed. 1986).

22. *See* MD. CODE ANN., art. 66B § 10.01 (2000).

23. FLA. STA. ANN. §§ 163.3177 (h), 163.3202(2)(g), 163.3180 (West Supp. 1989).

24. VT. STAT. ANN. tit. 10 § 6086(a)(9)(A) (2000).

25. WASH. STAT. ANN. § 36.70A.070(6)(B) (2001).

26. N.H. REV. STAT. ANN. § 674:22 (1986 and Supp. 1988).

subdivision legislation. In *Golden v. Planning Board of Ramapo*,<sup>27</sup> the seminal case that paved the way for concurrency, the court found the requisite authority for a tiered growth plan. The town of Ramapo adopted a master plan, comprehensive zoning ordinance, and CIP spanning a period of 18 years.<sup>28</sup> The town's zoning act was based on the Standard Zoning Enabling Act. The town also adopted amendments, for the purpose of limiting urban sprawl, requiring that residential development could only proceed "according to the provision of adequate municipal facilities and services, with the assurance that any concomitant restraint upon property use is to be of a 'temporary' nature..."<sup>29</sup> The standards for the issuance of permits were based on the availability of five essential facilities: (1) public sanitary sewers or approved alternative; (2) drainage facilities; (3) improved public parks or recreation facilities, including public schools; (4) major, secondary, or collector roads; and (5) firehouses.<sup>30</sup> The system was based on an elaborate point system whereby each public facility was allotted certain point values, and a developer had to earn a certain number of points to be granted a permit.

The court held that Ramapo had the implicit authority under New York's enabling legislation<sup>31</sup> and the Standard Zoning Act to enact the concurrency system, stating:

The power to restrict and regulate conferred under section 261 includes within its grant, by way of necessary implication, the authority to direct the growth of population for the purposes indicated, within the confines of the township. It is the matrix of land use restrictions, common to each of the enumerated powers and sanctioned goals, a necessary concomitant to the municipalities' recognized authority to determine the lines along which local development shall proceed, though it may divert from its natural course.<sup>32</sup>

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27. *Golden v. Planning Bd. of the Town of Ramapo*, 285 N.E.2d 291, 304, *appeal dismissed for want of a substantial federal question*, 409 U.S. 1003 (1972).

28. *Golden*, 285 N.E.2d at 294.

29. *Id.* at 295.

30. *Id.* at 295.

31. *Id.* at 296; *see also* FREILICH, *supra* note 4, at 58-59 (explaining that Section 261 of the New York Town laws granted municipalities the authority to zone for the purpose of promoting the health, safety, and general welfare of the community, and Section 263 of the New York Town laws required that such regulations be made in accordance with a comprehensive plan and designed, among other things, to "facilitate the adequate provision of transportation, water, sewerage, schools, parks and other public requirements").

32. *Golden*, 285 N.E.2d at 297.

Nor did the court find that the ordinance was exclusionary, stating, "the present amendments...seek, by implementation of sequential development and timed growth, to provide a balanced cohesive community dedicated to the efficient utilization of land."<sup>33</sup> Finally, the court found that implementation of the plan did not constitute a taking in violation of the U.S. Constitution because, while the restrictions upon property in Ramapo were substantial, they were not absolute.<sup>34</sup> The takings issue will be considered further below.

Some communities have followed *Ramapo*, finding authority for concurrency regulations through state statutes that confer the police power to zone.<sup>35</sup> However, other states have statutory restrictions that limit some types of concurrency standards, e.g., statutes restricting moratoria that can preclude some approaches controlling the timing and sequencing of development. In *Toll Bros., Inc. v. West Windsor Township*,<sup>36</sup> the Township of West Windsor, in response to rapid growth, passed an ordinance that adopted a 50-year program to increase its road capacity and other capital improvements. In conjunction with the program, the township passed "timed growth controls" to regulate the rate of growth that deferred development until the necessary road improvements for development were complete. Because of the delay on development of their property, the Toll Brothers sued the township, seeking to invalidate the growth controls and claiming the growth controls were a moratorium on development, which violated a statute that prohibited moratoria on development except in cases of imminent public health risks. The court upheld the challenge, finding that the ordinance was in violation of a state law that prohibited moratoria.

## Takings

The final clause of the Fifth Amendment, known as the Just Compensation Clause, provides that private property shall not be taken for public use without just compensation.<sup>37</sup> Most states have parallel just compensation or takings clauses in their state constitutions. These clauses apply to land use regulations as well as traditional exercises of

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33. *Id.* at 302.

34. *Id.* at 304.

35. *See, e.g.,* *Schenck v. City of Hudson*, 997 F. Supp. 902, 905 (N.D. Ohio 1998) ("Under its police power, Defendant City of Hudson has the right to maintain its character and to grow at a slower pace to allow orderly provision of services, including infrastructure service levels."). *See also* *Halle Dev., Inc. v. Anne Arundel County*, 808 A.2d 1280 (Md. 2002).

36. 712 A.2d 266, 272 (N.J. Super. A.D. 1998).

37. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 306, n.1 (2002).

eminent domain power.<sup>38</sup> Most litigation concerning timing and sequencing regulations is brought under the guise of the takings clauses of state constitutions or the U.S. Constitution.<sup>39</sup> Of the three types of takings, physical, title, and economic, concurrency regulations typically fall under the latter two. As such, physical takings will not be addressed in this article.

### *Economic Takings*

Under the U.S. Supreme Court decision in *First English Evangelical Lutheran Church v. County of Los Angeles*, a local government must compensate landowners for land use restrictions that deprive landowners of all reasonable use of their property.<sup>40</sup> Temporary restrictions on development in order to implement a comprehensive, staged growth plan will not result in a taking of property so long as landowners are able to utilize their property within a reasonable period of time.

In *Lucas v. South Carolina Coastal Council*,<sup>41</sup> the Supreme Court held that property owners are categorically entitled to compensation where a regulation strips a property of all economic use, unless the government can establish that development would create a public nuisance or that existing ownership restrictions, such as the public trust,<sup>42</sup> restrict development. Because *Lucas* involved a regulation that was originally adopted as a permanent restriction on development, the court did not address the question of when a regulation designed to impose only a temporary delay in development rises to the level of a taking. Thus, as is discussed further below, courts are hesitant to invoke a *Lucas* takings analysis in the absence of a permanent restriction of the property. If a permanent taking does occur, per *Lucas*, a court would apply the three-part *Penn Central* test.<sup>43</sup>

A municipality's ability to apply temporary restrictions was further upheld by the Supreme Court in *Tahoe Sierra Preservation Council v. Tahoe Regional Planning Agency*.<sup>44</sup> The Court held that a 32-month total

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38. DAVID L. CALLIES, ROBERT H. FREILICH, & THOMAS E. ROBERTS, CASES AND MATERIALS ON LAND USE 253-55 (3d. ed. 1999).

39. U.S. CONST. amend. V.

40. *Lutheran Church*, 482 U.S. 304, 321 (1987).

41. 505 U.S. 1003 1015 (1992).

42. See, e.g., *Orion Corp. v. State of Washington*, 747 P.2d 1062, 1073 (1987).

43. If a permanent restriction upon the property leaves the landowner any value, then under *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124 (1978), the court will look to three factors. First, the economic impact of the regulation; second, the extent to which the impact has interfered with investment-backed expectation; and third, the character of the government action.

44. 535 U.S. 302, 334 (2002).

moratorium on development did not constitute a per se taking. An association of landowners brought action against the Tahoe Regional Planning Agency, claiming that the agency's temporary moratoria on development effected an unconstitutional regulatory taking of property. The Court first rejected the petitioner's assertion that *First English* and *Lucas* stand for the proposition that whenever the government imposes a deprivation of all economically viable use of property, no matter how brief, it affects a taking.<sup>45</sup> The Court noted that those cases did not answer the question of a temporary taking, as would be affected by a concurrency regulation.

The Court found that municipalities could indeed institute moratoria without constituting a taking, finding it necessary to protect the decision-making process. The Court found an important interest in formulating informed decision making on planning issues by regulatory agencies. The Court noted that "otherwise, the financial constraints of compensating property owners during a moratorium may force officials to rush through the planning process or to abandon the practice altogether."<sup>46</sup> The Court also noted the importance of protecting the decision-making process for regional planning.<sup>47</sup>

A number of state courts have affirmed a municipality's authority to use temporary regulations for planning purposes. In *Woodbury Place Partners v. City of Woodbury*,<sup>48</sup> the court affirmed the principle that all use of a property may be denied for a temporary period of time without resulting in a taking.<sup>49</sup> In *W.R. Grace & Co.-Conn. v.*

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45. *Id.* at 328-30.

46. *Id.* at 338-39.

47. *Id.* at 339. For a more detailed discussion of the *Tahoe* case, see Matthew G. St. Amand & Dwight H. Merriam, *Defensible Moratoria: The Law Before and After the Tahoe-Sierra Decision*, 43 NAT. RESOURCES J. \_\_\_\_ (2003).

48. 492 N.W.2d 258 (Minn. App. 1992), *cert. denied*, 113 S. Ct. 2929 (1993).

49. See also *Williams v. City of Central*, 907 P.2d 701, 705 (Colo. App. 1995) (10-month moratorium on development in gaming district while studying city's ability to absorb growth was not a compensable taking); *Woodbury Place Partners v. City of Woodbury*, 492 N.W.2d 258, 262 (Minn. App. 1992) (moratorium pending review of plan for land adjacent to interstate highway was not a taking even though it deprived property owner of all economically viable use of property for two years); *Zilber v. Town of Moraga*, 692 F. Supp. 1195, 1207 (N.D. Cal. 1988) (18-month development moratorium during completion of a comprehensive scheme for open space did not require compensation); *Gisler v. Deschutes County*, 945 P.2d 1051, 1055 (1997), *citing* OR. REV. STAT. § 197.505(1):

"Moratorium on construction or land development" means engaging in a pattern or practice of delaying or stopping issuance of permits, authorizations or approvals necessary for the subdivision and partitioning of, or construction on, any land. It does not include denial or delay of permits or authorizations because they are inconsistent with applicable statutes, rules, zoning or other laws or ordinances, or a public facilities strategy that meets the provisions of ORS 197.768.

*Cambridge City Council*,<sup>50</sup> the court held that a two-year moratorium that deprived a landowner of value for a temporary period is not per se a taking of property requiring compensation, as the deprivation is not permanent. Even though there was an economic impact on the landowner's property as a result of a moratorium imposed via adoption of a zoning amendment, it was insufficient to constitute a compensable regulatory taking under the Fifth Amendment because the landowner continued to realize a return on the investment property and use various production. Research and development facilities were located on the property throughout the interim period, and the landowner had already voluntarily delayed developing the property for a period of approximately seven years.<sup>51</sup>

While property may be regulated, the regulation may constitute an economic taking, necessitating compensation, because it goes too far and "imposes too heavy a burden on property rights to be sustained as a police power regulation."<sup>52</sup> To overcome a takings challenge, an APFO must leave the property owner with a reasonable use of the property for a reasonable amount of time.<sup>53</sup> Reasonableness is based on (1) whether the regulation substantially advances a legitimate public purpose or (2) whether the regulation denies a landowner economically viable use of the property.<sup>54</sup> The first test balances the government interest against the

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50. 779 N.E.2d 141, 151 (Mass. App. 2002).

51. See also *Williams v. City of Central*, 907 P.2d 701, 705 (Colo. App. 1995) (Ten-month moratorium on special use permits, while city studied impact of its growing gaming district, did not constitute a categorical compensable taking of the permit applicant's property, even if all economically viable uses were temporarily barred, because the moratorium was intended to be temporary and the delay was not extraordinary.); *Santa Fe Village Venture v. City of Albuquerque*, 914 F. Supp. 478, 483 (D.N.M. 1995) (Thirty-month moratorium on development of lands within the Petroglyph National Monument was not a taking); *Long Beach Equities, Inc. v. County of Ventura*, 282 Cal. Rptr. 877, 888 (Cal. App. 2 Dist. 1991) ("Unless a temporary moratorium is total and is unreasonable in purpose, duration, or scope, the restrictions it places on development are not compensable."); *Tocco v. N.J. Council on Affordable Housing*, 576 A.2d 328, 330-31 (N.J. Super. Ct. App. Div. 1990) (Eighteen-month land development moratorium, imposed on a municipality in which land was scarce for the purpose of enabling the municipality to fulfill its constitutional obligation to provide for its fair share of low and moderate income housing, did not result in an unconstitutional taking of affected property.); but see *Joint Ventures, Inc. v. Dep't of Transp.*, 563 So. 2d 622, 625-26 (Fla. 1990) (Statute permitting Department of Transportation to impose development moratorium on property in transportation corridor during period of department's preacquisition planning unconstitutionally permitted state to take private property without just compensation.).

52. DONALD G. HAGMAN & JULIAN C. JUERGENSMEYER, *URBAN PLANNING AND LAND DEVELOPMENT CONTROL LAW* § 10.7 (2d ed. 1986); see also *Pennsylvania Coal v. Mahon*, 260 U.S. 393 (1922).

53. Robert H. Freilich & Stephen R. Chinn, *Finetuning the Taking Equation: Applying it to Development Exactions* (pts 1 & 2), 40 LAND USE L. & ZON. DIG. Feb. 1988, at 3, & Mar. 1988, at 3.

54. *Keystone Bituminous Coal Ass'n v. De Benedictus*, 480 U.S. 470, 486 (1987).



economic impact of the regulation,<sup>55</sup> while the second test focuses on whether the landowner has been deprived of all reasonable use of the property.

An APFO might be challenged as an economic taking where development is deferred pending the availability of facilities to meet LOS standards.<sup>56</sup> Since the property is only provisionally burdened, the landowner may argue that the regulations are a "temporary taking."<sup>57</sup> The critical issue is the amount of time that a property can be burdened before a taking is deemed to have occurred.

If development approval is denied or deferred because of the unavailability of public facility capacity, the community must show that the public facilities forming the basis for the concurrency determination will be provided within a "reasonable" period of time. Unfortunately, case law provides little guidance as to what constitutes a reasonable period of time. In *Golden v. Planning Board of Town of Ramapo*,<sup>58</sup> the court approved a concurrency ordinance based upon a staged, 18-year CIP that would have deferred some development approvals for the duration of the plan.

### *Title Takings*

A title take is one in which the government acquires incidents of ownership, title to the property, or an exaction in lieu of the dedication of land. Unlike a regulatory taking, which simply limits the economic use of the property, a title taking requires the landowner to surrender an incident of ownership. Concurrency ordinances typically impose only regulatory restrictions and do not involve the transfer of property interests and fees. Most concurrency ordinances require the phasing of development until adequate facilities are available at adopted LOS standards, per the adopted CIP. The ordinances often allow developers to speed up the time by providing facilities themselves before the scheduled date in the CIP, but this provision is typically voluntary rather than mandatory.<sup>59</sup>

A concurrency ordinance is subject to attack if a court is convinced that the ordinance is a form of extortion designed to shift a disproportionate burden of the costs of the public facilities onto the

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55. Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104 (1978); Keystone Bituminous Coal Ass'n, 480 U.S. 492 (quoting *Agins v. Tiburon*, 447 U.S. 255, 260-61 (1980)).

56. WHITE, *supra* note 2, at 10.

57. *Id.*

58. 334 N.Y.S.2d 138, *appeal dismissed*, 409 U.S. 1003 (1972).

59. WHITE, *supra* note 2, at 12.

developer.<sup>60</sup> Such an ordinance is considered an illegal exaction, in violation of the Fifth Amendment of the U.S. Constitution.

The Supreme Court has established a complex analytical framework for review of exactions. The first piece of the framework, developed by the Court in *Nollan v. California Coastal Commission*,<sup>61</sup> requires that there be an essential nexus between the types of impacts created by the proposed development and the public concern underlying the concurrency regulation.<sup>62</sup> This involves an inquiry into whether a reasonable causal relationship exists between the prevention of the perceived adverse impacts of the development and the conditions the government imposes on the permit. While municipalities must carefully consider *Nollan* when drafting concurrency regulations, the cases following *Nollan* indicate that the standard is fairly deferential.<sup>63</sup> Thus, while an ordinance may only require facilities that mitigate impacts of development, it may allow a developer a large range of types of facilities and alternatives to mitigate such impacts. For example, if a developer proposes a subdivision that would increase traffic congestion, an ordinance may allow the developer to mitigate the impact through pedestrian facilities, public transit, or additional roadway facilities.<sup>64</sup>

Following *Nollan*, the state courts applied a number of nexus tests, requiring various degrees of relationship between the conditions and the impact of new development. The Supreme Court clarified the relationship in *Dolan v. City of Tigard* by requiring that, in addition to the nexus test, the exaction must be "roughly proportional" to the impact of the proposed development.<sup>65</sup> In *Dolan*, the city required dedication of an easement for a pedestrian/bicycle path as a condition for construction of a commercial building.<sup>66</sup> The condition was based on the Pedestrian/Bicycle Pathway Plan and the Court found that the plan established a reasonable relationship between the developmental impacts on traffic congestion and the need for alternative forms of transportation.<sup>67</sup> However, the city failed to quantify the relationship between the additional trip generation caused by the development and the number of additional pedestrian and bicycle facilities needed to offset those impacts.

The *Nollan/Dolan* cases suggest that a community must carefully design its concurrency ordinance such that there is a quantifiable

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60. *Id.*

61. 484 U.S. 825 (1987).

62. 143 U.S. 825, 837 (1992).

63. WHITE, *supra* note 2, at 12.

64. *Id.*

65. 512 U.S. 374 (1994)

66. *Id.* at 381-82.

67. *Id.* at 388-89.

relationship between the exaction and the impact a particular development will have on the particular facilities the exaction is meant to address. A local government can minimize *Dolan* challenges by including several components in a concurrency ordinance. First, the ordinance must allow denial or deferral of development approvals if the proposed development would degrade the adopted LOS standards.<sup>68</sup> Second, any mitigation alternatives must actually speed up construction of the particular facility to insure a link between the impacts of the new development and the availability of the facilities.<sup>69</sup> This might be done by tying the mitigation measure to a specific date referred to in the adopted CIP. Third, the ordinance should specifically quantify the extent and cost of additional facilities or mitigation measures needed per unit of demand.<sup>70</sup> Fourth, the ordinance could include procedures and forms for the preparation of an impact analysis.<sup>71</sup> Fifth, because courts have found that voluntary exactions are not subject to constitutional challenge,<sup>72</sup> developers should be required to sign a form acknowledging that the provision of the facilities is voluntary and is being provided only to expedite the project approval.<sup>73</sup> Finally, the ordinance must be based on an improvements program with realistic projected funding sources.

### Substantive Due Process—The Right to Travel

Substantive due process requires that land use regulations have a reasonable relationship to the protection of public health, safety, and general welfare.<sup>74</sup> The requirement has two prongs: first that the land use regulations address a legitimate public purpose and second that the method of achieving that goal is closely related to the purpose. Like the standard for the rational basis test, courts are generally very deferential to local governments, such that only egregious acts will lead to a violation of substantive due process rights.<sup>75</sup> This deference is derived from the longstanding recognition of the legitimacy of growth management and planning controls by the Supreme Court. To that effect, in *Village of Belle Terre v. Boraas*, the Court stated, "The police power is not

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68. WHITE, *supra* note 2, at 13.

69. *Id.*

70. *Id.*

71. *Id.*

72. *Leroy Land v. Tahoe Reg'l Planning Agency*, 939 F.2d 696 (9th Cir. 1991).

73. WHITE, *supra* note 2, at 13.

74. DANIEL R. MANDELKER, *LAND USE LAW* § 2.39 (4th ed. 1997).

75. See *Licari v. Ferruzzi*, 22 F.3d 344 (1st Cir. 1994); *Chesterfield Dev. Corp. v. City of Chesterfield*, 963 F.2d 1102 (8th Cir. 1992); *Creative Env'ts v. Estabrook*, 680 F.2d 822 (1st Cir. 1982), *cert. denied*, 459 U.S. 989 (1982); *PFZ Props. v. Rodriguez*, 928 F.2d 28 (1st Cir. 1991), *cert. dismissed as improvidently granted*, 112 S. Ct. 1151 (1992).

confined to the elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion, and clean air make the area a sanctuary for people."<sup>76</sup>

This approach was confirmed in *Sylvia Development Corp. v. Calvert County*,<sup>77</sup> where a developer brought suit against Calvert County, Maryland, and the Board of County Commissioners, alleging due process and equal protection violations arising out of the denial of an application to increase the density of proposed development under the county's transfer zone district program. The court upheld the county's denial of the application, which was, in part, based on an adequate public facilities requirement and findings that the proposed subdivision could not be served by adequate road facilities for traffic or water supplies for fire fighters. The court found no egregious behavior on the part of the commission, noting that the decision was supportable on a rational basis.<sup>78</sup>

Of particular importance to concurrency regulations, the Supreme Court has recognized the fundamental right to travel freely among the states under the Due Process Clause.<sup>79</sup> Any government regulation that restricts the right to travel freely among the states and to relocate to another state might be struck down as a violation of the Due Process Clause.

A right-to-travel challenge to an adequate public facilities ordinance arises when the ordinance interferes with one's ability to relocate. For example, if an ordinance restricts development of housing prior to adequate transportation facilities and effectively constitutes a moratorium on building in the area, new residents would be prevented from moving to that area. These arguments typically fail because a compelling government interest can generally be found to justify the interference. Further, concurrency ordinances do allow developers to build and pay for the necessary infrastructure; thus, the right to travel is not actually restricted. Finally, most residents lack standing to bring these actions because concurrency ordinances are rarely challenged by those seeking to enter the community, but rather by those already in the community.<sup>80</sup>

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76. 416 U.S. 1, 9 (1974).

77. 842 F. Supp. 183 (D. Md. 1994).

78. *Id.* at 189.

79. See *Zobel v. Williams*, 457 U.S. 55 (1982); *Saenz v. Roe*, 526 U.S. 489 (1999).

80. See, e.g., *Constr. Indus. Ass'n v. City of Petaluma*, 522 F.2d 897 (9th Cir. 1975), *cert. denied*, 424 U.S. 934 (1976).

### Equal Protection Clause

The Fourteenth Amendment to the U.S. Constitution provides that states cannot deny the equal protection of the law to persons. This provision applies to legislative classifications and distinctions. Legislative classifications are typically upheld where they are rationally related to a legitimate government interest. This standard is very deferential. If a fundamental right or a suspect class is the basis of a classification, then the court will apply strict scrutiny, upholding a regulation only if the regulation is based on a compelling state interest and that interest is met by the least restrictive means.<sup>81</sup>

Concurrency ordinances inherently make classification based on geographic locations, thereby imposing different standards on those who live in different areas of a community. For example, one challenging a concurrency ordinance on equal protection grounds might argue that newcomers to a community, or those wanting to move to the areas without existing infrastructure, are disproportionately burdened with paying for adequate public facilities. Otherwise, a court will apply the rational basis test and uphold the regulation if it bears a rational relationship to a legitimate public purpose.<sup>82</sup>

The rational basis test is an extremely deferential standard for local governments. Most decisions have found that developers are not a suspect class, nor have courts found that land development is a fundamental right.<sup>83</sup> Nonetheless, the ordinance must still bear a rational relationship to the purpose, so communities must take care to conduct careful studies that justify the adopted LOS standards and their effect on the physical geography of a community.

### CASE STUDIES

#### Davidson & Concord-Cabarrus County, North Carolina

Davidson, North Carolina, is a college town located within the Charlotte metropolitan area. Concerned with the quality of new development and the possible erosion of community character and

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81. S. Mark White, *Development Fees and Exemptions for Affordable Housing: Tailoring Regulations to Achieve Multiple Public Objectives*, 6 FLA. ST. U. J. LAND USE & ENVTL. L. 25, 32-3 (1990).

82. See *Village of Euclid v. Ambler Realty*, 22 U.S. 365 (1926).

83. *Russ Bldg. P'ship v. City of San Francisco*, 199 Cal.App. 3d 1506 (App. 1987) (citing *Candid Enters. v. Grossmont Union High Sch. Dist.*, 39 Cal. 3d 878 (1985); *Loup-Miller Const. Co. v. City of Denver*, 676 P.2d 1170 (Colo. 1984).

quality of life, the town implemented the first New Urbanist<sup>84</sup> code in the state. The local leadership in Davidson recognized that, in order to maintain and improve the small-town qualities attracting the new residents, it needed a plan and a code emphasizing sustainable development and alternative forms of transportation. Incorporating the principles of New Urbanism, the code focuses on building and development types instead of use and dimensional requirements and mandates a mixed-use pedestrian-oriented environment reminiscent of Davidson's historic past. The code also encourages walkable communities, well designed architecture and urban form reflective of the small-town character, a mix of compatible uses based on building types, preservation of the small-town character, and safeguarding and utilization of open spaces.<sup>85</sup> Improving the quality of life in Davidson is the underlying goal of the new code.

In order to facilitate the implementation of the code and plan, the town adopted an APFO specifically furthering the New Urbanist goals embodied in the Davidson Planning Ordinance. Authorized by the state of North Carolina, this APFO applies to intersections, fire protection, law enforcement, affordable housing, greenways, and community parks.<sup>86</sup> According to the CIP, capacity for intersections, fire protection, and law enforcement are scheduled for the first year, while the other services are scheduled to be available in the third year.<sup>87</sup> The APFO applies to any development, use, or project that results in a new dwelling unit, excluding those that are part of a previously approved master plan. Developments proposing more than 20 units must submit a traffic impact analysis, complete with analysis for intersections within tier 1 (urban areas), tier 2 (suburban areas), and tier 3 (rural areas), each with corresponding levels of service depending on the facility.<sup>88</sup> The department makes a determination based on the analysis and the availability of facilities. If facilities are not available, the developer may

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84. New Urbanism, or neo-traditional development, creates communities based on fundamental characteristics often associated with small towns and traditional neighborhoods. Communities are designed to include a mixture of uses, pedestrian oriented streets, interconnected street systems, ample public spaces, and architecture relating to the surrounding context and local history. This type of development is in contrast to the standard form of post World War II development featuring auto dominated transportation systems, segregated uses, and non-contextual architecture.

85. TOWN OF DAVIDSON, DAVIDSON PLANNING ORDINANCE, 1.0 GENERAL PRINCIPLES FOR PLANNING IN DAVIDSON 2-3, *available at* <http://www.ci.davidson.nc.us/blobbuilder.asp?BLOBID=34> (last visited Sept. 20, 2003).

86. TOWN OF DAVIDSON, DAVIDSON PLANNING ORDINANCE, 18.0 ADEQUATE PUBLIC FACILITIES ORDINANCE 2-3, *available at* <http://www.ci.davidson.nc.us/blobbuilder.asp?BLOBID=66> (last visited Sept. 20, 2003).

87. *Id.* at 15.

88. *Id.* at 7.

advance facilities as long as advancement will not cause deterioration in the adopted LOS standards and certain other financial conditions are met.<sup>89</sup>

Another North Carolina community that adopted an APFO is the area of Concord and Cabarrus County. Like the town of Davidson, Concord and the surrounding Cabarrus County are experiencing tremendous population and economic growth fueled by the city of Charlotte. This growth is reminiscent of the earlier boom in the region when the Cannon and other cotton and textile mills developed in the nearby city of Kannapolis. To deal with the more recent suburban growth, Cabarrus County developed a unified development code that included an APFO provision. The county allowed voluntary adoption of the unified development code by the municipalities within the county as a means to promote intergovernmental coordination towards addressing the countywide growth. The city of Concord voluntarily adopted the APFO portion of the unified development code. The city starts the APFO process when a developer applies for conditional re-zonings, major or minor site plans of projects that generate 2000 or more trips per day, major or minor site plan approval of a multi-family or attached single-family residential project (APFO review for school capacity only), and preliminary review of major subdivisions.<sup>90</sup> The ordinance also employs the concept of equivalent residential units (ERU). Under the ERU approach, if the demand for public facilities created by a proposed development is equivalent to that of one dwelling unit, then the development is subject to the ordinance.<sup>91</sup> The APFO applies to water, sewer, roads, and schools.<sup>92</sup> Like Davidson's ordinance, the APFO separates the community into tiers 1, 2, and 3, with corresponding levels of service depending on the facility.

The Concord-Cabarrus County ordinance is special because it is multi-jurisdictional. The APFO was successfully enacted through intergovernmental agreements with state agencies, independent water/sewer districts, and adjacent local governments. Intergovernmental agreements provide for the enforcement of LOS standards as well as the provision of public facilities and services pursuant to a CIP to serve projected new development. Often, however, either a city or a county will adopt an APFO, but not both, thus curtailing the benefits of regional planning efforts. Another challenge for the area was the fact that the reviewing agencies did not necessarily provide the services included in

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89. *Id.* at 12.

90. CONCORD, NORTH CAROLINA, UNIFIED DEVELOPMENT ORDINANCE 14.1.3.1, *available at* <http://www.ci.concord.nc.us/planning/udo/Index.htm> (last visited Sept. 20, 2003).

91. *Id.*

92. *Id.* tbl. 14-2.

the LOS standards and cannot compel the provision of such facilities. The failure of another entity to expand a facility when needed to allow for development approval could result in a de facto moratorium, thus creating the possibility of legal challenges and potential interference with the timing and sequencing objectives of the APFO. Concord-Cabarrus County solved this problem through the use of intergovernmental agreements.

### **Hillsborough County, Florida**

Encompassing the city of Tampa, Hillsborough County has experienced tremendous growth within the past 30 years. Recently the County adopted a revised zoning code and comprehensive plans incorporating several principals of New Urbanism. Like the Town of Davidson, Hillsborough County recognized that contemporary development patterns threaten the county's quality of life and the Florida environment.

In addition to incorporating New Urbanist principals into the Land Development Ordinance, the APFO complied with Florida's mandatory concurrency requirements. Deriving from the state's 1985 statewide planning legislation,<sup>93</sup> the concurrency regulations forbid the issuance of development permits by a local government if the impacts of the development cause a deterioration in adopted LOS standards. Local governments are required to prepare and adopt a comprehensive plan, including a capital improvements element containing "standards to ensure the availability of public facilities and the adequacy of those facilities including acceptable levels of service."<sup>94</sup> The state law further requires that communities enact land development regulations to implement the concurrency requirements.<sup>95</sup> The state law requires concurrency for water, sanitary sewer, solid waste, stormwater management, transportation, and parks and recreation.

However, not wanting to place a burden on projects conforming to the principals of New Urbanism and projects conforming to Smart Growth principles, the Hillsborough APFO contains predetermined thresholds for impacts caused by New Urbanist and other Smart Growth projects. These thresholds act as incentives to encourage development based on New Urbanism rather than conventional suburban development. The APFO assumes that since a traditional neighborhood development is walkable and provides for adequate transit, it will generate only a limited amount of automobile trips. Also, given an infill

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93. FLA. STAT. ANN. § 163.3161-3215 (West 2003).

94. FLA. STAT. ANN. § 163.3177(3) (West 2003).

95. FLA. STAT. ANN. § 163.3202(2)(g) (West 2003).



project, the APFO assumes that adequate facilities are already in place and that additional development will not place an additional burden on the system. This concurrency waiver encourages urban infill and redevelopment while discouraging sprawl. These exceptions also reflect the fact that new development in downtown and infill areas will not so adversely affect LOS standards as to preclude the benefits. The concurrency ordinance also includes transportation concurrency management areas, a device that utilizes the existing framework of roads and allows for multiple, viable alternative travel paths or modes.

### **Albuquerque, New Mexico: The Planned Growth Strategy**

In 2002, the Albuquerque City Council adopted the Planned Growth Strategy (PGS), a comprehensive system designed to direct future growth in the Albuquerque/Bernalillo County region.<sup>96</sup> The PGS was developed by the city and Bernalillo County through a series of public workshops, technical studies by a variety of consultants, and local planning staff. During this process, consultants and planning staff developed goals and policies for regional growth and tested the fiscal impacts of various growth scenarios. The PGS states six major guiding principles:<sup>97</sup>

- (1) The location of population and employment growth should be phased and timed to achieve community goals. This goal is represented by the PGS Preferred Alternative.
- (2) Critical infrastructure capacity (streets, parks, schools, water, sewer, and storm drainage) is available to support urban growth.
- (3) The needs of growth, rehabilitation, and the correction of existing infrastructure deficiencies are fully funded.
- (4) Implementation is guided by adopted plans, *e.g.*, corridor plans, neighborhood plans, redevelopment plans, and area plans.
- (5) Charges for infrastructure to support growth reflect the costs of growth to the community.
- (6) The system is flexible.

The PGS identifies short-term (growth to occur within the next ten years) and long-term (growth to occur from ten to twenty-five years) growth areas.<sup>98</sup> These growth areas can be viewed in several different ways. First, the areas reflect the community's objectives about the location and density of development. Second, these areas reflect the

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96. At the time this article was written, Bernalillo County had not adopted the PGS.

97. CITY OF ALBUQUERQUE, PLANNED GROWTH STRATEGY SECTION 2: IMPLEMENTATION 170 (2002), available at <http://www.cabq.gov/council/Part2-5.pdf> (last visited Sept. 20, 2003).

98. *Id.* at 170-71.

community's goals about the timing and sequencing of development. In other words, the fully served areas may be more appropriate for higher densities and should be developed prior to new development in unserved areas.

The PGS includes a "Preferred Alternative" for development of the community, which is based, in part, on the availability of infrastructure in the community. The location of infrastructure is divided into three broad "tiers."<sup>99</sup> Generally, the "Fully Served Areas" (FSAs) contain the full range of urban infrastructure and "Partially Served Areas" (PSAs) have some, though not all, of the necessary infrastructure and services. Outside of the FSAs and PSAs lie the "Unserved Areas" (UAs), which lack all or most of the needed infrastructure and services.

A number of tools, including APFOs, have been identified to implement the Preferred Alternative. APFOs are an appropriate tool for PGS implementation for four critical reasons. First, an adequate planning basis must be established for the implementation tools,<sup>100</sup> and while the community has numerous plans, none of these plans call for implementation in the context of current land use controls. Nevertheless, the existing plans provide ample basis for moving from planning to implementation. A comprehensive tool, such as an APFO, could tie together many of the policies scattered among the various plans into one set of standards. This not only provides a bridge from the community's land use and infrastructure policies to new development proposals, but it also offers predictability for service providers and developers who now face a bewildering array of policies when undertaking service expansion or development decisions.

Second, the CIP/APFO approach is sufficiently flexible to be mandatory or incentive-based, or a combination of both approaches. A purely mandatory system would directly tie issuance of development permits to LOS standards for infrastructure. A purely incentive-based system would tie the LOS only to increases in density or other regulatory or financial incentives. In practice, most communities use a mandatory system, though some communities (such as Montgomery County, Maryland, and Orlando, Florida) use a sophisticated blend of mandates and incentives. While mandatory systems are generally more effective, they are less acceptable to the development community. In practice, a system of incentives is advisable to tailor the APFO to the location and design policies of the PGS and to offset some unintended negative consequences of the system. Incentives might include a transfer of

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99. For more information on tier systems, see Robert H. Freilich, *Smart Growth in Western Metro Areas*, 43 NAT. RESOURCES J. \_\_\_\_ (2003).

100. See CITY OF ALBUQUERQUE, *supra* note 97, at 172.

development rights (TDR) program or use of exemption or capacity set-asides for affordable housing.

Third, while no system can ensure that all costs are fully funded, the variable CIP/APFO approach increases the likelihood that critical infrastructure capacity will be available to serve urban growth. This is because expansion of infrastructure is tied to LOS standards that make sense for particular areas of the community, rather than a uniform approach. Areas where capacity cannot be expanded for policy reasons can be assigned a lower LOS or exempted from an APFO altogether. This creates an incentive for the development of infill areas by removing a step in the development approval process. By using a reasonable, long-term CIP in other areas of the community and a combination of public and private financing, resources otherwise committed to post-hoc capacity in low priority areas can be committed to maintenance and rehabilitation. Further, a long-range constrained CIP ensures that the community is also making land available to future development to accommodate an expanding population and employment base.

Finally, a varied LOS approach ensures that infrastructure charges reflect the true costs to the community. This is because development approvals specified in the system<sup>101</sup> cannot proceed unless the LOS standards will be met. The cost of providing the facilities needed to meet the LOS will be identified in the CIP. Developers can choose to phase their development to match the build-out of infrastructure, based on the area's LOS, or to voluntarily advance the facilities with a development agreement. A varied approach also provides a basis for determining whether an area "may be provided with municipal services" for purposes of evaluating annexation proposals under the Municipal Boundary Commission legislation<sup>102</sup> and similar statutory requirements.

## CONCLUSION

Concurrency ordinances are an effective means to manage the timing and phasing of public services and infrastructure in a community and will guarantee that all new residents receive services. Concurrency ordinances are more advantageous than other traditional land use controls because they directly control the level of population and

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101. The categories of land use approvals subject to the system, as well as the consequences of not meeting the LOS standard, are a major policy decision for the community. This report is not intended to suggest that an outright moratorium be imposed where an LOS standard is not met. However, increases in density and the staging of development can be tied to the LOS without resorting to a moratorium.

102. N.M. STAT. ANN. § 3-7-15 (Michie 1978).

employment growth, which represents a major component of roadway demand. Concurrency ordinances also are more popular than some traditional land use controls because they necessitate exact standards against which proposed development can be measured, thereby reducing the likelihood of a successful legal challenge. Moreover, APFOs can serve as the springboard for other innovative land use controls, such as traffic demand management ordinances, transfer of development rights, negotiated exactions, and impact fees, and may be used to meet other comprehensive planning goals relating to urban development patterns and affordable housing. While they will not stop growth, down zone property, deter economic development, or raise housing prices, nor are they a catchall solution to growth management. They are one tool in the planning toolbox to help a community meet their expectation of growth and visions for the future.