

TRANSPORTATION PLANNING AND THE PREVENTION OF URBAN SPRAWL

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INTRODUCTION

In recent years, a number of states have passed comprehensive land use reform bills.¹ Many of these statutes have appeared in response to the phenomenon of urban sprawl—a pattern of haphazard, automobile-dependent development on the fringes of existing cities.² With rising personal incomes and persistent consumer demand for single-family homes on large lots in ethnically and physically homogeneous jurisdictions, urban sprawl has boomed.³ Fearful of the myriad costs of sprawl—which many commentators have chronicled⁴—some states have acted to prevent it altogether. The most egregious costs of sprawl include the abandonment of urban centers,

* Copyright © 2008 by Michael M. Maya. J.D., 2008, New York University School of Law; B.A., 2005, Yale University. Many thanks to Professor Rick Hills for his insightful comments and suggestions on a number of earlier drafts of this Note. I would also like to express my gratitude to John Infranca, Bill Curran, Mitra Ebadolahi, Drew Johnson-Skinner, Lizzie Seidlin-Bernstein, and the staff of the *New York University Law Review* for their invaluable assistance throughout the production process.

¹ See, e.g., *infra* notes 76–81, 131–34, 167–68 and accompanying text (discussing passage of land use reform bills in Oregon, Florida, and Washington, respectively).

² See *Home Builders & Contractors Ass'n of Brevard v. Dep't of Cmty. Affairs*, 585 So. 2d 965, 968 (Fla. Dist. Ct. App. 1991) (defining sprawl as “extension of urban-type development into rural, agricultural, or other undeveloped or sparsely developed lands in a haphazard development pattern in which land uses are not functionally related to each other”).

³ See ANTHONY DOWNS, *STUCK IN TRAFFIC: COPING WITH PEAK-HOUR TRAFFIC CONGESTION* 17 (1992) (discussing consumer preference for detached, single-family housing); KENNETH T. JACKSON, *CRAIGGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES* 283–96 (1985) (discussing economic and racial causes of increased suburbanization); ERIC DAMIAN KELLY, *MANAGING COMMUNITY GROWTH* 140–41 (2d ed. 2004) (noting that land use reform legislation frequently attempts to limit sprawl); *id.* at 147 (discussing study on continuing consumer demand for large single-family homes in Portland, Oregon, metropolitan area).

⁴ See, e.g., ROBERT H. FREILICH, *FROM SPRAWL TO SMART GROWTH: SUCCESSFUL LEGAL, PLANNING, AND ENVIRONMENTAL SYSTEMS* 21–29 (1999); Richard Briffault, *The Local Government Boundary Problem in Metropolitan Areas*, 48 *STAN. L. REV.* 1115, 1135 (1996); William W. Buzbee, *Urban Sprawl, Federalism, and the Problem of Institutional Complexity*, 68 *FORDHAM L. REV.* 57, 69–75 (1999); J. Celeste Sakowicz, *Urban Sprawl: Florida's and Maryland's Approaches*, 19 *J. LAND USE & ENVTL. L.* 377, 386–88 (2004); Jeremy R. Meredith, Note, *Sprawl and the New Urbanist Solution*, 89 *VA. L. REV.* 447, 452–66 (2003); see also *infra* Part I (summarizing literature on economic, social, and environmental costs of sprawl).

severe air and water pollution, and the loss of open green spaces.⁵ In economic terms, sprawl also vastly increases transportation costs for residents and workers who must travel greater distances to reach their homes, their jobs, and other destinations.⁶

Without statewide coordination, sprawl is difficult to prevent. For example, if one county prohibits the subdivision of its farmland into low-density residential lots, a neighboring county will not necessarily do the same. In fact, precisely because the restrictive county has stifled consumer demand, its neighbor may have greater incentives (in the form of spillover demand) to permit sprawling development.⁷ In addition, neither county is likely to be particularly well attuned to the negative effects of sprawl, which are often geographically and temporally dispersed and thus less salient for many local politicians.⁸ To combat these structural and political problems, some states have addressed sprawl as a matter of statewide, rather than local, concern.

Statewide land use reform laws impose substantive requirements on top of traditional, locally designed ordinances. In the typical situation, the process starts with a comprehensive plan—an administrative document promulgated by a local government agency known as the “planning commission.”⁹ The plan lays out a vision for the jurisdiction’s growth, usually in broad, long-range terms.¹⁰ To implement the plan, the legislative arm of the local government passes a set of statutes called a “zoning ordinance.”¹¹ In some states, comprehensive plans need not be produced at all, and in others, zoning ordinances can be implemented without regard to plans.¹² But in the jurisdictions that plan more actively, which include all of those analyzed in Part III

⁵ Buzbee, *supra* note 4, at 69–75.

⁶ See PETER M. HAAS ET AL., HOUSING & TRANSPORTATION COST TRADE-OFFS AND BURDENS OF WORKING HOUSEHOLDS IN 28 METROS 10–23 (2006), <http://www.cnt.org/repository/H-T-Tradeoffs-for-Working-Families-n-28-Metros-FULL.pdf> (demonstrating that while housing tends to be inexpensive in suburban fringe locations, transportation costs are high, so overall housing and transportation costs combined are similar to those in urban core).

⁷ Cf. Briffault, *supra* note 4, at 1136 (discussing negative regional consequences of local governments pursuing self-interested regulations).

⁸ Buzbee, *supra* note 4, at 69.

⁹ See DANIEL R. MANDELKER, LAND USE LAW § 3.06 (5th ed. 2003) (describing planning commission).

¹⁰ See *id.* § 3.01 (“[Comprehensive plans] are future-oriented and project the development of a community to a future point in time or a future point in the community’s growth.”).

¹¹ See *id.* (“Municipalities adopt and administer land use controls, such as zoning, in order to implement comprehensive plans.”).

¹² See *id.* § 3.14 (discussing majority view that comprehensive plan is not required in order to exercise zoning power).

of this Note, consistency between zoning and planning is a rigid requirement.¹³

The regulatory schemes enacted by statewide reform acts have varied. At some point, however, policymakers have usually been compelled to consider the effects of transportation planning and policy on development patterns.¹⁴ The reasons are not hard to understand. As early as the 1970s, scholars demonstrated that low-density development could not support public transportation.¹⁵ Moreover, low-density development leads to residents traveling more than those who live in high-density areas.¹⁶ The result, in sprawling areas, is greater dependence on roads and highways, which themselves end up becoming heavily congested with private automobiles. This congestion creates demand for new roads, which then lead to even more sprawl.¹⁷ Without these roads and highways, the thinking goes, it may be possible to curtail sprawl.¹⁸

Although it would be unreasonable to dismantle roads where they already exist, this Note contends that steps can be taken to prevent new road construction, especially where development has not yet occurred. In more general terms, careful planning of transportation infrastructure may enable local governments to determine *where* development will take place, thereby concentrating growth in certain areas while protecting other areas from new construction. This is what I will call the “transportation planning” side of the sprawl-prevention equation.

The other side of the equation deals with the converse situation: Instead of roads preceding development, sometimes development precedes roads.¹⁹ This situation is no less pernicious for states looking to

¹³ See FLA. STAT. § 163.3202 (2007); WASH. REV. CODE § 36.70A.120 (2008); Baker v. City of Milwaukie, 533 P.2d 772, 775 (Or. 1975).

¹⁴ See Robert H. Freilich, *The Land-Use Implications of Transit-Oriented Development: Controlling the Demand Side of Transportation Congestion and Urban Sprawl*, 30 URB. LAW. 547, 547 (1998) (“Transportation is, in many ways, the most important segment of a community’s infrastructure. A community’s transportation system has a profound influence on its land-use patterns and rate of growth.”).

¹⁵ See BORIS S. PUSHKAREV & JEFFREY M. ZUPAN, PUBLIC TRANSPORTATION AND LAND USE POLICY 35–37 (1977) (suggesting that seven dwelling units per acre is lowest residential density that can support mass transit).

¹⁶ DOWNS, *supra* note 3, at 17.

¹⁷ See *infra* note 20 and accompanying text (explaining that new roads lead to more development while failing to solve congestion problems).

¹⁸ See, e.g., Conservation Law Foundation, Fight Sprawl, <http://www.clf.org/programs/projects.asp?id=148> (last visited Apr. 3, 2008) (explaining connection between highways and sprawl and discussing advocacy efforts against construction of new highways).

¹⁹ This makes logical sense: If development never preceded roads, residents would never demand the construction of new transportation infrastructure to serve previously built-up areas or to replace (or expand) already congested arteries. Yet this happens on a

prevent sprawl. If a local government allows housing to be built in a place that is underserved by existing transportation infrastructure, sooner or later political pressure will mount to provide residents of the newly developed area with better access to their homes or businesses. In sprawling areas, such access will most likely be provided in the form of new roads, not public transportation. These roads, however, will only create more traffic and lead to more sprawling development as they become just as congested as the other roads in the area.²⁰ A potential response to this dilemma is to ensure that development only occurs once adequate transportation infrastructure exists or will soon be constructed.²¹ I will call this the “concurrency” side of the sprawl-prevention equation. If transportation planning determines *where* development will occur via the location of new roads, concurrency determines *when* development will occur by respecting the capacity of existing roads.

This Note evaluates the efforts of states that have made the affirmative policy decision to reduce sprawl. I assess whether these states have enacted transportation planning and concurrency rules that promise to achieve their antisprawl goals—and if not, I look at what they should do differently. This is the first analysis of sprawl-prevention efforts that looks to both of these distinct, and crucial, parts of the sprawl-prevention equation. Part I of the Note discusses some of the costs of sprawl, without comprehensively revisiting ground well trodden by other commentators. Part II argues for the necessity of both transportation planning and concurrency rules. The structure of this claim is straightforward: Without planning, the location of growth is impossible to control; without concurrency, its timing cannot be controlled, ultimately leading to political pressure to undermine locational plans. Part III of the Note analyzes the regulatory regimes in three states with aggressive antisprawl statutes, regulations,

regular basis. See, e.g., Rick Fink, Jr., *The Widening of I-93, the Granite State Outgrows a Major Corridor*, BUS. NH MAG., Jan. 1, 2003, at 34 (discussing proposal to widen Interstate 93 in New Hampshire in order to “make travel safer and less congested” and observing that “[t]he state has outgrown a stretch of the highway that continues to see rising traffic counts”).

²⁰ New roads allow residents drawn by lower housing prices to move farther and farther from the urban core, thereby increasing the total amount of driving in a given metropolitan area. See ROBERT CERVERO, *SUBURBAN GRIDLOCK* 9–10 (1986) (noting jump in average commuting distances and suggesting that “as American cities have sprawled, so have trip patterns”). The roads themselves will soon become congested with drivers who used to travel on other roads, at other times, or by mass transit. DOWNS, *supra* note 3, at 27–30. The result will be demand for yet more roads, which will in turn lead to yet more sprawl.

²¹ See KELLY, *supra* note 3, at 44–48 (discussing adequate public facilities requirements).

and jurisprudence. The focus is on Oregon, Florida, and Washington because they are widely discussed in the literature as three of the most antisprawl jurisdictions in the country.²² Since these states' planning statutes developed during three distinct time periods, they also provide a convenient chronology of the land use reform movement. Finally, in Part IV, the Note offers recommendations on the future use of transportation planning and concurrency rules to prevent sprawling development.

A final note: The arguments and recommendations that follow do not necessarily depend upon the normative position that sprawl should be avoided. Rather, my aim is to evaluate the efforts of states that have already made the decision, for better or worse, to attempt to reduce sprawl. Nonetheless, it would be hard to carry out that evaluation without some understanding of the factors that motivated these states to act in the first place. It is to those factors that I now turn.

I

THE COSTS OF SPRAWL

Previous commentators have discussed the economic, environmental, and social costs of sprawl at great length;²³ nevertheless, a brief review of their findings will help situate the remainder of this Note. The environmental effects of sprawl have been particularly well documented. Many of these effects stem from a simple fact: Residents of sprawling areas drive greater distances than people who live in more compact communities.²⁴ This increased use of cars results in a rise in automobile emissions, which undermines efforts to reduce air pollution.²⁵ Although air pollution itself has not been found to cause respiratory illness, it does have the potential to exacerbate pre-existing medical conditions.²⁶ Furthermore, scientists have concluded that it is very likely that greenhouse gas emissions, in particular, have

²² See, e.g., FREILICH, *supra* note 4, at 220–23, 234–36 (discussing antisprawl programs in Oregon, Florida, and Washington); KELLY, *supra* note 3, at 122 (listing Oregon, Florida, and Washington among states that have adopted significant comprehensive planning reforms).

²³ See *supra* note 4 and accompanying text.

²⁴ Buzbee, *supra* note 4, at 71; see also *supra* notes 15–16 and accompanying text.

²⁵ See Buzbee, *supra* note 4, at 72 (noting that benefits from emissions control regulations under Clean Air Act have been undercut by overall increase in vehicle miles traveled per resident).

²⁶ See Robert D. Bullard et al., *The Costs and Consequences of Suburban Sprawl: The Case of Metro Atlanta*, 17 GA. ST. U. L. REV. 935, 954 (2001) (“Ground-level ozone may exacerbate health problems such as asthma, nasal congestion, . . . lung scarring, formation of lesions within the lungs, and premature aging of lung tissues.”).

contributed to global climate change.²⁷ Beyond its effects on humans, sprawl poses an extreme threat to ecosystems, including by destroying and fragmenting animal habitats.²⁸ As more land has been paved over to make way for development, leaving less green space to absorb rainwater and chemical runoff, soil erosion and water pollution have also increased.²⁹

Sprawl also has significant social costs. As residents have moved to the outer fringes of metropolitan areas, jobs—especially entry-level positions—have moved with them.³⁰ Urban dwellers, who frequently do not own cars, cannot commute to these new jobs, resulting in concentrated urban poverty.³¹ Given past racism in the real estate industry and in federal housing initiatives—which contributed greatly to the common settlement pattern of minority groups in impoverished, segregated, inner-city communities—minorities are disproportionately harmed by sprawl.³²

The costs of sprawl, however, are not only borne by those left behind in the inner cities. For suburbanites, the average distance traveled between home and work has increased considerably since the beginning of the 1980s.³³ The vast majority of this new travel has been by automobile,³⁴ and it has not come cheaply. The explosion in private vehicle use has led to increased traffic congestion.³⁵ This congestion imposes a variety of costs on drivers: wasted time, increased gasoline consumption, and greater wear and tear on vehicles.³⁶ Thus, even if traffic always flowed smoothly, the added cost of driving to and from the suburban fringe would frequently more than offset the

²⁷ INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2007: SYNTHESIS REPORT 5 (2007), available at http://www.ipcc.ch/pdf/assessment-report/ar4/syr/ar4_syr_spm.pdf.

²⁸ Meredith, *supra* note 4, at 464.

²⁹ *Id.* at 466.

³⁰ See Robert H. Freilich & Bruce G. Peshoff, *The Social Costs of Sprawl*, 29 URB. LAW. 183, 192 (1997) (discussing geographic redistribution of employment due to sprawl).

³¹ Meredith, *supra* note 4, at 458–59.

³² See JACKSON, *supra* note 3, at 197–98 (describing origins of “red lining” practice of federal Home Owners Loan Corporation, which systematically denied mortgages to residents of predominantly African-American neighborhoods); Bullard et al., *supra* note 26, at 947–50 (discussing contemporary costs of red lining in minority communities).

³³ See CERVERO, *supra* note 20, at 78 (discussing role of local governments in widening gap between where people live and work); Craig N. Oren, *Getting Commuters Out of Their Cars: What Went Wrong?*, 17 STAN. ENVTL. L.J. 141, 168–69 (1998) (stating that average commute between home and work increased by 2.2 miles from 1983 to 1990).

³⁴ See CERVERO, *supra* note 20, at 12–13 (noting that automobiles have been increasingly dominant means of commuting since 1970 and will likely continue to be so in future); Oren, *supra* note 33, at 169 (“Low density has meant increasing dependence on the automobile to get to work.”).

³⁵ DOWNS, *supra* note 3, at 1.

³⁶ Oren, *supra* note 33, at 171–72.

savings (realized in the form of lower housing prices) of living far from work.³⁷ For these and other reasons, a number of states have attempted to reduce the incidence of sprawl within their borders.³⁸

II

THE NEED FOR TRANSPORTATION PLANNING AND CONCURRENCY RULES

In this Part, I lay out some of the critiques of planning and concurrency requirements. I then explain why these critiques do not defeat the need for both sets of requirements. To begin with, it is not self-evident that transportation planning and concurrency rules are the best, or even a desirable, way to reduce sprawl. Planning (in a general sense, including the timing rules contained in concurrency requirements) has definite costs that must be balanced against the practice's usefulness in combating sprawling development. Primarily from an economic standpoint, scholars have criticized planning—and its legal embodiment, zoning³⁹—as an inefficient and potentially destructive departure from the Anglo-American system of common law property rights and reliance on free markets.⁴⁰

Many commentators who approve of the antisprawl goals of planning and zoning have nevertheless attacked the practices as ineffective or inefficient. One recent study showed, as many researchers had pre-

³⁷ See *supra* note 6 and accompanying text. Economist William Bogart has vehemently disputed the idea that sprawl has been the primary force behind the increases in both the duration and length of the average commute. Instead, he points to a regression analysis indicating that “rising incomes and an increase in the fraction of two-worker households are the main factors explaining the longer commutes” and claims that sprawl has actually shortened most trips to work. WILLIAM T. BOGART, *DON'T CALL IT SPRAWL: METROPOLITAN STRUCTURE IN THE TWENTY-FIRST CENTURY* 147–48 (2006). Dean Bogart's analysis of the costs of congestion, however, considers only the lost productivity suffered by workers stuck in traffic; it fails to account for the hard costs of owning and maintaining a vehicle, *see id.* at 148–49, not to mention the environmental costs associated with increased driving, *see supra* notes 24–27 and accompanying text. In the same vein, while Bogart makes much of the fact that, on average, transit riders spend more time commuting than drivers, he ignores the environmental gains that attach to transit ridership. *See id.* at 146. There may even be productivity gains associated with such ridership; after all, it is possible to read on the train but not at the wheel—despite what some drivers might think.

³⁸ See *infra* notes 76–106, 131–56, 167–82 and accompanying text (discussing policies to combat urban sprawl in Oregon, Florida, and Washington, respectively).

³⁹ For an explanation of the interaction between planning and zoning, see *supra* notes 9–13 and accompanying text.

⁴⁰ See Andrew P. Morriss & Roger E. Meiners, *The Destructive Role of Land Use Planning*, 14 TUL. ENVTL. L.J. 95, 96–97 (2000) (likening land use planning to failed theories of “central economic planning”); John M. Quigley, *Regulation and Property Values in the United States: The High Cost of Monopoly*, in LAND POLICIES AND THEIR OUTCOMES 46, 53–61 (Gregory K. Ingram & Yu-Hung Hong eds., 2007) (reviewing empirical literature on costs of zoning regulation).

viously suggested, that zoning increases the cost of new construction by decreasing the supply of buildable land.⁴¹ This fact alone does not mean that zoning is economically inefficient: The high price of heavily restricted lots could be due primarily to the premium that buyers are willing to pay for spacious, quiet, and otherwise idyllic properties. A recent review of the economic literature on zoning and housing costs, however, indicated that this is probably not the case.⁴² Moreover, there is evidence that zoning reduces the supply of available housing⁴³ and may also contribute to racial segregation within metropolitan areas.⁴⁴ In addition, a famous 1989 land use study concluded that restrictive zoning actually promotes sprawl by forcing people who crave a suburban lifestyle to commute longer distances to work.⁴⁵

Economic critiques of planning have also come from the legal academy. Professors Andrew Morriss and Roger Meiners have characterized zoning as a mechanism for creating “administrative property,” whereby local governments “subtract[] some rights from the common law fee simple absolute bundle and transfer[] those rights to” themselves.⁴⁶ They argue that centralized land use decision-making, exercised by government actors rather than by private markets, fails to address, or actually worsens, various perceived failures in the market for land.⁴⁷ For example, according to Professors Morriss and Meiners, planning inhibits the flow of information—in this case, accurate free market prices—to buyers and sellers.⁴⁸ It also fails to do a better job than markets at overcoming free-rider problems in the provision of common “environmental amenities” such as parks.⁴⁹

Finally, restrictive planning and zoning laws have been criticized as inequitable. The problem, from this perspective, is that planning “may be used to stop or slow growth, intentionally or unintentionally limiting the availability of affordable housing.”⁵⁰ If this is the case, housing in heavily regulated areas will become increasingly expensive,

⁴¹ See Edward Glaeser & Joseph Gyourko, *Zoning's Steep Price*, REGULATION, Fall 2002, at 24 (empirically linking zoning to increased housing prices).

⁴² Quigley, *supra* note 40, at 56–57.

⁴³ *Id.* at 57–58.

⁴⁴ *Id.* at 58–59.

⁴⁵ See WILLIAM A. FISCHER, DO GROWTH CONTROLS MATTER?: A REVIEW OF EMPIRICAL EVIDENCE ON THE EFFECTIVENESS AND EFFICIENCY OF LOCAL GOVERNMENT LAND USE REGULATION 1 (1989) (discussing “wasteful decentralization of firms and too much commuting by households”).

⁴⁶ Morriss & Meiners, *supra* note 40, at 109.

⁴⁷ *Id.* at 110–22.

⁴⁸ *Id.* at 113.

⁴⁹ *Id.* at 117.

⁵⁰ Oliver A. Pollard, III, *Smart Growth: The Promise, Politics, and Potential Pitfalls of Emerging Growth Management Strategies*, 19 VA. ENVTL. L.J. 247, 283–84 (2000).

forcing middle- and lower-class residents to move either to impoverished and decaying portions of the urban core or to the sprawling fringes of metropolitan areas.

Although many of these criticisms are well founded, planning remains popular and shows no signs of disappearing from the regulatory scene.⁵¹ What explains this inconsistency? Do the citizens who approve strict planning and zoning rules consistently vote against their self-interest? Or do the benefits of planning somehow outweigh its economic costs?

As a threshold matter, consumer demand for low-density housing may not accurately reflect residents' true preferences. Between the 1930s and the 1960s, the federal government heavily subsidized the construction and purchase of detached, single-family homes,⁵² thereby artificially inflating demand for such properties. The lasting effects of these subsidies may still be felt today.⁵³ Yet, even assuming that artificial demand for low-density housing is a permanent feature of American land use policy, properly formulated zoning schemes should not produce many of the negative economic effects discussed by planning's critics. By allowing for increasingly dense development within stable, existing communities—though not elsewhere—well-drawn regulations should avoid drastically cutting the supply of available housing. The key is that low-density zoning in areas threatened by sprawl must be coupled with higher-density zoning closer to the urban core.⁵⁴ Although this result has proved difficult to achieve in the United States, the problem is a matter of local government law rather than one of planning principles.⁵⁵ Moreover, in contrast to older plan-

⁵¹ See Craig Anthony Arnold, *The Structure of the Land Use Regulatory System in the United States*, 22 J. LAND USE & ENVTL. L. 441, 442 (2007) (describing land use regulation as “one of the most pervasively influential, and therefore important, areas of law and public policy in the United States”). Houston, Texas, which lacks a zoning ordinance, is the most notable exception to this trend. Asmara Tekle Johnson, *Privatizing Eminent Domain: The Delegation of a Very Public Power to Private, Non-profit and Charitable Corporations*, 56 AM. U. L. REV. 455, 488 n.150 (2007). Yet even in Houston, “the deep-rooted subject [of zoning] never stops festering below ground level.” Bill Schadewald, ‘Form-Based Zoning’ Appears To Take Shape, HOUS. BUS. J., Apr. 27, 2007, at 60A.

⁵² See JACKSON, *supra* note 3, at 207–09, 213 (discussing policies of Federal Housing Administration that provided subsidies for low-density housing in racially segregated areas from 1930s to 1960s).

⁵³ See *id.* at 217–18 (discussing long-term urban abandonment that resulted from federal housing policies).

⁵⁴ See Pollard, *supra* note 50, at 284 (advocating strategies to promote density in existing communities).

⁵⁵ In the typical American metropolitan area, which encompasses a plethora of local government units, it is difficult to implement policies that serve the best interests of the region as a whole. Instead of coordinating with their neighbors, local governments tend to draft regulations that meet their own, and only their own, needs. See Briffault, *supra* note

ning strategies, current theories should be able to address many of the equity concerns voiced by planning opponents. For example, the New Urbanist movement has committed itself to prioritizing pedestrian-friendly neighborhoods and public spaces over large, exclusionary, private lots.⁵⁶

Concurrency provisions have received additional criticisms that do not apply to transportation planning rules. Simplest among these is the claim that, by preventing development that would increase traffic on existing roads beyond predetermined levels (referred to as “levels of service”⁵⁷), concurrency rules may encourage developers to avoid building in already-congested neighborhoods in downtown areas.⁵⁸ The predictable result is that more projects will be initiated on virgin lands far from city centers.⁵⁹

One possible solution to this problem, which has been implemented in Florida, is to create exceptions to normal concurrency provisions for urban infill development.⁶⁰ Proponents of Florida’s scheme hoped that the resulting “exception areas” would become cen-

4, at 1133–36 (discussing sprawl-inducing aggregate effects of land use regulation by individual local government units within metropolitan areas). A system of metropolitan government could overcome this problem by taking a region-wide view of local land use needs. *See id.* at 1164–71 (arguing for creation of elected governmental units with binding authority to adopt regional land use plans).

⁵⁶ *See Meredith, supra* note 4, at 478–82 (outlining four fundamental tenets of New Urbanism: diverse land use and population, pedestrian-friendly development, prominent public spaces, and celebration of local identity).

⁵⁷ At the heart of most concurrency regimes are level-of-service standards. According to the Municipal Research and Services Center of Washington, “Level of service (LOS) standards are measures of the amount (and/or quality) of [a] public facility which must be provided to meet [a] community’s basic needs and expectations.” MUN. RESEARCH & SERVS. CTR. OF WASH., LEVEL OF SERVICE STANDARDS: MEASURES FOR MAINTAINING THE QUALITY OF COMMUNITY LIFE 1 (1994), available at <http://www.mrsc.org/Publications/levelserv.pdf>. When it comes to transportation, LOS standards “involve[] a judgment call about what level of congestion and delay is acceptable to community residents relative to the cost of reducing the congestion.” *Id.* at 41. Concurrency requirements typically forbid local governments from permitting development projects that would create sufficient traffic to bring roadways out of compliance with these standards. *See, e.g., infra* notes 145–55 and accompanying text (detailing concurrency rules and related provisions in Florida).

⁵⁸ *See Susan L. Trevarthen & Chad Friedman, Senate Bill 360: Growth Management Reform Arrives and It Is All About Infrastructure*, FLA. B.J., Oct. 2005, at 39, 41 (describing “perverse incentives” of early Florida concurrency requirements).

⁵⁹ *See id.* at 41–42 (noting that early Florida concurrency requirements “favor[ed] . . . suburban greenfield development in areas with under-utilized roadways”).

⁶⁰ *See* FLA. STAT. § 163.3180(5) (2007) (enumerating conditions and guidelines for such exceptions). Urban infill (re)development (or revitalization) involves building at increasing densities in areas that have been developed in the past, often in decaying urban cores. *See, e.g.,* § 163.2514(2) (defining “[u]rban infill and redevelopment area”); *id.* § 163.2511(2)(c) (noting state policy of “revitaliz[ing] urban centers” in statutory section titled “Urban infill and redevelopment”).

ters of dense development.⁶¹ Critics, however, argued that these provisions would be used predominantly by local governments hoping to avoid building costly transportation infrastructure *outside* the downtown core.⁶² Accordingly, a better solution may be a more nuanced approach to level-of-service standards themselves. Generally, such standards describe the maximum amount of traffic that a local government will permit on a given piece of transportation infrastructure.⁶³ In urban areas, or in any area where public transportation is available, more congestion should be tolerated before concurrency requirements are triggered.⁶⁴

A potentially more damaging critique of concurrency rules is that, when combined with restrictive planning schemes, such rules may stifle growth completely. If concurrency provisions prohibit new projects unless roads are in place, but planning provisions do not provide for the roads in question, how can any new construction take place?⁶⁵ The answer is that concurrency and planning regulations must be coordinated: Each must be designed with the other in mind. For example, concurrency requirements might be relaxed in areas where a local government wants to encourage growth while, at the same time, they might be strengthened in areas where the government wants to avoid sprawl. Likewise, planning rules should allow for greater densities in the former areas than in the latter. The result should be restrictions on growth in certain places to prevent sprawl, coupled with inducements for dense development in other places to meet demand for various types of land uses.⁶⁶

⁶¹ After realizing that uniform roadway concurrency rules could potentially increase sprawl, Florida amended its statutes to allow for a complex system of “Transportation Concurrency Exception Areas” to promote dense development within urban cores. FLA. ADMIN. CODE ANN. r. 9J-5.055(5)–(8) (2007).

⁶² See, e.g., Sakowicz, *supra* note 4, at 405 (declaring that “exemptions and exceptions . . . allow local governments to either procrastinate or avoid expanding and improving roadways”).

⁶³ See *supra* note 57 (describing level-of-service standards).

⁶⁴ See Freilich, *supra* note 14, at 564–65 (praising Montgomery County, Maryland for adjusting level-of-service standards where public transportation is available). Note that what I advocate here—explicitly allowing higher levels of congestion in urban areas—is different from manipulating and/or circumventing established level-of-service standards through the use of inaccurate measurement techniques. See *infra* notes 188–94 and accompanying text (criticizing Washington courts for allowing city of Seattle to implement traffic measurement system that purposely overstated road capacity).

⁶⁵ I am indebted to Professor Rick Hills of New York University School of Law for proposing this argument.

⁶⁶ See S. Mark White & Elisa L. Paster, *Creating Effective Land Use Regulations Through Concurrency*, 43 NAT. RESOURCES J. 753, 756–62 (2003) (explaining that, when properly formulated, concurrency rules should be consistent with smart growth goals of dense, pedestrian- and transit-friendly development in urban areas, coupled with preservation of open spaces in rural areas).

The need for coordination between transportation planning and concurrency rules also helps explain why states should not leave either side of the sprawl-prevention equation entirely in the hands of local authorities. State policymakers might be inclined to delegate authority to cities, towns, and counties because they believe that local politics or market forces, acting without regulatory constraints, have the ability to control either the location or the timing of growth.⁶⁷ For example, state policymakers might think that there is no need for transportation planning rules that prohibit road construction in environmentally sensitive areas because local jurisdictions will naturally avoid the high costs—stemming from such requirements as extensive regulatory approvals and onerous building techniques—that are associated with such routings. Likewise, lawmakers might think that concurrency rules are unnecessary because the construction of housing is simply unprofitable where roads do not yet exist. However, even if population growth is moderate enough to sustain this strategy of delegation,⁶⁸ the approach sacrifices the coordination that is essential to the success of any planning regime. Heavy restrictions on growth in certain areas, without complementary and contemporaneous upzonings—i.e., increases in allowable densities—in other areas, may have disastrous effects on the price and supply of residential, commercial, and industrial space.⁶⁹

This response suggests another question: Why require concurrency at all when strict planning rules seem to do most of the work in preventing sprawl? Two seemingly contradictory rationales stand out. First, plans are drawn infrequently⁷⁰ and with mostly long-term goals in mind.⁷¹ As a result, they must be deliberately broad, providing for many possible zones of growth within a given jurisdiction.⁷² Under-

⁶⁷ I am indebted to Professor Hills for this argument as well.

⁶⁸ It seems that neither local politics nor market forces should be able to constrain either the location or timing of growth in states experiencing extreme population booms. If new residents are flooding into an area quickly enough, it may make political and economic sense to build roads through wetlands regardless of the cost, or to allow the construction of housing before roads can be put into place.

⁶⁹ See Glaeser & Gyourko, *supra* note 41 (demonstrating that land use restrictions tend to raise property prices).

⁷⁰ See, e.g., Boston Metropolitan Planning Organization, *Journey to 2030*, <http://www.bostonmpo.org/bostonmpo/resources/plan/plan.htm> (last visited Apr. 3, 2008) (stating that “new Transportation Plan” is drawn up “[e]very four years”).

⁷¹ See, e.g., OR. ADMIN. R. 660-012-0030(3)(a) (2007) (mandating minimum transportation-planning horizon of twenty years).

⁷² See, e.g., BOSTON METRO. PLANNING ORG., *JOURNEY TO 2030: TRANSPORTATION PLAN OF THE BOSTON METROPOLITAN PLANNING ORGANIZATION* iii (2007), available at <http://www.bostonmpo.org/bostonmpo/resources/plan/2030plan-toc-1.pdf> (listing contents of transportation plan for Greater Boston, including such broad categories as “Mobility,” “Safety,” and “Security”).

standably, no local government will want to see all the areas it has slated for development over the course of fifteen or twenty years built up within a matter of months. This is precisely where concurrency requirements should come in: to control the timing of growth in areas already covered by a long-term, comprehensive plan.

The second rationale for requiring concurrency in addition to planning arises out of the harm to the planning process itself that results when local governments cannot control the timing of growth. This rationale stems from the intuition that, since they are drafted by elected officials, even the strictest plans should be relatively easy to amend when political conditions are favorable. Amendment is most likely to occur precisely where the timing of growth is uncontrolled, because in such jurisdictions people will move into newly developed areas before those areas are served by adequate transportation infrastructure.⁷³ Naturally, the new residents will call for the construction of new roads. The creation of these new roads, driven by political pressure rather than careful planning, will likely require planning and zoning amendments.⁷⁴ Local politicians will find this pressure difficult to withstand, especially because many of the new arteries will be deemed “necessary” to relieve existing traffic congestion, even if they will not be smart for the region’s long-term growth. Thus, the jurisdiction’s failure to implement concurrency requirements (that is, its failure to address the timing of growth) will undermine its long-term plans (that is, its vision for the location of growth), with the inevitable result of an increase in sprawl.

Without both planning and concurrency rules, it will be difficult for any state to avoid becoming the site of sprawling development. As long as consumer preferences—magnified by federal subsidies—continue to favor single-family housing, the pressure to sprawl will persist. In order to resist, states must give local governments the tools to decide where new development should take place. By restricting growth in certain areas while encouraging it in others, local govern-

⁷³ I use the example of transportation infrastructure here because transportation is the specific subject matter of this Note and because it is the most contentious target of concurrency rules in general. For a specific critique of transportation concurrency rules, see Ruth L. Steiner, *Florida’s Transportation Concurrency: Are the Current Tools Adequate To Meet the Need for Coordinated Land Use and Transportation Planning?*, 12 U. FLA. J.L. & PUB. POL’Y 269 (2001) (critiquing implementation of Florida’s transportation concurrency rules for failing to reduce sprawl). Analytically, however, my argument is just as applicable to any other sort of public infrastructure, such as sewage systems or electricity lines.

⁷⁴ While it is true that the roads in question occasionally will have been envisioned by the relevant comprehensive plan, this will not always be the case. In *Department of Transportation v. Lopez-Torres*, 526 So. 2d 674 (Fla. 1988), discussed *infra* notes 157–59 and accompanying text, a Florida municipality’s comprehensive growth plan failed to envision a similar construction project: the state-ordered relocation of a highway bridge.

ments can meet demand for a wide variety of land uses without incurring the costs of sprawl. But planning cannot stand on its own. Without concurrency rules, political pressure will undermine public officials' carefully considered land use policies. By employing both planning and concurrency rules, state and local governments should be able to manipulate infrastructure to avoid sprawl. If they so choose, dense and efficient development can become a realistic alternative.

III

WHAT THE STATES HAVE DONE: THREE EXAMPLES

Throughout most of the twentieth century, neither the states nor the federal government showed much desire to undertake the ambitious agenda described above; indeed, actors at all levels of government were generally content to allow the unfettered propagation of sprawl.⁷⁵ In recent years, however, this trend has begun to change. This Part analyzes statutes, regulations, and judicial decisions concerning transportation planning and concurrency in three states—Oregon, Florida, and Washington—at the forefront of efforts to curtail sprawling development. Each of these states has taken a different approach to the problem of sprawl: Oregon has concentrated on transportation planning, Florida has focused on concurrency, and Washington has attempted to use elements of both approaches. In none of these states, however, do the jurisdiction's statutes, regulations, and judicial decisions form a framework with sufficient power to effectively address both sides of the sprawl-prevention equation.

A. Oregon

Oregon initiated its reforms with the adoption of the Land Use Act in 1973.⁷⁶ In passing the Act, the state legislature intended to change significantly the way land use decisions were coordinated among local, regional, and state governmental entities.⁷⁷ Legislators feared that uncoordinated land uses would threaten “the orderly development [and] the environment of [the] state and the health, safety, order, convenience, prosperity and welfare of the people of

⁷⁵ See JACKSON, *supra* note 3, at 163–71 (discussing federal and local policies favoring construction of roads and highways over mass transit); *id.* at 248–51 (chronicling rise of interstate highway system); *id.* at 269–71 (summarizing major consequences of “drive-in culture”).

⁷⁶ OR. REV. STAT. ch. 197 (2007).

⁷⁷ See *id.* § 197.010(1) (declaring legislative policy “to provide for properly prepared and coordinated comprehensive plans for cities and counties, regional areas and the state as a whole”).

[the] state.”⁷⁸ To promote “coordinated statewide land conservation and development,” a strong statewide planning agency was needed.⁷⁹ To be effective, the agency had to possess the power to prescribe binding goals for cities and counties.⁸⁰ The legislature named the new agency the Land Conservation and Development Commission (LCDC).⁸¹

Although the Land Use Act has been amended several times,⁸² its core structure remains intact. Every city and county in the state, regardless of size, must adopt a comprehensive plan.⁸³ All comprehensive plans must address a variety of land use issues, including transportation infrastructure.⁸⁴ After local governments enact new plans, the LCDC reviews these plans to ensure compliance with the Commission’s statewide planning goals,⁸⁵ of which there are currently nineteen.⁸⁶ Local governments have one year from the date that a new goal is adopted to comply with the goal’s provisions.⁸⁷

Statewide Goal Twelve covers transportation planning.⁸⁸ It requires that transportation plans—or the transportation elements of comprehensive plans—meet nine substantive and procedural criteria.⁸⁹ Among other things, local jurisdictions must “consider all modes of transportation”; be aware of state, regional, and local transportation needs; avoid reliance on one mode of transportation; and minimize social, economic, and environmental costs.⁹⁰ In regulations that implement Goal Twelve, the LCDC has clarified what these provisions mean: To improve the quality of life in metropolitan areas, local governments are expected to achieve “reduction[s] in reliance on single occupant automobile use.”⁹¹ Transportation plans should

⁷⁸ *Id.* § 197.005(1).

⁷⁹ *Id.* § 197.005(4).

⁸⁰ *See id.* § 197.005(3)–(4) (outlining relationship between local governments and statewide planning agency).

⁸¹ *Id.* § 197.030(1).

⁸² *See, e.g., id.* § 197.175 (codifying laws regarding local comprehensive plans passed in 1973, 1977, 1981, 1983, 1989, 1991, 1993, and 1999).

⁸³ *Id.* § 197.175(2)(a).

⁸⁴ *Id.* § 197.015(5).

⁸⁵ *Id.* § 197.040(2)(d).

⁸⁶ OR. ADMIN. R. 660-015-0000 to -0010 (2007).

⁸⁷ § 197.250.

⁸⁸ OR. ADMIN. R. 660-015-0000(12). It should be noted that the LCDC regulations implementing Goal Twelve, which are contained in OR. ADMIN. R. 660-012-0000 to -0070, were amended substantially in mid-2006. *See* Oregon Department of Land Conservation and Development, Transportation Planning, <http://www.oregon.gov/LCD/transplan.shtml> (last visited Mar. 30, 2008) [hereinafter Transportation Planning].

⁸⁹ OR. ADMIN. R. 660-015-0000(12).

⁹⁰ *Id.*

⁹¹ OR. ADMIN. R. 660-012-0000(3)(c).

encourage people to “walk, bicycle, use transit, use automobile travel more efficiently, and drive less to meet their daily needs.”⁹² These requirements leave little doubt about the state’s intention to reduce the automobile dependence that exacerbates sprawl.

Additional regulations detail specific requirements for metropolitan areas. Each federally designated Metropolitan Planning Organization (MPO) area must use measurable standards—such as vehicle trips per capita—to gauge progress toward reduced automobile reliance.⁹³ These standards should help to decrease the number of car trips within the area while improving both the convenience and the actual use of alternative modes of transportation.⁹⁴ Any plan likely to result in an increase of vehicle miles traveled (VMT) per capita must be accompanied by a “significant expansion in transit service” and land use changes that will allow for higher-density development.⁹⁵ For the sake of simplicity, many of the VMT rules can be satisfied with proof that VMT per capita will decrease by five percent over a twenty-year planning period.⁹⁶ However, independent state-wide requirements to promote transit-oriented development and reduce available off-street parking always remain in force.⁹⁷ These provisions establish that restrictive land use regulation in certain areas must be combined with permissive, high-density conditions in other areas.

These statutes and regulations strongly denounce sprawling, automobile-centered development. By encouraging the creation of high-density urban areas, a reduced reliance on cars, and the use of alternative modes of transportation, this section of the Land Use Act seriously endeavors to curtail sprawl and preserve open spaces. Since this part of the Act focuses solely on the preparation of planning documents, however, the concurrency half of the sprawl-prevention equation must be dealt with elsewhere.

The Land Use Act never explicitly uses the word “concurrency,” but the concept is employed nonetheless. LCDC regulations maintain that a plan amendment or land use regulation must meet specific requirements whenever it “significantly affect[s] an existing or planned transportation facility.”⁹⁸ This triggering clause has been the

⁹² *Id.*

⁹³ OR. ADMIN. R. 660-012-0035(5).

⁹⁴ OR. ADMIN. R. 660-012-0035(5)(a).

⁹⁵ OR. ADMIN. R. 660-012-0035(5)(c).

⁹⁶ OR. ADMIN. R. 660-012-0035(6).

⁹⁷ OR. ADMIN. R. 660-012-0045(4)–(5).

⁹⁸ OR. ADMIN. R. 660-012-0060(1). A “transportation facility” is “any physical facility that moves or assist [sic] in the movement of people or goods . . . excluding electricity, sewage and water systems.” OR. ADMIN. R. 660-012-0005(30).

subject of much litigation and frequent refinement by administrative agencies.⁹⁹ Currently, there are three main ways for a land use amendment to “significantly affect[] a transportation facility”: when the amendment would (1) change the functional classification of the facility, (2) allow land uses inconsistent with that classification, or (3) decrease the level of service (LOS) at the facility to an unacceptable level or further diminish the LOS at an already noncompliant facility, as measured at the end of the twenty-year planning period.¹⁰⁰

When one of these situations occurs, however, local governments can take a variety of actions to comply with the LCDC without amending their plans. First, measures can be adopted that “demonstrate [that] allowed land uses are consistent with the . . . transportation facility.”¹⁰¹ Second, land use rules or development designs can be altered to decrease the use of automobiles relative to other forms of transportation.¹⁰² Third, the local government can place demands on developers through the use of exactions, explicit agreements with builders, or the like.¹⁰³ Compliance with any of these provisions will insulate a plan from invalidation by the LCDC.¹⁰⁴ In no case, however, do mitigating actions need to meet measurable standards. If, for example, a local government wishes to comply with the provisions above by decreasing automobile use, it is not required to achieve any specific level of use.¹⁰⁵ Similarly, agreements with developers do not have to take any specific form, nor do they have to include any specific content; indeed, the local government need only “specify when [such] measures . . . will be provided.”¹⁰⁶

If Oregon’s concurrency requirements look like a backdoor for sprawling development, it is because, at least to some extent, they were purposefully designed as such.¹⁰⁷ They contrast starkly with the

⁹⁹ See *infra* notes 122–30 and accompanying text (discussing judicial decisions interpreting earlier versions of concurrency trigger clause as well as backlash that resulted in current regulatory language).

¹⁰⁰ OR. ADMIN. R. 660-012-0060(1)(a)–(c) (listing ways for land use amendment to “significantly affect[] a transportation facility”); OR. ADMIN. R. 660-012-0005(22) (defining “Planning Period”). The LCDC added the final trigger after the court of appeals’ decision in *Jaqua v. City of Springfield*, 91 P.3d 817 (Or. Ct. App. 2004). See Transportation Planning, *supra* note 88 (laying out March 2005 amendments to transportation planning regulations); see also *infra* notes 122–30 and accompanying text (discussing judicial decisions that led to LCDC amendments to congestion mitigation regulations).

¹⁰¹ OR. ADMIN. R. 660-012-0060(2)(a).

¹⁰² OR. ADMIN. R. 660-012-0060(2)(c).

¹⁰³ OR. ADMIN. R. 660-012-0060(2)(e).

¹⁰⁴ OR. ADMIN. R. 660-012-0060(2).

¹⁰⁵ OR. ADMIN. R. 660-012-0060(2)(c).

¹⁰⁶ OR. ADMIN. R. 660-012-0060(e).

¹⁰⁷ See *infra* notes 128–30 and accompanying text (discussing how LCDC stymied state courts’ efforts to implement strong concurrency rules).

state's strong transportation planning rules. Thus, Oregon's concurrency rules may serve to reduce sprawl only through particularly powerful judicial enforcement. Before turning to the state courts' treatment of these regulations, however, it is appropriate to look at the courts' analyses of Oregon's transportation planning statutes.

Oregon courts have been reluctant to allow uncoordinated highway expansion. Two 2005 rulings of the intermediate court of appeals provide examples of the state's jurisprudence in this regard. Both decisions concerned the expansion of Highway 99, a state road in southern Oregon that runs close to, and at times shares its route with, Interstate 5. In the first case, *Rhodes v. City of Talent*,¹⁰⁸ the Land Use Board of Appeals (LUBA)—a specialized state trial court for land use matters¹⁰⁹—had overturned the city's Access Management Plan (AMP) for the new Highway 99 because the plan did not meet the procedural requirements for “land use decisions.”¹¹⁰ The city argued that, since the AMP could be adopted as part of its transportation plan at a later date, the mere passage of the AMP was not a “land use decision.”¹¹¹ The court rejected this claim and endorsed LUBA's determination that AMPs must be consistent with transportation plans at all times.¹¹² Since the AMP in the case was itself sufficient authorization for the construction of various highway interchanges, its passage had to be subject to the same requirements as any other “land use decision.”¹¹³

Some months later, the same court ruled on another portion of the planned Highway 99 expansion in *1000 Friends of Oregon v. Yamhill County*.¹¹⁴ This time, the litigation concerned the process by which a county had obtained exceptions to a number of statewide land use goals in order to locate a portion of the highway, which would serve as a bypass road, on rural land.¹¹⁵ The court held that the county had erred by following only the processes pertaining to transportation improvements without also complying with the provisions governing general exceptions to the statewide goals.¹¹⁶ Although the LCDC ultimately amended its regulations in order to overrule the

¹⁰⁸ 104 P.3d 1180 (Or. Ct. App. 2005).

¹⁰⁹ See OR. REV. STAT. § 197.810 (2007) (creating Land Use Board of Appeals).

¹¹⁰ *Rhodes*, 104 P.3d at 1181–82.

¹¹¹ *Id.* at 1183. The adoption of a transportation plan usually constitutes a local government's land use decision with respect to transportation. OR. ADMIN. R. 660-012-0025(1).

¹¹² *Rhodes*, 104 P.3d at 1183–84.

¹¹³ *Id.* at 1182–84.

¹¹⁴ 126 P.3d 684 (Or. Ct. App. 2005).

¹¹⁵ *Id.* at 686–87.

¹¹⁶ *Id.* at 690.

court on this point,¹¹⁷ the decision still sent the message that Oregon's judiciary will carefully scrutinize road-building projects that appear to conflict with the state's major land use policy goals.

Earlier decisions were more mixed in their support of antisprawl goals. *Department of Transportation v. Douglas County*¹¹⁸ is one case that did support these goals. The court held that, when a county amended its comprehensive plan, LUBA could review that plan as a whole, including its unchanged portions.¹¹⁹ Thus, a jurisdiction's adoption of any plan amendment appeared to be an opportunity for review to ensure that the overall planning scheme complied with statewide provisions. Two years later, the plaintiffs in *Volny v. City of Bend* argued that *Douglas County* was dispositive of their claim that a city could not amend the transportation provisions in its comprehensive plan without first passing a specialized transportation plan, something that the city had never instituted.¹²⁰ The court disagreed, however, holding that only a comprehensive plan, and not a specific transportation plan, was required.¹²¹

Although the *Volny* decision was a setback for antisprawl efforts in its rejection of a requirement to plan separately for transportation, the Oregon courts' record on halting uncoordinated road building remains solid. As seen above, state judges have required local jurisdictions to have regulations in place prior to initiating plan changes; they have also been consistently willing to scrutinize underlying transportation plans. In these ways, Oregon judges have met the zeal for planning of their legislative colleagues.

These same judges have responded more equivocally to the concurrency question. Significantly, the courts have had to contend with major administrative responses, which often appear to have been aimed at circumventing controversial judicial decisions, thereby complicating the development of a coherent jurisprudence.

Much of the litigation surrounding the state's concurrency rules has dealt with the provisions' triggering clauses. The court of appeals frequently has had to decide whether a particular plan amendment or land use regulation "significantly affects" a transportation facility, as those terms are defined in LCDC regulations. For example, in

¹¹⁷ See OR. ADMIN. R. 660-012-0070(2) (2007) ("The exceptions standards in OAR 660, division 4 and OAR 660, division 14 [regarding the general goals exception process] shall not apply."); Transportation Planning, *supra* note 88 (describing July 2006 amendments to various sections of OR. ADMIN. R. 660-012).

¹¹⁸ 967 P.2d 901 (Or. Ct. App. 1998).

¹¹⁹ *Id.* at 904.

¹²⁰ 4 P.3d 768, 771 (Or. Ct. App. 2000).

¹²¹ *Id.* at 772.

Department of Transportation v. Coos County,¹²² the court held that an upzoning—which would have increased traffic at three intersections already over mandated levels of service—did not “significantly affect” a transportation facility.¹²³ Evidently, adding more cars to roads that were already badly congested did not merit traffic mitigation efforts.

Two years after *Coos County*, the court of appeals changed course. In *Department of Transportation v. City of Klamath Falls*, the court ruled that a proposed plan amendment, which would have accelerated LOS noncompliance at various intersections, activated congestion mitigation requirements.¹²⁴ Although the intersections’ levels of service were acceptable at the time, the fact that congestion would significantly increase before the end of the twenty-year planning period sufficed to necessitate immediate mitigation efforts.¹²⁵ Put another way, the proposed plan amendment’s effects had to be analyzed continuously, rather than merely at the end of the planning period. The court extended this line of reasoning in *Jaqua v. City of Springfield*,¹²⁶ which required that mitigation measures be undertaken concurrently with the development of a facility that would start to underperform in the near future.¹²⁷ Thus, the implementation of mitigation measures could not be delayed until, say, nineteen years from the inception of the development, then imposed all at once.

Klamath Falls and *Jaqua*, read together, inserted a true concurrency requirement into the Oregon statutes and regulations. The response to the decisions, however, was decidedly negative.¹²⁸ The LCDC soon amended its regulations, resulting in the relatively soft rules discussed above.¹²⁹ The courts have failed to counter; no major proconcurrency decision has been issued since the LCDC revisions.

¹²² 976 P.2d 68 (Or. Ct. App. 1999).

¹²³ *Id.* at 70–71.

¹²⁴ 34 P.3d 667, 672 (Or. Ct. App. 2001).

¹²⁵ *Id.*

¹²⁶ 91 P.3d 817 (Or. Ct. App. 2004).

¹²⁷ *Id.* at 827–28.

¹²⁸ See Ransford S. McCourt, Oregon’s Transportation Planning Rule Goes into the Shop for Repairs 5 (Aug. 1, 2005) (unpublished manuscript, available at <http://ctr.utk.edu/TNMUG/TRB/oregon.pdf>) (noting that *Jaqua* decision posed threat to state’s transportation planning rule and that state responded by establishing horizon year as sole basis for analysis of rezonings).

¹²⁹ See OR. ADMIN. R. 660-012-0060(1)(c)(C) (2007) (providing that mitigation requirements are triggered when amendment or land use regulation would “[w]orsen the performance of an existing or planned transportation facility that is otherwise projected to perform below the minimum acceptable performance standard”); Transportation Planning, *supra* note 88 (describing March 2005 amendments to OR. ADMIN. R. 660-012-0060); see also *supra* notes 98–106 and accompanying text (discussing content of concurrency rules in Oregon).

Now, in most instances, concurrency is not a strict requirement in Oregon: Three of the five triggers for congestion mitigation are explicitly considered only at the end of the applicable planning period,¹³⁰ when it will likely be far too late to stop ill-advised development. Thus, while the state's courts initially tried to promote concurrency, the executive branch has stymied these efforts.

The result in Oregon is a system of strong planning requirements but weak concurrency rules. It is a system that seems effective in preventing road construction where there are no buildings, but one that is less effective in preventing building construction where there are no roads. Without more, Oregon's system does not promise to reduce sprawl dramatically.

B. Florida

Florida passed its Growth Management Act in 1985.¹³¹ The statute emphasizes coordinated government action more than conservation.¹³² Nevertheless, the state official who implemented the Act in its first years¹³³ stated that the prevention of sprawl is one of the law's primary purposes, though it is not made explicit in the text.¹³⁴

Under the Act's provisions, every city and county in Florida must adopt a comprehensive plan.¹³⁵ With respect to transportation, each plan must include a "traffic circulation element."¹³⁶ Although bicycle and pedestrian routes must be considered, transportation plans are not explicitly required to consider mass transit.¹³⁷ Local governments in urbanized areas, however, must examine alternative modes of

¹³⁰ OR. ADMIN. R. 660-012-0060(1)(c).

¹³¹ See FLA. STAT. § 163.3161 (2007). A note on terminology may be helpful here: There is not, nor ever was, a statute officially titled "Growth Management Act." The 1985 legislation that was known as the Growth Management Act was a series of amendments to other statutes, primarily Chapter 163 II, which included renaming that statute to the Local Government Comprehensive Planning and Land Development Regulation Act.

James C. Nicholas & Ruth L. Steiner, *Growth Management and Smart Growth in Florida*, 35 WAKE FOREST L. REV. 645, 651 n.50 (2000).

¹³² See § 163.3161(2) (emphasizing local government powers to "implement[] . . . comprehensive planning programs"); *id.* § 163.3161(3) (listing litany of police power goals, including, lastly, conservation); *id.* § 163.3161(4) (stressing cooperation and coordination).

¹³³ Florida Department of Community Affairs, Office of the Secretary, <http://www.dca.state.fl.us/aboutSecretary.cfm> (last visited Mar. 28, 2008) ("[Secretary Thomas G. Pelham] played a central role in the initial implementation of the 1985 Growth Management Act.").

¹³⁴ Thomas G. Pelham, *Shaping Florida's Future: Toward More Compact, Efficient, and Livable Development Patterns*, 7 J. LAND USE & ENVTL. L. 321, 321, 325-26 (1992) ("[The Florida Growth Management Act] makes the discouragement of urban sprawl and the encouragement of more compact development patterns the official policy of this state.").

¹³⁵ § 163.3167(2).

¹³⁶ *Id.* § 163.3177(6)(b).

¹³⁷ *Id.*

transportation, including mass transit.¹³⁸ They also must analyze methods for maintaining population densities sufficient to “promote public transportation systems in designated . . . corridors.”¹³⁹ Specific plans for mass transit systems may be included but, significantly, are never required.¹⁴⁰

Regulations promulgated by the Department of Community Affairs’ Division of Community Planning¹⁴¹ shed light on Florida’s transportation planning requirements. Unlike the lukewarm posture toward mass transit exhibited by the Growth Management Act itself, these administrative rules maintain that “[t]he purpose of the transportation element shall be to plan for a multimodal transportation system that places emphasis on public transportation systems.”¹⁴² To this end, the transportation element of comprehensive plans must “[a]ddress the provision of efficient public transit services.”¹⁴³ In designated public transit corridors, but not elsewhere, regulations must be put in place by local governments to ensure that new development—and land use policy in general—supports the use of public transit.¹⁴⁴ Yet in no case does the establishment of a transit corridor appear to be mandatory; as a result, the Division’s regulations concerning transit-supportive densities and land use policies are only as potent as the local government’s preexisting commitment to mass transit. In addition, despite the language in the regulations’ purpose statement, local governments are under no affirmative obligation to reduce driving or increase mass transit usage.

The absence of substantive public transportation or automobile use requirements should permit local governments to locate new roads wherever they please. The one potentially effective constraint on such rampant road construction is a statewide regulation that requires the coordination of transportation systems with future land use maps to ensure that the latter are consistent with planned or existing infrastructure.¹⁴⁵ Although this provision appears within the Department of Community Affairs’ rules on transportation planning, it functions more like a concurrency rule. Instead of placing any sort of restriction on the location of new roads, it prohibits the establishment of long-term development plans until appropriate transportation

¹³⁸ *Id.* § 163.3177(6)(j)(2).

¹³⁹ *Id.* § 163.3177(6)(j)(8).

¹⁴⁰ *Id.* § 163.3177(7)(a).

¹⁴¹ FLA. ADMIN. CODE ANN. r. 9J-5.019 (2007).

¹⁴² FLA. ADMIN. CODE ANN. r. 9J-5.019(1).

¹⁴³ FLA. ADMIN. CODE ANN. r. 9J-5.019(4)(b)(4).

¹⁴⁴ FLA. ADMIN. CODE ANN. r. 9J-5.019(4)(c)(9), (12).

¹⁴⁵ FLA. ADMIN. CODE ANN. r. 9J-5.019(4)(b)(2).

infrastructure has also been programmed. Thus, although the rule technically covers planning, it is concerned more with the *timing* than the *location* of growth. This distinction, it turns out, is telling.

Florida's weak transportation planning rules stand in stark contrast to its strong concurrency requirements.¹⁴⁶ The Growth Management Act provides that individual communities must determine appropriate levels of service for public facilities, including roads.¹⁴⁷ No development project that threatens to decrease the level of service of any road below the level set by the community can proceed unless new or improved roads will be in place or under construction within three years of the issuance of a building permit for the development.¹⁴⁸ Public transportation facilities are usually exempt from this provision, meaning that they do not have to be in place as quickly, possibly in order to avoid discouraging communities from undertaking ambitious mass transit projects.¹⁴⁹ The concurrency requirements are also waived for urban infill redevelopment on the understanding that such development, which the state has decided is desirable, otherwise might not occur.¹⁵⁰ Exemptions from the concurrency rules may also be granted for specific projects under limited circumstances. To qualify for an exemption, the local jurisdiction's comprehensive plan must include the infrastructure in question, and the project's developer must agree to pay his "fair share" of the cost of that infrastructure.¹⁵¹

Regulations of the Department of Community Affairs¹⁵² provide further detail regarding the three-year construction requirement for local roads. If at the time a new development permit is granted necessary roads are not already under construction, there must be a binding agreement in place to provide for those roads within the next three years.¹⁵³ Either the inclusion of the roads in the state's long-range

¹⁴⁶ Florida's concurrency requirements are modeled on the famous growth management plan discussed in *Golden v. Planning Board of Ramapo*, 285 N.E.2d 291, 295 (N.Y. 1972), which required residential development "to proceed according to the provision of adequate municipal facilities and services." Thomas G. Pelham, *From the Ramapo Plan to Florida's Statewide Concurrency System: Ramapo's Influence on Infrastructure Planning*, 35 URB. LAW. 113, 113 (2003).

¹⁴⁷ FLA. STAT. § 163.3177(3)(a)(3) (2007).

¹⁴⁸ *Id.* § 163.3180(2)(c).

¹⁴⁹ *Id.* § 163.3180(4)(b).

¹⁵⁰ *Id.* § 163.3180(4)(c)-(5)(c); see also *supra* notes 57-64 and accompanying text (discussing potential negative effects of inflexible concurrency rules on urban infill and revitalization and referencing Florida's exemption provisions). But see Nicholas & Steiner, *supra* note 131, at 667-68 (noting that despite exemption from transportation concurrency rules, urban infill development is still rare due to its high cost).

¹⁵¹ § 163.3180(11)(a)-(e).

¹⁵² FLA. ADMIN. CODE ANN. r. 9J-5.0055 (2007).

¹⁵³ FLA. ADMIN. CODE ANN. r. 9J-5.0055(3)(c)(1)-(4).

transportation plans or the existence of an enforceable development agreement is sufficient to fulfill this requirement.¹⁵⁴ Designated “multimodal transportation districts” are exempt from the three-year requirement; they may be approved for development so long as there are firm assurances that the necessary transportation facilities will be funded adequately and constructed in the near future.¹⁵⁵

Florida, unlike Oregon, seems to take concurrency quite seriously. The state’s strict requirements make it unlikely that sprawling subdivisions will be built in sensitive locations like the state’s remaining swamps—unless portions of those swamps are already covered with asphalt. This caveat, however, exposes the ramifications of the state’s failure to legislate with equal strength on the planning side of the equation. Thus, Florida’s statutory and regulatory regime is almost the exact opposite of Oregon’s: It includes tough language to ensure that new development only takes place once there is sufficient infrastructure in place, but it neglects to specify where new roads may be constructed through previously undeveloped areas.¹⁵⁶

Litigation concerning the Growth Management Act began just a few years after the statute’s enactment. With its decision in *Department of Transportation v. Lopez-Torres*,¹⁵⁷ the Florida Supreme Court quickly—albeit briefly—entered the debate on the issue of road location. In a definite setback to local governments’ ability to plan effectively, the court held that since the Department of Transportation (DOT) has plenary power over the state highway system, it could build a bridge carrying a state road through a municipality in direct contravention of the municipality’s comprehensive plan.¹⁵⁸ Although state and local governments were required to “cooperate and coordinate their transportation planning efforts,” DOT had the last word if no agreement could be reached between the various governments.¹⁵⁹ This decision should hardly be surprising considering the frailty of Florida’s statutory and regulatory efforts to constrain the location of new roads.

¹⁵⁴ FLA. ADMIN. CODE ANN. r. 9J-5.0055(3)(c)(2), (4).

¹⁵⁵ FLA. ADMIN. CODE ANN. r. 9J-5.0055(3)(c)(7).

¹⁵⁶ At least one commentator has argued, however, that even Florida’s concurrency requirements are not strong enough, and that they have been weakened by an increasing number of loopholes. Sakowicz, *supra* note 4, at 404–05. Another commentator would like to see the concurrency requirements tied more closely to comprehensive planning rules. Steiner, *supra* note 73, at 295. In comparison to Oregon and even Washington, however, it is hard to claim that Florida is weak on concurrency.

¹⁵⁷ 526 So. 2d 674 (Fla. 1988).

¹⁵⁸ *Id.* at 676.

¹⁵⁹ *Id.*

Perhaps more surprisingly, it appears that Florida courts have never ruled on the state's current transportation concurrency rules.¹⁶⁰ The closest they have come is a series of decisions dealing with the procedures governing the construction of water and sewer lines to serve new developments. In *Rinker Materials Corp. v. Town of Lake Park*,¹⁶¹ the state supreme court concluded that the term "development" did not include maintenance of or improvements made to roads, sewers, or piping within existing rights of way.¹⁶² As a result, such work did not have to conform to a local government's comprehensive plan.¹⁶³ Fourteen years later the Fifth District Court of Appeal, applying the same reasoning, held that the Growth Management Act did not apply to a county's decision to extend water and sewer lines underneath existing roads in order to facilitate the construction of two highway rest stops along Interstate 95.¹⁶⁴ The plaintiffs' claim that the project would foster growth in environmentally sensitive areas was not enough to convince the court that the Act applied.¹⁶⁵ In a later decision, the same court ruled that water and sewer line extensions did not need to be included in the same county's comprehensive plan.¹⁶⁶ Although these cases do not deal with transportation concurrency per se, they do hint at the Florida courts' willingness to allow the construction of infrastructure that enables sprawl-inducing development.

In the final analysis, Florida's transportation planning and concurrency rules are quite distinct from those in Oregon. Neither Florida's statutes and regulations, nor its judicial opinions, have done much to prevent uncoordinated decisions regarding the location of new roads. On the other hand, Florida's concurrency rules are rather strict, although they have not been litigated extensively. In the cases that have arisen, the state's appellate courts have endorsed plans to assemble quickly the utility infrastructure necessary for sprawl; how

¹⁶⁰ Westlaw searches for cases citing either FLA. STAT. § 163.3180 or FLA. ADMIN. CODE ANN. r. 9J-5.019 turned up only five cases, none of which are relevant here (from www.westlaw.com, search the database FL-CS for "163.3180 or 9J-5.019"; search conducted Apr. 3, 2008). Note, however, that section 163.3180 has been amended several times since its initial enactment, see Nicholas & Steiner, *supra* note 131, at 662-63 (discussing amendments to Growth Management Act), so it may take several years before judicial decisions treating the current version appear.

¹⁶¹ 494 So. 2d 1123 (Fla. 1986).

¹⁶² *Id.* at 1126.

¹⁶³ *Id.*

¹⁶⁴ 1000 Friends of Fla., Inc. v. St. Johns County, 765 So. 2d 216, 217-18 (Fla. Dist. Ct. App. 2000).

¹⁶⁵ *Id.* at 217.

¹⁶⁶ St. Johns County v. Dep't of Cmty. Affairs, 836 So. 2d 1034, 1034 (Fla. Dist. Ct. App. 2002).

those same courts would react to questions concerning transportation infrastructure is unclear. While Florida's transportation planning requirements do not come close to meeting Oregon's, its concurrency rules—at least on their face—do compare favorably.

C. Washington

Washington's statutory scheme exhibits a mix of the elements highlighted by earlier reforms in Oregon and Florida. The state passed its Growth Management Act in 1990,¹⁶⁷ well after its predecessors' statutes had taken effect. The Washington legislature used straightforward language to describe the statute's purpose. The law was designed to “[r]educe the inappropriate conversion of undeveloped land into sprawling, low-density development” and to “[e]ncourage efficient multimodal transportation systems.”¹⁶⁸ Curtailing sprawl and decreasing automobile reliance were thus clearly put on the agenda.

Unlike in Oregon and Florida, not every local government in Washington has to plan comprehensively. Counties that have not experienced rapid growth in the last ten years—as determined by a sliding scale based on the county's population—do not need to meet the Growth Management Act's requirements.¹⁶⁹ When such growth criteria are met and planning is required, however, comprehensive plans must include transportation elements.¹⁷⁰ These elements must be consistent with the jurisdiction's land use regulations¹⁷¹ and must include explicit level-of-service requirements.¹⁷² Each transportation plan must be accompanied by an assessment of its likely impact on the transportation systems of neighboring cities and counties.¹⁷³ In this way, the Act emphasizes regional coordination. At the same time, however, local governments are not obligated to consider public transportation options;¹⁷⁴ the only alternative modes that must be analyzed are walking and bicycling.¹⁷⁵ Together, these provisions seem more procedural than substantive. Although requiring local governments to coordinate their transportation planning *could* curtail the inefficient

¹⁶⁷ WASH. REV. CODE ch. 36.70A (2008).

¹⁶⁸ *Id.* § 36.70A.020(2)–(3).

¹⁶⁹ *Id.* § 36.70A.040(1).

¹⁷⁰ *Id.* § 36.70A.070(6).

¹⁷¹ *Id.*

¹⁷² *Id.* § 36.70A.070(6)(a)(iii)(B).

¹⁷³ *Id.* § 36.70A.070(6)(a)(v).

¹⁷⁴ *Id.* § 36.70A.070(6)(b) (“[Transportation] strategies *may* include increased public transportation service”) (emphasis added).

¹⁷⁵ *Id.* § 36.70A.070(6)(a)(vii) (mandating inclusion of “[p]edestrian and bicycle component” in transportation plan).

placement of roads, it will not necessarily do so. Still, Washington's rules carry more force than Florida's, which do not mandate any inter-governmental coordination.¹⁷⁶

Washington's transportation concurrency rules fall somewhere between those of Florida and Oregon. In general, a local government must prohibit developments that would reduce levels of service at transportation facilities to unacceptable levels.¹⁷⁷ Compliance with this rule can be accomplished by ensuring that the funding necessary to construct adequate facilities is allocated at the time a new development permit is granted.¹⁷⁸ The facilities themselves must be in place within six years.¹⁷⁹ As in Florida¹⁸⁰—and unlike in Oregon¹⁸¹—the timeframe for the provision of transportation infrastructure is fixed. Six years, however, is not a short period; projects in Florida must meet that state's concurrency requirements within half as much time.¹⁸²

The Washington courts have not erected serious barriers to development.¹⁸³ Most of the litigation surrounding the Growth Management Act has concerned its concurrency requirements. For the most part, the courts in such cases have taken a permissive stance that limits the force of the state's concurrency rules. In an important opinion issued in 2001, the Court of Appeals Division I held that a local government's decision to change the method by which it calculated peak hour traffic volumes—i.e., using statistics from the 4:00 p.m. to 5:00 p.m. hour as well as the 5:00 p.m. to 6:00 p.m. hour—was not a “zoning ordinance.”¹⁸⁴ Thus, the local community council, which otherwise might have been able to veto the change in methodology, was powerless to prevent its adoption.¹⁸⁵ Likewise, the council could not demand that the jurisdiction amend its comprehensive plan to reflect

¹⁷⁶ See FLA. ADMIN. CODE ANN. r. 9J-5.019 (2007) (detailing specific requirements for transportation plans without mentioning coordination with neighboring local government units).

¹⁷⁷ *Id.* § 36.70A.070(6)(b).

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ See *supra* notes 147–48 and accompanying text (discussing Florida's concurrency requirement of three years).

¹⁸¹ See *supra* notes 98–107, 122–30 and accompanying text (describing Oregon's complex system of concurrency rules).

¹⁸² See *supra* notes 147–48 and accompanying text.

¹⁸³ There are no administrative regulations that deal specifically with transportation planning in Washington. See WASH. ADMIN. CODE tit. 365 (2008) (listing contents of title 365 of Washington Administrative Code, titled “Community, Trade, and Economic Development,” none of which includes transportation).

¹⁸⁴ *Sammamish Cmty. Council v. City of Bellevue*, 29 P.3d 728, 730, 732 (Wash. Ct. App. 2001).

¹⁸⁵ *Id.* at 732.

the new measurement technique.¹⁸⁶ The court rejected the plaintiffs' argument that the new measurements would result in artificially low vehicle counts, undermining the state's efforts to demand transportation concurrency.¹⁸⁷

In a similar case the following year, the same court reached an analogous outcome. The plaintiffs in *Montlake Community Club v. Central Puget Sound Growth Management Hearings Board*¹⁸⁸ objected to Seattle's expanded use of "screenline" traffic-measurement methods.¹⁸⁹ Instead of counting the number of cars that passed through individual intersections, this controversial methodology focused on "larger corridors and geographic zones," with the explicit goal of "promot[ing] growth and minimiz[ing] the effect of stringent level-of-service standards."¹⁹⁰ Despite finding that screenline measurements tended to "overstate the [traffic] capacity of a corridor,"¹⁹¹ the court affirmed a local hearings board decision¹⁹² that allowed the city to continue using the methodology.¹⁹³ Moreover, the fact that the city had recently revamped the zoning ordinance applicable to certain neighborhoods did not afford the plaintiffs another opportunity to claim that the screenline methodology, originally adopted on a limited basis in 1994, was invalid; despite the update to the zoning code, the only time that this claim could have been made was in 1994.¹⁹⁴

Although the cases discussed above are representative, Washington's courts have not approved every concurrency-related local ordinance they have reviewed. In *City of Bellevue v. East Bellevue Community Municipal Corp.*,¹⁹⁵ the Court of Appeals Division I invalidated an enactment that would have exempted entire classes of development projects from the state's concurrency rules.¹⁹⁶ The court stressed that "concurrency is not a goal, it is a requirement."¹⁹⁷ However, the fact that a city had the gall to ignore a major portion of the Growth Management Act in the first place is a strong

¹⁸⁶ *Id.* at 733.

¹⁸⁷ *Id.* at 730.

¹⁸⁸ 43 P.3d 57 (Wash. Ct. App. 2002).

¹⁸⁹ *Id.* at 58.

¹⁹⁰ *Id.* at 60.

¹⁹¹ *Id.* at 61.

¹⁹² Washington's Growth Management Hearings Boards are special state trial courts for land use matters, much like Oregon's Land Use Board of Appeals. *See* WASH. REV. CODE § 36.70A.250–280 (2008) (creating Growth Management Hearings Boards); *see also supra* note 109 and accompanying text (discussing Oregon's Land Use Board of Appeals).

¹⁹³ *Montlake Cmty. Club*, 43 P.3d at 62.

¹⁹⁴ *Id.* at 61–62.

¹⁹⁵ 81 P.3d 148 (Wash. Ct. App. 2003).

¹⁹⁶ *Id.* at 149.

¹⁹⁷ *Id.* at 153.

indication of the consequences of the courts' more permissive decisions.

On balance, Washington's planning rules are tougher than those in Florida but weaker than those in Oregon, while its concurrency provisions are stricter than Oregon's lax policies but more permissive than Florida's strong ones. Unlike Oregon and Florida, Washington has addressed both sides of the sprawl equation—it has, after all, actually legislated with respect to both planning and concurrency—but in so doing, it has failed to take dramatic steps on either front.

This last observation is vital: Merely addressing both sides of the sprawl-prevention equation will not accomplish much unless the task is approached with sufficient vigor. In Washington, for example, the statutory requirement that neighboring local governments coordinate transportation plans with one another¹⁹⁸ does not mean much in the absence of rules demanding that such governments consider public transportation options or otherwise work to reduce automobile reliance. Indeed, consideration of ways to encourage the use of alternative modes of transportation should be mandatory to give force to the state's transportation planning requirements. Similarly, by endorsing Seattle's explicit attempts to circumvent the Growth Management Act's concurrency provisions, the *Montlake Community Club* decision¹⁹⁹ makes it improbable that the Act will actually be able to control the timing of future growth. To give teeth to these concurrency rules, the Washington state legislature should overturn the decision and explicitly restrict the traffic-measurement techniques that local governments can use to those proven to be accurate and even-handed. Finally, and perhaps most importantly, none of Washington's statewide land use regulations have any effect on the smaller cities and counties that are *not* required to plan comprehensively in the first place.²⁰⁰ As in Oregon and Florida, Washington should require all of its local governments to promulgate comprehensive plans for future growth.

IV

RECOMMENDATIONS

Although none of the states discussed in Part III has adequately or thoroughly addressed both sides of the sprawl-prevention equation, taken together their examples provide substantial guidance for future legislative efforts. As argued above, any serious effort to use statutes

¹⁹⁸ See *supra* note 173 and accompanying text.

¹⁹⁹ See *supra* text accompanying notes 188–94 for a discussion of the case.

²⁰⁰ WASH. REV. CODE § 36.70A.040(1) (2008).

governing transportation infrastructure to curtail sprawl must proceed along two lines.

First, transportation planning laws must discourage uncoordinated and unnecessary road building. As a threshold matter, all local government units should be required to plan comprehensively and to maintain consistency between their zoning ordinances and their long-term visions for growth. Effective planning should result in a well-considered strategy for moving people and goods rather than in a series of stopgap measures designed to placate voters concerned with daily traffic congestion. Instead of focusing on automobiles, local governments ought to be forced to think about how they can encourage people to use public transportation. Since public transportation cannot survive in areas of low population density,²⁰¹ this task will require individual jurisdictions to consider increasing buildable densities in certain areas while decreasing those densities—sometimes to extremely low levels—in others, in a pattern incompatible with sprawl. In addition, plans to construct new roads should not be approved without a showing that the roads are absolutely necessary. Since most new arteries will do little to reduce traffic congestion, but much to increase sprawl,²⁰² they should ultimately be built only as a last resort.

Second, concurrency rules must prohibit growth where transportation infrastructure is insufficient to support it. Local governments should not be allowed to issue permits, make planning or zoning changes, or otherwise alter the land use regulatory environment so as to enable new development unless necessary transportation facilities are already in place or will be in place soon. Any determination of what facilities are necessary, however, should be nuanced enough to allow growth in areas that were once developed but have since fallen into disrepair, such as decayed urban cores. New transportation facilities, if required, should be built in a short amount of time, with financing commitments in place when a project is approved. Without such stringent constraints on development in traffic-prone locations, political pressure will inevitably mount to build roads and highways that are inconsistent with the comprehensive plans discussed above. Put another way, sooner or later the absence of concurrency requirements will undermine the effectiveness of locational transportation planning.

²⁰¹ See *supra* note 15 and accompanying text.

²⁰² See *supra* note 20 and accompanying text (noting that new roads will become congested with drivers who previously traveled by alternate routes, at other times, or by public transportation).

The implementation of these recommendations would lead to concrete changes in a number of the cases discussed in Part III. For example, in the Florida case of *Lopez-Torres*,²⁰³ strong transportation planning rules—by complementing the state’s preexisting concurrency regulations—would likely have prevented the Department of Transportation from locating a state highway bridge in contravention of a municipality’s comprehensive plan. Likewise, in *Montlake Community Club*,²⁰⁴ insistence on more meaningful concurrency rules would likely have stopped Seattle from implementing “screenline” traffic-measurement techniques that deliberately overstated road and highway capacities in order to promote development in areas underserved by existing transportation infrastructure. Finally, in Oregon, a stronger commitment to concurrency probably would have dissuaded the Land Conservation and Development Commission from reacting to the *Klamath Falls* and *Jaqua* decisions—which together effectively inserted a true concurrency requirement into the state’s transportation planning rules—by amending its administrative regulations to eviscerate the two decisions.²⁰⁵

These recommendations, of course, will not be welcomed in every state. In many jurisdictions, sprawl continues to be accepted and even embraced, in part because of the power of groups who benefit from it, such as the real estate and construction industries.²⁰⁶ In addition, sprawl does have its advantages: If consumers really do prefer single-family homes on individual plots of land,²⁰⁷ large swaths of low-density development are the way to go. Nevertheless, the experiences of states like Oregon, Florida, and Washington suggest that the political will may exist, in certain areas, for wide-ranging changes to dominant land use patterns. In those jurisdictions that ultimately decide to reduce sprawl, lawmakers must be sure to address both components of the phenomenon’s transportation-related causes.

²⁰³ 526 So. 2d 674 (Fla. 1988). See *supra* text accompanying notes 157–59 for a discussion of this case.

²⁰⁴ 43 P.3d 57 (Wash. Ct. App. 2002). See *supra* notes 188–94 and accompanying text for a discussion of this case.

²⁰⁵ See *supra* notes 124–30 and accompanying text for a discussion of these cases and the subsequent regulatory changes.

²⁰⁶ See Pollard, *supra* note 50, at 276–77 (discussing strong resistance of real estate and construction industries to attempts to decrease sprawl).

²⁰⁷ See *supra* note 3 and accompanying text (discussing demand for single-family homes).

CONCLUSION

There is no mistaking the prevalence of sprawl in the American landscape, especially in the country's fastest-growing regions.²⁰⁸ Some see sprawl as a benign byproduct of economic growth and consumer preferences for space and privacy; others go so far as to deem it a manifestation of the American dream of upward mobility.²⁰⁹ For many, however, sprawl has been costly, inefficient, and alienating.²¹⁰ Accordingly, a number of states have moved to curtail sprawl's pattern of expansive, low-density development.

Even the most active states, however, have largely failed thus far in their legislative, administrative, and judicial efforts to account for the two primary transportation-related causes of sprawl. While some jurisdictions have managed to prevent the construction of roads where there are no people, and others have been able to curtail the development of housing where there are no roads, Oregon, Florida, and Washington have all been unable to attack sprawl successfully on both fronts. Unfortunately for these states, effective control of both the placement and timing of new road construction is crucial for any effort to curb the phenomenon. Future regimes with the political will to combat sprawl can do better by avoiding the mistakes of their predecessors. Otherwise, their efforts to curtail a wasteful pattern of development will themselves go to waste.

²⁰⁸ See CERVERO, *supra* note 20, at 22–23 (discussing decentralized population boom on suburban fringes of cities in south and west of country); FREILICH, *supra* note 4, at 2 (“Most of America’s growth during the twentieth century, and especially in the postwar era, has taken place in the suburban-rural fringes of major metropolitan areas . . .”).

²⁰⁹ JACKSON, *supra* note 3, at 4.

²¹⁰ See *supra* Part I (discussing economic, environmental, and social costs of sprawl).