

## From Policy to Reality



Primary Author:



Planning, Inc.

Brian Ross

Project Coordinator:



Planning, Inc.

## INTRODUCTION

A primary tenant of sustainability is that development must be commensurate with capacity. In terms of infrastructure, development should be directed to areas with existing infrastructure capacity, including roads, schools, waste water and drinking water systems, fire protection, parks, and recreation facilities.

Communities have several tools at their disposal to match development with infrastructure capacity, including the following:

- Zoning that restricts development within the infrastructure capacity of a given area,
- Development fees linked to infrastructure costs associated with each development,
- Performance standards that require low levels of demand on public facilities,
- Ordinances that overlay the zoning code or direct the rezoning and variance procedures to ensure that adequate investment in public facilities is made prior to development.

The following ordinance language reflects the last of these options; an Adequate Public Facilities Ordinance, also known as a Concurrency Ordinance.

Creating an Adequate Public Facilities Ordinance involves several steps, some of which are outside the realm of ordinances or codes. First, the community needs to identify in its comprehensive plan a land use plan that reflects where adequate facilities exist, and where facilities will be added at a later date to allow for growth. Second, the community must adopt (through its Comprehensive Plan, or through a separate document such as a Capital Improvement Plan) a plan for staging infrastructure growth to accommodate growth in the community. The staging of infrastructure investment should be tied to specific “level of service” measurements - each type of infrastructure should have a threshold level of service that the community has committed to maintain. Finally, the zoning ordinance should reflect the comprehensive plan policies, allowing development only where the comprehensive plan indicates adequate facilities exist or are scheduled for construction in the near future.

### Gray Infrastructure and Green Infrastructure

The ordinance below addresses the adequacy of “grey,” or built, infrastructure (roads, sewers, schools, etc). The concept of developing within the carrying capacity of infrastructure can be applied to natural resource “infrastructure” in much the same way as built infrastructure. The economics of sustainability discuss the issue of managing natural systems whose capacity cannot be manufactured (air, water, and non-renewable natural resources) as infrastructure. The concept of concurrency is applied to the carrying capacity of the atmosphere

### *Adequate Public Facilities Ordinance*

*The model ordinance was adapted from Douglas County, Colorado, Concurrency Management Ordinance, Section 25 (Rezoning) of the Land Management Code, as reproduced in the American Planning Association Planning Advisory Service Report 465, White, S. Mark. Adequate Public Facilities Ordinances and Transportation Management, 1996.*

to absorb emissions (local air quality authorities), capacity of lakes, rivers, or wetlands to absorb discharges (watershed districts and watershed planning), and the capacity of ecological systems to sustain the harvest of renewable resources (forest landscape management).

### **Concurrency for Non-Residential Development**

Most concurrency ordinances, including the one used in this model, are directed to residential development. A community could apply the concepts of adequate public facilities to commercial and industrial development as well. An adequate public facilities ordinance can, for instance, direct appropriate commercial development into the downtown area of a community rather than to greenfield sites along the highway outside of town. Similarly, industrial development may tax a community's sewer, water, or transportation system – concurrency would demand that capacity be added or otherwise managed in such a way as to maintain existing levels of service, reserve margins, and natural resource protection.

## I. Purpose and Intent

- A. To ensure that public facilities needed to support new development meet or exceed the adopted level of service standards established by the Model Community Comprehensive Plan and this ordinance;
- B. To ensure that no rezonings are approved that would cause a reduction in the levels of service for any public facilities below the adopted level of service established in the Model Community Comprehensive Plan;
- C. To ensure that adequate public facilities needed to support new development are available concurrent with the impacts of such development;
- D. To establish uniform procedures for the review of rezoning applications subject to the concurrency management standards and requirements;
- E. To facilitate implementation of goals and policies set forth in the Model Community Comprehensive Plan relating to adequacy of public facilities, level of service standards and concurrency, including:
  - 1. Goal 1 - Avoid sprawling or leapfrog development as an inefficient use of Model Community's infrastructure and services.
  - 2. Goal 2 - Give priority to development opportunities that do not require the construction of new public infrastructure.
- F. To ensure that all applicable legal standards and criteria are properly incorporated in these procedures and requirements.

## II. Applicability

- A. This Section shall not apply to any use, development, project, structure, fence, sign, or activity which does not result in a new residential dwelling unit.
- B. The provisions of this Section shall apply to all applications for development approval requesting a residential use, or those portions of applications for development approval requesting a residential use, within the unincorporated area of Model Community. No Development Order shall be granted, approved, or issued unless accompanied by a Concurrency Data Form that has received a positive concurrency determination or a positive concurrency determination subject to conditions.

### **Comprehensive Plan Goals**

*Section E references specific comprehensive plan goals. Making such a direct reference to comprehensive plan helps demonstrate that this regulation is tied to specific publicly-vetted policies, and also helps users (developers, elected and appointed officials, staff) understand the expected outcomes from the ordinance, rather than simply meeting the letter of the law.*

### **Non-Residential Development**

*This model is written to apply only to residential development. As noted in the introduction, concurrency can apply to commercial or other types of development as well. Commercial or industrial concurrency would require a different set of standards, and would need to be tailored to the specifics of the community's commercial goals. Concurrency could, for instance, be related to transportation levels of service or capacity, vacancy rates in existing commercial districts, in addition to sewer, water, stormwater, or energy infrastructure.*

- C. No application for development approval shall be approved unless it has received a positive concurrency determination as set out in Section VII.A, or a positive concurrency determination subject to conditions, as set out in Section VII.C.
- D. **Vested Rights**
  - 1. Nothing in this ordinance shall limit or modify the rights of an applicant to complete any development authorized by an approved Site Specific Development Plan for a period extending three (3) years following the approval thereof or the expiration date set forth in the Site Specific Development Plan.
  - 2. If a developer has, by his actions in reliance on prior regulations, obtained vested rights that by law would have prevented Model Community from changing those regulations in a manner adverse to his interests, nothing in this ordinance authorizes Model Community or any official thereof to abridge those rights.
- E. The determination of concurrency shall not affect the otherwise operable and applicable provisions of the Model Community Zoning Code or the Model Community Subdivision Ordinance all of which shall be operative and remain in full force and effect without limitation.
- F. A Concurrency Data Form shall not be required for proposed residential development in municipalities in Model County unless the municipality and the County have mutually executed an intergovernmental agreement providing for the County to undertake this function on behalf of the municipality.

#### **City and County Interactions**

*Section F is provided for county governments that choose to use a concurrency test. The language defers to the performance standards, zoning, or subdivision requirements of any municipality within the county, consistent with state law.*

### **III. General Provisions-Monitoring**

- A. **Concurrency Information Database** - Model Community Staff shall develop, maintain, and update a Concurrency Information Database that shall provide support to Model Community officials and departments responsible for concurrency review, monitoring, and planning for public facilities. At a minimum, the database shall contain the following information:
  - 1. Existing dwelling units and nonresidential development;
  - 2. Committed development;
  - 3. The capacity of existing public facilities provided by Model Community, based on adopted level of service; and
  - 4. The capacity created by the completion of public facilities to be provided by Model Community, and that are included in the capital improvements program.

- B. **Annual Review** - Model Community Staff shall, not less frequently than annually, prepare and submit to the Council an annual Concurrency Management Report. The report shall include:
1. Growth trends and projections;
  2. Proposed changes to the boundaries of impact areas for any public facility,
  3. Proposed changes to existing or adopted level of service standards;
  4. Proposed changes in concurrency analysis methodologies;
  5. Recommendations on amendments to the Adequate Public Facilities Ordinance if appropriate; and
  6. Other data, analysis, or recommendations as the Director may deem appropriate, or as may be requested by the Council.
- C. **Effect of Annual Review** - The Annual Review may, in whole or in part, form the basis for recommendations to the Council or Council actions to repeal, amend, or modify this Section. Other data, reports, analyses, and documents relevant to such decisions as may be available may also be used.
- D. **Amendments** - Nothing herein precludes the Council or limits its discretion to amend this Section at such other times as may be deemed necessary or desirable

#### IV. Procedures for the Processing of Concurrency Data Form

- A. **Submittal Requirements** - All applications for development approval shall be accompanied by a Concurrency Data Form that includes sufficient information to allow Model Community to determine the impact of the proposed development on public facilities pursuant to the concurrency determination procedures. The Concurrency Data Form shall be a form prepared by the Department. The information required shall include, but shall not be limited to:
1. The total number, type of dwelling units, and gross density of proposed development;
  2. The location of the proposed development;
  3. An identification of the public facilities impacted by the proposed development; and
  4. Any other appropriate information as may be required by Model Community consistent with the provisions herein.
- B. **Fee for Review of Concurrency Data Form** - Each application for development approval shall be accompanied by the required Concurrency review fees, as may be established by the Council.

*Section A defines the evidence, worksheets, or other information that must be submitted with other development documents for community approval. The community could adopt a concurrency ordinance addressing commercial or industrial development, or a concurrency requirement for the preservation of natural resource "infrastructure" carrying capacity. In this case the submittal requirements must require information related to carrying capacities or levels or service appropriate to those commercial/industrial development, or natural resource management goals.*

### **Concurrency Review Procedures**

*Section V describes the review process for concurrency determinations. The department in charge of review will vary depending on the unit of local government. Planning Department, Department of Public Works, and Department of the Environment, are all examples found in Minnesota that could lead review and recommendations.*

### **Number of Residential Dwelling Units**

*Subsection 1 notes that the report provide the number of dwelling units served by each public facility. The number of dwelling units is a general metric that may not be applicable for each type of infrastructure. The number does, however, provide a easily quantifiable threshold for identifying when capacity is exceeded.*

## **V. Procedures for Concurrency Review and Recommendation by Department**

- A. **Department Review** - The Department (acting by and through the staff planner) shall determine whether the Concurrency Data Form complies with the submittal requirements set forth in section IV.A. If the Concurrency Data Form is incomplete or the submittal requirements have not been complied with, the Department shall so notify the applicant, specifying the deficiencies. If the Concurrency Data Form is complete and the submittal requirements have been complied with, the Department shall evaluate the proposed development for compliance with the adopted levels of service and shall submit a Concurrency Recommendation pursuant to subsection V.B.
- B. **Department Recommendation** - If the Department concludes that each public facility will be available concurrent with the impacts of the proposed development at the adopted levels of service, the Department shall make a positive Concurrency Recommendation in its staff report. If the Department determines that any public facility will not be available concurrent with the impacts of the proposed development at the adopted levels of service based upon existing public facilities, the Department shall make a negative Concurrency Recommendation in the staff report or a positive Concurrency Recommendation with appropriate conditions consistent with the criteria set forth in subsections X.B and VII.C of this Section. If the Department recommends that the application be conditionally approved, the staff report shall recommend conditions or stipulations that may address the density of the proposed development, the timing and phasing of the proposed development, the provision of public facilities by the applicant or any other reasonable conditions to ensure that all public facilities will be adequate and available concurrent with the impacts of the proposed development. The staff report shall, at a minimum, include the following, based upon staff and referral agency concurrency management recommendations:
  - 1. The number of residential dwelling units proposed by the applicant, by type, and the resulting number of residential dwelling units served by each public facility;
  - 2. The timing and phasing of the proposed development, if applicable;
  - 3. The specific public facilities impacted by the proposed development;
  - 4. The extent of the impact of the proposed development in the applicable impact areas;
  - 5. The capacity of existing public facilities in the impact areas which will be impacted by the proposed development, based on adopted level of service;
  - 6. The demand on existing public facilities in the impact areas from all existing and approved development;



7. The availability of existing capacity to accommodate the proposed development; and
8. If existing capacity is not available, planned capacity and the year in which such planned capacity is projected to be available to serve the proposed development.

**VI. Withdrawal of Concurrency Data Form** - The applicant may withdraw the Concurrency Data Form at any time by submitting a written request to the Department. Withdrawal may result in the forfeiture of some or all fees paid by the applicant for the processing of the Concurrency Data Form.

**VII. Concurrency Determination by Council-Criteria** - A proposed rezoning or special review that could result in a range of potential impacts shall be reviewed as if the greatest impact would result. The concurrency review shall compare the capacity of public facilities to the maximum projected demand that may result from the proposed rezoning or special review based upon the maximum potential density of the affected area pursuant to the rezoning or special review. Nothing herein shall authorize a rezoning or an allowance by special review that would otherwise be inconsistent with the Model Community Comprehensive Plan or the Model Community Land Use Map. Upon receipt of the staff report, and subject to compliance with all other applicable standards of approval for a Development Order, the Council may determine:

- A. A positive Concurrency Determination
- B. A negative Concurrency Determination
- C. A positive Concurrency Determination subject to one or more of the following conditions:
  1. Deferral of further Development Orders until all public facilities are available and adequate if public facilities in the impact area are not adequate to meet the adopted levels of service for the development proposal, consistent with the requirements of subsection X.B herein.
  2. Reduction of the density or intensity of the proposed development, including phasing of development, to a level consistent with the available capacity of public facilities.
  3. Provision by the applicant of the public facilities necessary to provide capacity to accommodate the proposed development at the adopted levels of service and at the time that the impact of the proposed development will occur.

### VIII. Expiration of Concurrency Determination

- A. A Concurrency Determination issued pursuant to subsection VII of this Section shall be deemed to expire when the Development Order to which it is attached expires, lapses, or is waived or revoked, or if the applicant has not complied with conditions attached to its issuance.
- B. If a Concurrency Determination attached to a rezoning expires, Model Community may initiate proceedings to rezone the property.

### IX. Effect of Positive Concurrency Determination

- A. A Positive Concurrency Determination for a Development Order shall be deemed to indicate that public facilities are available as determined in subsection X.B herein at the time of issuance of the Concurrency Determination.
- B. The Concurrency Determination shall expire and become null and void upon the expiration of the Development Order to which it is attached or the time frame for submitting a subsequent application for approval, unless an application for a subsequent Development Order is submitted within the time frames set forth in the Model Community Zoning Code. If no expiration date is provided in the Model Community Zoning Code in the conditions of the Concurrency Determination or in the conditions of permit approval, the Concurrency Determination shall expire within two (2) years after approval of the Development Order.
- C. A Concurrency Determination shall not be deemed as evidence supporting a request for a Model Community Comprehensive Plan amendment changing designated land use from one category to another, nor shall it affect the need for the applicant for a rezoning to meet all other requirements as set forth in this ordinance.
- D. **Advancement of Capacity** - No advancement of capacity for public facilities needed to avoid a deterioration in the adopted levels of service shall be accepted by the Council unless the proposed public facility is a planned capital improvement or appropriate conditions are included to ensure that the applicant will obtain all necessary approvals for such planned capital improvement from any governmental agency having jurisdiction over such planned capital improvement prior to or concurrent with the issuance of a final residential subdivision plat or, if subdivision approval is not required, a building permit. If such planned capital improvement requires the approval of a governmental agency, such approval shall authorize the full capacity upon which the Concurrency Determination

#### *Advancement of Capacity*

*Subsection D and its subsections use language that assumes a regular addition of capacity to the infrastructure for which concurrency is required. An alternative to developing new capacity is to offer developers the opportunity to manage existing demand on the current infrastructure. Electric utilities, for instance, meet new demand for electricity partially through offering energy efficiency programs to existing customers; existing customers use less, making existing capacity available for new development. Some larger cities in Minnesota require new development to meet transportation infrastructure needs through “travel demand management” efforts, such as building bus shelters, bicycle racks, and showers with changing rooms (an example of a “TDM” requirement is provided in this document).*

*The “demand-side” option the only real opportunity for managing the carrying capacity of natural resources. A local government cannot build new capacity for the atmosphere to absorb air emissions, or increase the capacity of a lake to prevent bio-accumulation of mercury in fish.*

was rendered. The commitment to construction of public facilities prior to the issuance of a building permit shall be included as a condition of the Concurrency Determination and shall contain, at a minimum, the following:

1. For planned capital improvements, a finding that the planned capital improvement is included within the capital improvements program of the applicable service provider;
2. An estimate of the total funding needed to construct the planned capital improvement and a description of the cost participation associated therewith;
3. A schedule for commencement and completion, of construction of the planned capital improvement with specific target dates for multi phase or large-scale capital improvement projects;
4. A statement, based on analysis, that the planned capital improvement is consistent with the Model Community Comprehensive Plan; and
5. At the option of Model Community, and only if the planned capital improvement will provide capacity exceeding the demand generated by the proposed development, reimbursement to the applicant for the pro rata cost of the excess capacity.

**X. Methodology and Criteria for Determining Availability and Adequacy of Public Facilities**

- A. **Level of Service Standards** - Compliance with level of service standards shall be measured in accordance with the standards set forth in Appendix A, as the same may be amended from time to time, and which are incorporated by reference as if set forth in its entirety herein.
- B. **Availability of Public Facilities** - Public facilities shall be deemed to be available within the applicable impact area if they meet the following standards:
  1. **Water Facilities, Wastewater Facilities, and Fire Protection Facilities**
    - a. The public facilities are currently in place or will be in place when the Development Order is granted; or
    - b. Provision of the public facilities are a condition of the Development Order and are guaranteed to be provided at or before the approval of a final plat or issuance of a building permit for proposed development on the subject property; or
    - c. The public facilities are under construction and will be available at the time that the impacts of the proposed development will occur; or

*The most meaningful action to address capacity is to lower existing discharges or make existing treatment facilities more efficient. Some approaches to natural systems take the demand-side management approach. The Minnesota Pollution Control Agency, for instance, created a model program in a portion of the Minnesota River watershed allowing industrial pointsource emissions to increase only if the industry successfully lowered non-point source pollution within the same watershed.*

**Level of Service Standards**

*Section A establishes Level of Service (LOS) standards, a vital component of an Adequate Public Facilities Ordinance. LOS standards for many kinds of infrastructure, such as roads, are common in planning literature and practice. LOS standards for other infrastructure, such as schools, libraries, and municipal buildings may be found, but are less established in law and practice. LOS standards for natural resource infrastructure must be developed specific to local areas and accepted natural resource planning practices. Some LOS standards may require extensive research, measurement, and justification.*

**Availability of Public Facilities**

*The standards in Sections B through F are directed toward residential development. Different standards may be necessary for commercial or industrial development.*

### **Regional Parks and Public Schools**

*Section 2 treats schools as infrastructure with a concurrency requirement. Communities must recognize that the location of new schools can affect LOS standards for other infrastructure, such as roads.*

### **Streets**

*Section 3 discusses LOS for streets. Where proposed development will affect existing neighborhood streets, the LOS standards should be consistent with the community's neighborhood street design standards (an example of street design standards is offered in the Neighborhood Design Chapter). Neighborhood streets may be designed with a substantially lower traffic capacity in order to facilitate a LOS for pedestrians, bicycles, or other non-motorized traffic. LOS standards must acknowledge non-traffic performance goals of street design.*

- d. The public facilities are guaranteed by an enforceable development agreement ensuring that the public facilities will be in place at the time that the impacts of the proposed development will occur.
2. **Regional Parks and Public Schools**
    - a. One of the criteria set forth in subsection 10.B.1 is met, or
    - b. The public facilities are the subject of a written agreement or an enforceable development agreement that provides for the commencement of construction of the required Regional Parks or Public Schools, or
    - c. The public facilities are planned capital improvements.
  3. **Streets**
    - a. One of the criteria set forth in subsections 10.B or 10.B.2, above, is met, or
    - b. Proposed development is located in a traffic impact area in which the streets or intersections needed to achieve the adopted level of service are included in the capital improvements program, and the Council makes the following specific findings:
      - i. The streets identified in this subsection are financially feasible; and
      - ii. The capital improvements program provides for the construction of public facilities or improvements to streets within the traffic impact area that are necessary to maintain the adopted level of service standards; and
      - iii. The capital improvements program contains a financially feasible funding system based on currently available revenue sources that are adequate to fund the streets required to serve the development authorized by the Development Order; and
      - iv. The applicable provisions of the capital improvements program show (1) the estimated date of the commencement of construction and (2) the estimated date of project completion for needed streets; and
      - v. The concurrency information database includes sufficient data to ensure that proposed developments approved subject to this subsection do not cause a reduction of the level of service below the adopted level of service.

- C. **Adequacy of Public Facilities** - Public facilities shall be deemed to be adequate if it is demonstrated that they have available capacity to accommodate the demand generated by the proposed development in accordance with the following calculation methodology, unless otherwise indicated herein:
1. Calculate capacity for each public facility within an impact area by adding together:
    - a. The capacity of water facilities, wastewater facilities, and fire protection facilities consistent with subsection X.B.1 herein;
    - b. The capacity of public schools and regional parks consistent with subsection X.B.2 herein; and
    - c. The capacity of streets consistent with subsection X.B.3 herein.
  2. Calculate available capacity by subtracting from the capacity the sum of:
    - a. The existing demand for each public facility; and
    - b. The demand for each public facility created by the anticipated completion of committed development; and
    - c. The demand for each public facility created by the anticipated completion of the proposed development under consideration for concurrency determination.
- D. **Public Facilities Affecting Areas Outside of Model Community General** - Availability and adequacy of streets shall be determined only with respect to streets located within Model Community. If part of the applicable traffic impact area lies in an adjacent county or in a municipality within Model Community, absent an intergovernmental agreement with the county or municipality, availability and adequacy may be determined only with respect to that portion of the streets located within Model Community.
- E. **Intergovernmental Agreement** - If Model Community has entered into an intergovernmental agreement with an adjacent county or with a municipality to evaluate public facilities in such areas, an applicant will be subject to the evaluation of the level of service standard for the facility as adopted by the adjacent county or municipality. Prior to the determination of concurrency, Model Community shall require that the adjacent county or municipality certify that issuance of a Development Order for the proposed development will not cause a reduction in the level of service standards in Model Community with respect to those public facilities lying within the adjacent county or the municipality.
- F. Available capacity for fire protection facilities, water facilities, wastewater facilities, and public schools shall include municipally based demand and municipally based facilities.

#### ***Intergovernmental Agreement***

*Section E discusses intergovernmental agreements on shared infrastructure. Cities in a metropolitan area should consider forming Joint Powers Agreements to manage congestion-relief efforts and travel demand managements programs. All the cities along a major thoroughfare in the metropolitan area could, for instance, set uniform standards requiring new commercial development along a major highway to implement specific demand management efforts.*

**XI. Administration**

- A. **Rules and Regulations** - The Council may adopt, by resolution, any necessary rules, regulations, administrative guidelines, forms, worksheets and processes to efficiently and fairly administer and implement this Section.
- B. **Fees** - The Council may establish, by resolution, a fee schedule for each of the procedures, determinations, approvals and certifications required by this ordinance.

**XII. Conflict** - To the extent of any conflict between other Model Community codes or regulations and this Section, the more restrictive is deemed to be controlling. This Section is not intended to amend or repeal any existing Model Community code or regulation.

**XIII. Severability** - If any provision of this Section is for any reason held invalid or unconstitutional by any court of competent jurisdiction, such provision shall be deemed a separate, distinct and independent provision and such holding shall not affect the validity of the remaining provisions of this Section.