



**Testimony of Vermont Chamber of Commerce - H.740
Michael Zahner, March 13, 2014**

Transportation Impact Fees - H.740

Recommended Standards and Considerations:

I. Rational Nexus and Proportionality

In order to impose a rational impact fee, there needs to be a strong nexus or direct connection between the traffic impacts of a development or subdivision and the need for new transportation infrastructure improvements in the area pursuant to the findings of fact and conclusions of law issued by a district environmental commission. Under Criterion 5 (Traffic), the burden of proof is on any party in opposition, in this case the likely statutory party would be the Vermont Agency of Transportation that would have to prove that linkage. Interestingly, the burden is on the applicant under Criterion 9(K) (Impact on Public Investments). If there are undue impacts under either of these criteria justifying the imposition of an impact fee, the cost of the capital improvement will need to be identified and the fee must be tailored to the proportional degree to which the project creates that unreasonable or undue impact. The applicant must also benefit from the use of the capitol improvement within a reasonable period of time. We do not believe that 15 years is a reasonable amount of time. If the capital improvement is not constructed within a reasonable period of time, it is quite possible that those who have paid the impact fee will be adversely impacted by the growth of background traffic, will certainly not be able to benefit from the capital improvement and other projects may not be allowed to proceed similar to the situation we have now in a number of areas (as per testimony). If the traffic situation is critical enough to justify the imposition of impact fees, a 15 year period without the required capital improvement will only allow those conditions to seriously worsen in a manner that may: "*unnecessarily or unreasonably endanger.....the function, efficiency, or safety of, or the public's use or enjoyment of or access to the facility, service, or lands [roadway].*" See Criterion 9(K) - 10 V.S.A. Section 6086(9)(K). Therefore, we believe that it is critical to see capital improvements completed in a reasonable time frame, perhaps six to eight years, while allowing those developments paying an impact fee to go forward unless there are safety issues that need to be addressed.

II. "Specifically and Uniquely Attributable" Standard

Many courts have ruled that transportation impact fees can be imposed to fund necessary construction of capital improvements only if they are "*specifically and uniquely attributable*" to the development. (*Illinois Supreme Court: Northern Illinois Home Builders Association, Inc. v. County of DuPage, 165 Ill. 2d 25 (1995) and the U.S. Supreme Court: Dolan v. City of Tigard, 512 U.S. 374 (1994)*). This standard is preferable to the less stringent "*reasonable relationship*" standard that is currently in the latest draft.

Discussion: This is a policy question for the Committee. We prefer the more stringent test as outlined in U.S. Supreme Court caselaw. See line 19 on page 11 and the Comment Section on page 12 of the March 10th draft. As mentioned by legislative counsel, there is no Vermont Supreme Court caselaw regarding the various standards and we would prefer to have the legislature adopt the more stringent standard that has been adequately tested in other jurisdictions and there is sufficient caselaw to provide guidance. We agree that this standard should apply solely to the imposition of impact fees.

III. Imposition of a Traffic Impact Fee

§ 6104. TRANSPORTATION FEE; DISTRICT COMMISSION

(a) A District Commission may require payment of a transportation fee in accordance with section 6106 of this title to fund, in whole or in part, capital improvements that are necessary to mitigate the transportation impacts of a proposed ~~developmentland use project~~ development or subdivision or that benefit the proposed development or subdivision. The Agency shall review the application and recommend to the District Commission whether to require mitigation of the transportation impacts of the ~~developmentland use project~~ development or subdivision. The District Commission may require an applicant to pay the entire cost of a capital transportation project.

Discussion: There are two rationales for imposing an impact fee in Section 6104 above (page 9 of the current draft): 1) payment of a fee for capital improvements that serve to mitigate the unreasonable impacts of a development or subdivision; and, 2) payment of a fee if certain projects will benefit in some way by the capital improvements (which arguably are not necessary for the development or subdivision to move forward). It is unclear whether all proposed developments or subdivisions benefitting in some way would be required pay fees without the required rational nexus? Would de minimus projects be required to pay a fee and how would proportionality be determined. In Florida, there is a de minimus exemption provision provided the roadway is at or does not exceed 110% of its capacity. If the roadway capacity is exceeded above that level, future de minimus projects will not be approved. Finally, If the applicant is required to pay the entire cost of the capital improvement, there should be a method by which the applicant can be reimbursed in a proportional manner by subsequent developers that use or benefit from the improvement similar to provisions in the bill that will allow VTRANS to recoup its investment through subsequent developers.

IV. For Informational Purposes Only - State of Florida

PLANNING FOR CONCURRENCY

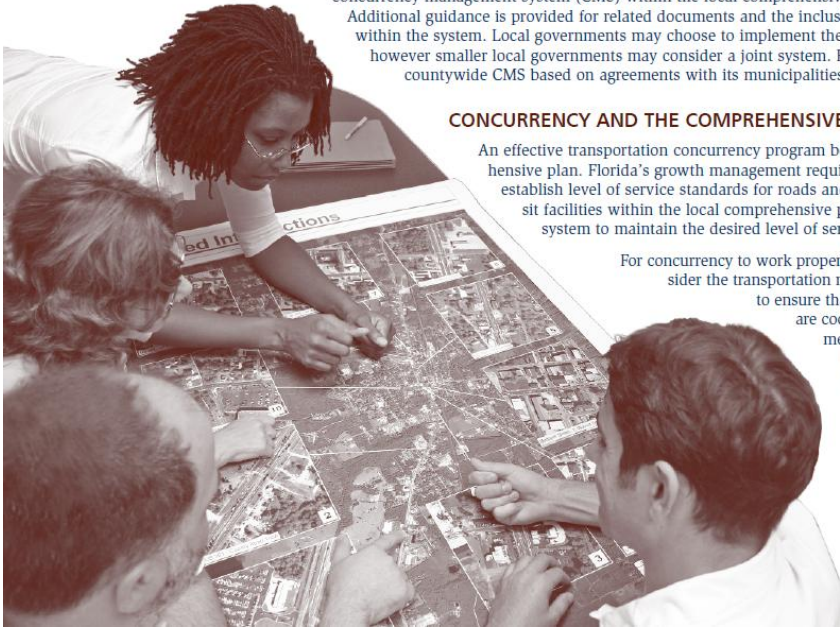
Although the concept of transportation concurrency is relatively straightforward, applying it well requires extensive planning. This chapter addresses the basic planning considerations in developing a concurrency management process for transportation. It begins with steps for including level of service standards and a concurrency management system (CMS) within the local comprehensive plan and land development regulations. Additional guidance is provided for related documents and the inclusion of proportionate fair share mitigation within the system. Local governments may choose to implement their own concurrency management system; however smaller local governments may consider a joint system. For example, a county may maintain a countywide CMS based on agreements with its municipalities.

CONCURRENCY AND THE COMPREHENSIVE PLAN

An effective transportation concurrency program begins with the local government comprehensive plan. Florida's growth management requirements direct each local government to establish level of service standards for roads and (for larger local governments) public transit facilities within the local comprehensive plan, along with a concurrency management system to maintain the desired level of service.

For concurrency to work properly, local governments should first consider the transportation needs implied by the future land use plan to ensure that local land use and transportation plans are coordinated. Future land use map amendments can have a substantial impact on the transportation system, ultimately affecting concurrency. Therefore, it is important to measure the impacts of these amendments and determine if additional transportation improvements are needed. Guidance on evaluating the transportation impacts of proposed comprehensive plan amendments is provided in the Appendix.

Local governments will also need to determine the financial feasibility of carrying out the capital improvements program and maintaining a desired



level of service in view of competing resource demands. If the capital improvements element does not identify transportation improvements sufficient to handle the impacts of planned future growth, then concurrency will be virtually impossible to achieve. A guide for local governments entitled *Preparing the Five-Year Schedule of Capital Improvements* is available on the DCA website.

Recognizing that transportation improvements need to be phased over time, concurrency also has a timing component. The capital improvements element should specify when, how and where improvements will be provided. The permitting of development should generally coincide with the timing of planned transportation improvements and service expansion. Without strategies for managing the rate, timing, and location of development, the concurrency technique could backfire and encourage urban sprawl.

Roads, for example, typically have more capacity to accommodate new development as one moves away from the urban core. Phased development strategies, such as staged expansion of urban service areas and infill incentives, such as the concurrency alternatives discussed in this chapter, could be applied to encourage development on or adjacent to existing infrastructure. Development may then be phased outward from urban centers through a predetermined expansion plan to promote more compact growth patterns. Land use regulations could

reinforce these strategies by restricting urban development outside the urban service area boundary and directing it in and around activity centers that can be more effectively served by roads and transit.

ESTABLISHING LEVEL OF SERVICE STANDARDS

PRACTICE TIP

Clearly establish level of service standards for roadways on the Strategic Intermodal System (SIS), including SIS Connectors, roadways on the Florida Intrastate Highway System (FIHS), and roadway facilities funded through the Transportation Regional Incentive Program (TRIP) based on Rule 14-94, F.A.C.

The 2005 amendments to Florida's growth management legislation changed the requirement for LOS standards on many state roads. Section 163.3180(10), Florida Statutes, now requires all local governments to adopt the level-of-service standard established by the Florida Department of Transportation on the Strategic Intermodal System (SIS), the Florida Intrastate Highway System (FIHS), and roadways funded under the Transportation Regional Incentive Program (TRIP). Prior to these changes, local governments were only required to apply FDOT minimum acceptable LOS standards to FIHS facilities.

Rule 14-94, Florida Administrative Code (F.A.C.) establishes LOS standards for state roads and has been modified to reflect the policy change and to reference the SIS and the TRIP. Table 1 shows the revised Statewide Minimum LOS Standards. To assure consistency with legislative and rule changes, it is a good idea for local governments to list and categorize roads by SIS (including SIS Connectors), FIHS, other state roads, and TRIP when establishing LOS standards. Below is model language that may be incorporated into the local comprehensive plan for generally establishing LOS standards for roads subject to Chapter 163, Florida Statutes, and subsequent revisions to Rule 14-94, F.A.C.:

The level of service standard for roadways on the Strategic Intermodal System (SIS), including SIS Connectors, roadways on the Florida Intrastate Highway System (FIHS), and roadway facilities per Chapter 163, Florida Statutes, funded in accordance with Section 339.2819 Florida Statutes, the Transportation Regional Incentive Program, shall be as set forth in Rule 14-94, Florida Administrative Code, as amended and applied as follows:

[list and categorize roads by SIS, FIHS, other state roads, and TRIP with the corresponding LOS standard]

The Florida Statewide Minimum Level of Service Standards (Table 1) may be included in the comprehensive plan, as well. Note that Rule 14-94, F.A.C., as

INCORPORATING TRANSPORTATION CONCURRENCY INTO THE LAND DEVELOPMENT CODE

Purpose and intent. A concurrency management chapter often begins with a purpose and intent. This section states the purpose the CMS will serve “to ensure that adequate public facilities are available with the impact of development” and may reference the state legislation mandating a CMS.

Geographic service area. The geographic service area of a CMS is typically defined here. If the geographic service area is different for the various public facilities or utilities governed by concurrency, each service area must be defined separately. In addition, local governments may list utilities and facilities addressed by the CMS.

Tracking and reporting systems. The description of and implementation process for monitoring and reporting systems are included in this section. It is recommended that local governments have separate tracking and reporting systems for transportation concurrency.

De minimis exceptions. As allowed by state legislation, this section includes a definition of developments that have a *de minimis* impact. Furthermore, most local governments list the developments or development activities considered to be *de minimis*. Developments with *de minimis* impacts may be exempted from the transportation concurrency determination process of local governments. However, there is a limit to *de minimis* impact on any given road link. If a road link is at or exceeds 110% of its service capacity, no further developments are to be approved on that link under the *de minimis* provision until the necessary improvements are in place and the roadway is operating within 110% of its service capacity.

Concurrency exemptions. In addition to *de minimis* exceptions, some local governments exempt specific types of development from concurrency, which would be listed in this section (e.g. improvements that would not add to the density or intensity of the existing land use such as any renovation to residential structures that do not increase the overall number of units or the type of units; and renovations to non-residential buildings that do not result in an increase in gross square footage for any use).

Concurrency certificates. Depending on the complexity of the CMS and the size of the local government, different types of certificates may

be issued. This section establishes when a concurrency certificate is issued (usually along with other permits such as development permits, final plat approvals, or building permits), as well as the duration of the certificate and conditions for its extension.

Concurrency evaluation process. A key component of the concurrency management chapter of the land development regulations (LDRs) is the explanation of the concurrency evaluation process. General procedures and conditions to be applied to every facility and utility are described along with the administrative process to be followed. The administrative process may contain the responsibilities of local government departments, as well as the data reporting and maintenance methodology. The specific process for each utility and facility type is explained separately, with the transportation concurrency evaluation process often discussed in the greatest detail.

Traffic study methodology. A traffic study, typically required for large development applications, must follow specific methodology. Some local governments include traffic study methodology as a separate section in their LDRs while others provide supplementary documents for traffic study procedures and merely reference them here.

Adopted level of service standards. Adopted LOS standards for utilities and facilities contained in related elements of the local government comprehensive plan are either listed here or referenced.

Mitigation. If adequate public facilities are not available for a development, local governments may allow a developer to mitigate the impacts of the proposed development. Mitigation procedures including acceptable and unacceptable mitigation methods are listed here along with other options including alternatives to mitigation such as reducing the scale of the development and/or phasing the project.

Vested rights. Application and determination of vested rights are contained in this section. Vested rights usually include development approvals issued prior to the adoption of concurrency. This section outlines the process a developer must follow to receive a vested rights determination and, therefore, avoid the concurrency process.

Appeal process. This section explains the procedure for appealing a concurrency determination and identifies the responsible departments or officers.

19

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