

THE DEVELOPMENT OF REGIONAL IMPACT IN FLORIDA'S GROWTH MANAGEMENT SCHEME: THE CHANGING ROLE IN REGIONALISM

JOSEPH VAN ROOY*

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I. INTRODUCTION

Florida's growth management legislation is among the most sophisticated in the nation. But, in recent years, many have noted the prevalence of strained infrastructure and ugly sprawl, and have questioned the ability of Florida's existing legislation to adequately and effectively manage its rapid growth. As the recent Growth Management Study Commission Report states, "although the processes established by [the existing growth management laws] were well intended, the quality of growth has not met our expectations, the strains on infrastructure have been only marginally reduced and, in essence, . . . a more complicated, more costly process [has been established which does not provide] the expected corresponding benefits."¹ Although this was written about Florida's growth management laws as a whole, many would assert that it could have been written about Florida's Development of Regional Impact (hereinafter DRI) program specifically.

*. Joseph J. Van Rooy is an attorney with the Northeast Florida law firm of Pappas, Metcalf, Jenks, & Miller, P.A. Mr. Van Rooy received his J.D. and M.S.P. from Florida State University in 2003. This article was prepared as the author's master's thesis for the Florida State University Development of Urban and Regional Planning. He wishes to thank his wife, Tara B. Van Rooy for her support throughout the project

1. A LIVEABLE FLORIDA FOR TODAY AND TOMORROW, FLORIDA'S GROWTH MANAGEMENT STUDY COMMISSION FINAL REPORT, STATE OF FLORIDA, 13 (2001).

The DRI program exists to give regional interests a voice at the bargaining table concerning large developments that are expected to have an impact on the region.² Typically, absent the DRI, seats at this bargaining table would be reserved only for the developer and the local government with permitting authority. Without the DRI program there would be very little opportunity for input from neighboring local governments about developments within the region that may have a direct effect on the neighboring local government.

The DRI has regional planning intentions, but, strong localist tendencies within Florida's legislature have signaled a retreat from that intent over time. The DRI program has been amended a number of times since its inception, and Florida's implementation of other growth management legislation has reduced its role. However, the DRI's basic operation has remained largely unaffected. Regional planning councils are required to analyze the effect of a proposed DRI on the region and issue reports to the local government. The recommendations in the reports are not binding on the local governments but are used by the local government in development order negotiations with the developer. Decision making authority is largely retained by the local government.

The DRI program in Florida was created amongst great controversy, a controversy that has plagued the program for the last 30 years. As a result, the program has been frequently amended in order to make the program more developer-friendly and less duplicitous.³ The amendments to the DRI process are more

2. The DRI is defined as "development which, because of its character, magnitude, or location, would have a substantial effect on the health, safety, or welfare of citizens of more than one county." FLA. STAT. § 380.06 (1)(2002).

3. The DRI review is intended to examine the impacts of the development that will be felt regionally. While consideration is given to regional effects, these are closely related to, and derive from the more local effects of the development. The result of this relationship is the common complaint of duplication that is associated with the DRI. Notwithstanding the rigorous review associated with the DRI process, the DRI developer must also, in completely separate applications and proceedings from the DRI process, satisfy all of the local government's permitting requirements, including amendments to the local government's comprehensive plan and/or its zoning map. At these proceedings, the local government will regularly seek further exactions from the DRI developer, above and beyond the exactions made in DRI negotiations.

streamlined and certain.⁴ However, by many accounts, the DRI remains a cumbersome, expensive,⁵ time-consuming process.⁶

Localist and Regionalist theories of planning, and to a lesser extent, governance, provide us with a framework for examining the evolution and the history of the DRI as it has been amended and as the context of planning in Florida has changed over time. This paper uses those theories as a way of explaining and evaluating the evolution of the DRI.

Part II of this paper takes a close look at the operation of Florida's DRI program. In some detail, the major statutory requirements and procedures will be discussed to provide an understanding of the DRI and to facilitate discussion of the DRI throughout the paper.

Part III of this paper explains two competing theories of planning and governance, Regionalism and Localism, each of which inherently influences growth management programs. The regionalist theory focuses on the connections and relationships between localities and looks for ways to make the relationships more efficient and equitable. The localist theory is based in small government and the importance of property rights in the American system. The DRI program has attempted to blend these two conflicting theories. It has done so by providing a means of regional comment and review, while permitting remains at the local level.

Part IV of this paper discusses the evolution and development of land use regulation, with particular attention paid to Florida's experience. The Environmental Land and Water Act of 1972 created the DRI program. For thirteen years, the DRI was the central element of development regulation in Florida. The role of the DRI in the Florida system changed with the passage of the Growth Management Act of 1985. The DRI became just one important part of a more comprehensive whole, and concurrency

4. Ms. Alex Magee, 1000 Friends of Florida, telephone interview (February 27, 2003). Prior to associating with 1000 Friends of Florida, Ms. Magee was the DRI Administrator for the Florida Department of Community Affairs, and also worked with DRI at the Florida Department of Transportation. Currently, the DRI program imposes a rigid timeline for government decisions, while providing flexibility in terms of time to the developer. The statute very specifically sets forth changes that can and cannot be made to an approved DRI without requiring further DRI review. The DRI also offers increased vesting of rights. Specifics of the DRI program are discussed at greater length in section II of this paper.

5. Charles L. Siemon, *Growth Management in Florida: An Overview and Brief Critique*, in STATE AND REGIONAL INITIATIVES FOR MANAGING DEVELOPMENT 46 (Douglas R. Porter, ed., 1992). "[T]he cost of processing a typical DRI is astronomical, ranging from \$250,000 to millions of dollars." *Id.*

6. *Id.* "DRI reviews often take years despite the time limits provided by the [Act establishing the DRI program]. The delay means that developers are vulnerable to the 'it's cheaper to pay than fight' temptation." *Id.*

became the central element of the state regime. The Growth Management Act of 1993 resulted in the temporary termination of the DRI, and a substantial reduction in the authority of the Regional Planning Councils (hereinafter RPC), which play an important role in the administration of the DRI program. This analysis indicates that regionalism has not played an important role in the Florida Growth Management System. In fact, the role of regionalism has been eroded from the Florida growth management scheme over time. Furthermore, the DRI is duplicitous of other permitting programs as well as comprehensive planning. Most importantly, however, is the finding that the DRI over-regulates the wrong developments, those that are the most highly capitalized and most likely to be well planned. It over-regulates those developments that least need the oversight while ignoring those that tend to be most problematic, undercapitalized, poorly planned, sub-DRI threshold developments, built by inexperienced or non-professional developers.

Part V is the conclusion, which summarizes the main themes of the paper and provides some parting thoughts.

II. A CLOSE LOOK AT FLORIDA'S DRI PROGRAM

The DRI brings a limited regionalist approach to Florida's growth management scheme by "establish[ing] a process for in-depth review of certain large developments by one of Florida's eleven regional planning councils."⁷ The RPC acts as an intermediate reviewing body.⁸ The RPC "has an influence on local decisions, even though no formal hearing is held, or decision made, at the regional level."⁹ The Model Code, on which Florida's growth management laws were based, had no inclusion of RPCs as a major participant in the review process.¹⁰ Rather this innovation was made by the State of Florida.¹¹ "This shift in the structure of the law has likewise shifted much of the conflict over DRI applications to the local and regional levels [from the state level under the ALI]¹²

7. FINAL REPORT OF THE ENVIRONMENTAL LAND MANAGEMENT STUDY COMMITTEE, STATE OF FLORIDA, 38 (1984) [hereinafter ELMS II REPORT].

8. DANIEL R. MANDELKER, ENVIRONMENTAL AND LAND CONTROLS LEGISLATION 116 (1976).

9. *Id.*

10. *Id.*

11. *Id.*

12. The American Law Institute was established in 1923:
to promote the clarification and simplification of the law and its better adaptation to social needs, to secure the better administration of justice, and to encourage and carry on scholarly and scientific work. The Institute drafts for consideration by its Council and its membership and then publishes various Restatements of the Law, Model Codes, and other

model code], as relatively few applications” are appealed to the Florida Land and Water Adjudicatory Commission,¹³ an administrative body that will be discussed further in this section.

The review of the proposed development by the RPC must be completed before the local government allows the development to move forward.¹⁴ The DRI developer must file an application for development approval with the local government with permitting authority, the RPC, and any other local, regional, or state agency.¹⁵ The RPC must then prepare and submit a report to the local government containing recommendations on the regional impact of the proposed development.¹⁶ The RPC’s report must address whether:

- 1) [t]he development will have a favorable or unfavorable impact on state or regional resources or facilities identified in the applicable state or regional plans; . . . 2) [t]he development will significantly impact adjacent jurisdictions; . . . 3) the development will favorably or adversely affect the ability of people to find adequate housing reasonably accessible to their places or employment.¹⁷

The RPC can then request that other applicable agencies review the proposed development, and prepare reports concerning the agency’s particular expertise.¹⁸ One commentator has said that this government report-generating requirement, “looks more like an environmental assessment process than a statute aimed at state review of development projects that serve more than local needs. For this reason, the Florida law may have as much kinship with the environmental impact statement requirement of the National Environmental Policy Act as with the [Model] Code.”¹⁹

Developers or any other substantially affected parties are permitted to bring forth evidence to the head of the RPC to help the RPC make its recommendations.²⁰ The recommendations, once

proposals for law reform.

<http://www.ali.org> (last viewed January 21, 2004).

13. *Id.*

14. FLA. STAT. § 380.06(6)(a)(2002).

15. James C. Nicholas & Ruth L. Steiner, *Growth Management and Smart Growth in Florida*, 35 WAKE FOREST L. REV. 645, 655 (2000); FLA. STAT. § 380.06(10)(a).

16. FLA. STAT. § 380.06 (12)(a).

17. *Id.* at § 380(12)(b).

18. *Id.* at § 380.06(12)(b).

19. MANDELKER, *supra* note 8, at 115.

20. FLA. STAT. § 380.06(12)(c).

made, are sent to the local government.²¹ The local government then decides if the development “shall be approved, denied, or approved subject to conditions, restrictions, or limitations.”²² In making this decision, “the local government shall consider whether, and the extent to which: (a) [t]he development is consistent with the local comprehensive plan and local land development regulations; (b) [t]he development is consistent with the report and recommendations of the regional planning agency; . . . and (c) [t]he development is consistent with the State Comprehensive Plan.”²³ Interestingly, as calculated in 1984, “[a]pplications are approved without conditions 9% of the time. They are approved with conditions 84% of the time, and denied only 7% of the time.”²⁴ The local government then must hold a public hearing,²⁵ and within 30 days of the hearing, render a development order concerning the application.²⁶ The development order:

1) [s]hall specify the monitoring procedures and the local official responsible for assuring compliance by the developer with the development order; 2) [s]hall establish compliance dates for the development order . . . ; 3) [s]hall establish a [date that development rights vest and the DRI] shall not be subject to downzoning . . . unless the local government can demonstrate that substantial changes in the conditions underlying the approval of the development order have occurred or the development order was based on substantially inaccurate information provided by the developer . . . or is essential to the public health, safety, or welfare; and 4) [s]hall specify the requirements [and contents] of the biennial report.²⁷

There is an appeal process available to the owner, the developer, or the Department of Community Affairs from the local government

21. *Id.* at § 380.06(12).

22. *Id.* at § 380.06(14).

23. *Id.*

24. Nicholas & Steiner, *supra* note 15, at 656. It is difficult to assess what the high approval rate means without knowing the extent of the conditions imposed, and/or the ability to compare the initial proposal to the final resulting DRI. However, in a negotiating process, one would expect there to be concessions on the part of both parties, so the high rate of approvals with conditions is as expected.

25. FLA. STAT. § 380.06(11).

26. *Id.* at § 380.06(15)(a).

27. *Id.* at § 380.06(15)(c).

development order.²⁸ The appeal is heard by an Administrative Law Judge, “who forwards . . . recommended findings of fact, conclusions of law, and final development orders” to the Florida Land and Water Adjudicatory Commission who has final order authority.²⁹ This Commission is made up of the Governor and the Cabinet.³⁰ A notice of appeal must be filed with the Commission within 45 days of the development order being rendered.³¹ Also, “[u]pon the request of an appropriate regional planning council, affected local government, or any citizen, the [Florida Department of Community Affairs] shall consider whether to appeal the order and shall respond to the request within the 45-day appeal period.”³²

The Commission is to issue a decision granting or denying permission to develop pursuant to ‘the standards of this [Chapter].’ The difficulty with this provision is that the Act only provides factors for consideration by the regional planning [councils] and by the local governments that initially review DRI applications. As in the [Model] Code, these factors do not contain substantive review criteria or standards. The reference to the “standards of the [Chapter]” is therefore ambiguous.³³

Usually, however, appeals are made either because a DRI is inconsistent with the local, regional, or state comprehensive plan, or, the appeal concerns differing opinions about the impacts of a development and the corresponding mitigation required.³⁴

The act limits the local government’s ability to exact land, public facilities, or funds to the amount necessary to mitigate the effects of the DRI.³⁵ The statute also includes an adequate public facilities requirement, which prohibits a local government from approving a

28. *Id.* at § 380.07.

29. *Id.* at § 380.07(4); Siemon, *supra* note 5, at 40.

30. *Id.* at § 380.07(1).

31. *Id.* at § 380.07 (2).

32. *Id.*

33. MANDELKER, *supra* note 8, at 116.

34. David L. Powell, *Managing Florida’s Growth: The Next Generation*, 21 FLA. L. REV. 223, 329 (1993) [hereinafter Powell, *Managing*]; Magee, *supra* note 4.

35. FLA. STAT. § 380.06(15)(d)-(e). This language limiting the power of local government may not be necessary, as these situations would likely fall under the limitations within the 5th and 14th amendments of the United States Constitution. See *Nollan v. Calif. Coastal Commn.*, 483 U.S. 825 (1987) (essential nexus) and *Dolan v. City of Tigard*, 512 U.S. 374 (1994) (rough proportionality). However, landowners like these property rights assurances to appear in the statutes themselves.

DRI prior to ensuring that public facilities are provided consistent to the schedule in the development order.³⁶

“Once approved, a DRI development order becomes the controlling instrument for land use within the boundaries of the DRI, and the rights conferred by the development order are vested.”³⁷ The developer has the responsibility to file the development order with the clerk of the circuit court in each county in which the development is located.³⁸ The local government that issues the permit is “responsible for monitoring the development and enforcing provisions of the development order.”³⁹ This monitoring includes reviewing and requesting the biennial report from the developer.⁴⁰ Every two years, the developer is responsible for submitting this report to the local government that issued the development order, the RPC, and the Department of Community Affairs.⁴¹ Failure by the developer to provide the report to any of the parties will ultimately result in a suspension of the development order.⁴²

The statute very specifically sets out what changes to the development are, and are not, allowed, without subjecting the development to further DRI review.⁴³ For example, the statute includes “[a]n increase in the number of hospital beds by 5 percent or 60 beds, whichever is greater” shall constitute a substantial deviation and shall cause the development to be subject to further DRI review.⁴⁴

Also addressed by the statute are comprehensive applications for developments involving two or more DRIs,⁴⁵ Downtown Development Authorities,⁴⁶ the adoption of rules by the Department of Community Affairs,⁴⁷ exemptions from the statute,⁴⁸ areawide DRIs,⁴⁹ the abandonment of the DRI,⁵⁰ and a dispute resolution process available to the developer when they are in doubt as to their rights, responsibilities, and obligations under a development order.⁵¹

36. FLA. STAT. § 380.06(15)(e).

37. Siemon, *supra* note 5, at 40; FLA. STAT. § 380.06(20).

38. FLA. STAT. § 380.06(15)(f).

39. *Id.* at § 380.06(17).

40. *Id.* at § 380.06 (18).

41. *Id.*

42. *Id.*

43. *Id.* at § 380.06(19).

44. *Id.* at § 380.06(19)(b)(3).

45. *Id.* at § 380.06(21).

46. *Id.* at § 380.06(22).

47. *Id.* at § 380.06(23).

48. *Id.* at § 380.06(24).

49. *Id.* at § 380.06(25).

50. *Id.* at § 380.06(26).

51. *Id.* at § 380.06(27). More specific DRI rules and procedures can be found in Chapter

The DRI is, therefore, effectively a mandatory, formalized development agreement process for developments over a given size.⁵² The focus is on the development order, which lays out the limits of the development as negotiated⁵³ by the developer and the local government. The DRI process affords the developer more vesting of rights than other types of approvals.⁵⁴ Also, the time frames set forth in the statute provide a lot of flexibility to the developer, while imposing a very firm schedule for the government entity responding to the developer's actions.⁵⁵ While regional oversight is provided by the RPC in the form of its report, the DRI's localist roots are clear as the findings in the report are not binding on the local government.⁵⁶ It is largely up to the local government to determine how much weight is to be given to suggestions made by the RPC.⁵⁷ The DRI process is a frequent subject of developer complaints.⁵⁸ The process is expensive, frequently costing millions of dollars, and time consuming, often taking over two years to complete.⁵⁹ Developers often complain that the process also subjects them to a "high public profile, thus making them 'targets' for various anti-development groups."⁶⁰

III. TWO COMPETING THEORIES OF GOVERNANCE AND PLANNING

Regionalism and Localism are two competing theories of governance and planning that affect a growth management system. The DRI has provided a limited amount of regionalism in a Florida system otherwise dominated by a localist theory.⁶¹

9J-2 of the Fla. Admin. Code R. (2002).

52. DRI thresholds for residential development range from 250 units in counties with a population of less than 25,000 persons, to 3000 units in counties with a population in excess of 500,000 persons. It is worth noting, however, "that any residential development located within 2 miles of a county line shall be treated as if it were located in the less populated county." FLA. ADMIN. CODE ch. 28-24.010.

53. Most developers would argue that the upper hand in these negotiations is held by the public agencies. Nicholas & Steiner, *supra* note 15, at 656.

54. *Id.*

55. Magee, *supra* note 4.

56. FLA. STAT. § 380.06(12).

57. *Id.*

58. Nicholas & Steiner, *supra* note 15, at 655-56.

59. *Id.*; Siemon, *supra* note 5, at 46. The cost of DRI approval is a function of the sophisticated nature of DRI work. Land use planning and transportation consultants, engineers, and attorneys frequently play important roles in the DRI process. Magee, *supra* note 4.

60. Nicholas & Steiner, *supra* note 15; Siemon, *supra* note 5, at 46.

61. See Thomas G. Pelham, *Regulating Developments of Regional Impact: Florida and the Model Code*, 29 U. FLA. L. REV. 789, 814 (1977) [hereinafter Pelham, *Regulating*]. "Except for its rather perverse dalliance with regionalism, the Acts DRI provisions are unwaveringly faithful to the principle of localism." *Id.*

The American Law Institute (ALI) Model Code, on which the Florida growth management system was based, and, to an even greater degree, the Florida legislature, had the retention of local government authority as one goal or aspect of their growth management systems. This is likely due to the fact that there is a long history of local government control in the land use arena. As such, it is politically much less controversial⁶² and structurally easier to add an element of regional or state oversight, as utilized in the DRI program, than to actually change the power structure from the local government level to more regionally responsive governmental entity.

The DRI program has attempted to meld together the conflicting regionalist and localist theories of government in a fashion that has satisfied neither. One commentator has stated that “[t]he demand for regional equity and the protection of local autonomy conflict with each other, and it is disingenuous to pretend otherwise.”⁶³ Both the regional and localist theories are discussed below, and will be used to assess the evolution of the DRI and to ultimately suggest an alternative growth management structure with which to replace the DRI.

A. Regionalism

While the Florida DRI program does involve regional oversight, it is unlike the system of regional governance and planning that many academics and land planners often claim to be an ideal. These regionalist theories are based on the very real “premise that places have relationships and connections to other places that should not be ignored.”⁶⁴

The regionalist movement has existed for some time. “During the 1930s, 1940s, and 1950s, city planners and political scientists (such as Louis Mumford and New York’s Regional Plan Association) promoted the notions of regional planning and metropolitan-wide government, either to promote government efficiency or to promote a sound environment.”⁶⁵ The movement traditionally has focused on the “irrational and inefficient” duplication of services provided by the adjacent local governments in metropolitan areas.⁶⁶ The movement took root after World War II as many people began moving to the suburbs from the central city.⁶⁷ But, “[a]sking these

62. “The irresistible attraction of DRI is its political feasibility.” *Id.* at 849.

63. Gerald E. Frug, *Beyond Regional Government*, 115 HARV. L. REV. 1763, 1780 (2002).

64. Bruce Katz, *Editor’s Overview*, in REFLECTIONS ON REGIONALISM 3 (2000).

65. MANUEL PASTOR ET AL., REGIONS THAT WORK 4 (2000).

66. *Id.*

67. *See id.*

new refugees to share their local taxes, schools, and other public services with central-city residents was a hard sell indeed.”⁶⁸

Regionalists see many problems as related, for example: “urban decline increases development pressure on the suburban fringe; and government policies that facilitate fringe development and keep poor people concentrated in urban neighborhoods make it more difficult for cities to maintain their social and economic health. Their conclusion is that cross-jurisdictional problems demand cross-jurisdictional solutions.”⁶⁹

While regional governance has been utilized by a number of jurisdictions, including Portland,⁷⁰ Minneapolis,⁷¹ Indianapolis,⁷² and Jacksonville,⁷³ it still faces a difficult road ahead. However, many commentators continue to argue for “a new synthesis of physical, social, and economic planning focusing on the metropolitan region.”⁷⁴ The regionalists themselves acknowledge this tough road, but stress the importance of their mission. One regionalist described the importance of his goal as one where “[b]uilding a constituency for changes in land-use policy and governance, wresting corrective policy from 50 state legislatures, and implementing that new policy in 270 metropolitan regions and 39,004 municipalities is the most important community-building challenge to face America since the adoption of the Constitution.”⁷⁵ “The growth of small suburban municipalities around central cities over the course of the twentieth century has gradually fragmented

68. *Id.*

69. Katz, *supra* note 64.

70. Portland has a directly elected regional government, the only one in the United States. ROLF PENDALL & JONATHAN MARTIN, *HOLDING THE LINE: URBAN CONTAINMENT IN THE UNITED STATES* 21 (The Brookings Institute, August 2002).

71. Minneapolis is governed by the Metropolitan Council, created in 1967, that serves 2.5 million residents living in the 7 counties and 189 cities and townships that comprise the region. The Metro Council operates the region’s bus system, collects and treats wastewater, is a housing and development authority, is involved in planning and funding parks and trails, and also prepares long range plans. See <http://www.metrocouncil.org/about/about.htm>.

72. “Indianapolis-Marion County is the only consolidated government in the nation that was formed by an act of the state. In 1970, the Indiana General Assembly enacted legislation, “Unigov,” that consolidated these governments.” National Assoc. of Counties at www.naco.org/pubs/research/briefs/consol/cfm.

73. Robert D. Yaro, *Growing and Governing Smart: A Case Study of the New York Region*, in *REFLECTIONS ON REGIONALISM*, *supra* note 64, at 44. Jacksonville and Duval County consolidated in 1967. See ROBERT A. CATLIN, *LAND USE PLANNING, ENVIRONMENTAL PROTECTION, AND GROWTH MANAGEMENT: THE FLORIDA EXPERIENCE*, 11 n.21 (Ann Arbor Press 1997). Each one of these regions are considered a regionalist success because the people of each have seen the benefit a regional perspective can provide, and have overcome political inertia to take advantage of that perspective.

74. Stephen M. Wheeler, *The New Regionalism*, 68 J. AM. PLAN. ASS’N. 267, 268 (2002).

75. Henry R. Richmond, *Metropolitan Land-Use Reform: The Promise and Challenge of Majority Consensus*, in *REFLECTIONS ON REGIONALISM*, *supra* note 64, at 36.

metropolitan regions into tiny tax and zoning bocks. Chicago is surrounded by 262 cities; Philadelphia, 245; and New York, 765.”⁷⁶ One commentator compares the fragmentation of local government to the America of the 1780's, under the Articles of Confederation.⁷⁷ He writes, “[t]his time the question is not unworkable fragmentation with respect to common national concerns, but unworkable fragmentation with respect to metropolitan concerns—and metropolitan regions where 80 percent of the American people now live.”⁷⁸

Tarlock and Lucero explain that there are two types of fragmentation. “The gaps between the different layers of government — federal, state, and local — create a complex disconnect, which might be called ‘vertical disconnects.’”⁷⁹ “There are also conflicts between different communities within the same region, or ‘horizontal disconnects.’”⁸⁰ Regionalists are concerned with both. Fragmentation of local governments is an example of horizontal disconnects, and the permitting duplication required by Florida’s DRI program⁸¹ is an example of a vertical disconnect.

A recent adaption of the traditional regionalist movement has been by a group referred to as the neo-regionalists. This group came together in the early 1990's with common “concern[s] about suburban sprawl, traffic congestion, central city/suburban inequities, environmental degradation, and the sterility and homogeneity of the built landscape.”⁸² All these problems ultimately “raised questions of [true] regional planning, since in the absence of regional coordination, initiatives by local jurisdictions could easily be undercut by neighboring communities.”⁸³

Various members of the neo-regionalist movement focused their work in different areas, including, the new urbanist movement,⁸⁴ the transit supportive urban design,⁸⁵ and the improvement of equity within metropolitan regions, often through tax sharing.⁸⁶

76. *Id.* at 10.

77. *Id.* at 37.

78. *Id.*

79. A. Dan Tarlock & Lora A. Lucero, Connecting Land, Water, and Growth, 54(4) LAND USE L. & ZONING DIG. 4 (2002).

80. *Id.* at 5.

81. *See supra* note 3.

82. Wheeler, *supra* note 74, at 269.

83. *Id.*

84. New Urbanism is a smart growth initiative based on “traditional neighborhood design.” This requires a built environment that is 1) pedestrian scaled, 2) diverse in use and population, and 3) capable of supporting mass transit as well as the automobile. *See* ANDRES DUANY, ET AL., SUBURBAN NATION: THE RISE AND FALL OF THE AMERICAN DREAM 245-252 (2000).

85. Wheeler, *supra* note 74, at 269.

86. *Id.* at 270.

In fact, the neo-regionalists point out that some aspects of metropolitan life require a regional perspective to be effectively addressed. This is due to a disconnect between the small, fragmented size of government and the size of the economic, ecological, and social regions.⁸⁷

The economic region is a function of proximity and networking among a large number of specialized people and businesses.⁸⁸ Important to the success of any business is access to these networks, including job networks, money networks, idea networks, and networks of vendors and services.⁸⁹ “Economic relationships have always slopped over political boundaries— local, state, and national—but, because of the increasing globalization of th economy, we have seen a dramatic transformation in the past decade.”⁹⁰ Today, economic regions have even come to overshadow nations as important players in the world economy.⁹¹

The ecological region is made up of entire watersheds, agricultural territory, and ecosystems that can cover many communities.⁹² “Many of the most important environmental initiatives of the past twenty years have focused on maintaining and enhancing larger ‘ecosystems’ based on land and water patterns: the Chesapeake Bay, the Everglades, and the southwestern deserts.”⁹³

The social region includes the relationships between people of a metropolitan area, and their common identity with regional institutions and amenities.⁹⁴ It also includes the transportation networks that allow the people in a region to interact.⁹⁵ The necessity of the regionalist approach is most evident “with regard to ‘hard’ urban infrastructure — transportation, water delivery, sewage treatment and disposal, and the like — which must necessarily operate at a regional scale.”⁹⁶

Florida is not, by any means, immune from the effects of the ‘unworkable fragmentation’ or the need for a regional perspective in regard to the economic, ecological, and social regions. 1000 Friends of Florida, a growth management watchdog group, published a series of essays by former Secretaries of the Florida Department of Community Affairs (FDCA). In these essays, each of the five

87. See PETER CALTHORPE & WILLIAM FULTON, *THE REGIONAL CITY* 17-30 (2001).

88. See *id.* at 18.

89. See *id.* at 19.

90. *Id.* at 18.

91. See *id.*

92. See *id.* at 23.

93. *Id.*

94. See *id.*

95. *Id.* at 27. Transportation is also an important factor in the economic region.

96. *Id.*

contributing former FDCA Secretaries cited intergovernmental coordination as a area that needs much improvement to effectively manage growth.

Tom Pelham, FDCA Secretary from 1987 to 1991, wrote:

[Florida's] growth management system has been far less successful in improving intergovernmental coordination, creating an effective regional planning mechanism, and subjecting the state government to the process. Predictably, the weak intergovernmental coordination element has been largely ineffective. Consequently, our fragmented system of 476 local governments continues to be a formidable barrier to effective growth management. Although they perform many valuable functions, our regional planning agencies have not been given the legal authority or the political and financial support needed to fill the void in intergovernmental coordination.⁹⁷

James F. Murley, Esq., FDCA Secretary from 1995 to 1999, similarly found fragmentation to be a barrier to effective growth management. He recognized that “[t]here are a variety of decision-making bodies that affect policy and planning in our communities at the local level. They often act in isolation and their decisions may have negative impacts on neighboring communities and essential statewide interests.”⁹⁸

Tom Lewis, Jr., Secretary of the FDCA from 1985 to 1987, similarly addressed the relationship between the DRI process and intergovernmental coordination when he wrote: “My hope was that by now the DRI program would have been abolished, since we would have had in place a strong program of intergovernmental coordination elements.”⁹⁹

John De Grove, FDCA Secretary from 1983 to 1985, while focusing his essay on infrastructure funding concerns, wrote “Florida needs to recognize and implement a regional approach to dealing with regional issues.”¹⁰⁰

97. Tom Pelham, *Perspectives on Growth Management*, in DCA SECRETARIES SHARE THEIR VIEWS, at http://www.1000fof.org/growth_manage_process_revision_dca_secretaries.asp.

98. James F. Murley, *Back to the Future*, in DCA SECRETARIES SHARE THEIR VIEWS, at http://www.1000fof.org/growth_manage_process_revision_dca_secretaries.asp.

99. Tom Lewis, Jr., *Florida's Growth Management Process: Success or Failure*, in DCA SECRETARIES SHARE THEIR VIEWS, at http://www.1000fof.org/growth_manage_process_revision_dca_secretaries.asp.

100. Dr. John M. DeGrove, *Growth Management in Florida: My Perspective on What Has*

This experienced group's advice should not be taken lightly. But there is a hurdle to the implementation of a regional strategy that must be acknowledged. This hurdle involves the same distribution of authority issue faced by the writers of the Model Code: localism.

B. Localism

The local government role in land use regulation primarily consists of the power to say no, or at least derives from the threat of saying no.¹⁰¹ The local government cannot actually require any development to take place within its borders.¹⁰² However, it can take action to make itself more attractive to outsiders, but this requires competing with neighboring local governments for the investment which, as discussed above, can harm the region as a whole.¹⁰³

Notwithstanding this observation, "Americans like the idea of small, accessible, responsive local governments and have not been quick to embrace larger governing bodies."¹⁰⁴ One commentator claims "[a] key reason for this reluctance to pursue regional alternatives is that local land use control remains the security blanket for suburbanites and exurbanites who seek to control the patterns of development typified by the single-family homes in which [they/we] live."¹⁰⁵

Other commentators have cited other, possibly less caustic, reasons for the continued persistence and popularity of local control in the land use arena. "First, local control provides a powerful means for enabling grass-roots participation in land-use decision making, for assuring that elected and appointed decision-makers are accountable to the public, and for facilitating regulation that is responsive to a wide variety of differing local needs, circumstances, and conditions."¹⁰⁶ The regionalization of metropolitan life, by expanding the circle of those affected by local actions without expanding the circle of participation, has undermined the democratic nature of local control. But decision-making by small-scale communities still provides an important means of enabling the

and Hasn't Worked and Why, in DCA SECRETARIES SHARE THEIR VIEWS, at http://www.1000fof.org/growth_manage_process_revision_dca_secretaries.asp.

101. See Richard Briffault, *Smart Growth and American Land Use Law*, 21 ST.L.U.P.L. REV. 253, 268 (2002).

102. See *id.*

103. See *id.*

104. Katz, *supra* note 64, at 3.

105. Peter Buchsbaum, *Neither Home Rule Nor State Mandate: A Third Way to Growth Management*, in TRENDS IN LAND USE LAW FROM A TO Z: ADULT USES TO ZONING, 235, 236 (Salkin ed. 2001).

106. Briffault, *supra* note 101, at 268.

people most directly affected by land use actions to have their voices heard and their views taken into account.

Second, land use regulation directly affects the home, a fundamental fixture of American society, which is characterized by its emotional and wealth aspects.¹⁰⁷ “[E]ven residents of the poorest communities want the measure of control over their immediate environment that local land use decision-making represents.”¹⁰⁸

Third, local control is the historic norm.¹⁰⁹ As the prevailing tradition, “[p]eople have invested in land under a certain institutional framework which they have come to know and understand.”¹¹⁰ This group may prefer local decision-making because they feel that a regionalist approach would result in more bureaucracy, more regulation and would not be as sensitive to local concerns about property rights. Many people who have had land use decisions concerning their property made at public hearings, under the current local control system, would agree that there seems to be something rather unsettling about another person having a say in the use of their property when the only interest connecting the other person to their property is the fact that they live across town. The idea of allowing more people, over a greater geographic area, to have standing to oppose a desired land use, or, to have decisions concerning allowable land uses made in a more distant governmental bureaucracy, is often, and frequently not undeservingly, viewed with suspicion.

As growth management regulation has expanded, more and more people have become concerned that land use regulations have gone too far. One author notes that “regulation has become so pervasive that even judges, scholars, and average citizens predisposed to support government have begun to fear that things have gotten out of hand.”¹¹¹ Such concerns often stem from worries related to the protection of private property rights.

Any dispute about the use of land concerns property rights. “[D]isputes about property rights reveal fundamental clashes between opposing perspectives on the proper society.”¹¹² The United States has a long tradition of property rights.

In general, purely regulatory solutions to land-use issues have become more controversial in the last 20

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. See DENNIS J. COYLE, PROPERTY RIGHTS AND THE CONSTITUTION, 13-14 (1993).

112. *Id.* at 18.

years, especially if they involve downzoning or maintaining non-urban zoning for property on the fringe of metropolitan areas that is subject to intense growth pressure. This is due in large part to a long series of property rights lawsuits brought by landowners and their advocate against government agencies, many of which have been successful in altering the “state of the law” regarding takings of property through regulation.¹¹³

These property rights cases have played an important role in keeping regulation of land reasonable, because “[r]ights, when enforced, keep procedural hurdles and substantive outcomes from becoming too abusive.”¹¹⁴

The ALI Model Code, on which Florida based its early growth management program, and even more so, the Florida legislature have been very conscious of the tradition of making land use decisions at a local, politically accountable, level. In fact, the ALI wrote that one of the most difficult issues it faced in preparing the Model Code was in the distribution of authority between the state and the local governments.¹¹⁵ As the foreword to the Model Code states:

[t]he judgment is that total localism in the regulation of land development has now become anachronistic but that recourse to the State’s authority should be confined to protecting defined values that ought not to be subordinated to competing local interests; and that even then reliance should be placed so far as possible on local agencies as organs of administration.¹¹⁶

The deference to local control that was utilized in the Model Code remains popular today, and likewise, Florida’s DRI program has remained true to this notion.

A guiding principle of both the Environmental Land Act [1972 Florida Legislation that created the DRI program] and the Model Code is that state land

113. PENDALL & MARTIN, *supra* note 70, at 20.

114. COYLE, *supra* note 111, at 6.

115. A MODEL LAND DEVELOPMENT CODE: PROPOSED OFFICIAL DRAFT, THE AMERICAN LAW INSTITUTE p. x (April 15, 1975).

116. *Id.* at xi.

management policies, 'to the maximum possible extent, be implemented by local governments through existing processes for the guidance of growth and development.' Except for its rather perverse dalliance with regionalism, the Act's DRI provisions are unswervingly faithful to the principal of localism. Local government retains the power initially to make all DRI decisions subject to state review under certain carefully constricted circumstances.¹¹⁷

The DRI program has changed incrementally over the years, and these changes have typically sent even more authority to the local governments. As discussed in the next section, this includes the early change from the Model Code of DRI review taking place at the state level, to the use of comparatively more local RPCs to perform the review. Other examples include exceptions made to DRI review, and the repeal of much of the RPCs' authority. The Florida legislature has ensured that the DRI remained true to the concept of local control. As a result, Florida has not adopted the regional governance model promoted by many planners and academics.

IV. EVOLUTION AND DEVELOPMENT OF GROWTH MANAGEMENT LEGISLATION

An examination of the evolution of state growth management systems would be inadequate without at least an acknowledgment of the environmental movement which played an important role in shaping early growth management legislation.

A. *Federal Environmental Regulation*

In late 1960s and early 1970s, a new awareness emerged toward the physical environment. The years 1970 to 1980 particularly experienced an explosion of federal environmental law, including the passage of such important and ground breaking federal environmental laws such as the National Environmental Policy Act¹¹⁸ (1969), the Clean Air Act¹¹⁹ (1970), the Clean Water Act¹²⁰ (1972), the Endangered Species Act¹²¹ (1973), the Resource

117. Pelham, *Regulating*, *supra* note 61, at 814 (quoting in part FLA. STAT. § 380.021(1975)).

118. 42 U.S.C. §§ 4321-4370f.

119. 42 U.S.C. §§ 7401-7671q.

120. 33 U.S.C. §§ 1251-1387.

121. 16 U.S.C. §§ 1531-1544.

Conservation and Recovery Act¹²² (1976), and the Comprehensive Environmental Response, Compensation, and Liability Act¹²³ (1980).

There has, however, never been explicit federal land use regulation.¹²⁴ In 1974, The Land Use Planning Act, which would have provided \$800 million in three to one matching grants to states that developed a comprehensive land use planning process, was defeated in the United States House of Representatives by seven votes.¹²⁵ In 1975, a similar act, the Land Use Resource Conservation Act, also failed to become law.¹²⁶

While this period has been most frequently noted for the development of federal environmental laws, it was also during this time, and out of the prevailing heightened sense of environmental awareness, that state growth management laws developed.¹²⁷

B. State Land Use Regulation

Prior to the 1970s, many states used basic zoning and subdivision regulations, but the 1970s saw an increase in the sophistication of land use controls. This time period has been called the “Quiet Revolution in Land Use Control,” with states asserting more control over land use decisions that were formerly thought to be only local in nature.¹²⁸

Land use controls are a function of the state’s police power.¹²⁹ “The state may delegate the police power to local government, and by this delegation, local government has the authority to regulate the use of land in the service of community health, safety, morals, and welfare.”¹³⁰ This delegation of general zoning authority requires enabling legislation from the state to the local government.

Local control of zoning was challenged and affirmed in *Village of Euclid v. Ambler Realty*.¹³¹ “The parties seeking to invalidate Euclid’s ordinance, in an argument foreshadowing the contemporary regionalist critique of local zoning, stressed that Euclid was ‘a mere suburb of the city of Cleveland’ and thus not really a free standing community.”¹³² They argued that industrial development denied by

122. 42 U.S.C. §§ 6901-6992k.

123. 42 U.S.C. §§ 9601-9675

124. COYLE, *supra* note 111, at 223.

125. *Id.*

126. *Id.*

127. MANDELKER, *supra* note 8, at 2-14.

128. David L. Powell, *Growth Management: Florida’s Past as a Prologue for the Future*, 28 FLA. L. REV. 519, 521 (2001) [hereinafter Powell, *Growth Management*].

129. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

130. JULIAN C. JUERGENSMYER, *FLORIDA LAND USE LAW*, Ch.2 at 1 (2d ed. 1998).

131. 272 U.S. 365 (1926).

132. Briffault, *supra* note 101, at 261.

Euclid's local government would only be pushed on a different, neighboring suburb within the Cleveland metropolitan area.¹³³ "The Supreme Court, however, rejected the implied claim that Euclid was too small a piece of the Cleveland Region to be allowed to zone autonomously."¹³⁴ The court wrote: "[t]he village, though physically a suburb of Cleveland, is politically a separate municipality, with powers of its own and authority to govern itself as it sees fit, within the limits of the organic law of its creation and the state and federal Constitutions."¹³⁵ This decision, is typically considered a "big win" for planning interests because it officially recognized zoning as an appropriate activity for a city. But, the regionalists might view the Supreme Court's decision in *Euclid* as a double-edged sword. This may be because the decision may have potentially harmed planning interests in the long run by legitimizing the practice of creating small, independent, suburbs around large urban centers, fragmenting a region's power structure.¹³⁶

1. *Two Waves of State Land Use Control*

One well-known commentator has asserted that "[s]tate interest in growth management has occurred in two fairly distinct waves, the first of which, in the early 1970s, stressed environmental concerns, and the second of which, beginning in the mid-1980s, emphasizes a broader array of issues."¹³⁷ In light of the strength of, and broad interest in, the environmental movement in the early 1970s, this two wave growth management process makes sense. This is because, "[a]s a political matter probably the most feasible method of moving towards a well-planned system of state land use regulation is to begin with a regulatory system that concentrates on a few goals that are generally perceived as important, and then to gradually expand the system by adding more comprehensive planning elements."¹³⁸ During the first wave, preserving the environment came to the foreground as a very important issue.

133. *Id.*

134. *Id.*

135. 272 U.S. at 389.

136. This problem was discussed in section III. A. of this paper. See Jay Wickersham, *Jane Jacobs's Critique of Zoning: From Euclid to Portland and Beyond*, 28 B.C. ENVTL. AFF. L. REV. 547 (2001) for a further exploration of modern implications of Euclidean Zoning.

137. John M. DeGove, *Growth Management and Governance*, in UNDERSTANDING GROWTH MANAGEMENT, 22, 23 (Urban Land Institute, 1989).

138. Powell, *Growth Management*, *supra* note 128, at 521-22.

a. The First Wave

The first wave involved environmental and citizen groups who were frustrated with the localist status quo because they felt that local governments either would not, or could not protect the environment in their management of growth.¹³⁹ Therefore, the environmental and citizen groups demanded the adoption of a regionalist perspective and a larger role for the state in control of land use.¹⁴⁰ In six states, including Vermont in 1970, Florida in 1972, California (coastal) in 1972, Oregon in 1973, Colorado in 1974, and North Carolina (coastal) in 1974, legislatures enacted laws creating growth management schemes.¹⁴¹ These laws frequently incorporated varying amounts of regionalist theory “by mandating certain actions by state, local, and, where applicable, regional agencies aimed at strengthening the capacity of these states to manage growth so as to avoid the negative impacts of unplanned, haphazard development that was at a high level in each of these states.”¹⁴² These states were then forced to face the difficult question of deciding what the role of each level of government — local, regional, and state — would play in the management of growth.¹⁴³ Each state answered this question of allocation of authority differently.¹⁴⁴ The solutions range from strong state and regional solutions, to those that retain strong local government control.¹⁴⁵ As such, the programs will be discussed in that order, beginning with California, with a very strong state role, to Oregon which was particularly innovative, to Vermont and Colorado, with their state and regional solutions inspired, like Florida, by the ALI Model Code, and finally, to North Carolina, which retained the most local control.

California’s coastal program had a very strong state role. The program, created in 1972, “imposed strict restrictions on the use of coastal [property].”¹⁴⁶ At first, California’s law ignored homerule issues completely.¹⁴⁷ “It placed the responsibility for planning and managing the coast in the hands of a state coastal commission appointed by the governor, the house and the senate, and in six

139. DeGrove, *supra* note 100, at 23.

140. *Id.*

141. *Id.* at 23-24.

142. *Id.* at 24.

143. *Id.*

144. DeGrove, *supra* note 100, at 24-40.

145. *Id.*

146. Douglas R. Porter, in *STATE AND REGIONAL INITIATIVES FOR MANAGING DEVELOPMENT*, *supra* note 5, at 6.

147. DeGrove, *supra* note 100, at 26.

regional coastal commissions.”¹⁴⁸ While local governments were cut out of the picture entirely in the beginning, in 1976, responding to local government outcry, the local governments were given responsibility for planning and permitting.¹⁴⁹

In Oregon, “the strength of the state role in a statewide process including all levels of government” drew the support of state legislators.¹⁵⁰ Even today, “[t]he Oregon Land Conservation and Development Act (LCDA) of 1973 is probably the strongest state growth management law in the nation.”¹⁵¹ All cities and counties in the state were required to create plans consistent with the state’s goals, and the plans had to be approved by the Governor appointed Land Conservation and Development Commission.¹⁵² The LCDA “require[d] the drawing of urban growth boundaries around all of the state’s cities and a metropolitan growth boundary around the Portland region.¹⁵³ Within the growth boundaries there is streamlined permit review.¹⁵⁴ Furthermore, the Portland region has a directly-elected regional government responsible for maintaining a 20-year supply of buildable land within the urban growth boundary, and provides transportation and land use planning services.¹⁵⁵ Metro, as the regional government is called, is the only directly elected regional government in the United States.¹⁵⁶ It currently encompasses all or part of 24 incorporated cities and urban portions of three counties.¹⁵⁷

Vermont’s early growth management program also had a strong state and regional role.¹⁵⁸ The program was established in 1970, and received strong bipartisan support due to the fear that uncontrolled development would destroy the state’s “special quality of life featuring small towns and farms.”¹⁵⁹ The program featured eleven district environmental commissions who were to make permitting decisions.¹⁶⁰ The commission members were lay people appointed by the governor.¹⁶¹ This effectively created a “permitting

148. *Id.*

149. *Id.* at 27.

150. *Id.* at 24.

151. PENDALL & MARTIN, *supra* note 70, at 20.

152. DeGrove, *supra* note 100, *supra* at 24.

153. PENDALL & MARTIN, *supra* note 70, at 21.

154. *Id.* at 21.

155. *Id.*

156. *Id.*

157. *Id.*

158. DeGrove, *supra* note 100, at 30.

159. *Id.* at 31. For a detailed history and explanation of the Vermont experience, see Jeffery F. Squires, *Growth Management Redux: Vermont’s Act 250 and Act 200*, in STATE AND REGIONAL INITIATIVES FOR MANAGING DEVELOPMENT, *supra* note 5, at 11-34.

160. DeGrove, *supra* note 100, at 31.

161. *Id.*

system operating essentially independent of the existing local and regional governments.”¹⁶² All development over a certain unit and acreage threshold was required to get a permit from the commission. However, the Vermont system was severely weakened because it operated until 1988 without a system of comprehensive plans, and Vermont’s local governments have opposed an increased state role.¹⁶³

Colorado encountered difficulty in the implementation of the state role in its growth management program.¹⁶⁴ Its system, as enacted in 1970, “included a State Land Use Commission with largely advisory powers.”¹⁶⁵ In 1974, amendments to the program included provisions influenced by the Model Code. These elements required local governments “to identify ‘matters of state interest,’ ([similar] to Florida’s [DRI] program and areas of critical state concern.)”¹⁶⁶ However, “[t]he Colorado story from then on is a sad one for those who support a growth management system set within a meaningful state framework of goals and policies.”¹⁶⁷ The failure of the system was largely due to the fact that while the growth management system enjoyed bipartisan support at its inception, by the 1975 Gubernatorial election, growth management became a partisan issue.¹⁶⁸ The Democratic Governor, Richard Lamm, attempted to protect the system, but conservative Republicans, who controlled the Senate and House, were able to cut the State Land Use Commission’s budget, and the Commission had to reduce its role.¹⁶⁹

In North Carolina, the state played a largely supervisory role using regional advisory committees, and the local governments retained authority.¹⁷⁰ By and large, the program required all coastal local governments to create plans.¹⁷¹

These states’ first wave programs provide a context and background to now consider the Florida program. Most of these growth management programs “have in common a change in the allocation of authority and responsibility vertically; and, at a minimum, new coordination requirements horizontally between and

162. *Id.* This aspect of the law was created because the legislature “[r]ecogniz[ed] the inability of the typical Vermont town to evaluate a large development proposal.” Squires, *supra* note 159, at 14.

163. DeGrove, *supra* note 100, at 30.

164. *Id.* at 30.

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.* “[T]he effort foundered in heavy political weather.” Siemon, *supra* note 5, at 7.

169. DeGrove, *supra* note 100, at 30.

170. *Id.* at 26.

171. *Id.*

among state agencies, and between and among cities and counties where both are players in the growth management process.”¹⁷² Each of these states was concerned about development’s effect on the environment and the quality of life in the state. While Florida’s program is not identical to any one of the other first wave programs discussed above, there are substantial similarities and differences with each of the programs.

i. The Florida “First Wave” Program

In 1970 and 1971, Florida experienced a terrible drought. Muck fires burned through the everglades, and salt water intrusion threatened the Biscayne Bay Aquifer.¹⁷³ Prompted by this crisis, and in response to the historical and widespread abuse¹⁷⁴ of the state’s land and water resources, Governor Rubin Askew called a statewide conference in August 1971.¹⁷⁵ The conference, which was called to discuss potential approaches to solving the environmental problems Florida faced, “was attended by over 150 participants, including developers, state and local government officials, federal agency representatives, and environmentalists.”¹⁷⁶

In addressing those who offered only a cautious approach, one that would not negatively affect the agendas of developers and agribusiness interests, Askew replied, ‘It is time we stopped viewing our environment through prisms of profit, politics, geography, or local and personal pride.’ He warned that ‘a failure to find appropriate solutions . . . would be disastrous to our economy as well as to our environment. The conference responded to Governor Askew’s theme by drafting a strongly worded set of findings and policy recommendations. The report stated that ‘an enforceable comprehensive land and water use plan . . . must be designed to limit increases in population . . . to a level that will ensure a quality environment.’¹⁷⁷

172. *Id.*

173. CATLIN, *supra* note 73, at 53.

174. See *id.* at 15-43, for a historical account of environmental abuse and corruption in Florida.

175. *Id.* at 53.

176. *Id.* This conference was termed the Governor’s Conference on Water Management in South Florida. See Siemon, *supra* note 5, at 36.

177. CATLIN, *supra* note 73, at 53.

Florida enacted four laws in 1972 in response to this new focus on growth and the environment.¹⁷⁸ Florida's approach differed from the other states discussed above in that it involved extensive state and regional involvement in narrowly selected areas, previously solely in the domain of local government.¹⁷⁹ The four laws were a) The Environmental Land and Water Management Act, b) The Water Resources Act, c) The Comprehensive Planning Act, and d) The Land Conservation Act.¹⁸⁰ Each piece of legislation was politically volatile, and involved many compromises.¹⁸¹

The Florida Water Resources Act of 1972 . . . created the regional water management districts, which today regulate the consumptive use of water and perform other planning and regulatory functions related to water resources. . . . The Florida State Comprehensive Planning Act of 1972 required Governor Askew to prepare a State Comprehensive Plan to articulate goals and policies to guide Florida's future growth. The Land Conservation Act of 1972 authorized the Governor and Cabinet to buy environmentally endangered lands throughout the state.¹⁸²

The centerpiece of the 1972 reforms, though, was the Environmental Land and Water Management Act.¹⁸³ This act was based on Tentative Draft No. 3 of the American Law Institute (ALI) Model Land Development Code.¹⁸⁴ It limited local government authority by imposing state oversight of developments in environmentally sensitive areas when they were designated as "areas of critical state concern."¹⁸⁵ It also "created a new regulatory process for 'developments of regional impact' (DRIs) in those local jurisdictions with local land use controls."¹⁸⁶ Florida, however, made a number of changes from the Model Code to make its adaption better fit its localist political environment. These changes included moving the DRI review process from the state level to the

178. *Id.* at 53-56.

179. DeGrove, *supra* note 100, at 28-29.

180. *Id.* at 28.

181. CATLIN, *supra* note 73, at 53-56.

182. *Id.* at 53-56.

183. Powell, *Growth Management*, *supra* note 128, at 524.

184. *Id.* at 523; Siemon, *supra* note 5, at 36-54.

185. Powell, *Growth Management*, *supra* note 128, at 523.

186. *Id.*

local and regional level.¹⁸⁷ The result of this arrangement, to this day, is that the:

[DRI] process rests primarily with the initiative and activity of developers and local government, as the regional planning agency simply prepares the regional impact statements, which are not binding on the local government. Therefore, if a local government is developer oriented, it would be difficult to maintain strong regulation The ultimate responsibility for DRI land use decisions rests with local governments, and local government can ignore the regional agency's recommendations.¹⁸⁸

The Act defined the DRI as "development which, because of its character, magnitude, or location, would have a substantial effect on the health, safety, or welfare of citizens of more than one county."¹⁸⁹

This approach to the definition of Development of Regional Impact appears to be based on the theory that the regional impact of any development is directly related to its size. In the case of residential development there is the additional assumption that the effect of development size varies directly with the size of the county; the larger the county, the larger the development must be before a regional impact occurs.¹⁹⁰

Development interests opposed the legislation because they "realized that mandatory planning tied to zoning and the Development of Regional Impact criteria plus the imposition of impact fees would be the final nail in the coffin of 'business as usual.'"¹⁹¹ For this reason, there was significant contention surrounding the passage of The Environmental Land and Water Management Act. The Florida Senate voted on the bill, Committee Substitute for Senate Bill 629, multiple times, each time amending, and re-voting. The bill finally won approval in the Senate on March 28, 1972, and included an "Explanation of Vote on CS for SB 629," written by Richard Deeb, Senator for the 22nd District. His

187. MANDELKER, *supra* note 8, at 116.

188. *Id.*

189. FLA. STAT. § 380.06(1).

190. MANDELKER, *supra* note 8, at 113.

191. CATLIN, *supra* note 73, at 59.

“explanation” illustrates the concerns of many localists, and many critics of land use regulation. The Explanation, in part, reads:

CS for SB 629 is a bill that concentrates more power in state government, usurps the zoning and planning powers of local government (after two legislative sessions geared toward placing more power in local government), discriminates against owners and developers of land and all the employees in construction and related industries CS for SB 629 was a usurpation of the property rights of individuals when it was first introduced and it was the same usurpation of property rights when the first substitute amendment was adopted.¹⁹²

In April 1972, Committee Substitute for Senate Bill 629 was passed by the Florida House of Representatives. There were multiple amendments, and attempted amendments before passage, not unlike the bill’s experience in the Senate. One House member, Ted Randell, who opposed the bill, also included a strongly worded, “Explanation” after the passage of the bill. He wrote:

In my consideration of CS for SB 629, I endeavored to weigh many factors, including the bill’s relationship to present environmental laws, its effect on home building, land development, highway construction, agriculture, and the unemployment picture. I also considered the strong possibility there might be serious and fundamental constitutional questions, and a potential hazard to local government powers.

After a thorough study of the bill, I concluded that present pollution and environmental laws, which I have favored and helped enact over the past few years, are sufficient to control the problems in that field and that progress is being made. I am strongly against creating additional bureaus with there attendant overlapping red tape.

I also concluded that CS for SB 629 was a slap at local government in that it required our city and county officials to follow the dictates of Tallahassee in

192. JOURNAL OF THE SENATE, STATE OF FLORIDA, 649, March 28, 1972.

matters of zoning, planning and serious employment problems would have to be faced in the home building and construction industries. Furthermore, debate and consideration of amendments was cut short.

For these reasons, I voted against CS for SB 629.¹⁹³

Both the Senate and the House explanations¹⁹⁴ echo many of the concerns that some people have with growth management regulations to this day. These include localism, property rights, and employment concerns.¹⁹⁵ In spite of the opposition to the DRI program, the DRI provisions quickly became the principal state land control in Florida.¹⁹⁶

The Florida legislature passed the Local Government Comprehensive Planning Act in 1975. This act “required all of Florida’s 467 cities and counties to adopt a comprehensive plan in accordance with certain procedural state standards.”¹⁹⁷ This act was written, at least in part, to make the DRI provision effective. The DRI requires that “the development must be consistent with local land development regulations,” therefore, each local government must have an “up-to-date, enforceable comprehensive plan” as the source of those land development regulations, to give the DRI provision meaning.¹⁹⁸

Meeting the requirements of the Local Government Comprehensive Planning Act (LGCPA) in 1975, however, was difficult indeed for many of Florida’s cities and counties. At the time of the LGCPA’s passage, “less than half a dozen cities and counties with populations over 10,000 had comprehensive plans prepared after 1960 The LGCPA would require 461 cities and counties to prepare plans in just three years.”¹⁹⁹ There was a very real shortage of trained planners to prepare these plans, and many of the plans reflected this shortage in their poor quality.²⁰⁰ However, “[b]y January 1980, over 300 of Florida’s 461 units of local

193. JOURNALS OF THE HOUSE OF REPRESENTATIVES, STATE OF FLORIDA, 1182, April 5, 1972.

194. Curiously, these are the only Explanations for the bill included in the Journal of the Senate and Journal of the House of Representatives. Unfortunately, those in favor of the bill apparently did not feel that an explanation discussing the bill’s importance was necessary.

195. Concerns with the DRI’s effect on the housing sector have proven to be unfounded.

196. MANDELKER, *supra* note 8, at 117.

197. CATLIN, *supra* note 73, at 57.

198. *Id.*

199. *Id.*

200. *Id.* at 58.

government had submitted plans to the Florida State Department of Community Affairs for review and comment.”²⁰¹

b. The Second Wave

Florida was among the first states to enter into what has been described as the second wave of land use controls.²⁰² During this time:

[t]he catchword became ‘balance,’ balancing the equally legitimate needs of economic development and environmental protection. Add the elusive but still very real concept of ‘quality of life’; articulate its expression through demands that infrastructure, especially transportation be adequate to support the impact of development . . . and you have the key ingredients of the ‘second wave’ of state actions in planning and growth management.²⁰³

The passage of Florida’s Growth Management Act of 1985 put the state at the forefront of this second wave. A number of other states were to follow in expanding the scope of their growth management plans, including New Jersey in 1986, Maine, Vermont, and Rhode Island in 1988, and Georgia in 1989.²⁰⁴

In Florida, the Environmental Land Management Study Committee, better known as the ELMS II committee, played an important role in the shaping of the Growth Management Act of 1985.

i. The ELMS II Committee and its Final Report

Florida’s entrance into the Second Wave of Land Use Control was prompted by disappointment and frustration with the system in place at that time. In late 1982, Governor Bob Graham appointed the Environmental Land Management Study Committee (referred to as ELMS II) and asked the members “to Review Chapter 380, and all related growth management programs, and to prepare a blueprint to guide growth and development in Florida for the [19]80’s and beyond.”²⁰⁵ The ELMS II Committee held numerous public meetings around the state to take comment on the status of

201. *Id.* at 60.

202. DeGrove, *supra* note 100, at 31.

203. *Id.* at 32.

204. *Id.* at 31.

205. ELMS II REPORT, *supra* note 7, at 1.

Florida's growth management laws, and issued its final report in February 1984. The ELMS II Committee's recommendations fell under three major areas.

The first area dealt with the development of a statewide planning framework. The state's goals and policies would be reflected in the state plan, regional plans, and local government comprehensive plans, with each level of planning coordinated and consistent with the next.²⁰⁶ There would also be mechanisms to resolve differences in the plans.²⁰⁷

The second area dealt with "revisions to the DRI process that [were] intended to improve the process in the short term, and, for the long term, to integrate it into the developing statewide planning framework."²⁰⁸ The committee recommended, in a nod to localism, to allow counties with comprehensive plans to adjust the applicable DRI threshold themselves.²⁰⁹ It also recommended adjusting the presumptive bands around the thresholds, and streamlining a number of procedures.²¹⁰

The third area dealt with recommendations which involved the strengthening of Florida's Coastal Management program.²¹¹

"Over the course of its meetings, the ELMS II Committee heard a great deal of testimony concerning the DRI [program]."²¹² At these public hearings, "[the DRI program] received heavy criticism from the business community for, among other reasons, the expense and delay caused by DRI review. However, it received strong support from environmental interests and persons concerned with the impacts of growth who wish[ed] to see more development undergo DRI review."²¹³

The DRI program received criticism from public officials as well, because it ignored the cumulative impacts of smaller developments.²¹⁴ "The ELMS II Committee found that only in rare cases did the DRI cover as much as 10%²¹⁵ of the residential

206. *Id.* at 2.

207. *Id.* at 2-3.

208. *Id.* at 3.

209. *Id.* This recommendation was not enacted by the Florida legislature. While DRI thresholds are typically a function of county population, the DRI statute includes a number of circumstances that allow threshold increases, as well as a process for the RPC or local government to petition the DCA to increase or decrease the threshold applicable to a particular local government, or part of a local government. See § 380.06(2) and (3)(2002). For current DRI thresholds, see *supra* note 52.

210. ELMS II REPORT, *supra* note 7, at 3.

211. *Id.* at 4.

212. *Id.* at 37.

213. *Id.*

214. *Id.* at 39-40.

215. This number may no longer be applicable to Florida's more urbanized counties.

development in a cross-section of Florida counties.”²¹⁶ Despite the criticism, the ELMS II Committee found that the DRI program had clearly become the most important and controversial of state growth management programs.²¹⁷

The Committee considered phasing out the DRI program, but determined that such a step, in 1984, would be premature.²¹⁸ Rather, the Committee recommended making the DRI process more user-friendly,²¹⁹ less duplicitous,²²⁰ and more certain,²²¹ while at the same time creating a new system of growth management that could focus on the cumulative impacts of all development.²²²

The ELMS II Committee concluded that Florida’s growth problems could not be solved with a piecemeal solution, and that Florida was failing to address the multiplying incremental impacts of new growth and development, which were ignored by the DRI process.²²³ This recommendation served as the catalyst for Florida’s step into the forefront of the “Second Wave” of growth management, with the passage of the Growth Management Act of 1985.

216. ELMS II REPORT, *supra* note 7, at 40.

217. *Id.* at 37.

218. *Id.* at 37-38.

219. “More user friendly,” likely means a reduction in the time associated with DRI review, and a reduction of the expense associated with the process.

220. *See supra* note 3, for an explanation of duplication.

221. There was very little certainty associated with the DRI process early in its life because there was no policy on which to base decisions concerning the DRI application – for years there was no state plan, regional plan, or even local government comprehensive plans. Siemon, *supra* note 5, at 46. “This policy void created a situation whereby large-scale developments were reviewed on an ad hoc, reactive basis that inevitably ‘presumed’ that any development was undesirable.” *Id.* “DRI development reviews have . . . often resulted in conditions that border on the ridiculous.” *Id.*

222. ELMS II REPORT, *supra* note 7, at 41-43. These recommendations, as stated in the Final Report of the ELMS II Commission include:

- (1) Revising the present DRI guidelines and standards, as well as allowing local variations of DRI thresholds and the development of regional thresholds for DRI status determination;
- (2) Clarifying the scope of, and the use of the presumption in binding letter review;
- (3) Expanding the use of DRI review to include area-wide DRI’s and locally undesirable land uses;
- (4) Focusing regional DRI review on important regional issues;
- (5) Limiting DRI development order exactions;
- (6) Coordinating DRI and permit reviews;
- (7) Strengthening the value and content of DRI development orders;
- (8) Strengthening administrative enforcement of the DRI process of appeals of DRI development orders.

Id. at 42-43.

223. *See id.* at 4.

ii. Florida's Growth Management Act of 1985

The Growth Management Act of 1985:

made important procedural changes in the state-regional-local scheme for managing growth; and it also imposed important substantive requirements on the system, in general, and on local governments, in particular. The major ones were: (1) various planning, plan implementation, and regulatory requirements aimed at getting development activity along Florida's coast away from barrier islands and other high-hazard coastal areas; (2) a second set of policies calling for incentives and disincentives to promote more compact urban development patterns; and (3), most radically, a new system requiring that after new local plans and land development regulations are in place, no development may be approved by local governments unless it can be shown that the infrastructure, especially roads, necessary to support the impacts of development are in place.²²⁴

This third requirement is referred to as an adequate public facilities requirement, or more commonly in Florida, as "concurrency."²²⁵ "[Concurrency] is a growth management tool for ensuring the availability of adequate public facilities and services to accommodate development."²²⁶ The term "concurrency" is used because the infrastructure to serve the development, and the impacts from the development, must come into place at the same time, or, put another way, concurrently. If the infrastructure is not in place or does not have available the capacity the development necessitates by the time the impacts from the development will occur, the development is not allowed to move forward.

With the adoption of the Growth Management Act of 1985, concurrency became the main tool of Florida growth management, and the DRI process was made just one important part of a larger,

224. DeGrove, *supra* note 100, at 33.

225. FLA. STAT. § 163.3180.

226. Thomas Pelham, *Adequate Public Facilities Requirements: Reflections on Florida's Concurrency System for Managing Growth*, 19 FLA. ST. U. L. REV. 974, 981-82 (1992) [hereinafter Pelham, *Public Facilities*]. "The purpose of the concurrency management system is to establish an ongoing mechanism which ensures that public facilities and services needed to support development are available concurrent with the impacts of such development." Fla. Admin. Code Ann. R. 9J-5.0055 (2002).

more comprehensive growth management system, rather than the focus²²⁷ of the system. The concurrency requirement also may have reduced the importance of the DRI to some extent by reducing the importance of many of the exactions from the DRI process. This is because concurrency may require the developer to increase the capacity of the infrastructure, for example, to compensate for the effects of the development, whereas, those exactions formerly would have been made in development order negotiations. This new system created by the Growth Management Act of 1985 focused on the impacts of all development, not just large developments, as was considered by many to be the major failing of the previous system with the DRI as the cornerstone.

iii. ELMS III and the Subsequent 1993 Legislation

Governor Lawton Chiles created the ELMS III Committee in November 1991, amid continuing controversy regarding implementation of the Growth Management Act of 1985.²²⁸ Not unlike the ELMS II Committee before it, ELMS III was directed to ‘review the operation and implementation of Florida’s growth management statutes . . . and . . . make recommendations for improvements in the State’s system for managing growth.’²²⁹ The recommended changes, and subsequent legislation in the form of the Growth Management Act of 1993, involved just about every component of Florida’s growth management legislation, from minor changes, to the temporary termination of the DRI program.²³⁰

The DRI program was terminated because many felt that it did not fit into the more comprehensive growth management system created under the 1985 Act. Even under the 1975 Local Government Planning Act, “it was understood that the impact analysis required for large-scale projects under the DRI program would result in wasteful and ‘unnecessary duplication’ of local comprehensive planning.”²³¹ Illustrating this concern, one commentator explained very early on:

A comprehensive plan considers a broad range of environmental, social, and economic values and makes the necessary trade-offs [across the

227. *Counter ELMS II REPORT*, *supra* note 7, at 37.

228. Powell, *Managing*, *supra* note 34, at 229-30 (citing Fla. Exec. Order No. 91-291, § 2 (Nov. 19, 1991)).

229. Powell, *Managing*, *supra* note 34, at 229.

230. *Id.* at 230. *See also* FLA. STAT. § 380.06 (27)(1993) for the section entitled TERMINATION OF THE DEVELOPMENT-OF-REGIONAL-IMPACT PROGRAM.

231. Powell, *Managing*, *supra* note 34, at 316.

jurisdiction]. Impact analysis, which assesses a specific project in relation to its surroundings, entails consideration of the same factors as a comprehensive plan, But [sic] the difference . . . is that under impact analysis, in contrast to comprehensive planning, each individual project must be studied anew.²³²

Stated another way, if a proposed development is consistent with the local comprehensive plan, and that local plan is consistent with the regional plan, a review such as the DRI should be unnecessary because the effects of such a development would have been previously considered. Therefore, from very early in the DRI program's life, a program of comprehensive local planning was seen as a superior alternative to the DRI program.²³³

In order for a local government to terminate the DRI program under the 1993 Act, the local government was required to adopt certain required amendments to the intergovernmental coordination element of its comprehensive plan.²³⁴

While there were few supporters for the DRI program when the termination provision was enacted in 1993, the implementation of the provision "created so much uncertainty that even development interests came forward to say the existing system wasn't so bad after all."²³⁵ By 1996, the termination of the DRI program was deemed a failure, and the termination provision disappeared from the act, leaving the DRI firmly in place.²³⁶

The Growth Management Act of 1993 saved the RPCs, it also dramatically weakened the role that they would play in the development process. "During the 1992 Regular Session, the legislature [enacted] a sunset provision of the Florida Regional Planning Council Act" (FRCPA).²³⁷ The FRCPA would have expired

232. *Id.* (quoting Thomas G. Pelham, *Regulating Development of Regional Impact: Florida and the Model Code*, 29 U. FLA. L. REV. 789, 827 (1977)).

233. Powell, *Managing*, *supra* note 34, at 316.

234. *Id.* at 317. See also FLA. STAT. § 380.06(27) (1993).

235. Charles Pattison, *Growth Management Study Commission Issues its Final Report*, FORESIGHT, Spring 2001, available at http://www.1000friendsofflorida.org/Growth_Manage_Process_Revision/GMSC_Report.asp.

236. Compare FLA. STAT. § 380.06 (27)(1993) through (1995) to FLA. STAT. § 380.06(27)(1996).

237. Powell, *Managing*, *supra* note 34, at 247. The Florida Regional Planning Council Act can be found in sections 186.501–186.513 Florida Statutes. The FRPCA begins with a very regionalist statement: "The problems of growth and development often transcend boundaries of individual units of local–general purpose government, and often no single unit can formulate plans or implement policies for their solution without affecting other units in their geographic area." FLA. STAT. § 186.502 (1)(a) (2002). The legislature has not followed this very regionalist passage with legislation to match.

if it had not been reenacted by September 1, 1993.²³⁸ This situation arose from a “frustration of many with the performance of the regional planning councils because of overreaching and poor accountability.”²³⁹ Ultimately, the RPCs were retained, but with altered structure and reduced authority.²⁴⁰ “[T]he 1993 Act enhanced their coordination and mediation roles, eliminate[d] their regulatory powers, and [made] dramatic changes in the nature of the regional policy plans.”²⁴¹ More specifically, the 1993 Act required each RPC to establish a dispute resolution process,²⁴² and repealed authority to appeal local government decisions administratively.²⁴³ This repeal of the RPC’s powers greatly weakened the regionalist approach in Florida because the Florida program relies on the RPCs to provide the only regional perspective in the development process.

Two reasons were given for the repeal of RPC appeal authority. “One was to eliminate a source of friction between state, regional, and local agencies, as well as between regional planning councils and developers and landowners.”²⁴⁴ The second reason “was to diminish the regulatory role of the councils and emphasize the councils’ planning, coordination, and technical assistance roles.”²⁴⁵ Although the RPCs maintain influence in the decision of whether to appeal a DRI development order, the RPCs’ work in regard to the DRI program is focused on advising developers and local governments on project impacts and mitigation strategies stemming from the DRI.²⁴⁶ Not unlike a private sector land-use consultant, “[t]heir principal tools [are] now . . . the quality of their analysis and art of persuasion.”²⁴⁷

238. Powell, *Managing*, *supra* note 34, at 247.

239. *Id.*

240. *Id.* at 248.

241. *Id.*

242. *Id.* at 253.

243. *Id.* at 261.

244. *Id.*

245. *Id.* at 261-62.

246. *Id.* at 262.

247. *Id.*

iv. Current Events Concerning the DRI Program

In an attempt to address disappointments²⁴⁸ surrounding Florida's growth management laws, Governor Bush assembled the Growth Management Study Commission in mid-2000 to analyze the Florida system and recommend changes. The Commission filed its final report in February 2001. The Report, entitled "A Liveable Florida For Today and Tomorrow" contained 89 recommended changes. Prominent among the recommended changes was the recommendation to "[d]esign and implement regional cooperation agreements for developments with extra-jurisdictional impacts to eventually eliminate the [DRI] process."²⁴⁹

The Report called for the elimination of the DRI program by January 1, 2003, at the latest.²⁵⁰ The report recommended replacing this program with regional cooperation agreements, whereby the RPCs and local governments would all come to agreement on how to mitigate and permit large projects affecting more than one of the governments.²⁵¹ This particular recommendation, has not been met, and there does not appear to be great support for such a move at this time.

1000 Friends of Florida, a growth management watchdog group, has said that this recommendation by the Growth Management Study Commission:

would replace the current complex process with an even more cumbersome system. Admittedly, it is time to get rid of the DRI program, but not before creating a well-thought-out, feasible alternative. A rushed effort five years ago to eliminate the DRI process created so much uncertainty that even development interests came forward to say the existing system wasn't so bad after all.²⁵²

In response, legislation was passed during the 2002 legislative session specifically concerning the DRI program. Effective May 31, 2002, Senate Bill 1906 made changes to the DRI program, though

248. "In February 2000, the Florida Department of Community Affairs issued a Report of its first Growth Management Survey. The report found that the most serious growth management problems noted in the survey were traffic congestion, urban sprawl, loss of wildlife habitat and limited water supplies." Patricia Salkin, *The Smart Growth Agenda: A Snapshot of State Activity at the Turn of the Century*, 21 ST. LOUIS U. PUB. L. REV. 271, 282 (2002).

249. GROWTH MANAGEMENT STUDY COMMISSION FINAL REPORT, *supra* note 1, at 3.

250. *Id.* at 21.

251. *Id.* at Recommendations 50-58.

252. Pattison, *supra* note 235.

not nearly as ground breaking as the changes recommended in the Report. Senate Bill 1906 did create a bright line rule concerning those projects that needed to undergo DRI review, by doing away with the presumptive band between 80% and 100% of the DRI threshold.²⁵³ Now, only those projects at or above the given DRI threshold must undergo review. “The presumption for developments at 100-120 percent of the DRI threshold was maintained, allowing a developer with a development between those percentages to prove that the development is not a DRI.”²⁵⁴

The bill also exempted three types of development from DRI review. These are certain marinas, petroleum storage facilities, and airports, each of which already receives significant oversight from a variety of federal, state and local administrative agencies.²⁵⁵ Marinas are exempted from DRI review in local governments that have adopted boating facility siting plans that address specific issues, including the protection of endangered species such as the manatee.²⁵⁶ Petroleum storage facilities are exempted if they meet the comprehensive plan requirements of the jurisdiction.²⁵⁷ Airport facilities are exempted from DRI review if an Airport Master Plan required by the Federal government is included in the local government’s comprehensive plan. These issues were each a common source of developer complaints because they closely duplicated other permitting programs necessary to build the respective facility.²⁵⁸

Termination of the DRI program was once again considered during the 2002 session. “One of the bills that failed during the 2002 legislative session attempted to replace the DRI process with an optional process to certify local governments with adequate capabilities to review and coordinate extra-jurisdictional impacts from development within the jurisdiction.”²⁵⁹ The passage of such a bill would have ended any semblance²⁶⁰ of regionalist planning

253. See FLA. STAT. § 380.06 (2)(d)(2002).

254. Cari Roth & Laura J. Feagin, *Reforms to Growth Management*, 76 FLA. BAR J. 57, 60 (July/August 2002); FLA. STAT. § 380.06(2)(d)(2002). For current DRI thresholds, see *supra* note 52.

255. Roth & Feagin, *supra* note 254, at 61.

256. *Id.*

257. *Id.*

258. Magee, *supra* note 4.

259. Roth & Feagin, *supra* note 254, at 61.

260. The “end any semblance” language could be slightly overstated from one perspective; Florida has five regional water management districts whose primary role is the management of water resources, and as such, they are tangentially related to real estate development and growth management. In fact, Tom Pelham, a former DCA secretary, as early as 1977, had proposed the use of the water management districts as agencies for regional governance, due to their “independence from local government” and ability to “inject a genuine regional perspective into land use decision making.” See Pelham, *Regulating*, *supra* note 61, at 852.

and regulation in Florida legislation, and would have symbolized a retreat to the status quo of fragmented local governments. However, such a move would have just been a continuation of the undermining of regionalism that has been taking place in Florida, marked most clearly by the ELMS III recommendations and the Growth Management Act of 1993.

During this coming 2003 legislative session, there will likely again be pressure to make changes to the DRI program, and consideration given to doing away with the program entirely, as recommended in the Growth Management Study Commission Report. If the DRI program is done away with, Florida has been implemented with a different program to potentially replace the DRI, the optional sector plan.

Florida has currently implemented the optional sector plan demonstration program as an alternative to the DRI process.²⁶¹ The sector plan is intended to “avoid duplication of effort in terms of the level of data and analysis required for a [DRI], while ensuring the adequate mitigation of impacts to applicable regional resources and facilities.”²⁶² The local governments enter into agreements with each other concerning various factors concerning the sector plan. These include: “the geographic area to be [covered by] the sector plan, the planning issues [to be] emphasized, requirements for intergovernmental coordination to address extra-jurisdictional impacts, supporting application materials including data and analysis, and the procedures for public participation.”²⁶³ Optional sector plans are approved through comprehensive plan amendments initiated by the local government with approval from with the FDCA.²⁶⁴ “The sector plan will be of two levels: a conceptual, long-term build-out overlay; and detailed specific area plans.”²⁶⁵ The required contents of the long-term build-out overlay and the detailed specific area plans are set forth, in some detail, in the statute.²⁶⁶

This demonstration project was created during the 1998 legislative session, so it is somewhat early to judge its success. The sector planning process is an interesting planning concept because

261. Optional sector plans are currently being utilized on developments in Bay, Clay, Collier, Orange, and Palm Beach Counties, at <http://www.dca.state.fl.us/fdcp/DCP/sectorplans/Optsectpln.htm>.

262. FLA. STAT. § 163.3245(1)(2002).

263. *Id.* at § 163.3245(2).

264. *Id.* at § 163.3245(1).

265. Florida Department of Community Affairs webpage at <http://www.dca.state.fl.us/fdcp/DCP/sectorplans/Optsectpln.htm>; see also FLA. STAT. § 163.3245(3)(2002).

266. See FLA. STAT. § 163.3245(3)(a)(2002) for long-term build-out overlay details. See FLA. STAT. § 163.3245(3)(b)(2002) for detailed specific area plan requirements.

the local government is “institutionally responsive,”²⁶⁷ or proactive in projecting demand for development and infrastructure and allocating the resources to accommodate the demand by changing zoning and securing funding for the infrastructure. However, the sector planning process is not necessarily regionalist. In fact, the local government, in developing the sector plan, seems to write the “DRI report” that is written by the RPCs in the DRI process.²⁶⁸ While regional issues are addressed in the sector plan, they are addressed only by the local government in which the sector plan is located.²⁶⁹ Notwithstanding this lack of a true regionalist perspective, if the program is successful, there will likely be pressure to implement the sector planning program more widely and ultimately replace the DRI program.

It is also worth noting that a recent study by Chapin and Connerly found that Floridian’s support of growth management initiatives has waned in recent years.²⁷⁰ The study was based on the results of two surveys administered to Florida residents in 1985 and 2001. One of the study’s findings was that “between 1985 and 2001, there has been a shift in citizen preference from state-level growth management to county-level growth management.”²⁷¹ In fact, localism seems to be garnering support, as there is “an emerging belief that growth management is best undertaken at the local level.”²⁷²

Chapin and Connerly extrapolated from their research an explanation for the waning support of Florida’s growth management system. They wrote “[a]ny public policy that is poorly understood by citizens, deemed ineffective at addressing key problems, and perceived as an incorrect organizational response to these problems is almost certain to lose citizen support over time.”²⁷³

The research also indicates that “over two-thirds of Florida’s citizens still perceive growth to be a problem in their community.”²⁷⁴ This indicates that despite the eroding support for growth management in general, and state mandates specifically, the public

267. Arthur C. Nelson, Presentation “Regulations and Planning” notes on file with author.
268. For example, see Objections, Recommendations and Comments Report for Clay County, 02-1B Amendment, May 8, 2002, *available at* http://www.claycounty.gov.com/planning_Dept/Plans_&_Amendments/Branan_Field_Plan/ORC_report_dept_community_affairs.pdf (last viewed April 11, 2003).

269. *Id.*

270. Tim Chapin & Charles Connerly, *Attitudes Towards Growth Management in Florida: Comparing Citizen Support in 1985 and 2001*, DeVoe L. Moore Center Policy Brief, Issue #6, January 2003.

271. *Id.*

272. *Id.*

273. *Id.*

274. *Id.*

still believes that the regulation of development is necessary, particularly when done at the local level.²⁷⁵

The adoption of the Portland regional model in Florida involves a narrowly focused power shift, from a system of localism toward regionalism, which will make the implementation of regional plans much more effective. While it is clear that this proposal is not a cure-all, it would certainly be a huge step in the right direction.

v. Findings

Regionalism has not played a strong role in the Florida growth management system. In fact, the DRI is the only element of the Florida system that incorporates regional planning and regulation, and even then, the regionalist perspective is deferential to local government decision-making.²⁷⁶ Localist interests within the Florida legislature seem to be much stronger than regional interests, and as a result, the DRI's small regional voice, over time, has been eroded in favor of localism, and frequently threatened with its termination. The increasingly important role of localism in the DRI program specifically, and Florida's growth management system generally, are clearly illustrated in the non-binding nature of the RPCs' recommendations, the reduction in the RPCs' regulatory powers, and the attempted terminations of the entire DRI process.

The DRI program should be terminated. The DRI is arguably duplicious of other permitting requirements,²⁷⁷ duplicious of comprehensive planning at both the local and regional levels,²⁷⁸ and

275. Evidencing the localist sentiment in Florida is the growing support of an extremist organization entitled Florida Hometown Democracy. This organization of NIMBYs (not in my backyard), BANANAs (build absolutely nothing anytime not anywhere) support an amendment to the Florida Constitution requiring all comprehensive plan amendments to go through the normal local government review process, and then, as an additional step go to a referendum ballot of the voters as a condition to approval. See <http://www.floridahometowndemocracy.com>. As one can easily imagine, this proposal, if enacted, has the potential to bring the entire process of amending all local government comprehensive plans to a screeching halt. This could have drastic consequences to economic development, job growth, and housing. To date, it appears that this concept is being favorably received by a wide-array of voters — both Republican and Democrat — as a “feel good” proposition. It is unclear to what degree members of the general public understand the impact on jobs, industry, and housing prices that may result from such a constitutional amendment.

276. “Except for its rather perverse dalliance with regionalism, the Act's DRI provisions are unswervingly faithful to the principle of localism.” Pelham, *supra* note 61, at 814. Tom Pelham wrote this passage in 1977, when regionalism associated with the DRI through the RPCs was comparatively much stronger than it is today. Most notably this was before the RPCs powers were dramatically reduced as discussed in sections IV.B.1.b.iii. of this paper.

277. Duplication of other permitting requirements is discussed *supra* note 3.

278. Duplication of comprehensive planning is discussed in section IV.B.1.b.iii of this paper. See also Pelham, *Regulating*, *supra* note 61, at 827.

from the very beginning, has over-regulated the wrong developments.

DRI's are over-regulated. The DRI focuses on the regional impacts of certain large developments. However, these large developments are the most unlikely to be done poorly. The developers who do DRI work are typically highly capitalized and therefore most able to provide the needed infrastructure to serve the development. Further, it takes a long time for a DRI-sized development to reach build out. Therefore, the developer is closely tied to the project for an extended time period. Market forces ensure that the development will be done right, because if the infrastructure is not in place or is inadequate, or the development is otherwise poorly planned, the developer will not have difficulty selling just one or two lots or houses, but 500 or 1,000 homes.²⁷⁹

The problem, then, continues to be the cumulative impact of small developments. These small developments tend to be undercapitalized and therefore unable to adequately address infrastructure needs. Furthermore, unlike DRI sized developments which are large enough to necessitate their own internal planning to build workable neighborhoods, small development, particularly those done by non-professional or inexperienced developers have a higher probability of being disconnected from neighboring existing development both aesthetically and physically.

VI. CONCLUSION

Florida's DRI program has played various roles in Florida's growth management scheme. When it was first created, over 30 years ago, the DRI program was the core of the growth management program. After the Growth Management Act of 1985 was passed, the DRI program became one part of a more comprehensive whole. Over the years, the DRI program has become much more specific and complex. The provision which initially spanned three pages of the Florida statute books, today exceeds sixteen. While much has changed since its inception, two things have remained constant. The DRI program has remained controversial, and the DRI program has remained increasingly true to its localist core.

This controversial, localist program has outlived its time. It is duplicitous of other permitting programs and comprehensive planning. But most importantly, it over-regulates large developments that, due to market forces and adequate capitalization, would provide the necessary infrastructure, and due to size would be well planned, without the time and expense of DRI

279. For current DRI thresholds, see *supra* note 52.

review. At the same time as it over-regulates the large developments, it ignores the cumulative, incremental impacts of sub-DRI developments which are more prone to be undercapitalized and poorly planned. It is these smaller developments that are more likely to be physically and aesthetically disconnected from the surrounding areas, less likely to provide adequate infrastructure, and more in need of oversight.

Despite the many benefits a regionalist approach may offer, the cumulative impacts of small development are best addressed at the local level, the level of government that the majority of Floridians believe should wield such responsibility and authority.²⁸⁰

The DRI program is not an effective means of managing growth in Florida. This is due to the duplication of the DRI program and the over regulation of DRI developments discussed throughout this paper. Therefore, the DRI program should be terminated.

280. Chapin & Connerly, *supra* note 270.